

# **FEDERAL TRADE COMMISSION DECISIONS**

**FINDINGS, OPINIONS, AND ORDERS  
JANUARY 1, 2009, TO JUNE 30, 2009**

PUBLISHED BY THE COMMISSION

**VOLUME 147**



Compiled by  
The Office of the Secretary  
Robert F. Swenson, Editor

**MEMBERS OF THE FEDERAL TRADE COMMISSION**

**DURING THE PERIOD JANUARY 1, 2009, TO JUNE 30, 2009**

WILLIAM E. KOVACIC, *Chairman*

Took oath of office January 4, 2006.

PAMELA JONES HARBOUR, *Commissioner*

Took oath of office August 4, 2003.

JON LEIBOWITZ, *Commissioner*

Took oath of office September 3, 2004.

J. THOMAS ROSCH, *Commissioner*

Took oath of office January 5, 2006.

DONALD S. CLARK, *Secretary*

Appointed August 28, 1988.

## CONTENTS

---

	<b>Page</b>
Members of the Commission .....	II
Table of Cases .....	IV
Findings, Opinions, and Orders .....	1
Interlocutory and Other Orders .....	889
Advisory Opinion .....	925
Table of Commodities .....	928

## TABLE OF CASES

---

<b>ACA INTERNATIONAL (Advisory Opinion)</b> .....	925
ACON Laboratories, Inc. ....	<i>See</i> Inverness
Additives International LLC .....	<i>See</i> Lubrizol
Aemoh Products, LLC .....	<i>See</i> Inverness
<b>ALLCARE IPA</b> .....	<i>See</i> Independent Physician
<b>ALPHARMA INC.</b> .....	<i>See</i> King Pharmaceuticals, Inc.
<b>AMERICAN NATIONWIDE MORTGAGE COMPANY, INC.</b> .....	264
<b>AMERICAN TELECOM SERVICES, INC.</b> .....	580
<b>AURORA EQUITY PARTNERS III L.P. (Interlocutory Order)</b> .....	<i>See</i> CCC Holdings
<b>BARR PHARMACEUTICALS, INC.</b> .....	<i>See</i> Teva
BASF SE .....	649
<b>CCC HOLDINGS INC. (Interlocutory Order)</b> .....	902
<b>CERBERUS-PLASMA HOLDINGS, LLC (Interlocutory Order)</b> .....	<i>See</i> CSL Limited
<b>CHOICEPOINT GOVERNMENT SERVICES LLC</b> .....	<i>See</i> Reed Elsevier NV
<b>CHOICEPOINT INC.</b> .....	<i>See</i> Reed Elsevier NV
<b>CHOICEPOINT SERVICES INC.</b> .....	<i>See</i> Reed Elsevier NV
Ciba Holding, Inc. ....	<i>See</i> BASF SE
<b>COMPGEEKS.COM</b> .....	<i>See</i> Genica
<b>COMPUTER GEEKS DISCOUNT OUTLET</b> .....	<i>See</i> Genica
<b>CRH PLC (Interlocutory Order)</b> .....	893
<b>CSL LIMITED (Interlocutory Order)</b> .....	923
<b>CVS CAREMARK CORPORATION</b> .....	841
<b>DATASCOPE CORP.</b> .....	<i>See</i> Getinge AB
<b>DATASCOPE CORPORATION (Interlocutory Order)</b> .....	<i>See</i> Getinge AB
<b>DOW CHEMICAL COMPANY, THE</b> .....	402
<b>GEEKS.COM</b> .....	<i>See</i> Genica
<b>GENDROLIS, MICHAEL</b> .....	310
<b>GENICA CORPORATION</b> .....	374
<b>GETINGE AB</b> .....	332



TABLE OF CASES  
continued

<b>GETINGE AB (Interlocutory Order)</b> .....	898
<b>GOOD LIFE FUNDING</b> .....	<i>See</i> Gendrolis, Michael
<b>HERSHISER, MARIANNE</b> .....	<i>See</i> Native Essence
<b>HERSHISER, MARK J.</b> .....	<i>See</i> Native Essence
<b>HEXION LLC (Interlocutory Order)</b> .....	907
<b>HUNTSMAN CORPORATION</b> (Interlocutory Order) .....	<i>See</i> Hexion LLC
<b>INDEPENDENT PHYSICIAN ASSOCIATES MEDICAL</b> <b>GROUP, INC.</b> .....	52
<b>INNOVA FINANCIAL GROUP</b> .	<i>See</i> Shiva Venture Group, Inc.
<b>INVERNESS MEDICAL INNOVATIONS, INC.</b> .....	1
<b>JAMES B. NUTTER &amp; COMPANY</b> .....	823
<b>KING PHARMACEUTICALS, INC.</b> .....	78
<b>LOCKHART COMPANY, THE</b> .....	<i>See</i> Lubrizol
<b>LUBRIZOL CORPORATION, THE</b> .....	527
<b>NATIONAL ASSOCIATION OF MUSIC</b> <b>MERCHANTS, INC.</b> .....	552
<b>NATIVE ESSENCE HERB COMPANY</b> .....	592
<b>NATIVE ESSENCE HERB COMPANY</b> (Interlocutory Order) .....	891
<b>OLDCASTLE ARCHITECTURAL, INC.</b> (Interlocutory Order) .....	<i>See</i> CRH PLC
<b>OLDCASTLE, INC. (Interlocutory Order)</b> .....	<i>See</i> CRH PLC

TABLE OF CASES  
Continued

<b>PAVESTONE COMPANY, LP</b>	
<b>(Interlocutory Order)</b> .....	<i>See</i> CRH PLC
<b>POLYPORE INTERNATIONAL, INC.</b>	
<b>(Interlocutory Order)</b> .....	896
 Qualitest Pharmaceuticals .....	<i>See</i> Teva Pharmaceutical
 <b>RAMBUS INCORPORATED (Interlocutory Order)</b> ..	900, 904
<b>REED ELSEVIER GROUP PLC</b> .....	<i>See</i> Reed Elsevier NV
<b>REED ELSEVIER INC.</b> .....	<i>See</i> Reed Elsevier NV
<b>REED ELSEVIER NV</b> .....	780
<b>REED ELSEVIER PLC</b> .....	<i>See</i> Reed Elsevier NV
Rohm & Haas Company .....	<i>See</i> Dow Chemical Company, The
 <b>SCHLEGEL, ROBERT (Interlocutory Order)</b> ...	<i>See</i> CRH PLC
<b>SHIVA VENTURE GROUP, INC.</b> .....	287
Sorin Group USA, Inc. ....	<i>See</i> Getinge AB
 <b>TEVA PHARMACEUTICAL INDUSTRIES LTD.</b> .....	127
Thomson Reuters Legal Inc. ....	<i>See</i> Reed Elsevier NV
 Watson Pharmaceuticals .	<i>See</i> Teva Pharmaceutical Industries Ltd.
<b>WEST PENN MULTI-LIST, INC.</b> .....	242
<b>WHOLE FOODS MARKET, INC.</b> .....	729
<b>WHOLE FOODS MARKET, INC.</b>	
<b>(Interlocutory Order)</b> .....	897, 899, 901, 905
<b>WHOLE FOODS MARKET, INC. (Interlocutory Orders)</b>	889
<b>WILD OATS MARKETS, INC.</b> .....	<i>See</i> Whole Foods
<b>WILD OATS MARKETS, INC.</b>	
<b>(Interlocutory Orders)</b> .....	<i>See</i> Whole Foods

---

# FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS  
JANUARY 1, 2009, TO JUNE 30, 2009

---

IN THE MATTER OF

## INVERNESS MEDICAL INNOVATIONS, INC.

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

*Docket C-4244; File No. 061 0123  
Complaint, January 23, 2009 – Decision, January 23, 2009*

This consent order addresses charges that Inverness Medical Innovations, Inc., engaged in unlawful maintenance of its monopoly power in the research, development, manufacture, and sale of consumer pregnancy tests through its acquisition of certain assets of ACON Laboratories, Inc., a rival manufacturer of consumer pregnancy tests. The order prevents Inverness from interfering with the digital consumer pregnancy test product joint venture between ACON and Church & Dwight Co., Inc., and enables ACON and Church & Dwight to maintain their competitive viability after the joint venture ends. The order requires that Inverness disclaim any ownership rights on intellectual property developed during the joint venture. The order further requires that Inverness not interfere with ACON's transfer or licensing of digital consumer pregnancy test technology to Church & Dwight, and that Inverness not interfere with ACON's ability to manufacture digital consumer pregnancy tests for Church & Dwight during their collaboration. In addition, the order requires Inverness to divest, to Aemoh Products, LLC, a fully paid perpetual exclusive sub-license to Inverness' water-soluble dye intellectual property. It also requires Inverness not to assert intellectual property infringement claims against certain lateral flow products that use Inverness' water-soluble dye technology. These provisions, among others, will give Aemoh the ability to complete the commercialization of water-soluble dye based consumer pregnancy tests. The order provides that Inverness shall notify the Commission before acquiring any ownership interest in any entity engaged in the manufacture, distribution, and marketing of consumer pregnancy tests for sale in the United States; and before any proposed dissolution; any proposed acquisition, merger or consolidation; or any other change that might affect compliance obligations. The order also provides that the Commission may appoint an Interim Monitor to ensure that Inverness complies with all of its obligations and performs all of its responsibilities as required by the order. Inverness is also required to file periodic reports with the Commission detailing its compliance.

## Complaint

*Participants*

For the *Commission*: *Renee Henning, Tom Mays, Karen Mills, Michael R. Moiseyev, Morris Morke, James Southworth, Brian Telpner, Steven Tenn, Lore Unt, David von Nirschl, and Stephanie Wilkinson.*

For the *Respondent*: *Paul B. Hewitt, Daniel F. McInnis, and Anthony Swisher, Akin, Gump, Strauss, Hauer & Feld LLP.*

**COMPLAINT**

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 et seq., and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that respondent Inverness Medical Innovations, Inc. (“Inverness”) has violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint, stating its charges as follows:

1. This action challenges Inverness’s unlawful maintenance of its monopoly power in the market for the research, development, manufacture, and sale of consumer pregnancy tests through its acquisition of certain assets of ACON Laboratories, Inc. (“ACON”), a rival manufacturer of consumer pregnancy tests. Inverness’s conduct threatened to stifle future competition from digital consumer pregnancy test products and from a potentially competing consumer pregnancy test based on water-soluble dye technology.

**RESPONDENT**

2. Inverness is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 51 Sawyer Road, Suite 200, Waltham, Massachusetts 02453.

### Complaint

3. Inverness is the leader in the research, development, manufacture, and sale of consumer pregnancy tests. Inverness manufactures and sells consumer pregnancy tests under several brand names, including Clearblue, Accu-Clear, and FactPlus. Inverness is also the leader in the research, development, manufacture, and sale of digital consumer pregnancy tests.

4. Inverness is, and at all relevant times has been, a person, partnership, or corporation within the meaning of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and at all times relevant herein, Inverness has been, and is now, engaged in commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

### **INDUSTRY BACKGROUND**

5. Consumer pregnancy tests rely on immunoassay-based “lateral flow” technology, which tests a urine sample for the presence of a hormone (called human chorionic gonadotropin (“hCG”)) produced by pregnant women.

6. Consumer pregnancy tests typically include a test strip that contains an agent that reacts when exposed to any hCG present in the sample. The agent itself is bound to a colored label, typically a small gold or latex particle, in a complex called a “conjugate.” If hCG is present, the agent in the conjugate binds to the hCG, and a second antibody or antigen immobilized in the test strip then captures the complex. The test strip is imbedded inside a plastic handheld stick device that has an indicator window. If the test is positive, a colored line develops within the indicator window.

7. There are no viable substitutes for consumer pregnancy tests based on lateral flow technology. Lateral flow pregnancy tests are more accurate, easier to use, and less costly than other pregnancy tests, which resemble laboratory test kits.

8. “Digital” consumer pregnancy tests use and improve upon lateral flow technology. Rather than a colored line indicator, a

## Complaint

digital pregnancy test indicates results through a digital display of words, such as “PREGNANT” or “NOT PREGNANT.”

9. Digital consumer pregnancy tests have been a growing segment of the consumer pregnancy test market.

10. Digital consumer pregnancy tests are more difficult to develop and manufacture than standard consumer pregnancy tests. They require more extensive know-how and more exacting manufacturing tolerances than analog tests.

**RELEVANT MARKET & MARKET STRUCTURE**

11. A relevant product market is the research, development, manufacture, and sale of consumer pregnancy tests. A relevant geographic market is the United States.

12. Intellectual property, know-how, and advertising are barriers to entry into the consumer pregnancy test market.

13. Inverness is the dominant player in the market for consumer pregnancy tests. Inverness maintains an approximately 70% share of the U.S. consumer pregnancy test market.

14. Inverness also is the dominant player in the digital consumer pregnancy test segment. At the time of the acquisition, Inverness also was one of only three independent firms manufacturing or marketing digital consumer pregnancy tests. The other firms exited the market in 2006.

**COMPETITION BETWEEN INVERNESS AND ACON**

15. ACON Laboratories, Inc. (“ACON”) developed, manufactured, and sold rapid diagnostic tests in competition with Inverness.

16. Before the acquisition, ACON was developing digital consumer pregnancy tests in a joint venture with Church & Dwight

### Complaint

Co., Inc. (“Church & Dwight”), Inverness’s leading competitor. The collaboration with Church & Dwight envisioned that ACON would manufacture and supply the resulting digital consumer pregnancy test products on Church & Dwight’s behalf.

17. Before the acquisition, ACON had invested in the development of a new lateral flow consumer pregnancy test, which used a water-soluble dye as the label in the conjugate on the test strip. ACON had completed prototypes of the product, and supplied sample quantities to U.S. customers.

18. ACON also was one of the only, if not the only, firm involved in the development of consumer pregnancy tests that used water-soluble dye technology.

### **INVERNESS’S ANTI-COMPETITIVE CONDUCT AND ITS EFFECTS**

19. In 2006, Inverness acquired several assets from ACON, including its water-soluble dye product and assets relating to its digital consumer pregnancy test joint venture with Church & Dwight.

20. Inverness’s 2006 acquisition made a significant contribution to maintaining its power in this market. As outlined below, the acquisition of the ACON assets enabled Inverness to maintain its monopoly power by jeopardizing the development of consumer pregnancy test products that could pose future competition to Inverness.

21. At the time of the acquisition, Inverness’s actions reasonably appeared capable of making a significant contribution to maintaining its monopoly power by restricting competition from new consumer pregnancy tests.

## Complaint

**DIGITAL CONSUMER PREGNANCY TESTS**

22. Inverness's acquisition of the ACON assets interfered with ACON's ability and incentive to develop and manufacture digital consumer pregnancy tests. Among other things:

- a. Inverness imposed a substantial covenant not to compete on ACON, which limited the term and scope of ACON's digital joint venture with Church & Dwight;
- b. Inverness required ACON to remit to Inverness any profits from its digital consumer pregnancy test venture with Church & Dwight; and
- c. Inverness acquired certain rights to intellectual property developed by ACON and Church & Dwight during their joint venture.

23. Inverness's acquisition of the ACON assets protected Inverness's monopoly power in consumer pregnancy tests by weakening future competition from digital consumer pregnancy test products. Inverness's acquisition of the ACON assets impaired ACON's ability and incentive to serve as an independent developer and supplier of digital consumer pregnancy tests. Inverness's acquisition of the ACON assets also hampered Church & Dwight's ability and incentive to develop and introduce competing digital consumer pregnancy test products.

**WATER-SOLUBLE DYE  
CONSUMER PREGNANCY TESTS**

24. Inverness's acquisition of the ACON assets eliminated competition from ACON's water-soluble dye consumer pregnancy test product.

25. After Inverness acquired the rights to ACON's water-soluble dye consumer pregnancy test product, Inverness made no use of the test and ceased development and marketing efforts for it.



## Decision and Order

26. Inverness's acquisition protected Inverness's monopoly power in consumer pregnancy tests by weakening potential competition from competing water-soluble dye consumer pregnancy tests.

**VIOLATIONS ALLEGED**

27. The acts and practices of Inverness, as described in Paragraphs 1-26 above, incorporated herein by reference, constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

28. The conduct at issue in this action caused or threatens to cause substantial harm to competition and to consumers, absent the issuance of appropriate relief in the manner set forth below.

**WHEREFORE, THE PREMISES CONSIDERED**, the Federal Trade Commission on this twenty-third day of January, 2009, issues its complaint against Inverness.

By the Commission, Commissioner Harbour recused.

**DECISION AND ORDER**

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of Respondent Inverness Medical Innovations, Inc., hereinafter referred to as "Respondent," and Respondent having been furnished thereafter with a copy of a draft of Complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

## Decision and Order

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

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

1. Respondent Inverness Medical Innovations, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 51 Sawyer Road, Suite 200, Waltham, Massachusetts 02453.

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

## Decision and Order

**ORDER****I.**

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

- A. “Inverness” or “Respondent” means Inverness Medical Innovations, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Inverness Medical Innovations, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Commission” means the Federal Trade Commission.
- C. “ACON” means ACON Laboratories, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its headquarters address located at 4108 Sorrento Valley Boulevard, San Diego, California 92121. The term “ACON” includes ACON Laboratories, Inc., its parent, directors, officers, employees, agents, representatives, successors and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by ACON Laboratories, Inc., and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.
- D. “Acquisition” means Respondent Inverness’s acquisition of certain assets and rights of ACON pursuant to an Acquisition Agreement by and among Inverness Medical Innovations, Inc., ACON Laboratories, Inc., Azure Institute, Inc., LBI, Inc., Oakville Hong Kong Co., Ltd., ACON Biotech (Hangzhou) Co., Ltd., and Karsson Overseas, Ltd., dated as of February 24, 2006, and includes certain “Noncompetition Agreements” attached as exhibits thereto.

## Decision and Order

- E. “Aemoh” means Aemoh Products, LLC, a limited liability company, organized, existing, and doing business under and by virtue of the laws of the State of Massachusetts, with its headquarters address at 12 Hopewell Farm Road, South Natick, MA 01760.
- F. “Agency(ies)” means any government regulatory authority or authorities in the world responsible for granting approval(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the research, Development, manufacture, marketing, distribution, or sale of a product. The term “Agency” includes, without limitation, the United States Food and Drug Administration (“FDA”).
- G. “Assays” means any qualitative or quantitative analysis of a substance to determine its components or characteristics, the results of such analysis, and all information necessary to replicate such analysis, including without limitation, the following: all data, observations, and records relating to the analysis, the methodologies and procedures used in such analysis, all experiments performed, all information related to the development and qualification of such an analysis, and the identities of the person or persons responsible for such development and qualification of such an analysis.
- H. “Bayer” means Bayer Healthcare LLC, a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 511 Benedict Avenue, Tarrytown, New York 10591-5097. The term “Bayer” includes Bayer Healthcare LLC, its parent, directors, officers, employees, agents, representatives, successors and assigns; and its joint ventures, subsidiaries (including Metrika, Inc.), divisions, groups and affiliates in each case controlled by Bayer Healthcare LLC, and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.

## Decision and Order

- I. “Church & Dwight” means Church & Dwight Co., Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 469 N. Harrison Street, Princeton, New Jersey 08543-5297.
- J. “Church & Dwight/ACON R&D Agreement” shall mean the “Research and Development Agreement” between ACON and Church & Dwight (dated April 27, 2005), as amended.
- K. “Church & Dwight/ACON Supply Agreement” shall mean the “Supply Agreement” between ACON and Church & Dwight (dated June 23, 2006), as amended.
- L. “Confidential Business Information” means all information owned by, or in the possession or control of, Respondent that is not in the public domain and that is directly related to the research, Development, manufacture, marketing, commercialization, importation, exportation, cost, supply, sales, sales support or use of the Digital Consumer Pregnancy Test Products and was created, generated, or Developed by either ACON or Church & Dwight under the Church & Dwight/ACON R&D Agreement or the Church & Dwight/ACON Supply Agreement; *provided, however*, that the restrictions contained in this Order regarding the use, conveyance, provision or disclosure of “Confidential Business Information” shall not apply to the following:
  - 1. information that subsequently falls within the public domain through no violation of this Order or breach of confidentiality or non-disclosure agreement with respect to such information by Respondent;
  - 2. information related to the Digital Consumer Pregnancy Test Products that Respondent can demonstrate it obtained without the assistance of ACON prior to the Acquisition; and

## Decision and Order

3. information that is required by Law to be publicly disclosed.
- M. “Consumer Pregnancy Test(s)” means any product marketed, or designed to be marketed, to an end user in the over-the-counter market that uses a lateral flow strip to detect the presence or absence of a pregnancy-indicating hormone in a urine sample.
- N. “Contract Manufacture” means the testing and manufacture of a Digital Consumer Pregnancy Test Product to be supplied by Respondent, ACON, or a Designee to Church & Dwight.
- O. “Designee” means any entity other than Respondent or ACON that will manufacture a Digital Consumer Pregnancy Test Product on behalf of Church & Dwight.
- P. “Development” means all product development activities, including: test method development and stability testing; toxicology; formulation; process development; manufacturing scale-up; development-stage manufacturing; quality assurance/quality control development; statistical analysis and report writing; conducting tests or trials for any and all approvals, licenses, registrations or authorizations from any Agency necessary for the manufacture, use, storage, import, export, transport, promotion, marketing, and sale of a product (including any government price or reimbursement approvals); and regulatory affairs related to the foregoing. “Develop” means to engage in Development.
- Q. “Digital Consumer Pregnancy Test Product(s)” means the Consumer Pregnancy Test products that are the subject of Appendix 1 of Church & Dwight/ACON R&D Agreement and/or Attachment A-1 of the Church & Dwight/ACON Supply Agreement.

## Decision and Order

- R. “Digital Consumer Pregnancy Test Product Assets” means all rights, title and interest in and to the following assets:
1. all Digital Consumer Pregnancy Test Product Intellectual Property;
  2. all Product Approvals directly related to the Digital Consumer Pregnancy Test Products;
  3. all Product Manufacturing Technology that was created, generated, or Developed by ACON and/or Church & Dwight under the Church & Dwight/ACON R&D Agreement or the Church & Dwight/ACON Supply Agreement;
  4. all Product Development Reports directly related to the Digital Consumer Pregnancy Test Products;
  5. all Trademarks used prior to, up to, and including, the Order Date by Church and Dwight and/or ACON to market or sell the Digital Consumer Pregnancy Test Products;
  6. all options acquired by Respondent from ACON to acquire or exercise rights in the Digital Consumer Pregnancy Test Products;
  7. all contingent interests or claims acquired by Respondent from ACON in the Digital Consumer Pregnancy Test Products; and
  8. all of ACON’s books, records, and files directly related to the foregoing;
  9. *Provided, however,* that the Digital Consumer Pregnancy Test Product Assets:

## Decision and Order

- a. shall not include any and all technology, intellectual property or intellectual property right that was not created, generated, or Developed by ACON and/or Church & Dwight under the Church & Dwight/ACON R&D Agreement or the Church & Dwight/ACON Supply Agreement including the Reserved Patent Rights or the Metrika Patents;
  - b. shall not include administrative, financial, and accounting records;
  - c. shall include copies or relevant excerpts of documents and materials containing information relating to the Digital Consumer Pregnancy Test Product Assets in cases in which the documents or other materials included in the relevant assets to be provided to Church & Dwight contain information: (1) that relates both to any Digital Consumer Pregnancy Test Product and to other products or businesses of ACON or Respondent and cannot be segregated in a manner that preserves the usefulness of the information as it relates to such Digital Consumer Pregnancy Test Product; or (2) for which ACON or Respondent has a legal obligation to retain the original copies; and
  - d. shall include access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes.
- S. “Digital Consumer Pregnancy Test Product Core Employees” means the employees listed on Appendix A attached hereto.
- T. “Digital Consumer Pregnancy Test Product Intellectual Property” means all of the following intellectual property to the extent owned, controlled, held, or otherwise possessed by Respondent:



## Decision and Order

1. any and all Patents that were or are filed by either Church & Dwight or ACON, after April 27, 2005, do not claim priority to a patent application filed before April 27, 2005 and claim an invention conceived, created, generated, or Developed under the Church & Dwight/ACON R&D Agreement;
  2. any and all Other Intellectual Property, including the rights to obtain, file, and prosecute applications for patents and copyrights and registrations thereof, that was, or the subject matter of which was, created, generated, or Developed, by Church & Dwight and/or ACON under the Church & Dwight/ACON R&D Agreement or Church & Dwight/ACON Supply Agreement; and
  3. rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation, or breach of any of the foregoing.
- U. “Government Entity” means any Federal, state, local or non-U.S. government, or any court, legislature, government agency, or government commission, or any judicial or regulatory authority of any government.
- V. “Interim Monitor” means any monitor appointed pursuant to Paragraph V of this Order.
- W. “Law” means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.
- X. “May-Davis Patents” means any United States Patent claiming priority from British patent application numbers GB 8725457 and GB 8709873 (May), or GB 8903627 (Davis).

## Decision and Order

- Y. “Metrika Patents” means the following United States Patents:
1. US Patent No. 5,580,794; and
  2. US Patent No. 5,837,546.
- Z. “Order Date” means the date on which this Order becomes final.
- AA. “Other Intellectual Property” means trade secrets, copyrights (and right to obtain, file and prosecute copyrights and registrations thereof), know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development and other information.
- BB. “Ownership Interest” means any and all rights, present or contingent, of Respondent to hold any voting or nonvoting stock, share capital, assets, equity or other interests or beneficial ownership in a Person.
- CC. “Patents” means all patents, patent applications, including provisional patent applications, statutory invention registrations, and inventor’s certificates, and rights to obtain, file and prosecute applications for patents, in each case existing as of the Order Date (*except* where this Order specifies a different date or time), and includes all reissues, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions.
- DD. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or Government

## Decision and Order

Entity, and any subsidiaries, divisions, groups or affiliates thereof.

- EE. “Premarket Approval(s)” means the applications for a product filed or to be filed with the FDA pursuant to 21 C.F.R. § 814, and all supplements, amendments, and revisions thereto, any preparatory work, drafts and data necessary for the preparation thereof, all information submitted with or incorporated by reference, and all correspondence between Respondent and the FDA related thereto. The term “Premarket Approval(s)” includes all orders of approval and all reports and documents submitted to the FDA under postapproval requirements.
- FF. “Premarket Notification(s)” means a premarketing submission for a product filed or to be filed with the FDA pursuant to 21 C.F.R. § 807, and all supplements, amendments, and revisions thereto, any preparatory work, drafts and data necessary for the preparation thereof, all information submitted with or incorporated by reference, and all correspondence between Respondent and the FDA related thereto, to demonstrate that a device to be marketed is as safe and effective as, or substantially equivalent to, a legally marketed device that is not subject to Premarket Approval. The term “Premarket Notification(s)” includes all notices of registration and all reports and documents required to be submitted to the FDA related to the marketing of such product.
- GG. “Product Approval(s)” means any approvals, registrations, permits, licenses, consents, authorizations, and other approvals, and pending applications and requests therefor, required by applicable Agencies related to the research, Development, manufacture, distribution, finishing, packaging, marketing, sale, storage or transport of the product within the United States of America, and includes, without limitation, all approvals, registrations, licenses or

## Decision and Order

authorizations granted in connection with any Premarket Approval and/or Premarket Notification.

HH. “Product Development Reports” means all of the following documents to the extent directly related to the Digital Consumer Pregnancy Test Products and Water-Soluble Consumer Pregnancy Test Products:

1. inventory of research and development records, research history, research efforts, research notebooks, research reports, technical service reports, testing methods, invention disclosures, and know how;
2. all correspondence to or from the FDA related to such product(s);
3. annual and periodic reports;
4. approved product labeling;
5. currently used product package inserts;
6. customer circulars and information;
7. summary of product complaints from customers; and
8. product recall reports.

II. “Product Manufacturing Technology” means, to the extent owned, controlled, held, or otherwise possessed by Respondent, any and all of the following:

1. all technology, trade secrets, know-how, and proprietary information (whether patented, patentable or otherwise) directly related to the manufacture of the specified products including, without limitation, the following: all techniques and specifications, quality control processes, analytical methods for process controls, product designs, plans, trade secrets, ideas, concepts, manufacturing,

## Decision and Order

engineering, and other manuals and drawings, standard operating procedures, flow diagrams, chemical, safety, quality assurance, quality control, research records, clinical data, compositions, annual product reviews, regulatory communications, control history, current and historical information associated with the Product Approvals, and labeling and all other information related to the manufacturing process;

2. the identity of all suppliers and subcontractors;
3. all Assays; and
4. all Product Development Reports.

JJ. “Reserved Patent Rights” means, collectively, any and all Respondent’s rights in, to or under any and all patents and patent applications claiming the benefit of or priority to (i) U.S. Patent Application Serial No. 07/211,582, including, without limitation, U.S. Patent Nos. 5,714,389; 5,989,921; and 6,485,982; (ii) one or more of GB Patent Application Serial Nos. 8709873 and 8725457, including, without limitation, U.S. Patent Nos. 5,602,040; 5,622,871; 5,656,503; 6,187,598; 6,228,660; 6,818,455; and 7,109,042; (iii) GB Patent Application Serial No. 8903627, and including, without limitation, U.S. Patent Nos. 6,352,862; 7,238,537; 7,384,796; and 7,407,813; (iv) U.S. Patent Application Serial No. 07/072,459, including, without limitation, U.S. Patent Nos. 5,120,643; 5,578,577; and 6,534,320; and (v) any and all continuations, divisionals, reissues, reexaminations, and foreign counterparts or equivalents of any and all of the foregoing.

KK. “Technology Transfer Standards” means requirements and standards sufficient to ensure that the information and assets required to be delivered pursuant to this Order are delivered in an organized, comprehensive, complete, useful, timely (*i.e.*, ensuring no unreasonable delays in transmission), and

## Decision and Order

meaningful manner. Such standards and requirements may include, *inter alia*,

- a. designating employees knowledgeable about the Product Manufacturing Technology and intellectual property included in either the Digital Consumer Pregnancy Test Assets or the Water-Soluble Consumer Pregnancy Test Assets, as applicable, who will be responsible for communicating directly with any Person designated to receive such information and assets, including the Interim Monitor (if one has been appointed), for the purpose of effecting such delivery;
- b. preparing technology transfer protocols and transfer acceptance criteria for both the processes and analytical methods related to the specified product(s) that are acceptable to any Person designated to receive such information and assets;
- c. preparing and implementing a detailed technological transfer plan that contains, *inter alia*, the transfer of all relevant information, all appropriate documentation, all other materials, and projected time lines for the delivery of all such Product Manufacturing Technology and all such intellectual property to any Person designated to receive such information and assets; and
- d. providing, in a timely manner, assistance and advice to enable any Person designated to receive such information and assets (or its Designee) to:
  - (1) manufacture the specified product(s) in the quality and quantities achieved by ACON;
  - (2) obtain any Product Approvals necessary for any Person designated to receive such information

## Decision and Order

and assets to manufacture, distribute, market, and sell the specified product(s) in commercial quantities; and

- (3) receive, integrate, and use all such Product Manufacturing Technology and all such intellectual property related to the specified product(s).

LL. “Third Party(ies)” means any private entity other than the following: (1) Respondent; (2) ACON; (3) Church & Dwight or (4) Aemoh.

MM. “Trademark(s)” means all United States proprietary names or designations, trademarks, tradenames, and brand names, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof), and all common law rights, and the goodwill symbolized thereby and associated therewith.

NN. “Water-Soluble Consumer Pregnancy Test Product(s)” means the lateral flow immunoassay Consumer Pregnancy Tests based on the use of water-soluble dyes Developed or under Development by ACON prior to February 24, 2006 for sale in the United States and any improvement to such tests. The term “Water-Soluble Consumer Pregnancy Test Product(s)” shall not include lateral flow immunoassay pregnancy tests that use particulate labels, *e.g.*, colloidal gold or latex particles.

OO. “Water-Soluble Consumer Pregnancy Test Product ACON Patents” means the following United States Patents:

1. US Patent No. 6627460; and
2. US Patent No. 5543332.

## Decision and Order

PP. “Water-Soluble Consumer Pregnancy Test Product Assets” means all Respondent’s rights, title in and interest in and to the following assets related directly to the Water-Soluble Consumer Pregnancy Test Products:

1. The sublicense described in Paragraph III.A.1 of this Order;
2. all Product Approvals directly related to the Water-Soluble Consumer Pregnancy Test Products;
3. all Product Manufacturing Technology that was created, generated, or Developed by ACON for the Water-Soluble Consumer Pregnancy Test Products;
4. copies of all Product Development Reports directly related to the Water-Soluble Consumer Pregnancy Test Products; and
5. copies of all of Respondent books, records, and files directly related to the foregoing;
6. *Provided, however*, that the Water-Soluble Consumer Pregnancy Test Product Assets:
  - a. shall not include the administrative, financial, and accounting records;
  - b. shall include copies or relevant excerpts of documents and materials containing information relating to the Water-Soluble Consumer Pregnancy Test Product Assets in cases in which the documents or other materials included in the relevant assets to be provided to Aemoh contain information: (1) that relates both to any Water-Soluble Consumer Pregnancy Test Product and to other products or businesses of Respondent or ACON and cannot be segregated in a manner that preserves the usefulness



## Decision and Order

of the information as it relates to such Water-Soluble Consumer Pregnancy Test Product; or (2) for which Respondent or ACON has a legal obligation to retain the original copies; and

- c. shall include access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes.

QQ. “Water-Soluble Consumer Pregnancy Test Product Core Employees” means the employees listed in Appendix B attached hereto.

RR. “Water-Soluble Consumer Pregnancy Test Product Intellectual Property” means all of the following intellectual property to the extent owned, controlled, held, or otherwise possessed by Respondent:

1. any and all Water-Soluble Consumer Pregnancy Test Product ACON Patents and Patents that ACON filed that contain subject matter that relates directly to the Water-Soluble Consumer Pregnancy Test Product(s);
2. any and all Other Intellectual Property, including the rights to obtain, file, and prosecute applications for patents and copyrights and registrations thereof, that was, or the subject matter of which was, created, generated, or Developed, by ACON for the Water-Soluble Consumer Pregnancy Test Product(s); and
3. rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation, or breach of any of the foregoing.

SS. “Water-Soluble Consumer Pregnancy Test Product Releasee(s)” means Aemoh or any entity controlled by or under common control with Aemoh (“affiliated entities”), or

## Decision and Order

any licensees, sublicensees, manufacturers, suppliers, distributors, or customers of Aemoh or its affiliated entities.

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

- A. Not later than ten (10) days after the Order Date, Respondent shall:
1. disclaim in writing any and all rights, title and interest in or to the Digital Consumer Pregnancy Test Product Assets in favor of Church & Dwight;
  2. to the extent owned or controlled, directly or indirectly, by or otherwise in the possession of Respondent, and at the expense of Respondent, transfer and deliver all Digital Consumer Pregnancy Test Product Assets to Church & Dwight;
  3. amend, or provide written clarification of, any contract(s) or agreement(s) between the Respondent and ACON, and enter into such other contract(s) or agreement(s) as may be necessary with ACON, in order to:
    - a. permit ACON fully to transfer and deliver all of the Digital Consumer Pregnancy Test Product Assets to Church & Dwight to the extent such assets are owned or controlled, directly or indirectly, by ACON, or are otherwise in the possession of ACON, in a manner consistent with the Technology Transfer Standards;
    - b. remove any prohibitions or impediments that would prevent ACON from transferring and delivering such Digital Consumer Pregnancy Test Product Assets to Church & Dwight;

## Decision and Order

- c. permit, and provide all rights within Respondent's control necessary to allow, ACON to perform the Contract Manufacture of Digital Consumer Pregnancy Test Products on behalf of Church & Dwight on an uninterrupted basis for a period of time continuing at least until December 22, 2010;
- d. remove any prohibitions or impediments that would prevent ACON from performing the Contract Manufacture of Digital Consumer Pregnancy Test Products on behalf of Church & Dwight for a period of time continuing at least until December 22, 2010;
- e. remove any financial disincentives to the extent that such financial disincentives would prevent ACON from making and retaining a profit on any Contract Manufacture of Digital Consumer Pregnancy Test Products on behalf of Church & Dwight for a period continuing at least until December 22, 2010;
- f. permit, and provide all rights within Respondent's control necessary to allow, ACON to maintain the manufacturing and related testing, storage, and shipping facilities necessary to manufacture the Digital Consumer Pregnancy Test Products in finished form suitable for commercial sale for a period of time continuing at least until December 22, 2010; *provided however*, this requirement shall end if Church & Dwight exercises any rights it may have or otherwise determines to discontinue purchasing Digital Consumer Pregnancy Test Products from ACON at an earlier date;
- g. to the extent the foregoing ACON manufacturing and related testing, storage, and shipping facilities are subject to any rights held by the Respondent, permit Church & Dwight to continue purchasing Digital Consumer Pregnancy Test Products for a period of

## Decision and Order

time continuing at least until December 22, 2010, or to discontinue purchasing Digital Consumer Product Pregnancy Test Products, from such facilities, without penalty, upon Church & Dwight providing agreed-to or otherwise reasonable notification to ACON or Respondent; and

- h. permit, and provide all rights within Respondent's control necessary to allow, ACON to provide all records that relate to the manufacture of the Digital Consumer Pregnancy Test Products by ACON on behalf of Church & Dwight that are generated or created after the Order Date, as such records are requested by Church & Dwight or the Interim Monitor (if one has been appointed);

*provided, however,* Paragraph II shall not require Respondent to transfer, disclaim, license, grant, or not assert, any technology, intellectual property or intellectual property right that was not created, generated, or Developed by ACON and/or Church & Dwight under the Church & Dwight/ACON R&D Agreement or the Church & Dwight/ACON Supply Agreement, including the Reserved Patent Rights.

B. Respondent shall:

1. cooperate with, and take no action that interferes with or impedes:
  - a. ACON's transfer and delivery of such Digital Consumer Pregnancy Test Product Assets to Church & Dwight in a manner consistent with the Technology Transfer Standards; or
  - b. ACON's performance of the Contract Manufacture of Digital Consumer Pregnancy Test Products on

## Decision and Order

behalf of Church & Dwight during the period of time continuing until December 22, 2010; and

2. not seek to enforce, directly or indirectly, any of Respondent's rights under any contract or agreement with ACON that would interfere with or impede ACON's ability to transfer and deliver such Digital Consumer Pregnancy Test Product Assets to Church & Dwight, or that would interfere with or impede ACON's ability to Contract Manufacture Digital Consumer Pregnancy Test Products on behalf of Church & Dwight for a period of time continuing at least until December 22, 2010;
3. not enforce any agreement between Respondent and ACON, a Third Party, or Church & Dwight against the applicable counterparty to the extent that such agreement may limit or otherwise impair the ability of Church & Dwight to acquire the Digital Consumer Pregnancy Test Product Intellectual Property or the Product Manufacturing Technology included in the Digital Consumer Pregnancy Test Product Assets from any Third Party. Such agreements include, but are not limited to, agreements with respect to the disclosure of Confidential Business Information directly related to such Product Manufacturing Technology; and
4. not later than ten (10) days after the Order Date, grant a release to each Third Party that is subject to any agreement described in Paragraph II.B.3 allowing such Third Party to provide all such Digital Consumer Pregnancy Test Product Intellectual Property and/or, all such Product Manufacturing Technology included in the Digital Consumer Pregnancy Test Product Assets to Church & Dwight. Within five (5) days of the execution of each such release, Respondent shall provide a copy of the release to Church & Dwight.

## Decision and Order

- C. For a period of up to twelve (12) months from the Order Date, Respondent shall not interfere with the hiring or employing by Church & Dwight of the Digital Consumer Pregnancy Test Product Core Employees, and shall remove any impediments within the control of Respondent that may deter these employees from accepting employment with Church & Dwight, including, but not limited to, any noncompete or nondisclosure provision of employment or other contracts with Respondent that would affect the ability or incentive of those individuals to be employed by Church & Dwight. In addition, Respondent shall not make any counteroffer to such a Digital Consumer Pregnancy Test Product Core Employee who has received a written offer of employment from Church & Dwight of which Respondent is aware.
- D. Respondent shall take no action that would interfere with or prohibit knowledgeable employees of ACON from assisting Church & Dwight to defend against, respond to, or otherwise participate in any litigation directly related to the Digital Consumer Pregnancy Test Product Intellectual Property.
- E. Respondent shall:
1. submit to Church & Dwight all Confidential Business Information;
  2. deliver such Confidential Business Information:
    - a. in good faith;
    - b. as soon as practicable, avoiding any delays in transmission of the respective information; and
    - c. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;

## Decision and Order

3. pending complete delivery of all Confidential Business Information to Church & Dwight, provide Church & Dwight and the Interim Monitor (if one has been appointed) with access to all such Confidential Business Information, and to employees who possess or are able to locate such information, for the purpose of identifying the books, records and files related to the Digital Consumer Pregnancy Test Products that contain such Confidential Business Information and facilitating the delivery of such information in a manner consistent with this Order.

## F. Respondent shall not:

1. use, directly or indirectly, any such Confidential Business Information directly related to the research, Development, manufacturing, marketing, or sale of the Digital Consumer Pregnancy Test Products other than as necessary to comply with the following:
  - a. the requirements of this Order;
  - b. obligations to Church & Dwight under the terms of any pre-existing agreement between ACON and Church & Dwight; or
  - c. applicable Law;
2. disclose or convey any Confidential Business Information, directly or indirectly, to any private-entity Person (including the Respondent) except Church & Dwight; and
3. provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information to the employees of the Respondent associated with its business(es) related to rapid detection pregnancy tests.

## Decision and Order

- G. Respondent shall require that each Digital Consumer Pregnancy Test Product Core Employee hired or retained by Respondent, the direct supervisor(s) of any such employee, and any other employee hired or retained by Respondent and designated by the Interim Monitor (if one has been appointed) sign a confidentiality agreement pursuant to which such employee shall be required to maintain all Confidential Business Information directly related to the Digital Consumer Pregnancy Test Products as strictly confidential, including the nondisclosure of such information to all other employees, executives or other personnel of Respondent (other than as necessary to comply with the requirements of this Order).
- H. Respondent shall assure, in any instance wherein its counsel (including in-house counsel under appropriate confidentiality arrangements) either retains unredacted copies of documents or other materials provided to Church & Dwight, or accesses original documents (under circumstances where copies of documents are insufficient or otherwise unavailable) provided to Church & Dwight, that Respondent's counsel does so only for the following purposes:
1. to assure Respondent's compliance with this Order, any Law (including, without limitation, any requirement to obtain regulatory licenses or approvals), any agreement with Church & Dwight, any data retention requirement of any applicable Government Entity, or any taxation requirements; or
  2. to defend against, respond to, or otherwise participate in any litigation, investigation, audit, process, subpoena or other proceeding relating to the transfer of the Product Manufacturing Technology directly related to the research, Development, or manufacture of the Digital Consumer Pregnancy Test Products or the Digital Consumer Pregnancy Test Product Intellectual Property



## Decision and Order

or businesses associated with the Digital Consumer Pregnancy Test Products; *provided, however*, that Respondent may disclose such information as necessary for the purposes set forth in this Paragraph pursuant to an appropriate confidentiality order, agreement or arrangement;

*provided further, however*, that pursuant to this Paragraph, Respondent shall: (1) require those who view such unredacted documents or other materials to enter into confidentiality agreements with Church & Dwight (but shall not be deemed to have violated this requirement if Church & Dwight withholds such agreement unreasonably); and (2) use its best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

- I. Not later than ten (10) days after the Order Date, Respondent shall amend any contract(s) or agreement(s) between the Respondent and Bayer (including, without limitation such contract(s) or agreement(s) with Metrika, Inc.), and enter such other contract(s) or agreement(s) as may be necessary with Bayer, in order to authorize Bayer to sell a co-exclusive license to the Metrika Patents, in the United States, to Church & Dwight (*i.e.*, a license to the Metrika Patents under which license the Respondent and Church & Dwight would be co-exclusive licensees); *provided however*, that Respondent may condition the authorization granted to Bayer upon payment to Respondent of an amount not to exceed the lesser of: (1) one-half of Respondent's original purchase price for Respondent's exclusive license to the Metrika Patents, or (2) one half of the license fee paid to Metrika by Church & Dwight.
- J. Respondent shall not enforce any agreement between Respondent and Bayer, a Third Party, or Church & Dwight against the applicable counterparty to the extent that such agreement may limit or otherwise impair the ability of Church & Dwight to acquire the above-described co-

## Decision and Order

exclusive license to the Metrika Patents, and shall not interfere with, or take any action that might delay, such licensing of these patents to Church & Dwight.

- K. The purpose of Paragraph II of this Order is to ensure the continued use of the Digital Consumer Pregnancy Test Product Assets in the research, Development, and manufacture of the Digital Consumer Pregnancy Test Products, including variations and improvements thereto, fully independent of the Respondent, and to remedy the lessening of competition resulting from the acts and practices of the Respondent as alleged in the Commission's Complaint.

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

- A. Not later than ten (10) days after the Order Date, Respondent shall:
1. grant to Aemoh an exclusive, perpetual, fully paid-up and royalty-free sub-license in the United States, with rights to sub-license of all of Respondent's rights to the Water-Soluble Consumer Pregnancy Test Product Intellectual Property to the full extent of the fields of use for which Respondent is licensed to use such Water-Soluble Consumer Pregnancy Test Product Intellectual Property including, without limitation, the right and sub-license:
    - a. to use, make, distribute, offer for sale, promote, advertise, sell, import, or export the Water-Soluble Consumer Pregnancy Test Products; and
    - b. to have used, made, distributed, offered for sale, promoted, advertised, sold, imported, or exported the Water-Soluble Consumer Pregnancy Test Products;

## Decision and Order

2. deliver all Water-Soluble Consumer Pregnancy Test Product Assets, or copies thereof, in the possession of or under the control of Respondent to Aemoh in a manner consistent with the Technology Transfer Standards;
  3. amend, and/or provide written clarification of, any contract(s) or agreement(s) between the Respondent and ACON, and enter such other contract(s) or agreement(s) as may be necessary with ACON, in order to permit ACON fully to deliver any and all Water-Soluble Consumer Pregnancy Test Product Assets to Aemoh to the extent such assets are owned or controlled, directly or indirectly, by ACON, or otherwise in the possession of ACON, in a manner consistent with the Technology Transfer Standards.
- B. Respondent shall take all actions within its control to secure all consents and waivers from Third Party(ies) to the extent such consents are necessary to permit Respondent and/or ACON to grant, transfer or deliver such Water-Soluble Consumer Pregnancy Test Product Assets to Aemoh, in a timely manner, and/or to permit Aemoh to research, Develop, manufacture, sale, market or distribute Water-Soluble Consumer Pregnancy Test Products;
- provided, however,* Respondent may satisfy this requirement by certifying that Aemoh has executed all such agreements directly with each of the relevant Third Parties.
- C. Respondent shall:
1. not enforce any agreement between Respondent and ACON, a Third Party, or Aemoh against the applicable counterparty to the extent that such agreement may limit or otherwise impair the ability of Aemoh to acquire the Water-Soluble Consumer Pregnancy Test Product Intellectual Property or the Product Manufacturing Technology included in the Water-Soluble Consumer

## Decision and Order

Pregnancy Test Product Assets from any Third Party;  
and

2. not later than ten (10) days after the Order Date, grant a release to each Third Party that is subject to any agreement described in Paragraph III.C.1 allowing such Third Party to provide all such Water-Soluble Consumer Pregnancy Test Product Intellectual Property and/or all such Product Manufacturing Technology included in the Water-Soluble Consumer Pregnancy Test Product Assets to Aemoh. Within five (5) days of the execution of each such release, Respondent shall provide a copy of the release to Aemoh.
  - a. For a period of up to twelve (12) months from the Order Date, Respondent shall not interfere with the hiring or employing by Aemoh of the Water-Soluble Consumer Pregnancy Test Product Core Employees, and shall remove any impediments within the control of Respondent that may deter these employees from accepting employment with Aemoh, including, but not limited to, any noncompete or nondisclosure provision of employment or other contracts with Respondent that would affect the ability or incentive of those individuals to be employed by Aemoh. In addition, Respondent shall not make any counteroffer to such a Water-Soluble Consumer Pregnancy Test Product Core Employee who has received a written offer of employment from Aemoh of which Respondent is aware.
  - b. Respondent shall take no action which would interfere with or prohibit knowledgeable employees of ACON from assisting Aemoh to defend against, respond to, or otherwise participate in any litigation directly related to the Water-Soluble Consumer Pregnancy Test Product Intellectual Property.

## Decision and Order

- c. Respondent shall not join, file, prosecute or maintain any suit, in law or equity, against Aemoh or the Water-Soluble Soluble Consumer Pregnancy Test Product Releasee(s) for the research, Development, manufacture, use, import, export, distribution, or sale of the Water-Soluble Consumer Pregnancy Test Product(s) under the following:
3. any Patent owned or licensed by Respondent as of the Order Date that claims a method of making, using, or administering, or a composition of matter, relating to lateral flow immunoassay technology, or that claims a device relating to the use thereof, including, without limitation, the Reserved Patent Rights; or
  4. any Patent owned or licensed by Respondent at any time after the Order Date that claims any aspect of the research, Development, manufacture, use, import, export, distribution, or sale of the relevant lateral flow immunoassay technology, including, without limitation, the Reserved Patent Rights, other than Patents that claim inventions conceived by and reduced to practice after the Order Date;

if such suit would have the potential to interfere with Aemoh's freedom to practice the following: (1) the research, Development, or manufacture of the relevant Water-Soluble Consumer Pregnancy Test Product(s); or (2) the use, import, export, supply, distribution, sale, or offer for sale of the relevant Water-Soluble Consumer Pregnancy Test Product(s) within the United States. Respondent shall also covenant to Aemoh that as a condition of any assignment, transfer, or exclusive license to a Third Party of the above-described Patents, the Third Party shall agree to provide a covenant to Aemoh whereby the Third Party covenants not to sue Aemoh or the related Water-Soluble Consumer Pregnancy Test Product Releasee(s) under such Patents, if the suit would have the potential to interfere with Aemoh's freedom to

## Decision and Order

practice the following: (1) the research, Development, or manufacture of the relevant Water-Soluble Consumer Pregnancy Test Product(s); or (2) the use, import, export, supply, distribution, sale, or offer for sale of the relevant Water-Soluble Consumer Pregnancy Test Product(s) within the United States;

*provided however*, this Paragraph III.F shall have no force or effect with respect to any product that uses particulate labels, *e.g.*, colloidal gold or latex particles, whether or not such product uses (i) conjugates claimed or described in the Water-Soluble Consumer Pregnancy Test Product Intellectual Property and/or (ii) Water-Soluble Consumer Pregnancy Test Product Intellectual Property created, generated, or Developed by ACON for the Water-Soluble Consumer Pregnancy Test Products.

- a. The purpose of Paragraph III of this Order is to provide for the future use of the Water-Soluble Consumer Pregnancy Test Product Assets in the research, Development, manufacture, distribution, sale and marketing of Consumer Pregnancy Tests, and to remedy the lessening of competition resulting from the acts and practices of the Respondent as alleged in the Commission's Complaint.

**IV.**

**IT IS FURTHER ORDERED** that for a period commencing on the Order Date and continuing for the term of this Order, Respondent shall not, without providing advance written notification to the Commission, acquire, through subsidiaries or otherwise, directly or indirectly (including, without limitation, acquisitions by any joint venture in which Inverness is a partner from any other partner(s) of such joint venture), the following:

- A. any Ownership Interest in any Person that is not already included within the definition of Respondent and that

## Decision and Order

engages in manufacture, distribution, marketing of Consumer Pregnancy Tests for sale in the United States; *provided, however*, that this provision shall not apply to an acquisition of assets that are not used in the manufacture, distribution, or marketing of Consumer Pregnancy Tests for sale in the United States;

- B. any right, title, or interest under exclusive license or assignment from any Person that is not already included within the definition of Respondent under a United States Patent that: (1) includes the term “hCG” or “chorionic gonadotropin,” and (2) contains a claim directed to a lateral flow immunoassay technology for the detection of human chorionic gonadotropin (hCG); or
- C. any right, title, or interest under exclusive license or assignment from any Person that is not already included within the definition of Respondent under a United States Trademark that has been used to market, sell or distribute a Consumer Pregnancy Test of such Person in the United States at any time since February 24, 2006.

Said notifications shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as “the Notification”), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such Notification, Notification shall be filed with the Secretary of the Commission with a copy to the Assistant Director, Bureau of Competition, Division of Compliance. Notification need not be made to the United States Department of Justice, and Notification is required only of the Respondent and not of any other party to the transaction. Respondent shall provide three (3) complete copies (with all attachments and exhibits) of the Notification at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the “first waiting period”), as follows: one (1) such copy to the Assistant Director of the Bureau of Competition, Division of Compliance, and two (2) such copies to the

## Decision and Order

Secretary of the Commission. If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondent shall not consummate the transaction until thirty (30) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition; *provided, however*, that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a; *provided however*, that the notification requirements of this Paragraph IV shall not apply to the acquisition by Respondent of any of the assets and rights of ACON that are or were the subject of the Acquisition.

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

- A. At any time after Respondent signs the Consent Agreement in this matter, the Commission may appoint a monitor (“Interim Monitor”) to assure that Respondent expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order.
- B. The Commission shall select the Interim Monitor, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Interim Monitor, Respondent shall be deemed to have consented to the selection of the proposed Interim Monitor.
- C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondent shall execute an agreement



## Decision and Order

that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondent's compliance with the relevant requirements of the Order in a manner consistent with the purposes of the Order.

- D. If an Interim Monitor is appointed, Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:
1. The Interim Monitor shall have the power and authority to monitor Respondent's compliance with the transfer of the Product Manufacturing Technology and the related intellectual property, and with the asset maintenance obligations and related requirements of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission.
  2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.
  3. The Interim Monitor shall serve until the later of:
    - a. the completion of Respondent's obligations regarding the transfer of the Product Manufacturing Technology included in the Digital Consumer Pregnancy Test Assets and the Digital Consumer Pregnancy Test Product Intellectual Property to Church & Dwight (or the Designee(s) of Church & Dwight) in a manner that fully satisfies the requirements of the Order; or
    - b. the completion of Respondent's obligations regarding the transfer of the Product Manufacturing

## Decision and Order

Technology included in the Water-Soluble Consumer Pregnancy Test Assets and the Water-Soluble Consumer Pregnancy Test Product Intellectual Property to Aemoh (or the Designee(s) of Aemoh) in a manner that fully satisfies the requirements of the Order;

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

4. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondent's personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondent's compliance with its obligations under the Order, including, but not limited to, its obligations related to the relevant assets. Respondent shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondent's compliance with the Order.
5. The Interim Monitor shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.
6. Respondent shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or

## Decision and Order

in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.

7. Respondent shall report to the Interim Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondent, and any reports submitted by Church & Dwight with respect to the performance of Respondent's obligations under the Order. Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondent of its obligations under the Order.
  8. Respondent may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.

## Decision and Order

- F. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.
- G. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Order.

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

- A. Within thirty (30) days after the Order Date, and every sixty (60) days thereafter until Respondent has fully complied with Paragraphs II.A., II.E., II.I. and III.A of this Order, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondent shall submit at the same time a copy of its report concerning compliance with this Order to the Interim Monitor, if an Interim Monitor has been appointed. Respondent shall include in its reports, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant Paragraphs of the Order.
- B. One (1) year after the Order Date, annually for the next nine (9) years on the anniversary of the Order Date, and at such other times as the Commission may require, Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it is complying and has complied with this Order.

## Decision and Order

**VII.**

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

- A. any proposed dissolution of Respondent;
- B. any proposed acquisition, merger or consolidation of Respondent; or
- C. any other change in Respondent including, without limitation, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

**VIII.**

**IT IS FURTHER ORDERED** that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

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

## Decision and Order

- B. to interview officers, directors, or employees of such Respondent, who may have counsel present, regarding such matters.

**IX.**

**IT IS FURTHER ORDERED** that this Order shall terminate on the earlier of the following dates:

- A. January 23, 2019; or
- B. the date on which the last of the May-Davis Patents to expire expires.

By the Commission, Commissioner Harbour recused.

**CONFIDENTIAL APPENDIX A****Digital Consumer Pregnancy Test Product Core Employees**

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

Analysis to Aid Public Comment

## **CONFIDENTIAL APPENDIX B**

### **Water-Soluble Consumer Pregnancy Test Product Core Employees**

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

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

### **I. Introduction**

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) from Inverness Medical Innovations, Inc. (“Inverness”).

The proposed Consent Agreement is designed to remedy the harm to competition from Inverness’ conduct in acquiring certain assets of ACON Laboratories, Inc. (“ACON”). It would settle charges that Inverness engaged in an unlawful course of conduct to maintain its monopoly power in the lateral flow consumer pregnancy test market and hamper the development of future competition in that market, by restricting ACON’s digital consumer pregnancy test supply and development joint venture with Church & Dwight Co., Inc. (“Church & Dwight”), and by acquiring ACON’s competing water-soluble dye consumer pregnancy test technology.

## Analysis to Aid Public Comment

Under the terms of the proposed Decision and Order, Inverness will divest ACON's water-soluble dye consumer pregnancy test product assets. In addition, Inverness will remove barriers to ACON's continued supply of digital tests to Church & Dwight during the remaining term of their joint venture. The proposed Decision and Order also limits Inverness' ability to interfere with the unwinding of the ACON/Church & Dwight joint venture by, among other things, requiring Inverness to disclaim ownership of intellectual property developed by ACON and Church & Dwight during their joint venture.

**II. Background**

Inverness is a leader in the research, development, manufacture, and sale of consumer pregnancy tests in the United States. Nearly all retail consumer pregnancy tests use immunoassay-based "lateral flow" technology, which tests a urine sample for the presence of the human chorionic gonadotropin ("hCG") hormone produced by pregnant women. Consumer pregnancy tests consist of a plastic handheld stick device, which contains a test strip embedded beneath an indicator window. The test strip contains chemical agents that react to the presence of hCG in the urine sample. If the test is positive for hCG, a colored line will develop within the indicator window.

Lateral flow consumer pregnancy tests are more accurate, easier to use, and less costly than other pregnancy tests, which resemble laboratory test kits. There are no viable substitutes for consumer pregnancy tests based on lateral flow technology.

"Digital" consumer pregnancy tests use and improve upon lateral flow technology. Rather than a colored line indicator, a digital pregnancy test indicates results through a digital display of words, such as "PREGNANT" or "NOT PREGNANT." Digital consumer pregnancy tests are more difficult to develop and manufacture than standard consumer pregnancy tests, because they require more extensive know-how and more exacting manufacturing tolerances.



#### Analysis to Aid Public Comment

Digital consumer pregnancy tests are a growing segment of the consumer pregnancy test market.

Inverness is the dominant firm in the market for consumer pregnancy tests. Inverness maintains an approximately 70% share of the U.S. consumer pregnancy test market. At the time of Inverness' acquisition of ACON, Inverness was one of only three independent companies marketing or manufacturing digital consumer pregnancy tests. The other firms exited the market in 2006.

ACON developed, manufactured, and sold consumer pregnancy tests in competition with Inverness. Before Inverness' acquisition of the ACON assets, ACON was developing digital consumer pregnancy tests in a joint venture with Church & Dwight, Inverness' leading competitor. The collaboration with Church & Dwight envisioned that ACON would manufacture and supply the resulting digital consumer pregnancy test products on Church & Dwight's behalf.

ACON also had invested in the development of new lateral flow tests that used water-soluble dyes, rather than colored particles, as the reactive agents in the test strip. ACON was one of the only, if not the only, firm involved in the development of consumer pregnancy tests that used water-soluble dye technology. Before the acquisition, ACON had completed prototypes of the product, and supplied sample quantities to U.S. customers.

In 2006, Inverness acquired certain assets from ACON, which included assets relating to ACON's water-soluble dye technology and assets relating to ACON's digital consumer pregnancy test joint venture with Church & Dwight.

### **III. The Proposed Complaint**

The proposed complaint alleges that relevant market in which to analyze Inverness' conduct is the research, development, manufacture, and sale of consumer pregnancy tests in the United States. Inverness is the dominant player in the market for consumer

## Analysis to Aid Public Comment

pregnancy tests. Barriers to entry into the consumer pregnancy test market include intellectual property, know-how, and advertising.

The proposed complaint alleges that Inverness engaged in a course of conduct to maintain its monopoly power in this market by threatening to hamper or stifle future competition from two emerging alternative consumer pregnancy test technologies.

First, the proposed complaint alleges that Inverness' acquisition of the ACON assets weakened future competition from digital consumer pregnancy test products. The proposed complaint alleges that, through its acquisition of the ACON assets, Inverness: (a) imposed a covenant not to compete on ACON, which limited the scope and duration of the ACON's digital consumer pregnancy test joint venture with Church & Dwight; (b) required ACON to surrender to Inverness any profits from ACON's joint venture with Church & Dwight; and (c) acquired rights to the intellectual property developed by ACON and Church & Dwight in their joint venture. Through these actions, Inverness interfered with ACON's ability and incentive to develop and manufacture digital consumer pregnancy tests in its joint venture with Church & Dwight. Inverness' conduct also injured competition that might arise after the unwinding of the joint venture between ACON and Church & Dwight, by interfering with ACON's ability and incentive to serve as an independent developer and supplier of digital consumer pregnancy tests, and by hampering Church & Dwight's ability and incentive to introduce competing digital consumer pregnancy test products manufactured by another developer.

Second, the proposed complaint alleges that Inverness' acquisition of the ACON assets eliminated future competition from water-soluble dye lateral flow consumer pregnancy tests. After Inverness acquired the rights to ACON's water-soluble dye consumer pregnancy test product, Inverness made no use of the test, and ceased development and marketing efforts for it. Inverness' acquisition of the ACON assets further entrenched Inverness' monopoly power in consumer pregnancy tests by preventing future

## Analysis to Aid Public Comment

competition from competing water-soluble dye consumer pregnancy tests.

**IV. The Proposed Order**

The proposed order will remedy the Commission's competitive concerns about Inverness' conduct in maintaining its consumer pregnancy test product monopoly power.

First, the proposed order contains provisions to prevent Inverness from interfering with the digital consumer pregnancy test product joint venture between ACON and Church & Dwight, and to enable ACON and Church & Dwight to maintain their competitive viability after the joint venture ends. These provisions include a requirement that Inverness disclaim any ownership rights on intellectual property developed during the joint venture. The proposed order further requires that Inverness will not interfere with ACON's transfer or licensing of digital consumer pregnancy test technology to Church & Dwight, and that Inverness not interfere with ACON's ability to manufacture digital consumer pregnancy tests for Church & Dwight during their collaboration.

Second, to prevent Inverness from harming emerging competition from water-soluble dye consumer pregnancy test products, the proposed order requires Inverness to divest, to Aemoh Products, LLC, a fully-paid perpetual exclusive sublicense to Inverness' water-soluble dye intellectual property. The proposed order seeks to ensure that water-soluble dye products can be developed without risk of infringing Inverness' intellectual property, by requiring Inverness to covenant not to assert intellectual property infringement claims against certain lateral flow products that use Inverness' water-soluble dye technology. These provisions, among others, will give Aemoh – a start-up run by a successful and experienced health products entrepreneur – the ability to complete the commercialization of water-soluble dye based consumer pregnancy tests.

## Analysis to Aid Public Comment

**V. Opportunity for Public Comment**

The proposed consent order has been placed on the public record for 30 days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the proposed consent order and the comments received and will decide whether it should withdraw from the agreement or make the proposed consent order final.

By accepting the proposed Consent Agreement subject to final approval, the Commission anticipates that the competitive problems alleged in the complaint will be resolved. The purpose of this analysis is to invite public comment on the proposed Consent Agreement, in order to aid the Commission in its determination of whether to make the proposed order final. This analysis is not intended to constitute an official interpretation of the proposed order nor is it intended to modify the terms of the proposed order in any way.

## Complaint

## IN THE MATTER OF

**INDEPENDENT PHYSICIAN ASSOCIATES  
MEDICAL GROUP, INC.,  
DBA ALLCARE IPA**

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

*Docket C-4245; File No. 061 0258*

*Complaint, February 2, 2009 – Decision, February 2, 2009*

This consent order addresses horizontal agreements among competing physicians, acting through Independent Physician Associates Medical Group, Inc., dba AllCare IPA, to fix prices charged to those offering coverage for health care services (“payors”) and to refuse to deal with payors. The order prohibits the respondent from entering into or facilitating agreements between or among any health care providers (1) to negotiate on behalf of any physician with any payor, (2) to refuse to deal, or threaten to refuse to deal with any payor, (3) regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to price terms or (4) not to deal individually with any payor, or not to deal with any payor except through AllCare. The order does not preclude AllCare from engaging in conduct reasonably necessary to form or participate in legitimate “qualified risk-sharing” or “qualified clinically integrated” joint arrangements, and does not bar agreements that only involve physicians who are part of the same medical group practice. AllCare is required to notify the Commission before it initiates any arrangement to act as an agent or messenger with respect to physician contracting with payors. The order further requires AllCare to send a copy of the complaint and consent order to its physician members, its management and staff, and any payors who communicated with AllCare, or with whom AllCare communicated, with regard to any interest in contracting for physician services, as well as to each physician who begins participating in each group; each payor who contacts each group regarding the provision of physician services; and each person who becomes an officer, director, manager, or employee for three years after the date on which the order becomes final. AllCare must also publish a copy of the complaint and consent order, for three years, in any official publication that it sends to its participating physicians. In addition, the order requires AllCare to terminate preexisting payor contracts held by physicians who were AllCare participants since January 1, 2005, upon receipt by AllCare of a written request for termination by relevant payors, or the termination date, renewal date, or anniversary date of the contract, whichever is earlier. AllCare is also required to send a copy of any payor’s request for termination to every physician who participates in each group. Additional

## Complaint

provisions require the respondent to provide to the Commission information to assist in the monitoring of its compliance with the order.

*Participants*

For the *Commission*: *Kerry O'Brien and John Wiegand.*

For the *Respondent*: *Richard A. Feinstein, Boies, Schiller & Flexner LLP.*

**COMPLAINT**

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.* (“FTC Act”), and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that Independent Physician Associates Medical Group, Inc., dba AllCare IPA (“AllCare”), herein sometimes referred to as “Respondent,” has violated Section 5 of the FTC Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges in that respect as follows:

**NATURE OF THE CASE**

1. This matter concerns horizontal agreements among competing physicians, acting through Respondent, to fix prices charged to those offering coverage for health care services (“payors”) in the Modesto, California, area and to refuse to deal with payors.

**RESPONDENT**

2. AllCare, an independent practice association (“IPA”), is a for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of California, with its principal place of business located at 3340 Tully Rd., Suite B-4, Modesto, CA 95350. AllCare consists of multiple, independent medical practices

### Complaint

with a total of approximately 500 physician members, of which approximately 200 are devoted to primary care.

### **THE FTC HAS JURISDICTION OVER RESPONDENT**

3. At all times relevant to this Complaint, Respondent has been engaged in the business of negotiating or attempting to negotiate contracts with payors for the provision of physician services on behalf, and for the pecuniary benefit, of its members.

4. Except to the extent that competition has been restrained as alleged herein, AllCare's physician members have been, and are now, in competition with each other for the provision of physician services in the Modesto area.

5. Respondent is a "person," "partnership," or "corporation" within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

6. Respondent's general business practices, including the acts and practices herein alleged, are in or affecting "commerce" as defined in the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

### **OVERVIEW OF PHYSICIAN CONTRACTING WITH PAYORS**

7. Individual physicians and physician group practices contract with payors of healthcare services and benefits, health maintenance organizations (HMOs), preferred provider organizations (PPOs), self-insured employers, and others, to establish the terms and conditions, including price terms, under which the physicians will render their professional medical services to the payors' subscribers or covered employees and dependents. Physicians and physician group practices entering into such contracts often agree to accept lower compensation from payors in order to obtain access to additional patients made available by the payors' relationship with the covered individuals. These contracts may reduce payors' costs

## Complaint

and enable them to lower the price of insurance or of providing health benefits, thereby resulting in lower medical costs for covered individuals.

8. Physicians and physician group practices sometimes form or participate in financially integrated joint ventures to provide physician services under agreements with payors willingly seeking such arrangements. Under such arrangements, the physicians and physician group practices may share financial risks and rewards in several ways. For example, the physicians may provide services at a “capitated” rate or share rewards/penalties based on their collective success in achieving pre-established targets or goals regarding aggregate utilization and costs of the services provided to covered individuals. Physicians may also participate in clinically integrated joint ventures implementing an active and ongoing program to evaluate and modify practice patterns by the network’s physician participants and create a high degree of interdependence and cooperation among the physicians to control costs and ensure quality.

9. Other than through their participation in integrated joint ventures, and absent anticompetitive agreements among them, otherwise competing physicians and physician group practices unilaterally decide whether to enter into contracts with payors to provide services to individuals covered by a payor’s programs, and what prices they will accept as payment for their services pursuant to such contracts.

**RESPONDENT’S OPERATION**

10. Since its formation, AllCare has entered into contracts with payors for and on behalf of its respective physician members, under which AllCare received capitated payments from the payors in exchange for the medical practices’ agreement to provide their professional medical services to patients covered by the contracting payors. The capitated contracts provided to payors, in addition to the physician services, an insurance guarantee component that all covered physician services needed by patients covered under a



### Complaint

payor's program would be provided by AllCare's physician members for the predetermined capitation charge, regardless of the actual quantity or type of services needed and provided.

11. The member physicians participation in AllCare, and their offering of services through AllCare's capitated contracts, was not, however, the member physicians' exclusive or even primary method of selling their professional medical services. Rather, the member physicians also continued to sell their medical services individually, on a fee-for-service basis, outside of AllCare, to individual patients and through contracts individually and directly entered into with payors.

### **ANTICOMPETITIVE CONDUCT**

12. Since at least 2005, AllCare, acting as a combination of its physician members, and in conspiracy with its members, has acted to restrain competition on fee-for-service contracts by, among other things, facilitating, entering into, and implementing agreements, express or implied, to fix the prices and other terms at which they would contract with payors; to engage in collective negotiations over terms and conditions of dealing with payors; and to have AllCare members refrain from negotiating individually with payors or contracting on terms other than those approved by AllCare.

13. Since at least 2005, AllCare has engaged in contract talks with payors regarding the payors' offers of fee-for-service contracts. Those talks included negotiations over price and other terms that AllCare would present to its physician members.

14. To enforce these joint negotiation efforts, a significant number of AllCare physicians sent at least one payor the same form termination letter. In those letters, the physicians terminated their individual agreements with the payor "with the exception of [their] participation through the agreement with AllCare IPA." Each letter stressed that "I enjoy my relationship with [the payor's] members and wish to continue that relationship, but only through AllCare IPA."

## Complaint

**RESPONDENT'S CONDUCT IS NOT LEGALLY  
JUSTIFIED**

15. Respondent's joint refusal to deal and negotiation of fees and other competitively significant terms, and the agreements, acts, and practices described above, have not been, and are not, reasonably related to any efficiency-enhancing integration among the physician members of AllCare.

**RESPONDENT'S ACTIONS HAVE HAD, OR COULD BE  
EXPECTED TO HAVE, SUBSTANTIAL  
ANTICOMPETITIVE EFFECTS**

16. Respondent's actions described in Paragraphs 12 through 14 of this Complaint have had, have tended to have, or if successful would have had, the effect of restraining trade unreasonably and hindering competition in the provision of physician services in the Modesto area in the following ways, among others:

- a. unreasonably restraining price and other forms of competition among physicians who are members of AllCare;
- b. increasing prices for physician services;
- c. depriving payors, including insurers and employers, and individual consumers, of the benefits of competition among physicians; and
- d. depriving consumers of the benefits of competition among payors.

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

## Decision and Order

**WHEREFORE, THE PREMISES CONSIDERED**, the Federal Trade Commission on this second day of February, 2009, issues its Complaint against Respondent AllCare.

By the Commission.

**DECISION AND ORDER**

The Federal Trade Commission (“Commission”), having initiated an investigation of certain acts and practices of Independent Physician Associates Medical Group, Inc., dba AllCare IPA (“AllCare”), herein sometimes referred to as “Respondent,” and Respondent having been furnished thereafter with a copy of the draft Complaint that counsel for the Commission proposed to present to the Commission for its consideration and which, if issued, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act (“Act”), as amended, 15 U.S.C. § 45; and

Respondent, its attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order to Cease and Desist (“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 said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the 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, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Order:

1. Respondent AllCare is a for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of California, with its principal place of business located at 3340 Tully Rd., Suite B-4, Modesto, CA 95350.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and this proceeding is in the public interest.

**ORDER****I.**

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

- A. “Respondent” means Independent Physician Associates Medical Group, Inc., dba AllCare IPA, its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- B. “Medical Group Practice” means a bona fide, integrated firm in which physicians practice medicine together as partners, shareholders, owners, members, or employees, or in which only one Physician practices medicine.
- C. “Participate” in an entity means (1) to be a partner, shareholder, owner, member, or employee of such entity, or

## Decision and Order

(2) to provide services, agree to provide services, or offer to provide services, to a payor through such entity. This definition also applies to all tenses and forms of the word “participate,” including, but not limited to, “participating,” “participated,” and “participation.”

- D. “Payor” means any Person that pays, or arranges for the payment, for all or any part of any Physician services for itself or for any other Person, as well as any Person that develops, leases, or sells access to networks of Physicians.
- E. “Person” means both natural Persons and artificial Persons, including, but not limited to, corporations, unincorporated entities, and governments.
- F. “Physician” means a doctor of allopathic medicine (“M.D.”) or a doctor of osteopathic medicine (“D.O.”).
- G. “Preexisting Contract” means a contract for the provision of Physician services that was in effect on the date of the receipt by a payor that is a party to such contract of notice sent by Respondent AllCare pursuant to Paragraph V.A.2 of this Order of such payor’s right to terminate such contract.
- H. “Principal Address” means either (1) the primary business address, if there is a business address, or (2) the primary residential address, if there is no business address.
- I. “Qualified Clinically-integrated Joint Arrangement” means an arrangement to provide Physician services in which:
  - 1. all Physicians who Participate in the arrangement Participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, the Physicians who Participate in the arrangement, in order to control costs and ensure the

## Decision and Order

quality of services provided through the arrangement;  
and

2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies that result from such integration through the arrangement.
- J. “Qualified Risk-sharing Joint Arrangement” means an arrangement to provide Physician services in which:
1. all Physicians who Participate in the arrangement share substantial financial risk through their Participation in the arrangement and thereby create incentives for the Physicians who Participate jointly to control costs and improve quality by managing the provision of Physician services such as risk-sharing involving:
    - a. the provision of Physician services at a capitated rate,
    - b. the provision of Physician services for a pre-determined percentage of premium or revenue from payors,
    - c. the use of significant financial incentives (e.g., substantial withholds) for Physicians who Participate to achieve, as a group, specified cost-containment goals, or
    - d. the provision of a complex or extended course of treatment that requires the substantial coordination of care by Physicians in different specialties offering a complementary mix of services, for a fixed, predetermined price, when the costs of that course of treatment for any individual patient can vary greatly due to the individual patient’s condition, the choice,

## Decision and Order

complexity, or length of treatment, or other factors;  
and

2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies that result from such integration through the arrangement.

K. “Qualified Arrangement” means a Qualified Clinically-integrated Joint Arrangement or a Qualified Risk-sharing Joint Arrangement.

**II.**

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

- A. Entering into, adhering to, Participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any Physicians with respect to their provision of Physician services:
  1. To negotiate on behalf of any Physician with any Payor;
  2. To deal, refuse to deal, or threaten to refuse to deal with any Payor;
  3. Regarding any term, condition, or requirement upon which any Physician deals, or is willing to deal, with any Payor, including, but not limited to, price terms; or
  4. Not to deal individually with any Payor, or not to deal with any Payor other than through Respondent;

## Decision and Order

- B. Exchanging or facilitating in any manner the exchange or transfer of information among Physicians concerning any Physician's willingness to deal with a Payor, or the terms or conditions, including price terms, on which the Physician is willing to deal with a Payor;
- C. Attempting to engage in any action prohibited by Paragraphs II.A or II.B above; and
- D. Encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any Person to engage in any action that would be prohibited by Paragraphs II.A through II.C above.

*Provided, however,* that nothing in this Paragraph II shall prohibit any agreement or conduct involving Respondent that, subject to the requirements of Paragraph IV of this Order, is reasonably necessary to form, Participate in, or take any action in furtherance of, a Qualified Risk-sharing Joint Arrangement or a Qualified Clinically-integrated Joint Arrangement.

**III.**

**IT IS FURTHER ORDERED** that, for three (3) years after the date this Order becomes final, for any arrangement under which Respondent would act as an agent, or as a messenger, on behalf of any Physician or any Medical Group Practice with any Payor regarding contracts, except for those contracts under which Respondent is, or will be, paid on a capitated (per member per month) rate by the Payor, Respondent shall notify the Commission in writing ("Paragraph III Notification") at least sixty (60) days prior to entering into the arrangement for which Paragraph III Notification is required. The Paragraph III Notification shall include the number of proposed Physician Participants in the proposed arrangement; the proposed geographic area in which the proposed arrangement would operate; a copy of any proposed Physician Participation agreement; a description of the proposed arrangement's purpose and function; a description of any resulting efficiencies expected to be obtained through the proposed arrangement; and a description of procedures



## Decision and Order

to be implemented to limit possible anticompetitive effects of the proposed arrangement, such as those prohibited by this Order.

*Provided however*, that:

- (a) if, within fifteen (15) days from the date of the Commission's receipt of the Paragraph Notification, a representative of the Commission makes a written request for additional information, then Respondent shall not enter into the arrangement described in the Paragraph III Notification prior to the expiration of thirty (30) days after substantially complying with such request, or such shorter waiting period as may be granted in writing from the Bureau of Competition;
- (b) the expiration of any waiting period described herein without a request for additional information, or without the initiation of an enforcement proceeding, shall not be construed as a determination by the Commission, or its staff, that the proposed arrangement does or does not violate this Order or any law enforced by the Commission;
- (c) the absence of notice that the proposed arrangement has been rejected, regardless of a request for additional information, shall not be construed as a determination by the Commission, or its staff, that the proposed arrangement has been approved;
- (d) receipt by the Commission of any Paragraph III Notification is not to be construed as a determination by the Commission, or its staff, that the proposed arrangement does or does not violate this Order or any law enforced by the Commission; and
- (e) Paragraph III Notification shall not be required prior to Participating in any arrangement for which Paragraph III Notification has previously been given.

## Decision and Order

**IV.**

**IT IS FURTHER ORDERED** that for three (3) years from the date this Order becomes final, pursuant to each Qualified Arrangement in which Respondent is a Participant, except for those contracts under which Respondent is, or will be, paid on a capitated (per member per month) rate by the Payor, (“Paragraph IV Arrangement”), Respondent shall notify the Commission in writing (“Paragraph IV Notification”) at least sixty (60) days prior to:

- A. Participating in, organizing, or facilitating any discussion or understanding with or among any Physicians or Medical Group Practices in such Arrangement relating to price terms or conditions of dealing with any Payor; or
- B. Contacting a payor, pursuant to an Arrangement to negotiate or enter into any agreement concerning price or other terms or conditions of dealing with any Payor, on behalf of any Physician or Medical Group Practice in such Arrangement.

*Provided further* Paragraph IV Notification shall include the following information regarding the Arrangement pursuant to which Respondent intends to engage in the above identified conduct:

- a. the total number of Physicians and the number of Physicians in each specialty Participating in the Arrangement;
- b. a description of the Arrangement, including its purpose and geographic area of operation;
- c. a description of the nature and extent of the integration and the efficiencies resulting from the Arrangement;
- d. an explanation of the relationship of any agreement on prices, or contract terms related to price, to furthering the integration and achieving the efficiencies of the Arrangement;

## Decision and Order

- e. a description of any procedures proposed to be implemented to limit possible anticompetitive effects resulting from the Arrangement or its activities; and
- f. All studies, analyses, and reports that were prepared for the purpose of evaluating or analyzing competition for Physician services in any relevant market, including, but not limited to, the market share of Physician services in any relevant market.

*Provided further that:*

- (a) if, within sixty (60) days from the Commission's receipt of the Paragraph IV Notification, a representative of the Commission makes a written request to Respondent for additional information, then Respondent shall not Participate in any arrangement described in Paragraph IV.A or Paragraph IV.B of this Order prior to the expiration of thirty (30) days after substantially complying with such request for additional information, or such shorter waiting period as may be granted in writing from the Bureau of Competition;
- (b) the expiration of any waiting period described herein without a request for additional information, or without the initiation of an enforcement proceeding, shall not be construed as a determination by the Commission, or its staff, that the proposed Arrangement does or does not violate this Order or any law enforced by the Commission;
- (c) the absence of notice that the proposed arrangement has been rejected, regardless of a request for additional information, shall not be construed as a determination by the Commission, or its staff, that the proposed Arrangement has been approved;

## Decision and Order

- (d) receipt by the Commission of any Paragraph IV Notification regarding Participation pursuant to a proposed Arrangement is not to be construed as a determination by the Commission that any such proposed Arrangement does or does not violate this Order or any law enforced by the Commission; and
- (e) Paragraph IV Notification shall not be required prior to Participating in any Arrangement for which Paragraph IV Notification has previously been given.

**V.**

**IT IS FURTHER ORDERED** that Respondent shall:

- A. Within thirty (30) days after the date on which this Order becomes final:
  - 1. send by first-class mail with delivery confirmation or return receipt requested, or electronic mail with return confirmation, a copy of this Order and the Complaint to:
    - a. every Physician who Participates, or has Participated, in Respondent at any time since January 1, 2005; and
    - b. each current officer, director, manager, and employee of Respondent; and
  - 2. send by first-class mail, return receipt requested, a copy of this Order, the Complaint, and the letter attached as Appendix A to this Order to the chief executive officer of each payor that has contracted with Respondent for the provision of Physician services at any time since January 1, 2005 regarding contracting for the provision of Physician services, except for those contracts under which Respondent is, or will be, paid a capitated (per member per month) rate by the Payor;

## Decision and Order

- B. Terminate, without penalty or charge, and in compliance with any applicable laws, any Preexisting Contract with any Payor who is sent the letter required by Paragraph V.A.2 of this Order, at the earlier of: (1) receipt by Respondent AllCare of a written request to terminate such contract from any Payor that is a party to the contract, or (2) the earliest termination date, renewal date (including any automatic renewal date), or the anniversary date of such contract.

*Provided, however,* a Preexisting Contract for Physician services may extend beyond any such termination or renewal date no later than one (1) year from the date that the Order becomes final if, prior to such termination or renewal date:

- (a) the Payor submits to Respondent AllCare a written request to extend such contract to a specific date no later than one (1) year from the date that this Order becomes final, and
- (b) Respondent AllCare has determined not to exercise any right to terminate.

*Provided, further,* that any Payor making such request to extend a contract retains the right, pursuant to Paragraph V.B of this Order, to terminate the Preexisting Contract at any time.

- C. Within ten (10) days of receiving a written request to terminate from a Payor, pursuant to Paragraph V.B of this Order, distribute, by first-class mail, return receipt requested, a copy of that request to each Physician Participating in such contract as of the date that Respondent AllCare receives such request to terminate.
- D. For three (3) years from the date this Order becomes final:
- 1. Distribute by first-class mail, return receipt requested, a copy of this Order and the Complaint to:

## Decision and Order

- a. each Physician who begins Participating in Respondent, and who did not previously receive a copy of this Order and the Complaint from Respondent, within thirty (30) days of the time that such Participation begins;
  - b. each payor who contracts with Respondent for the provision of Physician services, except for those payors who contract with Respondent solely for Physician services that are, or will be, paid on a capitated (per member per month) rate by the Payor, and who did not previously receive a copy of this Order and the Complaint from Respondent, within thirty (30) days of the time that such payor enters into such contract; and
  - c. Each Person who becomes an officer, director, manager, or employee of Respondent, and who did not previously receive a copy of this Order and the Complaint from Respondent, within thirty (30) days of the time that he or she assumes such position with Respondent; and
2. Annually publish in an official annual report or newsletter sent to all Physicians who Participate in Respondent, a copy of this Order and the Complaint with such prominence as is given to regularly featured articles.
- E. File verified written reports within sixty (60) days from the date this Order becomes final, annually thereafter for three (3) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require. Each report shall include:
1. a detailed description of the manner and form in which the Respondent has complied and is complying with this Order;

## Decision and Order

2. the name, address, and telephone number of each payor with which the Respondent has had any contact, except for payors whose sole contacts with Respondent relate to contracts under which Respondent is, or will be, paid a capitated (per member per month) rate by the Payor; and
3. copies of the delivery confirmations, signed return receipts, or electronic mail with return confirmations required by Paragraph V.A.1, and copies of the signed return receipts required by Paragraphs V.A.2 and V.C.

**VI.**

**IT IS FURTHER ORDERED** that Respondent shall notify the Commission:

- A. of any change in its Principal Address within twenty (20) days of such change in address; and
- B. at least thirty (30) days prior to any proposed: (1) dissolution of Respondent; (2) acquisition, merger, or consolidation of Respondent; or (3) any other change in Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

**VII.**

**IT IS FURTHER ORDERED** that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondent, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. access, during office hours of Respondent, and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence,

## Decision and Order

memoranda, and all other records and documents in the possession, or under the control, of Respondent relating to compliance with this Order, which copying services shall be provided by Respondent at its expense; and

- B. to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

**VIII.**

**IT IS FURTHER ORDERED** that this Order shall terminate on February 2, 2029.

By the Commission.



Decision and Order

**Appendix A**

**Appendix A**

[Respondent's letterhead]

[name of payor's CEO]  
[address]

Dear \_\_\_\_\_:

Enclosed is a copy of a complaint and a consent order ("Order") issued by the Federal Trade Commission against Independent Physician Associates Medical Group, Inc., dba AllCare IPA ("AllCare").

Pursuant to Paragraph V.B of the Order, AllCare must allow you to terminate, upon your written request without any penalty or charge, any contracts with AllCare for the provision of physician services that were in effect prior to your receipt of this letter.

Paragraph V.B of the Order also provides that, if you do not terminate your contract, the contract will terminate at the earlier of [date one year from the date the Order becomes final] or its earliest termination or renewal date (including any automatic renewal date). If the termination or renewal date occurs prior to [date one year from the date the Order becomes final], you may request AllCare to extend that date to a date no later than [date one year from the date the Order becomes final]. If you choose to extend the term of the contract, you may later terminate the contract at any time.

Sincerely,

[AllCare to fill in information in brackets]

Analysis to Aid Public Comment

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

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed Consent Order with Independent Practice Associates Medical Group, Inc., dba AllCare IPA (“AllCare” or “Respondent”). The agreement settles charges that AllCare violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by fixing prices charged to those offering coverage for health care services (“payors”) in the Modesto, California, area and refusing to deal with payors. The proposed Consent Order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed Consent Order final.

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

**The Complaint’s Allegations**

AllCare is a multi-specialty independent practice association consisting of multiple, independent medical practices with a total of approximately 500 physician members, of which approximately 200 are devoted to primary care, in the Modesto, California, area. Since its formation, AllCare has negotiated contracts with payors under which it has received capitated (per member per month) payments. These contracts shift the risk of patient illness to the IPA by specifying that the health plan will pay the IPA a flat monthly fee for each enrollee, with almost no regard for patient utilization. This type

## Analysis to Aid Public Comment

of contracting is a form of financial integration. The Complaint does not challenge AllCare's activities concerning these contracts.

AllCare and its physicians also contract with Preferred Provider Organizations ("PPOs") to provide fee-for-service medical care. In PPO arrangements, the payor compensates physicians or group practices for services actually rendered pursuant to agreed-upon fee schedules. PPO contracts may or may not entail financial risk-sharing or clinical integration on the part of providers. It is AllCare's negotiation of certain PPO contracts that is the subject of the Commission's Complaint.

The Complaint alleges that AllCare, since at least 2005, has acted to restrain competition on fee-for-service contracts by facilitating, entering into, and implementing agreements to fix the prices and other terms in contracts with PPO payors; to engage in collective negotiations over terms and conditions of dealing with such payors; and to have AllCare members refrain from negotiating individually with such payors or contracting on terms other than those approved by AllCare. The Complaint further alleges that AllCare, to enforce the joint negotiation efforts, caused a significant number of AllCare physicians to send to at least one payor the same form termination letter. These letters terminated the physicians' individual agreements with the payor and affirmed that the physicians would contract with the payor only through an agreement with AllCare.

AllCare did not engage in any activity that might justify collective agreements on the prices its members would accept for their services. The physicians in AllCare, with respect to PPO contracts, do not share any financial risk in providing medical services, do not collaborate in programs to monitor and modify clinical practice patterns to control members' costs and ensure quality, or otherwise integrate their delivery of health care services. The Respondent's actions have restrained price and other forms of competition among physicians in the Modesto, California, area and thereby harmed consumers (including health plans, employers, and individual consumers) by increasing the prices for physician services

## Analysis to Aid Public Comment

**The Proposed Consent Order**

The proposed Consent Order is designed to prevent the continuance and recurrence of the unlawful conduct alleged in the Complaint while allowing AllCare to engage in legitimate, joint conduct. The proposed Consent Order does not affect AllCare's activities in contracting with the payors on a capitated basis.

Paragraph II.A prohibits Respondent from entering into or facilitating agreements between or among any health care providers (1) to negotiate on behalf of any physician with any payor, (2) to refuse to deal, or threaten to refuse to deal with any payor, (3) regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to price terms or (4) not to deal individually with any payor, or not to deal with any payor except through AllCare.

The other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits the Respondent from facilitating exchanges of information between health care providers concerning whether, or on what terms, to contract with a payor. Paragraph II.C bars attempts to engage in any action prohibited by Paragraph II.A or II.B, and Paragraph II.D proscribes encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs II.A through II.C.

As in other Commission orders addressing health care providers' collective bargaining with health care purchasers, certain kinds of agreements are excluded from the general bar on joint negotiations. Paragraph II does not preclude AllCare from engaging in conduct that is reasonably necessary to form or participate in legitimate "qualified risk-sharing" or "qualified clinically-integrated" joint arrangements, as defined in the proposed Consent Order. Also, Paragraph II would not bar agreements that only involve physicians who are part of the same medical group practice, defined in Paragraph I.B, because it is intended to reach agreements between and among independent competitors.

## Analysis to Aid Public Comment

Paragraphs III and IV require AllCare to notify the Commission before it initiates any arrangement to act as an agent or messenger with respect to physician contracting with payors. The Order also would require AllCare to provide to the Commission key details of the arrangement and to delay the implementation of that arrangement to permit further factual discovery by the Commission at its option. Paragraph III applies such requirements to arrangements under which AllCare would be acting as a messenger, and Paragraph IV applies them to arrangements under which AllCare plans to achieve financial or clinical integration.

Paragraph V.A requires AllCare to send a copy of the Complaint and Consent Order to its physician members, its management and staff, and any payors who communicated with AllCare, or with whom AllCare communicated, with regard to any interest in contracting for physician services.

Part V.B. of the Order requires AllCare to terminate preexisting payor contracts held by physicians who were AllCare participants since January 1, 2005, upon (1) receipt by AllCare of a written request for termination by relevant payors, or (2) the termination date, renewal date, or anniversary date of the contract, whichever is earlier. This termination can be delayed for up to one year after the effective date of the Order, upon the written request of the payor. This provision is intended to eliminate the effects of AllCare's joint price setting behavior.

Paragraph V.C requires that AllCare send a copy of any payor's request for termination to every physician who participates in each group. Paragraph V.D contains further notification provisions relating to future contact with physicians, payors, management, and staff. This provision requires AllCare to distribute a copy of the Complaint and Consent Order to each physician who begins participating in each group; each payor who contacts each group regarding the provision of physician services; and each person who becomes an officer, director, manager, or employee for three years after the date on which the Consent Order becomes final. In addition, Paragraph V.D requires AllCare to publish a copy of the

## Analysis to Aid Public Comment

Complaint and Consent Order, for three years, in any official publication that it sends to its participating physicians.

Paragraphs V.E and VI-VII impose various obligations on AllCare to provide to the Commission information that would assist in the monitoring of Respondent's compliance with the Consent Order.

Pursuant to Paragraph VIII, the proposed Consent Order will expire in 20 years from the date it is issued.

## Complaint

## IN THE MATTER OF

**KING PHARMACEUTICALS, INC.,  
AND  
ALPHARMA INC.**

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

*Docket C-4246; File No. 081 0240*

*Complaint, February 2, 2009 – Decision, February 2, 2009*

This consent order addresses the acquisition of Alpharma Inc. by King Pharmaceuticals, Inc. Both companies are engaged in the research, development, manufacture and sale of human pharmaceutical products. The acquisition would eliminate competition in the market for oral long-acting morphine sulfate in which King's Avinza and Alpharma's Kadian compete with each other. The order requires King to divest Kadian to Actavis Elizabeth, L.L.C., or another Commission-approved acquirer. Currently, Actavis manufactures Kadian for Alpharma. With the divestiture, Actavis will continue to sell Kadian in competition with Avinza and other oral long-acting opioids. The assets to be divested include all intellectual property and regulatory approvals, inventory, books and records, marketing materials, and assumed contracts necessary for Actavis to sell Kadian as either a branded or generic product. Because Actavis already manufactures Kadian, no divestiture of fixed assets, interim supply agreement, provision of technical assistance, or asset maintenance order are required. The consent order restricts King's use of confidential business information relating to Kadian. The order provides that the Commission may appoint a divestiture trustee to effectuate such modifications as are necessary to satisfy the requirements of the order. Additionally, the order allows the Commission to appoint an Interim Monitor to ensure the respondents' compliance.

*Participants*

*For the Commission: Sylvia M. Brooks, Leslie Farber, Jacqueline Mendel, Michael R. Moiseyev, Loren Smith, and James Southworth.*

*For the Respondents: Michael McFalls and Philip Proger, Jones Day LLP; and Joseph Tringali, Simpson, Thatcher & Bartlett LLP.*

## Complaint

**COMPLAINT**

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission (“Commission”), having reason to believe that Respondent King Pharmaceuticals, Inc. (“King”), a corporation subject to the jurisdiction of the Commission, has offered to acquire the common shares of Alpharma Inc. (“Alpharma”), 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. “Oral long-acting opioids” or “oral LAOs” mean orally-administered extended-release formulations of potent pure opioid agonists, including, but not limited to, oxycodone, morphine sulfate and oxymorphone.
2. “Kadian” means any oral extended-release morphine sulfate product in any dose form, presentation or line extension thereof marketed or sold by Alpharma under the trademark Kadian.
3. “Avinza” means any oral extended-release morphine sulfate product in any dose form, presentation or line extension thereof marketed or sold by King under the trademark Avinza.
4. “Commission” means the Federal Trade Commission.
5. “FDA” means the United States Food and Drug Administration.
6. “Respondents” means King and Alpharma, individually and collectively.



## Complaint

**II. RESPONDENTS**

7. Respondent King Pharmaceuticals, Inc. (“King”) is a corporation organized, existing and doing business under and by virtue of the laws of Tennessee, with its office and principal place of business located at 501 Fifth Street, Bristol, Tennessee 37620. King is engaged in the research, development, manufacture and sale of human pharmaceutical products.

8. Respondent Alpharma Inc. (“Alpharma”) is a corporation organized, existing and doing business under and by virtue of the laws Delaware, with its office and principal place of business located at 440 Route 22 East, Bridgewater, New Jersey 08807. Alpharma, is engaged in the research, development, manufacture and sale of human pharmaceutical products and animal health products.

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

**III. THE PROPOSED ACQUISITION**

10. On September 11, 2008, King announced its intention to acquire up to 100 percent of the outstanding share of Alpharma through a cash tender offer. On November 23, 2008, King, Albert Acquisitions Corp., a wholly-owned subsidiary of King, and Alpharma executed an Agreement and Plan of Merger (“Acquisition Agreement”) pursuant to which King will acquire all of the outstanding shares of Alpharma. The acquisition is valued at approximately \$1.6 billion.

## Complaint

**IV. THE RELEVANT MARKET**

11. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is no broader than the manufacture and sale of oral LAOs, and includes the narrower market for oral long-acting morphine sulfate in which Kadian and Avinza compete directly with each other.

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. THE STRUCTURE OF THE MARKET**

13. The United States market for oral LAOs is highly concentrated. Purdue Pharma L.P.'s OxyContin is the dominant product in the market. King's Avinza and Alpharma's Kadian are the only two significant branded morphine sulfate products in the market.

**VI. ENTRY CONDITIONS**

14. Entry into the relevant line of commerce described in Paragraph 11 would not be timely, likely or sufficient in its magnitude, character and scope to deter or counteract the anticompetitive effects of the Acquisition. Developing and obtaining FDA approval for a new oral LAO takes more than two years due to significant regulatory and intellectual property barriers.

**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, by eliminating actual, direct, and substantial competition between King and Alpharma in the relevant market, thereby (1) increasing the likelihood that King will be able to exercise

## Decision and Order

unilaterally market power in this market, and (2) increasing the likelihood that customers would be forced to pay higher prices.

**VIII. VIOLATIONS CHARGED**

16. The tender offer and the Acquisition Agreement described in Paragraph 10 constitute violations 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.

**WHEREFORE, THE PREMISES CONSIDERED**, the Federal Trade Commission on this second day of February, 2009, issues its Complaint against said Respondents.

By the Commission, Commissioner Harbour recused.

**DECISION AND ORDER**

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Respondent King Pharmaceuticals, Inc. (“King”) and its subsidiary Albert Acquisition Corporation (“Albert”) of Respondent Alharma Inc. (“Alharma”), hereinafter referred to as “Respondents,” and Respondents having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and 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

## Decision and Order

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

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

1. Respondent King is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its principal address located at 501 Fifth Street, Bristol, Tennessee 37620.

2. Respondent Alpharma is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal address located at 440 Route 22 East, Bridgewater, New Jersey 09907.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

**ORDER**

## Decision and Order

**I.**

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

- A. “King” means King Pharmaceuticals, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries (including Albert Acquisition Corp., a wholly owned subsidiary formed solely for the purpose of acquiring Respondent Alharma), divisions, groups, and affiliates controlled by King Pharmaceuticals, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Alharma” means Alharma Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Alharma Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Respondents” means King, and Alharma, individually and collectively.
- D. “Acquisition” means the Agreement and Plan of Merger, dated November 23, 2008, by and among King, Albert Acquisition Corp., and Alharma.
- E. “Commission” means the Federal Trade Commission.
- F. “Actavis” means Actavis Elizabeth, L.L.C., a limited liability company, organized, existing, and doing business under and by virtue of the laws of Delaware, with its offices and principal address located at 60 Columbia Road, Building B, Morristown, New Jersey 07960.
- G. “Kadian” means the pharmaceutical Product approved for distribution under New Drug Application 20-616 (including

## Decision and Order

all additions, amendments, supplements, extensions and modifications thereto and the official regulatory files relating thereto), in the dosage strengths and formulations approved for distribution as of the Closing Date, or that is marketed or sold under the Kadian® Trademark as of the Closing Date.

- H. “Kadian Asset Purchase Agreement” means the “Asset Purchase Agreement by and between King Pharmaceuticals, Inc. and Actavis Elizabeth, L.L.C. dated as of December, 2008, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Kadian Assets, that have been approved by the Commission to accomplish the requirements of this Order. The Kadian Asset Purchase Agreement is attached to this Order as non-public Appendix II.
- I. “Kadian Assets” means all of Respondent Alpharma’s rights, title, and interest in and to the following Kadian assets:
1. Kadian Intellectual Property;
  2. perpetual, fully paid-up and royalty-free exclusive license(s) with rights to sublicense to all Kadian Licensed Intellectual Property to use, make, distribute, offer for sale, promote, advertise, sell, import, or have used, made, distributed, offered for sale, promoted, advertised, sold, or imported Kadian in the United States, which includes its territories and possessions, including Washington, D.C. and Puerto Rico;
  3. at the Commission-approved Acquirer’s option, each of the Kadian Contracts;
  4. all Kadian Marketing Materials;
  5. all Kadian Scientific and Regulatory Materials;
  6. all Website(s) solely related to Kadian;

## Decision and Order

7. a list of all the NDC Numbers solely related to Kadian;
8. all rights to the Drug Master Files including, but not limited to the pharmacology and toxicology data contained in all NDAs, ANDAs, SNDAs, and MAAs;
9. all rights (if such rights exist) to information similar to the Drug Master Files submitted to any agency other than the United States Food and Drug Administration (“FDA”);
10. Kadian inventory;
11. a list of all targeted customers for Kadian and the planned or proposed pricing of Kadian for such customers;
12. all unfilled customer orders for finished goods as of the Closing Date (a list of such orders is to be provided to the Commission-approved Acquirer within four (4) Days after the Closing Date);
13. at the Commission-approved Acquirer’s option, all inventories in existence as of the Closing Date, including, but not limited to, crude drug substance, finished drug substance (morphine sulfate), building blocks and building block intermediates, and Kadian specific packaging and labels;
14. Kadian Manufacturing Technology, and Kadian manufacturing and manufacturing processes; and
15. all Respondents books, records, and files related to the foregoing, including, but not limited to, the following specified documents: the Kadian Registrations; Drug Master Files, including, but not limited to, the pharmacology and toxicology data contained in all NDAs, ANDAs, SNDAs, and MAAs; all data submitted to and all correspondence with the FDA and other agencies; all validation documents and data; all market studies; all

## Decision and Order

sales histories, including, without limitation, clinical data, and sales force call activity, for Kadian from January 1, 2001, through the Closing Date, and quality control histories pertaining to Kadian owned by, or in the possession or control of, Respondents or to which Respondents have a right of access, in each case such as is in existence as of the Closing Date;

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

- J. “Kadian Contracts” means all of the following contracts or agreements:
1. pursuant to which any Third Party purchases Kadian from the Respondents;
  2. pursuant to which the Respondents purchase any materials from any Third Party for use in connection with the manufacture of Kadian;



## Decision and Order

3. relating solely to any clinical trial involving Kadian;
4. constituting the material transfer agreements involving the transfer of Kadian;
5. relating to the marketing of Kadian or educational matters relating to Kadian;
6. relating to the manufacture of Kadian;
7. constituting confidentiality agreements involving Kadian;
8. involving any royalty, licensing, or similar arrangement involving Kadian;
9. pursuant to which any services are provided with respect to Kadian or Kadian's business, including consultation arrangements; and/or
10. pursuant to which any Third Party collaborates with the Respondents in the performance of research or Development of Kadian or the Kadian business;

*provided, however*, that where any such contract or agreement also relates to Products of the Respondents other than Kadian pursuant to this Order, Respondents shall assign the Commission-approved Acquirer all such rights under the contract or agreement as are related to Kadian pursuant to this Order, but concurrently may retain similar rights for the purposes of the other Products.

- K. "Kadian Copyrights" means rights to all original works of authorship of any kind solely related to Kadian and any registrations and applications for registrations thereof, including, but not limited to, the following: all promotional materials for healthcare providers; all promotional materials for patients; educational materials for the sales force; copyrights in all pre-clinical, clinical and process

## Decision and Order

development data and reports relating to the research and Development of Kadian or of any materials used in the research, Development, manufacture, marketing or sale of Kadian, including all raw data relating to clinical trials of Kadian, all case report forms relating thereto and all statistical programs developed (or modified in a manner material to the use or function thereof (other than through user references) to analyze clinical data, all market research data, market intelligence reports and statistical programs (if any) used for marketing and sales research; customer information, promotional and marketing materials, Kadian sales forecasting models, medical education materials, sales training materials, Website content and advertising and display materials; all records relating to employees who accept employment with the Commission-approved Acquirer (excluding any personnel records the transfer of which is prohibited by applicable Law); all records, including customer lists, sales force call activity reports, vendor lists, sales data, reimbursement data, speaker lists, manufacturing records, manufacturing processes, and supplier lists; all data contained in laboratory notebooks solely relating to Kadian or relating to its biology; all adverse experience reports and files related thereto (including source documentation) and all periodic adverse experience reports and all data contained in electronic data bases relating to adverse experience reports and periodic adverse experience reports; all analytical and quality control data; and all correspondence with the FDA.

- L. “Kadian Core Employee(s)” means the Kadian Manufacturing Employees, the Kadian Marketing Employees, and the Kadian Research and Development Employees related to the Kadian Assets.
- M. “Kadian Intellectual Property” means all of the following solely related to Kadian:
  - 1. Kadian Patents;

## Decision and Order

2. Kadian Copyrights;
3. Kadian Software, other than Kadian Licensed Intellectual Property;
4. Kadian Trademarks;
5. trade secrets, know-how, techniques, data, inventions, practices, methods and other confidential or proprietary technical, business, research, Development and other information, and all rights in any jurisdiction to limit the use or disclosure thereof, other than Kadian Licensed Intellectual Property;
6. rights to obtain and file for Patents and registrations thereof; and
7. rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation, or breach of any of the foregoing;

*provided, however,* that “Kadian Intellectual Property” does not include the names “Alpharma,” or “King,” or the names of any other corporations or companies owned by Respondent Alpharma or Respondent King or related logos to the extent used on other of Respondents’ Products.

- N. “Kadian Licensed Intellectual Property” means the following:
1. Patents that are related to Kadian and that Respondents can demonstrate have been routinely used, prior to the Effective Date, by Respondent Alpharma for Product(s) other than Kadian, or are likely to be used for Products other than Kadian by Respondents;
  2. Kadian Software that is used in connection with the analysis of clinical trial data for Kadian that Respondents can demonstrate has been routinely used, prior to the

## Decision and Order

Effective Date, by Respondent Alpharma for Product(s) other than Kadian, or is likely to be used for Products other than Kadian by Respondents; and

3. trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development, and other information, and all rights in any jurisdiction to limit the use or disclosure thereof, that are related to Kadian and that Respondents can demonstrate have been routinely used, prior to the Effective Date, by Respondent Alpharma for Product(s) other than Kadian, or are likely to be used for Products other than Kadian by Respondents.
- O. “Kadian Manufacturing Employees” means all salaried employees of Respondent(s) who directly have participated (irrespective of the portion of working time involved) in the manufacture of Kadian, including, but not limited to, those involved in the quality assurance and quality control of Kadian, within the eighteen (18) month period immediately prior to the Closing Date.
- P. “Kadian Manufacturing Technology” means all technology, trade secrets, know-how, and proprietary information related to the manufacture, validation, packaging, release testing, stability, and shelf life of Kadian, including Kadian’s formulation, in existence and in the possession of Respondents as of the Closing Date, including, but not limited to, manufacturing records, sampling records, standard operating procedures, and batch records related to the manufacturing process, and supplier lists.
- Q. “Kadian Marketing Materials” means all marketing materials related to Kadian as of the Closing Date, including, without limitation, all advertising materials, training materials, Kadian data, price lists, mailing lists, sales materials (e.g., detailing reports, vendor lists, sales data, reimbursement

## Decision and Order

data), marketing information (e.g., competitor information, research data, market intelligence reports, statistical programs (if any) used for marketing and sales research, customer information, including customer sales information, sales forecasting models, medical educational materials, Website content and advertising and display materials, speaker lists), promotional and marketing materials, artwork for the production of packaging components, television masters and other similar materials.

- R. “Kadian Ongoing Clinical Development Employees” means those employees of Respondent Alpharma who are engaged in any ongoing clinical trials related to Kadian.
- S. “Kadian Registrations” means all registrations, permits, licenses, consents, authorizations, and other approvals, and pending applications and requests therefor, required by applicable Agencies related to the research, Development, manufacture, distribution, finishing, packaging, marketing, or sale worldwide of Kadian, including all INDs, NDAs, ANDAs, SNDAs, MAAs, in existence for Kadian as of the Closing Date.
- T. “Kadian Releasee(s)” means the Commission-approved Acquirer for Kadian, or any entity controlled by or under common control with such Commission-approved Acquirer, or any licensees, sublicensees, manufacturers, suppliers, distributors, and customers of such Commission-approved Acquirer, or of such Commission-approved Acquirer-affiliated entities.
- U. “Kadian Research and Development Employees” means all employees of Respondents who directly have participated (irrespective of the portion of working time involved) in the research, Development, regulatory approval process, or clinical studies of Kadian within the eighteen (18) month period immediately prior to the Closing Date.

## Decision and Order

- V. “Kadian Sales and Marketing Employees” means all management level employees of Respondents who directly have participated (irrespective of the portion of working time involved) in the marketing, contracting, or promotion or sale of Kadian in the United States within the eighteen (18) month period immediately prior to the Closing Date. These employees include, without limitation, all management level employees having any responsibilities in the areas of sales management, brand management, sales training, market research, managed care contracting, hospital market and other specialty markets, but excluding administrative assistants.
- W. “Kadian Scientific and Regulatory Material” means all technological, scientific, chemical, biological, pharmacological, toxicological, regulatory, and clinical trial materials and information related to Kadian, and all rights thereto, in any and all United States jurisdictions.
- X. “Kadian Software” means computer programs, including all software implementations of algorithms, models, and methodologies whether in source code or object code form, databases and compilations, including any and all data and collections of data, all documentation, including user manuals and training materials, related to any of the foregoing and the content and information contained on any Website; *provided, however,* that “Kadian Software” does not include software that is readily purchasable or licensable and which has not been modified in a manner material to the use or function thereof (other than through user preference settings).
- Y. “Kadian Trade Dress” means the current trade dress of Kadian, including, but not limited to, Product packaging associated with the sale of Kadian and the lettering of Kadian’s trade name or brand name.
- Z. “Kadian Trademark(s)” means all proprietary names or designations, trademarks, tradenames, and brand names, including registrations and applications for registration

## Decision and Order

therefor (and all renewals, modifications, and extensions thereof), and all common law rights, and the goodwill symbolized thereby and associated therewith, for Kadian.

- AA. “Closing Date” means the date on which Respondents (or a Divestiture Trustee) and a Commission-approved Acquirer consummate a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey the relevant assets pursuant to this Order.
- BB. “Commission-approved Acquirer” means the following: (1) an entity that is specifically identified in this Order to acquire particular assets that the Respondents are required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order and that has been approved by the Commission to accomplish the requirements of this Order in connection with the Commission’s determination to make this Order final; or (2) an entity approved by the Commission to acquire particular assets that the Respondents are required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.
- CC. “Confidential Business Information” means all information owned by, or in the possession or control of, Respondents that is not in the public domain related to the research, Development, manufacture, marketing, commercialization, distribution, importation, exportation, cost, pricing, supply, sales, sales support, or use of a Product.
- DD. “Day(s)” means the period of time prescribed under this Order as computed pursuant to 16 C.F.R. § 4.3 (a).
- EE. “Development” means all preclinical and clinical drug development activities (including formulation), including test method development and stability testing, toxicology, formulation, process development, manufacturing scale-up, development-stage manufacturing, quality assurance/quality control development, statistical analysis and report writing,

## Decision and Order

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.

- FF. “Direct Cost” means the cost of direct labor and direct material used to provide the relevant assistance or service.
- GG. “Divestiture Trustee” means a trustee appointed by the Commission pursuant to the relevant provisions of this Order.
- HH. “Domain Name” means the domain name(s) (universal resource locators), and registration(s) thereof, issued by any entity or authority that issues and maintains the domain name registration. “Domain Name” shall not include any trademark or service mark rights to such domain names other than the rights to the Product Trademarks required to be divested.
- II. “Drug Master Files” means the information submitted to the FDA as described in 21 C.F.R. \_ 314.420 related to Kadian.
- JJ. “Effective Date” means the date on which the Acquisition occurs.
- KK. “Employee Notification” means the “Notice of Antitrust Remedy and Requirement for Confidentiality” attached to this Order as Appendix I.
- LL. “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.



## Decision and Order

- MM. “Interim Monitor” means any monitor appointed pursuant to Paragraph III of this Order.
- NN. “Law” means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Governmental Entity having the effect of law.
- OO. “NDC Numbers” means the National Drug Code numbers(s) assigned by the FDA to a Product.
- PP. “Patents” means all patents, patent applications, and statutory invention registrations, in each case existing as of the Effective Date (*except* where this Order specifies a different time), and includes all reissues, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, all rights therein provided by international treaties and conventions, and all rights to obtain and file for patents and registrations thereto in the United States, related to Kadian as of the Closing Date.
- QQ. “Product” means any pharmaceutical, biological, or genetic composition containing any formulation or dosage of a compound referenced as its pharmaceutically, biologically, or genetically active ingredient.
- RR. “Remedial Agreement” means the following: (1) any agreement between Respondents and a Commission-approved Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission’s determination to make this Order final; and/or (2) any agreement between the Respondents and a Commission-approved Acquirer (or between a Divestiture Trustee and a Commission-approved

## Decision and Order

Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of this Order.

SS. "Third Party(ies)" means any private entity other than the following: (1) the Respondents, or (2) the Commission-approved Acquirer for the relevant assets to be divested related to a particular Product(s) required to be divested.

TT. "Website" means the content of the Website(s) located at the Domain Names, the Domain Names, and all copyrights in such Website(s), to the extent owned by Respondents; *provided, however*, "Website" shall not include the following: (1) content owned by Third Parties and other Kadian Intellectual Property not owned by Respondents that are incorporated in such Website(s), such as stock photographs used in the Website(s), *except* to the extent that Respondents can convey their rights, if any, therein; or (2) content unrelated to Kadian.

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

A. Not later than ten (10) Days after the Effective Date, or December 31, 2008, whichever is later, Respondents shall divest the Kadian Assets, absolutely and in good faith, to Actavis pursuant to and in accordance with the Kadian Asset Purchase Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of Actavis or to reduce any obligations of the Respondents under such agreement), and such agreement, if it becomes the Remedial

## Decision and Order

Agreement related to the Kadian Assets, is incorporated by reference into this Order and made a part hereof. If Respondents do not divest the Kadian Assets to Actavis within ten (10) Days after the Effective Date, or December 31, 2008, whichever is later, the Commission may appoint a Divestiture Trustee to divest the Kadian Assets;

*provided, however,* that if Respondents have divested the Kadian Assets to Actavis prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Actavis is not an acceptable purchaser of the Kadian Assets, then Respondents shall immediately rescind the transaction with Actavis and shall divest the Kadian Assets within six (6) months from the date the Order becomes final, absolutely and in good faith, at no minimum price, to a Commission-approved Acquirer and only in a manner that receives the prior approval of the Commission;

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

- B. Any Remedial Agreement related to the Kadian Assets shall be deemed incorporated into this Order, and any failure by Respondents to comply with any term of such Remedial Agreement related to the Kadian Assets shall constitute a failure to comply with this Order.

## Decision and Order

- C. Respondents shall include in any Remedial Agreement related to the Kadian Assets the following provisions:
1. upon reasonable notice and request from the Commission-approved Acquirer to Respondents, Respondents shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of the Respondents to assist the Commission-approved Acquirer to defend against, respond to, or otherwise participate in any litigation related to the Kadian Intellectual Property;
  2. Respondents shall covenant to the Commission-approved Acquirer that Respondents shall not join, file, prosecute or maintain any suit, in law or equity, against the Commission-approved Acquirer under Patents that: (1) are owned or licensed by Respondents as of the Effective Date; or (2) may be assigned, granted, licensed, or otherwise conveyed to Respondents after the Effective Date, if such suit would have the potential to interfere with the Commission-approved Acquirer's freedom to practice in the research, Development, manufacture, use, import, export, distribution or sale of Kadian;® and
  3. Respondents shall covenant to the Commission-approved Acquirer that: (1) any Third Party assignee, transferee or licensee of the above-described Patents shall agree to provide a covenant not to sue the Kadian Releasee(s), at least as protective as those extended pursuant to the preceding Paragraph II.C.2, as a condition of such assignment, transfer or license; and (2) with respect to any Third Party rights licensed to Respondents as of or after the Effective Date, and as to which Respondents do not control the right of prosecution of any legal action, Respondents shall not actively induce, assist or participate in any legal action or proceeding relating to Kadian against the Kadian Releasees, unless required by Law or contract (such contract not to be solicited or entered into

## Decision and Order

for the purpose of circumventing any of the requirements of this Order).

## D. Respondents shall:

1. submit to the Commission-approved Acquirer, at Respondents' expense, all Confidential Business Information related to Kadian;
2. deliver such Confidential Business Information as follows: (1) in good faith; (2) as soon as practicable, avoiding any delays in transmission of the respective information; and (3) in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;
3. pending complete delivery of all such Confidential Business Information to the Commission-approved Acquirer, provide the Commission-approved Acquirer and the Interim Monitor (if any has been appointed) with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files related to Kadian that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order;
4. not use, directly or indirectly, any such Confidential Business Information related to the research, Development, manufacturing, marketing, or sale of Kadian (other than as necessary to comply with the following: (1) the requirements of this Order; (2) the Respondents' obligations to the Commission-approved Acquirer under the terms of any Remedial Agreement related to the Kadian Assets; or (3) applicable Law; and

## Decision and Order

5. not disclose or convey any such Confidential Business Information, directly or indirectly, to any person except the Commission-approved Acquirer.
- E. For a period of one (1) year from the Closing Date, Respondents shall not:
1. directly or indirectly, solicit or otherwise attempt to induce any employee of the Commission-approved Acquirer with any amount of responsibility related to Kadian (“Kadian Employee”) to terminate his or her employment relationship with the Commission-approved Acquirer; or
  2. hire any Kadian Employee; *provided, however,* Respondents may hire any former Kadian Employee whose employment has been terminated by the Commission-approved Acquirer or who independently applies for employment with the Respondents, as long as such employee was not solicited in violation of the nonsolicitation requirements contained herein;
- provided, further,* Respondents may do the following: (1) advertise for employees in newspapers, trade publications or other media not targeted specifically at the Kadian Employees; or (2) hire a Kadian Employee who contacts Respondents on his or her own initiative without any direct or indirect solicitation or encouragement from the Respondents.
- F. Prior to the Closing Date, Respondents shall secure all consents and waivers from all Third Parties that are necessary for the divestiture of the Kadian Assets to the Commission-approved Acquirer, or for the continued research, Development, manufacture, sale, marketing or distribution of Kadian by the Commission-approved Acquirer;
- provided, however,* Respondents may satisfy this requirement by certifying that the Commission-approved Acquirer has

## Decision and Order

executed all such agreements directly with each of the relevant Third Parties.

- G. For the periods as set forth in this Paragraph II.G (collectively, the “Moratorium/Waiting Period”), if the Commission-approved Acquirer is not Actavis, Respondents shall not market or promote Avinza in the United States using the services of any Kadian Sales or Marketing Employee, regardless of the portion of work time expended on Kadian, within the eighteen (18) month period immediately prior to the Closing Date. The Moratorium/Waiting Period shall be at least twelve (12) months from the Closing Date with respect to the Sales or Marketing Employees related to Kadian.
- H. For a period of at least six (6) months after the completion of any clinical trials related to Kadian that were ongoing as of the Effective Date, Respondents shall not use any Kadian Ongoing Clinical Development Employee for any purpose related to the Development of Avinza.
- I. Respondents shall require, as a condition of continued employment post-divestiture, that each Kadian Core Employee sign a confidentiality agreement pursuant to which such employee shall be required to maintain all Confidential Business Information related to Kadian strictly confidential, including the nondisclosure of such information to all other employees, executives or other personnel of Respondents (other than as necessary to comply with the requirements of this Order).
- J. Respondents shall provide written notification of the restrictions on the use of the Confidential Business Information related to Kadian by Respondents’ personnel to all of Respondents’ employees who:
  - 1. are or were involved in the research, Development, manufacturing, distribution, sale or marketing of Kadian;

## Decision and Order

2. are involved in the research, Development, manufacturing, distribution, sale or marketing of Avinza; and/or
3. may have Confidential Business Information related to Kadian.

Such notification shall be in substantially the form set forth in the Employee Notification. Respondents shall give such notification by e-mail with return receipt requested or similar transmission, and keep a file of such receipts for one (1) year after the Closing Date. Respondents shall provide a copy of such notification to the Commission-approved Acquirer. Respondents shall maintain complete records of all such agreements at Respondents' corporate headquarters and shall provide an officer's certification to the Commission stating that such acknowledgment program has been implemented and is being complied with. Respondents shall provide the Commission-approved Acquirer with copies of all certifications, notifications and reminders sent to Respondents' personnel.

- K. Upon reasonable notice and request by the Commission-approved Acquirer, Respondents shall make available to the Commission-approved Acquirer, at no greater than Direct Cost (or, if the Kadian Asset Purchase Agreement is the Remedial Agreement for the Kadian Assets, then at such cost as provided therein), such personnel, assistance and training as the Commission-approved Acquirer might reasonably need to transfer the Kadian Assets, and shall continue providing such personnel, assistance and training, at the request of the Commission-approved Acquirer, until the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) is fully validated, qualified, and approved by the FDA, and able to manufacture Kadian independently of the Respondents;



## Decision and Order

*provided, however*, the Commission may eliminate, or limit the duration of, the Respondents' obligation under this provision if the Commission determines that the Commission-approved Acquirer is not using commercially reasonable best efforts to secure the FDA approvals necessary to manufacture Kadian finished drug product in a facility that is independent of Respondents.

- L. Pending divestiture of the Kadian Assets, Respondents shall take such actions as are necessary to maintain the full economic viability and marketability of the business associated with the Kadian Assets, to minimize any risk of loss of competitive potential for such business, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Kadian Assets except for ordinary wear and tear.
- M. 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 (under circumstances where copies of documents are insufficient or otherwise unavailable) provided to the Commission-approved Acquirer only in order to do the following:
  - 1. 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; or
  - 2. 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 Kadian Assets or Kadian business; *provided, however*, that Respondents may disclose such information as necessary for the purposes set forth in this Paragraph

## Decision and Order

pursuant to an appropriate confidentiality order, agreement or arrangement;

*provided, however,* that pursuant to this Paragraph II.M, Respondents shall: (1) require those who view such unredacted documents or other materials to enter into 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) and (2) use their best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

- N. Respondents shall maintain manufacturing facilities for any of the ingredients that are necessary to manufacture Kadian finished drug product and that, at any time prior to the Effective Date, were manufactured by the Respondents, until the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) has secured sources of supply of these ingredients that are independent of Respondents;

*provided, however,* that if Actavis receives all its requirements for any of the ingredients that are necessary to manufacture Kadian finished drug product from a Third Party, as provided for in the Kadian Asset Purchase Agreement, then Respondents shall cause that Third Party to maintain the manufacturing facilities for any of those ingredients;

*provided further* that the Commission may eliminate, or limit the duration of, the Respondents' obligation under this provision if the Commission determines that the Commission-approved Acquirer is not using commercially reasonable best efforts to secure sources of supply of the ingredients necessary to manufacture Kadian finished drug product that are independent of Respondents.

## Decision and Order

- O. Respondents shall not join, file, prosecute or maintain any suit, in law or equity, against the Kadian Releasee(s) for the research, Development, manufacture, use, import, export, distribution, or sale of Kadian under the following:
1. any Patents owned or licensed by Respondents as of the Effective Date or acquired after the Effective Date that claim the use of Kadian; or
  2. any Patents owned or licensed at any time after the Effective Date by Respondents that claim any aspect of the research, Development, manufacture, use, import, export, distribution, or sale of Kadian, other than such Patents that claim inventions conceived by and reduced to practice by Respondents' employees after the Effective Date.
- P. Respondents shall not, in any jurisdiction throughout the world: (1) use the Kadian Trademarks or any mark confusingly similar to the Kadian Trademarks, as a trademark, tradename, or service mark; (2) attempt to register the Kadian Trademarks; (3) attempt to register any mark confusingly similar to the Kadian Trademarks; (4) challenge or interfere with the Commission-approved Acquirer's use and registration of the Kadian Trademarks; or (5) challenge or interfere with the Commission-approved Acquirer's efforts to enforce its trademark registrations for and trademark rights in the Kadian Trademarks against Third Parties.
- Q. The purpose of the divestiture of the Kadian Assets is to ensure the continued use of the Kadian Assets in the same business, independent of Respondents, in which the Kadian Assets were engaged at the time of the announcement of the Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

**III.**

## Decision and Order

**IT IS FURTHER ORDERED** that:

- A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint one or more Interim Monitors to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order and the Remedial Agreement.
- B. The Commission shall select the Interim Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) Days after notice by the staff of the Commission to Respondents of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.
- C. Not later than ten (10) Days after the appointment of the Interim Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents' compliance with the relevant requirements of the Order in a manner consistent with the purpose of the Order.
- D. If one or more Interim Monitors are appointed pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of each Interim Monitor:
  1. The Interim Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and asset maintenance obligations and related requirements of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the

## Decision and Order

purposes of the Order, and in consultation with the Commission, including, recommending that the Commission direct the Respondents to effect such modifications to the manner of divestiture of the Kadian Assets to Actavis (including, but not limited to, entering into additional agreements or arrangements) as are necessary to satisfy the requirements of this Order;

2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission;
  3. The Interim Monitor shall serve until the completion by Respondents of the divestiture of the Kadian Assets, or, to the Commission-approved Acquirer, if Actavis is not the Commission-approved Acquirer, pursuant to the Decision and Order in a manner that fully satisfies the requirements of the Order and notification by the Commission-approved Acquirer to the Interim Monitor that it is fully capable of implementing and marketing the Kadian Assets and, if Actavis is not the Commission-approved Acquirer, the Supplemental Assets independently of Respondents. As necessary or appropriate, the Commission may extend or modify this period to accomplish the purposes of the Order;
- D. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with their obligations under the Order, including, but not limited to, their obligations related to the relevant assets. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Order;

## Decision and Order

- E. 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;
- F. Respondents shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Interim Monitor;
- G. Respondents shall report to the Interim Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondents, and any reports submitted by the Commission-approved Acquirer with respect to the performance of Respondents' obligations under the Order or the Remedial Agreement. Within one (1) month from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Orders;
- H. 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

## Decision and Order

agreement shall not restrict the Interim Monitor from providing any information to the Commission.

- I. 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.
- J. 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.
- K. 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.
- L. The Interim Monitor appointed pursuant to this Order may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order.

**IV.**

**IT IS FURTHER ORDERED** that:

- A. If Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver or otherwise convey relevant assets as required by this Order, the Commission may appoint a Divestiture Trustee(s) to assign, grant, license, divest, transfer, deliver or otherwise convey the assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed pursuant to each of the relevant Paragraphs in a manner that satisfies the requirements of each such Paragraph. In the event that the

## Decision and Order

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

- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) Days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- C. Not later than ten (10) Days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by the Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:



## Decision and Order

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed.
2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court; *provided, however*, the Commission may extend the divestiture period only two (2) times.
3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or 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.

## Decision and Order

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

## Decision and Order

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 gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.
7. In the event that the Divestiture Trustee determines that he or she is unable to assign, grant, license, divest, transfer, deliver or otherwise convey the relevant assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed in a manner that preserves their marketability, viability and competitiveness, the Divestiture Trustee may assign, grant, license, divest, transfer, deliver or otherwise convey such additional assets of Respondents and effect such arrangements as are necessary to satisfy the requirements of this Order.
8. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed by this Order.
9. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) Days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

## Decision and Order

10. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph.
- F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.
- 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 ten (10) Days of the Acquisition, Respondents shall submit to the Commission a letter certifying the date on which the Acquisition occurred.
- B. Within thirty (30) Days after the date this Order becomes final, and every sixty (60) Days thereafter until Respondents have fully complied with Paragraph II of this Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order. Respondents shall submit at the same time a copy of their report concerning compliance with

## Decision and Order

this Order to the Interim Monitor, if any Interim Monitor has been appointed. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraph II, including a description of all substantive contacts or negotiations related to the divestiture of the relevant assets and the identity of all parties contacted. Respondents shall include in their reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing the obligations.

- C. One (1) year after the date this Order becomes final, and annually on the anniversary of the date this Order becomes final, until the earlier of nine (9) years, or a final judicial determination of the validity of the Avinza® patent, and at other times as the Commission may require, Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with this Order.

**VI.**

**IT IS FURTHER ORDERED** that:

- A. At the earlier of nine (9) years from the date this Order becomes final, or a final judicial determination of the validity of the Avinza® patent, Respondents shall submit to the Commission at least thirty (30) days prior to entering into a settlement related to the infringement of that patent, a copy of the settlement agreement;
- B. The absence of notice that the proposed settlement has been rejected shall not be construed as a determination by the Commission, or its staff, that the proposed settlement has been approved; and

## Decision and Order

- C. Receipt by the Commission of any settlement agreement pursuant to this Paragraph VI is not to be construed as a determination by the Commission, or its staff, that the proposed settlement does or does not violate this Order or any law enforced by the Commission.

**VII.**

**IT IS FURTHER ORDERED** that Respondents shall provide a copy of this Order to each of Respondent's officers, employees, or agents having managerial responsibility for any of Respondent's obligations under Paragraphs II through V of this Order, no later than ten days from the date this Order becomes final.

**VIII.**

**IT IS FURTHER ORDERED** that each Respondent shall notify the Commission:

- A. Of any change in its principal address within twenty (20) days of such change in address; and
- B. At least thirty (30) days prior to any proposed: (a) dissolution of Respondent; (b) acquisition, merger, or consolidation of Respondent; or (c) any other change in Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

**IX.**

**IT IS FURTHER ORDERED** that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to a Respondent, that Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

Decision and Order

- A. Access, during office hours of Respondent, and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession, or under the control, of Respondent relating to compliance with this Order, which copying services shall be provided by Respondent at its expense; and
- B. To interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

**X.**

**IT IS FURTHER ORDERED** that this Order shall terminate on February 2, 2019.

By the Commission, Commissioner Harbour recused.

## Decision and Order

**APPENDIX I****PUBLIC  
APPENDIX I  
TO THE DECISION AND ORDER****NOTICE OF ANTTITRUST REMEDY AND REQUIREMENT FOR CONFIDENTIALITY**

On [INSERT DATE], King Pharmaceuticals, Inc. ("King") and Alpha Inc. ("Alpha") hereinafter referred to as "Respondents," entered into an Agreement Containing Consent Orders ("Consent Agreement") with the Federal Trade Commission ("FTC") relating to the divestiture of certain assets. That Consent Agreement includes a Decision and Order ("Order").

The Order requires the divestiture of assets relating to Kadian®. The Order requires Respondents to commit that no Confidential Business Information relating to Kadian® will be disclosed to or used by any employee of the combined entity formed by the acquisition of a controlling interest in Alpha by King ("Combined Entity"). In particular, this is to protect such information from being used in any way for the research, development, sale or manufacture of any product that competes or may compete with any product that is marketed by the Respondents after the proposed acquisition. The Order also requires the complete divestiture of ALL documents (including electronically stored material) that contain Confidential Business Information related to Kadian.® Accordingly, no employee of the Combined Entity may maintain copies of documents containing such information, except as otherwise required by law.

Under the Order, the Respondents are required to divest Kadian® to an acquirer that must be approved by the FTC. Until a complete divestiture of all of Kadian® occurs, the Order requires the continued marketability, viability and competitive vigor of Kadian®. This includes preserving the work force that performs functions related to Kadian.® You are receiving this notice because you are one or more of the following: (i) an employee with work responsibilities related to Kadian;® (ii) an employee for Alpha, King or the Combined Entity who has work responsibilities in some way related to products that compete or may compete with Kadian;® or (iii) an employee or former employee of King or Alpha who might have Confidential Business Information in your possession related to Kadian.®

All Confidential Business Information related to Kadian® must be retained and maintained by the persons involved in the operation of that business on a confidential basis, and such persons must not provide, discuss, exchange, circulate, or otherwise disclose any such information to or with any other person whose employment involves responsibilities unrelated to Kadian® (such as persons with job responsibilities related to Alpha or King products that compete or may compete with Kadian®). In addition, any person who possesses such Confidential Business Information related to Kadian® and who becomes involved in the Combined Entity's business related to any product that competes or may compete with Kadian® must not provide, discuss, exchange, circulate, or otherwise disclose any such information to or with any other person whose employment relates to such business. Finally, any Alpha, King or former Alpha or King employee with documents that contain information that he or she believes might be considered Confidential Business Information related to Kadian® and who has



Decision and Order

not received specific instructions as to how the documents in his or her possession should be disposed of should contact the contact person identified at the end of this notice.

Furthermore, the Order places restrictions upon the functions that management level employees of Alpharma and King can perform for the Combined Entity for one (1) year from the closing of the King/Alpharma transaction, as follows: any employee of Alpharma who was involved in the marketing of Kadian® may not perform a similar function for the Combined Entity relating to Avinza®. In addition, any employee involved in sales efforts for Kadian® may not perform a similar function for the Combined Entity regarding Avinza® for six (6) months from the closing of the King/Alpharma transaction.

[ADD ONLY IF ACTAVIS IS NOT THE BUYER]: Furthermore, the Order places restrictions upon the functions that management level employees of Alpharma and King can perform for the Combined Entity for one (1) year from the closing of the King/Alpharma transaction, as follows: any employee of Alpharma who was involved in the marketing of Kadian® may not perform a similar function for the Combined Entity relating to Avinza®. In addition, any employee involved in sales efforts for Kadian® may not perform a similar function for the Combined Entity regarding Avinza® for six (6) months from the closing of the King/Alpharma transaction.]

Any violation of the Order may subject King, Alpharma, or the Combined Entity to civil penalties and other relief as provided by law. If you have any questions regarding the contents of this notice, the confidentiality of information or the Order, you should contact \_\_\_\_\_.

**ACKNOWLEDGMENT**

I, \_\_\_\_\_ (print name), hereby acknowledge that I

have read the above notification and agree to abide by its provisions.

Decision and Order

**Appendix II**

NON-PUBLIC APPENDIX II TO THE DECISION AND ORDER

KADIAN ASSET PURCHASE AGREEMENT

[Redacted From the Public Record Version 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 King Pharmaceuticals, Inc. (“King”) and Alpharma Inc. (“Alpharma”), which is designed to remedy the anticompetitive effects of King’s acquisition of Alpharma. Under the terms of the Consent Agreement, the companies would be required to divest to Actavis all rights to Kadian, Alpharma’s branded long-acting morphine sulfate opioid analgesic product. Kadian’s patent runs until April of 2010. The divestiture gives Actavis all rights to Kadian, restoring the competition between Kadian and King’s Avinza that would be lost with the acquisition.

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

Pursuant to a merger agreement executed on November 23, 2008, King intends to acquire all the outstanding shares of Alpharma for approximately \$1.6 billion. Both parties sell branded pharmaceuticals in the United States. The Commission’s Complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45. The proposed Consent Agreement remedies the alleged violations by maintaining existing competition between branded Kadian and Avinza, and permitting an authorized generic version of branded Kadian to be launched prior to when the patent expires.

## Analysis to Aid Public Comment

**II. The Competitive Effects of the Proposed Acquisition**

The proposed acquisition would cause significant anticompetitive harm by eliminating actual, direct and substantial competition between King and Alpharma in the market for oral long acting opioid analgesics (“oral LAOs”). The merging firms today offer the only two competitively significant branded morphine sulfate oral LAOs, and the evidence shows that they are particularly close competitors within the larger oral LAO market. The loss of head-to-head competition between King’s Avinza and Alpharma’s Kadian would result in higher prices for branded ER morphine sulfate.

While King and Alpharma oral LAO products compete most directly with each other, they also compete, to a lesser extent, with other oral LAOs. Oral LAOs have become the standard of care for the management of moderate-to-severe chronic pain because of their effectiveness, ease of titration and favorable risk-to-benefit ratio. Other oral LAOs are based on distinct chemical compounds, but all of these products have the same mechanisms of action, similar indications, similar dosage forms and similar dosage frequency. The most significant of the other oral LAOs is Purdue Pharma L.P.’s OxyContin, which is four times larger than Avinza and Kadian, combined. A fourth product, Endo Pharmaceutical’s Opana ER, also competes in the market.

As with most pharmaceutical products, entry into the manufacture and sale of oral LAOs, is difficult, expensive and time consuming. Developing and obtaining U.S. Food and Drug Administration (“FDA”) approval for the manufacture and sale of oral LAOs takes at least two years due to substantial regulatory, technological and intellectual property barriers. As a result, new entry is unlikely to ameliorate the anticompetitive effects of the acquisition.

## Analysis to Aid Public Comment

**III. The Consent Agreement**

The order would remedy the competitive concerns raised by the proposed acquisition by requiring King to divest Kadian to Actavis no later than ten days after its acquisition of Alparma is consummated. Headquartered in Iceland, Actavis is one of the world's largest generic pharmaceutical companies. Currently, Actavis manufactures Kadian for Alparma at its plant located in Elizabeth, New Jersey. With the divestiture, Actavis will continue to sell Kadian in competition with Avinza and other oral LAOs, and be able to introduce an "authorized" generic version of Kadian earlier than would have been otherwise possible, as Kadian's patent expires in April of 2010. An "authorized" generic is a pharmaceutical product that was originally marketed and sold by a brand company but is relabeled and marketed under a generic product name. As the current manufacturer of Kadian for Alparma, Actavis has the incentive and ability to launch the first generic Kadian product prior to patent expiry.

The assets to be divested include all intellectual property and regulatory approvals, inventory, books and records, marketing materials, and assumed contracts necessary for Actavis to sell Kadian as either a branded or generic product. Because Actavis already manufactures Kadian, no divestiture of fixed assets, interim supply agreement, provision of technical assistance is required, or asset maintenance order are required.<sup>1</sup> The proposed order also contains provisions designed to restrict King's use of confidential business information relating to Kadian.

The FTC's prior orders involving the divestiture of branded pharmaceutical products have required that any buyer of branded products have the requisite brand marketing experience to replace the competition that would have been eliminated through the transactions. However, the Commission has determined that the

---

<sup>1</sup> The proposed order requires the respondents to maintain the assets pending divestiture.

## Analysis to Aid Public Comment

divestiture of Kadian to the generic drug manufacturer Actavis is an appropriate remedy in this case because (1) with only a little over a year left to Kadian's patent life, further innovation of the Kadian product is unlikely, and (2) the proposed remedy not only prevents the loss of price competition between Avinza and Kadian which was the competitive concern identified in our investigation, but also makes possible early introduction of a generic product – with lower pricing for consumers – before the patent expires.

In the event that the Commission determines that Actavis is not an acceptable acquirer, the proposed order requires the parties to unwind the sale and then divest Kadian within six months of the date the order becomes final to another Commission-approved acquirer. The proposed order also provides that, in the event that the Commission determines that the manner of the divestiture is not acceptable, that the Commission may appoint a divestiture trustee to effectuate such modifications as are necessary to satisfy the requirements of the order. Additionally, the proposed order allows the Commission to appoint an Interim Monitor to ensure the respondents' compliance with the terms of the order.

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

## Complaint

## IN THE MATTER OF

**TEVA PHARMACEUTICAL INDUSTRIES LTD.  
AND  
BARR PHARMACEUTICALS, INC.**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS  
OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL  
TRADE COMMISSION ACT*Docket C-4242; File No. 081 0224**Complaint, December 18, 2008 – Decision, February 9, 2009*

This consent order addresses the acquisition of Barr Pharmaceuticals, Inc., by Teva Pharmaceutical Industries Ltd. Both companies are engaged in the research, development, manufacture, and sale of generic pharmaceutical products. The acquisition would lessen competition in the U.S. markets for the manufacture and sale of a number of generic drugs. The order requires the respondents to assign and divest to Watson Pharmaceuticals Teva's rights and assets necessary to manufacture and market these generic products: chlorzoxazone tablets, deferoxamine injection, fluoxetine weekly capsules, carboplatin injection, and metronidazole tablets. The order requires the respondents to assign and divest to Watson all of Barr's rights and assets necessary to manufacture and market these generic products: metoclopramide hydrochloride (HCl) tablets, cyclosporine liquid, cyclosporine capsules, desmopressin acetate tablets, epoprostenol sodium injection, flutamide capsules, glipizide/metformin HCl tablets, mirtazapine orally disintegrating tablets, tamoxifen citrate tablets, and tetracycline HCl capsules. The order requires the respondents to divest Teva's rights and assets necessary to manufacture and market generic trazodone HCl tablets and thirteen oral contraceptive products to Qualitest Pharmaceuticals. If the Commission determines that either Watson or Qualitest is not an acceptable acquirer, the assets must be divested to another Commission-approved acquirer. Teva and Barr must provide transitional services to enable the acquirers to obtain all of the necessary approvals from the U.S. Food and Drug Administration. These transitional services include technology transfer assistance to manufacture the products in substantially the same manner and quality employed or achieved by Teva or Barr. The order also requires Teva and Barr to file reports with the Commission periodically until the divestitures and transfers are accomplished.

## Complaint

*Participants*

For the *Commission*: *Stephanie C. Boyce, Sylvia M. Brooks, Leslie Farber, Michael R. Moiseyev, Elizabeth A. Piotrowski, David Von Nirschl, and Kari A. Wallace.*

For the *Respondents*: *Micha N. Hildenbrand, Mark L. Kovner, and Marimichael O. Skubel, Kirkland & Ellis LLP; and Amy R. Fitzpatrick, Jeffrey Korn, David K. Park, and William H. Rooney, Willkie, Farr & Gallagher 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 Teva Pharmaceutical Industries Ltd. (“Teva”), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Barr Pharmaceuticals, Inc. (“Barr”), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act (“FTC Act”), as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

**I. DEFINITIONS**

1. “Commission” means the Federal Trade Commission.
2. “FDA” means the United States Food and Drug Administration.
3. “Respondent(s)” means Teva and Barr, individually and collectively.



## Complaint

**II. RESPONDENTS**

4. Respondent Teva is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Israel, with its corporate head office and principal place of business located at 5 Basel Street, P.O. Box 3190, Petach Tikva 49131 Israel and the address of its United States subsidiary, Teva Pharmaceuticals USA, Inc. located at 1090 Horsham Road, P.O.B. 1090, North Wales, Pennsylvania 19454. Teva is engaged in the research, development, manufacture, and sale of generic pharmaceutical products.

5. Respondent Barr is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 400 Chestnut Ridge Road, Woodcliff Lake, New Jersey 07677. Barr is engaged in the research, development, manufacture, and sale of generic pharmaceutical products.

6. Respondents are, and at all times relevant herein have been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act as amended, 15 U.S.C. § 12, and are corporations whose business is in or affects commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

**III. THE PROPOSED ACQUISITION**

7. On July 18, 2008, Teva and Barr entered into an Agreement and Plan of Merger (the “Merger Agreement”) whereby Teva proposes to acquire all of the issued and outstanding shares of Barr for approximately \$7.4 billion, plus the assumption of approximately \$1.5 billion of net debt, for a total of approximately \$8.9 billion (the “Acquisition”).

## Complaint

**IV. THE RELEVANT MARKETS**

8. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are the manufacture and sale of the following generic pharmaceutical products:

- a. tetracycline hydrochloride (“HCl”) capsules;
- b. chlorzoxazone tablets;
- c. desmopressin acetate tablets;
- d. metoclopramide HCl tablets;
- e. carboplatin injection;
- f. tamoxifen citrate tablets;
- g. metronidazole tablets;
- h. trazodone HCl tablets;
- i. glipizide/metformin HCl tablets;
- j. cyclosporine capsules;
- k. cyclosporine liquid;
- l. flutamide capsules;
- m. mirtazapine orally disintegrating tablets (“ODT”);
- n. deferoxamine injection;
- o. epoprostenol sodium (freeze-dried powder) injection;
- p. fluoxetine weekly capsules;

## Complaint

- q. norgestimate/ethinyl estradiol 0.025 mg/0.35 mg (“generic Ortho Cyclen”) tablets;
- r. norgestimate/ethinyl estradiol 0.018 mg/0.35 mg, 0.215 mg/0.35 mg, and 0.25 mg/0.35 mg (“generic Ortho Tri-Cyclen”) tablets;
- s. desogestrel/ethinyl estradiol 0.15mg/0.03 mg (“generic Ortho-cept”) tablets;
- t. desogestrel/ethinyl estradiol and ethinyl estradiol 0.15mg/0.02 mg and 0.01 mg (“generic Mircette”) tablets;
- u. levonorgestrel/ethinyl estradiol 0.05 mg/0.03 mg, 0.075 mg/0.04 mg, and 0.125 mg/0.03 mg (“generic Triphasil 28”) tablets;
- v. levonorgestrel and ethinyl estradiol 0.1 mg/0.02 mg (“generic Alesse”) tablets;
- w. norethindrone/ethinyl estradiol 0.5 mg/0.035 mg, 0.75 mg/0.035 mg, and 1 mg/0.035 mg (“generic Ortho-Novum 7/7/7”) tablets;
- x. norethindrone/ethinyl estradiol 1 mg/0.035 mg (“generic Ortho-Novum 1/35”) tablets;
- y. norethindrone acetate/ethinyl estradiol/ferrous fumarate 1.5 mg/0.03 mg/75 mg and 1 mg/0.02 mg/75 mg (“generic Loestrin FE 1.5/30”) tablets;
- z. norethindrone acetate/ethinyl estradiol/ferrous fumarate 1 mg/0.02 mg/75 mg (“generic Loestrin FE 1/20”) tablets;
- aa. norethindrone/ethinyl estradiol 0.4 mg/0.035 mg (“generic Ovcon-35”) tablets;
- bb. norethindrone acetate/ethinyl estradiol/ferrous fumarate 1mg/0.02 mg (“generic Loestrin FE 24”); and

## Complaint

cc. norgestimate/ethinyl estradiol 0.180mg/0.025 mg, 0.215 mg/0.025 mg, and 0.250 mg/0.025 mg (“generic Ortho Tri-Cyclen Lo 28”).

9. For the purposes of this Complaint, the United States is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant line of commerce.

## V. THE STRUCTURE OF THE MARKETS

10. Teva and Barr are the only suppliers of generic tetracycline tablets in the United States. Tetracycline is an old, broad-spectrum antibiotic used primarily to treat acne. The Acquisition would create a monopoly in the market for generic tetracycline in the United States.

11. Chlorzoxazone is a centrally acting muscle relaxant used to treat muscle spasms. Teva and Barr are the only suppliers of generic chlorzoxazone tablets in the United States, with respective markets shares of approximately 42 and 58 percent. The Acquisition would create a monopoly in this market.

12. Teva and Barr are the only manufacturers of generic desmopressin acetate in the United States. Desmopressin acetate tablets are a synthetic replacement for an antidiuretic hormone that reduces urine production during sleep. The Acquisition would create a monopoly in the market for generic desmopressin acetate in the United States.

13. Metoclopramide HCl is a dopamine receptor antagonist used to treat nausea and vomiting, as well as gastroesophageal reflux disease. Barr, Teva, United Research Laboratories/Mutual Pharmaceutical Company (“Mutual”), Qualitest Pharmaceuticals Inc. (“Qualitest”), and Actavis Group (“Actavis”) are the only suppliers of generic metoclopramide HCl in the United States. Teva, Barr, Mutual, and Qualitest, however, are the only suppliers of both the 5 mg and 10 mg strengths of generic metoclopramide HCl. The Acquisition would increase the combined Teva/Barr’s share in both

## Complaint

formulations to over 82 percent and increase the Herfindahl-Hirschman Index (“HHI”) concentration by 3,223 points to 6,928 points.

14. Carboplatin injection is a chemotherapy drug used to treat a variety of cancers. Barr, Teva, APP Pharmaceuticals, and Bedford Laboratories (“Bedford”) are the only companies that currently supply generic carboplatin in the United States. The Acquisition would increase the HHI by 1,840 points to 4,652 points and reduce the number of companies offering generic carboplatin injection in the United States from four to three.

15. Tamoxifen is a selective estrogen receptor modulator that is used in the treatment of breast cancer. Teva, Barr, and Mylan Inc. (“Mylan”) are the suppliers of generic tamoxifen citrate tablets. Teva is the market leader with 58 percent of the market. Mylan has 27 percent and Barr has 15 percent. The Acquisition would increase the HHI by 1,740 points to 6,058 points, and would create a duopoly in the U.S. market for generic tamoxifen citrate tablets.

16. Metronidazole is an anti-infective used in the treatment of a variety of bacterial infections. Barr and Teva are the only significant competitors in the market for the manufacture and sale of generic metronidazole tablets. Barr is the market leader with 50 percent of the market, followed by Teva with 39 percent of the market. The Acquisition would increase the HHI by 2,901 points to 7,974 points.

17. Trazodone HCl is an antidepressant with a sedative effect. Four companies currently supply generic trazodone HCl in the United States – Barr, Apotex Group (“Apotex”), Teva, and Watson Pharmaceuticals (“Watson”). Barr is the dominant supplier with close to 71 percent of the market, followed by Apotex with 22 percent and Teva with 4 percent. Watson has less than 3 percent of the market. The Acquisition would increase the HHI by 568 points to 6,118 points.

18. Glipizide/metformin is an anti-diabetes drug that is commonly prescribed as a first line treatment for diabetes. Four

## Complaint

companies – Teva, Barr, Sandoz, Inc. (“Sandoz”), and Mylan – currently sell glipizide/metformin HCl tablets in the United States. Sandoz is the market leader with 37 percent of the market. Barr and Teva have roughly equal shares at 25 percent and 26 percent, respectively. The remaining supplier, Mylan, has captured only 12 percent of the market. The Acquisition would reduce the number of competitors in the generic glipizide/metformin HCl tablet market from four to three firms, and would increase the HHI by 1,300 points to 4,114 points.

19. Cyclosporine, in both the liquid and gelcap form, is an immunosuppressant drug used to prevent the rejection of transplanted organs.

20. Abbott Laboratories (“Abbott”), Barr, and Teva, are the three suppliers of generic liquid cyclosporine. Abbott and Barr roughly split the bulk of the market at 45 percent and 44 percent, respectively. The third supplier – Teva – accounts for approximately an 11 percent share of sales. The Acquisition would reduce the number of generic liquid cyclosporine suppliers from three to two firms, and increase the HHI by 968 points to 5,050 points.

21. Sandoz, Abbott, Barr, and Teva are the four current suppliers of cyclosporine gelcaps. Abbott is the market leader with 51 percent of the market. Teva has 20 percent of the market, and Barr has 21 percent of the market. Sandoz is a much smaller market participant with only 8 percent of the market. The Acquisition would increase the HHI by 840 points to 4,331 points.

22. Flutamide is an anti-androgen drug used to treat prostate cancer. Four suppliers – Teva, Par Pharmaceutical Companies (“Par”), Barr, and Sandoz – supply generic flutamide capsules in the United States. Sandoz is the market leader with 34 percent of the market. Teva has 28 percent and Par has 24 percent of the market. Barr has captured 14 percent of the market. The Acquisition would increase the HHI by 784 points to 3,496 points.

## Complaint

23. Deferoxamine is a chelating agent used to remove excess iron from the body. Hospira Inc. (“Hospira”), Bedford, Teva, and Barr are the four current suppliers of generic deferoxamine injection in the United States. Hospira is the market leader with 73 percent of the market and Bedford and Teva have approximately 11 percent and 12 percent, respectively. Approximately 4 percent of generic deferoxamine sales are currently attributable to Barr. The Acquisition increases the HHI by 96 points to 5,540 points.

24. Mirtazapine ODT is an antidepressant used to treat moderate to severe depression. With 49 percent of the market, Prasco Laboratories is the dominant supplier while Barr and Teva account for 26 percent and 10 percent of the market, respectively. Aurobindo Pharma Ltd. represents 7 percent of the market. Actavis has manufactured and sold generic mirtazapine ODT in the United States, but recently faced manufacturing difficulties and recalled its generic mirtazapine ODT product earlier this year. Thus, the Acquisition would reduce the current number of suppliers of generic mirtazapine ODT from four to three firms, resulting in a post-acquisition HHI of 3,910 points.

25. Oral contraceptives are forms of birth control that contain varying ratios of synthetic estrogen and synthetic progestin to prevent ovulation and pregnancy. In each of the thirteen relevant generic oral contraceptive markets, Teva and Barr are two of a limited number of suppliers or potential entrants.

26. The U.S. market for the manufacture and sale of generic Ortho-Cyclen tablets is already highly concentrated. Watson, Barr, and Teva, are the only suppliers of this generic oral contraceptive in the United States. After the Acquisition, the HHI would increase by 264 points, resulting in a post-acquisition HHI of 5,648 points, and Teva would account for 68 percent of the market.

27. Barr is the leading supplier in the U.S. market for the manufacture and sale of generic Ortho Tri-Cyclen tablets with 49 percent of the market. Watson and Teva are the only other suppliers of this generic oral contraceptive in the United States. The market

## Complaint

for generic Ortho Tri-Cyclen is already highly concentrated. After the Acquisition, the HHI would increase by 196 points, resulting in a post-acquisition HHI of 5,002 points, and Teva would account for 51 percent of the market.

28. Barr currently competes in ten additional oral contraceptive markets where Teva is developing competitive products. These ten markets represent generic products that are equivalent to Ortho-Novum 1/35, Ortho-Novum 7/7/7, Ortho-Cept Desogen, Alesse 28, Triphasil 28, Mircette, Ovcon 35, Loestrin FE (1 mg/0.020 mg), Loestrin FE (1.5 mg/0.030 mg), and Loestrin 24 FE. In each of these highly concentrated markets, Barr is one of only two or three suppliers. Teva is one of a limited number of firms developing generic oral contraceptives that would compete in each of these markets, and is well-positioned to enter the markets in a timely manner.

29. Both Teva and Barr are developing generic Ortho Tri-Cyclen Lo 28 tablets. They are two of a limited number of suppliers capable of entering this future generic market in a timely manner.

30. Epoprostenol sodium (freeze-dried powder) injection is used to treat severe primary pulmonary hypertension. Teva is currently the only generic supplier on the market. Barr is one of a limited number of suppliers capable of entering this generic market in a timely manner.

31. The weekly capsule version of fluoxetine is a widely prescribed antidepressant. Barr and Teva are both developing fluoxetine weekly capsules, and are two of a limited number of companies capable of entering this future generic market in a timely manner.

**VI. ENTRY CONDITIONS**

32. Entry into the relevant product markets described in Paragraph 8 would not be timely, likely, or sufficient in its magnitude, character, and scope to deter or counteract the



## Complaint

anticompetitive effects of the Acquisition. Entry would not take place in a timely manner because the combination of generic drug development times and FDA drug approval requirements takes at least two years. Entry would not be likely because some of the relevant markets are relatively small and in decline, limiting sales opportunities for any potential new entrant.

**VII. EFFECTS OF THE ACQUISITION**

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

a. by eliminating actual, direct, and substantial competition between Teva and Barr in the market for the manufacture and sale of generic tetracycline HCl capsules, generic chlorzoxazone tablets, and generic desmopressin acetate tablets, thereby: (1) increasing the likelihood that Teva will be able to unilaterally exercise market power in these markets, and (2) increasing the likelihood that customers would be forced to pay higher prices;

b. by eliminating actual, direct, and substantial competition between Teva and Barr in the markets for the manufacture and sale of generic metoclopramide HCl tablets, generic carboplatin injection, generic tamoxifen citrate tablets, generic metronidazole tablets, generic trazodone HCl tablets, generic glipizide/metformin HCl tablets, generic cyclosporine capsules, generic cyclosporine liquid, generic flutamide capsules, generic deferoxamine injection, generic mirtazapine ODT, generic Ortho-Cyclen, and generic Ortho Tri-Cyclen, thereby: (1) increasing the likelihood that Teva will be able to unilaterally exercise market power in these markets, (2) increasing the likelihood and degree of coordinated interaction between or among the remaining competitors, and (3) increasing the likelihood that customers would be forced to pay higher prices;

## Complaint

c. by eliminating potential competition between Teva and Barr in the markets for the manufacture and sale of generic epoprostenol sodium (freeze-dried powder) injection, generic Ortho-Cept tablets, generic Triphasil 28 tablets, generic Alesse tablets, generic OrthoNovum 1/35 tablets, generic OrthoNovum 7/7/7 tablets, generic Loestrin FE 1/20 tablets, generic Loestrin FE 1.5/30 tablets, generic Mircette tablets, generic Loestrin 24 FE, and generic Ovcon-35 tablets, thereby: (1) increasing the likelihood that the combined entity would forego or delay the launch of Barr's generic epoprostenol sodium (freeze-dried powder) injection and Teva's generic Ortho-Cept tablets, generic Triphasil 28 tablets, generic Alesse tablets, generic OrthoNovum 1/35 tablets, generic OrthoNovum 7/7/7 tablets, generic Loestrin FE 1/20 tablets, generic Loestrin FE 1.5/30 tablets, generic Mircette tablets, generic Loestrin 24 FE and generic Ovcon-35 tablets products and (2) increasing the likelihood that the combined entity would delay or eliminate the substantial additional price competition that would have resulted from Barr's independent entry into the generic epoprostenol sodium (freeze-dried powder) injection and Teva's independent entry into the generic Ortho-Cept tablets, generic Triphasil 28 tablets, generic Alesse tablets, generic OrthoNovum 1/35 tablets, generic OrthoNovum 7/7/7 tablets, generic Loestrin FE 1/20 tablets, generic Loestrin FE 1.5/30 tablets, generic Mircette tablets, generic Loestrin 24 FE and generic Ovcon-35 tablets markets; and

d. by eliminating future competition between Teva and Barr in the markets for the manufacture and sale of generic fluoxetine weekly capsules and generic Ortho Tri-Cyclen Lo 28 tablets, thereby: (1) increasing the likelihood that the combined entity would forego or delay the launch of Teva's or Barr's products in these markets and (2) increasing the likelihood that the combined entity would delay or eliminate the substantial additional price competition that would have resulted from Teva's and Barr's independent entry into the markets.

## Order to Maintain Assets

**VIII. VIOLATIONS CHARGED**

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

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

**WHEREFORE, THE PREMISES CONSIDERED**, the Federal Trade Commission on this eighteenth day of December, 2008, issues its Complaint against said Respondents.

By the Commission.

**ORDER TO MAINTAIN ASSETS**

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

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid

## Order to Maintain Assets

draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Maintain Assets:

1. Respondent Teva is a corporation organized, existing and doing business under and by virtue of the laws of the State of Israel, with its corporate head office and principal place of business located at 5 Basel Street, P.O. Box 3190, Petach Tikva 49131 Israel, and the address of its United States subsidiary, Teva Pharmaceuticals USA, Inc., located at 1090 Horsham Road, P.O.B. 1090, North Wales, Pennsylvania 19454.

2. Respondent Barr is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 400 Chestnut Ridge Road, Woodcliff Lake, New Jersey 07677.

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

**ORDER****I.**

## Order to Maintain Assets

**IT IS ORDERED** that, as used in this Order to Maintain Assets, the following definitions and the definitions used in the Consent Agreement and the proposed Decision and Order (and when made final, the Decision and Order), which are incorporated herein by reference and made a part hereof, shall apply:

- A. “Teva” means Teva Pharmaceutical Industries Limited, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Teva (including, but not limited to, Teva Pharmaceuticals USA, Inc., Barr Acquisition Corp., Barr Acquisition, LLC, and IVAX Corporation), and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each. After the Acquisition, Teva shall include Barr.
- B. “Barr” means Barr Pharmaceuticals, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Barr (including, but not limited to, Barr Laboratories, Inc., and PLIVA d.d. ), and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.
- C. “Respondent(s)” means Teva and Barr, individually and collectively.
- D. “Commission” means the Federal Trade Commission.
- E. “Decision and Order” means the:
  - 1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final Decision and Order by the Commission; and

## Order to Maintain Assets

2. Final Decision and Order issued by the Commission following the issuance and service of a final Decision and Order by the Commission in this matter.
- F. “Divestiture Assets” means the Generic Assorted Indication Product Assets, the Generic Oral Contraceptive Product Assets, and the Trazodone Product Assets, as defined in the Decision and Order.
- G. “Divestiture Product Business(es)” means the business of the Respondent(s) within the Geographic Territory specified in the Decision and Order related to each of the Divestiture Products, including the research, Development, manufacture, distribution, marketing, and sale of each Divestiture Product and the assets related to such business, including, without limitation, the Divestiture Assets.
- H. “Interim Monitor” means any monitor appointed pursuant to Paragraph III of this Order to Maintain Assets or Paragraph III of the Decision and Order.
- I. “Orders” means the Decision and Order and this Order to Maintain Assets.

**II.**

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

- A. Until Respondents fully transfer and deliver each of the respective Divestiture Assets to an Acquirer, Respondents shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of each of the related Divestiture Product Businesses, to minimize any risk of loss of competitive potential for such Divestiture Product Businesses, and to prevent the destruction, removal, wasting, deterioration, or impairment of such Divestiture Product Businesses except for ordinary

## Order to Maintain Assets

wear and tear. Respondents shall not sell, transfer, encumber or otherwise impair such Divestiture Assets (other than in the manner prescribed in the Decision and Order) nor take any action that lessens the full economic viability, marketability or competitiveness of the related Divestiture Product Businesses.

- B. Until Respondents fully transfer and deliver each of the respective Divestiture Assets to an Acquirer, Respondents shall maintain the operations of the related Divestiture Product Businesses in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets of such business) and/or as may be necessary to preserve the marketability, viability, and competitiveness of such Divestiture Product Businesses and shall use their best efforts to preserve the existing relationships with the following: suppliers; vendors and distributors; the High Volume Accounts; customers; Agencies; employees; and others having business relations with each of the respective Divestiture Product Businesses. Respondents' responsibilities shall include, but are not limited to, the following:
1. providing each of the respective Divestiture Product Businesses with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such business and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for such Divestiture Product Business;
  2. continuing, at least at their scheduled pace, any additional expenditures for each of the respective Divestiture Product Businesses authorized prior to the date the Consent Agreement was signed by Respondents including, but not limited to, all research, Development,

## Order to Maintain Assets

manufacturing, distribution, marketing and sales expenditures;

3. providing such resources as may be necessary to respond to competition against each of the Divestiture Products and/or to prevent any diminution in sales of each of the Divestiture Products during and after the Acquisition process and prior to the complete transfer and delivery of the related Divestiture Assets to an Acquirer;
  4. providing such resources as may be necessary to maintain the competitive strength and positioning of each of the Divestiture Products at the related High Volume Accounts;
  5. making available for use by each of the respective Divestiture Product Businesses funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the assets related to such business, including without limitation, the Divestiture Assets;
  6. providing each of the respective Divestiture Product Businesses with such funds as are necessary to maintain the full economic viability, marketability and competitiveness of such Divestiture Product Business; and
  7. providing such support services to each of the respective Divestiture Product Businesses as were being provided to such business by Respondent(s) as of the date the Consent Agreement was signed by Respondents.
- C. Until Respondents fully transfer and deliver the Divestiture Assets to the relevant Acquirer, Respondent(s) shall maintain a work force at least as equivalent in size, training, and expertise to what has been associated with the



## Order to Maintain Assets

Divestiture Products for the relevant Divestiture Product's last fiscal year.

- D. Until the Closing Date for each of the respective Divestiture Assets, Respondents shall provide all the related Divestiture Product Core Employees with reasonable financial incentives to continue in their positions and to research, Develop, and manufacture the relevant Divestiture Products consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of such Divestiture Products pending divestiture. Such incentives shall include a continuation of all employee benefits offered by Respondent(s) until the Closing Date for the divestiture of the Divestiture Assets has occurred, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by Law), and additional incentives as may be necessary to prevent any diminution of the relevant Divestiture Product's competitiveness.
- E. Respondents shall:
1. for each Divestiture Product, for a period of six (6) months from the Closing Date or upon the hiring of twenty (20) Divestiture Product Core Employees by each of the relevant Acquirers, whichever occurs earlier, provide each Acquirer with the opportunity to enter into employment contracts with the Divestiture Product Core Employees related to the Divestiture Products and assets acquired by such Acquirer. Each of these periods is hereinafter referred to as the "Divestiture Product Core Employee Access Period(s)"; and
  2. not later than the earlier of the following dates: (1) ten (10) days after notice by staff of the Commission to Respondents to provide the Product Employee Information; or (2) ten (10) days after written request by an Acquirer, provide such Acquirer or Proposed Acquirer(s) with the Product Employee Information

## Order to Maintain Assets

related to the Divestiture Product Core Employees. Failure by Respondents to provide the Product Employee Information for any Divestiture Product Core Employee within the time provided herein shall extend the Divestiture Product Core Employee Access Period(s) with respect to that employee in an amount equal to the delay;

3. during the Divestiture Product Employee Access Period, not interfere with the hiring or employing by the relevant Acquirer of Divestiture Product Core Employees, and shall remove any impediments within the control of Respondent(s) that may deter these employees from accepting employment with such Acquirer, including, but not limited to, any noncompete provisions of employment or other contracts with Respondent(s) that would affect the ability or incentive of those individuals to be employed by such Acquirer. In addition, Respondents shall not make any counteroffer to a Divestiture Product Core Employee who receives a written offer of employment from the relevant Acquirer;

*provided, however,* that, subject to the conditions of continued employment prescribed in this Order, this Paragraph II.E.3. shall not prohibit Respondents from continuing to employ any Divestiture Product Core Employee under the terms of such employee's employment with Respondent(s) prior to the date of the written offer of employment from the Acquirer to such employee.

F. Pending divestiture of the relevant Divestiture Assets, Respondents shall:

1. not use, directly or indirectly, any Confidential Business Information related to the research, Development, manufacturing, marketing, or sale of the relevant Divestiture Product(s) other than as necessary to comply

## Order to Maintain Assets

with the following: (1) the requirements of the Orders; (2) Respondents' obligations to an Acquirer under the terms of any Remedial Agreement related to relevant Divestiture Product(s); or (3) applicable Law;

2. not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person except the relevant Acquirer or Persons specifically authorized by the relevant Acquirer or the Commission to receive such information;
  3. not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the marketing or sales of the relevant Divestiture Products to the employees associated with business related to those Retained Products that contain the same active pharmaceutical ingredient as the Divestiture Products; and
  4. institute procedures and requirements to ensure that the above-described employees:
    - a. do not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information in contravention of this Order to Maintain Assets; and
    - b. do not solicit, access or use any Confidential Business Information that they are prohibited under this Order to Maintain Assets from receiving for any reason or purpose.
- G. Not later than thirty (30) days following the Closing Date, Respondents shall provide to all of Respondents' employees and other personnel who may have access to Confidential Business Information related to the Divestiture Products written or electronic notification of the restrictions on the use of such information by Respondents' personnel. At the

## Order to Maintain Assets

same time, if not provided earlier, Respondents shall provide a copy of such notification by e-mail with return receipt requested or similar transmission, and keep an electronic file of such receipts for one (1) year after the Closing Date for each of the respective Divestiture Product Assets. Respondents shall provide a copy of the form of such notification to the Acquirer, the Interim Monitor(s), and the Commission. Respondents shall also obtain from each employee covered by this Paragraph II.G. an agreement to abide by the applicable restrictions. Respondents shall maintain complete records of all such agreements at Respondents' registered office within the United States and shall provide an officer's certification to the Commission stating that such acknowledgment program has been implemented and is being complied with. Respondents shall monitor the implementation by its employees and other personnel of all applicable restrictions, and take corrective actions for the failure of such employees and personnel to comply with such restrictions or to furnish the written agreements and acknowledgments required by this Order to Maintain Assets. Respondents shall provide the relevant Acquirer with copies of all certifications, notifications and reminders sent to Respondents' employees and other personnel.

- H. Respondents shall adhere to and abide by the Remedial Agreements (which agreements shall not vary or contradict, or be construed to vary or contradict, the terms of the Orders, it being understood that nothing in the Orders shall be construed to reduce any obligations of Respondents under such agreement(s)), which are incorporated by reference into this Order to Maintain Assets and made a part hereof.
- I. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Divestiture Product Businesses within the Geographic Territory through their full transfer and

## Order to Maintain Assets

delivery to an Acquirer, to minimize any risk of loss of competitive potential for the Divestiture Product Businesses within the Geographic Territory, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Divestiture Assets except for ordinary wear and tear.

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

- A. At any time after 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 the Order to Maintain Assets, the Decision and Order, and the Remedial Agreements.
- B. The Commission shall select the Interim Monitor, subject to the consent of Respondent Teva, which consent shall not be unreasonably withheld. If Respondent Teva has not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent Teva of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.
- C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents’ compliance with the relevant requirements of the Orders in a manner consistent with the purposes of the Orders.

## Order to Maintain Assets

- D. If an Interim Monitor is appointed, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:
1. The Interim Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission.
  2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.
  3. The Interim Monitor shall serve until the date of completion by Respondents of the divestiture of all Generic Assorted Indication Product Assets, Generic Oral Contraceptive Assets, and the Trazodone Product Assets, and the transfer and delivery of the related Product Manufacturing Technology in a manner that fully satisfies the requirements of the Decision and Order and until the earliest of:
    - a. with respect to each Generic Assorted Indication Product and the Trazodone Products, the date the Acquirer (or its Designee(s)) is approved by the FDA to manufacture such Divestiture Product and able to manufacture such Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents;
    - b. with respect to each Generic Oral Contraceptive Product, the date the Acquirer (or its Designee(s)) is approved by the FDA to manufacture such Divestiture Product and able to manufacture such

## Order to Maintain Assets

Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents and Watson/Andrx;

- c. with respect to each Divestiture Product, the date the Acquirer notifies the Commission and the Respondents of its intention to abandon its efforts to manufacture such Divestiture Product; or
- d. with respect to each Divestiture Product, the date of written notification from staff of the Commission that the Interim Monitor, in consultation with staff of the Commission, has determined that the Acquirer has abandoned its efforts to manufacture such Divestiture Product;

*provided, however,* that, with respect to each Divestiture Product, the Interim Monitor's service shall not exceed five (5) years from the Order Date;

*provided, further,* that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

4. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondent's compliance with its obligations under the 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 the Order.

## Order to Maintain Assets

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

*provided, however,* beginning one hundred twenty (120) days after Respondents have filed their final report pursuant to Paragraph IX.B. of the Decision and Order,



## Order to Maintain Assets

and every one hundred twenty (120) days thereafter, the Interim Monitor shall report in writing to the Commission concerning progress by the Acquirer toward obtaining FDA approval to manufacture each Divestiture Product and obtaining the ability to manufacture each Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents (and, in the case of the Generic Oral Contraceptive Products, independently of Respondents and Watson/Andrx).

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

## Order to Maintain Assets

- H. The Interim Monitor appointed pursuant to this Order to Maintain Assets may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

**IV.**

**IT IS FURTHER ORDERED** that within thirty (30) days after the date this Order to Maintain Assets becomes final, and every thirty (30) days thereafter until Respondents have fully complied with their obligations to assign, grant, license, divest, transfer, deliver or otherwise convey relevant assets as required by Paragraph II.A., and II.B., of the related Decision and Order in this matter, 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 to Maintain Assets and the related Decision and Order; *provided, however,* that, after the Decision and Order in this matter becomes final, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission at the same time as, the reports required to be submitted by Respondents pursuant to Paragraph VI of the Decision and Order.

**V.**

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

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

## Order to Maintain Assets

**VI.**

**IT IS FURTHER ORDERED** that, for purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondents made to their principal United States offices or headquarter's address, Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission:

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

**VII.**

**IT IS FURTHER ORDERED** that this Order to Maintain Assets shall terminate on the earlier of:

- A. Three (3) days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. The later of:
  - 1. The day after the divestiture of all of the Divestiture Assets, as required by and described in the Decision and Order, has been completed and each Interim Monitor, in

## Decision and Order

consultation with Commission staff and the Acquirer(s), notifies the Commission that all assignments, conveyances, deliveries, grants, licenses, transactions, transfers and other transitions related to such divestitures are complete, or the Commission otherwise directs that this Order to Maintain Assets is terminated; or

2. the day the related Decision and Order becomes final.

By the Commission.

**DECISION AND ORDER**

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

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

## Decision and Order

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

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

1. Respondent Teva is a corporation organized, existing and doing business under and by virtue of the laws of the State of Israel, with its corporate head office and principal place of business located at 5 Basel Street, P.O. Box 3190, Petach Tikva 49131 Israel and the address of its United States subsidiary, Teva Pharmaceuticals USA, Inc., located at 1090 Horsham Road, P.O.B. 1090, North Wales, Pennsylvania 19454.

2. Respondent Barr is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 400 Chestnut Ridge Road, Woodcliff Lake, New Jersey 07677.

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

**ORDER****I.**

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

## Decision and Order

- A. “Teva” means Teva Pharmaceutical Industries Limited, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Teva (including, but not limited to, Teva Pharmaceuticals USA, Inc., Barr Acquisition Corp., Barr Acquisition, LLC, and IVAX Corporation), and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each. After the Acquisition, Teva shall include Barr.
- B. “Barr” means Barr Pharmaceuticals, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Barr (including, but not limited to, Barr Laboratories, Inc., and PLIVA d.d. ), and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.
- C. “Respondent(s)” means Teva and Barr, individually and collectively.
- D. “Commission” means the Federal Trade Commission.
- E. “Acquirer(s)” means the following:
  - 1. a Person specified by name in this Order to acquire particular assets or rights that Respondents are required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order and that has been approved by the Commission to accomplish the requirements of this Order in connection with the Commission’s determination to make this Order final; or
  - 2. a Person approved by the Commission to acquire particular assets or rights that Respondents are required to

## Decision and Order

assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.

- F. “Acquisition” means the acquisition contemplated by the “Agreement and Plan of Merger” by and among Barr Pharmaceuticals, Inc., Teva Pharmaceutical Industries LTD. and Boron Acquisition Corp., dated as of July 17, 2008.
- G. “Agency(ies)” means any government regulatory authority or authorities in the world responsible for granting approval(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the research, Development, manufacture, marketing, distribution, or sale of a Product. The term “Agency” includes, without limitation, the United States Food and Drug Administration (“FDA”).
- H. “Application(s)” means all of the following: “New Drug Application” (“NDA”), “Abbreviated New Drug Application” (“ANDA”), “Supplemental New Drug Application” (“SNDA”), or “Marketing Authorization Application” (“MAA”), the applications for a Product filed or to be filed with the FDA pursuant to 21 C.F.R. Part 314, and all supplements, amendments, and revisions thereto, any preparatory work, drafts and data necessary for the preparation thereof, and all correspondence between Respondent(s) and the FDA related thereto. The term “Application” also includes an “Investigational New Drug Application” (“IND”) for a Product filed or to be filed with the FDA pursuant to 21 C.F.R. Part 312, and all supplements, amendments, and revisions thereto, any preparatory work, drafts and data necessary for the preparation thereof, and all correspondence between Respondent(s) and the FDA related thereto.
- I. “Carboplatin Products” means all of the following: all Products in Development, manufactured, marketed or sold by Respondent Teva pursuant to the following ANDA:

## Decision and Order

1. Carboplatin (Paraplatin) for injection, USP 50mg; 150mg; and 450mg strengths, pursuant to ANDA No. 76-162; and
2. any supplements, amendments, or revisions thereto;

*provided, however,* that for the purposes of the Contract Manufacture provisions of this Order, the term “Carboplatin Products” shall include all presentations of any Retained Product that, as of the Effective Date, are being, or will be, manufactured, marketed or sold by either Respondent for sale within the United States that contain the active pharmaceutical ingredient carboplatin in the dosage strengths and presentations specified above.

- J. “Categorized Assets” means the following assets related to the specified Divestiture Product(s):
1. all Product Intellectual Property related to such Divestiture Product(s);
  2. perpetual, non-exclusive, fully paid-up and royalty-free license(s) with rights to sublicense to all Product Licensed Intellectual Property to use, make, distribute, offer for sale, promote, advertise, sell, import, export, or have used, made, distributed, offered for sale, promoted, advertised, sold, imported, or exported the Divestiture Product(s) within the specified Geographic Territory;
  3. all Product Approvals related to such Divestiture Product(s);
  4. all Product Manufacturing Technology related to such Divestiture Product(s);
  5. all Product Marketing Materials related to such Divestiture Product(s);



## Decision and Order

6. all Website(s) related to such Divestiture Product(s);
7. a list of all of the NDC Numbers related to such Divestiture Product(s), and rights, to the extent permitted by Law:
  - a. to require Respondent(s) to discontinue the use of those NDC Numbers in the sale or marketing of Products other than with respect to returns, rebates, allowances, and adjustments for Divestiture Products sold prior to the Effective Date;
  - b. to prohibit Respondent(s) from seeking from any customer any type of cross-referencing of those NDC Numbers with any Retained Product(s);
  - c. to seek to change any cross-referencing by a customer of those NDC Numbers with the Retained Product(s) (including the right to receive notification from Respondent(s) of any such cross-referencing that is discovered by Respondent(s));
  - d. to seek cross-referencing from a customer of those NDC Numbers with the Acquirer's NDC Numbers related to the Divestiture Product(s);
  - e. to approve the timing of Respondents' discontinued use of those NDC Numbers in the sale or marketing of Products other than with respect to returns, rebates, allowances, and adjustments for Divestiture Products sold prior to the Effective Date; and
  - f. to approve any notification(s) from Respondent(s) to any customer(s) regarding the use or discontinued use of such NDC numbers by Respondent(s) prior to such notification(s) being disseminated to the customer(s);

## Decision and Order

8. all rights to all of Respondents' Applications related to such Divestiture Product(s);
9. Right of Reference or Use to the Drug Master Files related to the above-described Applications including, but not limited to, the pharmacology and toxicology data contained in all Application(s);
10. all Product Development Reports related to such Divestiture Product(s);
11. at the Acquirer's option, all Product Assumed Contracts related to such Divestiture Product(s) (copies to be provided to the Acquirer on or before the Closing Date);
12. all strategic safety programs submitted to the FDA related to such Divestiture Product(s) that are designed to decrease product risk by using one or more interventions or tools beyond the package insert;
13. all patient registries related to such Divestiture Product(s), and any other systematic active post-marketing surveillance program to collect patient data, laboratory data and identification information required to be maintained by the FDA to facilitate the investigation of adverse effects related to such Divestiture Product(s);
14. a list of all customers and/or targeted customers for such Divestiture Product(s) and the net sales (in either units or dollars) of such Divestiture Products to such customers on either an annual, quarterly, or monthly basis including, but not limited to, a separate list specifying the above-described information for the High Volume Accounts and including the name of the employee(s) for each High Volume Account that is or has been responsible for the purchase of such Divestiture Products on behalf of the High Volume Account and his or her business contact information;

## Decision and Order

15. at the Acquirer's option and to the extent approved by the Commission in the relevant Remedial Agreement, all inventory in existence as of the Closing Date including, but not limited to, raw materials, packaging materials, work-in-process and finished goods related to such Divestiture Product(s);
16. copies of all unfilled customer purchase orders for such Divestiture Product(s) as of the Closing Date, to be provided to the Acquirer not later than five (5) days after the Closing Date;
17. at the Acquirer's option, subject to any rights of the customer, all unfilled customer purchase orders for such Divestiture Products; and
18. all of the relevant Respondent's books, records, and files directly related to the foregoing or to such Divestiture Product(s);

*provided, however,* that "Categorized Assets" shall not include: (1) documents relating to either Respondent's general business strategies or practices relating to research, Development, manufacture, marketing or sales of generic pharmaceutical Products, where such documents do not discuss with particularity the Divestiture Products; (2) shall not include administrative, financial, and accounting records; (3) quality control records that are determined by the Interim Monitor or the Acquirer not to be material to the manufacture of the Divestiture Product(s); and (4) any real estate and the buildings and other permanent structures located on such real estate;

*provided further, however,* that in cases in which documents or other materials included in the relevant assets to be divested contain information: (1) that relates both to such Divestiture Product(s) and to other Products or businesses of the Respondent(s) and cannot be segregated in a manner that

## Decision and Order

preserves the usefulness of the information as it relates to such Divestiture Product(s); or (2) for which the Respondent(s) has a legal obligation to retain the original copies, the Respondent(s) shall be required to provide only copies or relevant excerpts of the documents and materials containing this information. In instances where such copies are provided to the Acquirer, the Respondent(s) shall provide such Acquirer access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this proviso is to ensure that Respondent(s) provides the Acquirer with the above-described information without requiring Respondent(s) completely to divest itself of information that, in content, also relates to Retained Product(s).

- K. “cGMP” means current Good Manufacturing Practice as set forth in the United States Federal Food, Drug, and Cosmetic Act, as amended, and includes all rules and regulations promulgated by the FDA thereunder.
- L. “Chlorzoxazone Products” means all of the following: all Products in Development, manufactured, marketed or sold by Respondent Teva pursuant to the following ANDA:
  - 1. Chlorzoxazone tablet, USP 500mg strength, pursuant to ANDA No. 89-859; and
  - 2. any supplements, amendments, or revisions thereto;

*provided, however,* that for the purposes of the Contract Manufacture provisions of this Order, the term “Chlorzoxazone Products” shall include all presentations of any Retained Product that, as of the Effective Date, are being, or will be, manufactured, marketed or sold by either Respondent for sale within the United States that contain the active pharmaceutical ingredient chlorzoxazone in the dosage strengths and presentations specified above.

## Decision and Order

- M. “Closing Date” means, as to each Divestiture Product, the date on which Respondent(s) (or a Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey assets related to such Divestiture Product to an Acquirer pursuant to this Order.
- N. “Confidential Business Information” means all information owned by, or in the possession or control of, a Respondent that is not in the public domain and that is directly related to the research, Development, manufacture, marketing, commercialization, importation, exportation, cost, supply, sales, sales support, or use of the Divestiture Product(s);

*provided however*, that the restrictions contained in this Order regarding the Respondents’ use, conveyance, provision, or disclosure of “Confidential Business Information” shall not apply to the following:

1. information that subsequently falls within the public domain through no violation of this Order or breach of confidentiality or non-disclosure agreement with respect to such information by Respondent(s);
2. information related to the Divestiture Products that were researched, Developed, manufactured, marketed, or sold by Respondent Teva that Respondent Barr can demonstrate it obtained without the assistance of Respondent Teva prior to the Acquisition;
3. information related to the Divestiture Products that were researched, Developed, manufactured, marketed, or sold by Respondent Barr that Respondent Teva can demonstrate it obtained without the assistance of Respondent Barr prior to the Acquisition;
4. information that is required by Law to be publicly disclosed;

## Decision and Order

5. information that does not directly relate to the Divestiture Products;
  6. information relating to either Respondent's general business strategies or practices relating to research, Development, manufacture, marketing or sales of generic pharmaceutical Products that does not discuss with particularity the Divestiture Products; or
  7. information specifically excluded from the Categorized Assets.
- O. "Contract Manufacture" means the manufacture of a Divestiture Product to be supplied by Respondent Teva, Respondent Barr, or a Designee to an Acquirer.
- P. "Contract Manufacture Product" means any Divestiture Product *except* a Generic Pipeline Oral Contraceptive Product, an Epoprostenol Product, or a Fluoxetine Product.
- Q. "Cyclosporine Products" means all of the following: all Products in Development, manufactured, marketed or sold by Respondent Barr pursuant to the following of Respondent Barr's ANDAs:
1. Cyclosporine capsules, USP 25mg and 100mg strengths, pursuant to ANDA No. 65-044;
  2. Cyclosporine liquid, USP 100mg/ml strengths, pursuant to ANDA No. 65-054; and
  3. any supplements, amendments, or revisions thereto;

*provided, however,* that for the purposes of the Contract Manufacture provisions of this Order, the term "Cyclosporine Products" shall include all presentations of any Retained Product that, as of the Effective Date, are being, or will be, manufactured, marketed or sold by either

## Decision and Order

Respondent for sale within the United States that contain the active pharmaceutical ingredient cyclosporine in the dosage strengths and presentations specified above.

R. “Deferoxamine Products” means all of the following: all Products in Development, manufactured, marketed or sold by Respondent Teva pursuant to the following ANDA:

1. Deferoxamine for injection, USP 500mg and 2000mg strengths, pursuant to Teva Parenteral ANDA No. 76-806; and
2. any supplements, amendments, or revisions thereto;

*provided, however,* that for the purposes of the Contract Manufacture provisions of this Order, the term “Deferoxamine Products” shall include all presentations of any Retained Product that, as of the Effective Date, are being, or will be, manufactured, marketed or sold by either Respondent for sale within the United States that contain the active pharmaceutical ingredient deferoxamine in the dosage strengths and presentations specified above.

S. “Designee” means any Person other than Respondent Teva or Respondent Barr that has been designated by an Acquirer to manufacture a Divestiture Product for that Acquirer *provided however,* that the term “Designee” shall exclude Watson/Andrx for the manufacture of the Generic Oral Contraceptive Products.

T. “Desmopressin Products” means all of the following: all Products in Development, manufactured, marketed or sold by Respondent Barr pursuant to the following ANDA:

1. Desmopressin Acetate tablets, USP 0.1mg and 0.2mg strengths, pursuant to ANDA No. 76-470; and
2. any supplements, amendments, or revisions thereto;

## Decision and Order

*provided, however,* that for the purposes of the Contract Manufacture provisions of this Order, the term “Desmospressin Products” shall include all presentations of any Retained Product that, as of the Effective Date, are being, or will be, manufactured, marketed or sold by either Respondent for sale within the United States that contain the active pharmaceutical ingredient desmopressin acetate in the dosage strengths and presentations specified above.

- U. “Development” means all preclinical and clinical drug development activities (including formulation), including test method development and stability testing, toxicology, formulation, process development, manufacturing scale-up, development-stage manufacturing, quality assurance/quality control development, statistical analysis and report writing, conducting clinical trials for the purpose of obtaining any and all approvals, licenses, registrations or authorizations from any Agency necessary for the manufacture, use, storage, import, export, transport, promotion, marketing, and sale of a Product (including any government price or reimbursement approvals), Product approval and registration, and regulatory affairs related to the foregoing. “Develop” means to engage in Development.
- V. “Direct Cost” means a cost not to exceed the cost of labor, material, travel and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service. “Direct Cost” to the Acquirer for its use of any of Respondents’ employees’ labor shall not exceed the average hourly wage rate for such employee;

*provided, however,* in each instance where: (1) an agreement to divest relevant assets is specifically referenced and attached to this Order, and (2) such agreement becomes a Remedial Agreement for a Divestiture Product, “Direct Cost” means such cost as is provided in such Remedial Agreement for that Divestiture Product.



## Decision and Order

- W. “Divestiture Product(s)” means the following: the Generic Assorted Indication Products, the Generic Oral Contraceptive Products, and the Trazodone Products, individually and collectively.
- X. “Divestiture Product Core Employee(s)” means the Product Research and Development Employees and the Product Manufacturing Employees related to each Divestiture Product.
- Y. “Divestiture Product Releasee(s)” means the Acquirer for the assets related to a particular Divestiture Product or any Person controlled by or under common control with such Acquirer, or any licensees, sublicensees, manufacturers, suppliers, distributors, and customers of such Acquirer, or of such Acquirer-affiliated entities.
- Z. “Divestiture Trustee” means the trustee appointed by the Commission pursuant to the relevant provisions of this Order.
- AA. “Domain Name” means the domain name(s) (universal resource locators), and registration(s) thereof, issued by any Person or authority that issues and maintains the domain name registration. “Domain Name” shall not include any trademark or service mark rights to such domain names other than the rights to the Product Trademarks required to be divested.
- BB. “Drug Master Files” means the information submitted to the FDA as described in 21 C.F.R. Part 314.420 related to a Product.
- CC. “Effective Date” means the earliest of the following dates:
1. the date the Respondents close on the Acquisition pursuant to the Agreement and Plan of Merger;

## Decision and Order

2. the date the merger contemplated by the Acquisition Agreement becomes effective by filing the certificate of merger with the Secretary of State of the State of Delaware; or
  3. the date on which Respondent Teva acquires, directly or indirectly, fifty (50)% or more of the voting securities of Respondent Barr.
- DD. “Epoprostenol Products” means all of the following: all Products in Development, manufactured, marketed or sold by Respondent Barr pursuant to the following ANDA:
1. Epoprostenol Sodium freeze dried powder + diluent, USP 0.5mg strength dry vial, USP 1.5mg strength dry vial (freeze-dried powder) strengths, pursuant to ANDA No. 78-397; and
  2. any supplements, amendments, or revisions thereto;
- provided, however,* that for the purposes of the Contract Manufacture provisions of this Order, the term “Epoprostenol Products” shall include all presentations of any Retained Product that, as of the Effective Date, are being, or will be, manufactured, marketed or sold by either Respondent for sale within the United States that contain the active pharmaceutical ingredient epoprostenol sodium in the dosage strengths and presentations specified above.
- EE. “Fluoxetine Products” means all of the following: all Products in Development, manufactured, marketed or sold by Respondent Teva pursuant to the following ANDA:
1. Fluoxetine capsules, USP 90mg strength, pursuant to ANDA No. 77-664; and
  2. any supplements, amendments, or revisions thereto;

## Decision and Order

*provided, however,* that for the purposes of the Contract Manufacture provisions of this Order, the term “Fluoxetine Products” shall include all presentations of any Retained Product that, as of the Effective Date, are being, or will be, manufactured, marketed or sold by either Respondent for sale within the United States that contain the active pharmaceutical ingredient fluoxetine in the dosage strengths and presentations specified above.

FF. “Flutamide Products” means all of the following: all Products in Development, manufactured, marketed or sold by Respondent Barr pursuant to the following ANDA:

1. Flutamide, USP 125mg strength, pursuant to ANDA No. 75-820; and
2. any supplements, amendments, or revisions thereto;

*provided, however,* that for the purposes of the Contract Manufacture provisions of this Order, the term “Flutamide Products” shall include all presentations of any Retained Product that, as of the Effective Date, are being, or will be, manufactured, marketed or sold by either Respondent for sale within the United States that contain the active pharmaceutical ingredient flutamide in the dosage strengths and presentations specified above.

GG. “Generic Assorted Indication Products” means the following products: Carboplatin Products, Chlorzoxazone Products, Cyclosporine Products, Deferoxamine Products, Desmopressin Products, Epoprostenol Products, Flutamide Products, Fluoxetine Products, Glipizide/Metformin Products, Metoclopramide Products, Metronidazole Products, Mirtazapine Products, Tamoxifen Products, and the Tetracycline Products.

HH. “Generic Assorted Indication Product Assets” means all of the specified Respondent’s rights, title and interest in and to

## Decision and Order

all assets related to such Respondent's business within the Geographic Territory related to each of the respective Generic Assorted Indication Products to the extent legally transferable, including the research, Development, manufacture, distribution, marketing, and sale of each such Product, including, without limitation, the Categorized Assets related to each of the Generic Assorted Indication Products.

- II. "Generic Oral Contraceptive Product Assets" means all of the specified Respondent's rights, title and interest in and to all assets related to such Respondent's business within the Geographic Territory related to each of the respective Generic Oral Contraceptive Products to the extent legally transferable, including the research, Development, manufacture, distribution, marketing, and sale of each such Product, including, without limitation, the Categorized Assets related to each of the Generic Oral Contraceptive Products.
- JJ. "Generic Oral Contraceptive Products" means all Products in Development, manufactured, marketed or sold by Respondent Teva pursuant to the following of Respondent Teva's ANDAs and/or pre-ANDA Products in Development:
1. Norgestimate/Ethinyl Estradiol Tablets ("Previfem"), USP 0.25 mg/0.035 mg strength, pursuant to ANDA No. 76-334;
  2. Norgestimate/Ethinyl Estradiol Tablets ("Tri-Previfem"), USP 0.18 mg/0.035 mg, 0.215 mg/ 0.035 mg, and 0.25 mg/0.035 mg strengths, pursuant to ANDA No. 76-335;
  3. Norethindrone/Ethinyl Estradiol Tablets ("Cyclafem 1/35"), USP 1 mg/0.035 mg strength, pursuant to ANDA No. 76-337;

## Decision and Order

4. Norethindrone/Ethinyl Estradiol Tablets (“Cyclafem 7/7/7”), USP 0.5 mg/0.035 mg, 0.75 mg/0.035 mg, 1 mg/0.035 mg strengths, pursuant to ANDA No. 76-338;
5. Desogestrel/Ethinyl Estradiol Tablets (“Emoquette”), USP 0.15 mg/0.03 mg strength, pursuant to ANDA No. 76-675;
6. Desogestrel/Ethinyl Estradiol Tablets (“Belisma”), USP 0.15 mg/0.02 mg strength, and Ethinyl Estradiol Tablets USP 0.01 mg strength, pursuant to ANDA No. 76-681;
7. Norethindrone Acetate/Ethinyl Estradiol/Ferrous Fumarate Tablets (“Gildess Fe 1.5”), 1.5 mg/0.03 mg/75 mg strength, pursuant to ANDA No. 77-075;
8. Norethindrone Acetate/Ethinyl Estradiol/Ferrous Fumarate Tablets (“Gildess Fe 1/20”), USP 0.1 mg/0.02 mg/75 mg strength, pursuant to ANDA No. 77-077;
9. Levonorgestrel/Ethinyl Estradiol Tablets (“Monavi”), USP 0.10 mg/0.02 mg strength, pursuant to ANDA No. 77-099;
10. Levonorgestrel/Ethinyl Estradiol Tablets (“Iantha”), USP 0.05 mg/0.03 mg, 0.075 mg/0.04 mg, and 0.125 mg/0.03 mg strengths, pursuant to ANDA No. 77-502;
11. Norethindrone Acetate/Ethinyl Estradiol Tablets (“Genliet 35”), USP 0.4 mg/0.035 mg strength, pursuant to ANDA No. 78-376;
12. Norethindrone Acetate/Ethinyl Estradiol/Ferrous Fumarate Tablets (“Gildess Fe 24”), USP 1 mg/0.02 mg strength, pursuant to ANDA 90-293;
13. Norgestimate/Ethinyl Estradiol Tablets (generic Product in Development for Ortho Tri-Cyclen® Lo 28), USP

## Decision and Order

0.180 mg/0.025 mg, 0.215 mg/0.025 mg, and 0.250 mg/0.025 mg strengths, for which no ANDA has been filed; and

14. any supplements, amendments, or revisions thereto;

*provided, however,* that for the purposes of the Contract Manufacture provisions of this Order, the term “Generic Oral Contraceptive Products” shall include all presentations of any Retained Product that, as of the Effective Date, are being, or will be, manufactured, marketed or sold by either Respondent for sale within the United States that contain the same active pharmaceutical ingredients specified above in the dosage strengths and presentations specified above.

KK. “Generic Pipeline Oral Contraceptive Products” means the following Products in Development by Respondent Teva pursuant to the following of Respondent Teva’s ANDAs and/or pre-ANDA Products in Development: Cyclafem 1/35, Cyclafem 7/7/7, Emoquette, Belisma, Gildess Fe 1.5, Gildess Fe 1/20, Monavi, Iantha, Genliet 35, Gildess Fe 24, and a generic Product in Development for Ortho Tri-Cyclen Lo 28.

LL. “Geographic Territory” shall mean the United States of America (including all of the territories within its jurisdiction or control) unless otherwise specified.

MM. “Glipizide/Metformin Products” means all of the following: all Products in Development, manufactured, marketed or sold by Respondent Barr pursuant to the following ANDA:

1. Glipizide/Metformin HCl tablets, USP 2.5/250mg, 2.5/500mg and 5/500mg strengths, pursuant to ANDA No. 77-347; and

2. any supplements, amendments, or revisions thereto;

## Decision and Order

*provided, however,* that for the purposes of the Contract Manufacture provisions of this Order, the term “Glipizide/Metformin Products” shall include all presentations of any Retained Product that, as of the Effective Date, are being, or will be, manufactured, marketed or sold by either Respondent for sale within the United States that contain the active pharmaceutical ingredients glipizide and metformin in the dosage strengths and presentations specified above.

- NN. “Government Entity” means any Federal, state, local or non-U.S. government, or any court, legislature, government agency, or government commission, or any judicial or regulatory authority of any government.
- OO. “High Volume Account(s)” means any retailer, wholesaler or distributor whose annual and/or projected annual aggregate purchase amounts (on a company-wide level), in units or in dollars, of a Divestiture Product in the United States from the Respondent was, or is projected to be among the top twenty highest of such purchase amounts by the Respondent’s U.S. customers on any of the following dates: (1) the end of the last quarter that immediately preceded the date of the public announcement of the proposed Acquisition; (2) the end of the last quarter that immediately preceded the Effective Date; (3) the end of the last quarter that immediately preceded the Closing Date for the relevant assets; or (4) the end of the last quarter following the Acquisition and/or the Closing Date.
- PP. “Interim Monitor” means any monitor appointed pursuant to Paragraph III of this Order or Paragraph III of the related Order to Maintain Assets.
- QQ. “Law” means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.

## Decision and Order

RR. “Metoclopramide Products” means all of the following: all Products in Development, manufactured, marketed or sold by Respondent Barr pursuant to the following ANDAs:

1. Metoclopramide HCl tablets, USP 5mg strength, pursuant to ANDA No. 72-750;
2. Metoclopramide HCl tablets, USP 10mg strength, pursuant to ANDA No. 71-250 and
3. any supplements, amendments, or revisions thereto;

*provided, however,* that for the purposes of the Contract Manufacture provisions of this Order, the term “Metoclopramide Products” shall include all presentations of any Retained Product that, as of the Effective Date, are being, or will be, manufactured, marketed or sold by either Respondent for sale within the United States that contain the active pharmaceutical ingredients metoclopramide in the dosage strengths and presentations specified above.

SS. “Metronidazole Products” means all of the following: all Products in Development, manufactured, marketed or sold by Respondent Teva pursuant to the following ANDAs:

1. Metronidazole tablets, USP 250mg strength, pursuant to ANDA No. 70-035;
2. Metronidazole tablets, USP 500mg strength, pursuant to ANDA No. 70-044 and
3. any supplements, amendments, or revisions thereto;

*provided, however,* that for the purposes of the Contract Manufacture provisions of this Order, the term “Metronidazole Products” shall include all presentations of any Retained Product that, as of the Effective Date, are being, or will be, manufactured, marketed or sold by either



## Decision and Order

Respondent for sale within the United States that contain the active pharmaceutical ingredients metronidazole in the dosage strengths and presentations specified above.

TT. “Mirtazapine Products” means all of the following: all Products in Development, manufactured, marketed or sold by Respondent Barr pursuant to the following ANDA:

1. Mirtazapine orally disintegrating tablets, USP 15mg and 30mg strengths, pursuant to ANDA No. 76-307; and
2. any supplements, amendments, or revisions thereto;

*provided, however,* that for the purposes of the Contract Manufacture provisions of this Order, the term “Mirtazapine Products” shall include all presentations of any Retained Product that, as of the Effective Date, are being, or will be, manufactured, marketed or sold by either Respondent for sale within the United States that contain the active pharmaceutical ingredients mirtazapine in the dosage strengths and presentations specified above.

UU. “NDC Numbers” means the National Drug Code numbers, including both the labeler code assigned by the FDA and the additional numbers assigned by an Application holder as a product code for a specific Product.

VV. “Order Date” means the date on which this Decision and Order becomes final.

WW. “Order to Maintain Assets” means the Order to Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.

XX. “Patent(s)” means all patents, patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention and statutory invention registrations, in each case

## Decision and Order

existing as of the Closing Date (*except* where this Order specifies a different time), and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions, related to any Product of or owned by Respondent(s) as of the Closing Date (*except* where this Order specifies a different time).

YY. "Person" means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or Government Entity, and any subsidiaries, divisions, groups or affiliates thereof.

ZZ. "Product(s)" means any pharmaceutical, biological, or genetic composition containing any formulation or dosage of a compound referenced as its pharmaceutically, biologically, or genetically active ingredient.

AAA. "Product Approval(s)" means any approvals, registrations, permits, licenses, consents, authorizations, and other approvals, and pending applications and requests therefor, required by applicable Agencies related to the research, Development, manufacture, distribution, finishing, packaging, marketing, sale, storage or transport of the Product within the United States of America, and includes, without limitation, all approvals, registrations, licenses or authorizations granted in connection with any Application.

BBB. "Product Assumed Contracts" means all of the following contracts or agreements (copies of each such contract to be provided to the Acquirer on or before the Closing Date and segregated in a manner that clearly identifies the purpose(s) of each such contract):

## Decision and Order

1. that make specific reference to the Divestiture Product(s) and pursuant to which any Third Party is obligated to purchase, or has the option to purchase without further negotiation of terms, the Divestiture Product(s) from the Respondent(s) unless such contract applies generally to the Respondent's sales of Products to that Third Party;
2. pursuant to which Respondent(s) purchases the active pharmaceutical ingredient(s) or other necessary ingredient(s) or had planned to purchase the active pharmaceutical ingredient(s) or other necessary ingredient(s) from any Third Party for use in connection with the manufacture of the Divestiture Product(s);
3. relating to any clinical trials involving the Divestiture Product(s);
4. with universities or other research institutions for the use of the Divestiture Product(s) in scientific research;
5. relating to the particularized marketing of the Divestiture Product(s) or educational matters relating solely to the Divestiture Product(s);
6. pursuant to which a Third Party manufactures or packages the Divestiture Product(s) on behalf of Respondent(s);
7. pursuant to which a Third Party provides the Product Manufacturing Technology related to the Divestiture Product(s) to Respondent(s);
8. pursuant to which a Third Party is licensed by Respondent(s) to use the Product Manufacturing Technology;
9. constituting confidentiality agreements involving the Divestiture Product(s);

## Decision and Order

10. involving any royalty, licensing, or similar arrangement involving the Divestiture Product(s);
11. pursuant to which a Third Party provides any specialized services necessary to the research, Development, manufacture or distribution of the Divestiture Products to Respondent(s) including, but not limited to, consultation arrangements; and/or
12. pursuant to which any Third Party collaborates with Respondent(s) in the performance of research, Development, marketing, distribution or selling of the Divestiture Product(s) or the Divestiture Product(s) business;

*provided, however,* that where any such contract or agreement also relates to a Retained Product(s), Respondent(s) shall assign the Acquirer all such rights under the contract or agreement as are related to the Divestiture Product(s), but concurrently may retain similar rights for the purposes of the Retained Product(s).

CCC. "Product Copyrights" means rights to all original works of authorship of any kind directly related to the Divestiture Product(s) and any registrations and applications for registrations thereof within the Geographic Territory, including, but not limited to, the following: all such rights with respect to all promotional materials for healthcare providers, all promotional materials for patients, and educational materials for the sales force; copyrights in all preclinical, clinical and process development data and reports relating to the research and Development of the Divestiture Product(s) or of any materials used in the research, Development, manufacture, marketing or sale of the Divestiture Product(s), including all copyrights in raw data relating to clinical trials of the Divestiture Product(s), all case report forms relating thereto and all statistical programs developed (or modified in a manner material to the

## Decision and Order

use or function thereof (other than through user references)) to analyze clinical data, all market research data, market intelligence reports and statistical programs (if any) used for marketing and sales research; all copyrights in customer information, promotional and marketing materials, the Divestiture Product(s) sales forecasting models, medical education materials, sales training materials, and advertising and display materials; all records relating to employees who accept employment with the Acquirer (excluding any personnel records the transfer of which is prohibited by applicable Law); all copyrights in records, including customer lists, sales force call activity reports, vendor lists, sales data, reimbursement data, speaker lists, manufacturing records, manufacturing processes, and supplier lists; all copyrights in data contained in laboratory notebooks relating to the Divestiture Product(s) or relating to its biology; all copyrights in adverse experience reports and files related thereto (including source documentation) and all copyrights in periodic adverse experience reports and all data contained in electronic databases relating to adverse experience reports and periodic adverse experience reports; all copyrights in analytical and quality control data; and all correspondence with the FDA.

DDD. “Product Development Reports” means:

1. Pharmacokinetic study reports related to the specified Divestiture Product(s);
2. Bioavailability study reports (including reference listed drug information) related to the specified Divestiture Product(s);
3. Bioequivalence study reports (including reference listed drug information) related to the specified Divestiture Product(s);

## Decision and Order

4. all correspondence to the Respondent(s) from the FDA and from the Respondent(s) to the FDA relating to the Application(s) submitted by, on behalf of, or acquired by, the Respondent(s) related to the specified Divestiture Product;
  5. annual and periodic reports related to the above-described Application(s), including any safety update reports;
  6. FDA approved Product labeling related to the specified Divestiture Product(s);
  7. currently used product package inserts (including historical change of controls summaries) related to the specified Divestiture Product(s);
  8. FDA approved patient circulars and information related to the specified Divestiture Product(s);
  9. adverse event/serious adverse event summaries related to the specified Divestiture Product(s);
  10. summary of Product complaints from physicians related to the specified Divestiture Product(s);
  11. summary of Product complaints from customers related to the specified Divestiture Product(s); and
  12. Product recall reports filed with the FDA related to the specified Divestiture Product(s).
- EEE. “Product Employee Information” means the following, for each Divestiture Product Core Employee, as and to the extent permitted by Law:
1. a complete and accurate list containing the name of each relevant employee (including former employees who

## Decision and Order

were employed by Respondent(s) within ninety (90) days of the execution date of any Remedial Agreement);

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

## Decision and Order

FFF. “Product Intellectual Property” means all of the following related to a Divestiture Product (other than Product Licensed Intellectual Property):

1. Patents;
2. Product Copyrights;
3. Product Trademarks, Product Trade Dress, trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development and other information; and
4. rights to obtain and file for patents and copyrights and registrations thereof;

*provided, however*, “Product Intellectual Property” does not include the corporate names or corporate trade dress of “Teva” or “Barr”, or the corporate names or corporate trade dress of any other corporations or companies owned or controlled by Respondents or the related logos thereof.

GGG. “Product Licensed Intellectual Property” means the following:

1. Patents that are related to a Divestiture Product that Respondent(s) can demonstrate have been routinely used, prior to the Effective Date, for a Retained Product(s) that:
  - a. has been marketed or sold on an extensive basis by a Respondent within the two-year period immediately preceding the Acquisition; or
  - b. for which, prior to the announcement of the Acquisition, there was an approved marketing plan



## Decision and Order

to market or sell such a Retained Product on an extensive basis by a Respondent; and

2. trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development, and other information, and all rights in the Geographic Territory to limit the use or disclosure thereof, that are related to a Divestiture Product and that Respondent(s) can demonstrate have been routinely used, prior to the Effective Date, for a Retained Product(s) that:
  - a. has been marketed or sold on an extensive basis by the Respondent(s) within the two-year period immediately preceding the Acquisition; or
  - b. for which, prior to the announcement of the Acquisition, there was an approved marketing plan to market or sell such a Retained Product on an extensive basis by a Respondent;

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

*provided further, however*, that in such cases, Respondents may take a license back from such Acquirer for such intellectual property for use in connection with the Retained Products and such a license to Respondents may be perpetual, fully paid-up and royalty-free license(s) with rights to sublicense.

## Decision and Order

HHH. “Product Manufacturing Employees” means all salaried employees of Respondents who have directly participated in the planning, design, implementation or operational management of the Product Manufacturing Technology of the specified Divestiture Product(s) (irrespective of the portion of working time involved unless such participation consisted solely of oversight of legal, accounting, tax or financial compliance) within the eighteen (18) month period immediately prior to the Closing Date.

III. “Product Manufacturing Technology” means:

1. all technology, trade secrets, know-how, and proprietary information (whether patented, patentable or otherwise) related to the manufacture of the Divestiture Product(s), including, but not limited to, the following: all product specifications, processes, product designs, plans, trade secrets, ideas, concepts, manufacturing, engineering, and other manuals and drawings, standard operating procedures, flow diagrams, chemical, safety, quality assurance, quality control, research records, clinical data, compositions, annual product reviews, regulatory communications, control history, current and historical information associated with the FDA Application(s) conformance and cGMP compliance, and labeling and all other information related to the manufacturing process, and supplier lists;
2. all active pharmaceutical ingredients related to the Divestiture Product(s); and,
3. for those instances in which the manufacturing equipment is not readily available from a Third Party, at the Acquirer’s option, all such equipment used to manufacture the Divestiture Product(s).

JJJ. “Product Marketing Materials” means all marketing materials used specifically in the marketing or sale of a

## Decision and Order

Divestiture Product(s) in the Geographic Territory as of the Closing Date, including, without limitation, all advertising materials, training materials, product data, mailing lists, sales materials (*e.g.*, detailing reports, vendor lists, sales data), marketing information (*e.g.*, competitor information, research data, market intelligence reports, statistical programs (if any) used for marketing and sales research), customer information (including customer net purchase information to be provided on the basis of either dollars and/or units for each month, quarter or year), sales forecasting models, educational materials, and advertising and display materials, speaker lists, promotional and marketing materials, Website content and advertising and display materials, artwork for the production of packaging components, television masters and other similar materials related to the Divestiture Product(s); *provided however*, that for any generic Product, “Product Marketing Materials” excludes the pricing of each of the Divestiture Products to customers.

KKK. “Product Research and Development Employees” means all salaried employees of Respondents who directly have participated in the research, Development, or regulatory approval process, or clinical studies of the specified Divestiture Product(s) (irrespective of the portion of working time involved, unless such participation consisted solely of oversight of legal, accounting, tax or financial compliance) within the eighteen (18) month period immediately prior to the Closing Date.

LLL. “Product Trade Dress” means the current trade dress of the Divestiture Product, including but not limited to, Product packaging, and the lettering of the Product trade name or brand name.

MMM. “Product Trademark(s)” means all proprietary names or designations, trademarks, service marks, trade names, and brand names, including registrations and applications for

## Decision and Order

registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights, and the goodwill symbolized thereby and associated therewith, for the Divestiture Product(s).

NNN. “Proposed Acquirer” means a Person proposed by Respondents (or a Divestiture Trustee) to the Commission and submitted for the approval of the Commission as the acquirer for particular assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed by Respondents pursuant to this Order.

OOO. “Remedial Agreement(s)” means the following:

1. any agreement between Respondent(s) and an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission’s determination to make this Order final;
2. any agreement between Respondent(s) and a Third Party to effect the assignment of assets or rights of Respondent(s) related to a Divestiture Product to the benefit of an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission’s determination to make this Order final;
3. any agreement between Respondent(s) and an Acquirer (or between a Divestiture Trustee and an Acquirer) that

## Decision and Order

has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of this Order; and/or

4. any agreement between Respondent(s) and a Third Party to effect the assignment of assets or rights of Respondent(s) related to a Divestiture Product to the benefit of an Acquirer that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto.

PPP. “Retained Product” means any Product(s) other than a Divestiture Product.

QQQ. “Right of Reference or Use” means the authority to rely upon, and otherwise use, an investigation for the purpose of obtaining approval of an Application, including the ability to make available the underlying raw data from the investigation for FDA audit.

RRR. “Supply Cost” means a cost not to exceed the manufacturer’s average direct per unit cost in United States dollars of manufacturing the Divestiture Product for the twelve (12) month period immediately preceding the Effective Date. “Supply Cost” shall expressly exclude any intracompany business transfer profit; *provided, however*, that in each instance where: (1) an agreement to Contract Manufacture is specifically referenced and attached to this Order, and (2) such agreement becomes a Remedial Agreement for a Divestiture Product, “Supply Cost” means the cost as specified in such Remedial Agreement for that Divestiture Product.

## Decision and Order

SSS. “Tamoxifen Products” means all of the following: all Products in Development, manufactured, marketed or sold by Respondent Barr pursuant to the following ANDA:

1. Tamoxifen citrate tablet, USP 10mg and 20mg strengths, pursuant to ANDA No. 70-929; and
2. any supplements, amendments, or revisions thereto;

*provided, however,* that for the purposes of the Contract Manufacture provisions of this Order, the term “Tamoxifen Products” shall include all presentations of any Retained Product that, as of the Effective Date, are being, or will be, manufactured, marketed or sold by either Respondent for sale within the United States that contain the active pharmaceutical ingredients tamoxifen in the dosage strengths and presentations specified above.

TTT. “Technology Transfer Standards” means requirements and standards sufficient to ensure that the information and assets required to be delivered pursuant to this Order are delivered in an organized, comprehensive, complete, useful, timely (*i.e.*, ensuring no unreasonable delays in transmission), and meaningful manner. Such standards and requirements shall include, *inter alia*,

- a. designating employees knowledgeable about the Product Manufacturing Technology (and all related intellectual property) related to each of the Divestiture Products who will be responsible for communicating directly with the Acquirer and/or its Designee, and the Interim Monitor (if one has been appointed), for the purpose of effecting such delivery;
- b. preparing technology transfer protocols and transfer acceptance criteria for both the processes and analytical methods related to the specified

## Decision and Order

Divestiture Product(s) that are acceptable to the Acquirer;

- c. preparing and implementing a detailed technological transfer plan that contains, *inter alia*, the transfer of all relevant information, all appropriate documentation, all other materials, and projected time lines for the delivery of all such Product Manufacturing Technology (including all related intellectual property) to the Acquirer or its Designee; and
- d. providing, in a timely manner, assistance and advice to enable the Acquirer or its Designee to:
  - (1) manufacture the specified Divestiture Product(s) in the quality and quantities achieved by the Respondent(s), or the manufacturer and/or developer of such Divestiture Product;
  - (2) obtain any Product Approvals necessary for the Acquirer or its Designee, to manufacture, distribute, market, and sell the specified Divestiture Product(s) in commercial quantities and to meet all Agency-approved specifications for such Divestiture Product(s); and
  - (3) receive, integrate, and use all such Product Manufacturing Technology and all such intellectual property related to the specified Divestiture Product(s).

UUU. "Tetracycline Products" means all of the following: all Products in Development, manufactured, marketed or sold by Respondent Barr pursuant to the following ANDA:

1. Tetracycline HCl capsules, USP 250mg and 500mg strengths, pursuant to ANDA No. 61-837; and

## Decision and Order

2. any supplements, amendments, or revisions thereto;

*provided, however,* that for the purposes of the Contract Manufacture provisions of this Order, the term “Tetracycline Products” shall include all presentations of any Retained Product that, as of the Effective Date, are being, or will be, manufactured, marketed or sold by either Respondent for sale within the United States that contain the active pharmaceutical ingredients tetracycline in the dosage strengths and presentations specified above.

VVV. “Third Party(ies)” means any non-governmental Person other than the following: Respondent Teva, Respondent Barr, or the Acquirer for the affected assets, rights and Divestiture Product(s).

WWW. “Trazodone Product Assets” means all of Respondent Teva’s rights, title and interest in and to all assets related to Respondent Teva’s business within the Geographic Territory related to the Trazodone Products to the extent legally transferable, including the research, Development, manufacture, distribution, marketing, and sale of the Trazodone Products, including, without limitation, the Categorized Assets related to the Trazodone Products.

XXX. “Trazodone Products” means all of the following: all Products in Development, manufactured, marketed or sold by Respondent Teva pursuant to the following ANDAs:

1. Trazodone HCl tablets, USP 50mg strength, pursuant to ANDA No. 72-192;
2. Trazodone HCl tablets, USP 100mg strength, pursuant to ANDA No. 72-193; and
3. any supplements, amendments, or revisions thereto;



## Decision and Order

*provided, however,* that for the purposes of the Contract Manufacture provisions of this Order, the term “Trazodone Products” shall include all presentations of any Retained Product that, as of the Effective Date, are being, or will be, manufactured, marketed or sold by either Respondent for sale within the United States that contain the active pharmaceutical ingredients trazodone in the dosage strengths and presentations specified above.

YYY. “Vintage” means Vintage Pharmaceuticals LLC, a limited liability company organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 130 Vintage Drive, Huntsville, Alabama 35811.

ZZZ. “Vintage Generic Divestiture Product Agreement(s)” means the following agreements:

1. “Asset Purchase Agreements” between Teva Pharmaceuticals USA, Inc. and Vintage Pharmaceuticals LLC, dated as of November 20, 2008, and all amendments, exhibits, attachments, agreements, and schedules thereto, including:
  - a. The Asset Purchase Agreement related to the Generic Oral Contraceptive Products that is between Teva Pharmaceuticals USA, Inc. and Vintage Pharmaceuticals LLC, dated as of November 20, 2008, and all amendments, exhibits, attachments, agreements, and schedules thereto;
  - b. The Asset Purchase Agreement related to the Trazodone Products that is between Teva Pharmaceuticals USA, Inc. and Vintage Pharmaceuticals LLC, dated as of November 20, 2008, and all amendments, exhibits, attachments, agreements, and schedules thereto;

## Decision and Order

2. “Supply Agreement” related to the Trazodone Product that is between Teva Pharmaceuticals USA, Inc. and Vintage Pharmaceuticals LLC, dated as of November 20, 2008, and all amendments, exhibits, attachments, agreements, and schedules thereto; and
3. the following agreements assigned from Respondent Teva to Vintage:
  - a. “Manufacturing Services Agreement” between Patheon Inc. and Andrx Pharmaceuticals, Inc. dated as of October 3, 2006, and all amendments, exhibits, attachments, agreements, and schedules thereto, and to the full extent that such agreement(s) relate to any Generic Oral Contraceptive Product to be marketed or sold in the United States; and
  - b. “Marketing and Distribution Agreement” by and among Teva Pharmaceuticals USA, Inc., Novopharm Limited, Andrx Pharmaceuticals, Inc., and Andrx Pharmaceuticals, LLC, dated as of December 10, 2003, and all amendments, exhibits, attachments, agreements, and schedules thereto, and to the full extent that such agreement(s) relate to any Generic Oral Contraceptive Product to be marketed or sold in the United States;

related to the Generic Oral Contraceptive Product Assets and/or the Trazodone Product Assets that have been approved by the Commission to accomplish the requirements of this Order. The Vintage Generic Divestiture Product Agreements are attached to this Order and contained in non-public Appendix II.A.

AAAA. “Watson/Andrx” means Watson Pharmaceuticals, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by

## Decision and Order

Watson (including, but not limited to, Watson Laboratories, Inc., Andrx Corporation, Andrx Pharmaceuticals, Inc., and Andrx Pharmaceuticals, LLC), and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.

BBBB. “Watson” means Watson Laboratories, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada, with its headquarters address at 311 Bonnie Circle, Corona, California 92880.

CCCC. “Watson Generic Divestiture Product Agreement(s)” means the following agreements:

1. “Asset Purchase Agreement” between Teva Pharmaceuticals USA, Inc. and Watson Laboratories, Inc., dated as of November 24, 2008, and all amendments, exhibits, attachments, agreements, and schedules thereto;
2. “Supply Agreement” between Teva Pharmaceuticals USA, Inc. and Watson Laboratories, Inc., dated as of November 24, 2008, and all amendments, exhibits, attachments, agreements, and schedules thereto;
3. the following agreements assigned from Respondent Barr to Watson:
  - a. “Material Supply Agreement” between Johnson Matthey PLC and Barr Laboratories, Inc., dated as of September 30, 2003, and all amendments, exhibits, attachments, agreements, and schedules thereto, to the full extent that such agreement(s) relate to the Epoprostenol Product; and
  - b. “Supply Agreement” between Hollister-Stier Laboratories LLC and Barr Laboratories, Inc., dated as of December 15, 2004, and all amendments,

## Decision and Order

exhibits, attachments, agreements, and schedules thereto; and

- c. “Joint Venture Agreement” between Sidmark Laboratories, Inc. and Banner Pharmacaps Inc., dated as of May 29, 2002, and all amendments, exhibits, attachments, agreements, and schedules thereto, to the full extent that such agreement(s) relate to the Cyclosporine Products;

related to the Generic Assorted Indication Product Assets that have been approved by the Commission to accomplish the requirements of this Order. The Watson Generic Divestiture Product Agreements are attached to this Order and contained in non-public Appendix II.B.

DDDD. “Website” means the content of the Website(s) located at the Domain Names, the Domain Names, and all copyrights in such Website(s), to the extent owned by Respondents; *provided, however*, “Website” shall not include the following: (1) content owned by Third Parties and other Product Intellectual Property not owned by Respondents that are incorporated in such Website(s), such as stock photographs used in the Website(s), *except* to the extent that Respondents can convey its rights, if any, therein; or (2) content unrelated to any of the Divestiture Product(s).

**II.**

**IT IS FURTHER ORDERED** that:

- A. Not later than the earlier of: (1) ten (10) days after the Effective Date or (2) ten (10) days after the Order Date, Respondents shall divest the Generic Oral Contraceptive Product Assets and the Trazodone Product Assets, absolutely and in good faith, to Vintage pursuant to, and in accordance with, the Vintage Generic Divestiture Product Agreements (which agreements shall not vary or contradict, or be

## Decision and Order

construed to vary or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of Vintage or to reduce any obligations of Respondents under such agreements), and each such agreement, if it becomes a Remedial Agreement related to the Generic Oral Contraceptive Product Assets and the Trazodone Product Assets is incorporated by reference into this Order and made a part hereof;

*provided, however,* that if Respondents have divested the Generic Oral Contraceptive Product Assets and the Trazodone Product Assets to Vintage prior to the Order Date, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Vintage is not an acceptable purchaser of either the Generic Oral Contraceptive Product Assets or the Trazodone Product Assets, then Respondents shall immediately rescind the transaction with Vintage, in whole or in part, as directed by the Commission, and shall divest the Generic Oral Contraceptive Product Assets and/or the Trazodone Product Assets, as applicable, within one hundred eighty (180) days from the Order Date, absolutely and in good faith, at no minimum price, to an Acquirer or Acquirers that receive(s) the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission;

*provided further* that if Respondents have divested the Generic Oral Contraceptive Product Assets and the Trazodone Product Assets to Vintage prior to the Order Date, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Generic Oral Contraceptive Product Assets and/or the Trazodone Product Assets, as applicable, to Vintage (including, but not limited to, entering

## Decision and Order

into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

- B. Not later than the earlier of: (1) ten (10) days after the Effective Date or (2) ten (10) days after the Order Date, Respondents shall divest the Generic Assorted Indication Product Assets, absolutely and in good faith, to Watson pursuant to, and in accordance with, the Watson Generic Divestiture Product Agreements (which agreements shall not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of Watson or to reduce any obligations of Respondents under such agreements), and each such agreement, if it becomes a Remedial Agreement related to the Generic Assorted Indication Product Assets is incorporated by reference into this Order and made a part hereof;

*provided, however,* that if Respondents have divested the Generic Assorted Indication Product Assets to Watson prior to the Order Date, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Watson is not an acceptable purchaser of the Generic Assorted Indication Product Assets, then Respondents shall immediately rescind the transaction with Watson, in whole or in part, as directed by the Commission, and shall divest the Generic Assorted Indication Product Assets within one hundred eighty (180) days from the Order Date, absolutely and in good faith, at no minimum price, to an Acquirer or Acquirers that receive(s) the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission;

*provided further* that if Respondents have divested the Generic Assorted Indication Product Assets to Watson prior to Order Date, and if, at the time the Commission determines to make this Order final, the Commission notifies

## Decision and Order

Respondents that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Generic Assorted Indication Product Assets to Watson (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

- C. Prior to the Closing Date, Respondents shall secure all consents and waivers from all Third Parties that are necessary to permit Respondents to divest the assets required to be divested pursuant to this Order to each of the relevant Acquirers, and/or to permit each such Acquirer to continue the research, Development, manufacture, sale, marketing or distribution of the Divestiture Products;

*provided, however,* Respondents may satisfy this requirement by certifying that each such Acquirer has executed all such agreements directly with each of the relevant Third Parties.

- D. Respondents shall transfer and deliver, or cause to be transferred and delivered, all Product Manufacturing Technology (including all related intellectual property) related to the specified Divestiture Products that either Respondent owns, and shall transfer and deliver, or cause to be transferred and delivered, all rights to all Product Manufacturing Technology (including all related intellectual property) that is owned by a Third Party and licensed by either Respondent related to the specified Divestiture Products, to each of the relevant Acquirers in a manner consistent with the Technology Transfer Standards. Respondents shall obtain any consents from Third Parties required to comply with this provision.

- E. Respondents shall:

## Decision and Order

1. upon reasonable written notice and request from an Acquirer to Respondents, Contract Manufacture and deliver to the requesting Acquirer, in a timely manner and under reasonable terms and conditions, a supply of each of the Contract Manufacture Products at Respondents' Supply Cost, for a period of time sufficient to allow such Acquirer (or the Designee of the Acquirer) to obtain all of the relevant Product Approvals necessary to manufacture in commercial quantities, and in a manner consistent with cGMP, the finished drug product independently of Respondents and to secure sources of supply of the active pharmaceutical ingredients, excipients, other ingredients, and/or necessary components listed in the specified Respondent's Application(s) for the Product from Persons other than the Respondents;
2. make representations and warranties to the Acquirer(s) that the Contract Manufacture Product(s) supplied through Contract Manufacture pursuant to a Remedial Agreement meet the relevant Agency-approved specifications. For the Product(s) to be marketed or sold in the Geographic Territory, Respondents shall agree to indemnify, defend and hold the Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the Product(s) supplied to the Acquirer pursuant to a Remedial Agreement by Respondents to meet cGMP. This obligation may be made contingent upon the Acquirer giving Respondents prompt written notice of such claim and cooperating fully in the defense of such claim. The Remedial Agreement shall be consistent with the obligations assumed by Respondents under this Order;

*provided, however,* that Respondents may reserve the right to control the defense of any such litigation,



## Decision and Order

including the right to settle the litigation, so long as such settlement is consistent with Respondents' responsibilities to supply the ingredients and/or components in the manner required by this Order; *provided further* that this obligation shall not require Respondents to be liable for any negligent act or omission of the Acquirer or for any representations and warranties, express or implied, made by the Acquirer that exceed the representations and warranties made by Respondents to the Acquirer;

*provided further* that in each instance where: (1) an agreement to divest relevant assets is specifically referenced and attached to this Order, and (2) such agreement becomes a Remedial Agreement for a Divestiture Product, each such agreement may contain limits on Respondents' aggregate liability resulting from the failure of the Products supplied to the Acquirer pursuant to such Remedial Agreement by Respondents to meet cGMP;

3. give priority to supplying a Contract Manufacture Product to the Acquirer over manufacturing and supplying of Products for Respondents' own use or sale;
4. make representations and warranties to the Acquirer(s) that Respondents shall hold harmless and indemnify the Acquirer(s) for any liabilities or loss of profits resulting from the failure by Respondents to deliver the Contract Manufacture Products in a timely manner as required by the Remedial Agreement(s) unless Respondents can demonstrate that its failure was entirely beyond the control of Respondents and in no part the result of negligence or willful misconduct by Respondents;

*provided, however,* that in each instance where: (1) an agreement to divest relevant assets is specifically referenced and attached to this Order, and (2) such

## Decision and Order

agreement becomes a Remedial Agreement for a Divestiture Product, each such agreement may contain limits on Respondents' aggregate liability for such a breach;

5. during the term of any Contract Manufacture between Respondent(s) and an Acquirer, upon written request of such Acquirer or the Interim Monitor (if any has been appointed), make available to the Acquirer and the Interim Monitor (if any has been appointed) all records that relate to the manufacture of the relevant Contract Manufacture Products that are generated or created after the Closing Date;
6. during the term of any Contract Manufacture between Respondent(s) and an Acquirer, maintain manufacturing facilities necessary to manufacture each of the relevant Contract Manufacture Products in finished form, *i.e.*, suitable for sale to the ultimate consumer/patient; and
7. pending FDA approval of any Divestiture Product that has not yet been approved for commercial scale-up manufacturing and during the term of any Contract Manufacture between Respondent(s) and an Acquirer, provide consultation with knowledgeable employees of Respondents and training, at the written request of the Acquirer and at a facility chosen by the Acquirer, for the purposes of enabling such Acquirer (or the Designee of such Acquirer) to obtain all Product Approvals to manufacture the Divestiture Products in the same quality achieved by, or on behalf of, the Respondents and in commercial quantities, and in a manner consistent with cGMP, independently of Respondents (and, in the case of the Generic Oral Contraceptive Products, independently of Respondents and Watson/Andrx), and sufficient to satisfy management of the Acquirer that its personnel (or the Designee's personnel) are adequately trained in the manufacture of the Divestiture Products;

## Decision and Order

The foregoing provisions, II.E.1. - 7., shall remain in effect with respect to each Divestiture Product until the earliest of: (1) the date each Acquirer (or the Designee(s) of such Acquirer), respectively, is approved by the FDA to manufacture such Divestiture Product and able to manufacture such Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents (and, in the case of the Generic Oral Contraceptive Products, independently of Respondents and Watson/Andrx); (2) the date the Acquirer of a particular Divestiture Product notifies the Commission and the Respondents of its intention to abandon its efforts to manufacture such Divestiture Product; (3) the date of written notification from staff of the Commission that the Interim Monitor, in consultation with staff of the Commission, has determined that the Acquirer of a particular Divestiture Product has abandoned its efforts to manufacture such Divestiture Product, or (4) four (4) years from the Closing Date.

## F. Respondents shall:

1. submit to each Acquirer, at Respondents' expense, all Confidential Business Information related to the Divestiture Products;
2. deliver such Confidential Business Information to such Acquirer:
  - a. in good faith;
  - b. in a timely manner, *i.e.*, as soon as practicable, avoiding any delays in transmission of the respective information; and
  - c. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;

## Decision and Order

3. pending complete delivery of all such Confidential Business Information to each respective Acquirer, provide each such Acquirer and the Interim Monitor (if any has been appointed) with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to the Divestiture Products that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order;
4. not use, directly or indirectly, any such Confidential Business Information related to the research, Development, manufacturing, marketing, or sale of the Divestiture Products other than as necessary to comply with the following:
  - a. the requirements of this Order;
  - b. Respondents' obligations to the Acquirer of the particular Divestiture Product(s) under the terms of any Remedial Agreement related to such Divestiture Product(s); or
  - c. applicable Law;
5. not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person except the relevant Acquirer or other Persons specifically authorized by such Acquirer to receive such information; and
6. not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the marketing or sales of the Divestiture Products to the employees associated with business related to those Retained Products that contain

## Decision and Order

the same active pharmaceutical ingredient as the Divestiture Products.

- G. Respondents shall not enforce any agreement against a Third Party or an Acquirer to the extent that such agreement may limit or otherwise impair the ability of such Acquirer to acquire or use the Product Manufacturing Technology (including all related intellectual property) related to the Divestiture Products acquired by such Acquirer from the Third Party. Such agreements include, but are not limited to, agreements with respect to the disclosure of Confidential Business Information related to such Product Manufacturing Technology.
- H. Not later than ten (10) days after the Closing Date, Respondents shall grant a release to each Third Party that is subject to an agreement as described in Paragraph II.G. that allows the Third Party to provide the relevant Product Manufacturing Technology to the relevant Acquirer. Within five (5) days of the execution of each such release, Respondents shall provide a copy of the release to such Acquirer.
- I. Respondents shall:
1. for each Divestiture Product, for a period of six (6) months from the Closing Date or upon the hiring of twenty (20) Divestiture Product Core Employees by each of the relevant Acquirers, whichever occurs earlier, provide each Acquirer with the opportunity to enter into employment contracts with the Divestiture Product Core Employees related to the Divestiture Products and assets acquired by such Acquirer. Each of these periods is hereinafter referred to as the “Divestiture Product Core Employee Access Period(s)”; and
  2. not later than the earlier of the following dates: (1) ten (10) days after notice by staff of the Commission to

## Decision and Order

Respondents to provide the Product Employee Information; or (2) ten (10) days after written request by an Acquirer, provide such Acquirer or Proposed Acquirer(s) with the Product Employee Information related to the Divestiture Product Core Employees. Failure by Respondents to provide the Product Employee Information for any Divestiture Product Core Employee within the time provided herein shall extend the Divestiture Product Core Employee Access Period(s) with respect to that employee in an amount equal to the delay;

3. during the Divestiture Product Core Employee Access Period(s), not interfere with the hiring or employing by the relevant Acquirer of the Divestiture Product Core Employees related to the particular Divestiture Products and assets acquired by such Acquirer, and remove any impediments within the control of Respondent(s) that may deter these employees from accepting employment with such Acquirer, including, but not limited to, any noncompete or nondisclosure provision of employment with respect to a Divestiture Product or other contracts with Respondent(s) that would affect the ability or incentive of those individuals to be employed by such Acquirer. In addition, Respondents shall not make any counteroffer to such a Divestiture Product Core Employee who has received a written offer of employment from such Acquirer;

*provided, however,* that, subject to the conditions of continued employment prescribed in this Order, this Paragraph II.I.3. shall not prohibit Respondents from continuing to employ any Divestiture Product Core Employee under the terms of such employee's employment with Respondent(s) prior to the date of the written offer of employment from the Acquirer to such employee;

## Decision and Order

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

*provided, however,* that, subject to those conditions of continued employment prescribed in this Order, this Order does not require nor shall be construed to require Respondents to terminate the employment of any employee or to prevent Respondents from continuing to employ the Divestiture Product Core Employees in connection with the Acquisition; and

5. for a period of one (1) year from the Closing Date, not:
  - a. directly or indirectly, solicit or otherwise attempt to induce any employee of the Acquirer with any amount of responsibility related to a Divestiture Product (“Divestiture Product Employee”) to terminate his or her employment relationship with the Acquirer; or
  - b. hire any Divestiture Product Employee;

*provided, however,* Respondents may hire any former Divestiture Product Employee whose employment has been terminated by the Acquirer or who independently applies for employment with

## Decision and Order

Respondents, as long as such employee was not solicited in violation of the nonsolicitation requirements contained herein;

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

- J. Respondents shall require, as a condition of continued employment post-divestiture of the assets required to be divested pursuant to this Order, that each Divestiture Product Core Employee retained by Respondents, the direct supervisor(s) of any such employee, and any other employee retained by Respondents and designated by the Interim Monitor (if applicable) sign a confidentiality agreement pursuant to which such employee shall be required to maintain all Confidential Business Information related to the Divestiture Products as strictly confidential, including the nondisclosure of such information to all other employees, executives or other personnel of Respondents (other than as necessary to comply with the requirements of this Order).
- K. Not later than thirty (30) days after the Closing Date, Respondents shall provide written notification of the restrictions on the use of the Confidential Business Information related to the Divestiture Products by Respondent's personnel to all of Respondents' employees who:
  - 1. are or were directly involved in the research, Development, manufacturing, distribution, sale or marketing of any of the Divestiture Products;



## Decision and Order

2. are directly involved in the research, Development, manufacturing, distribution, sale or marketing of Retained Products that contain the same active pharmaceutical ingredient as the Divestiture Products; and/or
3. may have Confidential Business Information related to the Divestiture Products.

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

- L. Until Respondents complete the divestitures required by Paragraphs II.A. and II.B., and fully transfer and deliver, or cause to be transferred and delivered, the related Product Manufacturing Technology, to each of the relevant Acquirers,
  1. Respondents shall take such actions as are necessary to:
    - a. maintain the full economic viability and marketability of the businesses associated with each Divestiture Product;
    - b. minimize any risk of loss of competitive potential for such business;

## Decision and Order

- c. prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to each Divestiture Product;
  - d. ensure the assets required to be divested are transferred and delivered to each Acquirer in a manner without disruption, delay, or impairment of the regulatory approval processes related to the business associated with each Divestiture Product;
  - e. ensure the completeness of the transfer and delivery of the Product Manufacturing Technology; and
2. Respondents shall not sell, transfer, encumber or otherwise impair the assets required to be divested (other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the businesses associated with each Divestiture Product.
- M. Respondents shall not join, file, prosecute or maintain any suit, in law or equity, against an Acquirer or the Divestiture Product Releasee(s) of that Acquirer for the research, Development, manufacture, use, import, export, distribution, or sale of the Divestiture Product(s) acquired by that Acquirer under the following:
1. any Patent owned or licensed by Respondents as of the day after the Effective Date that claims a method of making, using, or administering, or a composition of matter, relating to the Divestiture Product(s) acquired by that Acquirer, or that claims a device relating to the use thereof;
  2. any Patents owned or licensed at any time after the Effective Date by Respondents that claim any aspect of the research, Development, manufacture, use, import, export, distribution, or sale of the Divestiture Product(s)

## Decision and Order

acquired by that Acquirer, other than such Patents that claim inventions conceived by and reduced to practice after the Effective Date;

if such suit would have the potential to interfere with such Acquirer's freedom to practice the following: (1) the research, Development, or manufacture of the Divestiture Products acquired by that Acquirer; or (2) the use, import, export, supply, distribution, or sale of such Divestiture Product(s) within the Geographic Territory. Respondents shall also covenant to such Acquirer that as a condition of any assignment, transfer, or license to a Third Party of the above-described Patents, the Third Party shall agree to provide a covenant whereby the Third Party covenants not to sue such Acquirer or the related Divestiture Product Releasee(s) under such Patents, if the suit would have the potential to interfere with that Acquirer's freedom to practice the following: (1) the research, Development, or manufacture of the Divestiture Product(s) acquired by that Acquirer; or (2) the use, import, export, supply, distribution, or sale of such Divestiture Product(s) within the Geographic Territory.

- N. Upon reasonable written notice and request from an Acquirer to Respondent(s), Respondent(s) shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of Respondents to assist that Acquirer to defend against, respond to, or otherwise participate in any litigation related to the Product Intellectual Property related to any of the Divestiture Products, if such litigation would have the potential to interfere with the Acquirer's freedom to practice the following: (1) the research, Development, or manufacture of the Divestiture Product(s) acquired by that Acquirer; or (2) the use, import, export, supply, distribution, or sale of such Divestiture Product(s) within the Geographic Territory.

## Decision and Order

- O. For any patent infringement suit in which either Respondent is alleged to have infringed a Patent of a Third Party prior to the Closing Date or for such suit as such Respondent has prepared or is preparing as of the Closing Date to defend against such infringement claim(s), and where such a suit would have the potential to interfere with the Acquirer's freedom to practice the following: (1) the research, Development, or manufacture of the Divestiture Product(s) acquired by that Acquirer; or (2) the use, import, export, supply, distribution, or sale of such Divestiture Product(s), Respondents shall:
1. cooperate with the Acquirer and provide any and all necessary technical and legal assistance, documentation and witnesses from Respondent(s) in connection with obtaining resolution of any pending patent litigation involving such Divestiture Product(s);
  2. waive conflicts of interest, if any, to allow either Respondent's outside legal counsel to represent the relevant Acquirer in any ongoing patent litigation involving such Divestiture Product(s); and
  3. permit the transfer to the relevant Acquirer of all of the litigation files and any related attorney work-product in the possession of either Respondent's outside counsel relating to such Divestiture Product(s).
- P. Respondents shall not, in the Geographic Territory:
1. use the Product Trademarks related to the Divestiture Products or any mark confusingly similar to such Product Trademarks, as a trademark, trade name, or service mark;
  2. attempt to register such Product Trademarks;

## Decision and Order

3. attempt to register any mark confusingly similar to such Product Trademarks;
4. challenge or interfere with the relevant Acquirer's use and registration of such Product Trademarks; or
5. challenge or interfere with the relevant Acquirer's efforts to enforce its trademark registrations for and trademark rights in such Product Trademarks against Third Parties;

*provided however*, that this paragraph shall not preclude Respondents from continuing to use all trademarks, tradenames, or service marks that have been in use in commerce on a Retained Product at any time prior to the Effective Date.

- Q. Respondents shall not seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Remedial Agreement, or in any agreement related to any of the Divestiture Products a decision the result of which would be inconsistent with the terms of this Order and/or the remedial purposes thereof.

## 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 this Order, the Order to Maintain Assets and the Remedial Agreements.
- B. The Commission shall select the Interim Monitor, subject to the consent of Respondent Teva, which consent shall not be unreasonably withheld. If Respondent Teva has not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent Teva of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.
- C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents’ compliance with the relevant requirements of the Order in a manner consistent with the purposes of the Order.
- D. If an Interim Monitor is appointed, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:
  1. The Interim Monitor shall have the power and authority to monitor Respondents’ compliance with the divestiture and asset maintenance obligations and related

## Decision and Order

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

2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.
3. The Interim Monitor shall serve until the date of completion by Respondents of the divestiture of all Generic Assorted Indication Product Assets, Generic Oral Contraceptive Assets, and the Trazodone Product Assets, and the transfer and delivery of the related Product Manufacturing Technology in a manner that fully satisfies the requirements of this Order and until the earliest of:
  - a. with respect to each Generic Assorted Indication Product and the Trazodone Products, the date the Acquirer (or its Designee(s)) is approved by the FDA to manufacture such Divestiture Product and able to manufacture such Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents;
  - b. with respect to each Generic Oral Contraceptive Product, the date the Acquirer (or its Designee(s)) is approved by the FDA to manufacture such Divestiture Product and able to manufacture such Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents and Watson/Andrx;
  - c. with respect to each Divestiture Product, the date the Acquirer notifies the Commission and the Respondents of its intention to abandon its efforts to manufacture such Divestiture Product; or

## Decision and Order

- d. with respect to each Divestiture Product, the date of written notification from staff of the Commission that the Interim Monitor, in consultation with staff of the Commission, has determined that the Acquirer has abandoned its efforts to manufacture such Divestiture Product;

*provided, however,* that, with respect to each Divestiture Product, the Interim Monitor's service shall not exceed five (5) years from the Order Date;

*provided, further,* that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

4. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondent's compliance with its obligations under the 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 the Order.
5. The Interim Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably



## Decision and Order

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 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 Respondent, and any reports submitted by the Acquirer with respect to the performance of Respondent's obligations under the Order or the Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Order;

*provided, however,* beginning one hundred twenty (120) days after Respondents have filed their final report pursuant to Paragraph IX.B., and every one hundred twenty (120) days thereafter, the Interim Monitor shall report in writing to the Commission concerning progress by the Acquirer toward obtaining FDA approval to manufacture each Divestiture Product and obtaining the ability to manufacture each Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents (and, in the case

## Decision and Order

of the Generic Oral Contraceptive Products, independently of Respondents and Watson/Andrx).

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

**IV.**

**IT IS FURTHER ORDERED** that:

## Decision and Order

- A. If Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver or otherwise convey the Generic Assorted Indication Product Assets, the Generic Oral Contraceptive Product Assets, and/or the Trazodone Product Assets as required by this Order, the Commission may appoint a trustee (“Divestiture Trustee”) to assign, grant, license, divest, transfer, deliver or otherwise convey these assets in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.
- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent Teva, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondent Teva has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent Teva of the identity of any proposed Divestiture Trustee, Respondents 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 assign, grant, license, divest, transfer, deliver or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed.
  2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however*, the Commission may extend the divestiture period only two (2) times.
  3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may

## Decision and Order

request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such Person within five (5) days after receiving notification of the Commission's approval.
5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of 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 Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

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

## Decision and Order

9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph.
- F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

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

With respect to Confidential Business Information, Respondents shall assure that, in any instance wherein Respondents' counsel (including in-house counsel under appropriate confidentiality arrangements) either retains unredacted copies of documents or other materials provided to an Acquirer or accesses original documents (under circumstances where copies of documents are insufficient or otherwise unavailable) provided to an Acquirer, Respondents' counsel does so only in order to do the following:

- A. comply with any Remedial Agreement, this Order, any Law (including, without limitation, any requirement to obtain regulatory licenses or approvals, and rules promulgated by the Commission), any data retention requirement of any applicable Government Entity, or any taxation requirements; or

## Decision and Order

- B. defend against, respond to, or otherwise participate in any litigation, investigation, audit, process, subpoena or other proceeding relating to the divestiture or any other aspect of the Divestiture Products or assets and businesses associated with those Divestiture Products;

*provided, however,* that Respondents may disclose such information as necessary for the purposes set forth in this Paragraph V pursuant to an appropriate confidentiality order, agreement or arrangement;

*provided further, however,* that pursuant to this Paragraph V, Respondents shall: (1) require those who view such unredacted documents or other materials to enter into confidentiality agreements with the relevant Acquirer (but shall not be deemed to have violated this requirement if such Acquirer withholds such agreement unreasonably); and (2) use its best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

**VI.**

**IT IS FURTHER ORDERED** that:

- A. Any Remedial Agreement shall be deemed incorporated into this Order.
- B. Any failure by a Respondent to comply with any term of such Remedial Agreement shall constitute a failure to comply with this Order.
- C. Respondents shall include in each Remedial Agreement related to each of the Divestiture Products a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of each Respondent's obligations to the Acquirer pursuant to this Order.



## Decision and Order

- D. Respondents shall also include in each Remedial Agreement a representation from the Acquirer that such Acquirer shall use commercially reasonable efforts to secure the FDA approval(s) necessary to manufacture, or to have manufactured by a Third Party, in commercial quantities, each such Divestiture Product and to have any such manufacture to be independent of Respondents, all as soon as reasonably practicable.
- E. Respondents shall not modify or amend any of the terms of any Remedial Agreement without the prior approval of the Commission.

**VII.**

**IT IS FURTHER ORDERED** that the purpose of the divestiture of the Generic Assorted Indication Product Assets, the Generic Oral Contraceptive Product Assets, and the Trazodone Product Assets and the transfer and delivery of the related Product Manufacturing Technology and the related obligations imposed on the Respondents by this Order is:

- A. to ensure the continued use of such assets in the research, Development, and manufacture of each of the Divestiture Products and for the purposes of the business associated with each Divestiture Product within the Geographic Territory;
- B. to provide for the future use of such assets for the distribution, sale and marketing of each of the Divestiture Products in the Geographic Territory;
- C. to create a viable and effective competitor, that is independent of the Respondents:
  - 1. in the research, Development, and manufacture of each of the Divestiture Products for the purposes of the business associated with each Divestiture Product within the Geographic Territory; and

## Decision and Order

2. the distribution, sale and marketing of the each of the Divestiture Products in the Geographic Territory; and,
- D. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

**VIII.**

**IT IS FURTHER ORDERED** that this Order shall not reduce or limit or be construed to reduce or limit the obligations of Watson/Andrx pursuant to the Order issued by the Commission *In the Matter of Watson Pharmaceuticals, Inc., and Andrx Corporation*, Docket Number C-4172.

**IX.**

**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 Order Date, and every sixty (60) days thereafter until Respondents have fully complied with the following: Paragraphs II.A , II.B., II.C., II.D., II.F. 1.-3., II.H., II.I.1.-4., II.K., and II.L., Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order. Respondents shall submit at the same time a copy of their report concerning compliance with this Order to the Interim Monitor, if any Interim Monitor has been appointed. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant paragraphs of the Order, including a full description of all substantive contacts or negotiations related to the divestiture

## Decision and Order

of the relevant assets and the identity of all Persons contacted, including copies of all written communications to and from such Persons, all internal memoranda, and all reports and recommendations concerning completing the obligations.

- C. One (1) year after the Order Date, annually for the next nine years on the anniversary of the Order Date, and at other times as the Commission may require, Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with the Order.

**X.**

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

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

**XI.**

**IT IS FURTHER ORDERED** that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to any Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, such Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

## Decision and Order

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

Decision and Order

**XII.**

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

By the Commission.

**NON-PUBLIC APPENDIX II.A.  
VINTAGE GENERIC DIVESTITURE PRODUCT  
AGREEMENTS**

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

**NON-PUBLIC APPENDIX II.B.  
WATSON GENERIC DIVESTITURE PRODUCT  
AGREEMENTS**

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

## Analysis to Aid Public Comment

**ANALYSIS OF AGREEMENT CONTAINING CONSENT  
ORDERS TO AID PUBLIC COMMENT**

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Teva Pharmaceutical Industries Ltd. (“Teva”) and Barr Pharmaceuticals Inc. (“Barr”) that is designed to remedy the anticompetitive effects of the acquisition of Barr by Teva. Under the terms of the proposed Consent Agreement, the companies would be required to assign and divest to Watson Pharmaceuticals (“Watson”) Teva’s rights and assets necessary to manufacture and market generic: (1) chlorzoxazone tablets; (2) deferoxamine injection; (3) fluoxetine weekly capsules; (4) carboplatin injection; and (5) metronidazole tablets. The Consent Agreement also requires the companies to assign and divest to Watson all of Barr’s rights and assets necessary to manufacture and market generic: (1) metoclopramide hydrochloride (“HCl”) tablets; (2) cyclosporine liquid; (3) cyclosporine capsules; (4) desmopressin acetate tablets; (5) epoprostenol sodium (freeze-dried powder) injection (“epop”); (6) flutamide capsules; (7) glipizide/metformin HCl tablets; (8) mirtazapine orally disintegrating tablets (“ODT”); (9) tamoxifen citrate tablets; and (10) tetracycline HCl capsules. In addition, the proposed Consent Agreement requires the companies to divest Teva’s rights and assets necessary to manufacture and market generic trazodone HCl tablets and thirteen oral contraceptive products to Qualitest Pharmaceuticals (“Qualitest”).

The proposed Consent Agreement has been placed on the public record for thirty days for receipt of comments by 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, modify it, or make final the Decision and Order (“Order”).

### Analysis to Aid Public Comment

Pursuant to an Agreement and Plan of Merger dated July 18, 2008, Teva proposes to acquire all of the issued and outstanding shares of Barr for approximately \$7.4 billion, plus the assumption of \$1.5 billion of net debt, for approximately \$8.9 billion. The Commission's Complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening competition in the U.S. markets for the manufacture and sale of the following generic pharmaceutical products: (1) tetracycline HCl capsules; (2) chlorzoxazone tablets; (3) desmopressin acetate tablets; (4) metoclopramide HCl tablets; (5) carboplatin injection; (6) tamoxifen citrate tablets; (7) metronidazole tablets; (8) trazodone HCl tablets; (9) glipizide/metformin HCl tablets; (10) cyclosporine liquid; (11) cyclosporine capsules; (12) flutamide capsules; (13) mirtazapine ODT; (14) deferoxamine injection; (15) epop; (16) weekly fluoxetine capsules; and (17) thirteen generic oral contraceptive markets (collectively, the "Products"). The proposed Consent Agreement will remedy the alleged violations by replacing the lost competition that would result from the acquisition in each of the markets.

### **The Products and Structure of the Markets**

The proposed acquisition of Barr by Teva would strengthen Teva's worldwide position in generic pharmaceuticals and provide Teva with a stronger pipeline of generic products.

The transaction would reduce the number of competing generic suppliers in each of the relevant markets. The number of generic suppliers has a direct and substantial effect on generic pricing as each additional generic supplier can have a competitive impact on the market. Generic pharmaceutical customers are not likely to switch to the equivalent branded product because they are priced significantly higher than the generic products. After more than one generic product is introduced, competition among the generic

## Analysis to Aid Public Comment

competitors drives pricing, and the branded product's pricing largely becomes competitively irrelevant.

In the markets for generic tetracycline HCl tablets, chlorzoxazone tablets, and desmopressin acetate tablets, Teva and Barr are the only companies manufacturing and selling products in the United States. Tetracycline HCl is an old, broad-spectrum antibiotic used now primarily for the treatment of acne and rosacea. Chlorzoxazone is a centrally acting muscle relaxant used to treat muscle spasms. Desmopressin acetate is a synthetic replacement for an antidiuretic hormone that reduces urine production during sleep and is used to treat bed-wetting in children. Because Teva and Barr are the only suppliers of these generic products in the United States, the proposed acquisition creates a monopoly in each of these markets.

In the generic tamoxifen citrate and cyclosporine liquid markets, the proposed acquisition reduces the number of competitors from three to two. Tamoxifen citrate is a selective estrogen receptor modulator that is used in the treatment of breast cancer. Cyclosporine is an immunosuppressant drug used to prevent the rejection of transplanted organs. Combined, Teva and Barr, currently account for 73 percent of the generic tamoxifen citrate market and 55 percent of the generic cyclosporine liquid market.

Teva's proposed acquisition of Barr would reduce the number of competitors from four to three in the following generic markets: (1) metoclopramide HCl tablets; (2) carboplatin injection; (3) metronidazole tablets; (4) trazodone HCl tablets; (5) cyclosporine capsules; (6) flutamide capsules; (7) glipizide/metformin HCl tablets; (8) deferoxamine injection; and (9) mirtazapine ODT. The structure of each of these markets is as follows:

- Metoclopramide HCl is a dopamine receptor antagonist used to treat nausea and vomiting as well as gastroesophageal reflux disease ("GERD"). In the generic metoclopramide HCl market, Teva and Barr are two of only four suppliers supplying all dosage forms of metoclopramide HCl.



## Analysis to Aid Public Comment

Qualitest and Mutual/URL Pharmaceuticals (“Mutual”) are the remaining two suppliers. A combined Teva and Barr would possess 82 percent of the overall generic metoclopramide HCl market based on current sales.

- Carboplatin, the generic version of Bristol-Myers Squibb Company’s (“BMS”) Paraplatin®, is a chemotherapy drug used to treat a variety of cancers, mainly ovarian, lung, head and neck cancers. Teva and Barr are two of the leading suppliers of generic carboplatin injection with a combined market share of 60 percent. APP Pharmaceuticals and Bedford Laboratories (“Bedford”) are the two remaining suppliers in the generic carboplatin injection market with 11 percent and 29 percent of the market, respectively.
- Metronidazole is an anti-infective used in the treatment of a variety of bacterial infections. Barr is the market leader in the generic metronidazole market with 50 percent market share. Teva is close behind with 39 percent of the market. Mutual and Amneal Pharmaceuticals are the only other suppliers with 4 percent and 1 percent of the market, respectively. Therefore, the proposed acquisition combines two of the most competitively significant suppliers of generic metronidazole, resulting in a combined market share of 89 percent.
- Trazodone is an antidepressant with a sedative effect. In the generic trazodone market, the proposed acquisition would result in a combined market share of 75 percent. Apotex Group is the only other competitively significant supplier with 22 percent of the market. The fourth supplier – Watson – has had limited success in this market, having captured only a 3 percent market share to date.
- Cyclosporine is an immunosuppressant drug used to prevent the rejection of transplanted organs. In the generic cyclosporine capsules market, Teva and Barr have roughly

## Analysis to Aid Public Comment

equal market shares and their post-acquisition market share would be 41 percent. Abbott Laboratories is the market leader with 51 percent of the market. The fourth supplier – Sandoz Inc. (“Sandoz”) – represents approximately 8 percent of the market.

- Flutamide is an anti-androgen drug used to treat prostate cancer. Teva, Barr, Par Pharmaceutical Companies (“Par”), and Sandoz are the four suppliers of generic flutamide. Sandoz is the market leader with 34 percent of the market. Teva has 28 percent of the market, Par has 24 percent, and Barr has 14 percent. Consequently, the proposed acquisition would result in a combined market share of 42 percent.
- Glipizide/Metformin, the generic version of BMS’s Metaglip®, is commonly prescribed as a first line treatment for diabetes. Mylan Pharmaceuticals (“Mylan”), Sandoz, Teva, and Barr are the four suppliers of generic glipizide/metformin. Sandoz is the market leader with 37 percent. Barr and Teva have roughly equal market shares of 25 and 26 percent, respectively. The fourth supplier – Mylan – has the smallest market share with 12 percent. Thus, Teva’s proposed acquisition of Barr would result in a post acquisition market share of 51 percent.
- Deferoxamine, the generic version of Novartis International AG’s Desferal®, is a chelating agent used to remove excess iron from the body. In the generic deferoxamine market, a combined Teva and Barr would possess 16 percent of the market. Hospira Inc. is the market leader with 73 percent market share. The remaining supplier – Bedford – is a small competitor as reflected by its 11 percent share of the market. Although the combined share of Teva and Barr is only 16 percent, the proposed transaction would combine two of only four companies offering generic deferoxamine injection in the United States. As discussed in Effects, below, the

## Analysis to Aid Public Comment

number of suppliers is the driving factor for prices in generic markets.

- Mirtazapine is an antidepressant used to treat moderate to severe depression. Only four companies currently supply generic mirtazapine in the United States – Teva, Barr, Prasco Laboratories (“Prasco”), and Aurobindo Pharma (“Aurobindo”). Prasco is the market leader with a 49 percent market share. Barr has 26 percent of the market, and Teva has 10 percent of the market. Aurobindo is the smallest competitor with only 8 percent of the market. Hence, the proposed acquisition would result in a combined market share of 36 percent.

In two product markets – epop and fluoxetine weekly capsules – the proposed acquisition would eliminate important and significant future competition. Epop is used to treat severe primary pulmonary hypertension. Epop is a new generic market and Teva is currently the only generic epop supplier. Barr has an epop product in development. Fluoxetine weekly capsules are a widely-prescribed antidepressant. Both Teva and Barr have generic products in development for the fluoxetine weekly capsules market. There are few firms that are capable of, and interested in, entering these markets.

Oral contraceptives are pills taken by mouth to prevent ovulation and pregnancy. They are the most common method of reversible birth control, used by 82 percent of women in the United States at some point during their reproductive years.

The thirteen oral contraceptive markets include two markets where both Teva and Barr participate, ten markets where Barr participates and Teva has a product in development and one market where both Teva and Barr have products in development. The two markets where both Barr and Teva currently participate – generic Ortho-Cyclen® and generic Ortho Tri-Cyclen® – are already highly concentrated. A combined Teva and Barr would have 68 percent of the generic Ortho-Cyclen® market and 51 percent of the generic

## Analysis to Aid Public Comment

Ortho Tri-Cyclen® market. Watson is the only other supplier in each of these markets.

Barr also competes in ten oral contraceptive markets where Teva is developing a competing product. These markets include generic products that are equivalent to Ortho-Cept®, Mircette®, Triphasil®, Alesse®, OrthoNovum® 1-35, OthroNovum® 7/7/7, Loestrin® FE (1mg/.02 mg & 1.5 mg/.03 mg), Loestrin® FE (1mg/.2 mg), Loestrin® FE 24, and Ovcon® 35. In each of these relevant markets, Teva is one of a limited number of firms capable of developing a generic oral contraceptive product that would compete in each of these markets, and is well-positioned to enter the markets in a timely manner. Both Teva and Barr are developing generic products equivalent to Ortho Tri-Cyclen® Lo 28 and are two of a limited number of firms with this product in development.

**Entry**

Entry into the markets for the manufacture and sale of the Products would not be timely, likely or sufficient in its magnitude, character, and scope to deter or counteract the anticompetitive effects of the acquisition. Entry would not take place in a timely manner because the combination of generic drug development times and Food and Drug Administration (“FDA”) drug approval requirements takes at least two years. Entry would not be likely because many of the relevant markets are relatively small and in decline, so the limited sales opportunities available to a new entrant would likely be insufficient to warrant the time and investment necessary to enter.

## Analysis to Aid Public Comment

**Effects**

The proposed acquisition would cause significant anticompetitive harm to consumers in the U.S. markets for the manufacture and sale of each of the generic markets listed above. In generic pharmaceutical markets, pricing is heavily influenced by the number of competitors that participate in a given market. Here, the evidence shows that the prices of the generic pharmaceutical products at issue decrease with the entry of each additional competitor.

Evidence gathered during the investigation confirms that pricing for the generic pharmaceutical products at issue in the transaction is driven by the number firms that compete in the markets. Customers consistently state that the price of a generic pharmaceutical decreases with the entry of the second, third and even fourth competitor. The evidence also indicates that the presence of four significant competitors allows customers to negotiate lower prices than is the case where there are fewer firms. The proposed transaction would eliminate one of at most four competitors in each of the relevant markets and would cause significant anticompetitive harm to consumers in the U.S. markets by eliminating actual, direct, and substantial competition between Teva and Barr and by increasing the likelihood that customers will pay higher prices.

The competitive concerns can be characterized as both unilateral and coordinated in nature. The homogenous nature of the products involved, the minimal incentives to deviate, and the relatively predictable prospects of gaining new business all indicate that the firms in the market will find it profitable to coordinate their pricing. The impact that a reduction in the number of firms would have on pricing can also be explained in terms of unilateral effects, as the likelihood that the merging parties would be the first and second choices in a significant number of bidding situations is enhanced where the number of firms participating in the market decreases substantially.

**The Consent Agreement**

## Analysis to Aid Public Comment

The proposed Consent Agreement effectively remedies the proposed acquisition's anticompetitive effects in the relevant product market. Pursuant to the Consent Agreement, Teva and Barr are required to divest certain rights and assets related to the Products to a Commission-approved acquirer no later than ten days after the acquisition. Specifically, the proposed Consent Agreement requires that Teva divest the oral contraceptive products and trazodone to Qualitest and that Teva/Barr divest the remainder of the Products to Watson.

The acquirer of the divested assets must receive the prior approval of the Commission. The Commission's goal in evaluating a possible purchaser of divested assets is to maintain the competitive environment that existed prior to the acquisition. A proposed acquirer of divested assets must not itself present competitive problems.

Qualitest and Watson are well-positioned to manufacture and market their respective acquired Products and to compete effectively in those markets. Both Qualitest and Watson develop, manufacturer, sell, and distribute generic pharmaceuticals within the United States. Moreover, the divestitures to both companies do not present competitive problems of their own because neither competes in those markets. With their resources, capabilities, strong reputation, and experience marketing generic products, the two companies are expected to replicate the competition that would be lost with the proposed acquisition.

If the Commission determines that either Watson or Qualitest is not acceptable acquirer of the assets to be divested, or that the manner of the divestitures is not acceptable, the parties must unwind the sale and divest the assets within six months of the date the Order becomes final to another Commission-approved acquirer. If the parties fail to divest within six months, the Commission may appoint a trustee to divest the Products.

The proposed remedy contains several provisions to ensure that the divestitures are successful. The Order requires Teva and Barr to

## Analysis to Aid Public Comment

provide transitional services to enable the Commission-approved acquirers to obtain all of the necessary approvals from the FDA. These transitional services include technology transfer assistance to manufacture the Products in substantially the same manner and quality employed or achieved by Teva or Barr. Most of the oral contraceptive products had been divested to Teva pursuant to a Commission Order in the matter of *Watson Pharmaceuticals, Inc./Andrx Corporation*, Docket No. C-4172 (October 31, 2006). This proposed D&O does not relieve Watson of any of its obligations pursuant to the Commission Order issued in the above referenced Watson/Andrx matter.

The Commission has appointed William Rahe of Quantic Regulatory Services, LLC (“Quantic”) to oversee the asset transfer and to ensure Teva’s and Barr’s compliance with all of the provisions of the proposed Consent Agreement. Mr. Rahe is a senior consultant at Quantic and has several years of experience in the pharmaceutical industry. He is a highly-qualified expert on FDA regulatory matters and currently advises Quantic clients on achieving satisfactory regulatory compliance and interfacing with the FDA. In order to ensure that the Commission remains informed about the status of the proposed divestitures and the transfers of assets, the proposed Consent Agreement requires Teva and Barr to file reports with the Commission periodically until the divestitures and transfers are accomplished.

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

## Complaint

## IN THE MATTER OF

**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](http://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.<sup>1</sup> 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.<sup>2</sup>

**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,<sup>3</sup> West Penn has market power in the provision of MLS services to professionals who provide residential real estate

---

<sup>1</sup> 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>.

<sup>2</sup> *In the Matter of MiRealSource, Inc.*, Dkt. No. 9321.

<sup>3</sup> 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.<sup>4</sup>

**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.

---

<sup>4</sup> 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.<sup>5</sup>

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

---

<sup>5</sup> 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 1309648 (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%<sup>1</sup>**

\* \*

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%<sup>[1]</sup> . . .

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%<sup>1</sup>**

**FREE APPRAISAL<sup>2</sup>**



Example

	Balance	Payment
Your Estimated Current Mortgage	\$430,000	\$3,720
Your Estimated Revolving Debt	\$21,439	200
Your Estimated Total	\$451,439	\$4,020 <sup>3</sup>

**Your New, One, Low Monthly Payment: \$2,463<sup>4</sup>**

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 Loans<sup>5</sup> can provide you with a 30-year fixed rate of 1.95%<sup>1</sup> for \$630,000 or more.

Based upon this estimate, you can save \$1,764<sup>4</sup> 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]

<sup>1</sup> 3.00% Annual Percentage Rate, 30-Year term.  
<sup>2</sup> Minimum all time of closing. See website for terms and conditions of this pre-approved offer.  
<sup>3</sup> Monthly payments would be \$202 for the next 12 months per \$100,000 borrowed.  
<sup>4</sup> Savings is estimated on all total 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](http://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: [sew-352157243@craigslist.org](mailto:sew-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](mailto: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

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](mailto: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](mailto: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/rt/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 2008 (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. #00330888. \*Interest Rate 1.64% APR. Interest amount will vary. 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.



## 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. 65<sup>th</sup> 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.

## Complaint

## IN THE MATTER OF

**GENICA CORPORATION,  
AND  
COMPGEEKS.COM  
D/B/A COMPUTER GEEKS DISCOUNT OUTLET  
AND  
GEEKS.COM,**

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

*Docket No. C-4252; File No. 082 3113  
Complaint, March 16, 2009 – Decision, March 16, 2009*

This consent order addresses Genica's representations about the security they provided for sensitive information provided to them by consumers. The Commission's complaint alleges that respondents represented that they implemented reasonable and appropriate security measures to protect the privacy and confidentiality of personal information. The complaint further alleges that since at least January 2007 and continuing through at least June 2007, hackers repeatedly exploited vulnerabilities by using SQL injection attacks on the [www.geeks.com](http://www.geeks.com) website and web application and found personal information of hundreds of customers, including credit card numbers, expiration dates, and security codes, stored on respondents' network which they exported over the internet to outside computers. The order prohibits respondents from misrepresenting the extent to which respondents maintain and protect the privacy, confidentiality, or integrity of any personal information collected from or about consumers and requires respondents to establish and maintain a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers.

**COMPLAINT**

The Federal Trade Commission, having reason to believe that Genica Corporation and Compgeeks.com also doing business as Computer Geeks Discount Outlet and geeks.com ("respondents") have violated the provisions of the Federal Trade Commission Act,

## Complaint

and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Genica Corporation (“Genica”) is a Delaware corporation with its principal office or place of business at 1890 Ord Way, Oceanside, California 92056.

2. Respondent Compgeeks.com also doing business as Computer Geeks Discount Outlet and [geeks.com](http://geeks.com) (“Compgeeks.com”) is a California corporation with its principal office or place of business at 1890 Ord Way, Oceanside, California 92056. Compgeeks.com is a wholly-owned subsidiary of Genica, and Genica controlled the acts and practices of Compgeeks.com at issue in this complaint.

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

4. Respondents are in the business of selling computer systems, peripherals, and consumer electronics to consumers over the internet, including through a website ([www.geeks.com](http://www.geeks.com)) operated by respondent Compgeeks.com.

5. Respondents operate a computer network that consumers use, in conjunction with the [www.geeks.com](http://www.geeks.com) website and web application, to obtain information and to buy their products.

6. In selling products through the [www.geeks.com](http://www.geeks.com) website, respondents routinely collect sensitive information from consumers to obtain authorization for credit card purchases, including a first and last name, address, e-mail address, telephone number, credit card number, credit card expiration date, and credit card security code (hereinafter “personal information”). Personal information collected at the website is sent to computers on respondents’ computer network, reformatted, and sent to outside computer networks for payment authorization. Until at least December 2007,

## Complaint

respondents stored information in clear, readable text on the network on a computer accessible through the [www.geeks.com](http://www.geeks.com) website.

7. Since at least October 2001, respondents have disseminated or caused to be disseminated privacy policies and statements on the [www.geeks.com](http://www.geeks.com) website, including, but not limited to, the following statements regarding the privacy and confidentiality of the consumer information they collect:

The objective of the safeguarding personal information principle is to assure you that we actively protect your privacy using a variety of security and controls. We use secure technology, privacy protection controls and restrictions on employee access in order to safeguard your personal information. We use state of the art technology (e.g., Secure Socket Layer, or SSL) encryption to keep customer personal information as secure as possible. We have also put in place privacy protection control systems designed to ensure that personal Customer data remains safe and private. (Exhibit A, current privacy policy effective 2007, and Exhibit B, former privacy policy effective between 2001 and 2007)

8. Until at least December 2007, respondents engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for the personal information stored on their network. Among other things, respondents: (1) stored personal information in clear, readable text; (2) did not adequately assess the vulnerability of their web application and network to commonly known or reasonably foreseeable attacks, such as “Structured Query Language” (“SQL”) injection attacks; (3) did not implement simple, free or low-cost, and readily available defenses to such attacks; (4) did not use readily available security measures to monitor and control connections between computers on the network and from the network to the internet; and (5) failed to employ reasonable

## Complaint

measures to detect and prevent unauthorized access to personal information, such as by logging or employing an intrusion detection system.

9. Since at least January 2007 and continuing through at least June 2007, hackers repeatedly exploited the failures set forth in Paragraph 8 by using SQL injection attacks on the [www.geeks.com](http://www.geeks.com) website and web application. Through these attacks, the hackers found personal information stored on respondents' network and exported the information of hundreds of customers, including credit card numbers, expiration dates, and security codes, over the internet to outside computers.

10. Respondents became aware of the breach in December 2007, at which time they took steps to prevent further unauthorized access and to notify law enforcement and affected consumers.

11. Through the means described in Paragraph 7, respondents represented, expressly or by implication, that they implemented reasonable and appropriate measures to protect personal information against unauthorized access.

12. In truth and in fact, respondents did not implement reasonable and appropriate measures to protect personal information against unauthorized access. Therefore, the representation set forth in Paragraph 11 was, and is, false or misleading.

13. The acts and practices of respondents as alleged in this complaint constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

**THEREFORE**, the Federal Trade Commission this sixteenth day of March, 2009, has issued this complaint against respondents.

By the Commission.

FEDERAL TRADE COMMISSION DECISIONS  
VOLUME 147


## Complaint

## Exhibit A

Geeks.com#privacy

Page 1 of 5

Subtotal: \$0.00 Items In Cart: 0 [View Cart](#) [Contact Us](#) [My Account](#)  
[Customer Service](#) | [Tech Support](#) | [Tech Tips](#) | [Volume Discounts](#) | [Gift Certificates](#) | [About Us](#) | [Site Map](#)

**COMPUTER GEEKS.COM**  

**NEW ARRIVALS** **TVs** **Notebooks** **MP3 & iPod** **Digital Cameras** **Networking** **Electronics**

**PayPal** **NO PAYMENTS FOR 90 DAYS** on orders over \$50 [Learn how!](#)

**SEARCH**   **Get Email Discounts and SAVE!**

**McAfee SECURE** TESTED DAILY 23-SEP

### SALES AND RETURNS POLICIES

**Systems**

- \* Desktop Computers
- \* Laptops / Notebooks
- \* PDAs

**Hardware**

- \* Bags / Cases / Backpacks
- \* Cables
- \* Cases
- \* CD-ROM / CD-RW / CD Burners
- \* Cell Phones
- \* Clearance
- \* Computer Power Supplies
- \* Consumer Electronics
- \* Controllers / Adapters
- \* Cooling Fans
- \* CPUs / Processors
- \* Digital Cameras
- \* DVD Drives / DVD Burners
- \* External Drive Cases
- \* Flash Memory / Card Readers
- \* Computer Gadgets
- \* Gaming
- \* GPS
- \* Hard Drives
- \* Joysticks
- \* Keyboards
- \* Media (CDR, DVD)
- \* Mouse - Optical / Trackball
- \* Memory / System Memory
- \* Modems
- \* Monitors / LCDs
- \* Motherboards
- \* MP3 / MP4 Players / iPod
- \* Networking
- \* Power Protection
- \* Printers
- \* Removable Storage
- \* Scanners
- \* Sound Cards
- \* Speakers / Microphones
- \* Televisions
- \* Toys (For All Ages)
- \* USB Flash Drives

**Sales and Return Policies:**

- \* All sales are final. Return of non-defective product within the first 30 days from date of purchase are subject to a 15% Return Fee.
- \* Sales Tax will be charged on all orders delivered to an address in California (CA)
- \* Damaged items or missing parts / accessories not as advertised must be reported within 7 business days of receipt of product.
- \* Shipping fees and/or Return shipping costs are not refundable and are the sole responsibility of the customer.
- \* Only defective product returns will be accepted after 30 days for repair or replacement only.
- \* Due to the dynamic nature of the Internet, computer and electronics related parts, prices may change at any time without notice. Geeks.com does not offer price protection.
- \* Products sold with a Manufacturer or Direct Warranty must be returned directly to the product manufacturer for repair or replacement. For these items, the warranty policy from the product manufacturer explicitly requires that any returns, repairs etc. be requested and processed directly by the consumer (or "end-user") of the item.
- \* Due to licensing and copyright laws, we do not accept returns on software once a package has been opened. Defective software will be exchanged for the same title only.
- \* To return a product you must obtain a Return Merchandise Authorization (RMA) number. Geeks.com will not accept returns without prior authorization.
- \* RMA numbers are valid for 30 days. RMA numbers will not be extended and will be closed upon expiration. You must contact Geeks.com to obtain another RMA number.
- \* Once the RMA has been issued you will receive an email explaining what to expect during the return process. It is highly recommended that you use the non-prepaid address label provided on the lower portion of the RMA email sent out upon generation. If the return is a multiple box shipment the RMA number must be marked on all packages returned. All packages returned must have the RMA number displayed in large bold letters on the outside of the box.
- \* Unauthorized or Unmarked returns will not be honored and may be refused upon receipt and/or shipped back at the customer's expense.
- \* Shipments that are refused without authorization, or that are returned due to an invalid address, are subject to a 15% Return Fee plus applicable handling fees.
- \* All product(s) must be return as originally received to include original packaging, manuals, documentation, and all bundled accessories. Returns must be packaged appropriately as to minimize any unnecessary damage during transit. Product(s) damaged during shipment will invalidate both the warranty and RMA and will be returned to the customer at the customer's expense.
- \* All Warranty Exchange replacements are subject to product availability. If an exact replacement is not available upon testing Geeks.com will substitute the product(s) with a similar, suitable, or upgraded product(s) of equal or greater value within 7 to 10 business days. If none of these options are available Geeks.com will credit the customer's account based upon current market value of the received product(s).
- \* Other than Gift Certificates, credits expire 6 months after the date they are issued.
- \* Geeks.com will not be responsible or held liable for any incidental or consequential damages arising from the use or misuse of any product(s) it sells including products with a net total cost of \$0.00.
- \* Per product descriptions, compatibility can be reasonably assured in most cases but can never be guaranteed; a product that is incompatible in a specific hardware/software environment is not therefore inherently "defective".
- \* Geeks.com reserves the right to refuse service to anyone.
- \* Return Policies subject to change without prior notice. Customer should review these policies prior to making purchase.

http://www.geeks.com/policies.asp

9/23/2008



Complaint

<p>* Video Cards                  * Video Cameras &amp; Web Cams                  * VoIP / Telephone Devices</p> <p><b>Software</b>                  * Software / Books</p> <p><b>SPECIAL PROGRAMS</b></p> <ul style="list-style-type: none"> <li>◊ Reseller Sales</li> <li>◊ Educational Sales</li> <li>◊ Government Sales</li> <li>◊ Affiliate Program</li> </ul> <p><b>GEEK FEEDBACK</b></p> <p>Can't find that item you're looking for? Please let us know what we should bring in stock.</p> <p>Type Feedback Here</p> <p style="text-align: center;"><input type="button" value="Submit"/></p>	<p>* Geeks.com strives to be as accurate as possible in our content and pricing. In the event a product is listed with an error in pricing or incorrect content, Geeks.com shall have the right to refuse or cancel any order whether or not the order has been confirmed and credit card charged. In the event that a credit card has already been charged and an order subsequently canceled, Geeks.com will issue a refund to the credit card account in the amount of the charge.</p> <p><b>Customer Pickup ("Will Call") Policies:</b></p> <p>Please visit: <a href="http://www.geeks.com/customerpickup.asp">http://www.geeks.com/customerpickup.asp</a></p> <p><b>Privacy Policies:</b></p> <p>Date Last Updated: September 4, 2007</p> <p><b>INTRODUCTION</b></p> <p>Geeks.com is committed to protecting the privacy of our Visitors and Customers. Our privacy policy governs our use of private Visitor information and other information about our Visitors and Customers.</p> <p><b>Purpose</b></p> <p>Geeks.com believes that our online Visitors and Customers need to be provided clear and prominent notice regarding what personal information is being collected about them, how it will be used, whether or not it will be disclosed, and if so, to whom.</p> <p>Many entities have examined the issue of privacy and developed guidelines for establishing reasonable policies. We believe that by addressing these issues, we will fulfill the goals of fair information use supported by the U.S. government and a variety of industry groups:</p> <p><a href="http://www.truste.org">www.truste.org</a>  <a href="http://www.privacyalliance.org">www.privacyalliance.org</a>  <a href="http://www.ftc.gov">www.ftc.gov</a>  <a href="http://www.the-dma.org">www.the-dma.org</a></p> <p><b>The Glossary of Terms</b> at the end of this Policy defines words with specific meaning as used in these guidelines.</p> <p><b>Privacy Guidelines:</b></p> <p><b>Navigational Data/Tracking.</b></p> <ul style="list-style-type: none"> <li>* Computer Geeks collects navigational data about where individual site visitors come from, exit to, and go while on our website. We do not disclose this information to third parties, except for those with whom we have contracted to analyze and safeguard the data on our behalf.</li> <li>* We may use web browser "cookies" to track progress through our Web site, but the cookies will not be used to collect or store individually identifiable information nor be linked to other information that allows us to identify any specific individual. However, we may use cookies with individual identifiers to support visitor enhancements such as site personalization or other eCommerce features such as product recommendations and your shopping cart.</li> </ul> <p><b>Information Sharing/Disclosure.</b></p> <ul style="list-style-type: none"> <li>* We do not share navigational data with outside companies, except with those with whom we have contracted to analyze and safeguard the data on our behalf.</li> <li>* To offer our products and services in the best way possible, Geeks.com contracts with third party service partners. These partners provide us with data collection, storage, analysis and reporting services and are restricted from using your information in any way other than to help us make our site and services more useful to you and our other visitors. If you would like to opt-out of having your personal information collected by the company with whom we have contracted, please click <a href="#">here</a>.</li> <li>* We do not disclose individual names or customer contact information (such as telephone numbers, email address, or various personal identification numbers), to any third party without your prior consent, except as required by law, or as needed to fulfill an order or deliver a product that a customer has ordered.</li> </ul> <p>Service partners will abide by Geeks.com's privacy policies.</p> <p>Additionally, we may share information with law enforcement agencies or other companies assisting us in fraud prevention or investigations.</p> <p>In support of maintaining a safe and secure environment for credit card purchases, it is essential to our customers that we use credit card and other billing account numbers only for the fulfillment of purchases or other</p>
--	--

## Complaint

Geeks.com#privacy

Page 3 of 5

transactions initiated by our Customers. We do not use credit card or other billing account numbers in other ways without your prior consent.

- We do not release to third parties specific customer account information except to comply with valid legal process or in reasonable efforts to fulfill a transaction initiated by our Customers.
- We provide Customers with the opportunity to update or correct contact and billing information.

We provide to our customers a means to update and ensure the accuracy of their online contact and billing information. For security reasons, we will not disclose the original information directly to the customer, but rather provide a means to reenter changes to the information on record.

**Online Purchases.**

The objective of the online purchases principle is to protect the information about customer transactions and other online uses from misuse and unauthorized disclosure.

- We may use information about the kinds of products you buy from us to make other marketing offers to you, unless you tell us not to, or to personalize your visits to our Web site. We do not give out this purchase data to others except as specified below.
- We do not give out information about what individual customers purchase, except to complete the transactions or to comply with valid legal process. However, pursuant to specific contracts, we may be required provide third-parties with listings of specific groups of customers who have made purchases. Generally, this data will be aggregated and not individually identifiable, but this may not be true in all cases.
- When we facilitate a transaction which is to be fulfilled by an outside party, we will not use the specific, individually identifiable transaction information collected from a customer for purposes other than fulfilling the transaction without your prior consent.

**Choice.**

We give you choices about how we use your personal information.

The objective of the choice principle is to allow customers to opt-out of future marketing offers.

- We give you choices about how the information that you provide may be used to make marketing offers to you. We provide you with a means to easily remove your contact information (like your email address) from marketing lists at any point in the future. Should you wish to be removed from our 100% opt-in Email subscribers list, [click here](#).
- We do not sell or rent customer contact information to unaffiliated third parties for marketing purposes without your prior consent.

**Safeguarding Personal Information.**

The objective of the safeguarding personal information principle is to assure you that we actively protect your privacy using a variety of security and controls. We use secure technology, privacy protection controls and restrictions on employee access in order to safeguard your personal information.

- We use state of the art technology (e.g., Secure Socket Layer, or SSL) encryption to keep customer personal information as secure as possible. We have also put in place privacy protection control systems designed to ensure that personal Customer data remains safe and private. [To learn more about SSL data encryption and how it helps to secure you personal information, click here.](#)
- We allow only authorized employees access to personal information and ensure that the access is limited by need.
- We require companies contracted as agents to adhere to confidentiality agreements to ensure that Customer information remains safe and secure.
- We require employees to acknowledge that they understand and will comply with our privacy policy. We subject employees who violate the privacy policy to disciplinary action.
- **Safe Shopping Guarantee:** We guarantee that every online transaction you make will be 100% safe. Under the **Fair Credit Billing Act**, your bank cannot hold you liable for more than \$50.00 of fraudulent charges. In the event of unauthorized use of your credit card, you must notify your credit card provider in accordance with its reporting rules and procedures.

**Notice.**

We will keep you informed, clearly and prominently on this page, about what we do with your personal information, and we will advise you here if we change our policy. The objective of the notice principle is to ensure that you are aware of and understand how we protect your privacy.

- We explain to visitors and customers how their information is used by providing this written privacy policy for our visitors and customers.
- We notify customers of our privacy policy during registration when they make a purchase.
- We provide written notice of policy changes through prominent and ongoing disclosure.
- We provide a means for Visitors and Customers to ask questions about, voice concerns about, or report violations of the privacy policy.

## Complaint

Geeks.com#privacy

Page 4 of 5

If you have questions or concerns about our privacy policy, or to report a suspected violation of our privacy policy, you may contact us by the following means:

Email: [privacy@geeks.com](mailto:privacy@geeks.com)

OR

Attn: Privacy  
Geeks.com  
1890 Ord Way  
Oceanside, CA 92056

**GLOSSARY OF TERMS**

**Account Information:** Information pertaining to and supporting the management of a customer's account, including but not limited to account numbers and other account identification, promotion information, registration/cancellation information, and preferences and profiles.

**Aggregate:** Information considered as a whole or in groups. Compiled information that does not disclose individual identity.

**Billing Information:** Customer generated information specific to a customer's billing and payment methods and history, including but not limited to bills, payment and billing statements, credit card number, credit card expiration date, checking account number, debit card number, and credit card type.

**Choice:** Providing customers options about how their information can be used, such as opt-outs of email marketing offers.

**Collection:** Requesting, recording, or generating information. The automatic or manual collection or receipt of customer information from a customer or other party.

**Contact Information:** Information to support contacting customers, including but not limited to name, mailing address, telephone numbers, email addresses, and fax numbers.

**Cookie:** A collection of data that gets entered into the memory of Web browsers by some Web sites. This data contains the domain, path, lifetime, and values of variables that are set by the Web site. Cookies may be "permanently" or temporarily stored as small text files on your computer's hard drive.

**Customer:** Someone who has registered with us for the purpose of making a purchase or who has made a purchase from us in the past. Generally, we store much more information regarding Customers, including but not limited to Contact Information, Account Information, and Individually Identifiable Information. Customers are different from Visitors.

**Disclosure:** The release of information to unaffiliated third parties. Disclosure does not include release to those agents and vendors who are covered by appropriate non-disclosure and confidentiality agreements or release of information for the purpose of complying with valid legal process, to protect the rights or property of Computer Geeks, or for emergencies. If you initiate contact with a third party with regard to us, we may disclose your communication with us or other relevant information to that same third party.

**Individually Identifiable Information:** Any information which can be used to identify a specific individual in particular by reference to an identification number or to one or more factors specific to the individual's physical, physiological, mental, economic, cultural status, or social affiliations.

**Marketing:** Promotions provided by us. May be through direct mail, email, pop-ups, banner and/or other online advertisements.

**Navigational Information:** Information about what visitors or customers do online and where they go, including but not limited to recency of visit to specific online areas, frequency of visit to specific online areas, and pathing information.

**Need to Access:** The need to have access to information, including private customer information, for the fulfillment of an official corporate duty.

**Notice:** Indications to visitors and customers about policies and practices in effect.

**Personal Information:** Individual information about a customer that is specific to that customer. Personal information includes but is not limited to anything collected about a customer on an individual level and any information volunteered by the customer, such as a personal profile or preferences.

**Registration Information:** Customer created, personalized information used to customize services and content, and/or to fulfill transactions.

**Private Communications:** Communications that are intended to be contained among a defined set of participants, such as Email. Message board postings and public room conversations are not considered private communications.

**Private Information:** Private information includes all information about a customer that the customer has not made publicly available.

Complaint


**Public Information:** Public information includes all online information about a customer that a customer has made publicly available.

**Publicly Available Consumer Data:** Information acquired from consumer marketing and reporting organizations and other publicly available sources.

**Transactional Information:** Purchase information, including but not limited to date of purchase, source of purchase, recency of purchase, frequency of purchase, dollar amount of purchase, type of product or product category purchased, means of purchase, type of credit card used, other uses of online commerce.

**Use:** Processing, transmitting, transforming, or otherwise handling information. Includes promotional, advertising, and marketing use.

**Visitor:** A Visitor to our Web site. Visitors are different from Customers.  
(All Customers are Visitors, but not all Visitors are Customers.)



[About Us](#) | [Affiliate Program](#) | [Contact Us](#) | [Customer Service](#) | [Gift Certificates](#) | [Site Map](#) | [Tech Support](#) | [Tech Tips](#) | [Volume Discounts](#)

© Copyright 1996-2008 Geeks.com™ All Rights Reserved Concerned about your personal information? [View Privacy Policies](#)



Complaint

Exhibit B

Geeks.com


Page 1 of 7

Subtotal: \$0.00    Items In Cart: 0

Customer Service    Tech Support    Tech Tips    Volume Discounts

View Cart    Contact Us    My Account

Gift Certificates    About Us



NEW ARRIVALS

Search

HACKER SAFE  
TESTED DAILY 14-APR

Go    Get Email Discounts and SAVE! Enter Email Here    Subscribe

**SALES AND RETURNS POLICIES**

**Sales and Return Policies:**

- All sales are final. Return of non-defective product within the first 30 days from date of purchase will be subjected to a 15% Return Fee.
- Sales Tax will be charged on all orders delivered to an address in California (CA)
- Customer must inspect all goods upon receipt and notify Geeks.com within 7 business days if any products are missing or damaged.
- Shipping fees and/or Return shipping costs are not refundable and are the sole responsibility of the customer.
- Only defective product returns will be accepted after 30 days for repair or replacement only.
- Products sold with a Manufacturer or Direct Warranty must be returned directly to the product manufacturer for repair or replacement. For these items, the warranty policy from the product manufacturer explicitly requires that any returns, repairs etc. be requested and processed directly by the consumer (or "end-user") of the item.
- Due to licensing and copyright laws, we do not accept returns on software once a package has been opened. Defective software will be exchanged for the same title only.
- To return a product you must obtain a Return Merchandise Authorization (RMA) number. Geeks.com will not accept returns without prior authorization.
- RMA numbers are valid for 30 days. RMA numbers will not be extended and will be closed upon expiration. You must contact Geeks.com to obtain another RMA number.
- Once the RMA has been issued you will receive an email explaining what to expect during the return process. It is highly recommended that you use the non-prepaid address label provided on the lower portion of the RMA email sent out upon generation. If the return is a multiple box shipment the RMA number must be marked on all packages returned. All packages returned must have the RMA number displayed in large bold letters on the outside of the box.
- Unauthorized or Unmarked returns will not be honored and may be refused upon receipt and/or shipped back at the customer's expense.
- Shipments that are refused without authorization, or that are returned due to an invalid address, are subject to a 15% Return Fee plus applicable handling fees.
- All product(s) must be returned as originally received to include original packaging, manuals, documentation, and all bundled accessories. Returns must be packaged appropriately as to minimize any unnecessary damage during transit. Product(s) damaged during shipment will invalidate both the warranty and RMA and will be returned to the customer at the customer's expense.

## Complaint

Geeks.com

Page 2 of 7

- Motherboards
- MP3 / MP4 Players / iPod
- Networking
- Power Protection
- Power Supplies
- Printers
- Removable Storage
- Scanners
- Sound Cards
- Speakers / Microphones
- Televisions
- Toys (For All Ages)
- USB Flash Drives
- Video Cards
- Video Cameras & Web Cams
- VoIP / Telephone Devices
- Software
- Software / Books

- All Warranty Exchange replacements are subject to product availability. If an exact replacement is not available upon testing Geeks.com will substitute the product(s) with a similar, suitable, or upgraded product(s) of equal or greater value within 7 to 10 business days. If none of these options are available Geeks.com will credit the customer's account based upon current market value of the received product(s).
- Other than Gift Certificates, credits expire 6 months after the date they are issued.
- Geeks.com will not be responsible or held liable for any incidental or consequential damages arising from the use or misuse of any product(s) it sells.
- Per product descriptions, compatibility can be reasonably assured in most cases but can never be guaranteed; a product that is incompatible in a specific hardware/software environment is not therefore automatically "defective".
- Geeks.com reserves the right to refuse service to anyone.
- Return Policies subject to change without prior notice. Customer should review these return policies prior to making purchase.

Customer Pickup ("Will Call") Policies:

Please visit:  
<http://web.archive.org/web/20070418191125/http://www.geeks.com/customerpickup.asp>

 Privacy Policies: (Last Update: 4 September 2003)

- Reseller Sales
- Educational Sales
- Government Sales
- Affiliate Program

**INTRODUCTION**

Geeks.com is committed to protecting the privacy of our Visitors and Customers. Our privacy policy governs our use of private Visitor information and other information about our Visitors and Customers. Geeks.com complies with the America Online (AOL) Certified Merchant privacy policy.

**Purpose**

Can't find that item you're looking for? Please let us know what we should bring in stock.

Geeks.com believes that our online Visitors and Customers need to be provided clear and prominent notice regarding what personal information is being collected about them, how it will be used, whether or not it will be disclosed, and if so, to whom.

Type Feedback Here

Many entities have examined the issue of privacy and developed guidelines for establishing reasonable policies. We believe that by addressing these issues, we will fulfill the goals of fair information use supported by the U.S. government and a variety of industry groups:

<http://web.archive.org/web/20070418191125/http://www.truste.org/>  
<http://web.archive.org/web/20070418191125/http://www.privacyalliance.org/>  
<http://web.archive.org/web/20070418191125/http://www.ftc.gov/>  
<http://web.archive.org/web/20070418191125/http://www.the-dma.org/>

**The Glossary of Terms** at the end of this Policy defines words with specific meaning as used in these guidelines.

Privacy Guidelines:

Navigational Data/Tracking.

## Complaint

Geeks.com

Page 3 of 7

Computer Geeks collects navigational data about where individual site visitors come from, exit to, and go while on our website. We do not disclose this information to third parties, except for those with whom we have contracted to analyze and safeguard the data on our behalf.

- We may use web browser "cookies" to track progress through our Web site, but the cookies will not be used to collect or store individually identifiable information not be linked to other information that allows us to identify any specific individual. However, we may use cookies with individual identifiers to support visitor enhancements such as site personalization or other eCommerce features such as product recommendations and your shopping cart.

### Information Sharing/Disclosure.

- We do not share navigational data with outside companies, except with those with whom we have contracted to analyze and safeguard the data on our behalf.
- To offer our products and services in the best way possible, Computer Geeks contracts with third party service partners. These partners provide us with data collection, storage, analysis and reporting services and are restricted from using your information in any way other than to help us make our site and services more useful to you and our other visitors. If you would like to opt-out of having your personal information collected by the company with whom we have contracted, please [click here](#).
- We do not disclose individual names or customer contact information (such as telephone numbers, email address, or various personal identification numbers), to any third party without your prior consent, except as required by law, or as needed to fulfill an order or deliver a product that a customer has ordered.

Service partners will abide by Computer Geeks' privacy policies.

Additionally, we may share information with law enforcement agencies or other companies assisting us in fraud prevention or investigations.

In support of maintaining a safe and secure environment for credit card purchases, it is essential to our customers that we use credit card and other billing account numbers only for the fulfillment of purchases or other transactions initiated by our Customers. We do not use credit card or other billing account numbers in other ways without your prior consent.

- We do not release to third parties specific customer account information except to comply with valid legal process or in reasonable efforts to fulfill a transaction initiated by our Customers.
- We provide Customers with the opportunity to update or correct contact and billing information.

We provide to our customers a means to update and ensure the accuracy of their online contact and billing information. For security reasons, we will not disclose the original information directly to the customer, but rather provide a means to reenter changes to the information on record.

### Online Purchases.

The objective of the online purchases principle is to protect the information about customer transactions and other online uses from misuse and unauthorized disclosure.

- We may use information about the kinds of products you buy from us to make other marketing offers to you, unless you tell us not to, or to personalize your visits to our Web site. We do not give out this purchase data to others except as specified below:
- We do not give out information about what individual customers purchase, except to

## Complaint

Geeks.com

Page 4 of 7

complete the transactions or to comply with valid legal process. However, pursuant to specific contracts, we may be required provide third-parties with listings of specific groups of customers who have made purchases. Generally, this data will be aggregated and not individually identifiable, but this may not be true in all cases.

- When we facilitate a transaction which is to be fulfilled by an outside party, we will not use the specific, individually identifiable transaction information collected from a customer for purposes other than fulfilling the transaction without your prior consent.

Choice.

We give you choices about how we use your personal information.

The objective of the choice principle is to allow customers to opt-out of future marketing offers.

- We give you choices about how the information that you provide may be used to make marketing offers to you. We provide you with a means to easily remove your contact information (like your email address) from marketing lists at any point in the future. Should you wish to be removed from our 100% opt-in Email subscribers list, [click here](#).
- We do not sell or rent customer contact information to unaffiliated third parties for marketing purposes without your prior consent.

Safeguarding Personal Information.

The objective of the safeguarding personal information principle is to assure you that we actively protect your privacy using a variety of security and controls. We use secure technology, privacy protection controls and restrictions on employee access in order to safeguard your personal information.

- We use state of the art technology (i.e., Secure Socket Layer, or SSL) encryption to keep customer personal information as secure as possible. We have also put in place privacy protection control systems designed to ensure that personal Customer data remains safe and private. To learn more about SSL data encryption and how it helps to secure you personal information, [click here](#).
- We allow only authorized employees access to personal information and ensure that the access is limited by need.
- We require companies contracted as agents to adhere to confidentiality agreements to ensure that Customer information remains safe and secure.
- We require employees to acknowledge that they understand and will comply with our privacy policy. We subject employees who violate the privacy policy to disciplinary action.
- **Safe Shopping Guarantee:** We guarantee that every online transaction you make will be 100% safe. Under the **Fair Credit Billing Act**, your bank cannot hold you liable for more than \$50.00 of fraudulent charges. In the event of unauthorized use of your credit card, you must notify your credit card provider in accordance with its reporting rules and procedures.

Notice.

We will keep you informed, clearly and prominently on this page, about what we do with your personal information, and we will advise you here if we change our policy. The objective of the notice principle is to ensure that you are aware of and understand how we protect your privacy.

- We explain to visitors and customers how their information is used by providing this written privacy policy for our visitors and customers.



## Complaint

Geeks.com

Page 5 of 7

- We notify customers of our privacy policy during registration when they make a purchase.
- We provide written notice of policy changes through prominent and ongoing disclosure.
- We provide a means for Visitors and Customers to ask questions about, voice concerns about, or report violations of the privacy policy.

If you have questions or concerns about our privacy policy, or to report a suspected violation of our privacy policy, you may contact us by the following means:

Email: [privacy@geeks.com](mailto:privacy@geeks.com)

OR

Attn: Privacy  
Geeks.com  
1890 Ord Way  
Oceanside, CA 92056

### GLOSSARY OF TERMS

**Account Information:** Information pertaining to and supporting the management of a customer's account, including but not limited to account numbers and other account identification, promotion information, registration/cancellation information, and preferences and profiles.

**Aggregate:** Information considered as a whole or in groups. Compiled information that does not disclose individual identity.

**Billing Information:** Customer generated information specific to a customer's billing and payment methods and history, including but not limited to bills, payment and billing statements, credit card number, credit card expiration date, checking account number, debit card number, and credit card type.

**Choice:** Providing customers options about how their information can be used, such as opt-outs of email marketing offers.

**Collection:** Requesting, recording, or generating information. The automatic or manual collection or receipt of customer information from a customer or other party.

**Contact Information:** Information to support contacting customers, including but not limited to name, mailing address, telephone numbers, email addresses, and fax numbers.

**Cookie:** A collection of data that gets entered into the memory of Web browsers by some Web sites. This data contains the domain, path, lifetime, and values of variables that are set by the Web site. Cookies may be "permanently" or temporarily stored as small text files on your computer's hard drive.

**Customer:** Someone who has registered with us for the purpose of making a purchase or who has made a purchase from us in the past. Generally, we store much more information regarding Customers, including but not limited to Contact Information, Account Information, and Individually Identifiable Information. Customers are different from Visitors.

**Disclosure:** The release of information to unaffiliated third parties. Disclosure does not include release to those agents and vendors who are covered by appropriate non-disclosure

## Complaint

Geeks.com

Page 6 of 7

and confidentiality agreements or release of information for the purpose of complying with valid legal process, to protect the rights or property of Computer Geeks, or for emergencies. If you initiate contact with a third party with regard to us, we may disclose your communication with us or other relevant information to that same third party.

**Individually Identifiable Information:** Any information which can be used to identify a specific individual in particular by reference to an identification number or to one or more factors specific to the individual's physical, physiological, mental, economic, cultural status, or social affiliations.

**Marketing:** Promotions provided by us. May be through direct mail, email, pop-ups, banner and/or other online advertisements.

**Navigational Information:** Information about what visitors or customers do online and where they go, including but not limited to recency of visit to specific online areas, frequency of visit to specific online areas, and pathing information.

**Need to Access:** The need to have access to information, including private customer information, for the fulfillment of an official corporate duty.

**Notice:** Indications to visitors and customers about policies and practices in effect.

**Personal Information:** Individual information about a customer that is specific to that customer. Personal information includes but is not limited to anything collected about a customer on an individual level and any information volunteered by the customer, such as a personal profile or preferences.

**Registration Information:** Customer created, personalized information used to customize services and content, and/or to fulfill transactions.

**Private Communications:** Communications that are intended to be contained among a defined set of participants, such as e-mail. Message board postings and public room conversations are not considered private communications.

**Private Information:** Private information includes all information about a customer that the customer has not made publicly available.

**Public Information:** Public information includes all online information about a customer that a customer has made publicly available.

**Publicly Available Consumer Data:** Information acquired from consumer marketing and reporting organizations and other publicly available sources.

**Transactional Information:** Purchase information, including but not limited to date of purchase, source of purchase, recency of purchase, frequency of purchase, dollar amount of purchase, type of product or product category purchased, means of purchase, type of credit card used, other uses of online commerce.

**Use:** Processing, transmitting, transforming, or otherwise handling information. Includes promotional, advertising, and marketing use.

**Visitor:** A Visitor to our Web site. Visitors are different from Customers.  
(All Customers are Visitors, but not all Visitors are Customers.)

**Update Information:**

When we did it: 4 September 2003

What we did: Moved this Privacy Policy information to the policies.asp page

## Complaint

Geeks.com

Page 7 of 7

**Why we did it:** To remove Sales, Return, and Privacy Policy information from the "About Us" page and make it easier to find.

© Copyright 1996-2007 Geeks.com™ All Rights Reserved

Concerned about your personal information? [View Privacy Policies](#)

## Decision and Order

**DECISION AND ORDER**

The Federal Trade Commission, having initiated an investigation of certain acts and practices of the Respondents named in the caption hereof, and the Respondents having been furnished thereafter with a copy of a draft of Complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued, would charge the Respondents with violation of the Federal Trade Commission Act; and

The Respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the Respondents of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by the Respondents that the law has been violated as alleged in such complaint, or that any of the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the Respondents have violated the Federal Trade Commission Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, 16 C.F.R. § 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Genica Corporation ("Genica") is a Delaware corporation with its principal office or place of business at 1890 Ord Way, Oceanside, California 92056.
2. Respondent Compgeeks.com also doing business as Computer Geeks Discount Outlet and Geeks.com

## Decision and Order

(“Compgeeks.com”) is a California corporation with its principal office or place of business at 1890 Ord Way, Oceanside, California 92056. Compgeeks.com is a wholly-owned subsidiary of Genica.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

**ORDER****DEFINITIONS**

For purposes of this Order, the following definitions shall apply:

1. “Personally identifiable information” or “personal information” shall mean individually identifiable information from or about an individual consumer including, but not limited to: (a) a first and last name; (b) a home or other physical address, including street name and name of city or town; (c) an email address or other online contact information, such as an instant messaging user identifier or a screen name; (d) a telephone number; (e) a Social Security number; (f) a driver’s license or other state-issued identification number; (g) credit or debit card information, including card number, expiration date, and security code; (h) a persistent identifier, such as a customer number held in a “cookie” or processor serial number, that is combined with other available data that identifies an individual consumer; or (i) any information that is combined with any of (a) through (h) above.
2. Unless otherwise specified, “respondents” shall mean Genica, Compgeeks.com, and their subsidiaries, divisions, affiliates, successors and assigns .
3. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

## Decision and Order

**I.**

**IT IS ORDERED** that respondents and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, website, or other device, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, the extent to which respondents maintain and protect the privacy, confidentiality, or integrity of any personal information collected from or about consumers.

**II.**

**IT IS FURTHER ORDERED** that respondents and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, website, or other device, shall, no later than the date of service of this order, establish and implement, and thereafter maintain, a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers. Such program, the content and implementation of which must be fully documented in writing, shall contain administrative, technical, and physical safeguards appropriate to respondents' size and complexity, the nature and scope of respondents' activities, and the sensitivity of the personal information collected from or about consumers, including:

- A. the designation of an employee or employees to coordinate and be accountable for the information security program;
- B. the identification of material internal and external risks to the security, confidentiality, and integrity of personal information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, and assessment of the sufficiency of any safeguards in place to control these risks. At a minimum, this risk assessment should include consideration of risks in each

## Decision and Order

area of relevant operation, including, but not limited to, (1) employee training and management, (2) information systems, including network and software design, information processing, storage, transmission, and disposal, and (3) prevention, detection, and response to attacks, intrusions, or other systems failure;

- C. the design and implementation of reasonable safeguards to control the risks identified through risk assessment, and regular testing or monitoring of the effectiveness of the safeguards' key controls, systems, and procedures;
- D. the development and use of reasonable steps to retain service providers capable of appropriately safeguarding personal information they receive from respondents and requiring service providers by contract to implement and maintain appropriate safeguards; and
- E. the evaluation and adjustment of respondents' information security program in light of the results of the testing and monitoring required by subpart C, any material changes to respondents' operations or business arrangements, or any other circumstances that respondents know or have reason to know may have a material impact on the effectiveness of their information security program.

**III.**

**IT IS FURTHER ORDERED** that, in connection with the online advertising, marketing, promotion, offering for sale, or sale of any product or service to consumers, in or affecting commerce, respondents, and their officers, agents, representatives, and employees, shall obtain initial and biennial assessments and reports ("Assessments") from a qualified, objective, independent third-party professional, who uses procedures and standards generally accepted in the profession. The reporting period for the Assessments shall cover: (1) the first one hundred eighty (180) days after service of the order for the initial Assessment; and (2) each two (2) year period

## Decision and Order

thereafter for ten (10) years after service of the order for the biennial Assessments. Each Assessment shall:

- A. set forth the specific administrative, technical, and physical safeguards that respondents have implemented and maintained during the reporting period to comply with Part II of this order;
- B. explain how such safeguards are appropriate to respondents' size and complexity, the nature and scope of respondents' activities, and the sensitivity of the personal information collected from or about consumers;
- C. explain how the safeguards that have been implemented meet or exceed the protections required by Part II of this order; and
- D. certify that respondents' security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of personal information is protected and has so operated throughout the reporting period.

Each Assessment shall be prepared and completed within sixty (60) days after the end of the reporting period to which the Assessment applies by: a person qualified as a Certified Information System Security Professional (CISSP) or as a Certified Information Systems Auditor (CISA); a person holding Global Information Assurance Certification (GIAC) from the SysAdmin, Audit, Network, Security (SANS) Institute; or a similarly qualified person or organization approved by the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

Respondents shall provide the initial Assessment to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, within ten (10) days after the Assessment has been prepared. All subsequent biennial



## Decision and Order

Assessments shall be retained by respondents until the order is terminated and provided to the Associate Director of Enforcement within ten (10) days of request.

**IV.**

**IT IS FURTHER ORDERED** that respondents shall maintain and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of:

- A. for a period of three (3) years after the date of preparation of each Assessment required under Part III of this order, all materials relied upon to prepare the Assessment, whether prepared by or on behalf of the respondents, including but not limited to all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, and any other materials relating to respondents' compliance with Parts II and III of this order, for the compliance period covered by such Assessment;
- B. unless covered by IV.A, for a period of five (5) years from the date of preparation or dissemination, whichever is later, all other documents relating to compliance with this order, including but not limited to:
  - 1. all advertisements and promotional materials containing any representations covered by this order, with all materials relied upon in disseminating the representation; and
  - 2. any documents, whether prepared by or on behalf of respondents, that call into question respondents' compliance with this order.

**V.**

**IT IS FURTHER ORDERED** that respondents shall deliver a copy of this order to all current and future principals, officers,

## Decision and Order

directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. Respondents shall deliver this order to such current personnel within thirty (30) days after service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

**VI.**

**IT IS FURTHER ORDERED** that respondents shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including, but not limited to: a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation(s) about which respondents learn fewer than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

**VII.**

**IT IS FURTHER ORDERED** that respondents shall, within one hundred eighty (180) days after service of this order, and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

**VIII.**

This order will terminate on March 16, 2029, or twenty (20) years from the most recent date that the United States or the

## Decision and Order

Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. any Part in this order that terminates in fewer than twenty (20) years;
- B. this order's application to any respondent that is not named as a defendant in such complaint; and
- C. this order if such complaint is filed after the order has terminated pursuant to this Part.

*Provided, further*, that if such complaint is dismissed or a federal court rules that respondent(s) did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order as to such respondent(s) will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

Analysis to Aid Public Comment

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

The Federal Trade Commission has accepted, subject to final approval, a consent agreement from Genica Corporation (“Genica”) and Compgeeks.com, also doing business as Computer Geeks Discount Outlet and Geeks.com (“Compgeeks.com”).

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement’s proposed order.

Genica and its wholly-owned subsidiary, Compgeeks.com, (collectively “respondents”) sell computer systems, peripherals, and consumer electronics to consumers over the internet, including through a website ([www.geeks.com](http://www.geeks.com)) operated by Compgeeks.com. Respondents operate a computer network that consumers use, in conjunction with the [www.geeks.com](http://www.geeks.com) website and web application, to obtain information and to buy their products. In selling products through the [www.geeks.com](http://www.geeks.com) website, respondents routinely collect sensitive information from consumers to obtain authorization for credit card purchases, including a first and last name, address, e-mail address, telephone number, credit card number, credit card expiration date, and credit card security code (hereinafter “personal information”). This information is particularly sensitive, because it can be used to facilitate payment card fraud and other consumer harm. This matter concerns alleged false or misleading representations respondents made about the security they provided for this information.

The Commission’s complaint alleges that respondents represented that they implemented reasonable and appropriate security measures to protect the privacy and confidentiality of personal information. The complaint alleges that this representation

## Analysis to Aid Public Comment

was false because respondents engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for sensitive personal information stored on their network. Among other things, respondents allegedly: (1) stored personal information in clear, readable text; (2) did not adequately assess the vulnerability of their web application and network to commonly known or reasonably foreseeable attacks, such as “Structured Query Language” (“SQL”) injection attacks; (3) did not implement simple, free or low-cost, and readily available defenses to such attacks; (4) did not use readily available security measures to monitor and control connections between computers on the network and from the network to the internet; and (5) failed to employ reasonable measures to detect and prevent unauthorized access to personal information, such as by logging or employing an intrusion detection system.

The complaint further alleges that since at least January 2007 and continuing through at least June 2007, hackers repeatedly exploited these vulnerabilities by using SQL injection attacks on the [www.geeks.com](http://www.geeks.com) website and web application. Through these attacks, the hackers allegedly found personal information stored on respondents’ network and exported the information of hundreds of customers, including credit card numbers, expiration dates, and security codes, over the internet to outside computers.

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

Part I of the proposed order prohibits respondents, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, from misrepresenting the extent to which respondents maintain and protect the privacy, confidentiality, or integrity of any personal information collected from or about consumers.

## Analysis to Aid Public Comment

Part II of the proposed order requires respondents to establish and maintain a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers. The written security program must contain administrative, technical, and physical safeguards appropriate to respondents' size and complexity, the nature and scope of respondents' activities, and the sensitivity of the personal information collected from or about consumers. Specifically the order requires respondents to:

- § Designate an employee or employees to coordinate and be accountable for the information security program;
- § Identify material internal and external risks to the security, confidentiality, and integrity of personal information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, and assess the sufficiency of any safeguards in place to control these risks;
- § Design and implement reasonable safeguards to control the risks identified through risk assessment, and regularly test or monitor the effectiveness of the safeguards' key controls, systems, and procedures;
- § Develop and use reasonable steps to retain service providers capable of appropriately safeguarding personal information they receive from respondents and requiring service providers by contract to implement and maintain appropriate safeguards; and
- § Evaluate and adjust respondents' information security program in light of the results of the testing and monitoring, any material changes to respondents' operations or business arrangements, or any other circumstances that respondents know or have reason to know may have a material impact on the effectiveness of their information security program.

## Analysis to Aid Public Comment

Part III of the proposed order requires that respondents, in connection with the online advertising, marketing, promotion, offering for sale, or sale of any product or service to consumers, obtain within 180 days, and on a biennial bases thereafter for a period of ten (10) years, an assessment and report from a qualified, objective, independent third-party professional, certifying, among other things, that respondents have in place a security program that provides protections that meet or exceed the protections required by Part II of the proposed order; and (2) respondents' security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of consumers' personal information is protected.

Parts IV through VIII of the proposed order are reporting and compliance provisions. Part IV requires respondents to retain documents relating to their compliance with the order. For most records, the order requires that the documents be retained for a five-year period. For the third-party assessments and supporting documents, respondents must retain the documents for a period of three years after the date that each assessment is prepared. Part V requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part VI ensures notification to the FTC of changes in corporate status. Part VII mandates that respondents submit an initial compliance report to the FTC, and make available to the FTC subsequent reports. Part VIII is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of the analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.

## Complaint

## IN THE MATTER OF

**THE DOW CHEMICAL COMPANY**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-4243; File No. 081 0214**Complaint, January 23, 2009 – Decision, March 31, 2009*

This consent order addresses the acquisition of Rohm & Haas Company by respondent Dow Chemical Company. Both companies manufacture, market, and sell acrylic monomers and acrylic polymers. The order requires Dow to divest to a Commission-approved buyer significant portions of its acrylic monomer, acrylic latex polymer, and hollow sphere particle businesses and to license to the acquirer certain intellectual property related to the production of the products in these businesses. The order requires Dow to continue to provide certain input products to the acquirer and to provide transition services for a short period of time to accomplish the transition of the divested assets. The order requires that Dow continue to provide site services to the acquirer in connection with the acrylic polymer production assets located in St. Charles, Louisiana, where the acquirer will operate a business unit that is located on the grounds of a larger Dow facility. In addition, Dow is required to supply hollow sphere particles and acrylic latex polymer for traffic paint to the acquirer at its manufacturing cost, until such time as the acquirer is able to develop its own manufacturing. Dow is also required to institute procedures to ensure that the other businesses it acquired from Rohm & Haas do not have access directly or indirectly to competitively sensitive non-public information regarding the divested assets, and is prohibited from using any such competitively sensitive non-public information it already has in an anticompetitive manner. The order gives the Commission the power to appoint an interim monitor to ensure that Dow expeditiously complies with all of its obligations and performs all of its responsibilities. If Dow fails to sell the divested assets within the specified period of time, the order allows for the appointment of a Divestiture Trustee to divest the assets. To ensure that the Commission remains informed about the status of the proposed divestitures and the transfers of assets, the order requires Dow to file reports with the Commission periodically until the divestitures and transfers are accomplished.



## Complaint

*Participants*

For the *Commission*: *Michael Franchak, Sebastian Lorigo, Victoria E. Luxardo, Catharine M. Moscatelli, Robert Tovsky, and Mark Williams.*

For the *Respondent*: *George Cary and Jeremy J. Calsyn, Cleary Gottlieb Steen & Hamilton LLP.*

**COMPLAINT**

Pursuant to the provisions of the Federal Trade Commission Act and of the Clayton Act, and by virtue of the authority vested by said Acts, the Federal Trade Commission (the “Commission”), having reason to believe that respondent Dow Chemical Company (“Dow”), a corporation, and Rohm and Haas Company (“Rohm & Haas”), a corporation, both subject to the jurisdiction of the Commission, have agreed to an acquisition by Dow of Rohm & Haas in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

**I. RESPONDENT**

1. Respondent Dow is a corporation organized and existing under the laws of the State of Delaware, with its principle place of business at 2030 Dow Center, Midland, MI 48674. Dow is a global company engaged in a wide variety of chemical businesses, including the research, development, manufacture, and sale of acrylic monomers, acrylic latex polymers, and hollow sphere particles.

**II. JURISDICTION**

2. Dow is, and at all times relevant herein has been, engaged in commerce as “commerce” is defined in Section 1 of the Clayton Act,

## Complaint

as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

**III. THE PROPOSED TRANSACTION**

3. Pursuant to an Agreement and Plan of Merger (the “Merger Agreement”) dated July 10, 2008, Dow proposes to purchase all of the outstanding shares of Rohm & Haas in a transaction valued at \$18.8 billion, including \$3.5 billion in debt assumptions. Both Dow and Rohm & Haas manufacture, market, and sell acrylic monomers and acrylic polymers.

**IV. THE RELEVANT PRODUCT MARKETS**

4. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the acquisition are: (a) glacial acrylic acid; (b) butyl acrylate; (c) ethyl acrylate; (d) acrylic latex polymers for traffic paint; and (d) hollow sphere particles. There are no practical substitutes for any of the relevant products.

5. Glacial acrylic acid is an acrylic monomer made from purifying crude acrylic acid. Glacial acrylic acid is used primarily in the production of superabsorbent polymers which are used in personal care and hygiene products, such as diapers.

6. Butyl acrylate is an acrylic monomer used primarily to produce polymers for paints and architectural coatings because it provides for a soft and flexible film.

7. Ethyl acrylate is an acrylic monomer used to produce polymers that are used in textile applications where abrasion resistance is required.

8. Acrylic latex polymers for traffic paint is a type of polymer uniquely produced and used in traffic paint. The purpose of acrylic latex polymer in traffic paint is to act as a binder, i.e., to keep the coating ingredients together; to bind the coating to the road surface;

## Complaint

and to adhere glass beads that are used in traffic paint to the actual coating.

9. Hollow sphere particles are a type of polymer used by paper companies to impart gloss, brightness, and opacity to paper.

**V. THE RELEVANT GEOGRAPHIC MARKET**

10. The relevant geographic market within which to analyze the likely effects of the proposed transaction is no broader than North America. Acrylic monomer imports for glacial acrylic acid, butyl acrylic acid, and ethyl acrylic acid have established a small presence in North America, but their competitive impact has been constrained by increases in production costs overseas, by increases in shipping costs, and by growing demand overseas. There are virtually no imports of acrylic polymers, including latex polymers for traffic paint and hollow sphere particles, due to the large amounts of water contained in these latex polymers making long-distance shipping relatively expensive.

**VI. CONCENTRATION IN THE RELEVANT MARKETS**

11. Each of the acrylic monomer markets is highly concentrated. Post-acquisition, Dow would have an over 40 percent share of the glacial acrylic acid market. Its share of the butyl acrylate market would exceed 75 percent; and its share of ethyl acrylate market would approach 90 percent. After the acquisition, the only other producer that would be similarly situated to Dow would be BASF, which, like Dow, produces large amounts of both acrylic monomers and polymers.

12. Dow and Rohm & Haas are the only two commercial producers of acrylic polymers for traffic paint and hollow sphere particles. As a result, Dow's acquisition of Rohm and Haas would result in a merger to monopoly in those markets.

## Complaint

**VII. CONDITIONS OF ENTRY**

13. Entry into the relevant acrylic monomer markets for glacial acrylic acid, butyl acrylate and ethyl acrylate would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the acquisition. The design, construction, and licensing requirements for an acrylic monomer facility that produces these products would require an investment of hundreds of millions of dollars and would take several years to complete. Expansion by fringe competitors would also be costly and is unlikely to occur.

14. Entry into latex polymers for traffic paint would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the acquisition. Dow and Rohm and Haas have patented formulas for their latex polymers used in traffic paint and state by state approval is required before new suppliers or formulas can be used in traffic paint.

15. Entry into hollow sphere particles would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the acquisition. Product development of hollow sphere particles would be difficult and time consuming due to the patents and trade secrets associated with the product and the great deal of experience in producing and manufacturing hollow sphere particles necessary to provide a quality product.

**VIII. EFFECTS OF THE ACQUISITION**

16. The effects of the acquisition, if consummated, may be substantially to lessen competition and tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45. Specifically, the acquisition would:

- a. eliminate actual, direct, and substantial competition between Dow and Rohm & Haas in the relevant markets;

## Order to Maintain Assets

- b. increase the likelihood that Dow will exercise market power unilaterally in the relevant markets; and
- c. increase the likelihood of coordinated interaction among competitors in the markets for glacial acrylic acid, butyl acrylate and ethyl acrylate.

**IX. VIOLATIONS CHARGED**

17. The Merger Agreement described in Paragraph 3 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

18. The transaction described in Paragraph 3, if consummated, would constitute a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

**WHEREFORE, THE PREMISES CONSIDERED,** the Federal Trade Commission on this twenty-third day of January, 2009, issues its Complaint against said Respondent.

By the Commission.

**ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS**

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Respondent The Dow Chemical Company (hereinafter “Dow,” “Respondent,” or “Respondent Dow”) of Rohm and Haas Company (“R&H”), and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7

## Order to Maintain Assets

of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

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

1. Respondent Dow is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal executive offices located at 2030 Dow Center, Midland, Michigan 48674.
2. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

**ORDER****I.**

## Order to Maintain Assets

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

- A. “Acquirers” means the Acrylic & Latex Business Acquirer and the Hollow Sphere Particle Business Acquirer.
- B. “Acquisition” means the proposed acquisition of R&H by Dow pursuant to the Agreement and Plan of Merger dated July 10, 2008, as may be amended by Dow and R&H.
- C. “Acquisition Date” means the date the Acquisition is consummated.
- D. “Acrylic Acid Business” means all of Respondent’s right, title, and interest in all tangible and intangible property of any kind primarily relating to or Necessary for the research and development of Acrylic Acid Products in the United States, the production and manufacture of Acrylic Acid Products at the Clear Lake Facility, and the marketing and sale of Acrylic Acid Products in North, South, and Central America, including, but not limited to, the:
  - 1. Clear Lake Facility;
  - 2. South Charleston Assets;
  - 3. Acrylic Acid Business Books and Records;
  - 4. Divested Acrylic Acid Business Intellectual Property;
  - 5. Acrylic Acid Business Intellectual Property License;
  - 6. Acrylic Acid Business Contracts; and
  - 7. Acrylic Acid Business Inventories;

*Provided, however,* Acrylic Acid Business does not include:

## Order to Maintain Assets

1. Any tangible or intangible property acquired by Respondent through the Acquisition or after the Effective Date of Divestiture of the Acrylic Acid Business;
  2. The Retained St. Charles Assets;
  3. Ownership of the Shared St. Charles Facility Assets; or
  4. Ownership of the Licensed Acrylic Acid Product Intellectual Property.
- E. “Acrylic & Latex Business Acquirer” means the Person approved by the Commission to acquire the Acrylic Acid Business and the Latex Polymers Business pursuant to Paragraph III of the Decision and Order.
- F. “Acrylic & Latex Key Employees” means the persons listed on Confidential Appendix A of the Decision and Order.
- G. “Acrylic & Latex Knowledgeable Employees” means any Person (a) employed by or under contract directly with Respondent at the Effective Date of Divestiture, and (b)(i) whose duties at any time between July 10, 2008, and the Effective Date of Divestiture primarily related to the Acrylic Acid Business or the Latex Polymers Business, or (ii) who is Necessary for the Acrylic Acid Business or the Latex Polymers Business;
- Provided, however, Acrylic & Latex Knowledgeable Employees do not include the Persons listed on Confidential Appendix B of the Decision and Order.*
- H. “Acrylic Acid Products” means crude acrylic acid, glacial acrylic acid, ethyl acrylate, and butyl acrylate.
- I. “Commission” means the Federal Trade Commission.



## Order to Maintain Assets

- J. “Decision and Order” means:
1. until the issuance and service of a final Decision and Order by the Commission, the proposed Decision and Order contained in the Consent Agreement in this matter; and
  2. following the issuance and service of a final Decision and Order by the Commission, the final Decision and Order issued by the Commission.
- K. “Dow” or “Respondent” means The Dow Chemical Company, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by The Dow Chemical Company, and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.
- L. “Dow Confidential Information” means competitively sensitive or proprietary information of Respondent not related to the Held Separate Business and the Hollow Sphere Particle Business, including, but not limited to, all customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets;
- Provided, however,* that Dow Confidential Information shall not include:
1. Information that is in the public domain when received by the Held Separate Business or the Hollow Sphere Particle Business;
  2. Information that is not in the public domain when received by the Held Separate Business or the Hollow Sphere Particle Business and thereafter becomes public

## Order to Maintain Assets

through no act or failure to act by the Held Separate Business or the Hollow Sphere Particle Business;

3. Information that the Held Separate Business or the Hollow Sphere Particle Business develops or obtains independently, without violating any applicable law or this Order; and
  4. Information that becomes known to the Held Separate Business or the Hollow Sphere Particle Business from a third party not in breach of applicable law or a confidentiality obligation with respect to the information.
- M. “Effective Date of Divestiture” means, as the context requires, the date upon which Respondent closes a divestiture of the Acrylic Acid Business, Latex Polymers Business, or Hollow Sphere Particle Business in compliance with the terms of this Order.
- N. “Held Separate Business” means the Acrylic Acid Business and the Latex Polymers Business as defined in this Order and the Decision and Order.
- O. “Hold Separate Period” means the time period beginning on the Acquisition Date and terminating pursuant to Paragraph VII hereof.
- P. “Hold Separate Trustee” means the individual appointed to act as the Hold Separate Trustee pursuant to Paragraph II.C hereof.
- Q. “Hollow Sphere Particle Business” means:
1. All of Respondent’s right, title, and interest in intangible property of any kind primarily relating to the research, development, production, and manufacture in the United States and the marketing and sale in the United States,

## Order to Maintain Assets

Puerto Rico, Mexico and Canada of Hollow Sphere Particle Products, including, but not limited to, the:

- a. Divested Hollow Sphere Particle Business Intellectual Property; and
  - b. Hollow Sphere Particle Business Contracts;
2. The following additional assets:
- a. At the option of the Hollow Sphere Particle Business Acquirer, and subject to the prior approval of the Commission, all equipment and machinery that Respondent has used since January 1, 2006, and is Necessary for the research, development, production, and manufacture in the United States and the marketing and sale in the United States, Puerto Rico, Canada, and Mexico of Hollow Sphere Particle Products;
  - b. Hollow Sphere Particle Business Books and Records;
  - c. Hollow Sphere Particle Business Intellectual Property License; and d. Hollow Sphere Particle Business Inventories;

*Provided, however,* that Hollow Sphere Particle Business does not include:

1. Any tangible or intangible property acquired by Respondent through the Acquisition or after the Effective Date of Divestiture;
2. Any interest in any real property or fixtures, including reactors, storage tanks, cooling towers, pipelines, control rooms, and any other fixed equipment at Dow's Midland, Michigan facility;

## Order to Maintain Assets

3. Any interest in any tangible or personal property, except as provided in I.Q.2 above; and
  4. Ownership of the Licensed Hollow Sphere Product Intellectual Property.
- R. “Hollow Sphere Particle Business Acquirer” means the Person approved by the Commission to acquire the Hollow Sphere Particle Business pursuant to Paragraph IV of the Decision and Order.
- S. “Hollow Sphere Particle Key Employees” means the persons listed on Confidential Appendix C of the Decision and Order.
- T. “Hollow Sphere Particle Knowledgeable Employees” means any Person: (a) employed by or under contract directly with Respondent at the Effective Date of Divestiture, and (b)(i) whose duties at any time between July 10, 2008, and the Effective Date of Divestiture primarily related to the Hollow Sphere Particle Business, or (ii) who is Necessary for, the Hollow Sphere Particle Business; provided, however, Hollow Sphere Particle Knowledgeable Employees do not include the Persons listed on Confidential Appendix D of the Decision and Order.
- U. “Latex Polymers Business” means all of Respondent’s right, title, and interest in all tangible and intangible property of any kind primarily relating to or Necessary for the research and development of Latex Polymers Products in the United States, the production and manufacture of Latex Polymers Products at the Alsip Facility, the St. Charles Facility, and the Torrance Facility, and the marketing and sale of Latex Polymers Products in the United States, Puerto Rico, Canada, and Mexico, including, but not limited to, the:
1. The Alsip Facility;

## Order to Maintain Assets

2. The Cary Facility;
3. The St. Charles Facility;
4. The Torrance Facility;
5. Latex Polymers Business Books and Records;
6. Divested Latex Polymers Business Intellectual Property;
7. Latex Polymers Business Intellectual Property License;
8. Latex Polymers Business Contracts;
9. Latex Polymers Business Inventories;
10. Latex Polymers Business Trademark Rights;
11. Latex Polymers Retained Products Intellectual Property Rights; and
12. MOD 5 License.

*Provided, however,* Latex Polymers Business does not include:

1. Any tangible or intangible property acquired by Respondent through the Acquisition or after the Effective Date of Divestiture;
2. Any tangible assets used in the research, development, production, manufacture, marketing, and sale of Latex Polymers Products located in Midland, MI, other than the assets listed on Confidential Appendix E of the Decision and Order;
3. Ownership of the Licensed Latex Polymers Intellectual Property;

## Order to Maintain Assets

4. Any interest in any trademarks other than the Latex Polymers Business Trademark Rights; and
  5. Any rights in the Latex Polymers Retained Products Intellectual Property other than the Latex Polymers Retained Products Intellectual Property Rights.
- V. “Material Confidential Information” means any material non-public information relating to the Divested Businesses either prior to or after the Effective Date of Divestiture, including, but not limited to, all customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets, relating to the Divested Businesses and:
1. Obtained by Respondent prior to the Effective Date of Divestiture; or
  2. Obtained by Respondent after the Effective Date of Divestiture, in the course of performing Respondent’s obligations under any Divestiture Agreement;

*Provided, however,* that Material Confidential Information shall not include:

1. Information that is in the public domain when received by Respondent;
2. Information that is not in the public domain when received by Respondent and thereafter becomes public through no act or failure to act by Respondent;
3. Information that Respondent develops or obtains independently, without violating any applicable law, this Order or the Decision and Order; and
4. Information that becomes known to Respondent from a third party not in breach of applicable law or a

## Order to Maintain Assets

confidentiality obligation with respect to the information.

- W. “R&H” means Rohm and Haas Company, 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 100 Independence Mall West, Philadelphia, Pennsylvania 19106, and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Rohm and Haas Company.

**II.**

**IT IS FURTHER ORDERED** that:

- A. From the date this Hold Separate Order becomes final, Respondent shall take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Acrylic Acid Business, the Latex Polymers Business, and the Hollow Sphere Particle Business, and shall prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer, or impairment of the Acrylic Acid Business, the Latex Polymers Business, and the Hollow Sphere Particle Business and assets related thereto except for ordinary wear and tear, including, but not limited to, continuing in effect and maintaining intellectual property, contracts, proprietary trademarks, trade names, logos, trade dress, identification signs, and renewing or extending any leases or licenses that expire or terminate prior to the Effective Date of Divestiture.
- B. Respondent shall not close the Acquisition until Respondent delivers to the Secretary of the Commission a notice of Respondent’s intent to close the Acquisition (“Notice of Intent to Close Acquisition”) stating the date upon which Respondent intends to close the Acquisition.

## Order to Maintain Assets

- C. From the Acquisition Date, Respondent shall hold the Held Separate Business as one separate and independent business under the terms specified in this Hold Separate Order, except to the extent that Respondent must exercise direction and control over the Held Separate Business to assure compliance with this Hold Separate Order and with the Decision and Order contained in the Consent Agreement, and except as otherwise provided in this Hold Separate Order. Respondent shall vest the Held Separate Businesses and Hold Separate Trustee with all powers and authorities necessary to conduct its business.
- D. From the Acquisition Date, Respondent shall hold the Held Separate Business separate, apart, and independent on the following terms and conditions:
1. Richard M. Klein shall serve as Hold Separate Trustee, pursuant to the agreement executed by the Hold Separate Trustee and Respondent and attached as Confidential Appendix A (“Trustee Agreement”).
    - a. The Trustee Agreement shall require that, no later than three (3) business days after the Acquisition Date, Respondent transfer to the Hold Separate Trustee all rights, powers, and authorities necessary to permit the Hold Separate Trustee to perform his duties and responsibilities, pursuant to this Hold Separate Order and consistent with the purposes of the Decision and Order.
    - b. No later than three (3) business days after the Acquisition Date, Respondent shall, pursuant to the Trustee Agreement, transfer to the Hold Separate Trustee all rights, powers, and authorities necessary to permit the Hold Separate Trustee to perform his duties and responsibilities, pursuant to this Hold Separate Order and consistent with the purposes of the Decision and Order.



## Order to Maintain Assets

- c. The Hold Separate Trustee shall have the responsibility, consistent with the terms of this Hold Separate Order and the Decision and Order, for monitoring the organization of the Held Separate Business; for managing the Held Separate Business through the Managers; for maintaining the independence of the Held Separate Business; and for monitoring Respondent's compliance with its obligations pursuant to this Hold Separate Order and the Decision and Order.
- d. Subject to all applicable laws and regulations, the Hold Separate Trustee shall have full and complete access to all personnel, books, records, documents and facilities of the Held Separate Business or to any other relevant information as the Hold Separate Trustee may reasonably request including, but not limited to, all documents and records kept by Respondent in the ordinary course of business that relate to the Held Separate Business. Respondent shall develop such financial or other information as the Hold Separate Trustee may request and shall cooperate with the Hold Separate Trustee. Respondent shall take no action to interfere with or impede the Hold Separate Trustee's ability to monitor Respondent's compliance with this Hold Separate Order and the Decision and Order or otherwise to perform his duties and responsibilities consistent with the terms of this Hold Separate.
- e. The Hold Separate Trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Hold Separate Trustee's duties and responsibilities.

## Order to Maintain Assets

- f. The Commission may require the Hold Separate Trustee to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with performance of the Hold Separate Trustee's duties.
- g. Respondent may require the Hold Separate Trustee to sign a confidentiality agreement prohibiting the disclosure of any confidential business information gained as a result of his or her role as Hold Separate Trustee to anyone other than the Commission.
- h. Thirty (30) days after the Acquisition Date, and every thirty (30) days thereafter until the Hold Separate Order terminates, the Hold Separate Trustee shall report in writing to the Commission concerning the efforts to accomplish the purposes of this Hold Separate Order. Included within that report shall be the Hold Separate Trustee's assessment of the extent to which the businesses comprising the Held Separate Business are meeting (or exceeding) their projected goals as are reflected in operating plans, budgets, projections or any other regularly prepared financial statements.
- i. If the Hold Separate Trustee ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate Order, the Commission may appoint a substitute Hold Separate Trustee consistent with the terms of this paragraph, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of the substitute Hold Separate Trustee within five (5) business days after notice by the staff of the Commission to Respondent of the identity of any substitute Hold Separate Trustee, Respondent shall be deemed to have

## Order to Maintain Assets

consented to the selection of the proposed substitute trustee. Respondent and the substitute Hold Separate Trustee shall execute a Trustee Agreement, subject to the approval of the Commission, consistent with this paragraph.

2. No later than five (5) business days after the Acquisition Date, Respondent shall enter into one or more management agreements with Alessandro Trombini and Richard Jenkins. No later than five (5) business days after the Acquisition Date, Respondent shall, pursuant to the management agreements transfer all rights, powers, and authorities necessary to manage and maintain the Held Separate Business, to the Managers,
  - a. In the event that either or both of the Manager(s) cease(s) to act as Managers, then Respondent shall select substitute Manager(s), subject to the approval of the Commission, and transfer to the substitute Manager(s) all rights, powers and authorities necessary to permit the substitute Manager(s) to perform his/her/their duties and responsibilities, pursuant to this Hold Separate Order.
  - b. The Managers shall report directly and exclusively to the Hold Separate Trustee and shall manage the Held Separate Business independently of the management of Respondent. The Managers shall not be involved, in any way, in the operations of the other businesses of Respondent during the term of this Hold Separate Order.
  - c. The Managers shall have no financial interests (other than existing options and interests in securities of Respondent) affected by Respondent's revenues, profits or profit margins, except that the compensation of the Managers for managing the Held Separate Business may include economic

## Order to Maintain Assets

incentives dependent on the financial performance of the Held Separate Business if there are also sufficient incentives for the Managers to operate the Held Separate Business at no less than current rates of operation (including, but not limited to, current rates of production and sales) and to achieve the objectives of this Hold Separate Order.

- d. The Managers shall make no material changes in the present operation of the Held Separate Business except with the approval of the Hold Separate Trustee, in consultation with the Commission staff.
- e. The Managers shall have the authority, with the approval of the Hold Separate Trustee, to remove employees (including Acrylic & Latex Key Employees and Acrylic & Latex Knowledgeable Employees) of the Acrylic Acid Business and the Latex Polymers Business and replace them with others of similar experience or skills. If any person ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate Order, the Managers, in consultation with the Hold Separate Trustee, may request Respondent to, and Respondent shall, appoint a substitute person, which person the Managers shall have the right to approve.
- f. In addition to those employees within the Held Separate Business, the Managers may employ such Persons as are reasonably necessary to assist the Managers in managing the Held Separate Business.
- g. The Hold Separate Trustee shall be permitted, in consultation with the Commission staff, to remove the Manager(s) for cause. Within fifteen (15) days after such removal of the Manager(s), Respondent shall appoint replacement Manager(s), subject to the approval of the Commission, on the same terms and

## Order to Maintain Assets

conditions as provided in Paragraph II.C.2 of this Hold Separate Order.

3. The Held Separate Business shall be staffed with sufficient employees to maintain the viability and competitiveness of the Held Separate Business. To the extent that any Acrylic & Latex Key Employees leave or have left the Held Separate Business prior to the Effective Date of Divestiture, the Managers, with the approval of the Hold Separate Trustee, may replace departing or departed Acrylic & Latex Key Employees with persons who have similar experience and expertise or determine not to replace such departing or departed Acrylic & Latex Key Employees.
4. In connection with support services or products not included within the Held Separate Business, Respondent shall continue to provide, or offer to provide, the same support services or products to the Held Separate Business as are being provided to such business interest by Respondent as of the date the Consent Agreement is signed by Respondent. For any services or products that Respondent may provide to the Held Separate Business, Respondent may charge no more than the same price they charge other similarly situated businesses for the same services or products. Respondent's personnel providing such services or products must retain and maintain all Material Confidential Information of the Held Separate Business on a confidential basis, and, except as is permitted by this Hold Separate Order or the Decision and Order, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any person whose employment involves any of Respondent's businesses, other than the Held Separate Business, except as needed to provide such services or products to the Held Separate Business. Such personnel shall also

## Order to Maintain Assets

execute confidentiality agreements prohibiting the disclosure of any Material Confidential Information of the Held Separate Business except as permitted by this Hold Separate Order or the Decision and Order.

- a. Respondent shall offer to the Held Separate Business any services and products that it has provided directly or through third party contracts to the businesses constituting the Held Separate Business at any time since January 1, 2006. The Held Separate Business may, at the option of the Managers with the approval of the Hold Separate Trustee, obtain such services and products from Respondent. The services and products that Respondent shall offer the Held Separate Business shall include, but shall not be limited to, the following:
  - (1) Human resources administrative services, including but not limited to payroll processing, labor relations support, pension administration, and health benefits;
  - (2) Environmental health and safety services, which are used to develop corporate policies and insure compliance with federal and state regulations and corporate policies;
  - (3) Preparation of tax returns;
  - (4) Audit services;
  - (5) Information systems, which constructs, maintains, and supports all computer systems;
  - (6) Processing of accounts payable;
  - (7) Technical support;

## Order to Maintain Assets

- (8) Finance and financial accounting services;
  - (9) Procurement of supplies;
  - (10) Procurement of goods and services utilized in the ordinary course of business by the Held Separate Business; and
  - (11) Legal services;
- b. the Held Separate Business shall have, at the option of the Managers with the approval of the Hold Separate Trustee, the ability to acquire services and products from third parties unaffiliated with Respondent.
5. Respondent shall cause the Hold Separate Trustee, the Managers, and each Acrylic & Latex Knowledgeable Employee and Acrylic & Latex Key Employee having access to Material Confidential Information to submit to the Commission a signed statement that the individual will maintain the confidentiality required by the terms and conditions of this Hold Separate Order. These individuals must retain and maintain all Material Confidential Information relating to the Held Separate Business on a confidential basis and, except as is permitted by this Hold Separate Order or the Decision and Order, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any of Respondent's businesses other than the Held Separate Business. These persons shall not be involved in any way in the management, production, distribution, sale, marketing or financial operations of the competing products of Respondent.

## Order to Maintain Assets

6. No later than five (5) business days after the Acquisition Date, Respondent shall establish written procedures, subject to the approval of the Hold Separate Trustee, covering the management, maintenance, and independence of the Held Separate Business consistent with the provisions of this Hold Separate Order.
7. No later than five (5) business days after the date this Hold Separate Order becomes final, Respondent shall circulate to employees of the Held Separate Business and to Respondent's employees who are responsible for the development, manufacture and sale of Acrylic Acid Products and Latex Polymers Products, a notice of this Hold Separate Order and the Decision and Order.
8. The Hold Separate Trustee and the Managers shall serve, without bond or other security, at the cost and expense of Respondent, on reasonable and customary terms commensurate with the person's experience and responsibilities.
9. Respondent shall indemnify the Hold Separate Trustee and Managers and hold each harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Hold Separate Trustee's or the Managers' 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 liabilities, losses, damages, claims, or expenses result from malfeasance, gross negligence, willful or wanton acts, or bad faith by the Hold Separate Trustee or the Managers.
10. Respondent shall provide the Held Separate Business with sufficient financial resources:



## Order to Maintain Assets

- a. as are appropriate in the judgment of the Hold Separate Trustee to operate the Held Separate Business as it is currently operated;
- b. to perform all maintenance to, and replacements of, the assets of the Held Separate Business;
- c. to carry on (i) existing capital projects, (ii) approved capital projects, and (iii) business plans to allow the Held Separate Business to be operated at current levels of production and sales; and
- d. to maintain the viability, competitive vigor, and marketability of the Held Separate Business.

Such financial resources to be provided to the Held Separate Business shall include, but shall not be limited to, (i) general funds, (ii) capital, (iii) working capital, and (iv) reimbursement for any operating losses, capital losses, or other losses; *provided, however*, that, consistent with the purposes of the Decision and Order, the Managers may reduce in scale or pace any capital or research and development project, or substitute any capital or research and development project for another of the same cost.

11. Respondent shall: (i) not directly or indirectly interfere with the Acrylic & Latex Business Acquirer's offer of employment to any one or more of the Acrylic & Latex Key Employees and Acrylic & Latex Knowledgeable Employees, directly or indirectly attempt to persuade any one or more of the Acrylic & Latex Key Employees and Acrylic & Latex Knowledgeable Employees to decline any offer of employment from the Acrylic & Latex Business Acquirer, or offer any incentive to Acrylic & Latex Key Employees and Acrylic & Latex Knowledgeable Employees to decline employment with the Acrylic & Latex Business Acquirer; (ii) irrevocably

## Order to Maintain Assets

waive any legal or equitable right to deter Acrylic & Latex Key Employees and Acrylic & Latex Knowledgeable Employees from accepting employment with the Acrylic & Latex Business Acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondent that directly or indirectly relate to the Acrylic Acid Business or the Latex Polymers Business; and (iii) continue to extend to Acrylic & Latex Key Employees and Acrylic & Latex Knowledgeable Employees, during their employment by the Acrylic Acid Business or the Latex Polymers Business prior to the Effective Date of Divestiture, all employee benefits offered by Respondent, including regularly scheduled or merit raises and bonuses, and regularly scheduled vesting of all pension benefits.

12. For a period of one (1) year from the Effective Date of Divestiture, Respondent shall not, directly or indirectly, solicit or induce, or attempt to solicit or induce, any Acrylic & Latex Knowledgeable Employee who has accepted an offer of employment with, or who is employed by, the Acrylic & Latex Business Acquirer to terminate his or her employment relationship with the Acrylic & Latex Business Acquirer; provided, however, a violation of this provision will not occur if: (1) The Acrylic & Latex Knowledgeable Employee's employment has been terminated by the Acrylic & Latex Business Acquirer; (2) Respondent Dow advertises for employees in newspapers, trade publications, or other media not targeted specifically at any one or more of the employees of the Acrylic & Latex Business Acquirer; or (3) Respondent Dow hires an Acrylic & Latex Knowledgeable Employee who has applied for employment with Respondent Dow, provided that such application was not solicited or induced in violation of this Order.

## Order to Maintain Assets

13. For a period of two (2) years from the Effective Date of Divestiture, Respondent shall not solicit, negotiate, hire or enter into any arrangement for the services of any Acrylic & Latex Key Employee who has accepted an offer of employment with, or who is employed by, the Acrylic & Latex Business Acquirer.
14. Except for the Managers, Acrylic & Latex Knowledgeable Employees, and Acrylic & Latex Key Employees, and support services employees involved in providing services to the Held Separate Business pursuant to this Held Separate Order, and except to the extent provided in Paragraph II.B., Respondent shall not permit any other of its employees, officers, or directors to be involved in the operations of the Held Separate Business.
15. Respondent's employees (excluding support services employees involved in providing support to the Held Separate Business pursuant to Paragraph II.C.) shall be prohibited from accessing, and shall not receive, use or continue to use any Material Confidential Information of the Held Separate Business not in the public domain except:
  - a. as required by law;
  - b. to the extent that necessary information is exchanged in the course of consummating the Acquisition;
  - c. in negotiating agreements to divest assets pursuant to the Decision and Order and engaging in related due diligence;
  - d. in complying with this Hold Separate Order, the Consent Agreement or the Decision and Order;

## Order to Maintain Assets

- e. in overseeing compliance with policies and standards concerning the safety, health and environmental aspects of the operations of the Held Separate Business and the integrity of the Held Separate Business's financial controls;
- f. in defending legal claims, investigations or enforcement actions threatened or brought against or related to the Held Separate Business; or in obtaining legal advice; and
- g. as otherwise permitted by this Hold Separate Order or the Decision and Order.

Respondent may receive aggregate financial and operational information relating to the Held Separate Business only to the extent necessary to allow Respondent to comply with the requirements and obligations of the laws of the United States and other countries, and to prepare consolidated financial reports, tax returns, reports required by securities laws, and personnel reports. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph.

- 16. The Managers, Acrylic & Latex Knowledgeable Employees, and Acrylic & Latex Key Employees shall execute confidentiality agreements prohibiting the access, receipt, use, continued use, or disclosure of any Dow Confidential Information not in the public domain about Respondent and relating to Respondent's businesses, except such information as is necessary to maintain and operate the Held Separate Business.
- 17. Respondent and the Held Separate Business shall jointly implement and at all times during the Hold Separate Period maintain in operation, policies or systems, as approved by the Hold Separate Trustee, to prevent

## Order to Maintain Assets

unauthorized access to or dissemination of Material Confidential Information of the Held Separate Business, including, but not limited to, the opportunity by the Hold Separate Trustee, on terms and conditions agreed to with Respondent, to audit Respondent's networks and systems to verify compliance with this Hold Separate Order.

- E. In addition to Respondent's obligation to maintain the full economic viability, marketability, and competitiveness of the Hollow Sphere Particle Business under Paragraph II.A. of this Hold Separate Order, from the Acquisition Date Respondent's obligations shall include, but not be limited to, the following:
1. Respondent shall provide the Hollow Sphere Particle Business with sufficient employees to maintain the viability and competitiveness of the Hollow Sphere Particle Business. Subject to the confidentiality provisions in this Order requiring Hollow Sphere Particle Business employee resources to retain and maintain all Material Confidential Information of the Hollow Sphere Particle Business on a confidential basis, those employees may also continue to support Dow's other businesses. To the extent that any Hollow Sphere Particle Key Employees leave or have left the Hollow Sphere Particle Business prior to the Effective Date of Divestiture, the Respondent, with the approval of the Hold Separate Trustee, may replace departing or departed Hollow Sphere Particle Key Employees with persons who have similar experience and expertise or determine not to replace such departing or departed Hollow Sphere Particle Key Employees.
  2. In connection with support services or products not included within the Hollow Sphere Particle Business, Respondent shall continue to provide, or offer to provide, the same support services or products to the

## Order to Maintain Assets

Hollow Sphere Particle Business as are being provided to such business interest by Respondent as of the date the Consent Agreement is signed by Respondent. For any services or products that Respondent may provide to the Hollow Sphere Particle Business, Respondent may charge no more than the same price they charge other similarly situated businesses for the same services or products. Respondent's personnel providing such services or products must retain and maintain all Material Confidential Information of the Hollow Sphere Particle Business on a confidential basis, and, except as is permitted by this Hold Separate Order or the Decision and Order, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any person whose employment does not involve the Hollow Sphere Particle Business. Such personnel shall also execute confidentiality agreements prohibiting the disclosure of any Material Confidential Information of the Hollow Sphere Particle Business.

- a. Respondent shall offer to the Hollow Sphere Particle Business any services and products that Respondent has provided directly or through third party contracts to the businesses constituting the Hollow Sphere Particle Business at any time since January 1, 2006. The Hollow Sphere Particle Business may obtain such services and products from Respondent. The services and products that Respondent shall offer the Hollow Sphere Particle Business shall include, but shall not be limited to, the following:
  - (1) Human resources administrative services, including but not limited to payroll processing, labor relations support, pension administration, and health benefits;

## Order to Maintain Assets

- (2) Environmental health and safety services, which are used to develop corporate policies and insure compliance with federal and state regulations and corporate policies;
  - (3) Preparation of tax returns;
  - (4) Audit services;
  - (5) Information systems, which constructs, maintains, and supports all computer systems;
  - (6) Processing of accounts payable;
  - (7) Technical support;
  - (8) Finance and financial accounting services;
  - (9) Procurement of supplies;
  - (10) Procurement of goods and services utilized in the ordinary course of business by the Hollow Sphere Particle Business; and,
  - (11) Legal services;
- b. the Hollow Sphere Particle Business shall have, with the approval of the Hold Separate Trustee, the ability to acquire services and products from third parties unaffiliated with Respondent.
3. Respondent shall cause the Hold Separate Trustee and each of the Hollow Sphere Particle Knowledgeable Employees and Hollow Sphere Particle Key Employees having access to Material Confidential Information to submit to the Commission a signed statement that the individual will maintain the confidentiality required by the terms and conditions of this Hold Separate Order. These individuals must retain and maintain all Material

## Order to Maintain Assets

Confidential Information relating to the Hollow Sphere Particle Business on a confidential basis and, except as is permitted by this Hold Separate Order or the Decision and Order, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment does not involve the Hollow Sphere Particle Business. These persons shall not be involved in any way in the management, production, distribution, sale, marketing or financial operations of the R&H hollow sphere particle business.

4. No later than five (5) business days after the Acquisition Date, Respondent shall establish written procedures, subject to the approval of the Hold Separate Trustee, covering the management and maintenance of the Hollow Sphere Particle Business consistent with the provisions of this Hold Separate Order.
5. No later than five (5) business days after the date this Hold Separate Order becomes final, Respondent shall circulate to the Hollow Sphere Particle Knowledgeable Employees, the Hollow Sphere Particle Key Employees, employee resources identified in II.D.1. and to Respondent's employees who are responsible for the development, manufacture and sale of products (including those acquired in the Acquisition) that compete with products manufactured and sold by the Hollow Sphere Particle Business, a notice of this Hold Separate Order and the Decision and Order.
6. Respondent shall provide the Hollow Sphere Particle Business with sufficient financial resources:
  - a. as are appropriate to operate the Hollow Sphere Particle Business as it is currently operated;



## Order to Maintain Assets

- b. to perform all maintenance to, and replacements of, the assets used to produce products for the Hollow Sphere Particle Business;
- c. to carry on (i) existing capital projects, (ii) approved capital projects, (iii) and business plans to allow the Hollow Sphere Particle Business to be operated at current levels of production and sales; and,
- d. to maintain the viability, competitive vigor, and marketability of the Hollow Sphere Particle Business.

Such financial resources to be provided to the Hollow Sphere Particle Business shall include, but shall not be limited to, (i) general funds, (ii) capital, (iii) working capital, and (iv) reimbursement for any operating losses, capital losses, or other losses; *provided, however,* that, consistent with the purposes of the Decision and Order, Respondent, with the approval of the Hold Separate Trustee, may reduce in scale or pace any capital or research and development project, or substitute any capital or research and development project for another of the same cost.

- 7. Respondent shall: (i) not directly or indirectly interfere with the Hollow Sphere Particle Business Acquirer's offer of employment to any one or more of the Hollow Sphere Particle Knowledgeable Employees and Hollow Sphere Particle Key Employees, directly or indirectly attempt to persuade any one or more of the Hollow Sphere Particle Knowledgeable Employees and Hollow Sphere Particle Key Employees to decline any offer of employment from the Hollow Sphere Particle Business Acquirer, or offer any incentive to any Hollow Sphere Particle Knowledgeable Employees and Hollow Sphere Particle Key Employees to decline employment with the Hollow Sphere Particle Business Acquirer; (ii)

## Order to Maintain Assets

irrevocably waive any legal or equitable right to deter any Hollow Sphere Particle Knowledgeable Employees and Hollow Sphere Particle Key Employees from accepting employment with the Hollow Sphere Particle Business Acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondent that directly or indirectly relate to the Hollow Sphere Particle Business; and (iii) continue to extend to any Hollow Sphere Particle Knowledgeable Employees and Hollow Sphere Particle Key Employees, during their employment by the Hollow Sphere Particle Business prior to the Effective Date of Divestiture, all employee benefits offered by Respondent, including regularly scheduled or merit raises and bonuses, and regularly scheduled vesting of all pension benefits.

8. For a period of one (1) year from the Effective Date of Divestiture, Respondent shall not, directly or indirectly, solicit or induce, or attempt to solicit or induce, any Hollow Sphere Particle Knowledgeable Employee who has accepted an offer of employment with, or who is employed by, the Hollow Sphere Particle Business Acquirer to terminate his or her employment relationship with the Hollow Sphere Particle Business Acquirer; provided, however, a violation of this provision will not occur if: (1) The Hollow Sphere Particle Knowledgeable Employee's employment has been terminated by the Hollow Sphere Particle Business Acquirer; (2) Respondent Dow advertises for employees in newspapers, trade publications, or other media not targeted specifically at any one or more of the employees of the Hollow Sphere Particle Business Acquirer; or (3) Respondent Dow hires a Hollow Sphere Particle Knowledgeable Employee who has applied for employment with Respondent Dow, provided that such

## Order to Maintain Assets

application was not solicited or induced in violation of this Order.

9. For a period of two (2) years from the Effective Date of Divestiture, Respondent shall not solicit, negotiate, hire or enter into any arrangement for the services of any Hollow Sphere Particle Key Employee who has accepted an offer of employment with, or who is employed by, the Hollow Sphere Particle Business Acquirer.
10. Except for the Hollow Sphere Particle Knowledgeable Employees, Hollow Sphere Particle Key Employees, employee resources identified in II.D.1. and support services employees involved in providing services to the Hollow Sphere Particle Business pursuant to this Hold Separate Order, and except to the extent provided in Paragraph II.B., Respondent shall not permit any other of its employees, officers, or directors to be involved in the operations of the Hollow Sphere Particle Business.
11. Respondent's employees (excluding Dow employees involved in providing support to the Hollow Sphere Particle Business pursuant to Paragraph II.D.1. and II.D.2.) shall be prohibited from accessing, and shall not receive, or use or continue to use any Material Confidential Information of the Hollow Sphere Particle Business not in the public domain except:
  - a. as required by law;
  - b. to the extent that necessary information is exchanged in the course of consummating the Acquisition;
  - c. in negotiating agreements to divest assets pursuant to the Decision and Order and engaging in related due diligence;

## Order to Maintain Assets

- d. in complying with this Hold Separate Order, the Decision and Order and the Consent Agreement;
- e. in overseeing compliance with policies and standards concerning the safety, health and environmental aspects of the operations of the Hollow Sphere Particle Business and the integrity of the Hollow Sphere Particle Business's financial controls;
- f. in defending legal claims, investigations or enforcement actions threatened or brought against or related to the Hollow Sphere Particle Business; or in obtaining legal advice; and
- g. as otherwise permitted by this Hold Separate Order or the Decision and Order

Respondent may receive aggregate financial and operational information relating to the Hollow Sphere Particle Business to the extent necessary to allow Respondent to comply with the requirements and obligations of the laws of the United States and other countries, and to prepare consolidated financial reports, tax returns, reports required by securities laws, and personnel reports. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph.

- 12. Hollow Sphere Particle Knowledgeable Employees or Hollow Sphere Particle Key Employees shall be prohibited from accessing, and shall not receive, or use any competitively sensitive or proprietary information not in the public domain about the R&H paper and paperboard hollow sphere particle business.
- 13. Respondent and the Hollow Sphere Particle Business shall jointly implement and at all times during the Hold Separate Period maintain in operation, policies and

## Order to Maintain Assets

systems prohibiting unauthorized access to or dissemination of Material Confidential Information of the Hollow Sphere Particle Business, including, but not limited to, the opportunity by the Hold Separate Trustee, on terms and conditions agreed to with Respondent, to audit Respondent's networks and systems to verify compliance with this Hold Separate Order.

- F. The purpose of this Hold Separate Order is to: (i) preserve the Held Separate Business and the Hollow Sphere Particle Business as viable, competitive, and ongoing businesses, and to hold and preserve the Held Separate Business independent of Respondent, until the Effective Date of Divestiture of each of the Held Separate Business and the Hollow Sphere Particle Business; (ii) assure that no Material Confidential Information is exchanged between Respondent and the Held Separate Business and the Hollow Sphere Particle Business, except as otherwise provided in this Hold Separate Order or the Decision and Order; (iii) prevent interim harm to competition pending divestiture of the Held Separate Businesses and the Hollow Sphere Particle Business, and to help remedy any anti-competitive effects of the Acquisition.
- G. Respondent shall comply with all terms of this Hold Separate Order, Hold Separate Trustee Agreement and Management Agreement. Any breach by Respondent of any term of this Hold Separate Order, Hold Separate Trustee Agreement or Management Agreement shall constitute a violation of this Order. If any term of the Hold Separate Trustee Agreement or Management Agreement varies from the terms of this Hold Separate Order ("Hold Separate Order Term"), then to the extent that Respondent cannot fully comply with both terms, the Hold Separate Order Term shall determine Respondent's obligations under this Hold Separate Order.

**III.**

## Order to Maintain Assets

**IT IS FURTHER ORDERED** that, from the Acquisition Date:

- A. Respondent shall:
1. not provide, disclose or otherwise make available any Material Confidential Information to any Person except as expressly permitted by this Hold Separate Order or the Decision and Order; and,
  2. not use any Material Confidential Information for any reason or purpose other than as expressly permitted by this Hold Separate Order or the Decision and Order.
- B. Respondent shall devise and implement measures to protect against the storage, distribution and use of Material Confidential Information that is not expressly permitted by this Hold Separate Order or the Decision and Order. These measures shall include, but not be limited to, policies restricting access by persons to information available or stored on any of Respondent's computers or computer networks.
- C. Respondent shall provide written or electronic instructions to any of its officers, directors, employees, or agents who have custody or control of any Material Confidential Information concerning the limitations placed by this Hold Separate Order on the distribution and use of Material Confidential Information.
- D. Except as expressly provided by the Decision and Order and this Hold Separate Order, Respondent may use Material Confidential Information only (i) for the purpose of performing Respondent's obligations under the Decision and Order, the Hold Separate Order, and the Divestiture Agreements; or (ii) to ensure compliance with legal and regulatory requirements; to perform required auditing functions; to provide accounting, information technology and credit-underwriting services; to provide legal services

## Order to Maintain Assets

associated with actual or potential litigation and transactions; and to monitor and ensure compliance with financial, tax reporting, governmental environmental, health, and safety requirements; or (iii) for inclusion within the periodic financial reports that the Held Separate Business and Hollow Sphere Particle Business may provide Respondent but only to the extent that any Material Confidential Information is aggregated so that data as to individual customers are not disclosed.

**IV.**

- A. Until Respondent implements systems that prevent Respondent's employees from accessing Material Confidential Information of the Held Separate Business and the Hollow Sphere Particle Business, except as otherwise permitted by this Hold Separate Order or the Decision and Order, Respondent shall prohibit any R&H employees involved in the R&H acrylic acid business, the R&H latex polymer business, and the R&H paper and paperboard hollow sphere particle business from receiving, having access to, or using any Material Confidential Information relating to the Acrylic Acid Business, the Latex Polymers Business or the Hollow Sphere Particle Business, respectively.

**V.**

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

- A. any proposed dissolution of The Dow Chemical Company;
- B. any proposed acquisition, merger or consolidation of The Dow Chemical Company; or
- C. any other change in the Respondent, including, but not limited to, assignment and the creation or dissolution of

## Order to Maintain Assets

subsidiaries, if such change might affect compliance obligations arising out of the Order.

**VI.**

**IT IS FURTHER ORDERED** that for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) business days notice to Respondent at its principle United States offices, registered office of its United States subsidiary or its headquarters address, Respondent shall permit any duly authorized representative of the Commission:

- A. To access, during office hours of Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondent relating to any matters contained in this Order; and
- B. Upon five (5) business days' notice to Respondent and without restraint or interference from it, to interview officers, directors or employees of Respondent, who may have counsel present, relating to any matter contained in this Order.

**VII.**

**IT IS FURTHER ORDERED** that this Hold Separate Order shall terminate at the earlier of:

- A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. The day after the last of the Effective Dates of Divestiture of the divestitures required by the Decision and Order; provided, however, that Respondent's obligations relating to



## Decision and Order

(1) the Held Separate Business shall continue only until the Held Separate Business is divested pursuant to the Decision and Order; and (2) the Hollow Sphere Particle Business shall continue only until the Hollow Sphere Particle Business is divested pursuant to the Decision and Order.

By the Commission.

**DECISION AND ORDER**

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

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

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

## Decision and Order

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 Dow is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal executive offices located at 2030 Dow Center, Midland, Michigan 48674.

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

## Decision and Order

**ORDER****I.**

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

**DEFINITIONS OF PERSONS**

- A. "Commission" means the Federal Trade Commission.
- B. "Dow" or "Respondent" means The Dow Chemical Company, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates controlled by The Dow Chemical Company, and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.
- C. "Governmental Entity" means any federal, provincial, state, county, local, or other political subdivision of the United States or any other country, or any department or agency thereof.
- D. "Person" means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or Governmental Entity, and any subsidiaries, divisions, groups or affiliates thereof.
- E. "R&H" means, Rohm and Haas Company, 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 100 Independence Mall West, Philadelphia, Pennsylvania 19106, and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Rohm and Haas Company.

## Decision and Order

**GENERAL DEFINITIONS**

- F. “Acquisition” means the proposed acquisition of R&H by Dow pursuant to the Agreement and Plan of Merger dated July 10, 2008, as may be amended by Dow and R&H.
- G. “Acquisition Date” means the date the Acquisition is consummated.
- H. “Competitively Sensitive Information” means Material Confidential Information, to the extent specific to the Divested Businesses, regarding pricing and material financial contract terms of the Divested Products, and customer contacts.
- I. “Divestiture Trustee” means the Divestiture Trustee appointed pursuant to Paragraph VII of this Order.
- J. “Effective Date of Divestiture” means, as the context requires, the date upon which Respondent closes a divestiture of the Acrylic Acid Business, Latex Polymers Business, or Hollow Sphere Particle Business in compliance with the terms of this Order.
- K. “Hold Separate” means the Order to Hold Separate and Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.
- L. “Material Confidential Information” means any material non-public information relating to the Divested Businesses either prior to or after the Effective Date of Divestiture, including, but not limited to, all customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets, relating to the Divested Businesses and:
  - 1. Obtained by Respondent prior to the Effective Date of Divestiture; or,

## Decision and Order

2. Obtained by Respondent after the Effective Date of Divestiture, in the course of performing Respondent's obligations under any Divestiture Agreement;

*Provided, however,* that Material Confidential Information shall not include:

1. Information that is in the public domain when received by Respondent;
2. Information that is not in the public domain when received by Respondent and thereafter becomes public through no act or failure to act by Respondent;
3. Information that Respondent develops or obtains independently, without violating any applicable law or this Order; and
4. Information that becomes known to Respondent from a third party not in breach of applicable law or a confidentiality obligation with respect to the information.

M. "Necessary" means a particular tangible or intangible asset but for which a Divested Product cannot be researched, developed, produced, manufactured, or sold by the applicable Acquirer and for which a substitute asset is not commercially available.

**DEFINITIONS RELATED TO DIVESTITURE ASSETS**

- N. "Acquirers" means the Acrylics & Latex Business Acquirer and the Hollow Sphere Particle Business Acquirer.
- O. "Acrylic Acid Business" means all of Respondent's right, title, and interest in all tangible and intangible property of any kind primarily relating to or Necessary for the research and development of Acrylic Acid Products in the United States, the production and manufacture of Acrylic Acid

## Decision and Order

Products at the Clear Lake Facility, and the marketing and sale of Acrylic Acid Products in North, South, and Central America, including, but not limited to, the:

1. Clear Lake Facility;
2. South Charleston Assets;
3. Acrylic Acid Business Books and Records;
4. Divested Acrylic Acid Business Intellectual Property;
5. Acrylic Acid Business Intellectual Property License;
6. Acrylic Acid Business Contracts; and,
7. Acrylic Acid Business Inventories;

*Provided, however,* Acrylic Acid Business does not include:

1. Any tangible or intangible property acquired by Respondent through the Acquisition or after the Effective Date of Divestiture of the Acrylic Acid Business;
  2. The Retained St. Charles Assets;
  3. Ownership of the Shared St. Charles Facility Assets; or
  4. Ownership of the Licensed Acrylic Acid Product Intellectual Property.
- P. “Acrylic & Latex Business Acquirer” means the Person approved by the Commission to acquire the Acrylic Acid Business and the Latex Polymers Business pursuant to Paragraph III of this Order.
- Q. “Acrylic & Latex Key Employees” means the persons listed on Confidential Appendix A

## Decision and Order

- R. “Acrylic & Latex Knowledgeable Employees” means any Person (a) employed by or under contract directly with Respondent at the Effective Date of Divestiture, and (b)(i) whose duties at any time between July 10, 2008, and the Effective Date of Divestiture primarily related to the Acrylic Acid Business or the Latex Polymers Business, or (ii) who is Necessary for the Acrylic Acid Business or the Latex Polymers Business;

*Provided, however,* Acrylic & Latex Knowledgeable Employees do not include the Persons listed on Confidential Appendix B.

- S. “Acrylic Acid Business Books and Records” means copies of all Books and Records relating to:
1. The research and development of Acrylic Acid Products in the United States;
  2. The production and manufacture of Acrylic Acid Products at the Clear Lake Facility; and
  3. The marketing and sale of Acrylic Acid Products in North, South, and Central America;

*Provided, however,* Respondent may redact from such Books and Records information relating solely to products and businesses other than Acrylic Acid Products and the Acrylic Acid Business if it also redacts from Respondent’s copy of such Books and Records any information that Respondent is not required or permitted to retain or use pursuant to this Order.

- T. “Acrylic Acid Business Contracts” means all contracts primarily relating to or Necessary for:
1. The research and development of Acrylic Acid Products in the United States;

## Decision and Order

2. The production and manufacture of Acrylic Acid Products at the Clear Lake Facility; and
3. The marketing and sale of Acrylic Acid Products in North, South, and Central America;

*Provided, however,* that Acrylic Acid Business Contracts does not include (i) any Contracts for the internal supply of Acrylic Acid Products to Respondent (other than any Contracts with the Latex Polymers Business) or to R&H; or (ii) any Contracts for the supply of butanol.

- U. “Acrylic Acid Business Divestiture Agreement” means all licenses, contracts, and agreements of any kind between Respondent and the Acrylic & Latex Business Acquirer (including, as applicable, agreements negotiated by a Divestiture Trustee appointed under this Order) that effectuate the divestiture of the Acrylic Acid Business required by Paragraph III of this Order, and approved by the Commission, including, but not limited to, the Acrylic Acid Business Intellectual Property License, and any Supply Agreement, Technical Assistance Agreement, Transition Services Agreement, or Ethylene/Ethanol Conversion Assistance Agreement.
- V. “Acrylic Acid Business Intellectual Property License” means a non-exclusive Intellectual Property License for the Licensed Acrylic Acid Product Intellectual Property, for use in the research, development, production, manufacture, marketing, and sale of acrylic acid and acrylic esters.
- W. “Acrylic Acid Business Inventories” means all Inventories primarily relating to or Necessary for:
1. The research and development of Acrylic Acid Products in the United States;



## Decision and Order

2. The production and manufacture of Acrylic Acid Products at the Clear Lake Facility; or
  3. The marketing and sale of Acrylic Acid Products produced at the Clear Lake Facility in North, South, and Central America.
- X. “Acrylic Acid Products” means crude acrylic acid, glacial acrylic acid, ethyl acrylate, and butyl acrylate.
- Y. “Alsip Facility” means all of Respondent’s right, title, and interest in the Facility Assets:
1. Located at the real property described in Exhibit 1 to this Decision and Order; and
  2. Primarily related to or Necessary for the research, development, production, and manufacture in the United States, and the marketing and sale in the United States, Puerto Rico, Mexico and Canada of Latex Polymers Products.
- Z. “Books and Records” means any books, records, files, research and production records, customer files, customer lists, customer product specifications, customer purchasing histories, distributor files, vendor files, vendor lists, advertising and marketing materials, sales materials, technical information, databases, or documents, information, and files of any kind, regardless of whether the document, information, or files are stored or maintained in traditional paper format, by means of electronic, optical, or magnetic media or devices, photographic or video images, or any other format or media. Books and Records do not include:
1. Employee or personnel files of persons other than those of Acrylic & Latex Key Employees, Acrylic & Latex Knowledgeable Employees, Hollow Sphere Particle Key Employees, or Hollow Sphere Particle Knowledgeable

## Decision and Order

Employees hired by an Acquirer, in each case who consent to such a transfer; or

2. Documents covered by the attorney-client privilege.

AA. “Cary Facility” means all of Respondent’s right, title, and interest in the Facility Assets:

1. Located at the real property described in Exhibit 2 to this Decision and Order; and
2. Primarily related to or Necessary for the research, development, production, and manufacture in the United States and the marketing and sale in the United States, Puerto Rico, Mexico and Canada of Latex Polymers Products.

BB. “Clear Lake Facility” means all of Respondent’s right, title, and interest in the Facility Assets:

1. Located at the real property described in Exhibit 3 to this Decision and Order; and
2. Primarily related to or Necessary for the research, development, production, and manufacture in the United States and the marketing and sale in North America of Acrylic Acid Products.

CC. “Contracts” means all leases, guaranties, distribution agreements, product swap agreements, customer contracts, sales contracts, supply agreements, collective bargaining agreements, and contracts or agreements of any kind in effect as of the Effective Date of Divestiture; *provided, however,* that Contracts shall not include (i) employment contracts, confidentiality agreements, non-disclosure agreements, insurance agreements, or (ii) software or Intellectual Property licenses that are not Necessary for the

## Decision and Order

operation of equipment or machinery divested pursuant to this Order.

DD. "Cost" means:

1. In connection with the manufacture, labeling and packaging of a product, the sum of the following cost elements:
  - a. The cost of materials, labor, and variable overhead (including utilities and energy) incurred in manufacturing, labeling and packaging, in each case as evidenced by reasonably detailed supporting documentation and prepared consistently from period to period; and
  - b. The fully absorbed allocation of fixed overhead, including depreciation, in each case with respect to the facility at which such product is manufactured, labeled, or packaged, and in each case as evidenced by reasonably detailed supporting documentation and prepared consistently from period to period;
2. In connection with the performance or provision of a service, the sum of the following cost elements:
  - a. The direct and indirect costs incurred by Dow to perform or provide the service, in each case as evidenced by reasonably detailed supporting documentation and prepared consistently from period to period; and
  - b. Pursuant to the Site Services Agreement for the St. Charles Facility and the Transition Services Agreement, a service fee, initially computed as of the Effective Date of Divestiture and computed annually thereafter on the anniversary date of the Effective Date of Divestiture ("Assessment Date"), which fee

## Decision and Order

shall be equal to the product of (1) a pro-rata share of the net book value as of the Assessment Date of the assets used to provide services to an Acquirer, such pro-rata share to be based upon the ratio of the value of the services provided to an Acquirer as of the Assessment Date to the value of all of the services provided by the assets, and; (2) a rate of 8%; *provided that* the pro-rata share at any time shall not include any charges or expenses that Acquirer has paid in connection with any facility expansion or modification, as described in Paragraph III.D of this Order; and, *provided further* that any agreement for services shall provide for commercially reasonable verification of the computation of, and resolution of disputes relating to, services as provided by this paragraph.

EE. “Divested Acrylic Acid Business Intellectual Property” means all Intellectual Property that is primarily related to the research, development, production, and manufacture in the United States and the marketing and sale in North, Central, and South America of Acrylic Acid Products (including all rights to obtain and file for Patents and registrations thereto in the United States, Mexico, and Canada); *provided however*, at the option of Respondent, that the Acrylic Acid Business Divestiture Agreement shall grant to Respondent a non-exclusive, irrevocable, royalty-free, assignable and transferable (including sublicenseable), fully-paid-up license to use the Divested Acrylic Acid Business Intellectual Property, including Respondent’s future developments and improvements thereto, to make, have made, use, sell, and/or offer to sell any products anywhere in the world. For the avoidance of doubt, Divested Acrylic Acid Business Intellectual Property does not include Licensed Acrylic Acid Product Intellectual Property.

## Decision and Order

FF. “Divested Hollow Sphere Particle Business Intellectual Property” means Intellectual Property that is primarily related to the research, development, production, and manufacture in the United States and the marketing and sale in the United States, Puerto Rico, Mexico and Canada of Hollow Sphere Particle Products manufactured or produced from an encapsulated ester core. Divested Hollow Sphere Particle Business Intellectual Property includes all rights to obtain and file for Patents and registrations thereto in the United States, Mexico, and Canada. For the avoidance of doubt, Divested Hollow Sphere Particle Business Intellectual Property does not include (i) Licensed Hollow Sphere Product Intellectual Property; (ii) Divested Latex Polymers Business Intellectual Property; or (iii) any Intellectual Property used in the manufacture of Respondent’s Seed Latex.

GG. “Divested Latex Polymers Business Intellectual Property” means all Intellectual Property that is primarily related to the research, development, production, and manufacture in the United States and the marketing and sale in the United States, Puerto Rico, Mexico and Canada of Latex Polymers Products, including, but not limited to, Latex Traffic Paint Products (including all rights to obtain and file for Patents and registrations thereto in the United States, Mexico, and Canada);

*Provided, however,* at the option of Respondent, the Latex Polymers Business Divestiture Agreement shall grant to Respondent a non-exclusive, irrevocable, royalty-free, fully paid-up license to use the Divested Latex Polymers Business Intellectual Property, including Respondent’s future developments and improvements thereto:

1. To make, have made, use, sell, and/or offer to sell any products outside the United States, Puerto Rico, Canada, and Mexico; and

## Decision and Order

2. To make, have made, use, sell, and/or offer to sell any products other than the Divested Products anywhere in the world.

Such license shall be assignable and transferable (including sublicenseable) outside the United States, Puerto Rico, Canada, and Mexico. For the avoidance of doubt, Divested Latex Polymers Business Intellectual Property does not include: (i) Licensed Latex Polymers Intellectual Property; (ii) Latex Polymers Retained Products Intellectual Property; (iii) Divested Hollow Sphere Particle Business Intellectual Property; or (iv) any Intellectual Property used in the manufacture of Respondent's Seed Latex.

HH. "Divestiture Agreements" means the Acrylic Acid Business Divestiture Agreement, the Latex Polymers Business Divestiture Agreement, and the Hollow Sphere Particle Business Divestiture Agreement.

II. "Divested Businesses" means the Acrylic Acid Business, the Latex Polymers Business, and the Hollow Sphere Particle Business.

JJ. "Divested Products" means the Acrylic Acid Products, Latex Polymers Products, and Hollow Sphere Particle Products.

KK. "Employee Information" means, for each Acrylic & Latex Key Employee, Acrylic & Latex Knowledgeable Employee, Hollow Sphere Particle Key Employee, or Hollow Sphere Particle Knowledgeable Employee, a profile prepared by Respondent summarizing the employment history of such employee. To the extent permitted by applicable law and with the consent of the employee, Employee Information shall also include such employee's personnel file.

LL. "Facility Assets" means:

## Decision and Order

1. All real property interests, including rights, title, and interests in and to owned or leased property, together with all easements, rights of way, buildings, improvements, and appurtenances;
2. All applicable federal, state, and local regulatory agency registrations, permits, and applications, and all documents related thereto, necessary for the operations of, and conduct of business at, such applicable facility, to the extent held by Respondent and with respect to which the transfer thereof is permitted by law, *provided, however*, that Dow shall cooperate with the applicable Acquirer in securing any federal, state, and local regulatory agency registrations, permits, and applications whose transfer is not permitted by law; and
3. All fixtures, equipment, machinery, tools, vehicles, personal property, or tangible property of any kind located at such applicable facility that is owned or leased by Respondent, or that Respondent has the legal right to use, or to have the custody or control of, that is related to:
  - a. The research, development, production, manufacture, marketing, and sale of any one or more of the Divested Products; and
  - b. Compliance by a Divested Business with any statute, ordinance, regulation, rule, or other legal requirement (including, but not limited to, environmental laws) of any Governmental Entity;

*Provided, however*, that Facility Assets do not include any computer equipment leased or software licensed by Respondent unless such equipment or software is Necessary to the operation of the applicable facility.

## Decision and Order

MM. “Historical Inputs” means any raw materials or ingredients used in the research, development, manufacture, or production of any one or more of the Divested Products that Respondent has manufactured and supplied to any of the Divested Businesses at any time since January 1, 2006.

NN. “Hollow Sphere Particle Business” means:

1. All of Respondent’s right, title, and interest in intangible property of any kind primarily relating to the research, development, production, and manufacture in the United States and the marketing and sale in the United States, Puerto Rico, Mexico and Canada of Hollow Sphere Particle Products, including, but not limited to, the:
  - a. Divested Hollow Sphere Particle Business Intellectual Property; and
  - b. Hollow Sphere Particle Business Contracts; and
2. The following additional assets:
  - a. At the option of the Hollow Sphere Particle Business Acquirer, and subject to the prior approval of the Commission, all equipment and machinery that Respondent has used since January 1, 2006, and is Necessary for the research, development, production, and manufacture in the United States and the marketing and sale in the United States, Puerto Rico, Canada, and Mexico of Hollow Sphere Particle Products;
  - b. Hollow Sphere Particle Business Books and Records;
  - c. Hollow Sphere Particle Business Intellectual Property License; and



## Decision and Order

## d. Hollow Sphere Particle Business Inventories;

*Provided, however,* that Hollow Sphere Particle Business does not include:

1. Any tangible or intangible property acquired by Respondent through the Acquisition or after the Effective Date of Divestiture;
2. Any interest in any real property or fixtures, including reactors, storage tanks, cooling towers, pipelines, control rooms, and any other fixed equipment at Dow's Midland, Michigan facility;
3. Any interest in any tangible or personal property, except as provided in I.NN.2 above; and
4. Ownership of the Licensed Hollow Sphere Product Intellectual Property.

OO. "Hollow Sphere Particle Business Acquirer" means the Person approved by the Commission to acquire the Hollow Sphere Particle Business pursuant to Paragraph IV of this Order.

PP. "Hollow Sphere Particle Business Books and Records" means copies of all Books and Records relating to the research, development, production, and manufacture in the United States and the marketing and sale in the United States, Puerto Rico, Mexico and Canada of Hollow Sphere Particle Products; *Provided, however,* Respondent may redact from such Books and Records information relating solely to products and businesses other than Hollow Sphere Particle Products and the Hollow Sphere Particle Business if it also redacts from Respondent's copy of such Books and Records any information that Respondent is not required or permitted to retain or use pursuant to this Order.

## Decision and Order

QQ. “Hollow Sphere Particle Business Contracts” means:

1. All Contracts for the sale in the United States, Puerto Rico, Mexico and Canada of Hollow Sphere Particle Products; and,
2. Any other Contracts Necessary for the research, development, production, and manufacture in the United States and the marketing and sale in the United States, Puerto Rico, Mexico and Canada of Hollow Sphere Particle Products.

RR. “Hollow Sphere Particle Business Divestiture Agreement” means all licenses, contracts, and agreements of any kind between Respondent and the Hollow Sphere Particle Business Acquirer (including, as applicable, agreements negotiated by a Divestiture Trustee appointed under this Order) that effectuate the divestiture required by Paragraph IV of this Order, and approved by the Commission, including, but not limited to, the Hollow Sphere Particle Business Intellectual Property License, and any Hollow Sphere Particle Business Supply Agreement, Hollow Sphere Particle Business Technical Assistance Agreement, and Hollow Sphere Particle Business Transition Services Agreement.

SS. “Hollow Sphere Particle Business Intellectual Property License” means a non-exclusive Intellectual Property License for the Licensed Hollow Sphere Product Intellectual Property, for use in the research, development, production, manufacture, marketing, and sale of ester core hollow sphere particles.

TT. “Hollow Sphere Particle Business Inventories” means all of Respondent’s Inventories of finished Hollow Sphere Particle Products.

## Decision and Order

- UU. “Hollow Sphere Particle Key Employees” means the persons listed on Confidential Appendix C.
- VV. “Hollow Sphere Particle Knowledgeable Employees” means any Person: (a) employed by or under contract directly with Respondent at the Effective Date of Divestiture, and (b)(i) whose duties at any time between July 10, 2008, and the Effective Date of Divestiture primarily related to the Hollow Sphere Particle Business, or (ii) who is Necessary for, the Hollow Sphere Particle Business; *provided, however*, Hollow Sphere Particle Knowledgeable Employees do not include the Persons listed on Confidential Appendix D.
- WW. “Hollow Sphere Particle Products” means hollow sphere particles produced by Dow comprised of synthetic latex polymers encapsulating an expanded ester core.
- XX. “Intellectual Property” means Patents, Know-how, and trade marks in Respondent’s possession or control and relating to the research, development, production, manufacture, marketing, and sale of any one or more of the Divested Products;
- Provided, however*, that Intellectual Property shall not include: (i) batch and recipe management software used by Respondent; (ii) MOD 5 process control software; (iii) high level guidelines, policies, standards, and procedures reflecting Dow’s corporate governance model; or (iv) any trademarks other than UCAR™, NeoCAR, EvoCAR, and POLYPHOBE.
- YY. “Intellectual Property License” means a perpetual, irrevocable, fully paid-up, and royalty-free license from Respondent to an Acquirer to use, exploit, and improve, anywhere in the world, the Intellectual Property that is the subject of the license. Such license shall be assignable to an entity that purchases all or substantially all of the assets of

## Decision and Order

the relevant Acquirer related to the Intellectual Property that is the subject of the Intellectual Property License.

ZZ. “Inventories” means:

1. All supplies and inventory of one or more of any of the finished Divested Products or any of the Divested Products in production; and,
2. All supplies and inventory of raw materials and supplies held for use in the research, development, manufacture, or production of any one or more of the Divested Products.

AAA. “Know-how” means Respondent’s know-how, trade secrets, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, development and other similar information.

BBB. “Latex Polymers Business” means all of Respondent’s right, title, and interest in all tangible and intangible property of any kind primarily relating to or Necessary for the research and development of Latex Polymers Products in the United States, the production and manufacture of Latex Polymers Products at the Alsip Facility, the St. Charles Facility, and the Torrance Facility, and the marketing and sale of Latex Polymers Products in the United States, Puerto Rico, Canada, and Mexico, including, but not limited to, the:

1. The Alsip Facility;
2. The Cary Facility;
3. The St. Charles Facility;
4. The Torrance Facility;
5. Latex Polymers Business Books and Records;

## Decision and Order

6. Divested Latex Polymers Business Intellectual Property;
7. Latex Polymers Business Intellectual Property License;
8. Latex Polymers Business Contracts;
9. Latex Polymers Business Inventories;
10. Latex Polymers Business Trademark Rights;
11. Latex Polymers Retained Products Intellectual Property Rights; and,
12. MOD 5 License.

*Provided, however,* Latex Polymers Business does not include:

1. Any tangible or intangible property acquired by Respondent through the Acquisition or after the Effective Date of Divestiture;
2. Any tangible assets used in the research, development, production, manufacture, marketing, and sale of Latex Polymers Products located in Midland, MI, other than the assets listed on Confidential Appendix E;
3. Ownership of the Licensed Latex Polymers Intellectual Property;
4. Any interest in any trademarks other than the Latex Polymers Business Trademark Rights; or
5. Any rights in the Latex Polymers Retained Products Intellectual Property other than the Latex Polymers Retained Products Intellectual Property Rights.

CCC. "Latex Polymers Business Books and Records" means copies of all Books and Records relating to:

## Decision and Order

1. The research, development, production, and manufacture of Latex Polymers Products in the United States; and
2. The marketing and sale of Latex Polymers Products in the United States, Puerto Rico, Canada, and Mexico;

*Provided, however,* Respondent may redact from such Books and Records information relating solely to products and businesses other than Latex Polymers Products and the Latex Polymers Business if it also redacts from Respondent's copy of such Books and Records any information that Respondent is not required or permitted to retain or use pursuant to this Order.

DDD. "Latex Polymers Business Contracts" means all Contracts primarily relating to or Necessary for:

1. The research and development of Latex Polymers Products in the United States;
2. The production and manufacture of Latex Polymers Products at the Alsip Facility, the St. Charles Facility, and the Torrance Facility; and
3. The marketing and sale of Latex Polymers Products in the United States, Puerto Rico, Canada, and Mexico.

EEE. "Latex Polymers Business Divestiture Agreement" means all licenses, contracts, and agreements of any kind between Respondent and the Acrylic & Latex Business Acquirer (including, as applicable, agreements negotiated by a Divestiture Trustee appointed under this Order) that effectuate the divestiture of the Latex Polymers Business required by Paragraph III of this Order, and approved by the Commission, including, but not limited to, the Latex Polymers Business Intellectual Property License, and any Site Services Agreement, Supply Agreement, Technical Assistance Agreement, or Transition Services Agreement.

## Decision and Order

FFF. “Latex Polymers Business Intellectual Property License” means a non-exclusive Intellectual Property License for the Licensed Latex Polymers Product Intellectual Property for use in the research, development, production, manufacture, marketing, and sale of acrylic latexes.

GGG. “Latex Polymers Business Inventories” means all Inventories held for use and relating to:

1. The research and development of Latex Polymers Products in the United States;
2. The production and manufacture of Latex Polymers Products at the Alsip Facility, the St. Charles Facility, and the Torrance Facility; and
3. The marketing and sale of Latex Polymers Products in the United States, Puerto Rico, Canada, and Mexico, including all of Respondent’s inventories of finished Latex Traffic Paint Products.

HHH. “Latex Polymers Business Trademark Rights” means:

1. The assignment of rights to Dow’s NeoCAR, EvoCAR, and POLYPHOBE trademarks within the United States, Puerto Rico, Canada, and Mexico; and
2. An exclusive license to Dow’s UCAR™ trademark for use in connection with Latex Polymers Products inside the United States, Puerto Rico, Canada, and Mexico.

III. “Latex Polymers Products” means UCAR™ Emulsion Systems specialty latex products produced (or produced for) and sold by Respondent, either under the UCAR™, EvoCAR, NeoCAR, or POLYPHOBE trademarks or as UCAR™ Emulsion Systems experimental or custom grade formulations, and consisting of the following: synthetic latex polymer dispersions prepared by emulsion polymerization

## Decision and Order

that are either acrylic latex, vinyl acrylic latex, styrene acrylic latex, vinyl versatate latex, or vinyl acetate ethylene latex, wherein the term “acrylic” refers to a polymer prepared from acrylic acid, methacrylic acid, and/or esters thereof, and wherein the term “vinyl”, as used in the term “vinyl acrylic”, refers to vinyl acetate. For the purposes of this Order, Latex Traffic Paint is a Latex Polymers Product. For the avoidance of doubt, Latex Polymers Products does not include (i) Hollow Sphere Particle Products or (ii) Latex Polymers Retained Products.

JJJ. “Latex Polymers Retained Products” means styrene acrylic latex, vinyl acrylic latex, vinyl acetate-ethylene latex, and vinyl versatate latex used in carpetbacking, artificial turf, and paper and paperboard fields; and acrylic associative thickeners used in aviation anti-icing and de-icing and personal care fields, including all precursors for making such thickeners.

KKK. “Latex Polymers Retained Products Intellectual Property” means all Intellectual Property primarily related to the Latex Polymers Retained Products.

LLL. “Latex Polymers Retained Products Intellectual Property Rights” means the assignment by Respondent to the Acrylic & Latex Business Acquirer of the Latex Polymers Retained Products Intellectual Property; *provided, however*, that the Acrylic & Latex Business Acquirer shall in turn grant Respondent and its affiliates an irrevocable, assignable and transferable (including the right to grant sublicenses), royalty-free, fully paid-up, worldwide license to use the Latex Polymers Retained Products Intellectual Property, including Respondent’s future developments and improvements thereto, to make, have made, use, sell, and/or offer to sell the Latex Polymers Retained Products into their associated fields of use. Such license shall be (i) non-exclusive for Latex Polymers Retained Products Intellectual Property for use in paper and paperboard fields and (ii)



## Decision and Order

exclusive for Latex Polymers Retained Products Intellectual Property used in fields other than paper and paperboard.

MMM. “Latex Traffic Paint Products” means Latex Polymers Products used for road or other pavement marking applications.

NNN. “Licensed Acrylic Acid Product Intellectual Property” means all Intellectual Property used in or Necessary for the research, development, production, and manufacture of Acrylic Acid Products in the United States, or the marketing and sale of Acrylic Acid Products in North, South, and Central America; *provided, however*, Licensed Acrylic Acid Product Intellectual Property does not include the Divested Acrylic Acid Business Intellectual Property.

OOO. “Licensed Hollow Sphere Product Intellectual Property” means all Intellectual Property used in or Necessary for the research, development, production, and manufacture in the United States and the marketing and sale in the United States, Puerto Rico, Mexico and Canada of Hollow Sphere Particle Products, including, but not limited to, the Intellectual Property involved in producing an encapsulated ester core from Respondent’s Seed Latex and putting a shell on such encapsulated ester core; *provided, however*, that Licensed Hollow Sphere Product Intellectual Property does not include: (i) the Divested Hollow Sphere Particle Business Intellectual Property; or (ii) any Intellectual Property used in the manufacture of Respondent’s Seed Latex, except to the extent that such Intellectual Property is Necessary for the manufacture of Hollow Sphere Particle Products from Respondent’s Seed Latex.

PPP. “Licensed Latex Polymers Intellectual Property” means all Intellectual Property used in or Necessary for the research, development, production, and manufacture in the United States, and the marketing and sale in the United States, Puerto Rico, Canada, and Mexico, of Latex Polymers

## Decision and Order

Products; *provided, however*, that Licensed Latex Polymers Intellectual Property does not include: (i) the Divested Latex Polymers Business Intellectual Property; (ii) the Latex Polymers Retained Products Intellectual Property; or (iii) any Intellectual Property used in the manufacture of Respondent's Seed Latex, except to the extent that such Intellectual Property is Necessary for the manufacture of Latex Polymers Products from Respondent's Seed Latex.

QQQ. "MOD 5 License" means a license to Respondent's MOD 5 process control system software for use by the Acrylic & Latex Business Acquirer at the St. Charles Facility, the term of which license shall be for so long as is necessary for the Acrylic & Latex Business Acquirer to convert the St. Charles Facility to a third party process control system, such time period not to extend beyond December 31, 2015.

RRR. "Patent" means Respondent's United States, Canadian, and Mexican patents and/or all related patent applications, and includes all reissues, divisions, continuations, continuations-in-part, substitutions, reexaminations, restorations, and/or patent term extensions thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions.

SSS. "Required Historical Inputs" means any Historical Inputs:

1. That are Necessary to the research, development, production, manufacture, and sale of a Divested Product; or,
2. For which substitution of a product from a supplier other than Respondent would require customer requalification, but only where such requalification would require six (6) months or longer;

*Provided, however* that Required Historical Inputs do not include butanol.

## Decision and Order

TTT. “Retained St. Charles Assets” means:

1. All of Respondent’s right, title, and interest in all tangible and intangible property of any kind (other than the St. Charles Facility) relating solely to the research, development, production, manufacture, marketing, and sale of any products, goods, or services other than Latex Polymers Products; and
2. Ownership of all Shared St. Charles Facility Assets, including an interest to use, improve, and maintain all Shared St. Charles Facility Assets:
  - a. In substantially the same manner as Respondent has used, improved, and maintained the Shared St. Charles Facility Assets since January 1, 2006, for the research, development, production, manufacture, marketing, and sale of any products, goods, or services other than the Latex Polymers Products; and,
  - b. In a manner that will not interfere unreasonably (it being understood that reasonable charges for such use shall not be considered unreasonable interference) with the use of the Shared St. Charles Facility Assets by the Acrylic & Latex Business Acquirer as the Shared St. Charles Facility Assets:
    - (1) Have been used in connection with the research, development, production, manufacture, marketing, and sale of Latex Polymers Products since January 1, 2006 and prior to the relevant Effective Date of Divestiture; and,
    - (2) Upon the expansion or other commercially reasonable modification of production within the St. Charles Facility as permitted by and pursuant to Paragraph III.D of this Order and consistent

## Decision and Order

with the Order's purposes as specified in Paragraph III.H as it relates to Latex Polymers Products, as is reasonably necessary to support such expansion or modification;

*Provided, however*, except as provided in Paragraph 2 of this Paragraph I.TTT with respect to Shared St. Charles Facility Assets, Retained St. Charles Assets do not include any tangible or intangible property of any kind used since January 1, 2006, for the research, development, production, manufacture, marketing, and sale of Latex Polymers Products.

UUU. "Seed Latex" means Dow's SL 3000 seed latex and any successor products.

VVV. "Shared St. Charles Facility Assets" means any Facility Assets located in St. Charles, Louisiana (other than the St. Charles Facility and the Retained St. Charles Assets) used by Respondent at any time since January 1, 2006 and prior to the relevant Effective Date of Divestiture, for the research, development, production, and manufacture in the United States, and the marketing and sale in the United States, Puerto Rico, Canada, and Mexico, of Latex Polymers Products; *provided, however*, that Shared St. Charles Facility Assets shall not include assets used in or relating to: (i) the delivery of site emergency services other than limited first response services; or (ii) the delivery of maintenance or industrial hygiene services.

WWW. "South Charleston Assets" means all of Respondent's right, title and interest in any assets located in South Charleston, West Virginia, primarily relating to or Necessary for the research, development, production, manufacture, marketing and sale of Acrylic Acid Products, including, but not limited to, at the option of the Acrylic & Latex Business Acquirer, and subject to the approval of the Commission, equipment and machinery;

## Decision and Order

*Provided, however,* the South Charleston Assets shall not include:

1. Any interest in any real property or fixtures; or
2. Any interest in the equipment or machinery designed to simulate the facilities or equipment used in the production of Acrylic Acid Products at St. Charles, Louisiana.

XXX. "St. Charles Facility" means all of Respondent's right, title, and interest in:

1. A lease for a term of not less than fifty (50) years to the real property described in Exhibit 4 to this Decision and Order; and
2. The Facility Assets located at the real property described in subparagraph 1 of this Paragraph I.WWW primarily relating to or Necessary for, the research, development, production, and manufacture of Latex Polymers Products in the United States, and the marketing and sale of Latex Polymers Products in the United States, Puerto Rico, Canada, and Mexico;

*Provided, however,* that the St. Charles Facility does not include:

1. Any ownership interest in any real property or in the Shared St. Charles Facility Assets or the Retained St. Charles Assets; or
2. Any interest in the surfactants storage tank used by the Ethoxylates Park Plant and located within the real property described in Exhibit 4 to this Decision and Order.

## Decision and Order

YYY. “Torrance Facility” means all of Respondent’s right, title, and interest in the Facility Assets:

1. Located at the real property described in Exhibit 5 to this Decision and Order; and
2. Primarily related to or Necessary for the research, development, production, and manufacture in the United States, and the marketing and sale in the United States, Puerto Rico, Canada, and Mexico, of Latex Polymers Products.

ZZZ. “Transitional Historical Inputs” means any Historical Inputs whose supply by Respondent is required (i) to transfer the operation of the Divested Businesses to the Acquirer or (ii) to avoid material interruption of the ability of the Divested Businesses to meet their then-existing supply commitments to customers, *provided, however* that Transitional Historical Inputs do not include butanol.

**II.**

**IT IS FURTHER ORDERED** that Respondent shall not close the Acquisition until Respondent delivers to the Secretary of the Commission a notice stating the date upon which Respondent intends to close the Acquisition. In addition, as provided by Paragraphs III and IV of this Order, at the option of the applicable Acquirers, and subject to the prior approval of the Commission, Respondent Dow shall negotiate, enter into, and fully comply with contracts and agreements with the applicable Acquirers that shall include, but not be limited to, one or more:

- A. “Site Services Agreement” requiring Respondent to provide at Cost at the St. Charles Facility utility and shared services to the Acrylic & Latex Business Acquirer, including, but not limited to, water, sewer, electricity, access to telephone lines, security, road maintenance, and other support services historically provided by Respondent since January 1, 2006,

## Decision and Order

to the Latex Polymers Business at the St. Charles Facility or to other businesses operated by lessees at Respondent's St. Charles, Louisiana, site, to the extent applicable. The Site Services Agreement, at a minimum, shall require Respondent to:

1. Consult and cooperate reasonably with the Acrylic & Latex Business Acquirer regarding any conduct by Respondent (including Persons under contract to Respondent or that Respondent has the right to control) that is reasonably likely to interrupt delivery of utility and shared services to the Acrylic & Latex Business Acquirer, so as to reduce as much as reasonably practicable any interruption of or interference with the research, development, production, manufacture, marketing, and sale of Latex Polymers Products at the St. Charles Facility;
2. Provide as much notice to the Acrylic & Latex Business Acquirer as reasonably practicable of any maintenance or construction that is reasonably likely to interrupt the delivery of utility and shared services to the Acrylic & Latex Business Acquirer at the St. Charles Facility; and,
3. Restore delivery to the Acrylic & Latex Business Acquirer of all utility and shared services, the delivery of which was interrupted for any reason, on a schedule that is fair, equitable, and commercially reasonable, and that does not give or permit a priority to the restoration of utility or shared services to Respondent unless such priority is necessary to avoid a material adverse effect on Respondent's retained businesses that is disproportionate to the effect on the Latex Polymers Business; *provided, however,* that any such schedule shall in all cases conform to Dow's environmental, health, and safety standards and reflect Dow's good manufacturing practices;

## Decision and Order

*Provided, however,* that Respondent shall not be obligated to provide maintenance services to the St. Charles Facility, industrial hygiene services, or emergency services other than first response services.

- B. “Supply Agreement” requiring Respondent to provide or supply an Acquirer, solely for the use by such Acquirer (or its successor) in connection with the research, development, production, manufacturing, marketing, and sale of one or more of the Divested Products, with any one or more of: (1) the Divested Products; (2) Required Historical Inputs; (3) butanol; (4) Seed Latex; or (5) Transitional Historical Inputs. The terms of any Supply Agreement shall include, but need not be limited to, the following terms and conditions:

1. The term of the Supply Agreement shall be as follows:
  - a. For Divested Products, the term shall be for a period from the Effective Date of Divestiture and no longer than that reasonably necessary for an Acquirer to transfer commercial production of the Divested Product from Respondent to the Acquirer or some other Person, with an option for the Acquirer to extend the period for not longer than one (1) year if circumstances outside the Acquirer’s control delay the transfer of production beyond the initial term of the Supply Agreement;
  - b. For Required Historical Inputs and butanol, the term shall be not less than two (2) years from the Effective Date of Divestiture;
  - c. For Transitional Historical Inputs, the term shall be as long as required to accomplish the transition to another input, but in no event longer than one (1) year from the Effective Date of Divestiture; and



## Decision and Order

- d. For Seed Latex, the term shall be as agreed upon by Respondent and the applicable Acquirer and with the approval of the Commission.
2. The pricing terms of the Supply Agreement shall be as follows:
  - a. Divested Products and Seed Latex shall be supplied at Respondent's Cost; and
  - b. Required Historical Inputs, butanol, and Transitional Historical Inputs shall be supplied at a market price, as determined by a formula based on an objective measure of raw material, utility, and/or energy costs.
3. Any Supply Agreement with the applicable Acquirer must include at least the following terms and conditions:
  - a. Respondent shall permit the Acquirer to terminate the Supply Agreement, or reduce the quantities that the Acquirer is obligated to purchase under the Supply Agreement, upon commercially reasonable terms (including, but not limited to, meet-or-release terms);
  - b. Respondent shall be required to provide prompt notice to the Acquirer if Respondent acquires knowledge of any facts or circumstances indicating that a force majeure event (or some other cause beyond Respondent's control) will likely prevent Respondent from delivering the full, timely contract quantities of any of the products that are the subject of the Supply Agreement;
  - c. Respondent shall provide the Acquirer with reasonable advance notice of any planned maintenance, shutdown, decrease in output, improvement, expansion, or increase in output of any

## Decision and Order

plant or facility that is necessary to provide products pursuant to the Supply Agreement and that is reasonably likely to affect materially and adversely Respondent's obligations to the Acquirer under the Supply Agreement. Such notice shall be provided sufficiently in advance of such event to provide the Acquirer with a commercially reasonable opportunity to avoid any interruption of its business, including, but not limited to, the interruption of the delivery of full, timely contract quantities to the Acquirer's customers (including deliveries to the Acquirer's own divisions and subsidiaries);

- d. If Respondent fails to make full, timely deliveries under the Supply Agreement of any products due to:
  - (a) a force majeure event; or, (b) any act of or conduct by and within the control of Respondent, Respondent shall provide the Acquirer with the right to purchase the products that are the subject of the Supply Agreement, at the Acquirer's sole option and upon notice to Respondent that is reasonable under the circumstances, either from:
    - (1) Respondent, at the price and in the quantities provided by the Supply Agreement, so long as:
      - (a) Respondent has such products available, and Respondent:
        - i) Is not required by contract to deliver them to another Person; or
        - ii) Does not require them to fulfill contractual commitments to produce goods or products for sale to another Person; or

## Decision and Order

- (b) Respondent has the operating, non-idled capacity at its other plants or facilities to produce such products and Respondent:
    - i) Does not need to use such capacity to fulfill contractual obligations to deliver the products to another Person; or
    - ii) Does not need to use such capacity to produce products needed to fulfill contractual commitments to produce goods or products for sale to another Person; or
  - (c) Any other Person, until such time as Respondent resumes full, timely deliveries under the Supply Agreement;
  - e. Respondent shall permit the Acquirer to purchase additional quantities above the initial contract maximums in the Supply Agreement for use by the Divested Businesses, if Respondent's facilities used for the production of the products are not operating at capacity and Respondent could increase its production of the products without interfering with Respondent's then existing businesses; and
  - f. In any dispute or litigation between Respondent and the Acquirer, the Supply Agreement must be interpreted in light of achieving the purposes of the Order.
- C. "Ethylene/Ethanol Conversion Assistance Agreement" requiring Respondent Dow to provide at Cost all advice and consultation reasonably necessary for any Acquirer to convert the ethyl acrylate production at the Clear Lake Facility from an ethylene-based Acrylic Acid Product production facility to an ethanol-based Acrylic Acid Product

## Decision and Order

production facility. The agreement shall provide against the use of any Material Confidential Information obtained or received by Dow from performing the agreement, other than Respondent's use to comply with this Order and the Ethylene/Ethanol Conversion Assistance Agreement. The term of the Ethylene/Ethanol Conversion Assistance Agreement shall be at the option of the Acquirer, but not longer than three (3) years.

- D. "Technical Assistance Agreement" requiring the Respondent to provide all advice and consultation reasonably necessary for any Acquirer to receive and use, in any manner related to achieving the purposes of this Order, any asset, right, or interest relating to one or more of the Divested Businesses. The term of the Technical Assistance Agreement shall be at the option of the Acquirer, but not longer than twenty-four (24) months. The Technical Assistance Agreement shall be on commercially reasonable terms, and Respondent shall not be required to provide services to the Acquirer if the provision of such services would interfere with Respondent's ability to meet the needs of its then existing businesses other than the Divested Businesses. Confidential Appendix F lists the maximum fee Respondent may charge for such advice and consultation in each month.
- E. "Transition Services Agreement" requiring Respondent Dow to provide at Cost all services reasonably necessary to transfer administrative support services to Acquirers of each of the Divested Businesses, including, but not limited to, such services related to payroll, employee benefits, accounts receivable, accounts payable, utility service, batch and recipe data transfer, and other administrative and logistical support. Prior to the Effective Date of Divestiture, Respondent shall complete the transfer of batch and recipe data in a customary and usable format so that such data may be used by the Acrylic & Latex Business Acquirer in connection with its production of Latex Polymers Products as of the Effective

## Decision and Order

Date of Divestiture. At the option of the Acrylic & Latex Business Acquirer, the Transition Services Agreement with the Acrylic & Latex Business Acquirer shall include the provision or arrangement of any carrier, logistics, or transportation services reasonably necessary for the operation of the Acrylic Acid Business or the Latex Polymers Business and for which contracts are not assigned in whole or in part under any Divestiture Agreement. With regard to services other than batch and recipe data transfer, the term of the Transition Services Agreement shall be at the option of the Acquirers, but not longer than six (6) months from the Effective Date of Divestiture, with an option for the Acquirer to extend the period for an additional six (6) months for any services that cannot reasonably be transferred in the initial term of the Transition Services Agreement because of circumstances outside the Acquirer's control. Respondent shall not be required to provide any services that would effect a change in Respondent's status under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), including, without limitation, provision of coverage under any benefits plan sponsored or maintained by Respondent if such coverage will cause any such plan to (i) be treated as a plan maintained by more than one employer within the meaning of Section 413(c) of the Internal Revenue Code of 1986, as amended (the "Code"), (ii) be treated as a multiple employer welfare arrangement within the meaning of Section 3(40) of ERISA, or (iii) cause any plan to violate any provision of the Code or ERISA.

**III.**

**IT IS FURTHER ORDERED** that:

- A. Respondent Dow shall divest, absolutely and in good faith and at no minimum price, the Acrylic Acid Business and the Latex Polymers Business to the Acrylic & Latex Business Acquirer pursuant to and in accordance with the Acrylic

## Decision and Order

Acid Business Divestiture Agreement and the Latex Polymers Business Divestiture Agreement within the later of: (1) two hundred and forty (240) days after the Commission accepts the Agreement Containing Consent Orders for public comment; and, (2) two hundred and forty (240) days after the Acquisition closes. The Acrylic & Latex Business Acquirer may, but need not, be the same Person as the Hollow Sphere Particle Business Acquirer.

- B. Respondent shall secure at its sole expense all consents from Persons that are necessary to divest and operate in a manner that will achieve the purposes of this Order any tangible or intangible assets (including, but not limited to, any Contract) of the Acrylic Acid Business and the Latex Polymers Business to the Acrylic & Latex Business Acquirer; *provided, however*, Respondent shall not be in violation of this Order if it obtains the consents identified on Confidential Appendix G by the dates set forth in that appendix.
- C. At the option of the Acrylic & Latex Business Acquirer, and subject to the prior approval of the Commission, the Respondent, prior to or as of the Effective Date of Divestiture, shall enter into one or more of:
  - 1. An Ethylene/Ethanol Conversion Assistance Agreement;
  - 2. A Site Services Agreement;
  - 3. A Supply Agreement relating to either one or both of the Acrylic Acid Business and the Latex Polymers Business;
  - 4. A Technical Assistance Agreement relating to either one or both of the Acrylic Acid Business and the Latex Polymers Business; and,

## Decision and Order

5. A Transition Services Agreement relating to either one or both of the Acrylic Acid Business and the Latex Polymers Business.
- D. Respondent shall permit, and the Latex Polymers Business Divestiture Agreement shall include terms to allow, the Acrylic & Latex Business Acquirer, in connection with its production of Latex Polymers Products or other acrylic latexes, to improve, expand, change technology or processes used at, change the Latex Polymers Products or other acrylic latexes or mix of Latex Polymers Products or other acrylic latexes produced at, and otherwise modify the St. Charles Facility and how it is operated, *provided, however*, that any such expansion or changes in production at the St. Charles Facility or corresponding use of the Shared St. Charles Facility Assets shall be at the cost of the Acrylic & Latex Business Acquirer, including any costs incurred by Respondent in connection with such expansions or changes, such as Respondent's provision of additional or increased site services under the Site Services Agreement; *provided further that*, in the event the Acrylic & Latex Business Acquirer and Respondent are unable to agree on the terms of service and costs in connection with any increase or change to the use of the Shared St. Charles Facility Assets that are to be borne by the Acrylic & Latex Business Acquirer, Respondent shall provide a grant of rights to the Acrylic & Latex Business Acquirer, at the Acrylic & Latex Business Acquirer's sole cost and expense, to make such increase or change in the use of the Shared St. Charles Facility Assets so long as such increase or change does not harm, or interfere unreasonably with the use, operation, or value of, the Retained St. Charles Assets, the Shared St. Charles Facility Assets, or Respondent's other businesses located in St. Charles, Louisiana. Notwithstanding the foregoing, prior to Respondent granting the rights to the Acrylic & Latex Business Acquirer described in the immediately preceding sentence, Respondent may require the Acrylic & Latex

## Decision and Order

Business Acquirer to disclose the proposed terms (including cost) of all arrangements in connection with the applicable expansion or change (which shall be documented, bona fide and commercially reasonable) and should Respondent offer to match such proposed terms the Acrylic & Latex Business Acquirer shall be obligated to contract with Respondent with respect thereto (to the extent the Acrylic & Latex Business Acquirer undertakes the applicable expansion).

- E. Respondent shall reasonably cooperate to assist the Acrylic & Latex Business Acquirer to evaluate independently and retain Acrylic & Latex Key Employees and Acrylic & Latex Knowledgeable Employees, such cooperation to include at least the following:
1. Not later than forty five (45) days before the Effective Date of Divestiture, Respondent shall, to the extent permitted by applicable law: (i) provide to the Acrylic & Latex Business Acquirer a list of all Acrylic & Latex Key Employees and Acrylic & Latex Knowledgeable Employees, and Employee Information for each Person on the list; and (ii) allow the Acrylic & Latex Business Acquirer an opportunity to interview any Acrylic & Latex Key Employees and Acrylic & Latex Knowledgeable Employees;
  2. Not later than thirty (30) days before the Effective Date of Divestiture, Respondent shall provide an opportunity for the Acrylic & Latex Business Acquirer: (i) to meet personally, and outside the presence or hearing of any employee or agent of Respondent, with any one or more of the Acrylic & Latex Key Employees and Acrylic & Latex Knowledgeable Employees; and (ii) to make offers of employment to any one or more of the Acrylic & Latex Key Employees and Acrylic & Latex Knowledgeable Employees;



## Decision and Order

3. Respondent shall: (i) not directly or indirectly interfere with the Acrylic & Latex Business Acquirer's offer of employment to any one or more of the Acrylic & Latex Key Employees and Acrylic & Latex Knowledgeable Employees, directly or indirectly attempt to persuade any one or more of the Acrylic & Latex Key Employees and Acrylic & Latex Knowledgeable Employees to decline any offer of employment from the Acrylic & Latex Business Acquirer, or offer any incentive to any Acrylic & Latex Key Employees and Acrylic & Latex Knowledgeable Employees to decline employment with the Acrylic & Latex Business Acquirer; (ii) irrevocably waive any legal or equitable right to deter any Acrylic & Latex Key Employees and Acrylic & Latex Knowledgeable Employees from accepting employment with the Acrylic & Latex Business Acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondent that directly or indirectly relate to the Acrylic Acid Business or the Latex Polymers Business; and (iii) continue to extend to any Acrylic & Latex Key Employees and Acrylic & Latex Knowledgeable Employees, during their employment by the Acrylic Acid Business or the Latex Polymers Business prior to the Effective Date of Divestiture, all employee benefits offered by Respondent to similarly situated employees at that date, including regularly scheduled or merit raises and bonuses, and regularly scheduled vesting of all pension benefits;
4. Respondent shall cooperate with the Acrylic & Latex Business Acquirer to provide incentives to encourage Acrylic & Latex Key Employees to accept employment with the Acrylic & Latex Business Acquirer, as described in Confidential Appendix A; and,

## Decision and Order

5. For a period of two (2) years from the Effective Date of Divestiture, Respondent shall not solicit, negotiate, hire or enter into any arrangement for the services of any Acrylic & Latex Key Employee who has accepted an offer of employment with, or who is employed by, the Acrylic & Latex Business Acquirer.
- F. For a period of one (1) year from the Effective Date of Divestiture, Respondent shall not, directly or indirectly, solicit or induce, or attempt to solicit or induce, any Acrylic & Latex Knowledgeable Employee who has accepted an offer of employment with, or who is employed by, the Acrylic & Latex Business Acquirer to terminate his or her employment relationship with the Acrylic & Latex Business Acquirer; *provided, however*, a violation of this provision will not occur if:
1. The Acrylic & Latex Knowledgeable Employee's employment has been terminated by the Acrylic & Latex Business Acquirer;
  2. Respondent Dow advertises for employees in newspapers, trade publications, or other media not targeted specifically at any one or more of the employees of the Acrylic & Latex Business Acquirer; or
  3. Respondent Dow hires an Acrylic & Latex Knowledgeable Employee who has applied for employment with Respondent Dow, provided that such application was not solicited or induced in violation of this Order.
- G. Respondent shall comply with all terms of the Acrylic Acid Business Divestiture Agreement and the Latex Polymers Business Divestiture Agreement, and any breach by Respondent of any term of the Acrylic Acid Business Divestiture Agreement or the Latex Polymers Business Divestiture Agreement shall constitute a violation of this

## Decision and Order

Order. If any term of the Acrylic Acid Business Divestiture Agreement or the Latex Polymers Business Divestiture Agreement varies from the terms of this Order (“Order Term”), then to the extent that Respondent cannot fully comply with both terms, the Order Term shall determine Respondent’s obligations under this Order. Any material modification of the Acrylic Acid Business Divestiture Agreement or the Latex Polymers Business Divestiture Agreement between the date the Commission approves the Acrylic Acid Business Divestiture Agreement or the Latex Polymers Business Divestiture Agreement and the Effective Date of Divestiture, without the prior approval of the Commission, or any failure to meet any material condition precedent to closing (whether waived or not), shall constitute a failure to comply with this Order. Notwithstanding any paragraph, section, or other provision of the Acrylic Acid Business Divestiture Agreement or the Latex Polymers Business Divestiture Agreement, for a period of five (5) years after the Effective Date of Divestiture, any modification of the Acrylic Acid Business Divestiture Agreement or the Latex Polymers Business Divestiture Agreement, without the approval of the Commission, shall constitute a failure to comply with this Order. Respondent shall provide written notice to the Commission not more than five(5) days after any modification (material or otherwise) of the Acrylic Acid Business Divestiture Agreement or the Latex Polymers Business Divestiture Agreement, or after any failure to meet any condition precedent (material or otherwise) to closing (whether waived or not).

- H. The purpose of the divestiture of the Acrylic Acid Business and Latex Polymers Business to the Acrylic & Latex Business Acquirer is to create an independent, viable and effective competitor in the relevant markets in which the Acrylic Acid Business and Latex Polymers Business were engaged at the time of the announcement of the Acquisition,

## Decision and Order

and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

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

- A. Respondent Dow shall divest, absolutely and in good faith and at no minimum price, the Hollow Sphere Particle Business to the Hollow Sphere Particle Business Acquirer pursuant to and in accordance with the Hollow Sphere Particle Business Divestiture Agreement within the later of: (1) two hundred and forty (240) days after the Commission accepts the Agreement Containing Consent Orders for public comment; and, (2) two hundred and forty (240) days after the Acquisition closes. The Hollow Sphere Particle Business Acquirer may, but need not be, the same Person as the Acrylic & Latex Business Acquirer.
- B. Prior to the Effective Date of Divestiture, Respondent shall secure at its sole expense all consents from Persons that are necessary to divest and operate in a manner that will achieve the purposes of this Order any tangible or intangible assets (including, but not limited to, any Contract) of the Hollow Sphere Particle Business to the Hollow Sphere Particle Business Acquirer.
- C. At the option of the Hollow Sphere Particle Business Acquirer, and subject to the prior approval of the Commission, the Respondent, prior to or as of the Effective Date of Divestiture, shall enter into one or more of a Supply Agreement, a Technical Assistance Agreement, and a Transition Services Agreement relating to the Hollow Sphere Particle Business.
- D. Respondent shall reasonably cooperate to assist the Hollow Sphere Particle Business Acquirer to evaluate independently and retain Hollow Sphere Particle Knowledgeable

## Decision and Order

Employees and Hollow Sphere Particle Key Employees, such cooperation to include at least the following:

1. Not later than forty five (45) days before the Effective Date of Divestiture, Respondent shall, to the extent permitted by applicable law: (i) provide to the Hollow Sphere Particle Business Acquirer a list of all Hollow Sphere Particle Knowledgeable Employees and Hollow Sphere Particle Key Employees, and Employee Information for each Person on the list; and (ii) allow the Hollow Sphere Particle Business Acquirer an opportunity to interview any Hollow Sphere Particle Knowledgeable Employees and Hollow Sphere Particle Key Employees;
2. Not later than thirty (30) days before the Effective Date of Divestiture, Respondent shall provide an opportunity for the Hollow Sphere Particle Business Acquirer: (i) to meet personally, and outside the presence or hearing of any employee or agent of Respondent, with any one or more of the Hollow Sphere Particle Knowledgeable Employees and Hollow Sphere Particle Key Employees; and (ii) to make offers of employment to any one or more of the Hollow Sphere Particle Knowledgeable Employees and Hollow Sphere Particle Key Employees;
3. Respondent shall: (i) not directly or indirectly interfere with the Hollow Sphere Particle Business Acquirer's offer of employment to any one or more of the Hollow Sphere Particle Knowledgeable Employees and Hollow Sphere Particle Key Employees, directly or indirectly attempt to persuade any one or more of the Hollow Sphere Particle Knowledgeable Employees and Hollow Sphere Particle Key Employees to decline any offer of employment from the Hollow Sphere Particle Business Acquirer, or offer any incentive to any Hollow Sphere Particle Knowledgeable Employees and Hollow Sphere Particle Key Employees to decline employment with the

## Decision and Order

Hollow Sphere Particle Business Acquirer; (ii) irrevocably waive any legal or equitable right to deter any Hollow Sphere Particle Knowledgeable Employees and Hollow Sphere Particle Key Employees from accepting employment with the Hollow Sphere Particle Business Acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondent that directly or indirectly relate to the Hollow Sphere Particle Business; and (iii) continue to extend to any Hollow Sphere Particle Knowledgeable Employees and Hollow Sphere Particle Key Employees, during their employment by the Hollow Sphere Particle Business prior to the Effective Date of Divestiture, all employee benefits offered by Respondent to similarly situated employees at that date, including regularly scheduled or merit raises and bonuses, and regularly scheduled vesting of all pension benefits;

4. Respondent shall cooperate with the Hollow Sphere Particle Business Acquirer to provide incentives to encourage Hollow Sphere Particle Key Employees to accept employment with the Hollow Sphere Particle Business Acquirer, as described in Confidential Appendix C; and
  5. For a period of two (2) years from the Effective Date of Divestiture, Respondent shall not solicit, negotiate, hire or enter into any arrangement for the services of any Hollow Sphere Particle Key Employee who has accepted an offer of employment with, or who is employed by, the Hollow Sphere Particle Business Acquirer.
- E. For a period of one (1) year from the Effective Date of Divestiture, Respondent shall not, directly or indirectly, solicit or induce, or attempt to solicit or induce, any Hollow Sphere Particle Knowledgeable Employee who has accepted an offer of employment with, or who is employed by, the

## Decision and Order

Hollow Sphere Particle Business Acquirer to terminate his or her employment relationship with the Hollow Sphere Particle Business Acquirer; *provided, however*, a violation of this provision will not occur if:

1. The Hollow Sphere Particle Knowledgeable Employee's employment has been terminated by the Hollow Sphere Particle Business Acquirer;
  2. Respondent Dow advertises for employees in newspapers, trade publications, or other media not targeted specifically at any one or more of the employees of the Hollow Sphere Particle Business Acquirer; or
  3. Respondent Dow hires a Hollow Sphere Particle Knowledgeable Employee who has applied for employment with Respondent Dow, provided that such application was not solicited or induced in violation of this Order.
- F. Respondent shall comply with all terms of the Hollow Sphere Particle Business Divestiture Agreement, and any breach by Respondent of any term of the Hollow Sphere Particle Business Divestiture Agreement shall constitute a violation of this Order. If any term of the Hollow Sphere Particle Business Divestiture Agreement varies from the terms of this Order ("Order Term"), then to the extent that Respondent cannot fully comply with both terms, the Order Term shall determine Respondent's obligations under this Order. Any material modification of the Hollow Sphere Particle Divestiture Agreement between the date the Commission approves the Hollow Sphere Particle Divestiture Agreement and the Effective Date of Divestiture, without the prior approval of the Commission, or any failure to meet any material condition precedent to closing (whether waived or not), shall constitute a failure to comply with this Order. Notwithstanding any paragraph, section, or other provision of the Hollow Sphere Particle Divestiture

## Decision and Order

Agreement, any modification after the Effective Date of Divestiture of the Hollow Sphere Particle Divestiture Agreement, for a period of five (5) years after the Effective Date of Divestiture, without the approval of the Commission, shall constitute a failure to comply with this Order. Respondent shall provide written notice to the Commission not more than five (5) days after any modification (material or otherwise) of the Hollow Sphere Particle Divestiture Agreement, or after any failure to meet any condition precedent (material or otherwise) to closing (whether waived or not).

- G. The purpose of the divestiture of the Hollow Sphere Particle Business to the Hollow Sphere Particle Business Acquirer is to create an independent, viable and effective competitor in the relevant markets in which the Hollow Sphere Particle Business was engaged at the time of the announcement of the Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

**V.**

**IT IS FURTHER ORDERED** that:

- A. After the Effective Date of Divestiture, Respondent shall:
1. not provide, disclose, or otherwise make available any Material Confidential Information to any Person except as required or permitted by this Order; and
  2. not use any Material Confidential Information for any reason or purpose other than as required or permitted by this Order.

*Provided, however,* that nothing in this Paragraph V shall prevent Respondent from using any intellectual property or Know-how that is conveyed or licensed to Respondent or



## Decision and Order

that Respondent retains the right to use pursuant to this Order, *provided, further* that to the extent that the use of such intellectual property or Know-how involves disclosure of Material Confidential Information to another Person, such Person must agree to maintain the confidentiality of such Material Confidential Information under terms no less restrictive than Respondent's obligations under this Order.

- B. Respondent shall devise and implement measures to protect against the storage, distribution, and use of Material Confidential Information that is not permitted by this Order. These measures shall include, but not be limited to, restrictions placed on access by Persons to information available or stored on any of Respondent's computers or computer networks.
- C. Respondent no less than annually shall provide written or electronic instructions to any of its officers, directors, employees, or agents who have custody or control of any Material Confidential Information concerning the limitations placed by this Order on the distribution and use of Material Confidential Information. Respondent shall require such officers to acknowledge in writing or electronically their receipt and understanding of these written or electronic instructions. Respondent shall maintain custody of these written or electronic instructions and acknowledgments for inspection upon request by the Commission.
- D. Notwithstanding Paragraph V.A. of this Order and subject to the Hold Separate Order, Respondent may use Material Confidential Information:
  - 1. For the purpose of performing Respondent's obligations under this Order, the Hold Separate Order, or the Divestiture Agreements;
  - 2. For uses or applications in Respondent's businesses that do not compete with the Divested Businesses, if such use

## Decision and Order

or application by Respondent is not competitively significant to the Divested Businesses, *provided, however,* that the applicable Acquirer of a Divested Business must consent to any use of Competitively Sensitive Information regarding such Divested Business;

3. To ensure compliance with legal and regulatory requirements;
4. To perform required auditing functions;
5. To provide accounting, information technology, and credit-underwriting services;
6. To provide legal services associated with actual or potential litigation and transactions;
7. To monitor and ensure compliance with financial, tax reporting, governmental environmental, health, and safety requirements;
8. For inclusion within the periodic financial reports that the Divested Businesses may provide Respondent but only to the extent that any Material Confidential Information is aggregated so that data as to individual customers are not disclosed; or
9. As otherwise provided by this Order.

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

- A. At any time after Respondent signs the Consent Agreement in this matter, the Commission may appoint a monitor (“Interim Monitor”) to assure that Respondent expeditiously complies with all of its obligations and performs all of its

## Decision and Order

responsibilities as required by this Order and the Divestiture Agreements.

- B. The Commission shall select the Interim Monitor, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Interim Monitor, Respondent shall be deemed to have consented to the selection of the proposed Interim Monitor.
- C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondent shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondent's compliance with the relevant requirements of the Order in a manner consistent with the purposes of the Order. A violation of the agreement with the Interim Monitor shall be a violation of this Order.
- D. If an Interim Monitor is appointed, Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:
  - 1. The Interim Monitor shall have the power and authority to monitor Respondent's compliance with the divestiture and related requirements of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission.
  - 2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.

## Decision and Order

3. The Interim Monitor shall provide periodic written reports to the Commission upon a schedule (but at least annually) that is sufficient to provide the Commission with timely information to determine if Respondent has complied and is complying with its obligations under this Order (including the Divestiture Agreements). In addition, the Interim Monitor shall provide such additional written reports as Commission staff may request that reasonably are related to determining if Respondent has complied and is complying with its obligations under this Order (including the Divestiture Agreements). The Interim Monitor may not provide to Respondent, and Respondent is not entitled to receive, copies of these reports.
4. The Interim Monitor shall serve until the earlier of the expiration or termination of the last to expire of the Divestiture Agreements and this Order;  
  
*provided, however,* that the Commission may modify this period as may be necessary or appropriate to accomplish the purposes of the Order.
5. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondent's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondent's compliance with its obligations under the Order, including, but not limited to, its obligations related to the relevant Product assets. Respondent shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondent's compliance with the Order.

## Decision and Order

6. The Interim Monitor shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of the Respondent, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities. The Interim Monitor shall provide an accounting, at least on a quarterly basis, to Respondent for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.
7. Respondent shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.
8. Respondent shall provide copies of reports to the Interim Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission.
9. Respondent may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.

## Decision and Order

- E. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.
- F. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.
- G. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Order.
- H. The Interim Monitor appointed pursuant to this Order may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order.

## Decision and Order

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

- A. If Respondent fails to complete any of the divestitures required by Paragraphs III or IV of this Order within the time periods specified therein, then the Commission may appoint one or more Divestiture Trustees to divest one or more of the Acrylic Acid Business, Latex Polymers Business, and Hollow Sphere Particle Business to one or two Acquirers and to execute Divestiture Agreements that satisfy the requirements of Paragraphs II, III, and IV of this Order.
- B. 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, for any failure by the Respondent to comply with this Order, Respondent shall consent to the appointment of a Divestiture Trustee in such action to divest the relevant assets and to enter into Divestiture Agreements in accordance with the terms of this Order. Neither the decision of the Commission to appoint a Divestiture Trustee, nor the decision of the Commission not to appoint a Divestiture Trustee, to divest any of the assets or to enter into Divestiture Agreements under this Paragraph VII shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, for any failure by the Respondent to comply with this Order.
- C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any

## Decision and Order

proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Divestiture Trustee, Respondent shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

- D. Within ten (10) days after appointment of the Divestiture Trustee, Respondent shall execute a trust agreement (“Divestiture Trustee Agreement”) that, subject to the prior approval of the Commission transfers to the Divestiture Trustee all rights and powers necessary to effect the relevant divestiture or transfer, and to enter into the relevant agreements, required by this Order.
- E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph VII of this Order, Respondent shall consent to, and the Divestiture Trustee Agreement shall include, the following terms and conditions regarding the Divestiture Trustee’s powers, duties, authority, and responsibilities:
  - 1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest relevant assets or enter into relevant agreements pursuant to the terms of this Order.
  - 2. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the Divestiture Trustee Agreement described in this Paragraph VII of this Order to divest relevant assets or enter into relevant agreements pursuant to the terms of this Order. If, however, at the end of the applicable twelve-month period, the Divestiture Trustee has submitted to the Commission a plan of divestiture for assets, or for entering into relevant agreements pursuant to the terms of this Order, or believes that divestiture can be achieved or agreements can be negotiated within a reasonable time, such period may be extended by the Commission,



## Decision and Order

or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend such 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 of Respondent related to the Acrylic Acid Business, Latex Polymers Business, and Hollow Sphere Particle Business, related to any agreements contemplated by this Order, or related to any other relevant information, as the Divestiture Trustee may request. Respondent shall develop such financial or other information as the Divestiture Trustee may reasonably request and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of his or her responsibilities. At the option of the Commission, any delays in divestiture or entering into any agreement caused by Respondent shall extend the time for divestiture under this Paragraph VII in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.
4. Respondent may require the Divestiture Trustee, and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement, provided, however, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission. The Divestiture Trustee Agreement shall terminate when the divestiture required by this Order is consummated.
5. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's

## Decision and Order

absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made to, and the Divestiture Agreements executed with, an Acquirer in the manner set forth in Paragraphs II, III, and IV of 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 acquiring entity, the Divestiture Trustee shall divest to the acquiring entity or entities selected by Respondent from among those approved by the Commission, *provided further, however*, that Respondent shall select such entity within five (5) days of receiving notification of the Commission's approval.

6. The Divestiture Trustee shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the Divestiture Trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Respondent. The Divestiture Trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the Divestiture Trustee's accomplishing the divestitures and assuring compliance with this Order. The powers, duties, and responsibilities of the Divestiture Trustee (including, but not limited to, the right to incur fees or other expenses) shall terminate when the divestiture required

## Decision and Order

by this Order is consummated, and the Divestiture Trustee has provided an accounting for all monies derived from the divestiture and all expenses occurred.

7. Respondent shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.
  8. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Acrylic Acid Business, Latex Polymers Business, or Hollow Sphere Particle Business.
  9. The Divestiture Trustee shall report in writing to Respondent and to the Commission every two (2) months until the Divestiture Trustee's obligations are completed concerning the Divestiture Trustee's efforts to divest and enter into agreements related to the Acrylic Acid Business, Latex Polymers Business, and Hollow Sphere Particle Business, and Respondent's compliance with the terms of this Order.
- F. If the Commission determines that the Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in this Paragraph VII of this Order.
- G. Respondent shall comply with all terms of the Divestiture Trustee Agreement, and any breach by Respondent of any term of the Divestiture Trustee Agreement shall constitute a

## Decision and Order

violation of this Order. Notwithstanding any paragraph, section, or other provision of the Divestiture Trustee Agreement, any modification of the Divestiture Trustee Agreement, without the prior approval of the Commission, shall constitute a failure to comply with this Order.

**VIII.**

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

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

**IX.**

**IT IS FURTHER ORDERED** that:

- A. Within thirty (30) days after the date this Order becomes final and every sixty (60) days thereafter until the Respondent has fully complied with the provisions of Paragraphs III and IV of this Order, Respondent shall submit to the Commission (with simultaneous copies to the Interim Monitor and Divestiture Trustee(s), as appropriate) verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs III and IV of this Order. Respondent shall include in the reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs III and IV of this Order, including a description of all substantive contacts

## Decision and Order

or negotiations for the divestitures and the identity of all parties contacted. Respondent shall include in the reports copies of all material written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing the obligations. In addition, Respondent's first report under this paragraph shall include a copy of the written instructions and acknowledgments concerning Material Confidential Information required by Paragraph V of this Order; and,

- B. One (1) year from the date this Order becomes final on the anniversary of the date this Order becomes final, and annually until the earlier of the expiration or termination of Respondent's obligations under the Divestiture Agreements and this Order, Respondent shall file verified written reports with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order. Respondent shall deliver a copy of each such report to the Interim Monitor.

**X.**

**IT IS FURTHER ORDERED** that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. To access, during business office hours of Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondent related to compliance with this Order, which copying services shall be provided by Respondent at the request of the authorized

## Decision and Order

representative(s) of the Commission and at the expense of the Respondent; and;

- B. To interview officers, directors, or employees of such Respondent, who may have counsel present, regarding such matters.

**XI.**

**IT IS FURTHER ORDERED** that this Order shall terminate on March 31, 2019.

By the Commission.

**CONFIDENTIAL APPENDICES A-G**

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

## Decision and Order

**Exhibit 1****Exhibit 1****Description of Real Property in Alsip, IL**

## PARCEL 1:

THAT PART OF THE EAST 550.00 FEET OF THE NORTHEAST 1/4 OF THE NORTHEAST 1/4 OF SECTION 34, TOWNSHIP 37 NORTH, RANGE 13 EAST OF THE THIRD PRINCIPAL MERIDIAN, LYING SOUTH OF A LINE DESCRIBED AS BEGINNING AT A POINT IN THE EAST LINE OF SAID NORTHEAST 1/4 DISTANT 730.00 FEET SOUTH OF THE NORTH EAST CORNER THEREOF; THENCE NORTH 82 DEGREES, 47 MINUTES, 35 SECONDS WEST ON A LINE PARALLEL WITH THE NORTH LINE OF SAID NORTHEAST 1/4 A DISTANCE OF 460.00 FEET; THENCE SOUTH 89 DEGREES, 49 MINUTES 32 SECONDS WEST 90.70 FEET TO A POINT IN THE WEST LINE OF THE EAST 550.00 FEET OF SAID NORTHEAST 1/4 (EXCEPTING FROM THE EAST 550.00 FEET OF SAID NORTHEAST 1/4 THAT PORTION OF THE SOUTH 66.00 FEET LYING WEST OF THE WEST LINE OF THE EAST 50.00 FEET THEREOF) AND (EXCEPT THEREFROM THE EAST 50 FEET THEREOF) AND (EXCEPT THEREFROM THAT PART OF THE NORTHEAST 1/4 OF THE NORTHEAST 1/4 OF SECTION 34, TOWNSHIP 37 NORTH, RANGE 13 EAST OF THE THIRD PRINCIPAL MERIDIAN BOUNDED AND DESCRIBED AS FOLLOWS::

BEGINNING AT THE INTERSECTION OF THE NORTH LINE OF THE SOUTH 66 FEET OF THE NORTHEAST 1/4 OF THE NORTHEAST 1/4 AFORESAID WITH THE WEST LINE OF THE EAST 50 FEET OF SAID NORTHEAST 1/4; THENCE NORTH ON SAID WEST LINE, 25 FEET; THENCE SOUTHWESTERLY TO A POINT 84 FEET WEST OF AND 75 FEET NORTH OF THE SOUTH EAST CORNER OF THE NORTHEAST 1/4 OF THE NORTHEAST 1/4 AFORESAID, (AS MEASURED ON THE SOUTH LINE OF SAID NORTHEAST 1/4 OF THE NORTHEAST 1/4 AND ON A LINE AT RIGHT ANGLES THERETO); THENCE WESTERLY TO A POINT ON THE NORTH LINE OF THE SOUTH 66 FEET AFORESAID, 200 FEET WEST OF THE PLACE OF BEGINNING; THENCE EAST ON SAID NORTH LINE, 200 FEET TO THE PLACE OF BEGINNING) AND (EXCEPT THEREFROM THAT PART OF THE NORTHEAST 1/4 OF SECTION 34 AFORESAID, BOUNDED AND DESCRIBED AS FOLLOWS::

BEGINNING AT THE INTERSECTION OF THE WEST LINE OF THE EAST 50 FEET OF SAID NORTHEAST 1/4 WITH THE SOUTH LINE OF THE NORTH 730 FEET OF SAID NORTHEAST 1/4 (SAID 730 FEET BEING MEASURED ON THE EAST LINE THEREOF; THENCE WEST, ON SAID SOUTH LINE, TO THE WEST LINE OF THE EAST 75 FEET OF SAID NORTHEAST 1/4; THENCE SOUTH ON SAID WEST LINE TO ITS INTERSECTION WITH A LINE DRAWN AT RIGHT ANGLES TO THE EAST LINE OF SAID NORTHEAST 1/4 FROM A POINT IN SAID EAST LINE, 736.76 FEET SOUTH OF THE NORTH EAST CORNER THEREOF; THENCE EAST, AT RIGHT ANGLES TO THE EAST LINE OF SAID

FEDERAL TRADE COMMISSION DECISIONS  
VOLUME 147

## Decision and Order

NORTHEAST 1/4 TO THE WEST LINE OF THE EAST 50 FEET AFORESAID; THENCE NORTH, ON SAID WEST LINE, TO THE PLACE OF BEGINNING) IN COOK COUNTY, ILLINOIS

## PARCEL 2:

THAT PART OF THE NORTHEAST 1/4 OF THE NORTHEAST 1/4 OF SECTION 34, TOWNSHIP 37 NORTH, RANGE 13 EAST OF THE THIRD PRINCIPAL MERIDIAN, LYING WEST OF THE EAST 550.0 FEET THEREOF, LYING EAST OF THE WEST 250.00 FEET THEREOF, LYING NORTH OF THE SOUTH 66.0 FEET THEREOF AND LYING SOUTH OF A LINE DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT IN THE EAST LINE OF THE WEST 250.0 FEET OF THE NORTHEAST 1/4 OF THE NORTHEAST 1/4 OF SECTION 34 AFORESAID, DISTANT 878.00 FEET SOUTH FROM THE NORTH

LINE OF THE NORTHEAST 1/4 OF THE NORTHEAST 1/4 OF SAID SECTION 34, AS MEASURED ON THE EAST LINE OF THE WEST 250.00 FEET THEREOF; THENCE NORTH 83 DEGREES, 37 MINUTES, 30 SECONDS EAST ON A LINE FORMING AN ANGLE OF 83 DEGREES, 37 MINUTES AND 30 SECONDS WITH THE LAST DESCRIBED LINE, A DISTANCE OF 93.39 FEET TO A POINT; THENCE NORTH 72 DEGREES, 24 MINUTES, 52 SECONDS EAST, A DISTANCE OF 307.20 FEET TO A POINT; THENCE NORTH 70 DEGREES, 32 MINUTES, 45 SECONDS EAST, A DISTANCE OF 63.92 FEET TO A POINT; THENCE NORTH 82 DEGREES, 49 MINUTES 32 SECONDS EAST, A DISTANCE OF 79.91 FEET MORE OR LESS TO THE WEST LINE OF THE EAST 550.0 FEET OF THE NORTHEAST 1/4 OF THE NORTHEAST 1/4 OF SECTION 34 AFORESAID, IN COOK COUNTY, ILLINOIS.

## PARCEL 3:

LOT 3 IN BCR SUBDIVISION, BEING A SUBDIVISION OF PART OF THE NORTHWEST 1/4 OF THE NORTHEAST 1/4 OF THE NORTHEAST 1/4 OF SECTION 34, TOWNSHIP 37 NORTH, RANGE 13 EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS



Decision and Order

**Exhibit 2**

**Exhibit 2**

**Legal Description of Real Property in Cary, NC**

Lying and being in Wake County, North Carolina, and more particularly described as follows:  
Being all of Lot No. 30, MacGregor Park according to a map by Runa A. Cooper, Land  
Surveyor, dated January 18, 1984, and recorded in Book of Maps 1984, Page 97.

FEDERAL TRADE COMMISSION DECISIONS  
VOLUME 147

## Decision and Order

**Exhibit 3****Exhibit 3****Description of Real Property in Clear Lake, TX****TRACT 1 – TRUCK SHED 2  
0.118 ACRE TRACT  
GEORGE B. MCKINSTRY, ABSTRACT 47  
HARRIS COUNTY, TEXAS**

**ALL THAT CERTAIN 0.118 ACRE TRACT** of land lying and situated in the George B. McKinstry Survey, Abstract 47, Harris County, Texas, being all that certain called 0.118 acre tract of land, described Memorandum of Ground Lease between Celanese LTD and The Dow Chemical Company per instrument recorded in Clerk's File No. X382270 of the Real Property Records of Harris County, Texas (R.P.R.H.C.T.), and being located in The Dow Chemical Company Celanese plant site, said 0.118 acre tract hereby conveyed being more particularly described by metes and bounds, using survey terminology which refers to the Texas State Plane Coordinate System, South Central Zone (NAD27), in which the directions are Lambert grid bearings and the distances are surface level horizontal lengths, (S.F. = 0.9998759575) as follows:

**COMMENCING** at a set 5/8" iron rod set with cap marking the Southeasterly corner of the remainder of a called 963.850 acre tract described in deed to Celanese Corporation, as recorded in Clerk's File No. D789836, R.P.R.H.C.T. located at Texas State Plane Coordinate X=3,221,323.29 and Y=13,795,342.55 from which a set 5/8" iron rod with cap bears North 27°32'59" West, a distance of 1346.34 feet at X=3,220,700.64 and Y=13,796,536.09;

**THENCE** South 82°16'25" West, a distance of 599.56 feet to an "X" in concrete set for the **POINT OF BEGINNING** of the herein described tract, being at position X=3,220,729.24 and Y=13,795,261.95;

**THENCE** South 87°31'29" West, along the South line of said called 0.118 acre tract, a distance of 50.00 feet to "X" in concrete set for corner;

**THENCE** North 02°28'31" West, along the West line of said called 0.118 acre tract, a distance of 103.00 feet to a 5/8" iron rod with cap set for corner;

**THENCE** North 87°31'29" East, along the North line of said called 0.118 acre tract, a distance of 50.00 feet to a 5/8" iron rod with cap set for corner;

**THENCE** South 02°28'31" East, along the East line of said called 0.118 acre tract, a distance of 103.00 feet to the **POINT OF BEGINNING** and containing 0.118 acres of land more or less.

**TRACT 2 – ACRYLATES TANK FARM  
0.052 ACRE TRACT**

## Decision and Order

**GEORGE B. MCKINSTRY, ABSTRACT 47  
HARRIS COUNTY, TEXAS**

**ALL THAT CERTAIN 0.052 ACRE TRACT** of land lying and situated in the George B. McKinstry Survey, Abstract 47, Harris County, Texas, being all that certain called 0.052 acre tract of land, described Memorandum of Ground Lease between Celanese LTD and The Dow Chemical Company per instrument recorded in Clerk's File No. X382270 of the Real Property Records of Harris County, Texas (R.P.R.H.C.T.), and being located in The Dow Chemical Company Celanese plant site, said 0.052 acre tract hereby conveyed being more particularly described by metes and bounds, using survey terminology which refers to the Texas State Plane Coordinate System, South Central Zone (NAD27), in which the directions are Lambert grid bearings and the distances are surface level horizontal lengths, (S.F. = 0.9998759575) as follows:

**COMMENCING** at a set 5/8" iron rod set with cap marking the Southeasterly corner of the remainder of a called 963.850 acre tract described in deed to Celanese Corporation, as recorded in Clerk's File No. D789836, R.P.R.H.C.T. located at Texas State Plane Coordinate X=3,221,323.29 and Y=13,795,342.55 from which a set 5/8" iron rod with cap bears North 27°32'59" West, a distance of 1346.34 feet at X=3,220,700.64 and Y=13,796,536.09;

**THENCE** North 62°49'44" West, a distance of 525.88 feet to a 5/8" iron rod with cap set for the **POINT OF BEGINNING** of the herein described tract, being at position X=3,220,855.49 and Y=13,795,582.66;

**THENCE** South 87°31'29" West, along the South line of said called 0.052 acre tract, a distance of 65.00 feet to a 5/8" iron rod with cap set for corner;

**THENCE** North 02°28'31" West, along the West line of said called 0.052 acre tract, a distance of 35.00 feet to a 5/8" iron rod with cap set for corner;

**THENCE** North 87°31'29" East, along the North line of said called 0.052 acre tract, a distance of 65.00 feet to a 5/8" iron rod with cap set for corner;

**THENCE** South 02°28'31" East, along the East line of said called 0.052 acre tract, a distance of 35.00 feet to the **POINT OF BEGINNING** and containing 0.052 acres of land, more or less.

**DOW LEASE TRACT 3 – ACRYLATES TANK FARM  
2.411 ACRE TRACT**

FEDERAL TRADE COMMISSION DECISIONS  
VOLUME 147

## Decision and Order

**GEORGE B. MCKINSTRY, ABSTRACT 47  
HARRIS COUNTY, TEXAS  
PAGE 1 OF 2**

**ALL THAT CERTAIN 2.411 ACRE TRACT** of land lying and situated in the George B. McKinstry Survey, Abstract 47, Harris County, Texas, being all that certain called 2.411 acre tract of land, described Memorandum of Ground Lease between Celanese LTD and The Dow Chemical Company per instrument recorded in Clerk's File No. X382270 of the Real Property Records of Harris County, Texas (R.P.R.H.C.T.), and being located in The Dow Chemical Company Celanese plant site, said 2.411 acre tract hereby conveyed being more particularly described by metes and bounds, using survey terminology which refers to the Texas State Plane Coordinate System, South Central Zone (NAD27), in which the directions are Lambert grid bearings and the distances are surface level horizontal lengths, (S.F. = 0.9998759575) as follows:

**COMMENCING** at a set 5/8" iron rod set with cap marking the Southeasterly corner of the remainder of a called 963.850 acre tract described in deed to Celanese Corporation, as recorded in Clerk's File No. D789836, R.P.R.H.C.T. located at Texas State Plane Coordinate X=3,221,323.29 and Y=13,795,342.55 from which a set 5/8" iron rod with cap bears North 27°32'59" West, a distance of 1346.34 feet at X=3,220,700.64 and Y=13,796,536.09;

**THENCE** North 84°31'26" West, a distance of 557.40 feet to a 5/8" iron rod with cap set for the **POINT OF BEGINNING** of the herein described tract, being at position X=3,220,768.49 and Y=13,795,395.73;

**THENCE** South 87°31'29" West, along the South line of said called 2.411 acre tract, distance of 110.00 feet to a "X" in concrete set for corner;

**THENCE** South 02°28'31" East, along the East line of said called 2.411 acre tract, a distance of 37.00 feet to a "X" in concrete set for corner;

**THENCE** South 87°31'29" West, along the South line of said called 2.411 acre tract, a distance of 269.00 feet to a P.K. nail set for corner;

**THENCE** North 02°28'31" West, along the West line of said called 2.411 acre tract, a distance of 192.00 feet to a P.K. nail set for corner;

**THENCE** North 87°31'29" East, along the North line of said called 2.411 acre tract, a distance of 59.00 feet to a P.K. nail set for corner;

**THENCE** North 02°28'31" West, along the West line of said called 2.411 acre tract, a distance of 68.00 feet to a point for corner;

**THENCE** South 87°31'29" West, along the North line of said called 2.411 acre tract, a distance of 59.00 feet to a bridge spike set for corner;

Decision and Order

**DOW LEASE TRACT 3 – ACRYLATES TANK FARM  
2.411 ACRE TRACT  
GEORGE B. MCKINSTRY, ABSTRACT 47  
HARRIS COUNTY, TEXAS  
PAGE 2 OF 2**

**THENCE** North 02°28'31" West, along the West line of said called 2.411 acre tract, a distance of 90.00 feet to a 5/8" iron rod with cap set for corner;

**THENCE** North 87°31'29" East, along the North line of said called 2.411 acre tract, a distance of 232.00 feet to a 5/8" iron rod with cap set for corner;

**THENCE** South 02°28'31" East, along the East line of said called 2.411 acre tract, a distance of 133.00 feet to a bridge spike set for corner;

**THENCE** North 87°31'29" East, along the North line of said called 2.411 acre tract, a distance of 147.00 feet to an "X" in concrete set for corner;

**THENCE** South 02°28'31" East, along the East line of said called 2.411 acre tract, a distance of 180.00 feet to the **POINT OF BEGINNING** and containing 2.411 acres or land, more or less.

**TRACT 4 – ACRYLATES TANK FARM  
1.581 ACRE TRACT**

FEDERAL TRADE COMMISSION DECISIONS  
VOLUME 147

## Decision and Order

**GEORGE B. MCKINSTRY, ABSTRACT 47  
HARRIS COUNTY, TEXAS  
PAGE 1 OF 1**

**ALL THAT CERTAIN 1.581 ACRE TRACT** of land lying and situated in the George B. McKinstry Survey, Abstract 47, Harris County, Texas, being all that certain called 1.581 acre tract of land, described Memorandum of Ground Lease between Celanese LTD and The Dow Chemical Company per instrument recorded in Clerk's File No. X382270 of the Real Property Records of Harris County, Texas (R.P.R.H.C.T.), and being located in The Dow Chemical Company Celanese plant site, said 1.581 acre tract hereby conveyed being more particularly described by metes and bounds, using survey terminology which refers to the Texas State Plane Coordinate System, South Central Zone (NAD27), in which the directions are Lambert grid bearings and the distances are surface level horizontal lengths, (S.F. = 0.9998759575) as follows:

**COMMENCING** at a set 5/8" iron rod set with cap marking the Southeasterly corner of the remainder of a called 963.850 acre tract described in deed to Celanese Corporation, as recorded in Clerk's File No. D789836, R.P.R.H.C.T. located at Texas State Plane Coordinate X=3,221,323.29 and Y=13,795,342.55 from which a set 5/8" iron rod with cap bears North 27°32'59" West, a distance of 1346.34 feet at X=3,220,700.64 and Y=13,796,536.09;

**THENCE** North 61°43'48" West, a distance of 840.13 feet to a 5/8" iron rod with cap set for the **POINT OF BEGINNING** of the herein described tract, being at position X=3,220,583.45 and Y=13,795,740.41;

**THENCE** South 87°31'29" West, along the South line of said called 1.581 acre tract, a distance of 194.00 feet to 5/8" iron rod with cap set for corner;

**THENCE** North 02°28'31" West, along the West line of said called 1.581 acre tract, a distance of 355.00 feet to a bridge spike set for corner;

**THENCE** North 87°31'29" East, along the North line of said called 1.581 acre tract, a distance of 194.00 feet to a bridge spike set for corner;

**THENCE** South 02°28'31" East, along the East line of said called 1.581 acre tract, a distance of 355.00 feet to the **POINT OF BEGINNING** and containing 1.581 acres of land, more or less.

**TRACT 5 – ACRYLATES TANK FARM  
0.239 ACRE TRACT  
GEORGE B. MCKINSTRY, ABSTRACT 47**

## Decision and Order

**HARRIS COUNTY, TEXAS  
PAGE 1 OF 1**

**ALL THAT CERTAIN 0.239 ACRE TRACT** of land lying and situated in the George B. McKinstry Survey, Abstract 47, Harris County, Texas, being all that certain called 0.239 acre tract of land, described Memorandum of Ground Lease between Celanese LTD and The Dow Chemical Company per instrument recorded in Clerk's File No. X382270 of the Real Property Records of Harris County, Texas (R.P.R.H.C.T.), and being located in The Dow Chemical Company Celanese plant site, said 0.239 acre tract hereby conveyed being more particularly described by metes and bounds, using survey terminology which refers to the Texas State Plane Coordinate System, South Central Zone (NAD27), in which the directions are Lambert grid bearings and the distances are surface level horizontal lengths, (S.F. = 0.9998759575) as follows:

**COMMENCING** at a set 5/8" iron rod set with cap marking the Southeasterly corner of the remainder of a called 963.850 acre tract described in deed to Celanese Corporation, as recorded in Clerk's File No. D789836, R.P.R.H.C.T. located at Texas State Plane Coordinate X=3,221,323.29 and Y=13,795,342.55 from which a set 5/8" iron rod with cap bears North 27°32'59" West, a distance of 1346.34 feet at X=3,220,700.64 and Y=13,796,536.09;

**THENCE** North 89°40'52" West, a distance of 1233.47 feet to a 5/8" iron rod with cap set for the **POINT OF BEGINNING** of the herein described tract, being at position X=3,220,089.98 and Y=13,795,349.41;

**THENCE** South 87°31'29" West, along the South line of said called 0.239 acre tract, a distance of 65.00 feet to "X" in concrete set for corner;

**THENCE** North 02°28'31" West, along the West line of said called 0.239 acre tract, a distance of 160.00 feet to an "X" in concrete set for corner;

**THENCE** North 87°31'29" East, along the North line of said called 0.239 acre tract, a distance of 65.00 feet to a 5/8" iron rod with cap set for corner;

**THENCE** South 02°28'31" East, along the East line of said called 0.239 acre tract, a distance of 160.00 feet to the **POINT OF BEGINNING** and containing 0.239 acres of land more or less.

**TRACT 6 – ACRYLATES ACID COMPLEX  
16.908 ACRE TRACT**

## Decision and Order

**GEORGE B. MCKINSTRY, ABSTRACT 47  
HARRIS COUNTY, TEXAS  
PAGE 1 OF 2**

**ALL THAT CERTAIN 16.908 ACRE TRACT** of land lying and situated in the George B. McKinstry Survey, Abstract 47, Harris County, Texas, being all that certain called 16.908 acre tract of land, described Memorandum of Ground Lease between Celanese LTD and The Dow Chemical Company per instrument recorded in Clerk's File No. X382270 of the Real Property Records of Harris County, Texas (R.P.R.H.C.T.), and being located in The Dow Chemical Company Celanese plant site, said 16.908 acre tract hereby conveyed being more particularly described by metes and bounds, using survey terminology which refers to the Texas State Plane Coordinate System, South Central Zone (NAD27), in which the directions are Lambert grid bearings and the distances are surface level horizontal lengths, (S.F. = 0.9998759575) as follows:

**COMMENCING** at a set 5/8" iron rod set with cap marking the Southeasterly corner of the remainder of a called 963.850 acre tract described in deed to Celanese Corporation, as recorded in Clerk's File No. D789836, R.P.R.H.C.T. located at Texas State Plane Coordinate X=3,221,323.29 and Y=13,795,342.55 from which a set 5/8" iron rod with cap bears North 27°32'59" West, a distance of 1346.34 feet at X=3,220,700.64 and Y=13,796,536.09;

**THENCE** South 79°31'30" West, a distance of 1436.10 feet to a "X" in concrete set for the **POINT OF BEGINNING** of the herein described tract, being at position X=3,219,911.29 and Y=13,795,081.49;

**THENCE** South 87°31'29" West, along the South line of said called 16.908 acre tract, a distance of 919.93 feet to a P.K. nail set for corner;

**THENCE** North 02°28'31" West, along the West line of said called 16.908 acre tract, a distance of 1100.00 feet to a bridge spike set for corner;

**THENCE** North 87°31'29" East, along the North line of said called 16.908 acre tract, a distance of 140.00 feet to a bridge spike set for corner;

**THENCE** North 02°28'31" West, along the West line of said called 16.908 acre tract, a distance of 110.00 feet to "X" in concrete set for corner;

**THENCE** North 87°31'29" East, along the North line of said called 16.908 acre tract, a distance of 290.00 feet to Celanese Plant Monument No. 5 for corner;;

**THENCE** South 02°28'31" East, along the East line of said called 16.908 acre tract, a distance of 600.00 feet to a P.K. nail set for corner;

**THENCE** North 87°31'29" East, along the North line of said called 16.908 acre tract, a distance of 307.88 feet to 5/8" iron rod set for corner;



Decision and Order

FEDERAL TRADE COMMISSION DECISIONS  
VOLUME 147

## Decision and Order

**TRACT 6 – ACRYLATES ACID COMPLEX  
16.908 ACRE TRACT  
GEORGE B. MCKINSTRY, ABSTRACT 47  
HARRIS COUNTY, TEXAS  
PAGE 2 OF 2**

**THENCE** South 02°28'31" East, along the East line of said called 16.908 acre tract, a distance of 369.30 feet to a P.K. nail set for corner;

**THENCE** North 87°31'29" East, along the North line of said called 16.908 acre tract, a distance of 182.05 feet to a P.K. nail set for corner

**THENCE** South 02°28'31" East, along the East line of said called 16.908 acre tract, a distance of 240.70 feet to the **POINT OF BEGINNING** and containing 16.908 acres or land, more or less.

## Decision and Order

**TRACT 7 –PROPYLENE VAPORIZER  
0.801 ACRE TRACT  
GEORGE B. MCKINSTRY, ABSTRACT 47  
HARRIS COUNTY, TEXAS**

**ALL THAT CERTAIN 0.801 ACRE TRACT** of land lying and situated in the George B. McKinstry Survey, Abstract 47, Harris County, Texas, being out of and portion of a called 963.850 acre tract described in deed to Celanese Corporation, as recorded in Clerk's File No. D789836, of the Real Property Records of Harris County, Texas (R.P.R.H.C.T.), and being located in the Dow Chemical Company Celanese Plant Site, said 0.801 acre tract hereby conveyed being more particularly described by metes and bounds, using survey terminology which refers to the Texas State Plane Coordinate System, South Central Zone (NAD27), in which the directions are Lambert grid bearings and the distances are surface level horizontal lengths, (S.F. = 0.9998759575) as follows:

**COMMENCING** at a set 5/8" iron rod set with cap marking the southeasterly corner said called 963.850 acre tract located at Texas State Plane Coordinate X=3,221,323.29 and Y=13,795,342.55 from which a set 5/8" iron rod with cap bears North 27°32'59" West, a distance of 1346.34 feet at X=3,220,700.64 and Y=13,796,536.09;

**THENCE** North 66°01'56" West, a distance of 2470.51 feet to column found for the **POINT OF BEGINNING** of the herein described tract, being at X=3,219,066.06 and Y=13,796,346.00;

**THENCE** South 87°31'28" West, a distance of 59.97 feet to a column found for corner;

**THENCE** North 02°28'35" West, a distance of 271.29 feet to bridge spike set for corner;

**THENCE** North 87°31'21" East, a distance of 28.69 feet to a bridge spike set for corner;

**THENCE** North 02°28'32" West, a distance of 100.03 feet to a bridge spike set for corner;

**THENCE** North 87°31'17" East, a distance of 101.29 feet to a bridge spike set for corner;

**THENCE** South 02°28'34" East, a distance of 221.31 feet to a bridge spike set for corner;

## Decision and Order

**THENCE** South 87°31'08" West, a distance of 70.00 feet to a bridge spike set for corner;

**THENCE** South 02°28'35" East, a distance of 150.00 feet to the **POINT OF BEGINNING** and containing 0.801 acres or land, more or less.

## Decision and Order

**Exhibit 4****Exhibit 4****Description of Real Property in St. Charles, LA****LEGAL DESCRIPTION**

The two (2) certain tracts or parcels of land, together with all the buildings and improvements thereon, located in Sections 15, 16 and 17, TT2S, R2OE, St. Charles Parish, Louisiana, being designated as **Lease Sites "Q" and "R"** on a Survey entitled, "Map Showing ALTA/ACSM Property, located in Sections 15, 16 & 17, T-12-S, R-20-E, S.E.D., West of the Mississippi River, St. Charles Parish, Louisiana for Union Carbide Corporation, Rohm & Haas (ALPENA 2) Project", made by David L. Patterson, R.L.P.S., dated November 5, 2008, the said Lease Sites "Q" and "R" being more particularly described thereon as follows:

**LEASE SITE "Q"**

A certain tract or parcel of ground, designated as "LEASE SITE "Q", containing 14.07 acres or 612,643 square feet, being situated on the property of Union Carbide Corporation, located in Sections 16 & 17, Township 12 South, Range 20 East, Southeast Land District, West of the Mississippi River, St. Charles Parish, Louisiana, limits of said Lease Site being more particularly described as follows:

Commence from Union Carbide Corporation Plant Monument "SCW BM 1991", having a State Plane Coordinate of X = 3,560,294.77, Y = 533,776.00, Louisiana South Zone, NAD 83; thence N 72°57'17" W a distance of 471.55 feet to a point and turn; thence N 17°02'43" E a distance of 7194.76 feet to a point and turn; thence N 72°57'17" W a distance of 329.17 feet to the POINT OF BEGINNING; thence N 72°57'17" W a distance of 143.00 feet to a point and turn; thence N 17°02'43" E a distance of 90.00 feet to a point and turn; thence N 72°57'17" W a distance of 567.00 feet to a point and turn; thence S 17°02'43" W a distance of 635.00 feet to a point and turn; thence N 72°57'17" W a distance of 200.00 feet to a point and turn; thence N 17°02'43" E a distance of 154.00 feet to a point and turn; thence N 10°53'18" E a distance of 345.00 feet to a point and turn; thence N 17°02'43" E a distance of 400.00 feet to a point and turn; thence S 72°57'17" E a distance of 357.00 feet to a point and turn; thence N 17°02'43" E a distance of 363.00 feet to a point and turn; thence S 72°57'17" E a distance of 590.00 feet to a point and turn; thence S 17°02'43" W a distance of 715.00 feet to the POINT OF BEGINNING, containing 14.09 acres or 613,605 square feet.

A Tergitol tank located on the following portion of Lease site "Q", with rights of access to the tank being retained by Union Carbide Corporation:

A certain tract or parcel of ground, being a portion of the above described tract or parcel, said tract being circular, having a centerline, State Plane Coordinate of X = 3,560,914.67, Y = 541,079.60, Louisiana South Zone, NAD 83, and a radius of 17.50 feet, containing 0.02 acres or 962 square feet.

## Decision and Order

**LEASE SITE "R"**

A certain tract or parcel of ground, designated as "LEASE SITE "R", being situated on the property of Union Carbide Corporation, located in Section 15, Township 12 south, Range 20 East, Southeast Land District, West of the Mississippi River, St. Charles Parish, Louisiana, limits of said Lease Site being more particularly described as follows:

Commence from Union Carbide Corporation Plant Monument "SCW BM 1991", having a State Plane Coordinate of X = 3,560,294.77, Y = 533,776.00, Louisiana South Zone, NAD 83; thence N 72°57'17" W a distance of 471.55 feet to a point and turn; thence N 17°02'43" E a distance of 7909.77 feet to a point and turn; thence S 72°57'17" E a distance of 1135.57 feet to a point and turn; thence N 17°02'43" E a distance of 1134.34 feet to the POINT OF BEGINNING; thence N 17°02'43" E a distance of 150.00 feet to a point and turn; thence S 72°57'17" E a distance of 200.00 feet to a point and turn; thence S 17°02'43" W a distance of 150.00 feet to a point and turn; thence N 72°57'17" W a distance of 200.00 feet to the POINT OF BEGINNING, containing 0.69 acres or 30,000 square feet.

Decision and Order

**Exhibit 5**

**Confidential Exhibit 5**

**Description of Real Property in Torrance, CA**

PARCEL 1 OF PARCEL MAP NO. 19096, IN THE CITY OF TORRANCE, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, AS PER MAP FILED IN BOOK 248 PAGE 50 OF THE LOS ANGELES COUNTY RECORDER'S OFFICE

EXCEPT ALL PETROLEUM, OIL, ASPHALTUM, GAS AND OTHER HYDROCARBON SUBSTANCES, INCLUDING HELIUM, WITHIN OR UNDERLYING THE SAID LAND, TOGETHER WITH THE EXCLUSIVE RIGHT AT ALL TIME TO REMOVE THE SAME THEREFROM AND THEREUNDER BY FACILITIES LOCATED ON ADJOINING OR ADJACENT PROPERTY AND INCLUDING THE RIGHT TO REMOVE SAID SUBSTANCES THEREFROM THE THEREUNDER BY DRILLING INTO THAT PORTION OF SAID LAND LYING BELOW THE UPPER 500 FEET THEREOF, BUT WITHOUT ANY RIGHT WHATSOEVER TO ENTER UPON OR TO USE THE SURFACE OF SAID LAND OR TO DRILL WELLS OR TO ERECT ANY STRUCTURES THEREON FOR THE PURPOSE OF REMOVING SAID SUBSTANCES, OR ANY OF THEM, AS RESERVED BY GENERAL PETROLEUM CORPORATION, A CORPORATION, IN DEED RECORDED SEPTEMBER 8, 1952 AS DOCUMENT NO. 863, OFFICIAL RECORDS.

Analysis to Aid Public Comment

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

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Dow Chemical Company (“Dow” or “Respondent”) to remedy the anticompetitive effects stemming from Dow’s proposed acquisition of Rohm & Haas Company (“Rohm & Haas”). Under the terms of the Consent Agreement, Dow is required to divest to a Commission-approved buyer significant portions of its acrylic monomer, acrylic latex polymer, and hollow sphere particle businesses and to license certain intellectual property related to the production of the products in these businesses. Dow is also required to institute procedures to ensure that the other businesses it acquired from Rohm & Haas do not have access directly or indirectly to competitively sensitive non-public information regarding the divested assets.

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

On July 10, 2008, Dow announced a definitive agreement to purchase all of the outstanding shares of Rohm and Haas in a transaction valued at \$18.8 billion, including \$3.5 billion in debt assumption. 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 North American markets for the research, development, manufacture and sale of glacial acrylic acid, butyl acrylate, ethyl acrylate, acrylic latex polymers for traffic paint, and



## Analysis to Aid Public Comment

hollow sphere particles. The Consent Agreement will remedy the alleged violation by divesting significant acrylic monomer and acrylic polymer research, development, production and manufacturing assets and related intellectual property to a third party thereby replacing the lost competition that would result from the acquisition in these markets.

**II. The Proposed Complaint**

According to the Commission's proposed Complaint, the relevant lines of commerce in which to analyze the effects of the proposed acquisition are the markets for the research, development, manufacture, and sale of certain acrylic monomers, including glacial acrylic acid, butyl acrylate and ethyl acrylate, as well as acrylic latex polymer for traffic paint and hollow sphere particles.

All of the acrylic monomer relevant products are made from crude acrylic acid. Glacial acrylic acid is purified crude acrylic acid and is used to make super absorbent polymers for personal care and hygiene products. Butyl acrylate and ethyl acrylate are acrylate esters formed from reacting crude acrylic acid with butanol and ethanol, respectively. These acrylate esters are then used to produce acrylic latex polymers used in paints, architectural coatings, and pressure sensitive adhesives.

Acrylic latex polymer for traffic paint and hollow sphere particles are unique types of polymers. Acrylic latex polymer for traffic paint is a quick drying polymer used to mark traffic lines on highways. Hollow sphere particles are a type of specialty polymer that is used in the manufacture of coated paper to provide gloss, brightness, and opacity.

The Complaint alleges that the relevant geographic market in which to analyze the anticompetitive effects of the proposed acquisition for all of the relevant markets is no larger than North America. Most monomers are difficult to ship because of their volatility. While there are some minor imports of acrylic monomers, they are not a meaningful constraint on the prices of these products

## Analysis to Aid Public Comment

in North America. Acrylic polymers, such as those used for traffic paint and hollow sphere particles, are also difficult and expensive to ship long distances. Shipping these polymers, which must be immersed in water for transport, is cost-prohibitive because of the substantial added water weight relative to the value of the polymer itself.

The Complaint further alleges that all of the relevant markets are highly concentrated. For the acrylic monomer relevant markets, the proposed transaction would reduce the number of significant players in those markets from four to three with the combined company having significant market shares in each of the markets. The combined entity would have a market share exceeding 40% in glacial acrylic acid, a market share approaching 90% in the market for butyl acrylate, and a market share approaching 80% in ethyl acrylate. The markets for acrylic polymer for traffic paint and hollow sphere particles are even more highly concentrated with Dow and Rohm & Haas as the only two suppliers. As a result, the proposed acquisition would result in a merger to monopoly in those markets.

Finally, the Complaint alleges that the proposed acquisition would reduce competition in the relevant markets by eliminating direct and substantial competition between Dow and Rohm & Haas, by increasing Dow's ability to exercise market power unilaterally in the relevant markets, and/or by increasing the likelihood of coordinated interaction in the markets for glacial acrylic acid, butyl acrylate, and ethyl acrylate. The Complaint further alleges that potential new entry or fringe expansion would not prevent the anticompetitive effects described in the Complaint.

**III. Terms of the Proposed Order**

Under the proposed Consent Agreement, Dow will divest to a single Commission-approved Acquirer a significant part of its acrylic monomer and polymer research and development and production assets including: its acrylic monomer production facility in Clear Lake, Texas; its acrylic polymer production assets located

## Analysis to Aid Public Comment

in St. Charles, Louisiana; its acrylic polymer production facility located in Alsip, Illinois; its acrylic polymer production facility located in Torrance, California; its acrylic monomer research and development group located in South Charleston, West Virginia; its acrylic latex polymer research and development group located in Cary, North Carolina, and other assets related to such businesses. The divestiture would also include the technology that is primarily related to these businesses, and further provides that Dow license to the Acquirer any intellectual property not primarily related to the divested business that Dow nonetheless uses in those businesses, and requires Dow to divest the business contracts of the divested businesses, and obtain the consents that are necessary to assign those contracts to the Acquirer. The divestiture to a single acquirer of both acrylic monomer and acrylic polymer research, development, manufacture and production assets best replicates the pre-acquisition market structure in which each of the significant acrylic monomer firms was forward-integrated into the supply of acrylic polymers.

In order to ensure the transition of the divested assets and the viability of the Acquirer, the Consent Agreement requires Dow to provide certain services. First, Dow is required to continue to provide certain input products to the Acquirer that Dow provided previously to the divested assets. Second, the Consent Agreement requires Dow to provide transition services for a short period of time to accomplish the transition of the divested assets to the Acquirer. Finally, the Consent Agreement requires that Dow continue to provide site services to the Acquirer in connection with the acrylic polymer production assets located in St. Charles, Louisiana, where the Acquirer will operate a business unit that, although largely separate, is located on the grounds of a larger Dow facility.

The Consent Agreement remedies the competitive concerns in the markets for hollow sphere particles and acrylic latex polymer for traffic paint by requiring Dow to divest the intellectual property that is primarily related to these products and to license certain other intellectual property used for these products. In addition, Dow is required to supply hollow sphere particles and acrylic latex polymer

## Analysis to Aid Public Comment

for traffic paint to the Acquirer at its manufacturing cost, until such time as the Acquirer is able to develop its own manufacturing.

The Consent Agreement also requires Dow to institute procedures to ensure that it does not have access directly, or indirectly, to competitively sensitive non-public information obtained from the Divested Businesses and Facilities or to use any such competitively sensitive non-public information it already has in an anticompetitive manner.

The proposed Order gives the Commission the power to appoint an interim monitor to assure that Dow expeditiously complies with all of its obligations and performs all of its responsibilities as required by the Order. If Dow fails to sell the divested assets within the later of (1) 240 days after the Consent Agreement is accepted by the Commission for Public Comment and (2) 240 days after the Acquisition closes, the Order allows for the appointment of a Divestiture Trustee to divest the assets that are the subject of the proposed Order. In order to ensure that the Commission remains informed about the status of the proposed divestitures and the transfers of assets, the proposed Consent Agreement requires Dow to file reports with the Commission periodically until the divestitures and transfers are accomplished.

The purpose of this analysis is to facilitate public comment on the proposed Decision and Order. This analysis is not intended to constitute an official interpretation of the Consent Agreement and the proposed Decision and Order.

## Complaint

## IN THE MATTER OF

**THE LUBRIZOL CORPORATION  
AND  
THE LOCKHART COMPANY**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-4254; File No. 071 0230  
Complaint, April 7, 2009 – Decision, April 7, 2009*

This consent order addresses the acquisition by the Lubrizol Corporation of certain assets from the Lockhart Company, which reduced competition in the market for rust preventives containing oxidates. The companies are the two largest providers of oxidates in the United States. The order requires Lubrizol to divest assets it acquired from Lockhart to Additives International LLC (AI). The transferred assets consist of a non-exclusive license to manufacture 28 former Lockhart rust preventive formulas that contain oxidates, including testing data relating to the formulas and the right to use the Lockhart trademarks and trade name for a period of two years after the date the order becomes final. Lockhart must also lease a portion of its Flint plant to AI and maintain the plant in good working order for the duration of the lease. AI also acquired from Lockhart a right of first refusal to purchase the plant. Lubrizol must release its right of first refusal to purchase Lockhart's oxidizer. The order also requires Lubrizol to execute a waiver of the non-compete provision of the acquisition agreement with Lockhart. The provision in the agreement prohibited Lockhart, for a period of five years from the date of the purchase agreement, from directly or indirectly engaging in any business competitive with the assets it sold to Lubrizol. The order also prohibits Lubrizol from acquiring any or all of AI without prior Commission approval. The acquisition of the former Lockhart formulas and the lease of the Lockhart plant by AI decrease the normal barriers a new entrant would face and remedies the anticompetitive effects of the previously executed acquisition.

*Participants*

For the Commission: *Daniel P. Ducore, Leonard L. Gordon,  
Alan Loughnan, Nancy Turnblacer, and Theodore Zang, Jr.*

## Complaint

For the *Respondents: Elizabeth Grove, Lubrizol in-house counsel; and Thomas A. Donovan, Kirkpatrick & Lockhart Preston Gates Ellis 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 The Lubrizol Corporation (“Lubrizol”), a corporation subject to the jurisdiction of the Commission, acquired certain assets of The Lockhart Company (“Lockhart”), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

**I. RESPONDENTS**

1. Respondent The Lubrizol Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 29400 Lakeland Boulevard, Wickliffe, Ohio 44092.

2. Respondent The Lockhart Company is a corporation organized, existing and doing business under and by virtue of the laws of Pennsylvania, with its principal office at 2873 West Hardies Road, Gibsonia, Pennsylvania 15044.

3. Respondents are, and at all times herein have been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and are corporations whose businesses are in or affect “commerce” as defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

## Complaint

**II. THE ACQUISITION**

4. Pursuant to an asset purchase agreement dated February 7, 2007, Lubrizol acquired certain assets from Lockhart, including assets relating to oxidates such as intellectual property, contracts, purchase orders, customer lists and records, product formulae and processes, and goodwill, for \$15.6 million (“the Acquisition”).

5. The purchase agreement included a non-competition agreement that prohibited Lockhart, for a period of five years from the date of the purchase agreement, from directly or indirectly engaging in any business competitive with the assets it sold to Lubrizol. Lubrizol subsequently indicated that this provision barred Lockhart from leasing its plant in Flint, Michigan, to another oxidate manufacturer.

**III. THE RELEVANT MARKET**

6. For the purposes of this Complaint, the relevant product market in which to evaluate the effects of the Acquisition is oxidate for use as a rust preventive additive. Oxidates include products composed of or containing oxidates, products derived from oxidates, and those products’ functional equivalents (collectively “oxidates”).

7. For the purposes of this Complaint, the relevant geographic market in which to evaluate the effects of the Acquisition is the United States of America.

8. Purchasers of Lubrizol’s oxidates have no economic alternative to purchasing these products.

**IV. THE STRUCTURE OF THE MARKET**

9. Lubrizol and Lockhart are, by a large margin, the two largest providers of oxidates in the United States. Consequently, the United States market for oxidates is highly concentrated, with a pre-acquisition Herfindahl-Hirschman Index (“HHI”) of 7,007. Prior to the Acquisition, Lubrizol and Lockhart dominated the market for

## Complaint

oxidates, and, together accounted over 98% of sales in the U.S. market for oxidates. The Acquisition created a monopoly in this market and increased HHI concentration by 2,672, resulting in a post-acquisition HHI of 9,679.

10. Lubrizol and Lockhart were actual and substantial competitors in the relevant market.

**V. ENTRY CONDITIONS**

11. New entry into the relevant market would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the Acquisition set forth in Paragraph 14 below.

12. New entry into the relevant market is a difficult process because of, among other things, the time and costs associated with building a plant capable of producing oxidates, obtaining the necessary regulatory permits for the plant, research and development of formulae, and the lengthy testing period necessary to attain customer approval for new oxidate products. As a result, entry into the market sufficient to achieve a significant market impact within two years is unlikely.

13. Lubrizol's plant in Painesville, Ohio, and Lockhart's plant in Flint, Michigan, are the only two plants in the United States that currently have the equipment capable of oxidizing products at the requisite pressure necessary to produce quality products.

**VI. ANTICOMPETITIVE EFFECTS**

14. The Acquisition substantially lessened competition in the following ways:

- a. it eliminates actual, actual potential, and perceived potential competition between Lubrizol and Lockhart;
- b. it removes Lockhart, the only alternative source of oxidates in the relevant market;



## Complaint

- c. it thwarts entry by restricting the use of Lockhart's Flint plant or equipment;
- d. it creates a monopoly in the relevant market;
- e. it leads to increased prices for the relevant product;
- f. it increases Lubrizol's market power in the relevant market; and
- g. it allows Lubrizol to exercise its market power unilaterally in the relevant market.

**VII. VIOLATIONS CHARGED**

15. The Acquisition described in Paragraph 5 constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45 and a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

**WHEREFORE, THE PREMISES CONSIDERED,** the Federal Trade Commission on this seventh day of April, 2009, issues its Complaint against Respondents.

By the Commission.

Decision and Order

**DECISION AND ORDER**  
**[Public Record Version]**

The Federal Trade Commission (“Commission”), having initiated an investigation of the acquisition of various product lines of chemical additives used to make rust preventives and other assets by The Lubrizol Corporation (“Respondent Lubrizol”) from The Lockhart Company (“Respondent Lockhart”) (collectively referred to as “Respondents”), and Respondents having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

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

## Decision and Order

1. Respondent The Lubrizol Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of Ohio, with its office and principal place of business located at 29400 Lakeland Boulevard, Wickliffe, OH 44092.

2. Respondent The Lockhart Company is a corporation organized, existing and doing business under and by virtue of the laws of Pennsylvania, with its office and principal place of business located at 2873 West Hardies Road, Gibsonia, PA 15044.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

**ORDER****I.**

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

- A. “Lubrizol” means The Lubrizol Corporation its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Lubrizol Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Lockhart” means The Lockhart Company, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries (including Lockhart Chemical Company), divisions, groups and affiliates controlled by The Lockhart Company, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Commission” means the Federal Trade Commission.

## Decision and Order

- D. “Additives International” means Additives International LLC, a limited liability corporation, organized, existing and doing business under and by virtue of the laws of Ohio, with its office and principal place of business located at 635 Chicago Ave., #104, Evanston, IL 60602.
- E. “Flint Plant” means the Lockhart manufacturing facility located at 4302 James P. Cole Boulevard, Flint, Michigan 48505.
- F. “Flint Plant Lease Agreement” means the October 6, 2008, lease agreement between Additives International and Lockhart Chemical Company, as amended on January 6, 2009, and that includes, among other things, an option for Additives International to acquire all or part of the Flint Plant and an option for Additives International to renew and extend the lease.
- G. “Flint Plant Leased Area” means those areas described in Paragraph 1 of the Flint Plant Lease Agreement including, but not limited to, calcium sulfonate reactors, a calcium sulfonate filter press, additive blend tanks, storage and blend tanks, shared use of the oxidation reactor, shared use of laboratory space and hot room, and 4800 square feet of warehousing space, including shared use of the loading dock.
- H. “Flint Plant Lessee” means Additives International or any other Person who leases the Flint Plant Leased Area pursuant to this Order.
- I. “Flint Plant Operational Areas” means the:
1. areas appurtenant to and used in the operation of the Flint Plant Leased Area including, but not limited to, loading and unloading areas, storage areas for inputs and inventory, at the Flint Plant;

## Decision and Order

2. areas for the use of employees working at the areas leased pursuant to the Flint Plant Lease Agreement, similar to those areas available to Respondent Lockhart employees working at the Flint Plant, including, but not limited to, exits and entrances, parking areas, machine rooms, work rooms, break rooms, bathrooms, and locker rooms;
  3. existing easements and rights of way relating to the leased areas;
  4. related facilities required for the storage of products produced at the Flint Plant by the Flint Plant Lessee.
- J. “Lockhart Oxidates” means the products listed on Non-Confidential Exhibit A to this Order that were previously manufactured and sold by Respondent Lockhart and acquired from Respondent Lockhart by Respondent Lubrizol, whether or not currently manufactured or sold by Respondent Lubrizol.
- K. “Lockhart Oxidates Assets” means
1. the non-exclusive rights to use trademarks, trade names, domain names, service marks and copyrights Relating To the Lockhart Oxidates solely to describe Additives International products as comparable, functionally equivalent, or chemically equivalent to the pertinent Lockguard product [Product No.] orally, in communications with individual customers, or on Additives International’s website for a period of two years after the date on which the order becomes final, if such products are made using the Lockhart formulae transferred pursuant to this Paragraph I.K.2;
  2. a copy of all processes, batch sheets, material data safety sheets, formulae, methods, quality control procedures, trade secrets, technology, know-how, inventions and

## Decision and Order

tangible or intangible proprietary information or material received by Lubrizol from Lockhart, including, but not limited to, technical information, processes, procedures, and methods Relating To the Lockhart Oxidates; and

3. a copy of all existing data and information relating to any of Respondent Lockhart's or Respondent Lubrizol's approvals, clearances, licenses, registrations, permits, franchises, product registrations or authorizations issued by any federal, state, municipal, or foreign authority, or any third party test house, registrar or certification body Relating To the Lockhart Oxidates including, without limitation, all clinical trial data, filings, engineering and design documentation, manufacturing and test results and procedures.
- L. "Material Confidential Information" means competitively sensitive, proprietary, and all other information that is not in the public domain owned by or pertaining to a Person or a Person's business, and includes, but is not limited to, all customer lists, price lists, contracts, cost information, marketing methods, patents, technologies, processes, or other trade secrets.
- M. "Person" means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, division, or department, or other business or legal entity.
- N. "Relating To" means pertaining in any way to, and is not limited to that which pertains exclusively to or primarily to.

**II.**

**IT IS FURTHER ORDERED** that Respondent Lubrizol shall,

- A. Remove and rescind any prohibition or restraint including, but not limited to, any non-compete agreements, on the sale

## Decision and Order

or use of all or any part of Respondent Lockhart's Flint Plant for the manufacture and sale of any products produced at the Flint Plant by Additives International or any other Person;

- B. Within thirty (30) days after the date this Order becomes final, divest to Additives International the Lockhart Oxidates Assets.

**III.**

**IT IS FURTHER ORDERED** that:

- A. Respondent Lockhart shall Lease the Flint Plant in good faith to Additives International, pursuant to and in accordance with the Flint Plant Lease 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 Additives International or to reduce any obligations of Respondent under such agreement), and such agreement, if approved by the Commission, is incorporated by reference into this Order and made a part hereof as Confidential Appendix B.
- B. For the length of time during which Respondent Lockhart leases the Flint Plant to the Flint Plant Lessee, Respondent Lockhart shall:
1. except as requested by the Flint Plant Lessee, take such actions as are necessary to prevent the destruction, removal, wasting, deterioration, or impairment of the Flint Plant Leased Area and the Flint Plant Operational Area, *provided, however* Respondent Lockhart shall not be responsible for changes to or problems of the Flint Plant Leased Area and the Flint Plant Operational Area caused by the Flint Plant Lessee; *provided, further, however*, Respondent Lockhart shall give the Flint Plant Lessee sixty (60) days prior notice of any facility

## Decision and Order

maintenance, including ordinary and regular maintenance, when such maintenance may affect the operation of the Flint Plant Leased Area and the Flint Plant Operational Area; *provided, further, however*, in the event Respondent Lockhart cannot give the Flint Plant Lessee sixty (60) days prior notice, then Respondent Lockhart shall notify the Flint Plant Lessee as soon as it first notifies any persons at the Flint Plant regarding maintenance or problems that may affect the operation of the Flint Plant Leased Area and the Flint Plant Operational Area; and

2. maintain the Flint Plant Leased Area and the Flint Plant Operational Area in the same general way in which it maintains the other areas at the Flint Plant owned by Respondent Lockhart (to the extent the Flint Plant Lessee complies with the lease terms) including, but not limited to, the uninterrupted provision of utilities and services.
- C. Respondent Lockhart shall not, directly or indirectly, discuss with, or provide, disclose or otherwise make available to, Respondent Lubrizol, or any person working on behalf of Respondent Lubrizol, any Material Confidential Information Relating To the Flint Plant Lessee's manufacture or sale of products at the Flint Plant.
- D. The purpose of this Order is to remedy the lessening of competition alleged in the Commission's Complaint.

**IV.**

**IT IS FURTHER ORDERED** that, for the term of this Order, Respondent Lockhart shall not, without providing advance written notification to the Commission in the manner described in this paragraph directly or indirectly modify, change or amend the Flint Plant Lease Agreement. *Provided, however*, advance written notice is not required if the Flint Plant Lease Agreement is being



## Decision and Order

terminated because Additives International is acquiring all of the Flint Plant.

Said advance written notification shall contain (i) a detailed description of the proposed modification, change, or amendment to such agreements, or acquisition and (ii) documents discussing the reasons for the proposed modification, change, or amendment, or acquisition (hereinafter referred to as “the Notification”). Respondents shall provide the Notification to the Commission, with a copy to the Commission’s Compliance Division of the Bureau of Competition, at least thirty (30) days prior to instituting the modifications, changes, or amendments (hereinafter referred to as the “first waiting period”). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not institute changes to the agreements until thirty (30) days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

**V.**

**IT IS FURTHER ORDERED** that, for the term of this Order, Respondent Lubrizol shall not acquire, without prior Commission approval, all or any part of Additives International.

**VI.**

**IT IS FURTHER ORDERED** that:

- A. The Commission may, at any time after the Order becomes final, appoint a Monitor to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order. The Commission shall select the Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in

## Decision and Order

writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor. Respondents shall comply with the terms of Paragraph VI.B. and VI.C. after the appointment of the substitute Monitor pursuant to Paragraph VI.F.

- B. Not later than ten (10) days after appointment of a Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondents' compliance with the terms of this Order in a manner consistent with the purposes of this Order ("Monitor Agreement").
- C. No later than one (1) day after the Monitor Agreement is approved pursuant to Paragraph VI.B., Respondents shall, pursuant to the Monitor Agreement and to this Order, transfer to the Monitor all the rights, powers, and authorities necessary to permit the Monitor to perform his or her duties and responsibilities in a manner consistent with the purposes of this Order.
- D. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
  - 1. The Monitor shall have the power and authority to monitor Respondents' compliance with the terms of this Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of this Order and in consultation with the Commission, including, but not limited to, assuring that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order.

## Decision and Order

2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
3. The Monitor shall serve for such time as is necessary to monitor Respondents' compliance with the provisions of this Order.
4. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondents' compliance with their obligations under this Order. Respondents shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with this Order.
5. The 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 Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.
6. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in

## Decision and Order

any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitor.

7. Respondents shall report to the Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by Respondents, with respect to the performance of Respondents' obligations under this Order.
  8. Within one (1) month from the date the Monitor is appointed pursuant to this paragraph, every sixty (60) days thereafter, and otherwise as requested by the Commission, the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under this Order.
  9. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement Relating To Commission materials and information received in connection with the performance of the Monitor's duties.
- F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, or if the Monitor is otherwise unable to perform his or her duties, the Commission may

## Decision and Order

appoint a substitute Monitor in the same manner as provided in this Paragraph VI.

- G. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

**VII.**

**IT IS FURTHER ORDERED** that:

- A. Thirty (30) days after the date this Order becomes final, each Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with the terms of this Order.
- B. If Respondent Lockhart sells the Flint Plant to Additives International, then within thirty (30) days of such sale, Respondent Lockhart shall submit a written report setting forth in detail the terms, including the contract for sale of the property, on which the Flint Plant was sold to Additives International.
- C. Beginning twelve (12) months after the date this Order becomes final, and annually thereafter on the anniversary of the date this Order becomes final, until the Order terminates, each Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which the Respondent is complying and has complied with this Order. Respondents shall submit at the same time a copy of these reports to the Monitor, if any Monitor has been appointed.

**VIII.**

## Decision and Order

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

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

**IX.**

**IT IS FURTHER ORDERED** that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to each Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, each Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission to:

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

Decision and Order

**X.**

**IT IS FURTHER ORDERED** that this Order shall terminate on April 7, 2019.

By the Commission.

FEDERAL TRADE COMMISSION DECISIONS  
VOLUME 147

Decision and Order

**NON-CONFIDENTIAL EXHIBIT A**

LOCKHART OXIDATES\*

LG 1216-47  
LG 8000  
LG 8000Z  
LG 8002  
LG 8020  
LG 8022  
LG 8080  
LG 8085  
LG 8855  
LG 8870  
LG 9005  
LG 9008  
LG 9009  
LG 9010  
LG 9013  
LG 9015  
LG 9017  
LG 9020  
LG 9021  
LG 9024  
LG 9025  
LG 9056  
LG 9057  
LG 9060  
LG 9070  
LG 9072  
LG 9075  
LG 9080

\* Product names may have a letter such as a "S" or "W" and all variations on each product name are intended to be included in this list.



Analysis to Aid Public Comment

**CONFIDENTIAL EXHIBIT B  
Flint Plant Lease Agreement**

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

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

**I. Introduction**

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) from The Lubrizol Corporation and The Lockhart Company (“Respondents”). The Consent Agreement is intended to resolve anticompetitive effects stemming from The Lubrizol Corporation’s (“Lubrizol”) acquisition of certain assets of The Lockhart Company (“Lockhart”) in the United States market for rust preventives containing oxidates. Under the terms of the proposed Consent Agreement, Lubrizol is required to divest assets it acquired from Lockhart to Additives International LLC (“AI”).

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, modify it, or make it final.

Pursuant to an Asset Purchase Agreement dated February 7, 2007, Lubrizol acquired from Lockhart a product line of chemical

## Analysis to Aid Public Comment

additives used to make rust preventives for approximately \$15.6 million (“Acquisition”). The Asset Purchase Agreement also included a non-competition agreement that prohibited Lockhart, for a period of five years from the date of the purchase agreement, from directly or indirectly engaging in any business competitive with the assets it sold to Lubrizol. The Commission’s complaint alleges that the Acquisition violated Section 7 of the Clayton Act, as amended 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended 15 U.S.C. § 45, by lessening competition in the market for rust preventives containing oxidates sold to metalworking firms, automotive parts suppliers, and other entities. The proposed Consent Agreement would remedy the alleged violation by replacing the competition that has been lost in this market as a result of the Acquisition.

**II. The Parties**

Lubrizol is a specialty chemical manufacturer that produces and supplies products designed for use in the global transportation, industrial, and consumer markets. Lubrizol manufactures products such as additives, ingredients, resins, and compounds, which customers use as rust preventives and in other ways to improve the quality of their end-use products. Prior to the Acquisition, Lubrizol was the leading maker of oxidates in North America. Lubrizol, headquartered in Wickliffe, Ohio, operates facilities in 29 countries, including production facilities in 20 countries and laboratories in 13 countries. In FY2007, Lubrizol had approximately \$4.5 billion in revenue.

Lockhart, a private corporation headquartered in Flint, Michigan, was the second leading maker of oxidates in North America. Lockhart previously manufactured specialty chemicals including corrosion and lubricity additive packages, soluble bases, coating intermediates, and petroleum sulfonates and oxidates that serve the metalworking and coatings industries. Lockhart’s metalworking product line included oxidates, natural, synthetic and gelled sulfonates, corrosion inhibitors and lubricity agents, emulsifier

## Analysis to Aid Public Comment

packages, grease additives, esters, soaps, semi-finished coatings, and rust preventives.

**III. Oxidates**

Oxidates are waxy petroleum-based substances that are normally solid at room temperature and are used in chemical formations designed to be applied to metal for rust prevention purposes. Oxidates may be further processed into soaps of oxidates and esters, which have the same rust preventive abilities as oxidates and are also used in chemical blends. In addition to their excellent rust preventive properties, oxidates are inexpensive and long-lasting compared to other rust preventive additives in the market. Due to oxidates' low costs and superior rust-preventing properties, they have become the "gold-standard" in long-term rust and corrosion protection. Oxidates are purchased by chemical formulators who use them to formulate rust protection and corrosion-inhibiting additives.

The relevant geographic market in which to assess the impact of the Acquisition is the United States. Foreign importers of oxidates face tariffs and other obstacles that increase their prices and make United States customers less likely to rely on foreign sources.

The market for oxidates is highly concentrated, with Lubrizol, and previously, Lockhart, being the top two providers of oxidates in the United States. While a few fringe firms exist, oxidates customers do not regard them as suitable alternatives to Lubrizol and Lockhart.

The acquisition of Lockhart's oxidate line by Lubrizol substantially lessened competition in the oxidate market. Through the Acquisition, Lubrizol removed its last substantial competitor in the market. Before the Acquisition, customers benefitted from the rivalry between Lubrizol and Lockhart in the form of lower prices, innovative products, and better service inand support. In addition, the Acquisition thwarted entry by restricting the use of Lockhart's Flint, Michigan, plant and equipment through the non-competition agreement.

## Analysis to Aid Public Comment

New entry or fringe expansion into the market for the manufacture of oxidates sufficient to counteract the competitive effects of the Acquisition is unlikely to occur within two years. To enter the market, a firm needs to invest in assets such as equipment, production know-how, supplier relationships, and infrastructure. The market for oxidates is not expanding and it is likely a new entrant would not be able to establish enough sales to achieve the minimum viable scale to make entry economically feasible. In addition, the formulations for oxidates and other rust preventatives go through extensive testing and certification processes. Due to the time and expense of testing, customers are reticent to change suppliers absent exigent circumstances.

**IV. Consent Agreement**

Under the terms of the Consent Agreement, Lubrizol is required to transfer certain assets to AI. The transferred assets consist of a non-exclusive license to manufacture twenty-eight former Lockhart rust preventive formulas that contain oxidates, including testing data relating to the formulas and the right to use the Lockhart trademarks and trade name for a period of two years after the date upon which the Decision and Order becomes final. Under the terms of the Consent Agreement, Lockhart must also lease a portion of its Flint plant to AI and maintain the plant in good working order for the duration of the lease. Lubrizol must also release its right of first refusal to purchase Lockhart's oxidizer. AI also acquired from Lockhart a right of first refusal to purchase the plant.

The Consent Agreement also requires Lubrizol to execute a waiver of the non-compete provision of the Acquisition Agreement. Specifically, Section II.A. of the Decision and Order requires Lubrizol to "[r]emove and rescind any prohibition or restraint including, but not limited to, any non-compete agreements, on the sale or use of all or any part of Respondent Lockhart's Flint Plant for the manufacture and sale of any products produced at the Flint Plant by [AI] or any other Person." Finally, the Consent Agreement

## Analysis to Aid Public Comment

prohibits Lubrizol from acquiring any or all of AI without prior Commission approval.

The Commission believes that this Consent Agreement establishes AI as a viable competitor in the oxidate market and substantially restores the competition lost as a result of the transaction. The acquisition of the former Lockhart formulas and the lease of the Lockhart plant by AI decreases the normal barriers a new entrant would face and remedies the anticompetitive effects of the previously executed Acquisition.

The purpose of this analysis is to facilitate public comment on the proposed Decision and Order. This analysis is not intended to constitute an official interpretation of the Consent Agreement and the proposed Decision and Order, and does not modify their terms in any way. Further, the proposed Consent Agreement has been entered into for settlement purposes only, and does not constitute an admission by Respondents that they violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

## Complaint

## IN THE MATTER OF

**NATIONAL ASSOCIATION OF MUSIC  
MERCHANTS, INC.**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS  
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-4255; File No. 001 0203  
Complaint, April 8, 2009 – Decision, April 8, 2009*

This consent order addresses allegations that the National Association of Music Merchants (NAMM), a trade association of more than 9000 manufacturers, distributors, and dealers of musical instruments and related products, arranged and encouraged the exchange among its members of competitively sensitive information that had the purpose, tendency, and capacity to facilitate price coordination and collusion among competitors. The order prohibits NAMM from encouraging, advocating, coordinating, or facilitating in any manner the exchange of information among musical instrument manufacturers and dealers relating to the retail price of musical instruments or the conditions pursuant to which any manufacturer or dealer will deal with any other manufacturer or dealer. The order also prohibits NAMM from facilitating any musical instrument manufacturer or dealer in entering into or enforcing any agreement between or among musical instrument manufacturers or dealers relating to the retail price of any musical instrument or the conditions pursuant to which any manufacturer or dealer will deal with any other manufacturer or dealer. In addition, the order requires NAMM to institute an antitrust compliance program; it requires the review by antitrust counsel of all written materials and prepared remarks by any member of NAMM's board of directors, employee, or agent of NAMM relating to price terms and minimum advertised price policies; the provision by antitrust counsel of appropriate guidance on compliance with the antitrust laws; and annual training of NAMM's board of directors, agents, and employees concerning NAMM's obligations under the Order. The order does not interfere with the ability of NAMM to engage in legitimate trade association activity, including its sponsorship of trade shows and other events. It explicitly excludes from its prohibitions the ordinary commercial activities of NAMM's members on the show floor and the publication or dissemination of aggregated survey data, the sharing of best practices and training materials, and the communication of information relating to creditworthiness, product safety, and warranty issues.

Complaint

*Participants*

For the *Commission*: Dana Abrahamsen, Barbara Blank, David Conn, Maria M. DiMoscato, Geoffrey M. Green, William L. Lanning, Teresa Martin, Steven Osnowitz, Jana Pariser, Mark D. Peterson, Christopher Renner, and Melanie Sabo.

For the *Respondents*: Debra Bernstein, Alston & Bird LLP; Frank M. Hinman, Bingham McCutchen; Joseph Datillo, Brouse McDowell; Larry Scarborough and J. Alex Grimsley, Bryan Cave; Rob Lipstein, Crowell & Moring; Michael R. Borasky, Eckert Seamans; Monica L. Rebuck, Hangle, Aronchick, Segal & Pudlin; Veronica G. Kayne, Haynes and Boone LLP; Michael McNeely, Law Offices of Michael D. McNeely; Steve Chidester, Luce, Forward, Hamilton & Scripps; Bill Codhina, Nixon Peabody; Larry F. Gitlin, Rapkin, Gitlin & Beaumont; Bryan King, Sheldon, Lim, Ruger & Kim LLP; Tara Reinhart, Skadden Arps.

**COMPLAINT**

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the National Association of Music Merchants, Inc. has violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Federal Trade Commission (“Commission”) that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges as follows:

1. Respondent National Association of Music Merchants, Inc. (“NAMM” or “Respondent”) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal place of business located at 5790 Armada Drive, Carlsbad, California 92008.

2. NAMM is a trade association composed of more than 9000 members that include manufacturers, distributors, and dealers of

## Complaint

musical instruments and related products. Most U.S. manufacturers, distributors, and dealers of musical instruments are members of NAMM. NAMM serves the economic interests of its members by, *inter alia*, promoting consumer demand for musical instruments, lobbying the government, offering seminars, and organizing trade shows. In the United States, NAMM sponsors two major trade shows each year, where manufacturers introduce new products and meet with dealers. In addition, NAMM's trade shows provide competitors an opportunity to meet and discuss issues of concern to the industry.

3. The acts and practices of NAMM, including the acts and practices alleged herein, are in commerce or affect commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

4. An ongoing subject of concern in the musical instruments industry has been the increased retail price competition for musical instruments. Commencing in 1999, and continuing thereafter, numerous leading musical instrument manufacturers adopted minimum advertised price policies.

5. Between 2005 and 2007, NAMM organized various meetings and programs at which competing retailers of musical instruments were permitted and encouraged to discuss strategies for implementing minimum advertised price policies, the restriction of retail price competition, and the need for higher retail prices. Representatives of NAMM determined the scope of discussion by selecting moderators and setting the agenda for these programs. At these NAMM-sponsored events, competitors discussed the adoption, implementation, and enforcement of minimum advertised price policies; the details and workings of such policies; appropriate and optimal retail prices and margins; and other competitively sensitive issues.

6. In many instances, the exchange of information and opinion arranged by NAMM, as set forth in Paragraph 5 above, served no legitimate business purpose for NAMM or its members.



Complaint

7. The exchange of information among NAMM members, as alleged herein, had the purpose, tendency, and capacity to facilitate collusion and to restrain competition unreasonably.

**Violations Alleged**

8. As set forth in Paragraph 5 above, NAMM arranged and encouraged the exchange among its members of competitively sensitive information, in violation of Section 5 of the FTC Act, as amended.

9. The acts and practices of Respondent, as alleged herein, constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

**WHEREFORE, THE PREMISES CONSIDERED,** the Federal Trade Commission on this eighth day of April, 2009, issues its complaint against Respondent.

By the Commission.

## Decision and Order

**DECISION AND ORDER**

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of the National Association of Music Merchants, Inc. (hereinafter “NAMM” or Respondent), and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

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

1. Respondent NAMM is a corporation organized, existing and doing business under and by virtue of the laws of the State of New

Decision and Order

York with its principal place of business located at 5790 Armada Drive, Carlsbad, CA 92008.

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

**ORDER**

**I.**

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

**THE PARTIES**

- A. “Respondent” or “NAMM” means the National Association of Music Merchants, Inc., its successors and assigns, and its directors, trustees, officers, representatives, committees, subcommittees, boards, divisions, agents, and employees.
- B. “Commission” means the Federal Trade Commission.

**OTHER DEFINITIONS**

- C. “Antitrust Compliance Officer” means a person appointed under Paragraph II.B.1.(a) of this Order.
- D. “Antitrust Counsel” means a lawyer admitted to practice law in one or more of the judicial districts of the courts of the United States. Antitrust Counsel may delegate obligations under this Order to another lawyer supervised by Antitrust Counsel.
- E. “Antitrust Laws” means the Federal Trade Commission Act, as amended, 15 U.S.C. §41 *et. seq.*, and the Sherman Act, 15 U.S.C. §1 *et. seq.*

## Decision and Order

- F. “Distribution” or “Distributed” means, with respect to Prepared Remarks or Written Materials, transmittal or delivery by any means.
- G. “Global Economic Summit” or “Global Summit” means the particular recurring event attended by Musical Products industry leaders, media, and advisors, including those events held in Carlsbad, California, such as the Fifth Global Summit in 2004, the Sixth Global Summit in 2007, and any future event held where NAMM performs the same, or substantially the same, organizing and hosting role as it did for previous Global Summits.
- H. “Member of the Board of Directors” means any member of Respondent’s Board of Directors, including any Member of the Executive Committee, acting in an official capacity or having the apparent authority to act in an official capacity.
- I. “Member of the Executive Committee” means any member of Respondent’s Executive Committee, acting in an official capacity or having the apparent authority to act in an official capacity.
- J. “Minimum Advertised Price Policy” means any Musical Product Manufacturer’s policy, program, or provision of any program that conditions the sale or continued sale of its Musical Products to Musical Product Dealers upon the advertisement or display of Musical Products at or above a specified minimum dollar amount.
- K. “Musical Product(s)” means any musical instrument or musical instrument accessory sold or offered for sale by Respondent’s members.
- L. “Musical Product Dealer” means any person, corporation, or entity that in the course of its business offers for sale or sells to consumers any Musical Product in or into the United States, including, but not limited to, retail establishments,

Decision and Order

catalogue sellers, and internet retail sites, and the officers, agents, and employees thereof.

- M. “Musical Product Manufacturer” means any person, corporation, or entity that manufactures or distributes Musical Products to Musical Product Dealers for resale to consumers, and the officers, agents, and employees thereof.
- N. “NAMM Event” includes any trade show, town hall meeting or any similar event that NAMM sponsors and organizes and for which NAMM has final authority over the list of invitees. NAMM Event also means any meeting or teleconference of Respondent’s Board of Directors or Executive Committee to which the entire Board of Directors or Executive Committee has been invited to participate.
- O. “Prepared Remarks” means the final version of any script, speech, or other statement prepared for Distribution at, or in advance of, a NAMM Event, a Global Summit, or an event at which any Member of the Board of Directors, employee or agent of Respondent delivers a speech or statement.
- P. “Price Terms” means:
  - 1. The retail or wholesale prices, resale prices, credit terms, or terms defining, setting forth, or relating to monetary or non-monetary compensation paid by or on behalf of any Musical Product Dealer or other person who acquires one or more Musical Products; or
  - 2. The retail or wholesale prices, resale prices, credit terms, return policies, volume or other discounts, rebates, or other policies, programs, conditions, or terms defining, setting forth, or relating to monetary or non-monetary compensation of any Musical Product Manufacturer.

## Decision and Order

*Provided, however,* that Price Terms do not include purchase for personal use by an employee of Respondent or donation for charitable use.

- Q. “Resale Price Maintenance Policy” means any Musical Product Manufacturer’s policy, program, or provision of any program that conditions the sale or continued sale of its Musical Products to Musical Product Dealers upon the sale of Musical Products at or above a specified minimum dollar amount.
- R. “Written Materials” means the final version of any written or paper document, or any electronic version of any document, audio recording, video recording, photograph, or other data, created on, included in, or stored on any computer, computer file, electronic mail, audio CD, DVD, or other electronic or magnetic storage media prepared for Distribution at, or in advance of, a NAMM Event, a Global Summit, or an event at which any Member of the Board of Directors, employee or agent of Respondent delivers a speech or statement.

**II.**

**IT IS FURTHER ORDERED** that:

- A. Respondent, acting directly or indirectly, or through any corporate or other device, in or affecting commerce, as “commerce” is defined by the Federal Trade Commission Act, forthwith shall cease and desist from:
1. Urging, encouraging, advocating, suggesting, coordinating, participating in, or facilitating in any manner the exchange of information between or among Musical Product Manufacturers or Musical Product Dealers relating to:
    - (a) the retail price of Musical Products; or

Decision and Order

- (b) any term, condition or requirement upon which any Musical Product Manufacturer or Musical Product Dealer deals, or is willing to deal, with any other Musical Product Manufacturer or Musical Product Dealer, including, but not limited to, Price Terms, margins, profits, or pricing policies, including but not limited to Minimum Advertised Price Policies or Resale Price Maintenance Policies.
2. Entering into, adhering to, enforcing, urging, encouraging, advocating, suggesting, assisting or otherwise facilitating any Musical Product Manufacturer or Musical Product Dealer to enter into, adhere to or enforce any combination, conspiracy, agreement or understanding between or among any Musical Product Manufacturers or Musical Product Dealers relating to:
- (a) the retail price of any Musical Product;
  - (b) any term, condition or requirement upon which any Musical Product Manufacturer or Musical Product Dealer deals, or is willing to deal, with any other Musical Product Manufacturer or Musical Product Dealer, including, but not limited to, Price Terms, margins, profits, or pricing policies, including but not limited to Minimum Advertised Price Policies, or Resale Price Maintenance Policies; or
  - (c) the refusal to do business, or the reduction of business, with particular Musical Product Manufacturers or Musical Product Dealers.

*Provided, however,* that nothing in this Paragraph II.A prohibits Respondent from engaging in, participating in, coordinating, urging, encouraging, or suggesting to others to engage in any conduct protected by the *Noerr-Pennington* doctrine;

## Decision and Order

*Provided, further, however,* that nothing in this Paragraph II.A prohibits the participants in Respondent's trade shows from conducting their commercial activities on the show floor in their ordinary and customary manner;

*Provided, further, however,* that nothing in this Paragraph II.A applies to meetings of industry participants not attended by Respondent at which Respondent's role is limited to the provision of a venue, a speaker, administrative support, refreshments, or other incidentals; and

*Provided, further, however,* that nothing in this Paragraph II.A prohibits Respondent from publishing or disseminating, by any means: (i) information relating to creditworthiness, product safety, and warranty service issues; (ii) links to individual web sites of Musical Product Manufacturers, Musical Product Dealers, distributors, sales representatives, consultants, industry associations, education and arts associations, societies, and organizations; (iii) NAMM or third-party publications or material containing advertisements, brand image, or public relations material; (iv) aggregated survey data, such as that published in Music Trades, The NAMM Global Report Featuring Music USA, and the Cost of Doing Business Survey; or (v) in the context of industry education, including the sharing of best practices and training materials, generic references to Price Terms, Resale Price Maintenance Policy, and the terms and conditions on which Musical Product Manufacturers and Musical Product Dealers do business.

B. Respondent shall:

1. Institute a program to comply with this Order and with the Antitrust Laws, which program shall require:
  - (a) The appointment and maintenance of an Antitrust Compliance Officer for the duration of this Order. For the first three (3) years of this Order, the



## Decision and Order

Antitrust Compliance Officer shall be Antitrust Counsel. After the third anniversary of the date this Order becomes final, a new Antitrust Compliance Officer may be appointed who shall be Antitrust Counsel, a Member of the Board of Directors, or the general counsel of Respondent. Respondent shall direct the Antitrust Compliance Officer to take reasonable steps to develop, implement, administer, monitor, and actively supervise a program to obtain Respondent's compliance with this Order and with the Antitrust Laws.

- (b) The appointment and maintenance of Antitrust Counsel, who shall also serve as the Antitrust Compliance Officer until at least the third anniversary of the date this Order becomes final. Within fifteen (15) days of the date this Order becomes final, Respondent shall appoint Antitrust Counsel to provide legal advice to Respondent. Respondent shall direct Antitrust Counsel to take reasonable steps to develop, implement, administer, monitor, and actively supervise a program to obtain Respondent's compliance with this Order and with the Antitrust Laws. Antitrust Counsel shall also train an Antitrust Compliance Officer to take reasonable steps to obtain Respondent's compliance with this Order and with the Antitrust Laws.
- (c) Annual in-person training of Respondent's Board of Directors concerning Respondent's obligations under this Order and an overview of the Antitrust Laws as they apply to Respondent's activities, behavior, and conduct;
- (d) Annual training of Respondent's employees and agents concerning Respondent's obligations under this Order and an overview of the Antitrust Laws as

## Decision and Order

they apply to Respondent's activities, behavior, and conduct;

- (e) Review and written approval by the Antitrust Compliance Officer, prior to Distribution, of:
  - (i) All Written Materials and Prepared Remarks by any Member of the Board of Directors, or by any employee or agent of Respondent, acting in an official capacity or having the apparent authority to act in an official capacity, that concern or relate to the Price Terms, margins, profits, Minimum Advertised Price Policies, or Resale Price Maintenance Policies for Musical Products; and
  - (ii) All final agendas and materials Distributed at, in advance of, or after any meeting of Respondent's Board of Directors or Executive Committee.
- (f) Provision of a written statement that provides context-appropriate guidance on compliance with the Antitrust Laws to all Musical Product Manufacturers or Musical Product Dealers who are scheduled speakers at NAMM Events and Global Summits;
- (g) Certification, in writing, by each Musical Product Manufacturer or Musical Product Dealer who is a scheduled speaker at a NAMM Event or Global Summit that he or she is in receipt of, and has read, the written statement provided in Paragraph II.B.1(f);
- (h) Implementation and administration of a procedure to enable persons (including, but not limited to, Respondent's members, officers, directors, employees, and agents) to report violations of this Order and the Antitrust Laws to the Antitrust Compliance Officer and Antitrust Counsel,

Decision and Order

confidentially and without fear of retaliation of any kind; and

- (i) Implementation of internal policies and procedures that provide for discipline for members of Respondent's Board of Directors, employees, and agents for failure to comply fully with this Order, which policies and procedures shall require, among other steps, the termination or discharge of any such person who engages in such conduct only after conviction and all appeals have run or after civil liability and all appeals have run, provided that such termination or discharge does not violate any other applicable U.S. law.
2. Require the personal attendance of Antitrust Counsel at all NAMM Events and Global Summits for three (3) years from the date this Order becomes final.
  3. Require that Antitrust Counsel be present at, or be a party to, any meeting or teleconference conducted by Respondent to which the entire Board of Directors or Executive Committee has been invited to participate, for three (3) years from the date this Order becomes final.
  4. Require the recitation of a statement:
    - (a) At the commencement of each meeting of the Board of Directors and Executive Committee that summarizes Respondent's obligations under this Order and provides context-appropriate guidance on compliance with the Antitrust Laws; and
    - (b) At the commencement of each NAMM Event and Global Summit that provides context-appropriate guidance on compliance with the Antitrust Laws.

## Decision and Order

*Provided, however,* that Respondent may satisfy the requirements of this Paragraph II.B.4 with respect to NAMM University or “NAMM U” sessions (other than NAMM U breakfast sessions) by enclosing in any materials provided to session attendees a copy of a written statement that provides context-appropriate guidance on compliance with the Antitrust Laws.

5. Require the audio or video recording of each panel discussion or presentation at all NAMM Events and Global Summits, prompt delivery of each such recording to the Antitrust Compliance Officer, and the retention of each such recording in the custody and control of the Antitrust Compliance Officer for five (5) years, provided that Respondent need not require the audio or video recording of meetings of the Board of Directors or Executive Committee.
6. Publish a copy of this Order and the Complaint issued by the Commission, and the internet address of the link to the Commission’s press release concerning this Order on the Commission’s web site at [www.FTC.gov](http://www.FTC.gov), in the first electronic edition of NAMM’s newsletter prepared for publication after this Order becomes final, in the same size and font as regularly featured items in NAMM’s newsletter.
7. Within thirty (30) days after the date this Order becomes final:
  - (a) Distribute, electronically or by other means, return receipt requested, to each Member of the Board of Directors a copy of this Order and the Complaint issued by the Commission, and a letter in the form of the letter attached as Exhibit A to this Order; and,
  - (b) Publish on Respondent’s official web site until the termination of this Order, a copy of this Order and

Decision and Order

the Complaint issued by the Commission, and a letter in the form of the letter attached as Exhibit A to this Order, with a link from NAMM's home or menu page, entitled "Antitrust Compliance," in the same size and font provided to other menu items. The Order shall remain accessible through common search terms and archives on the web site until the termination of Respondent's obligations under this Order.

8. Within thirty (30) days of the date any person becomes a Member of the Board of Directors, distribute electronically or by other means, return receipt requested, a copy of this Order and the Complaint issued by the Commission. In addition, a hard copy of this Order and the Complaint shall be provided to any new member at the first subsequent meeting of the Board of Directors, and any new member shall certify in writing that he or she is in receipt of, and has read, this Order and the Complaint.

*Provided, however,* that nothing in this Paragraph II.B prohibits Respondent from instituting additional components to its compliance program; and

*Provided further, however,* that full compliance with Paragraph II.B is not a defense to a violation of Paragraph II.A.

## Decision and Order

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

- A. Within sixty (60) days after the date the Order becomes final, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which the Respondent has complied, is complying, and will comply with this Order. For the period covered by this report, the report shall include, but not be limited to:
1. The names, business addresses, e-mail addresses, and business phone numbers of the Antitrust Compliance Officer and Antitrust Counsel;
  2. A description in reasonable detail of the program instituted by Respondent to comply with Paragraph II.B.1 of this Order;
  3. A list of the NAMM Events and Global Summits held within sixty (60) days after the date the Order became final, including the title of each NAMM Event and Global Summit, and the dates on which and the locations at which each was held;
  4. A copy of all Written Materials and Prepared Remarks Distributed by Respondent, and reviewed by the Antitrust Compliance Officer under Paragraph II.B.1(e), at each NAMM Event, Global Summit, or other event at which any Member of the Board of Directors, employee or agent of Respondent delivered a speech or statement within sixty (60) days after the date the Order became final;
  5. The names, business addresses, e-mail addresses, and business phone numbers of each Member of the Board of Directors and each Member of the Executive Committee;

Decision and Order

6. The name and business address of each Member of the Board of Directors to whom Respondent distributed, electronically or by other means, a copy of this Order and the Complaint issued by the Commission, the date Respondent distributed the documents, and the date each person signed for receipt or electronic receipt was received by Respondent;
  7. A copy of NAMM's newsletter in which Respondent published this Order and the Complaint issued by the Commission; and
  8. A description and explanation, in reasonable detail, of any affirmative action taken by Respondent with regard to Paragraph II.B.1(i) of this Order.
- B. One (1) year after the date the Order becomes final, annually for the next nine (9) years on the anniversary of the date the Order becomes final, and at such other times as the Commission may require, Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with the Order. For the periods covered by these reports, these reports shall include, but not be limited to:
1. The names, business addresses, e-mail addresses, and business phone numbers of the Antitrust Compliance Officer and Antitrust Counsel;
  2. The name and business address of each Member of the Board of Directors to whom Respondent distributed, electronically or by other means, a copy of this Order and the Complaint issued by the Commission, the date Respondent distributed the documents, and the date each person signed for receipt or electronic receipt was received by Respondent;

## Decision and Order

3. The name, title, and business address of each person required to receive, and who has received, annual in-person training concerning Respondent's obligations under this Order, an overview of the Antitrust Laws as they apply to Respondent's activities, behavior, and conduct, and the identity of the Antitrust Compliance Officer, and the name, title, and business address of the person who conducted the training; and
4. A description and explanation, in reasonable detail, of any affirmative action taken by Respondent with regard to Paragraph II.B.1(i) of this Order.

*Provided, however,* that nothing in this Paragraph III shall require the provision of information protected by the attorney-client privilege, work product doctrine, or other applicable privilege.

**IV.**

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

- A. Any proposed dissolution of Respondent;
- B. Any proposed acquisition, merger or consolidation of Respondent; or
- C. Any other change in Respondent that may affect compliance obligations arising out of this Order, including but not limited to assignment, the creation or dissolution of subsidiaries, or any other change in Respondent.

**V.**

**IT IS FURTHER ORDERED** that for the purpose of determining or securing compliance with this order, upon written request, Respondent shall permit any duly authorized representative of the Commission:



Decision and Order

- A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondent relating to any matters contained in this Order; and
- B. Upon five (5) days' notice to Respondent and without restraint or interference from Respondent, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

**VI.**

**IT IS FURTHER ORDERED** that this Order shall terminate on April 8, 2029.

By the Commission.

FEDERAL TRADE COMMISSION DECISIONS  
VOLUME 147

## Decision and Order

**Exhibit A****EXHIBIT A**

(Letterhead of NAMM)

Dear Member:

As many of you know, the Federal Trade Commission has conducted an investigation concerning Minimum Advertised Price policies ("MAP policies") and retail pricing in the music products industry.

To end the investigation expeditiously and to avoid disruption to its core functions, NAMM has voluntarily agreed, without admitting any violation of the law, to the entry of a Consent Agreement and a Decision and Order by the Federal Trade Commission, pertaining to NAMM's practices with regard to NAMM events and programs and other related matters.

In general, the Federal Trade Commission has prohibited NAMM from engaging in certain activities involving information exchanges among its members relating to MAP policies, retail margins, and retail pricing in connection with the sale and marketing of musical products. In addition, NAMM will be required to implement an antitrust compliance program. A copy of the Federal Trade Commission Decision and Order is enclosed and sets forth the specific requirements of the Order that apply to NAMM. The Decision and Order is also available on the Federal Trade Commission website at [www.FTC.gov](http://www.FTC.gov).

Analysis to Aid Public Comment

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

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with the National Association of Music Merchants, Inc. (“NAMM” or “Respondent”). NAMM is a trade association composed of more than 9000 members that include manufacturers, distributors, and dealers of musical instruments and related products. The agreement settles charges that NAMM violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by arranging and encouraging the exchange among its members of competitively sensitive information that had the purpose, tendency, and capacity to facilitate price coordination and collusion among competitors. The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final.

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

### **I. The Complaint**

The allegations of the complaint are summarized below:

NAMM is a trade association. Most U.S. manufacturers, distributors, and dealers of musical instruments are members of NAMM. NAMM serves the economic interests of its members by, among other things, promoting consumer demand for musical

## Analysis to Aid Public Comment

instruments, lobbying the government, offering seminars, and organizing trade shows. In the United States, NAMM sponsors two major trade shows each year, where manufacturers introduce new products and meet with dealers. In addition, NAMM's trade shows provide competing manufacturers, distributors and retailers of musical instruments an opportunity to meet and discuss issues of concern to the industry.

An ongoing subject of concern to NAMM members in recent years has been the increased retail price competition for musical instruments, and whether that competition benefitted consumers more than it benefitted NAMM members. Between 2005 and 2007, NAMM organized various meetings and programs for its members at which competing retailers of musical instruments were permitted and encouraged to exchange information and discuss strategies for implementing minimum advertised price policies, the restriction of retail price competition, and the need for higher retail prices. Representatives of NAMM determined the scope of information exchange and discussion by selecting moderators and setting the agenda for these programs. At these NAMM-sponsored events, NAMM members discussed the adoption, implementation, and enforcement of minimum advertised price policies; the details and workings of such policies; appropriate and optimal retail price and margins; and other competitively sensitive issues.

## II. Legal Analysis

Adam Smith famously warned of the danger of permitting competitors even to assemble in one place.<sup>1</sup> The Federal Trade Commission does not take nearly so jaundiced a view toward trade association activities. The Commission is aware that trade associations can serve numerous valuable and pro-competitive functions, such as expanding the market in which its members sell;

---

<sup>1</sup> "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* 55 (Great Books ed. 1952) (1776).

## Analysis to Aid Public Comment

educating association members, the public, and government officials; conducting market research; establishing inter-operability standards; and otherwise helping firms to function more efficiently.

At the same time, it is imperative that trade association meetings not serve as a forum for rivals to disseminate or exchange competitively-sensitive information, particularly where such information is highly detailed, disaggregated, and forward-looking. The risk is two-fold. First, a discussion of prices, output, or strategy may mutate into a conspiracy to restrict competition. Second, and even in the absence of an explicit agreement on future conduct, an information exchange may facilitate coordination among rivals that harms competition. In light of the long-recognized risk of antitrust liability, a well-counseled trade association will ensure that its activities are appropriately monitored and supervised.<sup>2</sup>

According to the Complaint, NAMM's activities crossed the line that distinguishes legitimate trade association activity from unfair methods of competition. A respondent violates Section 1 of the Sherman Act and Section 5 of the FTC Act when it engages in

---

<sup>2</sup> See, e.g., Steven J. Fellman, *Antitrust Compliance: Trade Association Meetings and Groupings of Competitors: The Associations's Perspective*, 57 *Antitrust L. J.* 209 (1988) ("Counsel should receive agendas of all committee meetings in advance of the meetings and make sure that he or she monitors committee meetings that may involve antitrust-sensitive issues."); Kimberly L. King, *An Antitrust Primer For Trade Association Counsel*, 75 *Fla. Bar J.* 26 (2001):

Here are a few things trade association counsel, executives, and members generally should and should not do: DO encourage the trade association to help expand the markets within which its members compete; . . . . DON'T let the association be used as a forum for discussion of members' price-related terms of sale, geographic areas or customers to be served, or the kinds of goods or services to be offered; DON'T let the association adopt rules governing price-related terms under which members sell goods or services; DON'T let the association be used as a conduit for anticompetitive exchanges of information, such as current pricing to particular customers or planned price increases; DON'T let the association be used to facilitate an agreement among competitors to refuse to deal with any third person . . .

## Analysis to Aid Public Comment

concerted conduct that has the principal tendency or the likely effect of harming competition and consumers. *California Dental Ass'n v. Federal Trade Commission*, 526 U.S. 756 (1999).<sup>3</sup> The conduct of a trade association or its authorized agents is generally treated as concerted action. *E.g.*, *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999); *North Texas Specialty Physicians v. FTC*, 528 F.3d 346, 356 (5th Cir. 2008) (“When an organization is controlled by a group of competitors, it is considered to be a conspiracy of its members.”).

The Complaint alleges that at meetings and programs sponsored by NAMM, competing retailers of musical instruments and other NAMM members discussed strategies for raising retail prices. Firms also exchanged information on competitively-sensitive subjects – prices, margins, minimum advertised price policies and their enforcement. And not only did NAMM sponsor these meetings, but its representatives set the agenda and helped steer the discussions. The antitrust concern is that this joint conduct can facilitate the implementation of collusive strategies going forward.<sup>4</sup> For example, such discussions could lead competing NAMM members to refuse to deal with a manufacturer, distributor, or retailer unless minimum advertised price policies, or increases in minimum advertised prices,

---

<sup>3</sup> Although the Commission does not directly enforce the Sherman Act, conduct that violates the Sherman Act is generally deemed to be a violation of Section 5 of the FTC Act as well. *E.g.*, *Fashion Originators' Guild, Inc. v. FTC*, 312 U.S. 457, 463-64 (1941).

<sup>4</sup> Concerted action that impairs competition by facilitating collusion may be challenged under Section 1 of the Sherman Act. *E.g.*, *United States v. Container Corp.*, 393 U.S. 333 (1969) (agreement to exchange price information); *Sugar Institute, Inc. v. United States*, 297 U.S. 553 (1936) (agreement to exchange price information); *C-O-Two Fire Equipment Co. v. United States*, 197 F.2d 489 (9<sup>th</sup> Cir. 1952) (agreement to standardize product); *United States v. Rockford Memorial Hospital Corp.*, 898 F.2d 1278 (7<sup>th</sup> Cir. 1990) (merger).

Unilateral conduct that impairs competition by facilitating collusion may be challenged under Section 5 of the FTC Act. *E.g.*, *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984); *In the Matter of Valassis Communications, Inc.*, C-4160, 2006 FTC LEXIS 25 (April 19, 2006) (invitation to collude); *In the Matter of Sony Music Entertainment, Inc.*, C-3971, 2000 FTC LEXIS 95 (Aug. 30, 2000) (minimum advertised price policy).

## Analysis to Aid Public Comment

were observed and enforced against discounters.<sup>5</sup> Alternatively, NAMM members could lessen price competition in local retail markets. Any or all these strategies may result in higher prices and harm consumers of musical instruments. Any savings from lower manufacturing costs would be reserved to NAMM members, and not shared with consumers in the form of lower retail prices.

The potential for competitive harm from industry-wide discussions must be weighed against the prospect of legitimate efficiency benefits. Here, the Complaint alleges that no significant pro-competitive benefit was derived from the challenged conduct.

---

<sup>5</sup> In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2717 (2007), the Supreme Court explained that competing retailers, by acting together to compel a manufacturer to implement or enforce a vertical distribution restraint, may harm competition:

A group of retailers might collude to fix prices to consumers and then compel a manufacturer to aid the unlawful arrangement with resale price maintenance. In that instance the manufacturer does not establish the practice to stimulate services or to promote its brand but to give inefficient retailers higher profits. Retailers with better distribution systems and lower cost structures would be prevented from charging lower prices by the agreement.

The Court also observed that antitrust condemnation may be appropriate where resale price maintenance policies are adopted or enforced pursuant to an agreement among manufacturers.

Resale price maintenance may, for example, facilitate a manufacturer cartel. . . . An unlawful cartel will seek to discover if some manufacturers are undercutting the cartel's fixed prices. Resale price maintenance could assist the cartel in identifying price-cutting manufacturers who benefit from the lower prices they offer. Resale price maintenance, furthermore, could discourage a manufacturer from cutting prices to retailers with the concomitant benefit of cheaper prices to consumers. . . . To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel [*i.e.*, a manufacturer cartel or a retailer cartel], it, too, would need to be held unlawful under the rule of reason.

*Id.* at 2717-18.

## Analysis to Aid Public Comment

The Commission does not contend that the exchange of information among competitors is categorically without benefit.<sup>6</sup> Rather, the allegation is that here – taking into account the type of information involved, the level of detail, the absence of procedural safeguards, and overall market conditions – the exchange of information engineered by NAMM lacked a pro-competitive justification.

**III. The Proposed Consent Order**

NAMM has signed a consent agreement containing a proposed consent Order. The proposed Order enjoins NAMM from encouraging, advocating, coordinating, or facilitating in any manner the exchange of information among musical instrument manufacturers and dealers relating to the retail price of musical instruments or the conditions pursuant to which any manufacturer or dealer will deal with any other manufacturer or dealer. The proposed Order also enjoins NAMM from facilitating any musical instrument manufacturer or dealer in entering into or enforcing any agreement between or among musical instrument manufacturers or dealers relating to the retail price of any musical instrument or the conditions pursuant to which any manufacturer or dealer will deal with any other manufacturer or dealer.

In addition, the proposed Order requires NAMM to institute an antitrust compliance program. The proposed Order requires, *inter alia*, the review by antitrust counsel of all written materials and prepared remarks by any member of NAMM's board of directors, employee, or agent of NAMM relating to price terms and minimum advertised price policies; the provision by antitrust counsel of appropriate guidance on compliance with the antitrust laws; and annual training of NAMM's board of directors, agents, and employees concerning NAMM's obligations under the Order.

---

<sup>6</sup> See *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978) (explaining that the exchange of information can, in some circumstances, increase economic efficiency and render markets more, rather than less, competitive). See also Richard A. Posner, *Information and Antitrust: Reflections on the Gypsum and Engineers Decisions*, 67 Geo. L. J. 1187, 1193-97 (1979).



Analysis to Aid Public Comment

The proposed Order would not interfere with the ability of NAMM to engage in legitimate trade association activity, including its sponsorship of trade shows and other events. The proposed Order explicitly excludes from its prohibitions the ordinary commercial activities of NAMM's members on the show floor, and any conduct protected by the *Noerr-Pennington* doctrine. In addition, the proposed Order excludes from its prohibitions the publication or dissemination of aggregated survey data, the sharing of best practices and training materials, and the communication of information relating to creditworthiness, product safety, and warranty issues.

The proposed order will expire in 20 years.

## Complaint

## IN THE MATTER OF

**AMERICAN TELECOM SERVICES, INC.**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS  
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-4256; File No. 082 3114*  
*Complaint, April 15, 2009 – Decision, April 15, 2009*

This consent order addresses the offer of rebates by American Telecom Services, Inc., a company that has advertised and sold products to the public, including telephones and telephone services. The order prohibits the respondent from misrepresenting, in any manner, expressly or by implication, the time in which any rebate will be mailed, or otherwise provided to consumers; from failing to provide any rebate within the time specified or, if no time is specified, within 30 days of receiving a properly completed request; and from misrepresenting any material terms of any rebate program, including the status of or reasons for any delay in providing any rebate. The order requires the respondent to make available to the Commission, upon request, a specimen copy of all advertisements or rebate forms containing the representation covered by this order, all materials that were relied upon in disseminating the representation, and all written or electronic complaints relating to rebates and any responses to those complaints. The order also requires the respondent to provide a copy of the order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives whose duties include the exercise of managerial responsibility with respect to the subject matter. In addition, the order requires the respondent to notify the Commission prior to any change in the corporation that may affect compliance obligations arising under the order and to file periodic reports with the Commission.

*Participants*

For the *Commission*: *Linda K. Badger and Matthew D. Gold.*

For the *Respondent*: *Sean P. Gates, Morrison & Foerster.*

**COMPLAINT**

The Federal Trade Commission, having reason to believe that American Telecom Services, Inc., a corporation (“ATS” or

## Complaint

“respondent”), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a Delaware corporation with its principal office or place of business at 6 Concourse Parkway NE, Suite 1525, Atlanta, GA 30328-6117.

2. Respondent has advertised, labeled, offered for sale, sold, and distributed products to the public, including telephones and phone services. Respondent has distributed these products to the public through large, nationwide retailers.

3. To make its products more attractive to retailers and their customers, ATS has offered numerous mail-in rebates ranging from \$5 to \$50 in value. Most of ATS’s rebate offers have required consumers to fill out a rebate form, provide proof-of-purchase documentation, and “activate” an account entitling the consumer to 100 free long distance minutes. ATS has used third party fulfillment houses to process and pay rebate requests received from its customers.

4. 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.

**ATS’S REBATE ADVERTISEMENTS**

5. Respondent has disseminated or has caused to be disseminated advertisements and rebate forms for mail-in rebates, including but not necessarily limited to the attached Exhibit A. These advertisements contain the following statements:

“American Telecom **Pay N’Talk**

**\$15 REBATE**

...

## Complaint

## Terms and Conditions:

...

Allow 8 weeks to receive your rebate check.

....”

(Excerpts from Exhibit A, an ATS rebate form for a rebate offered on a Pay N’Talk telephone).

**FALSE SHIPMENT REPRESENTATION**

6. Through the means described in Paragraph 5, including but not necessarily limited to Exhibit A, respondent has represented, expressly or by implication, that purchasers of eligible ATS products will receive rebate checks within eight weeks after receipt of their properly completed requests.

7. In truth and in fact, in numerous instances, purchasers of eligible ATS products did not receive rebate checks within eight weeks after receipt of their properly completed requests. Tens of thousands of consumers who submitted properly completed requests for rebates since 2006 have experienced substantial delays, including delays of one year or longer. These delays have been due, in part, to ATS’s inability to pay its third party fulfillment houses, as well as its refusal to timely pay third party fulfillment houses with which it had disagreements. Therefore, the representation set forth in Paragraph 6 was, and is, false or misleading.

8. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

Complaint


**THEREFORE**, the Federal Trade Commission this fifteenth day of April, 2009, has issued this complaint against respondent.

By the Commission.

FEDERAL TRADE COMMISSION DECISIONS  
VOLUME 147

Complaint

**EXHIBIT A**

<h1 style="margin: 0;">\$15 REBATE</h1>											
<p><b>To qualify for rebate, you must:</b></p> <ol style="list-style-type: none"> <li>1. Purchase the specified product between the promotion dates listed on this form.</li> <li>2. Reveal the unique PIN # located on the top left hand corner of the "My Account Card" by scratching off the silver area. Write the PIN # in space provided below.</li> <li>3. Find the unique S/N # (Serial Number) located on the bottom left corner of the "My Account Card" and write it in the space provided below.</li> <li>4. Activate the "My Account Card" before submitting your rebate claim. Attention: Your rebate is not valid unless you have pressed the money-saving green button to access your free minutes.</li> <li>5. Submit postmarked form within 30 days from purchase date.</li> <li>6. Mail the following in one envelope to the address below. <ul style="list-style-type: none"> <li>• This completed rebate form (incomplete forms will not be accepted).</li> <li>• Original or photocopy of the receipt (circle item purchased).</li> <li>• Original 12-digit UPC barcode cut from the product packaging.</li> </ul> </li> </ol> <p><b>Mail to: PayN'Talk Rebate</b>  <b>Offer # H811559</b>  P.O. Box 100546  White Bear Lake, MN 55110-0546</p>	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr style="background-color: #333; color: white;"> <td><b>Product:</b></td> </tr> <tr> <td>PayN'Talk Analog Master RA22304H</td> </tr> <tr style="background-color: #333; color: white;"> <td><b>Promotion Dates:</b></td> </tr> <tr> <td>6/1/07-6/1/09</td> </tr> <tr style="background-color: #333; color: white;"> <td><b>Postmark Date:</b></td> </tr> <tr> <td>Within 30 Days from Purchase Date</td> </tr> <tr style="background-color: #333; color: white;"> <td><b>Valid Retailer:</b></td> </tr> <tr> <td>Walgreen's</td> </tr> <tr style="background-color: #333; color: white;"> <td><b>Rebate Amount:</b></td> </tr> <tr> <td>\$15.00</td> </tr> </table>	<b>Product:</b>	PayN'Talk Analog Master RA22304H	<b>Promotion Dates:</b>	6/1/07-6/1/09	<b>Postmark Date:</b>	Within 30 Days from Purchase Date	<b>Valid Retailer:</b>	Walgreen's	<b>Rebate Amount:</b>	\$15.00
<b>Product:</b>											
PayN'Talk Analog Master RA22304H											
<b>Promotion Dates:</b>											
6/1/07-6/1/09											
<b>Postmark Date:</b>											
Within 30 Days from Purchase Date											
<b>Valid Retailer:</b>											
Walgreen's											
<b>Rebate Amount:</b>											
\$15.00											
<p><b>Customer Information</b> (please print clearly)</p> <p>*Full Name: _____</p> <p>*Address: _____</p> <p>*City: _____ *State: _____ *Zip: _____</p> <p>Phone: _____</p> <p>email address: _____</p> <p>*Account Card PIN #: _____</p> <p>*Account Card S/N # (Serial Number): _____</p> <p>Signature of Purchaser: _____</p> <p>Date Submitted: _____</p> <p style="font-size: small; text-align: center;">Please keep copies of entire submission for your records. To check the status of your claim visit <a href="http://www.rebate-zone.com/ats">www.rebate-zone.com/ats</a></p>	<p><b>Terms and Conditions:</b> You must submit all of the required information and the completed rebate form. Request for rebates must be postmarked within 30 days from purchase date. <b>LIMIT ONE REBATE PER HOUSEHOLD.</b> Checks are paid in U.S. funds only to U.S. residents and must be cashed within 90 days of issuance. American Telecom Services, Inc. is not responsible for lost or stolen checks. Checks will not be mailed to PO boxes. All federal, state, and local rules apply. Offer not available in all areas or stores, outside the U.S., or to customers under 18 years of age. Rebate offer void where prohibited or restricted by law. We reserve the right to modify specifications and terms without notice. Late, incomplete, postage due, and illegible claims will be rejected. Fraudulent mailing of multiple requests can result in federal prosecution under U.S. Mail Statutes (18 USC, 1341/1342). Offer cannot be combined with any other offer or rebate. Allow 8 weeks to receive your rebate check. To check the status of your claim, call 1-866-818-8964 or visit <a href="http://www.rebate-zone.com/ats">www.rebate-zone.com/ats</a>. (ABQ)</p>										

**EXHIBIT A**

## Decision and Order

**DECISION AND ORDER**

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of the complaint which the Western Region proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent American Telecom Services, Inc., is a Delaware corporation with its principal office or place of business at 6 Concourse Parkway NE, Suite 1525, Atlanta, GA 30328-6117.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Decision and Order

**ORDER****DEFINITIONS**

For purposes of this order, the following definitions shall apply:

1. Unless otherwise specified, “respondent” shall mean American Telecom Services, Inc., a corporation, its successors and assigns and its officers, agents, representatives, and employees.
2. “Rebate” shall mean a check, cash, credit towards future purchases, or any other consideration offered to consumers who purchase products or services, and which is to be provided, subsequent to the purchase, to consumers who submit a request for redemption after satisfying the terms and conditions of the offer.
3. “Properly completed request” shall mean a rebate request made in compliance with the express terms of the rebate offer, including the submission of all documentation, information, and other materials required by such terms.
4. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

**I.**

**IT IS ORDERED** that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or service sold to consumers, in or affecting commerce, shall not:

- A. misrepresent, in any manner, expressly or by implication, the time in which any rebate will be mailed, or otherwise provided to consumers;



## Decision and Order

- B. fail to provide any rebate within the time specified or, if no time is specified, within thirty (30) days of receiving a properly completed request; or
- C. misrepresent, in any manner, expressly or by implication, any material terms of any rebate program, including the status of or reasons for any delay in providing any rebate.

**II.**

**IT IS FURTHER ORDERED** that respondent ATS, and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. A specimen copy of all advertisements or rebate forms containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All written or electronic complaints relating to rebates (whether received directly, indirectly, or through any third party) and any responses to those complaints.

**III.**

**IT IS FURTHER ORDERED** that respondent ATS, and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives whose duties include the exercise of managerial responsibility with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to

## Decision and Order

future personnel within thirty (30) days after the person assumes such position or responsibilities.

**IV.**

**IT IS FURTHER ORDERED** that respondent ATS, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

**V.**

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

## Decision and Order

**VI.**

This order will terminate on April 15, 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 that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

*Provided, further*, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

## Analysis to Aid Public Comment

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

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from American Telecom Services, Inc. (“ATS”). ATS, with headquarters in Atlanta, Georgia, is a distributor of telephones and phone services.

The proposed consent order has been placed on the public record for thirty (30) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement’s proposed order.

This matter concerns ATS’s cash rebate promotions. To make its products more attractive to retailers and their customers, ATS has offered numerous mail-in rebates ranging from \$5 to \$50 in value. In implementing these promotions, ATS used third party fulfillment houses to process and pay rebate requests received from its customers. The complaint alleges that ATS engaged in deceptive practices relating to these rebate offers. Specifically, the complaint alleges that ATS falsely represented that purchasers of eligible ATS products will receive rebate checks within eight weeks after receipt of their properly completed requests. The proposed complaint further alleges that tens of thousands of consumers who submitted properly completed requests for rebates since 2006 have experienced substantial delays, including delays of one year or longer. According to the complaint, these delays have been due, in part, to ATS’s inability to pay its third party fulfillment houses, as well as its refusal to timely pay third party fulfillment houses with which it had disagreements.

The proposed order contains provisions designed to prevent ATS from engaging in similar acts and practices in the future. Part I of the proposed order prohibits ATS from misrepresenting the time in which any rebate will be mailed and from failing to provide any

## Analysis to Aid Public Comment

rebate within the time specified, or if no time is specified, within thirty days. This provision also prohibits the company from misrepresenting any material terms of any rebate program, including the status of or reasons for any delay in providing any rebate.

Parts II through V of the proposed order are standard reporting and compliance provisions. Part VI provides that the order will terminate after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Complaint

IN THE MATTER OF

**NATIVE ESSENCE HERB COMPANY,  
MARK J. HERSHISER,  
AND  
MARIANNE HERSHISER**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. 9328; File No. 082 3115  
Complaint, September 16, 2008 – Decision, May 7, 2009*

This consent order addresses the respondents' advertising and promotion of Native Essence (Rene Caisse) Formula tea and extract, Native Essence Plus tea and extract, Native Essence with Cat's Claw tea and extract, chaparral herb, Maitake mushroom extract, and Mai-T Mushroom Plus Formula extract. The complaint alleges that respondents have claimed that their products are effective in treating and curing various forms of cancer and in reducing the size of, or eliminating, cancerous tumors. The consent order requires respondents to have competent and reliable scientific evidence substantiating any claim that their products are effective in the treatment or cure of cancer; prevent or lower the risk of cancer; are effective in reducing the size of, or eliminating, cancerous tumors; or is safe or non-toxic or has no side effects.

*Participants*

For the *Commission*: Rich Cleland, Matthew D. Gold, Rosemary Rosso, and Erika Wodinsky.

For the *Respondents*: Richard A. Jaffe and Judith A. Rosenstein.

**COMPLAINT**

The Federal Trade Commission, having reason to believe that Native Essence Herb Company, a corporation, Mark J. Hershiser, individually, d/b/a Native Essence Herb Company, and as an officer of the corporation, and Marianne Hershiser, individually, d/b/a Native Essence Herb Company, and as an officer of the corporation

## Complaint

(“ respondents”), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Native Essence Herb Company (“Native Essence”) is or has been a New Mexico corporation, with its principal office or place of business at 4 Tune Drive, Unit B, El Prado, New Mexico 87529.

2. Respondent Mark J. Hershiser is an officer of Native Essence. Individually or in concert with others, he has formulated, directed, controlled, or participated in the policies, acts, or practices of Native Essence, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of Native Essence.

3. Respondent Marianne Hershiser is an officer of Native Essence. Individually or in concert with others, she has formulated, directed, controlled, or participated in the policies, acts, or practices of Native Essence, including the acts and practices alleged in this complaint. Her principal office or place of business is the same as that of Native Essence.

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

5. Respondents have manufactured, advertised, labeled, offered for sale, sold, and distributed herbal products to the public, including Native Essence (Rene Caisse) Formula (also called the “Native Essence Original Formula”), Native Essence Plus, Native Essence with Cat’s Claw, chaparral herb, Japanese Maitake mushrooms, and Mai-T Mushroom Plus. Respondents offer these products through the following Internet websites: [www.herbalformulas.com](http://www.herbalformulas.com), [www.herbalalternative.com](http://www.herbalalternative.com), [www.herbmed.com](http://www.herbmed.com), and [www.herbalremedy.com](http://www.herbalremedy.com). Native Essence Original Formula, Native Essence Plus, Native Essence with Cat’s Claw, chaparral herb, Japanese Maitake mushrooms, and Mai-T Mushroom Plus are “foods” and/or

## Complaint

“drugs” within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

6. Respondents promote their Native Essense Original Formula, Native Essense Plus, and Native Essense with Cat’s Claw products as a treatment or cure for lymphoma, colon, rectal, and prostate cancer, as well as for diabetes, ulcers and other ailments. Respondents promote chaparral herb, Japanese Maitake mushrooms, and Mai-T Mushroom Plus, which contains a mix of Japanese Maitake mushrooms, Red Reishi mushrooms, Shiitake mushrooms, Corydyceps fungus, Chinese Astragalus root, and Rose Hips, as products that can treat or cure cancer.

Native Essense Original Formula, Native

Essense Plus, and Native Essense with Cat’s Claw

7. Respondents have disseminated or caused to be disseminated advertisements for their Native Essense Original Formula, Native Essense Plus, and Native Essense with Cat’s Claw products, including but not necessarily limited to the attached Exhibit A. These advertisements contain the following statements:

“Native Essense™ (Rene Caisse) Formula

...

Uses:

Thousands of people over the years have testified that Rene Caisse’s formula has cured their cancer, diabetes, ulcers and many other ailments. [Exhibit A, at 1]

...



## Complaint

## Testimonials:

“I was battling lymphoma for 10 years and was in horrendous pain. I began taking Native Essense™ Plus and began feeling better right away. After 4 months my blood was normal and I was not feeling pain anymore . . . I still take the Native Essense™ Plus everyday and have now been in remission for over a year.”

Christiane B. [Exhibit A, at 2; ellipses in the original]

“I am glad my wife is taking these herbs (Native Essense™ tea) you are giving her. Iit [sic] seems to be working, the cancer cells in her blood stream went from 10 to 1.05. Thank you very much for taking the time to talk with her and encouraging her to get well again.” Bernard G. “My PSA count went down from 6.4 to 3.9 after 3 months and the only thing I did differently was to take the Native Essense™ with Cat’s Claw formula. I’m very happy with the progress and I’m going to continue using it.”

Roland M. [Exhibit A, at 2]

. . .

“I had colon and rectal cancer and they could do no more for me as I’d had 8 weeks of chemo and 11 days of radiation. I could take the radiation no more and they told me the chemo was not reaching the tumor. I started on Native Essense™, 2 ounces three times a day for four months then 2 ounces twice a day. After about six months a large tumor was expelled and after that about five more smaller ones.” Comments from my Radiologist: “I’ve heard wonderful things about essiac.” Comments from my nurse after reading my blood test: “This blood test is awesome for a woman with colon and rectal cancer.”

Mary Helen H. [Exhibit A, at 2]

## Complaint

...

**Native Essense (essiac herbs) Ingredients**

...

**Ingredients**

**Original:** Burdock root, Sheep Sorrel herb, Slippery Elm bark, Turkish rhubarb root.

**Plus adds:** Red Clover, Watercress, Blessed Thistle, Kelp/Bladderwrack.

**With Cats Claw** adds Cats Claw bark to the Original.

...

**Sheep Sorrel herb** (*Rumex acetosella*)

...

Common Use: Throughout the centuries, the sorrels have appeared in historical archives as a folk remedy for cancer in both Europe and America. In the late 1740's, legislation was introduced in Williamsburg, Virginia, that permitted Mrs. Mary Johnson to use this plant as a treatment for cancer. . . . In 1926, the National Cancer Institute received a recipe from Canada citing an old Indian cure for cancer using a paste made with bread and the juice of sheep sorrel, applied externally. Thus, it would appear from early literature that the sorrels were used to treat cancer. Sorrel contains a high amount of nutrients including chlorophyll . . . The chlorophyll molecules that carry oxygen through the bloodstream may do the following: Inhibit chromosome damage to effectively block cancer, reduce the damage of radiation burns . . . [Exhibit A, at 4-5]

...

## Complaint

**Kelp** (*Laminaria species*) or **Bladderwrack** (*Fucus vesiculosus*)

...

Common Uses: . . .The extensive research done on this remarkable sea-weed has shown it to have anti-tumor properties (Japanese researchers have claimed kelp has been 'conclusively proven to prevent breast cancer'), as well as antibiotic, antioxidant and antibacterial properties. [Exhibit A, at 7]

...

**Peruvian Cat's Claw (Uña de Gato) bark** (*Uncaria tomentosa*)

...

Common Uses: This amazing vine from the Peruvian rain forest is offered in Peruvian pharmacies, the label states that the curative properties are almost unlimited. This is because the herb is considered a powerful cellular reconstitutor. Studies beginning in 1970 and continuing through today suggest it has applications in the treatment of

cancer. . . [Exhibit A, at 7]

...”

[Exhibit A, portions of respondents' website [www.herbmed.com/caisseinfo.html](http://www.herbmed.com/caisseinfo.html), as accessed on February 29, 2008]

8. Through the means described in Paragraph 7, respondents have represented, expressly or by implication, that:

a. Native Essense Original Formula, Native Essense Plus, and Native Essense with Cat's Claw are effective in treating and

## Complaint

curing cancer, including but not limited to lymphoma, colon cancer, rectal cancer, and prostate cancer;

b. Native Essense Original Formula, Native Essense Plus, and Native Essense with Cat's Claw are effective in reducing the size of, or eliminating, cancerous tumors; and

c. Native Essense Plus is effective in preventing breast cancer.

9. Through the means described in Paragraph 7, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 8, at the time the representations were made.

10. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 8, at the time the representations were made. Therefore, the representation set forth in Paragraph 9 was, and is, false and misleading.

11. Through the means described in Paragraph 7, respondents have represented, expressly or by implication, that:

a. Scientific research proves that Native Essense Plus prevents breast cancer; and

b. Scientific studies prove that Native Essense with Cat's Claw is effective in the treatment of cancer.

12. In truth and in fact:

a. Scientific research does not prove that Native Essense Plus prevents breast cancer; and

b. Scientific studies do not prove that Native Essense with Cat's Claw is effective in the treatment of cancer.

## Complaint

Therefore, the representations set forth in Paragraph 11 were, and are, false or misleading.

Chaparral Herb

13. Respondents have disseminated or caused to be disseminated advertisements for their Chaparral herb extract, including but not necessarily limited to the attached Exhibit B. These advertisements contains the following statements:

**“Chaparral herb (Larrea v. sp.)**

...

Common Uses: For centuries, Native Americans have been using chaparral leaves and stems to treat a wide variety of ailments, including cancer . . . In folk medicine, chaparral has been used for leukemia and many different types of cancers. Many people with cancer have claimed tumor shrinkage or complete remission using only chaparral. The plant contains immune stimulating polysaccharides and a key ingredient nordihydroguaiaretic acid (NGDA) [sic.], which has been shown to have powerful antitumor properties. According to vol. 19 of Biochemical Pharmacology NGDA inhibits electron transport in the mitochondria, or 'energy producing factories' within cancer cells, thereby depriving tumors of the electrical energy they require to exist. . . .”

[Exhibit B, portions of respondents' website [www.herbalformulas.com/chaparral.html](http://www.herbalformulas.com/chaparral.html), as accessed on February 29, 2008]

14. Through the means described in Paragraphs 13, respondents have represented, expressly or by implication, that:

- a. Chaparral herb is effective in treating and curing cancer;

## Complaint

b. Chaparral herb is effective in causing people with cancer to go into complete remission, without the need for any other form of treatment; and

c. Chaparral herb is effective in shrinking or eliminating cancerous tumors.

15. Through the means described in Paragraph 13, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 14, at the time the representations were made.

16. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 14, at the time the representations were made. Therefore, the representation set forth in Paragraph 15 was, and is, false and misleading.

Maitake Mushroom Extract and Mai-T Mushroom Plus Extract

17. Respondents have disseminated or have caused to be disseminated advertisements for their Maitake mushroom extract and Mai-T Mushroom Plus extract products, including but not necessarily limited to the attached Exhibit C. These advertisements contain the following statements:

**“Mai-T Mushroom Plus™ Ingredients**

...

**Immune, Adaptogenic and Whole Body Tonic.** The benefits shown by clinical trials performed on these mushrooms in China and Japan are far too numerous to list here. Among these include: the ability to inhibit many types of tumors, build bone marrow, aid in cancer prevention, stimulate the immune system on all levels, support people undergoing chemotherapy, stimulate circulation and help

## Complaint

with coronary/heart disease. The Japanese government has officially listed Reishi as an adjunct herb for cancer . . . [Exhibit C, at 1]

...

**Ingredients:** Maitake mushroom, Reishi mushroom, Shiitake mushroom, Cordyceps fungus, Astragalus root and concentrated Rose Hips extract.

...

**Japanese Maitake mushroom** (*Grifola frondosa*)

...

Common Uses: A Maitake extract is being studied in medical clinics in the U.S. for patients with breast and colorectal cancers. In China, an extract of this mushroom demonstrated an anti-cancer effect in 63 patients with lung, stomach, hepatocellular cancers and leukemia. Dr. Joan Priestly MD, reports that her patients with Kaposi's sarcoma and other symptoms of AIDS show improvement when administered the extract. When used consistently (3-5 times weekly), Maitake is said to aid in cancer prevention, immune stimulation in people with cancer, support people undergoing chemotherapy and benefit people with the AIDS virus. . . . [Exhibit C, at 1]

...

**Red Reishi mushroom** (*Ganoderma lucidum*)

...

Common Use: Red Reishi is in the most highly rated category of herbs ("Superior"), in terms of multiple benefits and lack of side effects, in Traditional Chinese Medicine.

## Complaint

Here is a small list of some of the things it is claimed to benefit. Cancer, side effects of cancer treatments including radiation, chemo-therapy and surgery . . . [Exhibit C, at 1]

...

**Shiitake mushroom** (*Lentinus edodes*)

...

Common Use: Shiitake is used for any and all diseases involving depressed immune function, including cancer . . . [Exhibit C, at 2]

...

**Chinese Astragalus root** (*Astragalus membranaceus*)  
[*ingredient in Mai-T Mushroom Plus*]

...

Common use:. . .Astragalus root has also been indicated as an aid in the side effects of chemotherapy as well as having the ability to inhibit tumor growth. If taken cumulatively, especially with Chinese Ligustrum (Privet) fruit, it shows marked anti-tumor properties. [Exhibit C, at 3]

...”

[Exhibit C, portions of respondents’ website [www.herbalformulas.com/mitxpinfo.html](http://www.herbalformulas.com/mitxpinfo.html), as accessed on February 29, 2008]

18. Through the means described in Paragraph 17, respondents have represented, expressly or by implication, that:

- a. Mai-T Mushroom Plus is effective in preventing, treating and curing cancer, including but not limited to lung cancer,



## Complaint

stomach cancer, hepatocellular cancer, leukemia, and Kaposi's sarcoma; and

b. Mai-T Mushroom Plus is effective in inhibiting the growth of cancerous tumors.

19. Through the means described in Paragraph 17, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 18, at the time the representations were made.

20. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 18, at the time the representations were made. Therefore, the representation set forth in Paragraph 19 was, and is, false and misleading.

21. Through the means described in Paragraph 17, respondents have represented, expressly or by implication, that clinical studies prove that Maitake mushrooms and Mai-T Mushroom Plus prevent and treat lung cancer, stomach cancer, hepatocellular cancer, leukemia, and Kaposi's sarcoma, and inhibit tumor growth.

22. In truth and in fact, clinical studies do not prove that Maitake mushrooms and Mai-T Mushroom Plus prevent or treat lung cancer, stomach cancer, hepatocellular cancer, leukemia, and Kaposi's sarcoma, and inhibit tumor growth. Therefore, the representation set forth in Paragraph 21 was, and is, false and misleading.

23. The acts and practices alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

\* \* \*

## Complaint

**NOTICE**

Proceedings on the charges asserted against the respondents named in this complaint will be held before an Administrative Law Judge (ALJ) of the Federal Trade Commission, under Part 3 of the Commission's Rules of Practice, 16 C.F.R. Part 3. A copy of Part 3 of the Rules is enclosed with this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the twentieth (20th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the ALJ shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the ALJ, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

## Complaint

The ALJ will schedule an initial prehearing scheduling conference to be held not later than 7 days after the last answer is filed by any party named as a respondent in the complaint. Unless otherwise directed by the ALJ, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within 5 days of receiving a respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

Notice is hereby given to each of the respondents named in this complaint that a hearing before the ALJ on the charges set forth in this complaint will begin on December 16, 2008, at 10:00 a.m., or such other date and time as determined by the ALJ, in Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. At the hearing, you will have the right under the Federal Trade Commission Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

The following is the form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint. If, however, the Commission should conclude from record facts developed in any adjudicative proceedings in this matter that the proposed order provisions might be inadequate to fully protect the consuming public, the Commission may order such other relief as it finds necessary or appropriate.

Moreover, the Commission has reason to believe that, if the facts are found as alleged in the complaint, it may be necessary and appropriate for the Commission to seek relief to redress injury to consumers, or other persons, partnerships or corporations, in the form of restitution for past, present, and future consumers and such other types of relief as are set forth in Section 19(b) of the Federal Trade Commission Act. The Commission will determine whether to apply to a court for such relief on the basis of the adjudicative

## Complaint

proceedings in this matter and such other factors as are relevant to consider the necessity and appropriateness of such action.

**ORDER****DEFINITIONS**

For purposes of this order, the following definitions shall apply:

1. Unless otherwise specified, “respondents” means Native Essence Herb Company, a corporation, its successors and assigns and its officers; Mark J. Hershiser, individually, d/b/a Native Essence Herb Company, and as an officer of the corporation; and Marianne Hershiser, individually, d/b/a Native Essence Herb Company, and as an officer of the corporation; and each of the above’s agents, representatives and employees.
2. “Commerce” means as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
3. “Competent and reliable scientific evidence” means tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.
4. “Food” and “drug” mean “food” and “drug” as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55.
5. “Covered product or service” means any food, dietary supplement, or drug, including, but not limited to, Native Essence (Rene Caisse) Formula tea or extract, Native Essence Plus tea or extract, Native Essence with Cat’s Claw tea or extract, chaparral herb (or any product containing chaparral herb), Maitake mushroom extract, or Mai-T

## Complaint

Mushroom Plus Formula extract, or any other health-related product, service, or program.

6. "Endorsement" means as defined in 16 C.F.R. § 255.0(b).

**I.**

**IT IS ORDERED** that respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, advertising, labeling, promotion, offering for sale, sale, or distribution of Native Essence (Rene Caisse) Formula tea or extract, Native Essence Plus tea or extract, Native Essence with Cat's Claw tea or extract, chaparral herb (or any product containing chaparral herb), Maitake mushroom extract, or Mai-T Mushroom Plus Formula extract, or any substantially similar product or any other covered product or service, in or affecting commerce, shall not represent, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, that:

- A. Such product is effective in the treatment or cure of cancer;
- B. Such product prevents or lowers the risk of cancer;
- C. Such product is effective in reducing the size of, or eliminating, cancerous tumors; or
- D. Such product is safe or non-toxic or has no side effects;

unless the representation is true, non-misleading, and, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

**II.**

**IT IS FURTHER ORDERED** that respondents, directly or through any corporation, partnership, subsidiary, division, trade

## Complaint

name, or other device, in connection with the manufacturing, advertising, labeling, promotion, offering for sale, sale, or distribution of any covered product or service, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, about the efficacy, performance, or health-related benefits of any covered product or service, unless the representation is true, non-misleading, and, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

**III.**

**IT IS FURTHER ORDERED** that respondents, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

**IV.**

**IT IS FURTHER ORDERED** that:

- A. Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in labeling for such drug under any tentative or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration; and
- B. Nothing in this order shall prohibit respondents from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

## Complaint

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

- A. Respondents shall, within seven (7) days after the date of service of this order, deliver to the Commission a list, in the form of a sworn affidavit, of all consumers who purchased Native Essense (Rene Caisse) Formula tea or extract, Native Essense Plus tea or extract, Native Essense with Cat's Claw tea or extract, chaparral herb (or any product containing chaparral herb), Maitake mushroom extract, or Mai-T Mushroom Plus Formula, on or after January 1, 2005 through the date of service of this order. Such list shall include each consumer's name and address, the product(s) purchased, and, if available, the consumer's telephone number and email address;
- B. Within forty-five (45) days after the date of service of this order, respondents shall send by first class mail, postage prepaid, an exact copy of the notice attached as Attachment A to all persons identified in Part V.A. The face of the envelope containing the notice shall be an exact copy of Attachment B. The mailing shall not include any other documents; and
- C. Except as provided in this order, respondents, and their officers, agents, servants, employees, attorneys, and representatives shall not sell, rent, lease, transfer, or otherwise disclose the name, address, telephone number, credit card number, bank account number, e-mail address, or other identifying information of any person who paid any money to any respondent, at any time prior to issuance of this order, in connection with the purchase of Native Essense (Rene Caisse) Formula tea or extract, Native Essense Plus tea or extract, Native Essense with Cats Claw tea or extract, chaparral herb (or any product containing chaparral herb), Maitake mushroom extract, or Mai-T Mushroom Plus extract. *Provided, however*, that respondents may disclose

## Complaint

such identifying information to the FTC pursuant to Part V.A, above, or any law enforcement agency, or as required by any law, regulation, or court order.

**VI.**

**IT IS FURTHER ORDERED** that respondents shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. A specimen copy of all advertisements and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

**VII.**

**IT IS FURTHER ORDERED** that respondent Native Essence Herb Company, and its successors and assigns, and respondents Mark J. Hershiser and Marianne Hershiser shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities. Respondents shall maintain and upon



## Complaint

request make available to the Federal Trade Commission for inspection and copying a copy of each signed statement acknowledging receipt of the order.

**VIII.**

**IT IS FURTHER ORDERED** that respondent Native Essence Herb Company, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

**IX.**

**IT IS FURTHER ORDERED** that respondents Mark J. Hershiser and Marianne Hershiser, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of their current business or employment, or of their affiliation with any new business or employment. The notice shall include respondents' new business address and telephone number and a description of the nature of the business or employment and their duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

## Complaint

**X.**

**IT IS FURTHER ORDERED** that respondents shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

**XI.**

This order will terminate twenty (20) years from the date of its issuance, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

*Provided, further*, that if such complaint is dismissed or a federal court rules that the respondents 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.

Complaint

**THEREFORE**, the Federal Trade Commission this sixteenth day of September, 2008, has issued this complaint against respondents.

By the Commission.

FEDERAL TRADE COMMISSION DECISIONS  
VOLUME 147

## Complaint

**Attachment A**ATTACHMENT A  
LETTER TO BE SENT BY FIRST CLASS MAIL  
[To be printed on letterhead of Native Essence Herb Company]

[Name and address of recipient] [Date]

Dear [Recipient]:

Our records show that you bought Native Essence (Rene Caisse or essiac herbs) Formula, Native Essence Plus, Native Essence with Cat's Claw, chaparral herb, Maitake mushrooms, and/or Mai-T Mushroom Plus Formula from one of our websites, [www.herbalformulas.com](http://www.herbalformulas.com), [www.herbmed.com](http://www.herbmed.com), [www.herbalalternative.com](http://www.herbalalternative.com), and [www.herbremedy.com](http://www.herbremedy.com). We are writing to tell you that the Federal Trade Commission ("FTC") has found that our advertising claims for these products were false or unsubstantiated, and has issued an Order prohibiting us from making those claims in the future. The Order entered against us also requires that we send you the following information about the scientific evidence on these products.

Very little scientific research has been done concerning Native Essence, Native Essence Plus, Native Essence with Cat's Claw, chaparral herb, Maitake mushrooms, or Mai-T Mushroom Plus as a treatment or cure for cancer in humans. The scientific studies that have been done do not demonstrate that Native Essence, Native Essence Plus, Native Essence with Cat's Claw, chaparral herb, Maitake mushrooms, or Mai-T Mushroom Plus, or the ingredients in these products, are effective when used as treatments for cancer.

It is very important that you talk to your doctor or health care provider before using *any* alternative or herbal product, including Native Essence, Native Essence Plus, Native Essence with Cat's Claw, chaparral herb, Maitake mushrooms, or Mai-T Mushroom Plus. Speaking with your doctor is important to make sure that all aspects of your medical treatment work together. Things that seem safe, such as certain foods, herbs, or pills, may interfere or affect your cancer or other medical treatment, or other medicines you might be taking. Some herbs or other complementary or alternative treatments may keep your medicines from doing what they are supposed to do, or could be harmful when taken with other medicines or in high doses. It also is very important that you talk to your doctor or health care provider before you decide to take any alternative or herbal product, including Native Essence, Native Essence Plus, Native Essence with Cat's Claw, Chaparral herb, Maitake mushrooms, or Mai-T Mushroom Plus, instead of taking conventional cancer treatments that have been scientifically proven to be safe and effective in humans.

If you would like further information about complementary and alternative treatments for cancer, the following Internet web sites may be helpful:

1. The National Cancer Institute: [www.cancer.gov/cancertopics/pdq](http://www.cancer.gov/cancertopics/pdq); or
2. The National Center for Complementary and Alternative Medicines: [www.nccam.nih.gov](http://www.nccam.nih.gov)

Attachment A

Complaint

You also can contact the National Cancer Institute's Cancer Information Service at 1-800-4-CANCER or 1-800-422-6237.

Sincerely,

Attachment A

Complaint

**Attachment B**

**ATTACHMENT B**

Native Essence Herb Company  
P.O. Box 189  
Carson, New Mexico 87517

[name and address of purchaser]

**GOVERNMENT ORDERED NOTICE**

Complaint

Exhibit A

Rene Caisse Herbs

Page 1 of 3

- Home
- Herbal Formulas
- Single Herbs
- Rene Caisse Herbs
- Roadside Formula
- Categories
- Ingredients
- About Us / FAQ
- Ordering
- Show Order
- Privacy Policy
- Info
- Search
- Index
- SHOPPING

**Native Essence Herb Company's  
HerbalFormulas.com**

**Free Shipping**  
We are offering free priority mail shipping on all US orders - select "priority mail" at check out! Estimated delivery 2-3 days

**Native Essence™ (Rene Caisse) Formula**

Compare to Essiac™ or Flor-Essence™ and save!  
This is the combination of herbs originally prepared by the Ojibwa Indians and later used so successfully by the late Canadian nurse Rene Caisse and called (Essiac is Caisse backwards). This formula is believed to normalize body systems by purifying the blood and thoroughly cleansing the body of harmful toxins. We call this formula Native Essence™ and we prepare it using only the finest organic quality herbs available.



Click [HERE](#) for more info on this amazing formula

[Order Here](#)

[Product Info](#)

[Ingredients](#)

Available in the traditional dry tea and a super concentrated, already prepared liquid extract that requires no preparation and no refrigeration.



The origins of Essiac

**About Native Essence™**

Native Essence is available in the traditional dry herbal tea format as well as a concentrated liquid extract. The Native Essence™ formula is carefully prepared using only the finest quality herbs. The herbs used in this formula are always organically grown or ecologically wildcrafted and will never be irradiated or fumigated.

The original Essiac™ formula consisted of 4 herbs: burdock root (picked in its first year of life), sheep sorrel (the whole plant), slippery elm bark (the innermost bark) and Turkish rhubarb root. Native Essence is always prepared using these herbs as listed above.

Throughout its evolution, 4 additional herbs have sometimes been added to the original formula. The addition of these herbs is based on the research of Dr. Chaites Brusck M.D., the personal physician to president John F. Kennedy. Dr. Brusck worked closely with Rene Caisse for many years, and after 30 years of testing and research, believed the formula to be perfected. These herbs (watercress, red clover, blessed thistle and kelp) are added to enhance the original formula. It is believed by some that these additional herbs help bring out the full potential of the original herbs, which still make up the heart and soul of the formula.

So that you may make your own choice regarding these additions, Native Essence is available in the original 4 herb formula (known as Native Essence original) and also in the "enhanced" 8 herb formula (known as Native Essence Plus). We make no recommendations with regard to these additions, and since both formulas contain the original "essential herbs" as traditionally prepared and proportioned, we believe either will be highly beneficial.

**Uses:**

Thousands of people over the years have testified that Rene Caisse's formula has cured their cancer, diabetes, ulcers and many other ailments. The formula is believed to normalize body systems by purifying and oxygenating the blood and thoroughly cleansing the body of harmful toxins. It helps break down catabolic tissue and promote the replacement of wasted tissue with healthy new tissue, also leading to a better absorption and assimilation of nutrients.

**Testimonials:**

**The Ojibway**

The Ojibway have been described as having a knowledge of herbal healing and spiritual powers as extensive as any other native American tribe. The medicine men gained their knowledge of plants in several ways. It came in the form of spiritual visions, intuition and thousands of years of observation. Observing the behavior of ill and injured animals, they learned which plants the animals consumed to heal themselves. From these sources as well as guidance from the Great Spirit, Kitchi Manitou, they amassed a wealth of knowledge and passed it down from generation to generation.

The Ojibway believe that all plants, as creations of the Great Creator, express their own unique identity. They believe that each plant possesses an incorporeal being, a spiritual substance that gives it physical form, growth potential and healing powers. They also believe that plants have another remarkable power, the power to combine and become a single "united spirit," much more powerful than any of the plants individually. They feel this "united spirit" gives the formula's supernatural healing powers. Not coincidentally, many modern herbalists believe the action of this formula must be the "synergy" of these combined herbs, some

<http://www.herbalformulas.com/renecaissetea.html>

2/29/2008

## Complaint

Rene Caisse Herbs

Page 4 of 3

"I was battling lymphoma for 10 years and was in horrendous pain. I began taking Native Essence™ Plus and began feeling better right away. After 4 months my blood was normal and I was not feeling pain anymore. I still take the Native Essence™ Plus everyday and have now been in remission for over a year."  
Christiane B.

"I am glad my wife is taking these herbs (Native Essence™ tea) you are giving her. It seems to be working, the cancer cells in her blood stream went from 10 to 1.05. Thank you very much for taking the time to talk with her and encouraging her to get well again."  
Bernard G. "My PSA count went down from 6.4 to 3.9 after 3 months and the only thing I did differently was to take the Native Essence™ with Carl's Claw formula. I'm very happy with the progress and I'm going to continue using it."  
Roland M.

"Thank you for the Native Essence™ you sent me. I appreciate your thoughtfulness, and also the professionalism and courtesy you extend each time I call."  
Jack L.

"Thank you very much for being so kind and thank you for having such a wonderful product. It has helped many, many people."  
Rebecca R.

"I had colon and rectal cancer and they could do no more for me as I had 8 weeks of chemo and 11 days of radiation. I could take the radiation no more and they told me the chemo was not reaching the tumor. I started on Native Essence™, 2 ounces three times a day for four months then 2 ounces twice a day. After about six months a large tumor was expelled and after that about five more smaller ones. Comments from my Radiologist: "I've heard wonderful things about Essiac." Comments from my nurse after reading my blood test: "This blood test is awesome for a woman with colon and rectal cancer."  
Mary Helen H.

\*\*\*\*\*

[Click here to learn about the Hoxsey formula](#)

"The Hoxsey formula worked real well for my mom, she had bronchitis for 3 months and it went away in approximately 1 1/2 weeks with the Hoxsey."  
Cecilia H.

[Back to the top](#)

"magical" quality emerging when blended together.

**Rene Caisse**  
In 1922, Canadian Nurse Rene Caisse received the Gijbway formula from a patient. Giving it the name Essiac (Caisse spelled backwards) she used the herbal remedy many times over the next 50 years and her work with it has been described as "one of the most remarkable stories in all of medicine."

Her life and work have been well documented in several books, as well as countless magazine and newspaper articles, recounting numerous claims and testimonials from people said to have benefitted from this remarkable, safe and simple formula.

**Exclusivity:**

Some companies claim to have the only recipe for the formula, but it is readily available for everyone to benefit from, as all good things from earth should be. Dr. Gary Glum published a biography of nurse Caisse entitled *Calling of an Angel* (1988). He was given the formula by Mary MacPherson, a close friend of nurse Caisse, and he sends the formula with his book. Likewise, the formula was published in the book *The Essence of Essiac* by Canadian Sheila Snow. Our formula uses the same herbs and the same ratios as nurse Rene Caisse recommended. Native Essence Rene Caisse formulas are prepared in a traditional manner by our trusted herbalist, whom started making the formula for others after curing his own stomach ulcers with it in 1962.

▪ [Order Native Essence](#)

▪ [Product Information](#)

© 2003 Native Essence Herb Co. All Rights Reserved

**Important notice:**

The information presented here is not presented with the intention of diagnosing any disease or condition or prescribing any treatment. It is offered as information only, for use in the maintenance and promotion of good health in cooperation with a licensed medical practitioner. In the event that any individual should use the information presented on this website without a licensed medical practitioner's approval, that individual will be diagnosing for him or herself. No responsibility is assumed by the author, publisher or distributors of this information should the information be used in place of a licensed medical practitioner's services. No guarantees of any kind are made for the performance

<http://www.herbalformulas.com/renecaissetea.html>

2/29/2008

Ex. A - page 2



Complaint

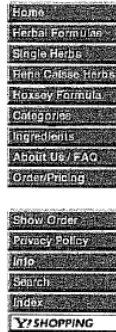
Rene Caisse Herbs

Page 3 of 3

or effectiveness of the preparations mentioned on this website.

Furthermore, this information is to be used for educational purposes only and has been based solely on the traditional and historic use of a given herb, or on clinical trials that are generally not recognized by any US government agency or medical organization. This information has not been evaluated by the US Food and Drug Administration, nor has it gone through the rigorous double-blind studies required before a particular product can be deemed truly beneficial or potentially dangerous and prescribed in the treatment of any condition or disease.

## Complaint


**Native Essence Herb Company's  
HerbalFormulas.com**
**Free Shipping**

We are offering free priority mail shipping on all US orders - select priority mail at check out! Estimated delivery 2-3 days

**Native Essence (essiac herbs) Ingredients**

This is the combination of herbs originally prepared by the Ojibwa Indians and later used so successfully by the late Canadian nurse Rene Caisse and called (Essiac is Caisse backwards). This formula is believed to normalize body systems by purifying the blood and thoroughly cleansing the body of harmful toxins. We call this formula Native Essence™, and we prepare it using only the finest organic quality herbs available.

**Ingredients:**

**Original:** Burdock root, Sheep Sorrel herb, Slippery Elm bark, Turkish rhubarb root.  
**Plus adds:** Red Clover, Watercress, Blessed Thistle, Kelp/Bladderwrack.  
**With Cats Claw** adds Cats Claw bark to the Original.

[Click here to order](#)

**Burdock root** (*Arcium lappa*)

**Actions:** Alterative, depurative, diuretic, bitter, tonic.

**Common Use:** This root is well known for its blood cleansing properties and is used in innumerable herbal medicines and blood remedies. Skin eruptions, due to impurities in the blood, are quickly remedied by burdock. It is extensively used in lymphatic, liver, rheumatic and skin diseases. Experiments on burdock have shown it to inhibit tumors, lower blood sugar, and destroy fungal and bacteria cultures. For example, two Hungarian scientists reported "considerable anti-tumor activity" in a purified fraction of burdock. Japanese researchers at Nagoya University found in burdock (aka as Gobo root in Japan) a new type of desmutagen, a substance that is uniquely capable of reducing cell mutation in either the absence or the presence of metabolic activation. This new property is so important, the Japanese scientists named it the B-factor for "burdock factor." In general, it is claimed burdock will help restore the body to a state of integration and health. Burdock is also included in the Rene Caisse (Essiac) formula.

Other formulas containing this herb:

[Dandelion/Milk Thistle Plus](#)  
[Devil's Claw/Cat's Claw Plus](#)  
[Hoxsey Formula](#)  
[Slim Tonic Plus](#)

[Back to the top](#)

**Sheep Sorrel herb** (*Rumex acetosella*)

**Actions:** Alterative, diuretic, anthelmintic, antineoplastic, antilithic, antiseptic, astringent, carminative, parasiticide, stomachic, tonic.

**Common Use:** Throughout the centuries, the sorrels have appeared in historical archives as a folk remedy for cancer in both Europe and America. In the late 1740's, legislation was introduced in Williamsburg, Virginia, that permitted Mrs. Mary Johnson to use this plant as a

<http://www.herbmed.com/caisseinfo.html>

2/29/2008

## Complaint

treatment for cancer. In the 1888 Canadian Pharmacy Journal, the leaves of both the sheep sorrel and the taller common sorrel (*Rumex acetosa*) were included in the list of Canadian medicinal plants. In 1926, the National Cancer Institute received a recipe from Canada citing an old Indian cure for cancer using a paste made with bread and the juice of sheep sorrel, applied externally. Thus, it would appear from early literature that the sorrels were used to treat cancer. Sorrel contains a high amount of nutrients including chlorophyll. Chlorophyll closely resembles hemoglobin, the red pigment in human blood, but has at its center a magnesium atom, whereas hemoglobin has an iron atom, and both carry oxygen to every cell of the organism. The chlorophyll molecules that carry oxygen through the bloodstream may do the following: inhibit chromosome damage to effectively block cancer, reduce the damage of radiation burns, kill germs and prevent the growth of harmful bacteria, strengthen the cell walls which may improve the vascular system, heart function, intestines, lungs and uterus, aid in the removal of foreign deposits from the walls of blood vessels, remove inflammation of the pancreas, purify the liver and increase the body's ability to utilize oxygen by raising the oxygen level in the tissue cells. Sheep sorrel is also high in oxalic acid. Dr. N.W. Walker tells us that the human body produces a small amount of oxalic acid every 24 hours and it is excreted through the kidneys. Dr. Edward E. Shook believes that oxalic acid is a powerful oxidizing acid that rouses the human system into activity. It readily combines with calcium to aid in its digestive assimilation and stimulates the peristaltic action of the intestines, thus helping sluggish, prolapsed intestines to regain their normal functions. Oxalic acid also seems to promote faster blood coagulation time, which makes it valuable for hemorrhages. Sheep sorrel has been known to prevent the spread of contagious diseases such as the plague and has overcome fevers caused by cholera and malaria. Its most important healing elements may be chlorophyll and oxalic acid, there is however, much research still to be done to discover the hidden mysteries that make this ubiquitous little plant so vital. This herb is also included in Rene Caisse's Essiac formula.

Other formulas containing this herb:

[Black Walnut/Wormwood Plus](#)

[Back to the top](#)

**Slippery Elm bark** (*Ulmus fulva* v. *sp.*)

**Actions:** Demulcent, emollient, mucilage, nutrient, astringent.

**Common Use:** Slippery elm is very useful in treating digestive conditions with inflamed mucous membrane linings such as gastritis, gastric or duodenal ulcers, enteritis and colitis, where it has a soothing demulcent action. It is often used as a food in convalescence as it is gentle and easily assimilated. As a nutritive tonic it feeds, soothes and strengthens the organs, tissues and mucous membranes, especially the lungs and stomach. By stimulating the growth of new cells, it quickly heals the damaged tissue of burns, cuts, hemorrhaging ulcers and wounds, including those caused by surgery. Slippery elm bark also overcomes debility and emaciation by revitalizing the entire body. The carbohydrates in slippery elm bark, including the starches and sugars, nourish and restore the plasma of the blood and lymph as well as the nervous, respiratory and digestive systems. The tannins provide an astringent quality to contract cell walls and condense tissue, thereby strengthening the muscles and tissues. The powdered bark counteracts excess acids in the stomach and intestines with its powerful alkalizing effect and as a natural antacid, it helps to improve the intestinal flora. Slippery elm bark also produces an antibiotic and antimicrobial effect. This herb is also included in Rene Caisse's Essiac formula. Available in formula only.

[Back to the top](#)

**Turkish Rhubarb root** (*Rheum palmatum*)

<http://www.herbmed.com/caisseinfo.html>

2/29/2008

## Complaint

**Actions:** Bitter stomachic, mild purgative, astringent, laxative, cathartic.

**Common Use:** Rhubarb root is a valuable remedy that incites the activity of the stomach, liver and bowels by increasing the flow of the digestive juices. In small doses it makes an excellent strengthening tonic for the stomach, in large doses it acts as a laxative. Rhubarb root's purgative action is useful in constipation, but also has an astringent effect following this. It therefore has a truly cleansing action on the gut, removing debris and then astringing with antiseptic properties as well.

Other formulas containing this herb:

[Dandelion/Milk Thistle Plus](#)

[Back to the top](#)

**Red Clover blossom** (*Trifolium pratense*)

**Actions:** Antineoplastic, alterative, depurative, expectorant, antispasmodic, antiseptic.

**Common Use:** A very useful remedy for skin problems, especially safe for children, it is also effective against chronic skin problems such as psoriasis. The expectorant and antispasmodic action of red clover make it helpful in the treatment of coughs and bronchitis, but especially in whooping cough. As an alterative with exceptional blood cleansing properties, red clover is indicated in a wide range of problems when approached in a holistic sense.

Other formulas containing this herb:

[Hoxsey Formula](#)

[Back to the top](#)

**Watercress herb** (*Nasturtium officinale*)

**Actions:** Depurative, tonic, stimulant.

**Common Use:** The American Indian used this herb for liver and kidney trouble and to dissolve kidney stones. It is rich in iron and other valuable mineral elements and its blood purifying and system cleansing properties cause it to be used extensively as a blood purifier. J.E. Meyers, Botanical Gardens of Hammond, Indiana informs us that watercress is one of the best sources of vitamin E. This is the fertility vitamin, helping the body use oxygen, which increases physical endurance and stamina and improves heart response. Brazilian research found watercress extract to possess anti-tumor properties while other research found watercress leaf juice to be active against cultures of tubercle bacillus. Avoid prolonged use in large amounts.

Other formulas containing this herb:

[Echinacea/Golden Seal Plus](#)

[Back to the top](#)

**Blessed Thistle herb** (*Cnicus benedictus*)

## Complaint

**Actions:** Bitter tonic, astringent, diaphoretic, depurative, antibacterial, febrifuge.

**Common Use:** Primarily used for helping with female problems such as painful menstruation and associated headache. This herb also has bitter properties and has been used (but should not be overused) as a digestive tonic. Works well with burdock root to cleanse the blood. Not recommended if nursing or pregnant.

Other formulas containing this herb:

[Dong Quai/Fo-Ti Plus](#)

[Back to the top](#)

**Kelp (*Laminaria species*) or Bladderwrack (*Fucus vesiculosus*)**

**Actions:** Alterative, anti-rheumatic, antibacterial, antibiotic, cardiac tonic, antioxidant.

**Common Uses:** One of the richest sources of micro-nutrition, minerals, and trace minerals, kelp is especially high in iodine and potassium. It has proved most useful in the treatment of underactive thyroid function and for alkalinizing blood chemistry. The extensive research done on this remarkable sea-weed has shown it to have anti-tumor properties ( Japanese researchers have claimed kelp has been "conclusively proven to prevent breast cancer"), as well as antibiotic, antioxidant and antibacterial properties. Kelp also has the ability to protect against environmental toxins, increase circulation and help lower cholesterol, among other benefits.

Other formulas containing this herb:

[Echinacea/Golden Seal Plus](#)

[Hawthorn/Motherwort Plus](#)

[Hoxsey Formula](#)

[Red Root/Cleavers Plus](#)

[Slim-Tonic Plus](#)

[Back to the top](#)

**Peruvian Cat's Claw (*Uña de Gato*) bark (*Uncaria tomentosa*)**

**Actions:** Deep immune activator, tonic, anti-inflammatory, anti-rheumatic, antimicrobial, antioxidant, antiviral, hypotensive, cardiac tonic.

**Common Uses:** This amazing vine from the Peruvian rain forest is offered in Peruvian pharmacies, the label states that the curative properties are almost unlimited. This is because the herb is considered a powerful cellular reconstitutor. Studies beginning in 1970 and continuing through today suggest it has applications in the treatment of cancer, arthritis, gastritis, ulcers, rheumatism, acne, organic depression, bursitis, genital herpes and herpes zoster, allergies, systematic candidiasis, diabetes, lupus, chronic fatigue syndrome, PMS, irregularities of the female cycle, environmental toxic poisoning, numerous bowel and intestinal disorders and those infected with the HIV virus. Studies done at the Shanghai College of Traditional Chinese Medicine indicate that rynchophylline, an alkaloid contained in cat's claw bark, has the ability to inhibit platelet aggregation and Thrombosis, which suggests that the compound in this plant may be useful in preventing strokes and reducing the risk of heart attack by lowering blood pressure, increasing circulation, and inhibiting both the formation of plaque on the arterial walls and the formation of blood clots in the brain, heart and arteries. Do not use with anti-ulcer medications. Not recommended if pregnant or nursing.

## Complaint

Rene Caisse Formula

Page 8 of 8

Click [HERE](#) to learn more about Cat's Claw bark

Other formulas containing this herb:

[Cat's Claw/Astragalus/Reishi](#)  
[Cat's Claw/Pau d Arco Plus](#)  
[Devil's Claw/Cat's Claw Plus](#)  
[Immun-Essence Plus](#)  
[Venus Flytrap/Cat's Claw](#)

[Back to the top](#)

## ▪ Ingredients

© 2003 Native Essence Herb Co. All Rights Reserved

## Important notice:

The information presented here is not presented with the intention of diagnosing any disease or condition or prescribing any treatment. It is offered as information only, for use in the maintenance and promotion of good health in cooperation with a licensed medical practitioner. In the event that any individual should use the information presented on this website without a licensed medical practitioner's approval, that individual will be diagnosing for him or herself. No responsibility is assumed by the author, publisher or distributors of this information should the information be used in place of a licensed medical practitioner's services. No guarantees of any kind are made for the performance or effectiveness of the preparations mentioned on this website.

Furthermore, this information is to be used for educational purposes only and has been based solely on the traditional and historic use of a given herb, or on clinical trials that are generally not recognized by any US government agency or medical organization. This information has not been evaluated by the US Food and Drug Administration, nor has it gone through the rigorous double-blind studies required before a particular product can be deemed truly beneficial or potentially dangerous and prescribed in the treatment of any condition or disease.

Complaint

Exhibit B

Chaparral

Page 1 of 4

- [Home](#)
- [Herbal Formulas](#)
- [Single Herbs](#)
- [Herb Cases Herbs](#)
- [Hoxsey Formula](#)
- [Categories](#)
- [Ingredients](#)
- [About Us/FAQ](#)
- [Order/Printing](#)
- [Show Order](#)
- [Privacy Policy](#)
- [Info](#)
- [Search](#)
- [Index](#)
- [Y SHOPPING](#)**

Native Essence Herb Company's  
**HerbalFormulas.com**

**Free Shipping**  
We are offering free priority mail shipping on all US orders - select "priority mail" at check out! Estimated delivery 2-3 days

**Chaparral herb (Larrea v. sp.)**

**Actions:** Antineoplastic, antirheumatic, analgesic, antioxidant, diuretic, immune stimulant.

**Common Uses:** For centuries, Native Americans have been using chaparral leaves and stems to treat a wide variety of ailments, including cancer, venereal disease, arthritis, rheumatism, tuberculosis, colds, stomach disorders and skin infections to name a few. In folk medicine, chaparral has been used for leukemia and many different types of cancers. Many people with cancer have claimed tumor shrinkage or complete remission using only chaparral. The plant contains immune stimulating polysaccharides and a key ingredient nor-dihydroguaiaric acid (NGDA), which has been shown to have powerful antitumor properties. According to vol. 19 of Biochemical Pharmacology NGDA inhibits electron transport in the mitochondria, or "energy producing factories" within cancer cells, thereby depriving tumors of the electrical energy they require to exist. Chaparral also has been shown to have good antirheumatic properties giving it a role in the treatment of rheumatoid arthritis. This remarkable plant has to many benefits to mention here. 10 to 30 drops 2-3 times daily. Not recommended if nursing or pregnant.

Formulas containing this herb:

[Devil's Claw/Cat's Claw Plus Hoxsey Formula](#)

All liquid extracts contain pure USP pharmaceutical grade grain alcohol.

8 oz. bottles have no droppers.

**Availability:** Usually ships the same business day.

2oz. Liquid Chaparral herb CHXS2 \$16.00

**Availability:** Usually ships the same business day.

4oz. Liquid Chaparral herb CHXS4 \$29.00

**Availability:** Usually ships the same business day.

8oz. Liquid Chaparral herb CHXS8 \$54.00

© 2003 Native Essence Herb Co. All Rights Reserved

Important notice:

## Complaint

The information presented here is not presented with the intention of diagnosing any disease or condition or prescribing any treatment. It is offered as information only, for use in the maintenance and promotion of good health in cooperation with a licensed medical practitioner. In the event that any individual should use the information presented on this website without a licensed medical practitioner's approval, that individual will be diagnosing for him or herself. No responsibility is assumed by the author, publisher or distributors of this information should the information be used in place of a licensed medical practitioner's services. No guarantees of any kind are made for the performance or effectiveness of the preparations mentioned on this website.

Furthermore, this information is to be used for educational purposes only and has been based solely on the traditional and historic use of a given herb, or on clinical trials that are generally not recognized by any US government agency or medical organization. This information has not been evaluated by the US Food and Drug Administration, nor has it gone through the rigorous double-blind studies required before a particular product can be deemed truly beneficial or potentially dangerous and prescribed in the treatment of any condition or disease.



Complaint

Exhibit C

- Home
- Herbal Formulas
- Single Herbs
- Pure Chinese Herbs
- Hersey Formula
- Categories
- Ingredients
- About Us / FAQ
- Order Pricing
- Show Order
- Privacy Policy
- Info
- Search
- Index
- XY SHOPPING

Native Essence Herb Company's  
**HerbalFormulas.com**

**Free Shipping**

We are offering free priority mail shipping on all US orders - select specialty mail at check out. Estimated delivery 2-3 days.

**Mai-T Mushroom Plus™ Ingredients**

**Immune, Adaptogenic and Whole Body Tonic.** The benefits shown by clinical trials performed on these mushrooms in China and Japan are far too numerous to list here. Among these include: the ability to inhibit many types of tumors, build bone marrow, aid in cancer prevention, stimulate the immune system on all levels, support people undergoing chemotherapy, stimulate circulation and help with coronary/heart disease. The Japanese government has officially listed Reishi as an adjunct herb for cancer and clinical reports seem to indicate its usefulness for people that are HIV positive, as well as for those who have Epstein-Barr Virus and other immune related disfunctions. This formula also makes an excellent adaptogenic and whole body detoxifying and revitalizing tonic.

**Ingredients:** Maitake mushroom, Reishi mushroom, Shiitake mushroom, Cordyceps fungus, Astragalus root and concentrated Rose Hips extract.

[Click here to order](#)

**Japanese Maitake mushroom** (*Grifola frondosa*)

**Actions:** T-cell stimulant, anti-neoplastic, Immune stimulant.

**Common Uses:** A Maitake extract is being studied in medical clinics in the U.S. for patients with breast and colorectal cancers. In China, an extract of this mushroom demonstrated an anti-cancer effect in 63 patients with lung, stomach, hepatocellular cancers and leukemia. Dr. Joan Priestly MD, reports that her patients with Kaposi's sarcoma and other symptoms of AIDS show improvement when administered the extract. When used consistently (3-5 times weekly), Maitake is said to aid in cancer prevention, immune stimulation in people with cancer, support people undergoing chemotherapy and benefit people with the AIDS virus. It also potentially benefits diabetics and people with hypertension.

[Back to the top](#)

---

**Red Reishi mushroom** (*Ganoderma lucidum*)

**Actions:** Adaptogen, deep immune activator, analgesic, anti-inflammatory, hypotensive, antibacterial, antiviral, cardiac tonic, expectorant, antineoplastic.

**Common Use:** Reishi is in the most highly rated category of herbs ("Superior"), in terms of multiple benefits and lack of side effects, in Traditional Chinese Medicine. Here is a small list of some of the things it is claimed to benefit. Cancer, side effects of cancer treatments including radiation, chemo-therapy and surgery, high altitude stress, high cholesterol and hyperlipidemia, high blood pressure, chronic (post-viral) fatigue syndrome and AIDS, weakness of the lung, wasting syndromes, difficulty concentrating, poor digestion, insomnia and poorly regulated immune response. The polysaccharides and ergosterols probably work together to stimulate natural immune functions that tend to be suppressed by cancers and immune disorders. Ganoderic acids are responsible for the anti-allergy effects and improved oxygen utilization. Reishi greatly reduced the symptoms (headaches, nausea, vomiting, insomnia, heart palpitations and extreme fatigue) of oxygen deprivation among Chinese workers who traveled to the high plateau of Tibet, climbing 15,000 feet in 3 days in the process. Reishi is also effective in reducing the symptoms of cardiovascular blockage and

## Complaint

Mai-I Mushroom Plus<sup>TM</sup>

Page 2 of 4

disease, including angina, palpitation, fullness in the chest, dizziness and headache, shortness of breath, insomnia and weariness, and loss of memory in 65% or more of the patients in various studies. Reishi is a true adaptogen, enhancing health and normal functions of the body. For example, while it increases some components of immune response for cancer patients, it also inhibits pathological immune functions in auto-immune diseases such as myasthenia gravis. It has been reported to reduce the histamine release associated with allergic reactions, and help prevent anaphylactic reaction. It also increased immunoglobulin-A levels in 2,000 chronic bronchitis patients.

Other formulas containing this herb:

[Cat's Claw/Astragalus/Reishi](#)  
[Cat's Claw/Pau 'd Arco Plus](#)  
[Immun-Essence Plus](#)

[Back to the top](#)

#### **Shiitake mushroom** (*Lentinus edodes*)

**Actions:** Adaptogen, deep immune activator, antiviral, antineoplastic.

**Common Use:** Shiitake is used for any and all diseases involving depressed immune function, including cancer, AIDS, environmental allergies, candida infections and frequent colds and flus. It also appears to be beneficial for soothing bronchial inflammations and regulating urine incontinence, as well as for reducing chronic high cholesterol. Shiitake mycelia is rich in carbohydrates, protein, vitamins and minerals. It contains a polysaccharide-protein complex that studies have shown to: accelerate degeneration of tumor cells; activate macrophages, promoting recognition of antigens and information transmission to the helper T-cells and increasing the rate at which objects are engulfed; reinforce interleukin-1 production, activating the helper T-cells; promote the mitosis of B-lymphocytes (and others), increasing their proliferation; increase antibody production; improve health of chronic hepatitis patients; and inhibit the HIV virus, benefiting AIDS patients. This fungi has been extensively studied in the Orient and elsewhere, the reported beneficial findings are detailed and numerous to mention here. For anyone with further interest we recommend reading *Medicinal Mushrooms* by Christopher Hobbs, subjects include reishi, shiitake, maitake, kombucha, and more.

Other formulas containing this herb:

[Immun-Essence Plus](#)  
[Milk Thistle/Schizandra Plus](#)

[Back to the top](#)

#### **Cordyceps fungus** (*Cordyceps sinensis*)

**Actions:** Adaptogen, tonic, immune stimulant, restorative.

**Common Uses:** Caterpillar fungus or Winter Worm - Summer Grass, those are the common names used for the highly prized Chinese tonic herb Cordyceps, which gained national publicity in a mainstream publication (Newsweek) a few years back because of its use by Chinese women athletes engaged in breaking world running records. In ancient China this fungus was used exclusively in the Emperor's Palace because of its scarcity. Approximately 5 grams were stuffed into the stomach of a duck and roasted until well cooked, then the Cordyceps was removed and the duck was slowly eaten, twice daily over a period of 8-10 days, this was thought to be as potent as 50 grams of Panax Ginseng. The New York

<http://www.herbalformulas.com/mitxpinfo.html>

2/29/2008

## Complaint

Journal of Medicine reported that Cordyceps has properties similar to Ginseng, being used to strengthen the body after exhaustion or long term illness. It has traditionally been used for impotence, backache, to increase sperm production and to increase blood production. In China, Cordyceps is used medically to regulate and support the gonads and as a lung and kidney tonic. It is used specifically for excess tiredness, chronic cough and asthma, impotence, debility, anemia, to build the bone marrow and reduce excess phlegm. The clinical studies done on Cordyceps in China have been numerous and remarkable, indicating the fungus can improve liver functions, reduce cholesterol, adjust protein metabolism, improve immune functions, inhibit lung carcinoma and has a therapeutic value in the treatment of aging disorders including loss of sexual drive. These are just some of the reported benefits attributed to this remarkable fungus. Not recommended if nursing or pregnant.

Other formulas containing this herb:

[Catuaba/Fo-ti Plus](#)  
[Catuaba/Guarana Plus](#)  
[Damiana Plus](#)  
[Panax Power Plus](#)  
[SumaFlex Plus](#)  
[SuMaca Plus](#)  
[SumaCeps Plus](#)  
[Yohimbé Plus](#)

[Back to the top](#)

#### Chinese Astragalus root (*Astragalus membranaceus*)

**Actions:** Deep immune activator, diuretic, tonic, hypotensive, vasodilator, anti-stress agent.

**Common Use:** A digestive aid containing polysaccharides which enhance immune activity and T-cell function. In Traditional Chinese Medicine astragalus is considered a deep immune tonic that increases the "bone marrow reserve", increasing the body's ability to produce more immune effector cells (such as T-cells), protecting us from "pathogens". Also used as a daily tonic when one is not feeling well; it has the ability to build the energy reserves in the body and exhibits several anti-stress properties. Astragalus root has also been indicated as an aid in the side effects of chemotherapy as well as having the ability to inhibit tumor growth. If taken cumulatively, especially with Chinese Ligustrum (Privet) fruit, it shows marked anti-tumor properties.

Other formulas containing this herb:

[Astragalus/Ligustrum 75/25](#)  
[Cat's Claw/Astragalus/Reishi](#)  
[Cat's Claw/Pau d'Arco Plus](#)  
[Echinacean Plus](#)  
[Panax Power Plus](#)  
[Immun-Essence Plus](#)  
[SumaCeps Plus](#)

[Back to the top](#)

#### Rose Hips (*Rosa canina*)

**Actions:** Nutrient, mild laxative, mild diuretic, mild astringent.

<http://www.herbalformulas.com/mitxpinfo.html>

2/29/2008

## Complaint

Common Use: Rose hips provide one of the best natural sources of vitamin C available. They are also rich in vitamins A, E and Rutin. They contain valuable nutrients believed to combat acute disease. Rose hips is a nutritional herb used to build up the body and strengthen the immune system.

[Back to the top](#)

▪ **Ingredients**

© 2003 Native Essence Herb Co. All Rights Reserved

**Important notice:**

The information presented here is not presented with the intention of diagnosing any disease or condition or prescribing any treatment. It is offered as information only, for use in the maintenance and promotion of good health in cooperation with a licensed medical practitioner. In the event that any individual should use the information presented on this website without a licensed medical practitioner's approval, that individual will be diagnosing for him or herself. No responsibility is assumed by the author, publisher or distributors of this information should the information be used in place of a licensed medical practitioner's services. No guarantees of any kind are made for the performance or effectiveness of the preparations mentioned on this website.

Furthermore, this information is to be used for educational purposes only and has been based solely on the traditional and historic use of a given herb, or on clinical trials that are generally not recognized by any US government agency or medical organization. This information has not been evaluated by the US Food and Drug Administration, nor has it gone through the rigorous double-blind studies required before a particular product can be deemed truly beneficial or potentially dangerous and prescribed in the treatment of any condition or disease.

## Decision and Order

**DECISION AND ORDER**

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of the 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 any of the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with § 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1.a. Respondent Native Essence Herb Company (“Native Essence”) is or has been a New Mexico corporation, with its principal office or place of business at 4 Tune Drive, Unit B, El Prado, New Mexico 87529.

1.b. Respondent Mark J. Hershiser is an officer of Native Essence. Individually or in concert with others, he has formulated, directed, controlled, or participated in the policies, acts, or practices

## Decision and Order

of Native Essence, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of Native Essence.

1.c. Respondent Marianne Hershiser is an officer of Native Essence. Individually or in concert with others, she has formulated, directed, controlled, or participated in the policies, acts, or practices of Native Essence, including the acts and practices alleged in this complaint. Her principal office or place of business is the same as that of Native Essence.

2. Respondents have been served with a copy of the complaint issued by the Federal Trade Commission charging them with violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

3. Respondents admit all the jurisdictional facts set forth in the Commission's complaint in this proceeding.

4. Respondents waive:

- a. Any further procedural steps;
- b. The requirement that the Commission's decision contain a statement of findings of fact and conclusions of the law;
- c. All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement; and
- d. Any claim under the Equal Access to Justice Act.

5. This agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission it will be placed on the public record for a period of thirty (30) days and information in respect thereto publicly released. The Commission thereafter may

## Decision and Order

either withdraw its acceptance of this agreement and so notify the respondents, in which event it will take such action as it may consider appropriate, or issue and serve its decision, in disposition of the proceeding.

6. This agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in the Commission's complaint, or that the facts as alleged in the Commission's complaint, other than the jurisdictional facts, are true.

7. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of Section 3.25(f) of the Commission's Rules, the Commission may without further notice to respondents, (1) issue its decision containing the following order to cease and desist in disposition of the proceeding, and (2) make information public in respect thereto. When so entered, the order to cease and desist shall have the same force and effect and may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders. The order shall become final upon service. Delivery of the decision containing the agreed-to order to respondents' address as stated in this agreement by any means specified in Section 4.4(a) of the Commission's Rules shall constitute service. Respondents waive any right they might have to any other manner of service. The complaint may be used in construing the terms of the order, and no agreement, understanding, representation, or interpretation not contained in the order or in the agreement may be used to vary or to contradict the terms of the order.

8. Respondents have read the complaint and the order contemplated hereby. They understand that once the order has been issued, they will be required to file one or more compliance reports showing that they have fully complied with the order. Respondents further understand that they may be liable for civil penalties in the amount provided by law for each violation of the order after it becomes final.

Decision and Order

**ORDER****DEFINITIONS**

For purposes of this order, the following definitions shall apply:

1. Unless otherwise specified, “respondents” means Native Essence Herb Company, a corporation, its successors and assigns and its officers; Mark J. Hershisier, individually, d/b/a Native Essence Herb Company, and as an officer of the corporation; and Marianne Hershisier, individually, d/b/a Native Essence Herb Company, and as an officer of the corporation; and each of the above’s agents, representatives and employees.
2. “Commerce” means as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
3. “Competent and reliable scientific evidence” means tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.
4. “Food” and “drug” mean “food” and “drug” as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55.
5. “Covered product or service” means any food, dietary supplement, or drug, including, but not limited to, Native Essence (Rene Caisse) Formula tea or extract, Native Essence Plus tea or extract, Native Essence with Cat’s Claw tea or extract, chaparral herb (or any product containing chaparral herb), Maitake mushroom extract, or Mai-T Mushroom Plus Formula extract, or any other health-related product, service, or program.



## Decision and Order

6. “Endorsement” means as defined in 16 C.F.R. § 255.0(b).

**I.**

**IT IS ORDERED** that respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, advertising, labeling, promotion, offering for sale, sale, or distribution of Native Essence (Rene Caisse) Formula tea or extract, Native Essence Plus tea or extract, Native Essence with Cat’s Claw tea or extract, chaparral herb (or any product containing chaparral herb), Maitake mushroom extract, or Mai-T Mushroom Plus Formula extract, or any substantially similar product or any other covered product or service, in or affecting commerce, shall not represent, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, that:

- A. Such product is effective in the treatment or cure of cancer;
- B. Such product prevents or lowers the risk of cancer;
- C. Such product is effective in reducing the size of, or eliminating, cancerous tumors; or
- D. Such product is safe or non-toxic or has no side effects;

unless the representation is true, non-misleading, and, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

**II.**

**IT IS FURTHER ORDERED** that respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, advertising, labeling, promotion, offering for sale, sale, or distribution of any covered product or service, in or affecting

## Decision and Order

commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, about the efficacy, performance, or health-related benefits of any covered product or service, unless the representation is true, non-misleading, and, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

**III.**

**IT IS FURTHER ORDERED** that respondents, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

**IV.**

**IT IS FURTHER ORDERED** that:

- A. Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in labeling for such drug under any tentative or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration; and
- B. Nothing in this order shall prohibit respondents from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

**V.**

## Decision and Order

**IT IS FURTHER ORDERED** that:

- A. Respondents shall, within seven (7) days after the date of service of this order, deliver to the Commission a list, in the form of a sworn affidavit, of all consumers who purchased Native Essense (Rene Caisse) Formula tea or extract, Native Essense Plus tea or extract, Native Essense with Cat's Claw tea or extract, chaparral herb (or any product containing chaparral herb), Maitake mushroom extract, or Mai-T Mushroom Plus Formula, on or after January 1, 2005 through the date of service of this order. Such list shall include each consumer's name and address, the product(s) purchased, and, if available, the consumer's telephone number and email address;
- B. Within forty-five (45) days after the date of service of this order, respondents shall send by first class mail, postage prepaid, an exact copy of the notice attached as Attachment A to all persons identified in Part V.A. The face of the envelope containing the notice shall be an exact copy of Attachment B. The mailing shall not include any other documents; and
- C. Except as provided in this order, respondents, and their officers, agents, servants, employees, attorneys, and representatives shall not sell, rent, lease, transfer, or otherwise disclose the name, address, telephone number, credit card number, bank account number, e-mail address, or other identifying information of any person who paid any money to any respondent, at any time prior to issuance of this order, in connection with the purchase of Native Essense (Rene Caisse) Formula tea or extract, Native Essense Plus tea or extract, Native Essense with Cats Claw tea or extract, chaparral herb (or any product containing chaparral herb), Maitake mushroom extract, or Mai-T Mushroom Plus extract. *Provided, however*, that respondents may disclose such identifying information to the FTC pursuant to Part

## Decision and Order

V.A, above, or any law enforcement agency, or as required by any law, regulation, or court order.

**VI.**

**IT IS FURTHER ORDERED** that respondents shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. A specimen copy of all advertisements and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

**VII.**

**IT IS FURTHER ORDERED** that respondent Native Essence Herb Company, and its successors and assigns, and respondents Mark J. Hershiser and Marianne Hershiser shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities. Respondents shall maintain and upon request make available to the Federal Trade Commission for

## Decision and Order

inspection and copying a copy of each signed statement acknowledging receipt of the order.

**VIII.**

**IT IS FURTHER ORDERED** that respondent Native Essence Herb Company, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

**IX.**

**IT IS FURTHER ORDERED** that respondents Mark J. Hershiser and Marianne Hershiser, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of their current business or employment, or of their affiliation with any new business or employment. The notice shall include respondents' new business address and telephone number and a description of the nature of the business or employment and their duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

**X.**

## Decision and Order

**IT IS FURTHER ORDERED** that respondents shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

**XI.**

This order will terminate on May 7, 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 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 respondents 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

Decision and Order

the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

FEDERAL TRADE COMMISSION DECISIONS  
VOLUME 147

## Decision and Order

**Attachment A****ATTACHMENT A**  
**LETTER TO BE SENT BY FIRST CLASS MAIL.**  
[To be printed on letterhead of Native Essence Herb Company]

[Name and address of recipient] [Date]

Dear [Recipient]:

Our records show that you bought Native Essence (Rene Caisse or essiac herbs) Formula, Native Essence Plus, Native Essence with Cat's Claw, chaparral herb, Maitake mushrooms, and/or Mai-T Mushroom Plus Formula from one of our websites, [www.herbalformulas.com](http://www.herbalformulas.com), [www.herbmed.com](http://www.herbmed.com), [www.herbalalternative.com](http://www.herbalalternative.com), and [www.herbremedy.com](http://www.herbremedy.com). We are writing to tell you that the Federal Trade Commission ("FTC") has found that our advertising claims for these products were false or unsubstantiated, and has issued an Order prohibiting us from making those claims in the future. The Order entered against us also requires that we send you the following information about the scientific evidence on these products.

Very little scientific research has been done concerning Native Essence, Native Essence Plus, Native Essence with Cat's Claw, chaparral herb, Maitake mushrooms, or Mai-T Mushroom Plus as a treatment or cure for cancer in humans. The scientific studies that have been done do not demonstrate that Native Essence, Native Essence Plus, Native Essence with Cat's Claw, chaparral herb, Maitake mushrooms, or Mai-T Mushroom Plus, or the ingredients in these products, are effective when used as treatments for cancer.

It is very important that you talk to your doctor or health care provider before using *any* alternative or herbal product, including Native Essence, Native Essence Plus, Native Essence with Cat's Claw, chaparral herb, Maitake mushrooms, or Mai-T Mushroom Plus. Speaking with your doctor is important to make sure that all aspects of your medical treatment work together. Things that seem safe, such as certain foods, herbs, or pills, may interfere or affect your cancer or other medical treatment, or other medicines you might be taking. Some herbs or other complementary or alternative treatments may keep your medicines from doing what they are supposed to do, or could be harmful when taken with other medicines or in high doses. It also is very important that you talk to your doctor or health care provider before you decide to take any alternative or herbal product, including Native Essence, Native Essence Plus, Native Essence with Cat's Claw, Chaparral herb, Maitake mushrooms, or Mai-T Mushroom Plus, instead of taking conventional cancer treatments that have been scientifically proven to be safe and effective in humans.

If you would like further information about complementary and alternative treatments for cancer, the following Internet web sites may be helpful:

1. The National Cancer Institute: [www.cancer.gov/cancertopics/pdq](http://www.cancer.gov/cancertopics/pdq); or
2. The National Center for Complementary and Alternative Medicines: [www.nccam.nih.gov](http://www.nccam.nih.gov)



Decision and Order

You also can contact the National Cancer Institute's Cancer Information Service at 1-800-4-CANCER or 1-800-422-6237.

Sincerely,

FEDERAL TRADE COMMISSION DECISIONS  
VOLUME 147

Decision and Order

**Attachment B**

**ATTACHMENT B**

Native Essence Herb Company  
P.O. Box 189  
Carson, New Mexico 87517

[name and address of purchaser]

**GOVERNMENT ORDERED NOTICE**

## Analysis to Aid Public Comment

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

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Native Essence Herb Company, a corporation, Mark J. Hershiser, individually, d/b/a Native Essence Herb Company, and as an officer of the corporation, and Marianne Hershiser, individually, d/b/a Native Essence Herb Company, and as an officer of the corporation (“respondents”).

The proposed consent order has been placed on the public record for thirty days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement’s proposed order.

This matter concerns the respondents’ advertising and promotion of Native Essence (Rene Caisse) Formula tea and extract, Native Essence Plus tea and extract, Native Essence with Cat’s Claw tea and extract, chaparral herb, Maitake mushroom extract, and Mai-T Mushroom Plus Formula extract. The complaint alleges that respondents have made a number of deceptive claims regarding the efficacy of these products in the prevention, treatment or cure of cancer.

Specifically, the Commission’s complaint alleges that respondents have claimed that their Native Essence Original Formula, Native Essence Plus, and Native Essence with Cat’s Claw products are effective in treating and curing cancer, including but not limited to lymphoma, colon cancer, rectal cancer, and prostate cancer. The complaint also alleges that respondents have claimed that these products are effective in reducing the size of, or eliminating, cancerous tumors. The complaint further alleges that respondents have claimed that Native Essence Plus is effective in preventing breast cancer. The complaint alleges that respondents did

## Analysis to Aid Public Comment

not have a reasonable basis for these claims. The complaint also alleges that respondents falsely claimed that scientific research proves that Native Essense Plus prevents breast cancer, and that scientific studies prove that Native Essense with Cat's Claw is effective in the treatment of cancer.

Regarding chaparral herb, the Commission's complaint alleges that respondents claimed that chaparral herb is effective in treating and curing cancer, is effective in causing people with cancer to go into complete remission without the need for any other form of treatment, and is effective in shrinking or eliminating cancerous tumors. The complaint alleges that respondents lacked a reasonable basis for these claims.

The complaint also alleges that respondents lacked a reasonable basis for the claims that Mai-T Mushroom Plus is effective in preventing, treating and curing cancer, including but not limited to lung cancer, stomach cancer, hepatocellular cancer, leukemia, and Kaposi's sarcoma; and that Mai-T Mushroom Plus is effective in inhibiting the growth of cancerous tumors. Finally, the complaint alleges that respondents falsely claimed that clinical studies prove that

Maitake mushrooms and Mai-T Mushroom Plus prevent and treat lung cancer, stomach cancer, hepatocellular cancer, leukemia, and Karposi's sarcoma, and inhibit tumor growth.

The proposed consent order contains provisions designed to prevent respondents from engaging in similar acts and practices in the future. Part I requires respondents to have competent and reliable scientific evidence substantiating any claim that Native Essense (Rene Caisse) Formula tea or extract, Native Essense Plus tea or extract, Native Essense with Cat's Claw tea or extract, chaparral herb (or any product containing chaparral herb), Maitake mushroom extract, or Mai-T Mushroom Plus Formula extract, or any other covered product or service, is effective in the treatment or cure of cancer; prevents or lowers the risk of cancer; is effective in reducing the size of, or eliminating, cancerous tumors; or is safe or

## Analysis to Aid Public Comment

non-toxic or has no side effects. A “covered product or service” is defined as any food, dietary supplement, or drug, including, but not limited to any of the above products, or any other health-related product, service, or program.

Part II requires that any future claim about the efficacy, performance, or health-related benefits of any covered product or service be truthful and supported by competent and reliable scientific evidence. Part III requires that respondents, in connection with the advertising of any product, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

Part IV of the proposed order provides that the order does not prohibit respondents from making representations for any drug that are permitted in labeling for the drug under any tentative or final Food and Drug Administration (“FDA”) standard or under any new drug application approved by the FDA, and representations for any product that are specifically permitted in labeling for that product by regulations issued by the FDA under the Nutrition Labeling and Education Act of 1990.

Part V of the proposed order requires respondents to compile a list of all consumers who purchased Native Essence (Rene Caisse) Formula tea or extract, Native Essence Plus tea or extract, Native Essence with Cat’s Claw tea or extract, chaparral herb (or any product containing chaparral herb), Maitake mushroom extract, or Mai-T Mushroom Plus Formula extract from respondents since July 1, 2005, and to mail a letter (attached to the proposed order as

Attachment A) to each such purchaser describing the scientific evidence related to these products. Part V also prohibits respondents from providing any identifying information about these purchasers to anyone other than the Commission, another law enforcement agency, or as required by law.

Part VI of the proposed order requires respondents to keep copies of relevant advertisements and materials that substantiate claims

*Analysis to Aid Public Comment*

made in the advertisements. Part VII requires respondents to provide copies of the order to certain of their employees. Part VIII requires the corporate respondent to notify the Commission at least thirty days prior to any change in the corporation that may affect compliance obligations arising under this order. Part IX requires the individual respondents to notify the Commission of their affiliation with any new business or employment. Part X requires respondents to file compliance reports with the Commission. Part XI of the proposed order is a “sunset” provision, dictating that the order will terminate twenty years from the date it is issued or twenty years after a complaint is filed in federal court, by either the United States or the FTC, alleging any violation of the order.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

## Complaint

**IN THE MATTER OF****BASF SE****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 No. C-4253, File No. 081 0265  
Complaint, April 1, 2009 – Decision, May 14, 2009*

This consent order addresses the \$5.1 billion acquisition by BASF of the outstanding stock of Ciba Holding, Inc. The complaint alleges that the acquisition would lessen competition in the world markets for the research, development, manufacture and sale of bismuth vanadate and indanthrone blue pigments. The complaint further alleges that these markets are highly concentrated and that that entry by another competitor is unlikely. The order requires BASF to either: (1) divest the Ciba bismuth vanadate production facility, (2) lease the production facility to the acquirer, or (3) enter into a tolling agreement that provides sufficient time for the acquirer to begin production at its own facilities and to qualify that production with customers. The order also provides ancillary relief and allows the Commission to appoint an interim monitor and a divestiture trustee as needed.

*Participants*

For the *Commission*: Wallace W. Easterling, Victoria E. Luxardo, Eric D. Rohlck, and Steven L. Wilensky.

For the *Respondent*: Kenneth S. Prince, Shearman & Sterling LLP; and Robert Schlossberg, Freshfields Bruckhaus Deringer US LLP.

**COMPLAINT**

Pursuant to the provisions of the Federal Trade Commission Act and of the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission (the “Commission”), having reason to believe that respondent BASF SE (“BASF”), a corporation, and Ciba Holding Inc. (“Ciba”), a corporation, both subject to the jurisdiction of the Commission, have agreed to an

## Complaint

acquisition by BASF of Ciba 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. RESPONDENT**

1. Respondent BASF is a corporation organized and existing under the laws of the Federal Republic of Germany, with its principal place of business at D-67056, Ludwigshafen, Germany. BASF’s principal subsidiary in the United States, BASF Corporation, is located at 100 Campus Drive, Florham Park, New Jersey 07932.

2. BASF is a global company engaged in a wide variety of chemical businesses, including the research, development, manufacture, and sale of pigments.

**II. JURISDICTION**

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

4. Ciba is a corporation organized and existing under the laws of the Swiss Confederation, with its principal place of business at Klybeckstrasse 141, 4057 Basel, Switzerland. Ciba’s principal subsidiary in the United States, Ciba Corporation, is located at 540 White Plains Road, Tarrytown, New York 10591-9005.

5. Ciba is, and at all times relevant herein has been, engaged in commerce as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is



## Complaint

in or affects commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

### **III. THE PROPOSED TRANSACTION**

6. Pursuant to an Agreement and Plan of Merger (the “Merger Agreement”) dated September 15, 2008, BASF proposes to purchase all of the outstanding shares of Ciba in a transaction valued at approximately \$5.1 billion. BASF and Ciba are two of the most significant firms involved in the research, development, manufacture, and sale of high performance pigments.

### **IV. THE RELEVANT PRODUCT MARKETS**

7. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the acquisition are the research, development, manufacture and sale of the following two pigments: (a) bismuth vanadate, and (b) indanthrone blue. There are no practical substitutes for the relevant products. Due to their unique characteristics, properties and cost-effectiveness, customers would not switch away from the relevant products in response to a small but significant and non-transitory increase in their price. In addition, there may be additional narrower product markets based on specific end-use applications.

8. Bismuth vanadate pigment is a high performance pigment that imparts a brilliant yellow color with a green tint. It is particularly favored for high heat applications because of its excellent performance in high temperature environments. Worldwide sales of bismuth vanadate in 2008 were approximately \$111 million.

9. Indanthrone blue is a high performance pigment that imparts a unique blue color with a tinge of red. Like bismuth vanadate, indanthrone blue is used primarily in automotive coating applications. Because of its unique properties, customers would not shift to alternative products in response to a small but significant and

## Complaint

non-transitory increase in the price of indanthrone blue. Worldwide sales of indanthrone blue in 2008 were approximately \$29 million.

**V. THE RELEVANT GEOGRAPHIC MARKET**

10. The relevant geographic market is worldwide. Because shipping costs are low relative to the overall value of the product, producers of high performance pigments are able to ship product worldwide from one plant. For example, BASF produces the relevant products in Germany, while Ciba produces them in France and the Netherlands. There are also no differences in technical standards in Europe, North America, South America, Africa, the Middle East, and Asia for these products.

**VI. CONCENTRATION IN THE RELEVANT MARKETS**

11. Each of the relevant markets is highly concentrated. In the market for bismuth vanadate, the proposed merger would reduce the number of significant competitors from four to three, with BASF having a 60 percent post-merger market share based on sales. The market for indanthrone blue is similarly highly concentrated with the proposed merger resulting in a reduction in the number of significant competitors from three to two, with BASF having 55 percent post-merger market share based on sales. These market shares confirm that many customers strongly prefer BASF and Ciba to the other producers of these products.

**VII. CONDITIONS OF ENTRY**

12. Entry into either relevant market would not be timely, likely, and sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the acquisition. A potential entrant would first need to develop the technological capability to produce the relevant pigment which would be difficult and time-consuming. Once an entrant has developed the product and has the capability to manufacture it, an entrant must then undergo a qualification process at each customer which can take anywhere from two to five years. Additional time is added to the start up

## Complaint

process for producers of indanthrone blue because producers must qualify raw materials to make certain it is adequate to make a product that will meet customer specifications. Entry is also unlikely because the costs to enter are high, the available market opportunities are limited, and there are significant sunk costs that would be incurred in any attempt to enter. Expansion by fringe competitors would also be costly and is unlikely to occur in a timely fashion or at all.

**VIII. EFFECTS OF THE ACQUISITION**

13. The effects of the acquisition, if consummated, may be to substantially lessen competition and tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45. Specifically, the acquisition would:

- a. eliminate actual, direct, and substantial competition between BASF and Ciba in the relevant markets;
- b. increase the likelihood that the combined firm will exercise market power unilaterally in the relevant markets;
- c. further consolidate an already concentrated market, thereby substantially increasing the likelihood of coordinated interaction in the relevant markets;
- d. reduce existing incentives to improve service or product quality or to pursue further innovation in the relevant market; and
- e. increase the likelihood that customers of the relevant products would be forced to pay higher prices.

**IX. VIOLATIONS CHARGED**

14. The Merger Agreement described in Paragraph 6 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

## Order to Maintain Assets

15. The transaction described in Paragraph 6, if consummated, would constitute a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

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

By the Commission.

**ORDER TO MAINTAIN ASSETS**

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

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

## Order to Maintain Assets

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

The Commission having thereafter considered the matter and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Maintain Assets:

1. Respondent BASF SE is a corporation organized, existing and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at D-67056, Ludwigshafen, Germany.

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

**ORDER****I.**

**IT IS ORDERED** that, as used in this Order to Maintain Assets, the following definitions and the definitions used in the Consent Agreement and the proposed Decision and Order (and when made final, the Decision and Order), which are incorporated herein by reference and made a part hereof, shall apply:

- A. "BASF" means BASF SE its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by BASF SE, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

## Order to Maintain Assets

- B. “Ciba” means Ciba Holding Inc., a corporation organized, existing and doing business under and by virtue of the laws of Switzerland, with its office and principal place of business located at Klybeckstrasse 141, 4057 Basel, Switzerland.
- C. “Commission” means the Federal Trade Commission.
- D. “BV Business” means the Ciba BV Pigments, the Maastricht Plant BV Leased Area, the Maastricht Plant BV Operational Areas, Ciba BV Business (including Ciba BV Inventory, Ciba BV Information, Ciba BV Intellectual Property, Ciba BV Packaging and Labeling Assets), Ciba BV Contracts, and the manufacture, sale, and distribution of the Ciba BV Pigments.
- E. “Decision and Order” means the:
  - 1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final Decision and Order by the Commission; and
  - 2. Final Decision and Order issued by the Commission following the issuance and service of a final Decision and Order by the Commission.
- F. “IB Business” means the Ciba IB Pigments, Huningue Plant, Ciba IB Business (including Ciba IB Inventory, Ciba IB Intellectual Property, Ciba IB Information, and Ciba IB Packaging and Labeling Assets), Ciba IB Contracts, BASF Blue RS-OPT Intellectual Property, Ciba IB Intermediate Supply Contract, and the manufacture, sale, and distribution of the Ciba IB Pigments.
- G. “Monitor” means any monitor appointed pursuant to Paragraph IV of this Order to Maintain Assets or Paragraph V of the Decision and Order.

## Order to Maintain Assets

- H. "Orders" means the Decision and Order and this Order to Maintain Assets.

**II.**

**IT IS FURTHER ORDERED** that from the Acquisition Date:

- A. Until the IB Effective Date, Respondent BASF shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of the IB Business to minimize any risk of loss of competitive potential for the IB Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the IB Business, except for ordinary wear and tear. Respondent BASF shall not sell, transfer, encumber or otherwise impair the IB Business (other than in the manner prescribed in the Decision and Order) nor take any action that lessens the full economic viability, marketability or competitiveness of the IB Business.
- B. Respondent BASF shall retain all of Respondent BASF's rights, title, and interest in the IB Business, until the IB Effective Date.
- C. Until the IB Effective Date, Respondent BASF shall maintain the operations of the IB Business in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets, as necessary) and/or as may be necessary to preserve the marketability, viability, and competitiveness of the IB Business and shall use its best efforts to preserve the existing relationships with the following: suppliers, vendors, distributors, customers, governmental agencies, employees, and others having business relations with the IB Business. Respondent BASF's responsibilities shall include, but are not limited to, the following:

## Order to Maintain Assets

1. Respondent BASF shall provide the IB Business with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such business and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for the IB Business;
2. Respondent BASF shall continue, at least at their scheduled pace, any additional expenditures for the IB Business authorized prior to the date the Consent Agreement was signed by Respondent BASF including, but not limited to, all research, Development, manufacture, distribution, marketing and sales expenditures;
3. Respondent BASF shall provide such resources as may be necessary to respond to competition against the IB Business and/or to prevent any diminution in sales of the IB Business after the Acquisition Date and prior to the IB Effective Date;
4. Respondent BASF shall provide such resources as may be necessary to maintain the competitive strength and positioning of the IB Business;
5. Respondent BASF shall make available for use by the IB Business funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the assets related to such business;
6. Respondent BASF shall provide the IB Business with such funds as are necessary to maintain the full economic viability, marketability and competitiveness of the IB Business; and
7. Respondent BASF shall provide such support services to the IB Business as were being provided to the IB



## Order to Maintain Assets

Business by Ciba as of the date the Consent Agreement was signed by Respondent BASF.

- D. Until the IB Effective Date, Respondent BASF shall maintain a work force at the equivalent or larger size, and with equivalent or better training and expertise, to what has been associated with the IB Business as of the Acquisition Date.
- E. Until the IB Effective Date, Respondent BASF shall provide all the Designated IB Employees with reasonable financial incentives to continue in their positions and to research, Develop, and manufacture the Ciba IB Pigments consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the Ciba IB Pigments pending divestiture. Such incentives shall include a continuation of all employee benefits offered by Respondent BASF, and previously by Ciba, until the IB Effective Date has occurred, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to prevent any diminution of the relevant IB Business' competitiveness.
- F. Respondent BASF shall not interfere with the hiring or employing of the Designated IB Employees as described in Paragraph VII of the proposed Decision and Order, and shall remove any impediments within the control of Respondent BASF that may deter these employees from accepting employment with the IB Acquirer including, but not limited to, any noncompete provisions of employment or other contracts with Respondent BASF that would affect the ability or incentive of those individuals to be employed by the IB Acquirer. In addition, Respondent BASF shall not make any counteroffer to a Designated IB Employee who receives a written offer of employment from the IB Acquirer;

## Order to Maintain Assets

*Provided, however,* subject to the conditions of continued employment prescribed in this Order to Maintain Assets, this Paragraph II.F. shall not prohibit Respondent BASF from continuing to employ any Designated IB Employee under the terms of such employee's employment with Respondent BASF prior to the date of the written offer of employment from the IB Acquirer to such employee.

## G. Pending the IB Effective Date:

1. Respondent BASF shall not use, directly or indirectly, any Confidential Business Information Related To the research, Development, manufacturing, marketing, or sale of the Ciba IB Pigments other than as necessary to comply with the following:
  - a. the requirements of the Orders;
  - b. applicable law;
2. Respondent BASF shall not disclose or convey any such Confidential Business Information, directly or indirectly, to any person except the IB Acquirer or other persons specifically authorized by the IB Acquirer to receive such information;
3. Respondent BASF shall not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the marketing or sales of the Ciba IB Pigments to Respondent BASF's employees associated with Respondent BASF's IB Pigments; and
4. Respondent BASF shall institute procedures and requirements to ensure that:
  - a. Respondent BASF employees with access to Confidential Information Relating To the Ciba IB

## Order to Maintain Assets

Pigments do not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information in contravention of this Order to Maintain Assets; and

- b. Respondent BASF employees associated with Respondent BASF's IB Pigments do not solicit, access or use any Confidential Business Information that they are prohibited under this Order to Maintain Assets from receiving for any reason or purpose.
- H. Respondent BASF shall require any Persons with access to Confidential Business Information Relating To the Ciba IB Pigments to enter into agreements, within ten (10) days after the date this Order to Maintain Assets becomes final, not to disclose any Confidential Business Information Relating To the Ciba IB Pigments to Respondent BASF or to any third party except as otherwise permitted by this Order to Maintain Assets. Copies of such agreements shall be retained by Respondent BASF, and provided to the Commission and the Monitor.
- I. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the IB Business until the IB Effective Date, to minimize any risk of loss of competitive potential for the IB Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the IB Business, except for ordinary wear and tear.

## Order to Maintain Assets

**III.**

**IT IS FURTHER ORDERED** that from the Acquisition Date:

- A. Until the BV Effective Date, Respondent BASF shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of the BV Business to minimize any risk of loss of competitive potential for the BV Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the BV Business, except for ordinary wear and tear. Respondent BASF shall not sell, transfer, encumber or otherwise impair the BV Business (other than in the manner prescribed in the Decision and Order) nor take any action that lessens the full economic viability, marketability or competitiveness of the BV Business.
- B. Respondent BASF shall retain all of Respondent BASF's rights, title, and interest in the BV Business, until the BV Effective Date.
- C. Until the BV Effective Date, Respondent BASF shall maintain the operations of the BV Business in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets, as necessary) and/or as may be necessary to preserve the marketability, viability, and competitiveness of the BV Business and shall use its best efforts to preserve the existing relationships with the following: suppliers, vendors, distributors, customers, governmental agencies, employees, and others having business relations with the BV Business. Respondent BASF's responsibilities shall include, but are not limited to, the following:
  1. Respondent BASF shall provide the BV Business with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such business and to carry on, at least at their scheduled

## Order to Maintain Assets

pace, all capital projects, business plans and promotional activities for the BV Business;

2. Respondent BASF shall continue, at least at their scheduled pace, any additional expenditures for the BV Business authorized prior to the date the Consent Agreement was signed by Respondent BASF including, but not limited to, all research, Development, manufacture, distribution, marketing and sales expenditures;
3. Respondent BASF shall provide such resources as may be necessary to respond to competition against the BV Business and/or to prevent any diminution in sales of the BV Business after the Acquisition Date and prior to the BV Effective Date;
4. Respondent BASF shall provide such resources as may be necessary to maintain the competitive strength and positioning of the BV Business;
5. Respondent BASF shall make available for use by the BV Business funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the assets related to such business;
6. Respondent BASF shall provide the BV Business with such funds as are necessary to maintain the full economic viability, marketability and competitiveness of the BV Business; and
7. Respondent BASF shall provide such support services to the BV Business as were being provided to the BV Business by Ciba as of the date the Consent Agreement was signed by Respondent BASF.

## Order to Maintain Assets

- D. Until the BV Effective Date, Respondent BASF shall maintain a work force at the equivalent or larger size, and with equivalent or better training and expertise to what has been associated with the BV Business as of the Acquisition Date.
- E. Until the BV Effective Date, Respondent BASF shall provide all the Designated BV Employees with reasonable financial incentives to continue in their positions and to research, Develop, and manufacture the Ciba BV Pigments consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the Ciba BV Pigments pending divestiture. Such incentives shall include a continuation of all employee benefits offered by Respondent BASF, and previously by Ciba, until the BV Effective Date has occurred, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to prevent any diminution of the relevant BV Business' competitiveness.
- F. Respondent BASF shall not interfere with the hiring or employing of the Designated BV Employees as described in Paragraph VII of the proposed Decision and Order, and shall remove any impediments within the control of Respondent BASF that may deter these employees from accepting employment with the BV Acquirer including, but not limited to, any noncompete provisions of employment or other contracts with Respondent BASF that would affect the ability or incentive of those individuals to be employed by the BV Acquirer. In addition, Respondent BASF shall not make any counteroffer to a Designated BV Employee who receives a written offer of employment from the BV Acquirer;

*Provided, however,* subject to the conditions of continued employment prescribed in this Order to Maintain Assets, this Paragraph III.F. shall not prohibit Respondent BASF from

## Order to Maintain Assets

continuing to employ any Designated BV Employee under the terms of such employee's employment with Respondent BASF prior to the date of the written offer of employment from the BV Acquirer to such employee.

## G. Pending the BV Effective Date:

1. Respondent BASF shall not use, directly or indirectly, any Confidential Business Information Related To the research, Development, manufacturing, marketing, or sale of the Ciba BV Pigments other than as necessary to comply with the following:
  - a. the requirements of the Orders;
  - b. applicable law;
2. Respondent BASF shall not disclose or convey any such Confidential Business Information, directly or indirectly, to any person except the BV Acquirer or other persons specifically authorized by the BV Acquirer to receive such information;
3. Respondent BASF shall not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the marketing or sales of the Ciba BV Pigments to Respondent BASF's employees associated with Respondent BASF's BV Pigments; and
4. Respondent BASF shall institute procedures and requirements to ensure that:
  - a. Respondent BASF employees with access to Confidential Information Relating To the Ciba BV Pigments do not provide, disclose or otherwise make available, directly or indirectly, any Confidential

## Order to Maintain Assets

Business Information in contravention of this Order to Maintain Assets; and

- b. Respondent BASF employees associated with Respondent BASF's BV Pigments do not solicit, access or use any Confidential Business Information that they are prohibited under this Order to Maintain Assets from receiving for any reason or purpose.
- H. Respondent BASF shall require any Persons with access to Confidential Business Information Relating To the Ciba BV Pigments to enter into agreements, within ten (10) days after the date this Order to Maintain Assets becomes final, not to disclose any Confidential Business Information Relating To the Ciba BV Pigments to Respondent BASF or to any third party except as otherwise permitted by this Order to Maintain Assets. Copies of such agreements shall be retained by Respondent BASF, and provided to the Commission, and the Monitor.
- I. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the BV Business until the BV Effective Date, to minimize any risk of loss of competitive potential for the BV Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the BV Business, except for ordinary wear and tear.

**IV.**

**IT IS FURTHER ORDERED** that:

- A. Mr. Edward Gold, of PriceWaterhouseCoopers, United States (with the direct assistance of Messrs. Alfred Höhn and Wolfgang Nothhelfer, PriceWaterhouseCoopers, Germany), shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondent BASF and attached as Confidential Exhibit A ("Monitor Agreement"). The



## Order to Maintain Assets

Monitor is appointed to assure that Respondent BASF expeditiously complies with all of its obligations and performs all of its responsibilities as required by the Orders.

- B. The Monitor Agreement shall require that, no later than one (1) day after the Acquisition Date, Respondent BASF transfers to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities, pursuant to the Orders, and consistent with the purposes of the Orders.
- C. No later than one (1) day after the Acquisition Date, Respondent BASF shall, pursuant to the Monitor Agreement, transfer to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities, pursuant to the Orders, and consistent with the purposes of the Orders.
- D. Respondent BASF shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
  - 1. The Monitor shall have the power and authority to monitor Respondent BASF's compliance with the terms of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission including, but not limited to:
    - a. Assuring that Respondent BASF expeditiously complies with all of its obligations and performs all of its responsibilities as required by the Orders; and
    - b. Monitoring any agreements between Respondent BASF and either the IB Acquirer or the BV Acquirer.

## Order to Maintain Assets

2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
3. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondent BASF's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, Related To Respondent BASF's compliance with its obligations under the Orders. Respondent BASF shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondent BASF's compliance with the Orders.
4. The Monitor shall serve, without bond or other security, at the expense of Respondent BASF on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondent BASF, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.
5. Respondent BASF shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with 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

## Order to Maintain Assets

from gross negligence, malfeasance, willful or wanton acts, or bad faith by the Monitor.

6. The Monitor Agreement shall provide that within one (1) month from the date the Monitor is appointed pursuant to this paragraph, and every sixty (60) days thereafter, the Monitor shall report in writing to the Commission concerning performance by Respondent BASF of its obligations under the Orders.
  7. Respondent BASF may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; provided, however, such agreement shall not restrict the Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Monitor's duties.
- F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor:
1. The Commission shall select the substitute Monitor, subject to the consent of Respondent BASF, which consent shall not be unreasonably withheld. If Respondent BASF has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondent BASF of the identity of any proposed Monitor, Respondent BASF shall be deemed to have consented to the selection of the proposed Monitor.

## Order to Maintain Assets

2. Not later than ten (10) days after appointment of the substitute Monitor, Respondent BASF shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondent BASF's compliance with the relevant terms of the Orders in a manner consistent with the purposes of the Orders.
- G. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.
- H. A Monitor appointed pursuant to this Order may be the same person appointed as the Monitor pursuant to the Decision and Order and the Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

**V.**

**IT IS FURTHER ORDERED** that within thirty (30) days after the date this Order to Maintain Assets becomes final, and every sixty (60) days thereafter until Respondent BASF has fully complied with its obligations under Paragraphs II.A, II.B, II.C., III.A., III.B. (if Respondent BASF divests pursuant to III.A.2.a.), and VII.A. of the related Decision and Order in this matter, Respondent BASF shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order to Maintain Assets and the related Decision and Order; *provided, however*, that, after the Decision and Order in this matter becomes final, the reports due under this Order to Maintain Assets shall be consolidated with, and submitted to the Commission at the same time as, the reports required to be submitted by Respondent BASF pursuant to Paragraph IX of the Decision and Order.

**VI.**

## Order to Maintain Assets

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

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

**VII.**

**IT IS FURTHER ORDERED** that, for purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondent BASF, Respondent BASF shall, without restraint or interference, permit any duly authorized representative(s) of the Commission:

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

## Order to Maintain Assets

**VIII.**

**IT IS FURTHER ORDERED** that this Order to Maintain Assets shall terminate on the earlier of:

- A. Three (3) days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. The latter of:
  - 1. the day after the IB Effective Date;
  - 2. the day after the BV Effective Date;
  - 3. the day the related Decision and Order becomes final; or
- C. The day after the Commission otherwise directs that this Order to Maintain Assets is terminated.

By the Commission.

**CONFIDENTIAL EXHIBIT A**

**MONITOR AGREEMENT**

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

## Decision and Order

**DECISION AND ORDER**

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

Respondent BASF, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondent BASF of all the jurisdictional facts set forth in the aforesaid draft Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent BASF 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 BASF has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent BASF SE is a corporation organized, existing and doing business under and by virtue of the laws of Germany, with

## Decision and Order

its office and principal place of business located at D-67056, Ludwigshafen, Germany.

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

**ORDER****I.**

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

- A. “BASF” means BASF SE, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by BASF SE, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Ciba” means Ciba Holding Inc., a corporation organized, existing and doing business under and by virtue of the laws of Switzerland, with its office and principal place of business located at Klybeckstrasse 141, 4057 Basel, Switzerland.
- C. “Commission” means the Federal Trade Commission.
- D. “Acquisition” means Respondent BASF’s acquisition of Ciba.
- E. “Acquisition Date” means the date on which the Acquisition is consummated.
- F. “Blue RS-OPT” means the type of IB intermediate produced by BASF for sale to Ciba for the production of Ciba IB Pigments.



## Decision and Order

- G. “BASF Blue RS-OPT Intellectual Property” means the BASF intellectual property Related To the manufacture and production of Blue RS-OPT including, but not limited to, software, computer programs, patents, licenses, know-how (including, but not limited to, flow sheets, process and instrumentation diagrams), risk analysis, certificates of analysis, goodwill, technology (including, but not limited to, equipment specifications and drawings), trade secrets (including, but not limited to, recipes and formulae), technical information (including, but not limited to, material and final product specifications), protocols (including, but not limited to, operational manuals), research and development, quality control information and the modifications or improvements to such intellectual property.
- H. “BV” means bismuth vanadate.
- I. “BV Acquirer” means the Person approved by the Commission to acquire the Ciba BV Business pursuant to this Order. The BV Acquirer may be the same Person as the IB Acquirer.
- J. “BV Divestiture Agreement” means all the divestiture agreements, licenses, assignments, and other agreements entered into by the BV Acquirer and Respondent BASF pursuant to Paragraph III.
- K. “BV Effective Date” means the date on which the divestitures, licensing, and assignments, pursuant to Paragraph III, are consummated.
- L. “BV Pigments” means chromatic inorganic bismuth vanadate pigments.
- M. “BV Tolling Agreement” means the agreement entered into between the BV Acquirer and Respondent BASF under which, among other things, Respondent BASF will produce the Ciba BV Pigments for the BV Acquirer for a limited

## Decision and Order

period of time, and which shall be approved by the Commission and become a part of the BV Divestiture Agreement. The BV Tolling Agreement may include, among other things, an option for the BV Acquirer to acquire, during or for a defined period after the BV Tolling Agreement, machines and equipment located at the Maastricht Plant that are Related To the manufacture of the Ciba BV Pigments.

N. “Ciba BV Business” means:

1. Ciba BV Information;
2. Ciba BV Intellectual Property;
3. Ciba BV Inventory, at the BV Acquirer’s option; and
4. Ciba BV Packaging and Labeling Assets.

O. “Ciba BV Contracts” means the current customer contracts for Ciba BV Pigments, and any other contracts between Ciba and other Persons to the extent they pertain to the manufacture and sale of Ciba BV Pigments. Ciba BV Contracts shall include contracts between Ciba and a customer that are not exclusively for Ciba BV Pigments, but may include other Ciba products.

P. “Ciba BV Information” means all information owned by, or in the possession or control of, Ciba that is not in the public domain and that is Related To the research, Development, manufacture, marketing, commercialization, importation, exportation, cost, supply, sales, sales support, or use of the Ciba BV Pigments including, but not limited to, information not otherwise included in the Ciba BV Intellectual Property Relating To the Ciba BV Pigments including, but not limited to, customer lists, current and historical customer purchases and data, historical data, complaints, safety history, all data and information Relating To any of Ciba’s approvals,

## Decision and Order

clearances, licenses, registrations, permits, franchises, product registrations, authorizations, or certifications issued by any federal, state, municipal, or foreign authority, or any third party, registrar or certification body Relating To the Ciba BV Pigments including, without limitation, all toxicology and epidemiology studies, filings, engineering and design documentation, manufacturing and test results and procedures, and any other information possessed by Ciba in any location Relating To Ciba BV Pigments.

- Q. “Ciba BV Intellectual Property” means all of the following Related To each Ciba BV Pigment owned by Ciba, or for which Ciba has the right to sub-license from third parties as of the Acquisition Date including, but not limited to:
1. Copyrights;
  2. Patents;
  3. Software;
  4. Trademarks;
  5. Trade Dress;
  6. trade secrets, know how, utility models, design rights, techniques, data, inventions, practices, recipes, raw material specifications, process descriptions, quality control methods in process, protocols, methods and other confidential or proprietary technical, business, research, Development and other information, and all rights in any jurisdiction to limit the use or disclosure thereof;
  7. rights to obtain and file for Patents and Copyrights and registrations thereof;
  8. rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach of any of the foregoing; and

## Decision and Order

9. the exclusive right to all Ciba BV intellectual property used in the research, Development, manufacturing, storage, distribution and sale of Ciba BV Pigments including, but not limited to, Software, computer programs, Patents, licenses (including, licenses to third-party software if transferable and sub-licenses to Software modified by Ciba), know-how (including, but not limited to, flow sheets, process and instrumentation diagrams), risk analysis, certificates of analysis, goodwill, technology (including, but not limited to, equipment specifications and drawings), trade secrets (including, but not limited to, recipes and formulae), technical information (including, but not limited to, material and final product specifications), marketing information, protocols (including, but not limited to, operational manuals), quality control information, Trademarks, trade names, service marks, logos, and the modifications or improvements to such intellectual property.

*Provided, however,* Ciba BV Intellectual Property does not include the corporate names or corporate Trade Dress of Ciba, or the related logos thereof, or the corporate names or corporate Trade Dress of any other corporations or companies owned or controlled by Respondent BASF or the related logos thereof;

*Provided, further, however,* Ciba BV Intellectual Property expressly includes all product formulations containing Ciba BV Pigments, licenses from customers related to the manufacture of Ciba BV Pigments for that specific customer, and all proprietary and/or trade secret information Related To Ciba BV Pigments for a particular customer.

- R. “Ciba BV Inventory” means all inventory of raw materials, intermediate work in process, and finished Ciba BV Pigments, wherever located.

## Decision and Order

- S. “Ciba BV Packaging and Labeling Assets” means the packaging and labeling used to package and label Ciba BV Pigments.
- T. “Ciba BV Pigments” means the BV Pigments researched, developed, manufactured, and sold by Ciba before the BV Effective Date including, but not limited to, the products of Ciba designated by the following names: Irgacolor Prismo Red; Irgacolor Yellow 14247; Irgacolor Yellow 14247/A; Irgacolor Yellow 14247/C; Irgacolor Yellow 2GLMA; Irgacolor Yellow 2GLMA/B; Irgacolor Yellow 2GLMA/C; Irgacolor Yellow 2GLMA/D; Irgacolor Yellow 2GTF; Irgacolor Yellow 2GTM; Irgacolor Yellow 2GTP; Irgacolor Yellow 3GLM; Irgacolor Yellow 3GLM/B; Irgacolor Yellow 3RLM; Irgacolor Yellow 5RLM; Irgazin Yellow 2093; Irgazin Yellow 2093/B; Irgazin Yellow 2094; Irgazin Yellow 2GTA; and Irgacolor Yellow 14189A.
- U. “Ciba IB Business” means:
1. Ciba IB Information;
  2. Ciba IB Intellectual Property;
  3. Ciba IB Inventory, at the IB Acquirer’s option; and
  4. Ciba IB Packaging and Labeling Assets.
- V. “Ciba IB Contracts” means the current customer contracts for Ciba IB Pigments, and any other contracts between Ciba and other Persons to the extent they pertain to the manufacture and sale of Ciba IB Pigments. Ciba IB Contracts shall include contracts between Ciba and a customer that are not exclusively for Ciba IB Pigments, but may include other Ciba products.

## Decision and Order

- W. “Ciba IB Intermediate Supply Contract” means the current agreement between Respondent BASF and Ciba for the supply of Blue RS-OPT, dated November 1993.
- X. “Ciba IB Information” means all information owned by, or in the possession or control of, Ciba that is not in the public domain and that is Related To the research, Development, manufacture, marketing, commercialization, importation, exportation, cost, supply, sales, sales support, or use of the Ciba IB Pigments including but not limited to, information not otherwise included in the Ciba IB Intellectual Property Relating To the Ciba IB Pigments including, but not limited to, customer lists, current and historical customer purchases and data, historical data, complaints, safety history, all data and information Relating To any of Ciba’s approvals, clearances, licenses, registrations, permits, franchises, product registrations, authorizations, or certifications issued by any federal, state, municipal, or foreign authority, or any third party, registrar or certification body Relating To the Ciba IB Pigments including, without limitation, toxicology and epidemiology studies, filings, engineering and design documentation, manufacturing and test results and procedures, and any other information possessed by Ciba in any location Relating To Ciba IB Pigments.
- Y. “Ciba IB Intellectual Property” means all of the following Related To each Ciba IB Pigment owned by Ciba or for which Ciba has the right to sub-license to third parties as of the Acquisition Date including but not limited to:
1. Copyrights;
  2. Patents;
  3. Software;
  4. Trademarks;

## Decision and Order

5. Trade Dress;
6. trade secrets, know-how, utility models, design rights, techniques, data, inventions, practices, recipes, raw material specifications, process descriptions, quality control methods in process, protocols, methods and other confidential or proprietary technical, business, research, Development and other information, and all rights in any jurisdiction to limit the use or disclosure thereof;
7. rights to obtain and file for Patents and Copyrights and registrations thereof;
8. rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach of any of the foregoing; and
9. the exclusive right to all Ciba IB intellectual property used in the research, Development, manufacturing, storage, distribution and sale of Ciba IB Pigments including, but not limited to, Software, computer programs, Patents, licenses (including, licenses to third-party software if transferable and sub-licenses to software modified by Ciba), know-how (including, but not limited to, flow sheets, process and instrumentation diagrams), risk analysis, certificates of analysis, goodwill, technology (including, but not limited to, equipment specifications and drawings), trade secrets (including, but not limited to, recipes and formulae), technical information (including, but not limited to, material and final product specifications), marketing information, protocols (including, but not limited to, operational manuals), quality control information, Trademarks, trade names, service marks, logos, and the modifications or improvements to such intellectual property.

## Decision and Order

*Provided, however,* Ciba IB Intellectual Property does not include the corporate names or corporate Trade Dress of Ciba, or the related logos thereof or the corporate names or corporate Trade Dress of any other corporations or companies owned or controlled by Respondent BASF or the related logos thereof;

*Provided, further, however,* Ciba IB Intellectual Property expressly includes all product formulations containing Ciba IB Pigments, licenses from customers Related To the manufacture of Ciba IB Pigments for that specific customer, and all proprietary and/or trade secret information related to a particular customer.

- Z. “Ciba IB Inventory” means all inventory of raw materials, intermediate work in process, and finished Ciba IB Pigments, wherever located.
- AA. “Ciba IB Packaging and Labeling Assets” means the packaging and labeling used to package and label Ciba IB Pigments.
- BB. “Ciba IB Pigments” means IB Pigments researched, Developed, manufactured, or sold by Ciba before the IB Effective Date including, but not limited to, the Ciba products designated by the following names: Cromophtal Blue A3R, Cromophtal Blue A3RJ, and Irgazin Blue A3RN.
- CC. “Confidential Business Information” means competitively sensitive, proprietary, and all other information that is not in the public domain owned by or pertaining to a Person or a Person’s business, and includes, but is not limited to, all customer lists, price lists, contracts, cost information, marketing methods, patents, technologies, processes, or other trade secrets.
- DD. “Copyrights” means rights to all original works of authorship of any kind directly Related To the Ciba IB



## Decision and Order

Pigments or Ciba BV Pigments, as applicable, and any registrations and applications for registrations thereof, including, but not limited to, the following: all such rights with respect to all promotional, marketing and advertising materials, educational and training materials for the sales force, and sales forecasting models; copyrights in all process development data and reports relating to the research and development of the Ciba IB Pigments or Ciba BV Pigments, as applicable, or of any materials used in the research, Development, manufacture, marketing or sale of the Ciba IB Pigments or the Ciba BV Pigments, including copyrights in all raw data, statistical programs developed (or modified in a manner material to the use or function thereof (other than through user preferences)) to analyze research data, market research data, market intelligence reports and statistical programs (if any) used for marketing and sales research; all copyrights in customer information; all records relating to employees who accept employment with either the IB Acquirer or the BV Acquirer, as applicable (excluding any personnel records the transfer of which is prohibited by applicable law); all copyrights in records, including customer lists, sales force call activity reports, vendor lists, sales data, manufacturing records, manufacturing processes, and supplier lists; all copyrights in data contained in laboratory notebooks relating to the Ciba IB Pigments or the Ciba BV Pigments; all copyrights in analytical and quality control data; and all correspondence with governmental agencies.

EE. “Designated BV Employee” means the employee or person filling the job descriptions listed in Confidential Exhibit A to this Order. “Designated BV Employee” may include any other person not listed on Confidential Exhibit A to this Order who has been determined by the BV Acquirer, the Monitor, and Commission staff to have devoted more than 25% of his/her time to Ciba BV Pigments in the twelve (12) months preceding the Acquisition Date.

## Decision and Order

- FF. “Designated IB Employee” means the employee or person filling the job descriptions listed in Confidential Exhibit B to this Order. “Designated IB Employee” may include any other person not listed on Confidential Exhibit B to this Order who has been determined by the IB Acquirer, the Monitor, and Commission staff to have devoted more than 25% of his/her time to Ciba IB Pigments in the twelve (12) months preceding the Acquisition Date.
- GG. “Development” means all research and development activities, including, without limitation, the following: test method development; stability testing; toxicology; formulation, including without limitation, customized formulation for a particular customer(s); process development; manufacturing scale-up; development-stage manufacturing; quality assurance/quality control development; statistical analysis and report writing; and conducting experiments for the purpose of obtaining any and all product approvals or certifications. Develop means to engage in Development.
- HH. “Huningue Plant” means the facility currently owned by Ciba located at Boîte Postale 151, 28, Rue de la Chapelle, Huningue Cedex 68331, France.
- II. “IB” means indanthrone blue.
- JJ. “IB Acquirer” means the Person approved by the Commission to acquire the assets and businesses pursuant to Paragraph II of this Order. The IB Acquirer may be the same Person as the BV Acquirer.
- KK. “IB Divestiture Agreement” means all the divestiture agreements, licenses, assignments, and other agreements entered into by the IB Acquirer and Respondent BASF pursuant to Paragraph II of this Order.

## Decision and Order

- LL. “IB Effective Date” means the date on which the divestitures, licensing, and assignments, pursuant to Paragraph II of this Order, are consummated.
- MM. “IB Finishing Agreement” means the agreement between the IB Acquirer and Respondent BASF under which Respondent BASF will produce the IB Pigments, which shall be approved by the Commission and become a part of the IB Divestiture Agreement. The IB Finishing Agreement, shall include, among other things, a term of up to thirty (30) months, an option for the IB Acquirer to extend the term, subject to the Commission’s prior approval, and an option for the IB Acquirer to terminate the IB Finishing Agreement with sixty (60) days notice.
- NN. “IB Pigments” means organic indanthrone blue pigments based on the indanthrone chemical structure.
- OO. “Licensed Ciba BV Intellectual Property” means the Ciba BV Intellectual Property that was not used by Ciba exclusively for the Ciba BV Pigments.
- PP. “Licensed Ciba IB Intellectual Property” means the Ciba IB Intellectual Property that was not used by Ciba exclusively for the Ciba IB Pigments.
- QQ. “Maastricht Plant” means the facility currently owned by Ciba and located at Sortieweg 39, Maastricht 6219 NT, The Netherlands.
- RR. “Maastricht Plant BV Lease Agreement” means the agreement entered into between Respondent BASF and the BV Acquirer, that is part of the BV Divestiture Agreement, for the lease of the Maastricht Plant BV Leased Area and access to the Maastricht Plant BV Operational Areas for the duration of the lease. The Maastricht Plant BV Lease Agreement, shall include, among other things, a term of up to thirty (30) months, an option for the BV Acquirer to

## Decision and Order

extend the term, subject to the Commission's prior approval, and an option for the BV Acquirer to terminate the Maastricht Plant BV Lease Agreement with sixty (60) days notice. The Maastricht Plant BV Lease Agreement may include, at the BV Acquirer's option, and in a manner that fully protects the rights of the BV Acquirer:

1. A requirement that Respondent BASF move and pay for the consolidation of laboratory and office facilities at the Maastricht Plant Relating To the Ciba BV Pigments.
2. An option for the BV Acquirer to acquire equipment including, but not limited to, manufacturing machines and laboratory equipment, that is Related To the production of Ciba BV Pigments and is covered within the terms of the Maastricht Plant BV Lease Agreement. The option shall not include, unless agreed to by Respondent BASF, any equipment that is shared by the BV Acquirer and Respondent BASF at the Maastricht Plant.
3. Terms Relating To trucking services provided at the Maastricht Plant Relating To the Ciba BV Pigments.
4. Terms Relating To licenses, permits, and authorizations including, but not limited to, permits for environmental, waste water, discharge and ground water withdrawal, and building.
5. A site services agreement providing for, among other things, plant security, canteen services, property taxes, workshop facilities and personnel, and warehousing services, to be provided to the BV Acquirer at or consistent with the level of services currently provided at the Maastricht Plant for the Maastricht Plant BV Leased Area.

## Decision and Order

6. Terms Relating To the disposal of waste water and sludge produced as part of the manufacturing of the Ciba BV Pigments at the Maastricht Plant.

SS. “Maastricht Plant BV Leased Area” means the areas and buildings at the Maastricht Plant, described in Exhibit C to this Order, and any other facilities or machines or areas at the Maastricht Plant reasonably necessary for manufacture, storage, and distribution of BV Pigments by the BV Acquirer, and may include areas within the Maastricht Plant BV Operational Areas.

TT. “Maastricht Plant BV Operational Areas” means the:

1. areas appurtenant to and used in the operation of the Maastricht Plant BV Leased Area including, but not limited to, loading and unloading areas, and storage areas for inputs and inventory, at the Maastricht Plant, excluding any such facilities or machines or areas exclusively used for the manufacture, storage, or distribution of products other than Ciba BV Pigments;
2. areas for the use of employees working at the areas leased pursuant to the Maastricht Plant BV Lease Agreement, similar to those areas available to Respondent BASF employees working at the Maastricht Plant, including, but not limited to, exits and entrances, parking areas, machine rooms, work rooms, break rooms, bathrooms, and locker rooms;
3. existing easements and rights of way relating to the leased areas; and
4. related facilities required for the storage and transfer of products produced at the Maastricht Plant BV Leased Area by the BV Acquirer.

## Decision and Order

- UU. “Patents” means all patents, patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention and statutory invention registrations, in each case existing as of the Acquisition Date, and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions, Related To any product of or owned by Ciba as of the Acquisition Date.
- VV. “Person” means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, division, or department, or other business or legal entity.
- WW. “Relating To” or “Related To” means pertaining in any way to, and is not limited to that which pertains exclusively to or primarily to.
- XX. “Software” means computer programs Related To the production of the Ciba BV Pigments or the Ciba IB Pigments, respectively, including all software implementations of algorithms, models, and methodologies whether in source code or object code form, databases and compilations, including any and all data and collections of data, all documentation, including user manuals and training materials, Related To any of the foregoing and the content and information contained on any website; provided, however, that Software does not include software that is readily purchasable or licensable from sources other than Respondent BASF and which has not been modified in a manner material to the use or function thereof (other than through user preference settings). Provided, further, however, that Software to be divested as part of the Ciba IB Business shall mean only that software specifically

## Decision and Order

applicable to the production of the Ciba IB Pigments at the IB Acquirer's production facility.

YY. "Trade Dress" means the current trade dress of a particular product or Person including, without limitation, product packaging, logos, and the lettering of the product trade name, brand name, or corporate name.

ZZ. "Trademark(s)" means all proprietary names or designations, trademarks, service marks, trade names, and brand names, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights, and the goodwill symbolized thereby and associated therewith, for the Ciba IB Pigments or the Ciba BV Pigments.

**II.**

**IT IS FURTHER ORDERED** that, within six (6) months of the date on which this Order becomes final:

- A. Respondent BASF shall divest the Ciba IB Business, assign the Ciba IB Intermediate Supply Contract and Ciba IB Contracts, and enter into a fully paid-up, irrevocable, royalty-free, non-exclusive license for the BASF Blue RS-OPT Intellectual Property, absolutely and in good faith, at no minimum price, only to an IB Acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission.

The IB Divestiture Agreement (which shall include, among other things, the divestiture agreement, the assignments, and license) between Respondent BASF and the IB Acquirer 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 the IB Acquirer or to reduce any obligations of Respondent BASF under such agreements, and such agreement, if approved by the Commission as the IB

## Decision and Order

Divestiture Agreement, shall be incorporated by reference into this Order and made a part hereof.

*Provided, however,* with respect to assets that are to be divested or agreements entered into pursuant to this paragraph at the IB Acquirer's option, Respondent BASF need not divest such assets or enter into such agreements only if the IB Acquirer chooses not to acquire such assets or enter into such agreements and the Commission approves the divestiture without such assets or agreements.

*Provided, further, however,* that if any of the Ciba IB Contracts are not assignable or the contracting Person refuses to accept the IB Acquirer, Respondent BASF shall use best efforts to facilitate the IB Acquirer in securing a similar contract with similar terms from: (1) the customer, if it is a customer contract, or (2) the same or a different Person supplying such product or service, if it is a supply contract.

*Provided, further, however,* that Respondent BASF shall be required to grant the IB Acquirer only the non exclusive rights to use Trademarks Relating To the Ciba IB Pigments solely to describe the IB Acquirer's products as comparable, functionally equivalent, or chemically equivalent to the pertinent Ciba IB Pigments in communications with individual customers, or on the IB Acquirer's website for a period of one (1) year after the IB Effective Date, if such products are made at the Huningue Plant using the Ciba IB Pigment formulae transferred pursuant to this Paragraph II.

*Provided, further, however,* that Respondent BASF shall be allowed to receive a fully paid-up, irrevocable, royalty-free license to the Licensed Ciba IB Intellectual Property, for use by Respondent BASF in the research, Development, production, manufacture, and sale of products other than IB Pigments.

- B. Respondent BASF shall, at the IB Acquirer's option, agree to amend the Ciba IB Intermediate Supply Contract to allow the IB Acquirer, within six (6) months after the IB Effective



## Decision and Order

Date, to renegotiate the terms of the Ciba IB Intermediate Supply Contract including, but not limited to, duration, price, and termination terms.

- C. Respondent BASF shall enter into an IB Finishing Agreement, absolutely and in good faith, at no minimum price, only with an IB Acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission. The IB Finishing Agreement shall become a part of the IB Divestiture Agreement.
- D. During the term of the IB Finishing Agreement:
1. Respondent BASF shall not terminate the IB Finishing Agreement before the end of the term approved by the Commission without:
    - a. the written agreement of the IB Acquirer and thirty (30) days prior notice to the Commission; or,
    - b. in the case of a proposed unilateral termination by Respondent BASF due to an alleged breach of an agreement by the IB Acquirer, sixty (60) days notice of such termination. *Provided, however*, such sixty (60) days notice shall only be given after the parties have:
      - (1) attempted to settle the dispute between themselves, and
      - (2) engaged in arbitration and received an arbitrator's decision, or
      - (3) received a final court decision after all appeals.
  2. Respondent BASF shall take such actions as are necessary to prevent the destruction, removal, wasting, deterioration, or impairment of the facilities and

## Decision and Order

machines Related To the finishing of the Ciba IB Pigments; *provided, however*, Respondent BASF shall give the IB Acquirer sixty (60) days prior notice of any facility maintenance, including ordinary and regular maintenance, when such maintenance may affect Respondent BASF's obligations under the IB Finishing Agreement; *provided, further, however*, in the event Respondent BASF cannot give the IB Acquirer sixty (60) days prior notice, then Respondent BASF must notify the IB Acquirer as soon as it first notifies any persons at the Huningue Plant regarding maintenance or problems that may affect Respondent BASF's obligations under the IB Finishing Agreement.

3. Respondent BASF shall allow employees of the IB Acquirer, with reasonable notice, access at the Huningue Plant to the:
  - a. facilities, laboratories, and machines that finish the Ciba IB Pigments, and
  - b. areas where finished Ciba IB Pigments are stored and distributed.

*Provided, however*, Respondent BASF may restrict access to the machines finishing the Ciba IB Pigments during such time, if any, as those machines are being used to produce other products.

- E. Respondent BASF shall, at the IB Acquirer's option, provide electronic access to extracted information Relating To the production, storage, and distribution of the Ciba IB Pigments.
- F. Respondent BASF shall, not later than the IB Effective Date and at the IB Acquirer's option, enter into one or more transition services agreements for the provision of services to be provided by Respondent BASF to the IB Acquirer.

## Decision and Order

Such agreements shall be subject to the prior approval of the Commission and become a part of the IB Divestiture Agreement.

1. Such agreements may include, but are not limited to:
  - a. an agreement for technical assistance. Such transition services agreements may have a duration extending throughout, or for a defined period beyond, the term of the IB Finishing Agreement and may include, among other things, assistance in the establishment of Ciba IB Pigment finishing machinery and production of the Ciba IB Pigments at the IB Acquirer's facility.
  - b. an agreement granting the IB Acquirer the right to use, for a period from six (6) to twelve (12) months from the IB Effective Date, the Ciba IB Packaging and Labeling Assets, *provided, however*, Respondent BASF may require that the IB Acquirer alter such packaging and labeling to make clear that the IB Acquirer is the seller of that product by, among other things, affixing a label to such packaging.
2. Respondent BASF shall not terminate any transition services agreement before the end of the term approved by the Commission without:
  - a. the written agreement of the IB Acquirer and thirty (30) days prior notice to the Commission; or,
  - b. in the case of a proposed unilateral termination by Respondent BASF due to an alleged breach of an agreement by the IB Acquirer, sixty (60) days notice of such termination. *Provided, however*, such sixty (60) days notice shall only be given after the parties have:

## Decision and Order

- (1) attempted to settle the dispute between themselves, and
  - (2) engaged in arbitration and received an arbitrator's decision, or
  - (3) received a final court decision after all appeals.
- G. The purposes of this Paragraph II of the Order are: (1) to ensure the continuation of the Ciba IB Business as a going concern in the same manner in which it conducted business as of the date the Consent Agreement is signed, (2) to ensure that the IB Acquirer has the intention and ability to produce the Ciba IB Pigments at facilities independent of Respondent BASF, similar to Ciba's independent production of Ciba IB Pigments, (3) to allow the IB Acquirer, using the IB Finishing Agreement, a sufficient amount of time to replicate the certifications and approvals (currently required by Persons acquiring Ciba IB Pigments from the Huningue Plant) for the manufacture of IB Pigments at another manufacturing facility, and (4) to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

## Decision and Order

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

- A. Within six (6) months of the date on which this Order becomes final:
1. Respondent BASF shall divest the Ciba BV Business, and assign the Ciba BV Contracts, absolutely and in good faith, at no minimum price, only to a BV Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission; and
  2. Respondent BASF shall choose either to:
    - a. divest the Maastricht Plant BV Leased Area absolutely and in good faith, at no minimum price, only to a BV Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission; or
    - b. lease the Maastricht Plant BV Leased Area absolutely and in good faith, at no minimum price, only to a BV Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission; or
    - c. enter into a BV Tolling Agreement absolutely and in good faith, at no minimum price, only with a BV Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

The BV Divestiture Agreement between Respondent BASF and the BV Acquirer shall not vary or contradict, or be construed to vary or

## Decision and Order

contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of the BV Acquirer or to reduce any obligations of Respondent BASF under such agreements, and such agreement, if approved by the Commission as the BV Divestiture Agreement, shall be incorporated by reference into this Order and made a part hereof.

*Provided, however,* with respect to assets that are to be divested or agreements entered into pursuant to this paragraph at the BV Acquirer's option, Respondent BASF need not divest such assets or enter into such agreements only if the BV Acquirer chooses not to acquire such assets or enter into such agreements and the Commission approves the divestiture without such assets or agreements.

*Provided, further, however,* that Respondent BASF shall be required to grant the BV Acquirer only the non exclusive rights to use Trademarks Relating To the Ciba BV Pigments solely to describe the BV Acquirer's products as comparable, functionally equivalent, or chemically equivalent to the pertinent Ciba BV Pigments in communications with individual customers, or on the BV Acquirer's website for a period of one (1) year after the BV Effective Date, if such products are made at the Maastricht Plant using the Ciba BV Pigment formulae transferred pursuant to this Paragraph III.

*Provided, further, however,* that Respondent BASF shall be allowed to receive a fully paid-up, irrevocable, royalty-free license to the Licensed Ciba BV Intellectual Property, for use by Respondent BASF in the research, Development, production, manufacture, and sale of products other than BV Pigments.

- B. If the BV Acquirer acquires the Maastricht Plant BV Leased Area, Respondent BASF shall agree to include in the BV Divestiture Agreement, at the Acquirer's option:
  1. an agreement with the BV Acquirer providing:

## Decision and Order

- a. for access to the Maastricht Plant BV Operational Areas, and
  - b. that Respondent BASF shall maintain the Maastricht Plant BV Operational Areas in the same general way in which it maintains the other areas at the Maastricht Plant and common areas of the Maastricht Plant including, but not limited to, the uninterrupted provision of utilities and services;
2. an agreement that Respondent BASF move and pay for the consolidation of laboratory and office facilities at the Maastricht Plant Relating To the Ciba BV Pigments;
  3. a transition services agreement for the provision of technical services by Respondent BASF, for a limited time, Related To the manufacture of Ciba BV Pigments including, but not limited to, computer and back office services;
  4. an agreement Relating To trucking services provided at the Maastricht Plant Relating To the Ciba BV Pigments;
  5. an agreement Relating To licenses, permits, and authorizations including, but not limited to, permits for environmental, waste water, discharge and ground water withdrawal, and building;
  6. a site services agreement providing for, among other things, plant security, canteen services, property taxes, workshop facilities and personnel, and warehousing services, to be provided to the BV Acquirer at or consistent with the level of services currently provided at the Maastricht Plant for the Maastricht Plant BV Leased Area; and

## Decision and Order

7. an agreement Relating To the disposal of waste water and sludge produced as part of the manufacturing of the Ciba BV Pigments at the Maastricht Plant.
- C. If the BV Acquirer leases the Maastricht Plant BV Leased Area:
1. Respondent BASF shall not terminate the Maastricht Plant BV Lease Agreement or any of the agreements entered into pursuant to this Paragraph III before the end of the term approved by the Commission without:
    - a. the written agreement of the BV Acquirer and thirty (30) days prior notice to the Commission; or,
    - b. in the case of a proposed unilateral termination by Respondent BASF due to an alleged breach of an agreement by the BV Acquirer, sixty (60) days notice of such termination. *Provided, however*, such sixty (60) days notice shall only be given after the parties have:
      - (1) attempted to settle the dispute between themselves, and
      - (2) engaged in arbitration and received an arbitrator's decision, or
      - (3) received a final court decision after all appeals.
  2. During the term of the Maastricht Plant BV Lease Agreement:
    - a. Respondent BASF shall, except as requested by the BV Acquirer, take such actions as are necessary to prevent the destruction, removal, wasting, deterioration, or impairment of the Maastricht Plant BV Operational Areas, *provided, however*, that



## Decision and Order

Respondent BASF shall give the BV Acquirer sixty (60) days prior notice of any facility maintenance, including ordinary and regular maintenance, when such maintenance may affect the operation of or access to the Maastricht Plant BV Operational Areas or the Maastricht Plant BV Leased Area; provided, further, however, that in the event Respondent BASF cannot give the BV Acquirer sixty (60) days prior notice, then Respondent BASF must notify the BV Acquirer as soon as it first notifies any persons at the Maastricht Plant regarding maintenance or problems that may affect the operation of or access to the Maastricht Plant BV Operational Areas or the Maastricht Plant BV Leased Area; and

- b. Respondent BASF shall maintain the Maastricht Plant BV Operational Areas in the same general way in which it maintains the other areas at the Maastricht Plant and common areas of the Maastricht Plant (to the extent the BV Acquirer complies with the lease terms) including, but not limited to, the uninterrupted provision of utilities and services.

D. If the BV Acquirer enters into a BV Tolling Agreement:

1. Respondent BASF shall not terminate the BV Tolling Agreement before the end of the term approved by the Commission without:
  - a. the written agreement of the BV Acquirer and thirty (30) days prior notice to the Commission; or,
  - b. in the case of a proposed unilateral termination by Respondent BASF due to an alleged breach of an agreement by the BV Acquirer, sixty (60) days notice of such termination. *Provided, however*, such sixty (60) days notice shall only be given after the parties have:

## Decision and Order

- (1) attempted to settle the dispute between themselves, and
  - (2) engaged in arbitration and received an arbitrator's decision, or
  - (3) received a final court decision after all appeals.
2. For the duration of the BV Tolling Agreement:
- a. Respondent BASF shall take such actions as are necessary to prevent the destruction, removal, wasting, deterioration, or impairment of the facilities and machines Related To the finishing of the Ciba BV Pigments; *provided, however*, Respondent BASF shall give the BV Acquirer sixty (60) days prior notice of any facility maintenance, including ordinary and regular maintenance, when such maintenance may affect Respondent BASF's obligations under the BV Tolling Agreement; *provided, further, however*, in the event Respondent BASF cannot give the BV Acquirer sixty (60) days prior notice, then Respondent BASF must notify the BV Acquirer as soon as it first notifies any persons at the Maastricht Plant regarding maintenance or problems that may affect Respondent BASF's obligations under the BV Tolling Agreement;
  - b. Respondent BASF shall allow employees of the BV Acquirer, with reasonable notice, access at the Maastricht Plant:
    - (1) to the facilities and machines that produce and test the Ciba BV Pigments, and
    - (2) the areas where finished products are stored and distributed.

## Decision and Order

- c. Respondent BASF shall, at the BV Acquirer's option, provide electronic access to extracted information Relating To the production, storage, and distribution of the Ciba BV Pigments.
- E. Respondent BASF shall enter, not later than the BV Effective Date and at the BV Acquirer's option, into one or more transition services agreements for the provision of services to be provided by Respondent BASF to the BV Acquirer. Such agreements shall be subject to the prior approval of the Commission and become a part of the BV Divestiture Agreement.
1. Such agreements may include, but are not limited to:
    - a. an agreement for technical assistance. If there is a BV Tolling Agreement, such transition services agreements may have a duration extending throughout, or for a defined period beyond, the term of the BV Tolling Agreement and may include, among other things, assistance in the establishment of Ciba BV Pigment machinery and production of the Ciba BV Pigment at the BV Acquirer's facility.
    - b. an agreement granting the BV Acquirer the right to use, for a period from six (6) to twelve (12) months from the BV Effective Date, the Ciba BV Packaging and Labeling Assets, *provided, however*, Respondent BASF may require that the BV Acquirer must alter such packaging and labeling to make clear that the BV Acquirer is the seller of that product by, among other things, affixing a label to such packaging.
  2. Respondent BASF shall not terminate any transition services agreement before the end of the term approved by the Commission without:

## Decision and Order

- a. the written agreement of the BV Acquirer and thirty (30) days prior notice to the Commission; or,
  - b. in the case of a proposed unilateral termination by Respondent BASF due to an alleged breach of an agreement by the BV Acquirer, sixty (60) days notice of such termination. *Provided, however*, such sixty (60) days notice shall only be given after the parties have:
    - (1) attempted to settle the dispute between themselves, and
    - (2) engaged in arbitration and received an arbitrator's decision, or
    - (3) received a final court decision after all appeals.
- F. The purposes of this Paragraph III of the Order are: (1) to ensure the continuation of the Ciba BV Business as a going concern in the same manner in which it conducted business as of the date the Consent Agreement is signed, (2) to ensure that the BV Acquirer has the intention and ability to produce the Ciba BV Pigments at facilities independent of Respondent BASF, similar to Ciba's independent production of Ciba BV Pigments, or as an independent producer of Ciba BV Pigments at facilities owned at the Maastricht Plant, (3) to allow the BV Acquirer, if it chooses to enter into a BV Tolling Agreement, to do so for a sufficient amount of time to replicate the certifications and approvals (currently required by Persons acquiring Ciba BV Pigments from the Maastricht Plant) for the manufacture of BV Pigments at another manufacturing facility, and (4) to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

## Decision and Order

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

- A. Respondent BASF and Respondent BASF's employees shall not (1) during or after the term of the BV Tolling Agreement, if applicable, or (2) during or after the term of the Maastricht Plant BV Lease Agreement, if applicable, or (3) after the divestiture of the Maastricht Plant BV Leased Area, if applicable, use or share, directly or indirectly, any Confidential Business Information Relating To the Ciba BV Pigments (including, but not limited to, the production, transportation, delivery, storage, distribution, marketing, and sale of Ciba BV Pigments by the BV Acquirer from the Maastricht Plant) with any of Respondent BASF's employees who manage, produce, or sell, Respondent BASF's BV products; and
- B. Respondent BASF and Respondent BASF's employees shall not during or after the term of the IB Finishing Agreement use or share, directly or indirectly, any Confidential Business Information Relating To the Ciba IB Pigments (including, but not limited to, the production, transportation, delivery, storage, distribution, marketing, and sale of Ciba IB Pigments by the IB Acquirer from the Huningue Plant) with any of Respondent BASF's employees who manage, produce, or sell, Respondent BASF's IB products.

*Provided, however,* the provisions of Paragraphs IV.A. and IV.B. apply except:

1. As otherwise allowed in this Order;
2. As provided for in a transition services agreement;
3. As consented to by the BV Acquirer or IB Acquirer;
4. As required by law;

## Decision and Order

5. In negotiating agreements to divest assets pursuant to this Order and engaging in related due diligence;
  6. In complying with this Order;
  7. To the extent necessary to allow Respondent BASF to comply with the requirements and obligations of the laws of the United States and other countries;
  8. In defending legal claims, investigations or enforcement actions threatened or brought against or related to the Ciba BV Business or Ciba IB Business; and
  9. In obtaining legal advice.
- C. Respondent BASF shall require any Persons with access to Confidential Business Information Relating To the Ciba BV Pigments and the Ciba IB Pigments to enter into agreements, within ten (10) days after the BV Effective Date or IB Effective Date, respectively, not to disclose any Confidential Business Information Relating To the Ciba BV Pigments or the Ciba IB Pigments, respectively, to Respondent BASF or to any third party except as otherwise permitted by this Order. Copies of such agreements shall be retained by Respondent BASF, and provided to the Commission and the Monitor.

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

- A. Mr. Edward Gold of PriceWaterhouseCoopers, United States (with the direct assistance of Messrs. Alfred Höhn and Wolfgang Nothhelfer, PriceWaterhouseCoopers, Germany), shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondent BASF and attached as Confidential Exhibit D (“Monitor Agreement”). The Monitor is appointed to assure that Respondent BASF

## Decision and Order

expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order;

- B. The Monitor Agreement shall require that, no later than one (1) day after the Acquisition Date, Respondent BASF transfers to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities, pursuant to this Order and the Asset Maintenance Order, and consistent with the purposes of the Decision and Order.
- C. No later than one (1) day after the Acquisition Date, Respondent BASF shall, pursuant to the Monitor Agreement, transfer to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities, pursuant to this Order and the Asset Maintenance Order, and consistent with the purposes of the Decision and Order.
- D. Respondent BASF shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
  - 1. The Monitor shall have the power and authority to monitor Respondent BASF's compliance with the terms of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission including, but not limited to:
    - a. Assuring that Respondent BASF expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order; and
    - b. Monitoring any agreements between Respondent BASF and either the IB Acquirer or the BV Acquirer.

## Decision and Order

2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
3. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondent BASF's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, Related To Respondent BASF's compliance with its obligations under the Order. Respondent BASF shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondent BASF's compliance with the Order.
4. The Monitor shall serve, without bond or other security, at the expense of Respondent BASF on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondent BASF, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.
5. Respondent BASF shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with 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



## Decision and Order

from gross negligence, malfeasance, willful or wanton acts, or bad faith by the Monitor.

6. The Monitor Agreement shall provide that within one (1) month from the date the Monitor is appointed pursuant to this paragraph, and every sixty (60) days thereafter, the Monitor shall report in writing to the Commission concerning performance by Respondent BASF of its obligations under the Order.
  7. Respondent BASF may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Monitor's duties.
- F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor:
1. The Commission shall select the substitute Monitor, subject to the consent of Respondent BASF, which consent shall not be unreasonably withheld. If Respondent BASF has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondent BASF of the identity of any proposed Monitor, Respondent BASF shall be deemed to have consented to the selection of the proposed Monitor.

## Decision and Order

2. Not later than ten (10) days after appointment of the substitute Monitor, Respondent BASF shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondent BASF's compliance with the relevant terms of the Order in a manner consistent with the purposes of the Order.
- G. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Order.
- H. A Monitor appointed pursuant to this Order may be the same person appointed as the Divestiture Trustee pursuant to the relevant provisions of this Order.

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

- A. If Respondent BASF has not fully complied with the obligations as required by Paragraphs II and III of this Order, the Commission may appoint a Divestiture Trustee to divest the Ciba IB Business and the Ciba BV Business, and enter into other agreements, assignments, and licenses, in a manner that satisfies the requirements of this Order.

In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondent BASF shall consent to the appointment of a Divestiture Trustee in such action to effectuate the divestitures and other obligations as described in Paragraphs II and III. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph VI shall preclude

## Decision and Order

the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent BASF to comply with this Order.

- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent BASF, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent BASF has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent BASF of the identity of any proposed Divestiture Trustee, Respondent BASF shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondent BASF 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 divestitures required by this Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph VI, Respondent BASF shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
  - 1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the Ciba IB Business and enter into the IB Finishing Agreement, and/or divest the Ciba BV Business, and either divest or lease the Maastricht Plant BV Leased Area, or enter into the BV Tolling

## Decision and Order

Agreement, and enter into all agreements, licenses and assignments as described in Paragraphs II and III of this Order.

2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to divest the Ciba IB Business and enter into the IB Finishing Agreement, and/or divest the Ciba BV Business, and either divest or lease the Maastricht Plant BV Leased Area, or enter into the BV Tolling Agreement, and enter into all agreements, licenses and assignments as described in Paragraphs II and III of this Order, absolutely and in good faith, at no minimum price, to one or more acquirers that receives the prior approval of the Commission and in a manner that receives 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 or periods may be extended by the Commission; *provided, however*, the Commission may extend the divestiture period only two (2) times.
3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be divested by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondent BASF shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent BASF shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent BASF shall extend the time for divestiture under this Paragraph

## Decision and Order

VI in an amount equal to the delay, as determined by the Commission.

4. The Divestiture Trustee shall use best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent BASF's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an acquirer as required by this Order;

*Provided, however,* if the Divestiture Trustee receives bona fide offers from more than one acquiring entity for assets and businesses to be divested pursuant to Paragraph II and Paragraph III, respectively, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondent BASF from among those approved by the Commission;

*Provided, further, however,* that Respondent BASF shall select such entity within five (5) days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent BASF, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent BASF, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture

## Decision and Order

Trustee's services, all remaining monies shall be paid at the direction of the Respondent BASF, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

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

## Decision and Order

Divestiture Trustee from providing any information to the Commission.

11. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.
- 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 VI.
- 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 obligations under Paragraphs II and III of this Order.
- G. The Divestiture Trustee(s) appointed pursuant to Paragraph VI of this Order may be the same Person appointed as the Monitor pursuant to Paragraph V of this Order.

**VII.**

**IT IS FURTHER ORDERED** that:

- A. Beginning from the Acquisition Date until ninety (90) days after each of the IB Effective Date and the BV Effective Date, Respondent BASF shall, in a manner consistent with local labor laws:
  1. facilitate employment interviews between each Designated IB Employee and the IB Acquirer, and

## Decision and Order

between each Designated BV Employee and the BV Acquirer, including providing the names and contact information for such employees and allowing such employees reasonable opportunity to interview with the IB Acquirer or the BV Acquirer, respectively, and shall not discourage such employee from participating in such interviews;

2. not interfere in employment negotiations between each Designated IB Employee and the IB Acquirer, or between each Designated BV Employee and the BV Acquirer;
3. with respect to each Designated IB Employee or Designated BV Employee who receives an offer of employment from the IB Acquirer or BV Acquirer, respectively:
  - a. not prevent, prohibit, or restrict, or threaten to prevent, prohibit, or restrict:
    - (1) the Designated IB Employee from being employed by the IB Acquirer, and shall not offer any incentive to the Designated IB Employee to decline employment with the IB Acquirer; or
    - (2) the Designated BV Employee from being employed by the BV Acquirer, and shall not offer any incentive to the Designated BV Employee to decline employment with the BV Acquirer.
  - b. cooperate with:
    - (1) the IB Acquirer in effecting transfer of the Designated IB Employee to the employ of the IB Acquirer, if the Designated IB Employee accepts an offer of employment from the IB Acquirer; or



## Decision and Order

- (2) the BV Acquirer in effecting transfer of the Designated BV Employee to the employ of the BV Acquirer, if the Designated BV Employee accepts an offer of employment from the BV Acquirer;
- c. eliminate any contractual provisions or other restrictions entered into or imposed by Respondent BASF that would otherwise prevent the Designated IB Employee or Designated BV Employee from being employed by the IB Acquirer or BV Acquirer, respectively;
- d. eliminate any confidentiality restrictions that would prevent:
  - (1) the Designated IB Employee who accepts employment with the IB Acquirer from using or transferring to the IB Acquirer any information Relating To the operation of the Ciba IB Business; or
  - (2) the Designated BV Employee who accepts employment with the BV Acquirer from using or transferring to the BV Acquirer any information Relating To the operation of the Ciba BV Business.
- e. unless alternative arrangements are agreed upon with the IB Acquirer or BV Acquirer, retain the obligation for the benefit of:
  - (1) any Designated IB Employee who accepts employment with the IB Acquirer, all accrued bonuses, vested pensions, and other accrued benefits;

## Decision and Order

- (2) any Designated BV Employee who accepts employment with the BV Acquirer, all accrued bonuses, vested pensions, and other accrued benefits.

*Provided, however,* that Respondent BASF may require that offers of employment made to Designated BV Employees working the Maastricht Plant and necessary for the performance of the BV Tolling Agreement, if any, must specify a start date after termination of the BV Tolling Agreement.

- B. Respondent BASF shall not, for a period of two (2) years following the BV Effective Date and IB Effective Date, respectively, directly or indirectly, solicit, induce, or attempt to solicit or induce:
  1. any Designated IB Employee who is employed by the IB Acquirer to terminate his or her employment relationship with the IB Acquirer, unless that employment relationship has already been terminated by the IB Acquirer; *provided, however,* Respondent BASF may make general advertisements for employees including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at the IB Acquirer's employees; *provided, further, however,* Respondent BASF may hire Designated IB Employees who apply for employment with Respondent BASF as long as such employees were not solicited by Respondent BASF in violation of this Paragraph.
  2. any Designated BV Employee who is employed by the BV Acquirer to terminate his or her employment relationship with the BV Acquirer, unless that employment relationship has already been terminated by the BV Acquirer; *provided, however,* Respondent BASF may make general advertisements for employees including, but not limited to, in newspapers, trade

## Decision and Order

publications, websites, or other media not targeted specifically at the BV Acquirer's employees; *provided, further, however*, Respondent BASF may hire Designated BV Employees who apply for employment with Respondent BASF as long as such employees were not solicited by Respondent BASF in violation of this Paragraph.

**VIII.**

**IT IS FURTHER ORDERED** that for a period of ten (10) years from the date this Order becomes final:

- A. Respondent BASF shall not, without the prior approval of the Commission, acquire, directly or indirectly, any assets divested pursuant to this Order, *provided, however*, prior approval shall not be required by Respondent BASF to take possession of the areas of the Maastricht Plant covered by the Maastricht Plant BV Lease Agreement after such agreement (1) expires according to its terms, or (2) is terminated by the BV Acquirer, and in both cases, the BV Acquirer notifies Respondent BASF that it is abandoning all of its rights to the Maastricht BV Leased Area. In such a situation, Respondent BASF shall provide written notification to the Commission of the timing and terms of the termination and abandonment as soon as possible after Respondent BASF receives notice from the BV Acquirer; and
- B. Respondent BASF shall not, without providing advance written notification to the Commission in the manner described in this Paragraph VIII.B., directly or indirectly, acquire:
  - 1. any stock, share capital, equity, or other interest in any Person, corporate or non corporate, that produces, designs, manufactures, or sells BV Pigments or IB Pigments in or into the United States; or

## Decision and Order

2. any assets used, at the time of the acquisition, in the design, manufacture, production, or sale of BV Pigments or IB Pigments in or into the United States.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (herein referred to as “the Notification”), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondent BASF and not of any other party to the transaction. Respondent BASF shall provide the Notification to the Commission at least thirty days prior to consummating the transaction (hereinafter referred to as the “first waiting period”). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondent BASF shall not consummate the transaction until thirty days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

*Provided, however,* that prior notification shall not be required by this paragraph for a transaction for which Notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

*Provided, further, however,* that prior notification shall not be required by this Paragraph VIII.B. for an acquisition, if Respondent BASF acquires no more than one percent of the outstanding securities or other equity interest in an entity described in this Paragraph VIII.B.

## Decision and Order

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

- A. Within thirty (30) days after the date this Order becomes final, and every sixty (60) days thereafter until Respondent BASF has fully complied with Paragraphs II.A, II.B, II.C., III.A., III.B. (if Respondent BASF divests pursuant to III.A.2.a.), and VII.A. of this Order, Respondent BASF shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondent BASF shall submit at the same time a copy of its report concerning compliance with this Order to the Monitor or Divestiture Trustee, if any Divestiture Trustee has been appointed pursuant to this Order. Respondent BASF shall include in its report, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant Paragraphs of the Order, including a description of all substantive contacts or negotiations related to the divestiture of the relevant assets and the identity of all parties contacted. Respondent BASF shall include in its report copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing the obligations.
- B. Beginning twelve (12) months after the date this Order becomes final, and annually thereafter on the anniversary of the date this Order becomes final, for the next nine (9) years, Respondent BASF shall submit to the Commission a verified written report setting forth in detail the manner and form in which it has complied, is complying, and will comply with this Order. Respondent BASF shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with the Order and copies of all written communications to and from all persons relating to this

## Decision and Order

Order. Additionally, Respondent BASF shall include in its compliance report whether or not it (i) made any notifiable acquisitions pursuant to Paragraph VIII, (ii) directly or indirectly, acquired any stock, share capital, equity, or other interest in any Person, corporate or non-corporate that produces, designs, manufactures, or sells BV Pigments or IB Pigments in or into areas other than the United States, and (iii) directly or indirectly, acquired any assets used, at the time of the acquisition, in the design, manufacture, production, or sale of BV Pigments or IB Pigments in or into areas other than the United States. Respondent BASF shall include a description of such acquisitions including, but not limited to, the identity of the Person or assets acquired, the location of the Person or assets, and a detailed description of the assets or Person and its BV Pigments or IB Pigments sales or manufacturing.

**X.**

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

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

**XI.**

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

## Decision and Order

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

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

**XII.**

**IT IS FURTHER ORDERED** that this Order shall terminate on May 14, 2019.

By the Commission.

Decision and Order

**CONFIDENTIAL EXHIBIT A  
DESIGNATED CIBA BV EMPLOYEES**

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

**CONFIDENTIAL EXHIBIT B  
DESIGNATED CIBA IB EMPLOYEES**

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

**CONFIDENTIAL EXHIBIT C  
MAASTRICHT PLANT BV LEASED AREA**

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



Analysis to Aid Public Comment

**CONFIDENTIAL EXHIBIT D  
MONITOR AGREEMENT**

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

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

**I. Introduction**

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from BASF SE (“BASF” or “Respondent”) to remedy the anticompetitive effects stemming from BASF’s proposed acquisition of Ciba Holding Inc. (“Ciba”). Under the terms of the Consent Agreement, BASF is required to divest to a Commission-approved buyer certain Ciba assets and intellectual property relating to two of its high performance pigment businesses.

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

Pursuant to an Agreement and Plan of Merger dated September 15, 2008, BASF proposes to purchase all of Ciba’s outstanding stock in a transaction valued at approximately \$5.1 billion. The Commission’s complaint alleges that the proposed acquisition, if

## Analysis to Aid Public Comment

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 (“FTC Act”), as amended, 15 U.S.C. § 45, by lessening competition in the world markets for the research, development, manufacture and sale of bismuth vanadate and indanthrone blue pigments. The Consent Agreement will remedy the alleged violation by divesting certain Ciba assets and intellectual property to a third party thereby replacing the lost competition that would result from the acquisition in these markets.

**II. The Parties**

BASF, headquartered in Ludwigshafen, Germany, is the world’s leading chemical company. It manufactures, among other things, chemicals, plastics, agricultural products, fine chemicals and high performance pigments. BASF is a leading supplier of several high performance pigments including bismuth vanadate and indanthrone blue. In 2008, BASF’s worldwide sales were approximately \$79.5 billion.

Ciba, headquartered in Basel, Switzerland, is a leading supplier of chemicals used to, among other things, provide color performance and care for plastics, coatings, textile, paper, home and personal care products. Ciba is a leading supplier of high performance pigments including bismuth vanadate and indanthrone blue. In 2008, Ciba’s worldwide sales were approximately \$5.4 billion.

**III. The Complaint**

According to the Commission’s Complaint, the relevant lines of commerce in which to analyze the effects of the proposed acquisition are the markets for the research, development, manufacture, and sale of bismuth vanadate and indanthrone blue pigments. Pigments are small particles that are used to impart color to a wide variety of products including inks, coatings, plastics and fibers. Bismuth vanadate and indanthrone blue are high performance pigments. High performance pigments are pigments that offer superior durability and light fastness compared to other

## Analysis to Aid Public Comment

pigments such as commodity pigments. As a result, high performance pigments are particularly suited for use in products that are exposed to sunlight and weather, such as automotive coatings.

Bismuth vanadate is a high performance pigment that imparts a brilliant yellow coloration with a green tint. Bismuth vanadate is primarily used in applications requiring exposure to high temperatures because of its durability under such conditions. Because no other pigment offers the same combination of unique color and high performance characteristics that bismuth vanadate provides, customers of bismuth vanadate could not achieve the same colors and performance levels in their products without it. Thus, there are no substitute products that customers of bismuth vanadate could turn to even in the face of a significant price increase.

Indanthrone blue is a high performance pigment that imparts a blue coloration with a tinge of red. Because of its durability and light fastness, indanthrone blue is used primarily in automotive coatings. Similar to bismuth vanadate, no other pigment offers the same combination of unique color and high performance characteristics that indanthrone blue provides and customers of indanthrone blue could not achieve the same colors and performance levels in their products without it. Thus, there are no substitute products that customers of indanthrone blue could turn to even if faced with a significant price increase.

The Complaint alleges that the relevant geographic market in which to analyze the anticompetitive effects of the proposed acquisition is the world. Transportation costs and technical barriers to worldwide shipment of the relevant products are insignificant. As a result, several pigment suppliers manufacture these products in a single location and ship them worldwide. For example, BASF and Ciba supply the relevant products for their customers worldwide from their production facilities in Europe.

The Complaint further alleges that the relevant markets are highly concentrated. In the bismuth vanadate market, the proposed transaction would reduce the number of significant players in that

## Analysis to Aid Public Comment

market from four to three and the combined entity would have a market share of approximately 60 percent based on sales. The market for indanthrone blue is also highly concentrated with BASF and Ciba constituting two of only three significant suppliers. In that market, the combined entity's market share would be approximately 56 percent based on sales. By eliminating competition between BASF and Ciba in the relevant markets, the proposed transaction would allow the combined firm to unilaterally exercise market power, as well as increase the likelihood of coordinated interaction among the remaining suppliers. As a result, the proposed transaction would increase the likelihood that purchasers of bismuth vanadate and indanthrone blue would be forced to pay higher prices for these products and that innovation and service in these markets would decline.

Entry into either relevant market is not likely and would not be timely or sufficient to deter or counteract the anticompetitive effects that would result from the proposed merger. It would take a new entrant well over two years to complete all of the requisite steps for entry, including: researching and developing the pigment technology; building a manufacturing facility; and passing the rigorous qualification testing required to get customer approval. Additionally, new entry into either the bismuth vanadate or indanthrone blue markets is unlikely to occur because the capital investment to become a viable supplier is high relative to the limited sales opportunities available to new entrants.

**IV. Terms of the Proposed Order**

The proposed Consent Agreement effectively remedies the proposed merger's anticompetitive effects in the markets for bismuth vanadate and indanthrone blue pigments. BASF is required to divest assets used to research, develop, manufacture, and sell those products. The divested assets will permit the acquirer to become a viable competitor in the relevant markets.

The assets to be divested include Ciba's bismuth vanadate production assets which are located in Europe, or provides a

## Analysis to Aid Public Comment

mechanism for, at the acquirer's option, production to be relocated to the acquirer's production facilities. More specifically, BASF can either: (1) divest the Ciba bismuth vanadate production facility, (2) lease the production facility to the acquirer, or (3) enter into a tolling agreement that provides sufficient time for the acquirer to begin production at its own facilities and to qualify that production with customers. The indanthrone blue production assets will be used to produce that product pursuant to a tolling arrangement at the Ciba facilities until the acquirer of those assets is prepared to shift production to its own facilities. All tangible assets and intellectual property used to produce the relevant products will also be divested. Several credible acquirers have expressed interest in purchasing the assets to be divested.

The provisions ordering the two divestitures further include ancillary relief such as supply agreements, protections for confidential information, assistance in hiring of key employees, and the appointment of a monitor to oversee the divestiture process to ensure that the acquirer, or acquirers, of the relevant assets will be able to effectively compete in the research, development, manufacture, and sale of bismuth vanadate and indanthrone blue pigments. A final Order to Maintain Assets has also been issued.

The proposed Consent Agreement includes a provision that allows the Commission to appoint an interim monitor to ensure that BASF expeditiously complies with all of its obligations and performs all of its responsibilities as required by 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 and the efforts being made to accomplish the divestitures.

Finally, the Consent Agreement contains provisions that allow the Commission to appoint a divestiture trustee to divest the assets that are the subject of the Commission's Decision and Order if BASF fails to divest the designated assets within six (6) months after the Consent Agreement is accepted by the Commission for Public

## Analysis to Aid Public Comment

Comment. To ensure that the Commission remains informed about the status of the proposed divestitures and the transfer of the assets, the proposed Consent Agreement requires BASF to file reports with the Commission periodically until the divestitures and transfers are accomplished.

The purpose of this analysis is to facilitate public comment on the proposed Decision and Order. This analysis is not intended to constitute an official interpretation of the Consent Agreement and the proposed Decision and Order.

## Complaint

## IN THE MATTER OF

**WHOLE FOODS MARKET, INC.,  
AND  
WILD OATS MARKETS, INC.**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS  
OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL  
TRADE COMMISSION ACT*Docket No. 9324, File No. 071 0114**Complaint, June 27, 2007 – Decision, May 28, 2009*

This consent order addresses the \$700 million acquisition by Whole Foods Market Inc., of Wild Oats Markets, Inc. The combination of Whole Foods and Wild Oats would provide Whole Foods with market power post-acquisition in the premium natural and organic supermarkets market, leading to significant anticompetitive effects. Both the district court and administrative complaints alleged that the combined company would increase prices, and decrease the quality and number of offered services, if the merger were permitted to close. The consent order requires Whole Foods to divest 32 stores, along with associated Wild Oats intellectual property and related assets, leases, properties, and government permits. The Order to Maintain Assets will require Whole Foods to maintain the operating status of the open stores, and maintain all leases (open and dark stores) until divestiture is complete.

*Participants*

For the *Commission*: Tom Brock, Malcolm Catt, Sean Dillon, Jil Frumin, Kevin Hahm, Albert Kim, Kenneth A. Libby, Mazor Matzkevich, Brendan McNamara, Jonathan Platt, Stephanie Reynolds, Andrea Ryan, Jennifer Schwab, Jennifer Stiefvater, Laura Sullivan, Matt Tabas, Nicholas Widnell, and Michelle Yost.

For the *Respondents*: Jeffrey Brennan, Paul Denis, and James Fishkin, Dechert LLP, and Lanny Davis, Orrick, Herrington & Sutcliffe LLP.

## Complaint

**COMPLAINT****I. INTRODUCTION**

Whole Foods Market, Inc.'s ("Whole Foods") proposed acquisition of Wild Oats Markets, Inc. ("Wild Oats"), will substantially lessen competition and thereby cause significant harm to consumers. This merger, involving the two leading operators of premium natural and organic supermarkets, will increase prices and reduce quality and services in a number of geographic markets throughout the United States. Whole Foods' Chief Executive Officer John Mackey bluntly advised his Board of Directors of the purpose of this acquisition: "By buying [Wild Oats] we will . . . avoid nasty price wars in Portland (both Oregon and Maine), Boulder, Nashville, and several other cities which will harm [Whole Foods'] gross margins and profitability. By buying [Wild Oats] . . . we eliminate forever the possibility of Kroger, Super Value, or Safeway using their brand equity to launch a competing national natural/organic food chain to rival us. . . . [Wild Oats] may not be able to defeat us but they can still hurt us . . . . [Wild Oats] is the only existing company that has the brand and number of stores to be a meaningful springboard for another player to get into this space. Eliminating them means eliminating this threat forever, or almost forever."

To prevent this consumer harm, the Federal Trade Commission ("Commission"), pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, having reason to believe that Respondent Whole Foods and Respondent Wild Oats have entered into an agreement pursuant to which Whole Foods would acquire the voting securities of Wild Oats, that such agreement violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that such acquisition, 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, and it appearing to the Commission that a proceeding by it in respect thereof would be



## Complaint

in the public interest, hereby issues its complaint, stating its charges as follows:

**II. THE PARTIES AND JURISDICTION****A. Whole Foods Market, Inc.**

1. Respondent Whole Foods is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 550 Bowie Street, Austin, Texas 78703.

2. Established in 1980, Whole Foods operates approximately 190 premium natural and organic supermarkets in more than 30 states and the District of Columbia.

3. Whole Foods is the largest operator of premium natural and organic supermarkets in the United States.

4. According to Whole Foods' Chief Executive Officer John Mackey, Whole Foods is "a company that is authentically committed to its mission of natural/organic/healthy foods. Its core customers recognize this authenticity and it creates a customer loyalty that will not be stolen away by conventional markets who sell the same products. Whole Foods has created a 'brand' that has real value for millions of people."

5. Whole Foods is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

**B. Wild Oats Markets, Inc.**

6. Respondent Wild Oats is a corporation organized, existing, and doing business under and by virtue of the laws of the State of

## Complaint

Delaware, with its office and principal place of business located at 1821 30th Street, Boulder, Colorado 80301.

7. Wild Oats is the second largest operator of premium natural and organic supermarkets in the United States, currently operating numerous premium natural and organic supermarkets throughout the United States.

8. Founded in 1987, Wild Oats provides a broad selection of natural, organic, and gourmet foods, environmentally friendly products, and natural vitamins, remedies, and body care products. The firm was built “on the vision of enhancing the lives of our customers and our people with products and education that support health and wellbeing.” As Wild Oats’ Vice President of Marketing Laura Coblentz has described: “Wild Oats is more than a retail chain – it’s about a lifestyle, and that’s how we market ourselves.”

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

### III. THE ACQUISITION

10. On February 21, 2007, Whole Foods and Wild Oats executed an agreement whereby Whole Foods proposes to acquire all of the voting securities of Wild Oats through WFMI Merger Co., a wholly-owned subsidiary of Whole Foods (the “Acquisition”). The purchase will be effected through a tender offer for all shares of Wild Oats common stock. The total cost of the Acquisition is expected to be approximately \$671 million in cash and assumed debt.

11. Respondent Whole Foods intends to then merge Wild Oats into Whole Foods; to close numerous Wild Oats stores; to sell

## Complaint

several Wild Oats stores; and to operate the remainder as Whole Foods stores.

12. On June 5, 2007, the Commission authorized the commencement of an action under Section 13(b) of the Federal Trade Commission Act to seek a temporary restraining order and a preliminary injunction barring the Acquisition during the pendency of administrative proceedings to be commenced by the Commission pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. \_ 45(b).

13. In authorizing the commencement of this action, the Commission determined that a temporary restraining order and a preliminary injunction are in the public interest and that it has reason to believe that the Acquisition would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act because the Acquisition may substantially lessen competition in the relevant markets alleged in this Complaint.

14. On June 7, 2007, United States District Judge Paul L. Friedman of the United States District Court for the District of Columbia issued an Order granting the Commission's motion for a temporary restraining order. The closing of the Acquisition is currently prohibited only by the District Court's restraining order.

#### **IV. NATURE OF COMPETITION**

15. "Natural foods" are foods that are minimally processed and largely or completely free of artificial ingredients, preservatives, and other non-naturally occurring substances.

16. "Organic foods" are foods that are produced using: agricultural practices that promote healthy ecosystems; no genetically engineered seeds or crops, sewage sludge, long-lasting pesticides or fungicides; healthy and humane livestock management practices including use of organically grown feed, ample access to fresh air and the outdoors, and no antibiotics or growth hormones; and food processing that protects the healthfulness of the organic

## Complaint

product, including the avoidance of irradiation, genetically modified organisms, and synthetic preservatives.

17. Pursuant to the United States Department of Agriculture's ("USDA") Organic Foods Production Act of 1990 (the "Organic Rule"), all products labeled "organic" must be certified by a federally accredited certifying agency as satisfying USDA standards for organic foods. The Organic Rule further requires that retailers of products labeled "organic" use handling, storage, and other practices to protect the integrity of organically-labeled products, including: preventing commingling of organic and non-organic ("conventional") products; protecting organic products from contact with prohibited substances; and maintaining records that document adherence to the USDA requirements.

18. Premium natural and organic supermarkets offer a distinct set of products and services to a distinct group of customers in a distinctive way, all of which significantly distinguish premium natural and organic supermarkets from conventional supermarkets and other retailers of food and grocery items ("Retailers").

19. Premium natural and organic supermarkets are not simply outlets for natural and organic foods. Whole Foods' Chief Executive Officer John Mackey acknowledged that "Whole Foods isn't primarily about organic foods. It never has been. Organic foods is only one part of its highly successful business model." In announcing its fourth quarter results for 2006, Whole Foods stated that "Whole Foods Market is about much more than just selling 'commodity' natural and organic products. We are a lifestyle retailer and have created a unique shopping environment built around satisfying and delighting our customers." Specifically, Mr. Mackey has said that "[s]uperior quality, superior service, superior perishable product, superior prepared foods, superior marketing, superior branding, and superior store experience working together are what makes Whole Foods so successful." "[P]eople who think organic foods are the key don't understand the business model. . . ."

## Complaint

20. To begin with, premium natural and organic supermarkets focus on perishable products, offering a vast selection of very high quality fresh fruits and vegetables (including exotic and hard-to-find items) and other perishables. As Whole Foods stated in its 2006 annual report, “We believe our heavy emphasis on perishable products differentiates us from conventional supermarkets and helps us attract a broader customer base.” Whole Foods’ Chief Executive Officer John Mackey has also emphasized the importance of high quality perishable foods to Whole Foods’ business model: “This [produce, meat, seafood, bakery, prepared foods] is over 70% of Whole Foods total sales. Wal-Mart doesn’t sell high quality perishables and neither does Trader Joe’s while we are on the subject. That is why Whole Foods coexists so well with [Trader Joe’s] and it is also why Wal-Mart isn’t going to hurt Whole Foods.”

21. Relative to conventional supermarkets and most other Retailers, premium natural and organic supermarkets target shoppers who are, in the words of one of the respondents, “affluent, well educated, health oriented, quality food oriented people. . . .” The core shoppers of premium natural and organic supermarkets have a preference for natural and organic products, and premium natural and organic supermarkets offer an extensive selection of natural and organic products to enable those shoppers to purchase substantially all of their food and grocery requirements during a single shopping trip.

22. Premium natural and organic supermarkets are differentiated from other Retailers in that premium natural and organic supermarkets offer more amenities and service venues; higher levels of service and more knowledgeable service personnel; and special features such as in-store community centers.

23. Premium natural and organic supermarkets promote a lifestyle of health and ecological sustainability, to which a significant portion of their customers are committed. Through the blending together of these elements and others, premium natural and organic supermarkets strive to create a varied and dynamic experience for shoppers, inviting them to make the premium natural

## Complaint

and organic supermarket a destination to which shoppers come not merely to shop, but to gather together, interact, and learn, often while enjoying shared eating and other experiences. Premium natural and organic supermarkets expend substantial resources on developing a brand identity that connotes this blend of elements, and especially the qualities of trustworthiness (*viz.*, that all products are natural, that products labeled “organic” are properly labeled, that the store’s suppliers practice humane animal husbandry, and that the store’s actions are ecologically sound) and qualitative superiority to other Retailers.

24. Relative to most other Retailers, premium natural and organic supermarkets’ products often are priced at a premium reflecting not only product quality and service, but the marketing of a lifestyle to which their customers aspire.

25. As Whole Foods’ Chief Executive Officer John Mackey has acknowledged, “Safeway and other conventional retailers will keep doing their thing – trying to be all things to all people . . . They can’t really effectively focus on Whole Foods Core Customers without abandoning 90% of their own customers. . . . Whole Foods core customers will not abandon them because Safeway has made their stores a bit nicer and is selling some organic foods. Whole Foods knows their core customers well and serves them far better than any of their potential competitors do.”

26. Mr. Mackey has also said that “[a]ll those [conventional supermarkets and club stores] you named have been selling organic foods for many years now. The only thing ‘new’ is that they are now beginning to sell private label organic foods for the first time. However, they’ve been selling organic produce and organic milk for many years now. Doing so has never hurt Whole Foods.”

27. Wild Oats’ most recent 10K filed with the Securities and Exchange Commission noted: “Despite the increase in natural foods sales within conventional supermarkets, [Wild Oats] believe[s] that conventional supermarkets still lack the concentration on a wide

## Complaint

variety of natural and organic products, and emphasis on service and consumer education that our stores offer.”

28. Premium natural and organic supermarkets are also very different from mass-merchandisers, such as Wal-Mart and Target. According to Mr. Mackey, “Wal-Mart does a particularly poor job selling perishable foods. Whole Foods quality is better, its customer service is far superior, and the store ambience and experience it provides its customers is fun, entertaining and educational . . . .”

29. With respect to Trader Joe’s, Mr. Mackey stated: “TJ’s is a completely different concept than WFMI. WFMI’s business is all about perishables – fresh produce, fresh seafood, fresh meat, in store delis, juice bars, and bakeries. WFMI has stated that more than 50% of their sales are in these categories of products – categories which TJ’s doesn’t even have. TJ’s is primarily a discount private label company with a large wine selection.”

30. Unlike other natural and organic product retailers, premium natural and organic supermarkets offer an extensive selection of natural and organic products to enable shoppers to purchase substantially all of their food and grocery requirements during a single shopping trip. As a result, premium natural and organic supermarkets are appreciably larger than other natural and organic retailers in square footage, number of products offered, inventory for each product offered, and annual dollar sales.

31. Whole Foods and Wild Oats, respectively, are the largest and second largest operators of premium natural and organic supermarkets in the United States.

32. Whole Foods and Wild Oats are the only two nationwide operators of premium and natural organic supermarkets in the United States.

33. Consumers spent a combined total of \$6.5 billion in fiscal 2006 at Whole Foods and Wild Oats. Approximately 70% of that

## Complaint

total was spent on perishable products, such as produce, meat, seafood, baked goods, and prepared foods.

34. Whole Foods and Wild Oats are one another's closest competitors in 21 geographic markets. Consumers in these markets have reaped price and non-price benefits of competition between Whole Foods and Wild Oats. The markets where the two compete head to head are: Albuquerque, NM; Medford, MA (suburban Boston); Saugus, MA (suburban Boston); Boulder, CO; Hinsdale, IL (suburban Chicago); Evanston, IL (suburban Chicago); Cleveland, OH; Denver, CO; Lakewood, CO; Ft. Collins, CO; West Hartford, CT; Henderson, NV; Indianapolis, IN; Kansas City-Overland Park, KS; Las Vegas, NV; Los Angeles-Santa Monica-Brentwood, CA; Louisville, KY; Omaha, NE; Pasadena, CA; Phoenix, AZ; Portland, ME; Portland, OR; St. Louis, MO; and Tualatin, OR.

35. Over the last five years, Whole foods has targeted markets for entry where, in Whole Foods' words, Wild Oats enjoyed a "monopoly." Consumers in those markets benefitted from the new competition in those markets.

36. There are other geographic markets in which only one or the other is present. In many of these markets, Wild Oats or Whole Foods plans, but for the proposed Acquisition, to enter and offer direct and unique competition to the other. Each has developed expansion plans that target the other's "monopoly" markets, as Whole Foods describes it. These markets include: Palo Alto, CA; Fairfield County, CT; Miami Beach, FL; Naples, FL; Nashville, TN; Reno, NV; and Salt Lake City, UT.

37. Whole Foods' Mr. Mackey has said that "Whole Foods has taken significant market share from OATS wherever they have opened competing stores – Boulder, Santa Fe, Denver, Boca Raton, Ft. Lauderdale, and St. Louis." Each of the parties, in anticipation of entry by the other, engages in aggressive price and non-price competition that conveys to shoppers benefits that go well beyond the benefits resulting from the presence or threatened entry in those



### Complaint

geographic markets of other retailers. In addition, when Whole Foods or Wild Oats expects the other to enter one of its markets, it plans substantial improvements in quality, including renovations, expansions, and competitive pricing. As Mr. Mackey explained upon Whole Foods' entry into Nashville: "At least Wild Oats will likely improve their store there in anticipation of Whole Foods eventually opening and [customers will] benefit from that." Neither company responds in the same way to competition from conventional supermarkets or other Retailers.

38. Consumers have benefitted directly from the price and quality competition between Whole Foods and Wild Oats. If the Acquisition occurs, these benefits will be lost in the markets where the two currently compete and they will not occur in those markets where each is planning to expand.

## **V. RELEVANT MARKETS**

39. A relevant product market in which to analyze the effects of the proposed Acquisition is the operation of premium natural and organic supermarkets.

40. A relevant geographic market in which to analyze the effects of the proposed Acquisition is an area as small as approximately five or six miles in radius from premium natural and organic supermarkets or as large as a metropolitan area.

## **VI. ENTRY CONDITIONS**

41. Entry or repositioning into the operation of premium natural and organic supermarkets is time-consuming, costly, and difficult. As a result, entry or repositioning into the operation of premium natural and organic supermarkets in the relevant geographic markets is unlikely to occur or to be timely or sufficient to prevent or defeat the anticompetitive effects of the proposed Acquisition.

## Complaint

**VII. ANTICOMPETITIVE EFFECTS**

42. The relevant markets are highly concentrated and would become significantly more concentrated after the proposed Acquisition. Premium natural and organic supermarkets' primary competitors are other premium natural and organic supermarkets. Shoppers with preferences for premium natural and organic supermarkets are not likely to switch to other retailers in response to a small but significant non-transitory increase in premium natural and organic supermarket prices.

43. The proposed Acquisition may substantially lessen competition in the following ways, among others:

a. the proposed Acquisition will eliminate one of only two or three premium natural and organic supermarkets and substantially increase concentration in the operation of premium natural and organic supermarkets in the relevant geographic markets, each of which already is highly concentrated;

b. the proposed Acquisition will eliminate substantial and effective price and non-price competition between Whole Foods and Wild Oats in the operation of premium natural and organic supermarkets in the relevant geographic markets, substantially reducing or eliminating competition in the operation of premium natural and organic supermarkets in each of those geographic areas;

c. the proposed Acquisition will eliminate one of only two or three premium natural and organic supermarkets in each of the relevant geographic markets, tending to create a monopoly in the operation of premium natural and organic supermarkets in each of those geographic areas;

d. the proposed Acquisition will eliminate the only existing company that can serve as a meaningful springboard for a conventional supermarket operator to enter the market for premium natural and organic supermarkets in each of the

## Complaint

relevant geographic markets, tending to create a monopoly in the operation of premium natural and organic supermarkets in each of those geographic areas;

e. the proposed Acquisition will eliminate Whole Foods' closest competitor in geographic and product space in each of the relevant geographic areas, resulting in the loss of direct and unique price and non-price competition that conveys to shoppers benefits that go well beyond the benefits resulting from the presence or threatened entry of other retailers;

f. the proposed Acquisition will result in the closing of numerous Wild Oats stores, reducing or eliminating consumer choice in premium natural and organic supermarkets;

g. the proposed Acquisition will enable the combined Whole Foods/Wild Oats to exercise market power unilaterally; and

h. the proposed Acquisition will eliminate potential competition in numerous parts of the United States.

**VIII. VIOLATIONS CHARGED****COUNT I – ILLEGAL ACQUISITION**

44. The allegations contained in paragraphs 1-45 are repeated and realleged as though fully set forth here.

45. Whole Foods' proposed acquisition of Wild Oats, if consummated, would substantially lessen competition in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. §18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

## Complaint

## COUNT II – ILLEGAL ACQUISITION AGREEMENT

46. The allegations contained in paragraphs 1-45 are repeated and realleged as though fully set forth here.

47. Whole Foods and Wild Oats, through the Agreement described in paragraph 10, have engaged in unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

**NOTICE**

Notice is hereby given to the Respondents that the twenty-seventh day of September, 2007, at 10 a.m., or such later date as determined by the Commission or by an Administrative Law Judge of the Commission, is hereby fixed as the time and Federal Trade Commission offices, 600 Pennsylvania Ave., N.W., Washington, D.C. 20580, as the place when and where a hearing will be had on the charges set forth in this Complaint, at which time and place you will have the right under the Federal Trade Commission Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

Pending further order of the Commission, the Commission will retain adjudicative responsibility for this matter. *See* § 3.42(a) of the Commission's Rules of Practice for Adjudicative Proceedings. The Commission hereby allows you 20 days from the date of service of this Complaint upon you to file either an answer or a dispositive motion. If you file a dispositive motion within that time, your time for filing an answer is extended until 10 days after service of the Commission's order on such motion. If you do not file a dispositive motion within that time, you must file an answer.

An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are

## Complaint

without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission or the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under §3.46 of the Commission's Rules of Practice for Adjudicative Proceedings and the right to appeal the initial decision to the Commission under §3.52 of said Rules.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the Commission or the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions, and order.

An initial prehearing scheduling conference will be scheduled no later than 14 days after the last answer is filed by any party named as a respondent in the complaint. Unless otherwise directed, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Ave., N.W. Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within 5 days of receiving a respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

## Complaint

**NOTICE OF CONTEMPLATED RELIEF**

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the acquisition of Whole Foods by Wild Oats, or any other transaction that combines them, challenged in this proceeding violates Section 7 of the Clayton Act, as amended, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. An order preventing Whole Foods from acquiring Wild Oats, if the acquisition has not occurred at the time of the Commission's decision;
2. The divestiture of Wild Oats and any other associated or necessary assets in a manner that restores Wild Oats as a viable, independent competitor in the relevant markets, with the ability to offer such services as Wild Oats is now offering and planning to offer, if the acquisition has occurred at the time of the Commission's decision;
3. A prohibition against any transaction between Whole Foods and Wild Oats that combines their operations in the relevant markets except as may be approved by the Commission;
4. A requirement that, for a period of time, Whole Foods provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of its operations with any other company providing the operation of premium and natural organic supermarkets;
5. A requirement for Whole Foods to file periodic compliance reports with the Commission; and
6. Any other relief appropriate to correct or remedy the anticompetitive effects of the transaction or to restore Wild Oats as a viable, independent competitor in the relevant market.

## Order to Maintain Assets

**IN WITNESS WHEREOF**, the Federal Trade Commission has caused this complaint to be signed by the Secretary and its official seal to be affixed hereto, at Washington, D.C., this twenty-seventh day of June, 2007.

By the Commission.

**ORDER TO MAINTAIN ASSETS**

The Federal Trade Commission (“Commission”) having heretofore issued its complaint charging Whole Foods Market, Inc. (“Whole Foods” or “Respondent”) with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Respondent having been served with a copy of that complaint, together with a notice of contemplated relief, and Respondent having answered the complaint denying said charges but admitting the jurisdictional allegations set forth therein; and

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

The Secretary of the Commission having thereafter withdrawn the matter from adjudication in accordance with § 3.25(c) of its Rules; and

## Order to Maintain Assets

The Commission having thereafter considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in conformity with the procedure prescribed in § 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following Order: to Maintain Assets:

1. Whole Foods is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its offices and principal place of business located at 550 Bowie Street, Austin, Texas 78703.

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, as used in this Order to Maintain Assets, the definitions used in the Consent Agreement and the attached Decision and Order shall apply. In addition, “Store To Be Maintained” means any operating store or closed store location identified as a part of the Assets To Be Divested or any operating store listed in Confidential Appendix D to the Decision and Order.

**II.**

**IT IS FURTHER ORDERED** that:

A. Respondent shall maintain the viability, marketability, and competitiveness of the Assets To Be Divested, and shall not cause the wasting or deterioration of the Assets To Be Divested, nor shall it cause the Assets To Be Divested to be operated in a manner inconsistent with applicable laws, nor shall it sell, transfer, encumber or otherwise impair the



## Order to Maintain Assets

viability, marketability or competitiveness of the Assets To Be Divested. Respondent shall comply with the terms of this Paragraph until such time as Respondent has divested the Assets To Be Divested pursuant to the terms of the attached Decision and Order. Respondent shall conduct or cause to be conducted the business of the Assets To Be Divested in the regular and ordinary course and in accordance with past practice (including regular repair and maintenance efforts) and shall use reasonable best efforts to preserve the existing relationships with landlords, suppliers, customers, employees, and others having business relations with the Assets To Be Divested in the ordinary course of business and in accordance with past practice. Respondent shall exercise any option it has to extend the lease for any Store To Be Maintained whose lease would otherwise expire.

- B. Respondent shall not terminate the operation of any Store To Be Maintained. Respondent shall continue to maintain the inventory of each Store To Be Maintained at levels and selections (*e.g.*, stock-keeping units) consistent with those maintained by such Respondent at such Store in the ordinary course of business consistent with past practice. Respondent shall use best efforts to keep the organization and properties of each Store To Be Maintained intact, including current business operations, physical facilities, working conditions, and a work force of equivalent size, training, and expertise associated with the Store in a manner consistent with past practice. Included in the above obligations, Respondents shall, without limitation:
1. maintain operations and departments, and not reduce hours, at each Store To Be Maintained in a manner consistent with past practice;
  2. not transfer inventory from any Store To Be Maintained, other than in the ordinary course of business consistent with past practice;

## Order to Maintain Assets

3. make any payment required to be paid under any contract or lease when due, and otherwise pay all liabilities and satisfy all obligations associated with any Store To Be Maintained, in each case in a manner consistent with past practice;
4. maintain the books and records of each Store To Be Maintained in a manner consistent with past practice;
5. not display, prior to the Commission's approval of the acquirer for a Store To Be Maintained, any signs or conduct any advertising (*e.g.*, direct mailing, point-of-purchase coupons, media advertisements) that indicates that Respondent is moving its operations at such Store To Be Maintained to another location, or that indicates such Store To Be Maintained will close;
6. not conduct, prior to the Commission's approval of the acquirer for a Store To Be Maintained, any "going out of business," "close-out," "liquidation" or similar sales or promotions at or relating to such Store To Be Maintained; and
7. not change, prior to the Commission's approval of the acquirer for a Store To Be Maintained, or modify in any material respect the existing advertising practices, programs and policies for such Store To Be Maintained, other than changes in the ordinary course of business consistent with past practice for locations of the Respondent not being closed or relocated.

*Provided, however,* that nothing in this Order shall require Respondent to resume the operations of any Store To Be Maintained that was not being operated by Respondent on the date Respondent signed the Agreement Containing Consent Orders.

**III.**

## Order to Maintain Assets

**IT IS FURTHER ORDERED** that:

- A. At any time after Respondent signs the Consent Agreement in this matter, the Commission may appoint a monitor (“Interim Monitor”) to assure that Respondent expeditiously complies with all of its obligations and perform all of its responsibilities as required by Paragraph II of this Order and the Divestiture Agreement(s).
- B. The Commission shall select the Interim Monitor, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Interim Monitor, Respondent shall be deemed to have consented to the selection of the proposed Interim Monitor.
- C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondent shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondent’s compliance with the relevant requirements of this Order in a manner consistent with the purposes of this Order.
- D. If an Interim Monitor is appointed, Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:
  - 1. The Interim Monitor shall have the power and authority to monitor Respondent’s compliance with the divestiture and asset maintenance obligations and related requirements of this Order, and shall exercise such power and authority and carry out the duties and

## Order to Maintain Assets

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 Respondent of the divestiture of all the Assets To Be Divested; or
  - b. the completion by Respondent 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 Respondent's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to the Assets To Be Divested and Respondent's compliance with its obligations under this Order, including, but not limited to, its obligations related to the relevant assets. Respondent shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondent's compliance with this Order.
5. The Interim Monitor shall serve, without bond or other security, at the expense of Respondent on such reasonable and customary terms and conditions as the

## Order to Maintain Assets

Commission may set. The Interim Monitor shall have authority to employ, at the expense of the Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.

6. Respondent shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.
7. Respondent shall report to the Interim Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondent, and any reports submitted by the Commission-approved Acquirer with respect to the performance of Respondent's obligations under this 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 Respondent of its obligations under this Order.
8. Respondent may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,*

## Order to Maintain Assets

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. The Commission shall select the Interim Monitor, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Interim Monitor, Respondent shall be deemed to have consented to the selection of the proposed Interim Monitor.
- 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 shall not be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

**IV.**

**IT IS FURTHER ORDERED** that Respondent shall notify the Commission at least thirty (30) days prior to any proposed (1)

## Order to Maintain Assets

dissolution of the Respondent, (2) acquisition, merger or consolidation of Respondent, or (3) any other change in the Respondent that may affect compliance obligations arising out of this Order To Maintain Assets, including, but not limited to, assignment, the creation or dissolution of subsidiaries, or any other change in Respondent.

**V.**

**IT IS FURTHER ORDERED** that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondent, Respondent shall, without restraint or interference, permit any duly authorized representative(s) of the Commission:

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

## Decision and Order

**VI.**

**IT IS FURTHER ORDERED** that this Order to Maintain Assets shall terminate on the earlier of:

- A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. With respect to each Store To Be Maintained, the day after Respondent's completion of the divestiture of Assets to Be Divested related to such Store To Be Maintained, as described in and required by the Decision and Order, or the expiration of the trustee's authority to divest such Store To Be Maintained.

By the Commission.

**DECISION AND ORDER**

The Federal Trade Commission ("Commission") having heretofore issued its complaint charging Whole Foods Market, Inc. ("Whole Foods" or "Respondent") with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Respondent having been served with a copy of that complaint, together with a notice of contemplated relief, and Respondent having answered the complaint denying said charges but admitting the jurisdictional allegations set forth therein; and

The Respondent, its attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by



## Decision and Order

Respondent of all the jurisdictional facts set forth in the aforesaid Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn the matter from adjudication in accordance with § 3.25(c) of its Rules; and

The Commission having thereafter considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, and having duly considered the comments filed by interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in conformity with the procedure prescribed in § 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following Order:

1. Whole Foods is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its offices and principal place of business located at 550 Bowie Street, Austin, Texas 78703.
2. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

## Decision and Order

**ORDER****I.**

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

- A. “Whole Foods” or “Respondent” means Whole Foods Market, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Whole Foods Market, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Wild Oats” means the former corporation Wild Oats Markets, Inc., which was 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 1821 30th Street, Boulder, Colorado 80301, and which was acquired by Respondent Whole Foods.
- C. “Commission” means the Federal Trade Commission.
- D. “Closing Date” means the date on which Respondent (or the Divestiture Trustee) and a Commission-approved Acquirer consummate a transaction to divest any Asset To Be Divested pursuant to this Order.
- E. “Commission-approved Acquirer” means an entity that receives the prior approval of the Commission to acquire particular assets that the Respondent is required to divest pursuant to this Order.
- F. “Divestiture Trustee” means a trustee appointed by the Commission pursuant to the relevant provisions of this Order to effectuate the divestitures required by this Order [as distinguished from interim monitor].

## Decision and Order

- G. “Assets To Be Divested” means:
1. The name “WILD OATS,” all trademarks, trade dress, service marks, trade names, and other Wild Oats intellectual property associated with the Wild Oats stores (all hereinafter collectively “Wild Oats Associated Intellectual Property”);
  2. The store locations listed on Appendix A of this Order;
  3. The store locations listed on Appendix B of this Order; and
  4. All assets, leases, fixtures, properties, government permits (to the extent transferable), tangible and intangible, related to or used in the stores operated at these locations at the Closing Date, but shall not include those assets consisting of or pertaining to any of Respondent’s other (non “WILD OATS”) trademarks, trade dress, service marks, or trade names, or any inventory, books and records, financial information, supplies or packaging related to or used in the stores operated at these locations.
- H. “Divestiture Agreement” means any agreement between the Divestiture Trustee and a Commission-approved Acquirer and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Assets To Be Divested that have been approved by the Commission to accomplish the requirements of this Order.
- I. “Interim Monitor” means a monitor appointed by the Commission pursuant to the Order to Maintain Assets in this matter.
- J. “Store Employees” means all employees of Whole Foods currently working at the store locations listed on Appendix A of this Order, or who have, within the past six (6) months,

## Decision and Order

worked at any store location listed on Appendix A or Appendix B of this Order.

- K. “Third Party Consents” means all consents and waivers from any person other than the Respondent, including all landlords, that are necessary to effect the complete divestiture of the Assets To Be Divested to the Commission-approved Acquirer(s) and that are necessary for the continued operation of the stores by the Commission-approved Acquirer(s).

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

- A. Respondent shall divest the Assets To Be Divested, at a price from each Commission-approved Acquirer not less than zero dollars, absolutely and in good faith, in a manner that receives the prior approval of the Commission and solely to an acquirer (or acquirers) that receives the prior approval of the Commission. Such divestiture (or divestitures) shall be accomplished exclusively by the Divestiture Trustee pursuant to Paragraph II of this Order.
- B. The Commission hereby appoints The Food Partners LLC as Divestiture Trustee to divest the Assets To Be Divested. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondent shall execute a trustee 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.
- C. Respondent shall consent to the following terms and conditions regarding the Divestiture Trustee’s powers, duties, authority, and responsibilities:

## Decision and Order

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the Assets To Be Divested and to assure that Respondent has completed all of its obligations under Paragraph II.H. of this Order for any Asset To Be Divested.
2. The Divestiture Trustee shall have six (6) months from the date the Commission approves the trustee 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 six (6) month period, the Divestiture Trustee has received a good faith offer or offers for a particular store or stores, the divestiture period may be extended by the Commission as to such store(s) to allow the Divestiture Trustee to continue negotiations with such potential acquirer(s); *provided however*, the Commission may extend the divestiture period for any such store(s) only for a maximum of six (6) months; *provided further, however*, that if the Divestiture Trustee submits any proposed Divestiture Agreement(s) and proposed acquirer(s) to the Commission for approval before the end of the divestiture period for the particular store(s), as may be extended by the Commission, and if the Commission has not acted on such Divestiture Agreement(s), or the Closing Date has not occurred, by the end of the divestiture period, then the divestiture period for the store(s) covered by such Divestiture Agreement(s) shall automatically extend until the day after the Commission rejects such Divestiture Agreement(s) or the Closing Date(s) has occurred, whichever is the case; *provided further, however*, that the Divestiture Trustee's authority shall extend for such time until Respondent has completed all of its obligations under Paragraph II.H. of this Order for any particular Asset To Be Divested.

## Decision and Order

3. The divestiture of the Assets To Be Divested may be made to one or more Commission-approved Acquirers, *provided, however,* that the Wild Oats Associated Intellectual Property shall be divested to only a single Commission-approved Acquirer; *provided further, however,* that any Commission-approved Acquirer of the Wild Oats Associated Intellectual Property may license, at its sole option, any other person(s) to use the Wild Oats Associated Intellectual Property at any location in any place in the United States.
4. Respondent shall provide to the Divestiture Trustee the information listed in Appendix C within ten (10) days of the date the Commission approves the trustee agreement. The Divestiture Trustee shall have reasonable access to the facilities listed in Appendix A and Appendix B. Subject to any demonstrated legally recognized privilege, Respondent shall provide any additional information requested by the Divestiture Trustee that is directly related to the Assets To Be Divested and shall cooperate with the Divestiture Trustee, *provided however,* that Respondent shall not be required to provide income statement and balance sheet financial information (other than as listed in Appendix C and updated quarterly gross sales data by store); other information related to Whole Foods' operation of the store(s); vendor information; any sku-level data; and team member (employee) information and files related to human resources, payroll or benefits. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission.
5. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price

## Decision and Order

and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest expeditiously and at a price from each Commission-approved Acquirer not less than zero dollars. Each divestiture shall be made in the manner and to a Commission-approved Acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity for a particular location listed on Appendix A or Appendix B of this Order, and if the Commission determines to approve more than one such acquiring entity for such location, the Divestiture Trustee shall divest to the acquiring entity selected by Respondent from among those approved by the Commission; *provided further, however*, that Respondent shall select such entity within five (5) days after receiving notification of the Commission's approval.

6. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent, on such reasonable and customary terms and conditions as the Commission may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondent, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement

## Decision and Order

contingent on the divestiture of the relevant assets that are required to be divested by this Order.

7. Respondent shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.
8. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested.
9. The Divestiture Trustee shall report in writing to Respondent and to the Commission every thirty (30) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
10. The Divestiture Trustee shall notify Respondent immediately upon signing any letter of intent or other significant event relating to the sale of the Assets To Be Divested that is required to be revealed by Respondent to accurately reflect its financial statements.
11. Respondent may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.



## Decision and Order

- D. 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. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of a proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Divestiture Trustee, Respondent shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- E. Any Divestiture Agreement that has been approved by the Commission between the Divestiture Trustee and a Commission-approved Acquirer shall be deemed incorporated into this Order, and any failure by Respondent to comply with any term of such Divestiture Agreement shall constitute a failure to comply with this Order.
- F. Respondent shall:
1. from the date any Divestiture Agreement is signed, not interfere with the hiring or employing by each Commission-approved Acquirer of Store Employees, and shall remove any impediments or incentives within the control of Respondent 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 Respondent that would affect the ability or incentive of those individuals to be employed by the Commission-approved Acquirer; *provided, however*, that nothing in this Order shall be construed to require Respondent to terminate the employment of any employee or prevent Respondent from continuing the employment of any employee; *provided further, however*, that nothing in this Order shall be construed to

## Decision and Order

prohibit Respondent from providing any notice required by law or contract to any Store Employee who Respondent may transfer to another of Respondent's stores; and

2. provide all Store 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 Store Employees covered by a pension plan), offered by Respondent.

- G. Prior to the each Closing Date, Respondent shall secure all Third Party Consents.

*Provided however*, that, if within twelve (12) months of the date the Commission approves the trustee agreement described herein, Respondent certifies to the Commission that a landlord is unreasonably withholding its consent to a transfer or assignment of the lease of a particular store location, then the divestiture period is tolled while the Commission reviews the matter. If Respondent demonstrates to the Commission's satisfaction that a landlord is unreasonably withholding its consent to a transfer or assignment of the lease of a particular store location, then, and only then, Respondent may remove that location from the definition of Assets To Be Divested and may substitute a store location to the definition of Assets To Be Divested from the list contained on Confidential Appendix D. Any substitutions of locations shall be made in the order in which the stores appear in Confidential Appendix D. If a substitution is made pursuant to this Paragraph, then the Divestiture Trustee shall have six (6) months from the date Respondent notifies the Divestiture Trustee of the substitution to accomplish the divestiture of the substituted store location, which shall be subject to the prior approval of

## Decision and Order

the Commission. The Divestiture Trustee's period may be extended in the same manner as provided in Paragraph II.C.2.

*Provided further, however,* that Respondent may seek substitution for store locations only up to the number of stores contained in Confidential Appendix D;

*Provided further, however,* that Respondent may not seek further substitution for any store that has been added to the Assets To Be Divested from Confidential Appendix D;

*Provided further, however,* that Respondent shall notify the Divestiture Trustee of any substitution within three (3) days of Respondent's receipt from the Commission of the Commission's acceptance of such substitution;

*Provided further, however,* that all of Respondent's obligations as to the Assets To Be Divested, including its obligations under Paragraph II.C.4., shall apply to the substitute store as of the date Respondent notifies the Divestiture Trustee of the substitution.

- H. Respondent shall make all commercially reasonable efforts to remove as soon as practicable any of Respondent's trademarks, trade dress, service marks, trade names, inventory, and all other proprietary information from the store locations listed in Appendix A of this Order after the Closing Date for each such location, during which time the location will not be open for business, pursuant to the following terms:
1. For a period of not more than ten (10) days after the Closing Date, Respondent shall have exclusive access to the store, during which period Respondent shall use all commercially reasonable efforts to remove as soon as practicable all confidential business information, including all information technology and operating

## Decision and Order

systems, all human resources, payroll and benefits records, all accounting and financial records, all company policies and directives, and all purchasing information. This exclusive access period shall end when Respondent has removed all confidential business information from the store. *Provided, however,* that Respondent shall also use commercially reasonable efforts to remove as soon as practicable any of Respondent's trademarks, trade dress, service marks, trade names, inventory, and all other proprietary information from the store during such exclusive access period.

2. For a period of not more than twenty (20) days after Respondent has removed the confidential business information from the store, Respondent shall have non-exclusive access to the store, during which period Respondent shall use all commercially reasonable efforts to remove as soon as practicable any remaining trademarks, trade dress, service marks, trade names, inventory, and all other proprietary information from the store. Respondent shall cooperate fully with the Commission-approved Acquirer to coordinate its removal efforts with the Commission-approved Acquirer's efforts to prepare the location for reopening.

*Provided, however,* that Respondent shall be responsible for all lease and utility costs associated with such store until it has completely removed its assets from such store.

*Provided further, however,* that Respondent shall not remove any of the Wild Oats Associated Intellectual Property identified in Paragraph I.G.1. of this order.

- I. The purpose of the divestiture of the Assets To Be Divested is to ensure the viable and competitive operation of the Assets To Be Divested in the same business and in the same manner in which the Assets To Be Divested were engaged at

## Decision and Order

the time of the announcement of the proposed acquisition of Wild Oats by Whole Foods and to remedy the lessening of competition alleged in the Commission's complaint.

**III.**

**IT IS FURTHER ORDERED** that:

- A. Within thirty (30) days after the date this Order becomes final, and every thirty (30) Days thereafter until Respondent has fully complied with Paragraphs II.A., through II.H, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondent shall submit at the same time a copy of its report concerning compliance with this Order to the Interim Monitor, if any Interim Monitor has been appointed and to the Divestiture Trustee. Respondent shall include in its reports, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant Paragraphs of this Order.

**IV.**

**IT IS FURTHER ORDERED** that Respondent shall notify the Commission at least thirty (30) days prior to any proposed (1) dissolution of the Respondent, (2) acquisition, merger or consolidation of Respondent, or (3) any other change in the Respondent that may affect compliance obligations arising out of this Order, including, but not limited to, assignment, the creation or dissolution of subsidiaries, or any other change in Respondent.

## Decision and Order

**V.**

**IT IS FURTHER ORDERED** that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondent, Respondent shall, without restraint or interference, permit any duly authorized representative(s) of the Commission:

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

**VI.**

**IT IS FURTHER ORDERED** that this Order shall terminate on May 28, 2019.

By the Commission.

Decision and Order

**APPENDIX A**

**APPENDIX A  
OPERATING LOCATIONS**

Wild Oats Market  
2584 Baseline Rd.  
Boulder, CO 80305

Alfalfa's  
1651 Broadway St.  
Boulder, CO 80302

Whole Foods Market  
3180 New Center Point  
Colorado Springs, CO 80922

Wild Oats Market  
4301 Main St.  
Kansas City, MO 64111

Whole Foods Market  
7250 W. Lake Mead Blvd.  
Las Vegas, NV 89128

Wild Oats Market  
5910 S. University Blvd.  
Littleton, CO 80121

Whole Foods Market  
6930 S. Highland Dr.  
Cotton Wood Heights, UT 84121

Wild Oats Market  
1090 St. Francis Dr.  
Santa Fe, NM 87505

Whole Foods Market  
8688 East Raintree Drive  
Scottsdale, AZ 85260

Whole Foods Market  
19440 NW Cornell Rd.  
Hillsboro, OR 97124

Whole Foods Market  
7133 N. Oracle Rd.  
Tucson, AZ 85704

Whole Foods Market  
340 N. Main St.  
West Hartford, CT 06117

Whole Foods Market  
9229 N. Sheridan Blvd.  
Westminster, CO 80031

FEDERAL TRADE COMMISSION DECISIONS  
VOLUME 147

## Decision and Order

**APPENDIX B****APPENDIX B  
CLOSED LOCATIONS**

200 W. Foothills Pkwy. Fort Collins, CO 80525	13823 N. Tatum Blvd. Phoenix, AZ 85032
1422 N. Cooper Road Gilbert, AZ 85233	87 Marginal Way Portland, ME 04101
874 E. Warner Road Gilbert, AZ 85296	2077 NE Burnside St. Gresham, OR 97030
5350 W. Bell Road Glendale, AZ 85308	5695 S. Virginia Street Reno, NV 89502
517 N. Stephanie St. Henderson, NV 89014	4979 S. Virginia Street Reno, NV 89502
17711 Jean Way Lake Oswego, OR 97035	4600 Shelbyville Road St. Matthews, KY 40207
8194 S. Kipling Parkway Littleton, CO 80127	15569 W. Bell Road Surprise, AZ 85374
6424 Naples Blvd. Naples, FL 34109	3736 W. Center Park Drive West Jordan, UT 84084
7831 Dodge St. Omaha, NE 68114	8819-8833 Ladue Rd. St. Louis, MO 63124
9028 W. Union Hills Peoria, AZ 85382	



Decision and Order

**APPENDIX C**

**APPENDIX C**

**INFORMATION TO BE PROVIDED TO THE DIVESTITURE TRUSTEE**

For each store listed in Appendix A and Appendix B:

Store number, banner, name, address, city, state, zip code and county

Total square footage and selling space square footage

Date store opened and closed (if applicable)

Indication whether store is freestanding or in a shopping center

Indication whether store has equipment (yes or no answer within ten (10) days of approval of trustee agreement, full list of fixtures and equipment to be provided later upon the request of the Divestiture Trustee

Total gross sales for the (1) 2008 fiscal year, (2) first quarter 2009 fiscal year, and (3) first quarter 2008 fiscal year

Occupancy expenses (segmented by minimum annual rent, percentage rent, common area maintenance expenses, insurance, taxes and utilities) during the last full fiscal year

Lease and lease abstract indicating lease commencement date, base lease expiration, remaining renewal options, minimum annual rent, percentage rent and threshold, rent adjustments, recapture rights/operating covenants, and use restrictions

Any required contractual obligations to be assumed related to occupancy

Fixture (basic floor plan layout) and site plans (e.g., ingress and egress into shopping center, etc.) to the extent they exist

Aerial, exterior and interior photographs to the extent they exist

Maps of the customer draw area and customer spotting surveys and supporting data, to the extent they exist, to be provided on the Closing Date for the particular store

For the Wild Oats Associated Intellectual Property:

A detailed list of all assets that constitute the Wild Oats Associated Intellectual Property

All registrations for all trademarks, trade dress, service marks and trade names

Decision and Order

**CONFIDENTIAL APPENDIX D**

CONFIDENTIAL APPENDIX D

[Redacted From the Public Record Version, But Incorporated By Reference]

## Analysis to Aid Public Comment

**ANALYSIS OF CONSENT ORDERS TO AID PUBLIC COMMENT****I. INTRODUCTION**

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Whole Foods Market, Inc. (“Whole Foods”). The purpose of the proposed Consent Agreement is to remedy the competitive harm resulting from Whole Foods’ acquisition of Wild Oats Markets, Inc. (“Wild Oats”), completed on or about August 28, 2007. Under the terms of the proposed Consent Agreement, Whole Foods is required to maintain and subsequently divest a significant portion of the Wild Oats assets at issue in this matter.

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 again will review the proposed Consent Agreement and the comments received, and decide whether it should withdraw the Consent Agreement or make it final.

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

**II. BACKGROUND**

On February 21, 2007, Whole Foods and Wild Oats publicly announced that they had executed a merger agreement pursuant to which Whole Foods would acquire Wild Oats in a transaction valued at about \$700 million. At the time of the merger announcement, Whole Foods (headquartered in Austin, Texas) and Wild Oats (headquartered in Boulder, Colorado) were the only national operators of premium natural and organic supermarkets (“PNOS”) in

## Analysis to Aid Public Comment

the United States. Whole Foods operated 194 stores in more than 37 states and the District of Columbia as well as the United Kingdom, and Wild Oats maintained 74 PNOS stores in 24 states.<sup>1</sup>

Wild Oats and Whole Foods offered a unique selection of natural and organic products, amenities, and high levels of customer service that differentiated them from conventional supermarkets, mass merchants, and other categories of food retailers. The combination of Whole Foods and Wild Oats would provide Whole Foods with market power post-acquisition in the PNOS market, leading to significant anticompetitive effects. Staff's investigation confirmed that repositioning by existing competitors or new entry would be inadequate to deter or counteract this harm to competition.

Having reason to believe the proposed transaction would result in competitive harm, the Commission authorized staff to seek a temporary restraining order ("TRO") and preliminary injunctive relief in federal district court and to commence an administrative trial under Part 3 of the Commission's Rules of Practice. Both the district court and administrative complaints alleged that the combined company would increase prices, and decrease the quality and number of offered services, if the merger were permitted to close.

### **III. LITIGATION HISTORY**

On June 6, 2007, the Commission filed an action in the U.S. District Court for the District of Columbia to seek a TRO and a preliminary injunction against the acquisition. The court granted the TRO on June 7, 2007. On June 28, 2007, the Commission issued an administrative complaint pursuant to Part 3 of its Rules. Given the proceedings in the collateral federal district court case, the Commission, as a matter of discretion, stayed the Part 3 action in an order issued on August 7, 2007.

---

<sup>1</sup> Wild Oats also operated stores under the Henry's Farmers Market banner (in Southern California), the Sun Harvest banner (in Texas), and the Capers Community Market banner (in British Columbia, Canada).

## Analysis to Aid Public Comment

After a two-day hearing on July 31 and August 1, 2007, the district court denied the Commission's motion for a preliminary injunction on August 16, 2007. On August 17, 2007, the Commission filed with the U.S. Court of Appeals for the D.C. Circuit a notice of appeal and an emergency motion for an injunction pending appeal. Although the D.C. Circuit initially denied the Commission's emergency motion for an injunction pending appeal, on July 29, 2008, the court of appeals reversed the district court's opinion and found that the Commission had demonstrated the requisite likelihood of success in the preliminary injunction proceeding, and remanded the matter to the district court to address the equities and, if necessary, fashion appropriate relief.<sup>2</sup> Approximately one week later, on August 8, 2008, the Commission lifted the stay of the Part 3 proceedings, and the Commission issued an amended administrative complaint on September 8, 2008. The amended complaint alleged anticompetitive effects in 22 overlap markets (in which Whole Foods and Wild Oats competed head-to-head) and seven potential competition markets (in which Whole Foods had planned to enter but for the merger).

On January 8, 2009, the district court issued a written order and opinion holding that the issue of likelihood of success had been fully resolved in the Commission's favor by the court of appeals, and confirming that all that remained was to weigh the equities and impose relief, if necessary.

On January 26, 2009, Whole Foods filed a motion to withdraw the matter from administrative litigation, together with a settlement agreement. The Commission granted Whole Foods' motion on January 29, 2009, and temporarily withdrew the matter from administrative adjudication. The withdrawal was subsequently

---

<sup>2</sup> Following Whole Foods' August 26, 2008 petition for rehearing *en banc* in the court of appeals, the D.C. Circuit denied the petition and reissued the court's judgment on November 21, 2008. The two judges of the panel majority reissued opinions that reiterated their respective rationales for concluding that the Commission had carried its burden of showing a likelihood of success on the merits and that the district court should conduct an equities analysis to determine whether an injunction should issue.

## Analysis to Aid Public Comment

extended until March 6, 2009, as Whole Foods and Commission staff negotiated a remedy in settlement of the ongoing litigation.

**IV. POST-ACQUISITION INTEGRATION**

The acquired Wild Oats assets included stores operating under the Wild Oats banner as well as a number of leases for Wild Oats stores that were closed prior to the acquisition.<sup>3</sup> After the district court's August 16, 2007 decision denying the Commission's request for a preliminary injunction, Whole Foods consummated its acquisition of Wild Oats and began integrating certain of the acquired Wild Oats assets, rebranding Wild Oats stores, closing other Wild Oats locations, and terminating certain leases.

In the 18 months since the close of the transaction, Whole Foods has closed a number of Wild Oats stores. Whole Foods has maintained leases and physical assets relating to some, but not all, of the closed Wild Oats locations. Within the 29 geographic markets alleged in the complaint, Whole Foods is currently operating 31 former Wild Oats stores and is maintaining control of 19 formerly operating Wild Oats stores.

**V. THE PROPOSED CONSENT AGREEMENT**

In order to remedy, to a significant degree, the anticompetitive effects of the transaction, the Commission has entered into the attached Consent Agreement with Whole Foods, which requires the divestiture of 32 stores, along with associated Wild Oats intellectual property and related assets, leases, properties, and government permits.<sup>4</sup> The Order to Maintain Assets will require Whole Foods to maintain the operating status of the open stores, and maintain all

---

<sup>3</sup> Immediately following the closing, on September, 30, 2007, Whole Foods sold the Henry's and Sun Harvest stores that Wild Oats had been operating to Smart & Final Inc., a Los Angeles-based food retailer.

<sup>4</sup> Of the 32 stores, 13 are live stores and 19 are "dark" stores. Dark stores are former Wild Oats stores that are not presently operating, but are under the control of Whole Foods.

## Analysis to Aid Public Comment

leases (open and dark stores) until divestiture is complete. *See* Appendix A.

The inclusion of the Wild Oats intellectual property is an important component of the package. The intellectual property includes the use, without restriction, of the Wild Oats name. Even months after the acquisition, the Wild Oats brand name retains significant brand equity that has been developed over the past 20 years.

As shown in Appendices A & B of the Decision and Order, Whole Foods is required to divest a significant portion of the acquired and currently operating stores, and all of the formerly operating stores for which leases still exist. These planned divestitures will offer relief in 17 of the 29 geographic markets alleged in the amended administrative complaint, eliminating Whole Foods' monopoly position in these markets, and permitting consumers to once again enjoy the benefits of competition between PNOS operators. These stores also could provide a springboard from which the acquirer(s) can expand into additional geographic markets.

The proposed order provides that the responsibility for the marketing and sale of the assets to be divested will immediately be put in the hands of the divestiture trustee.<sup>5</sup> The trustee will have six months within which to divest the stores and related assets to a buyer or buyers approved by the Commission. If the trustee has received good faith offers from potential acquirers for certain stores within the initial six-month divestiture period, the Commission may extend the divestiture period for those stores for up to an additional six months. The requirement that any potential acquirer be approved by the Commission is designed to ensure that the potential acquirer(s) intends to put the divested assets, including the stores

---

<sup>5</sup> Pursuant to the proposed Consent Agreement, although the divestiture of the stores may be made to one or more Commission-approved buyers, the Wild Oats-associated intellectual property may be divested to only a single buyer.

## Analysis to Aid Public Comment

and the Wild Oats brand, to use in the relevant product market in competition with Whole Foods.

**VI. OTHER PROVISIONS OF THE CONSENT AGREEMENT**

The Consent Agreement contains several additional provisions designed to ensure that competition is, in fact, replicated in the targeted geographic markets. As referenced above, the Consent Agreement requires appointment of a divestiture trustee to oversee the process for divesting the Wild Oats assets. The Food Partners (“TFP”) has been appointed to fill this role. TFP is one of the leading investment banking firms in the food retailing industry, with particular expertise in mergers, acquisition, and divestiture services. TFP has advised on a number of supermarket sales and acquisitions, including divesting packages of geographically dispersed national chain supermarkets. For these reasons, TFP is well-suited to serve as divestiture trustee in this matter.

The Consent Agreement also includes an Order to Maintain Assets (“OMA”), which requires Whole Foods to continue to operate the Wild Oats stores until a buyer is identified and approved by the Commission and final closing of the purchase occurs. Because of concerns about possible deterioration of the stores during the divestiture period, the OMA further provides for the appointment of an interim monitor to ensure that Whole Foods maintains the viability, marketability, and competitiveness of the assets and does not terminate the operation of any store included in the divestiture package.

**VII. POST-CONSUMMATION RELIEF**

The absence of pre-consummation relief from the district court, and Whole Foods’ subsequent integration activities, have made it more difficult for the Commission to obtain complete relief in this matter. However, the proposed Consent Agreement will provide substantial relief to consumers in 17 geographic markets across the United States. Moreover, acceptance of the proposed Consent Agreement will bring immediate, certain relief and avoid the



## Analysis to Aid Public Comment

expense and uncertainty inherent in continued litigation. Reestablishing a PNOS competitor in these markets under the Wild Oats banner will reintroduce direct price, quality, and service competition in these areas, restoring to a substantial degree the competition that was eliminated by the acquisition, providing important benefits to consumers, and perhaps creating a springboard for broader competition nationwide.

Complaint

IN THE MATTER OF

**REED ELSEVIER NV,  
REED ELSEVIER PLC,  
REED ELSEVIER GROUP PLC,  
REED ELSEVIER INC.,  
CHOICEPOINT INC.,  
CHOICEPOINT SERVICES INC.,  
AND  
CHOICEPOINT GOVERNMENT SERVICES LLC**

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 No. C-4257; File No. 081 0133  
Complaint, June 1, 2009 – Decision, June 1, 2009*

This consent order addresses the \$4.1 billion acquisition by Reed Elsevier of ChoicePoint. The complaint alleges that the acquisition would eliminate substantial competition between the only two significant suppliers of electronic public record services sold to law enforcement customers in the United States and enable LexisNexis to unilaterally raise the prices of electronic public records services. The complaint also alleges that this market is highly concentrated. The order requires the divestiture of assets related to ChoicePoint's AutoTrackXP and CLEAR electronic public records services to Thomson Reuters Legal Inc. The order also requires Reed Elsevier to provide various transitional services and allows the Commission to appoint an interim monitor.

*Participants*

For the *Commission*: *Brendan J. McNamara, Christine Naglieri,  
and Catherine M. Sanchez.*

For the *Respondents*: *Richard Feinstein, Boies, Schiller &  
Flexner LLP; Robert Lipstein, Crowell Moring LLP; Christine  
Varney, Hogan & Hartson LLP; Dale Collins, Shearman & Sterling  
LLP; and Damian Didden, Wachtell, Lipton, Rosen & Katz.*

## Complaint

**COMPLAINT**

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission (“Commission”), having reason to believe that Respondent Reed Elsevier Inc., a subsidiary of Respondent Reed Elsevier Group plc, which is owned by Respondent Reed Elsevier NV and Respondent Reed Elsevier PLC (collectively “Reed Elsevier”), corporations subject to the jurisdiction of the Commission, have agreed to acquire Respondent ChoicePoint Inc., Respondent ChoicePoint Services Inc., and Respondent ChoicePoint Government Services LLC (collectively “ChoicePoint”), corporations subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

**I. RESPONDENTS**

1. Respondent Reed Elsevier NV is a corporation organized, existing, and doing business under and by virtue of the laws of The Netherlands, with its office and principal place of business located at Radarweg 29, 1043 NX Amsterdam, The Netherlands.

2. Respondent Reed Elsevier PLC is a public limited company, organized, existing, and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at 1-3 The Strand, WC2N 5JR, London, England.

3. Respondent Reed Elsevier Group plc is a public limited company, organized, existing, and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at 1-3 The Strand, WC2N 5JR, London, England.

## Complaint

4. Respondent Reed Elsevier Inc. is a corporation, organized, existing, and doing business under and by virtue of the laws of Massachusetts, with its office or principal place of business at 125 Park Avenue, Suite 2300, New York, New York 10017.

5. Respondent ChoicePoint Inc. is a corporation organized, existing and doing business under and by virtue of the laws of Georgia, with its office and principal place of business located at 1000 Alderman Drive, Alpharetta, Georgia 30005.

6. Respondent ChoicePoint Services Inc. is a corporation organized, existing and doing business under and by virtue of the laws of Georgia, with its office and principal place of business located at 1000 Alderman Drive, Alpharetta, Georgia 30005.

7. Respondent ChoicePoint Government Services LLC is a Georgia limited liability company with its office and principal place of business located at 1000 Alderman Drive, Alpharetta, Georgia 30005.

8. Respondents are, and at all times herein have been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. §12, and are corporations whose businesses are in or affect commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

**II. THE PROPOSED ACQUISITION**

9. Pursuant to an Agreement and Plan of Merger dated as of February 20, 2008 (the “Agreement”), Reed Elsevier proposes to acquire ChoicePoint for approximately \$4.1 billion (the “Acquisition”).

## Complaint

**III. THE RELEVANT MARKET**

10. For the purposes of this Complaint, the relevant market in which to analyze the effects of the Acquisition is electronic public records services for law enforcement customers.

11. 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.

**IV. THE STRUCTURE OF THE MARKET**

12. LexisNexis, a wholly-owned subsidiary of Reed Elsevier, and ChoicePoint are, by a large margin, the two largest providers in the United States of electronic public records services for law enforcement customers. Consequently, the U.S. market for electronic public records services for law enforcement customers is highly concentrated as measured by the Herfindahl-Hirschman Index (“HHI”).

13. LexisNexis and ChoicePoint are actual and substantial competitors in the relevant market.

**V. ENTRY CONDITIONS**

14. New entry into the relevant market would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the Acquisition set forth in Paragraph 16 below. New entry into the relevant market is a difficult process because of, among other things, the time and cost associated with developing electronic public records services for law enforcement customers and the lengthy period necessary to attain customer acceptance within this customer segment. As a result, new entry into any of these markets sufficient to achieve a significant market impact within two years is unlikely.

15. Expansion by smaller competitors into the relevant market would not be timely, likely, or sufficient to deter or counteract the

## Complaint

anticompetitive effects of the Acquisition set forth in Paragraph 16 below. As a result, new entry into any of these markets sufficient to achieve a significant market impact within two years is unlikely.

**VI. EFFECTS OF THE ACQUISITION**

16. 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. by eliminating actual, direct, and substantial competition between LexisNexis and ChoicePoint for the sale of electronic public records services for law enforcement customers in the United States;
- b. by increasing the likelihood that LexisNexis will exercise market power unilaterally in the U.S. market for electronic public records services for law enforcement customers;
- c. by reducing the merged entity's incentives to improve service or product quality or to pursue further innovation in the U.S. market for electronic public records services for law enforcement customers; and
- d. by increasing the likelihood that law enforcement customers would be forced to pay higher prices for electronic public records services.

**VII. VIOLATIONS CHARGED**

17. The Acquisition described in Paragraph 9 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

18. The Acquisition described in Paragraph 9, if consummated, would constitute a violation of Section 7 of the Clayton Act, as

## Decision and Order

amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

**WHEREFORE, THE PREMISES CONSIDERED**, the Federal Trade Commission on this first day of June, 2009, issues its Complaint against said Respondents.

By the Commission.

**DECISION AND ORDER**

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Respondent Reed Elsevier, Inc., a subsidiary of Respondent Reed Elsevier Group plc, which is owned by Respondent Reed Elsevier NV and Respondent Reed Elsevier PLC (collectively “Reed Elsevier”) of Respondent ChoicePoint Inc., Respondent ChoicePoint Services Inc., and Respondent ChoicePoint Government Services LLC (collectively “ChoicePoint”), and Respondents having been furnished thereafter with a copy of the draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and that, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed a Consent Agreement, an admission by Respondents 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 Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint,

## Decision and Order

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons pursuant to section 2.34 of its Rules, now in further conformity with the procedure 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 Reed Elsevier NV is a corporation organized, existing, and doing business under and by virtue of the laws of The Netherlands, with its office and principal place of business located at Radarweg 29, 1043 NX Amsterdam, The Netherlands.

2. Respondent Reed Elsevier PLC is a public limited company, organized, existing, and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at 1-3 The Strand, WC2N 5JR, London, England.

3. Respondent Reed Elsevier Group plc is a public limited company, organized, existing, and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at 1-3 The Strand, WC2N 5JR, London, England.

4. Respondent Reed Elsevier Inc. is a corporation, organized, existing, and doing business under and by virtue of the laws of Massachusetts, with its office or principal place of business at 125 Park Avenue, Suite 2300, New York, New York 10017.



## Decision and Order

5. Respondent ChoicePoint Inc. is a corporation organized, existing and doing business under and by virtue of the laws of Georgia, with its office and principal place of business located at 1000 Alderman Drive, Alpharetta, Georgia 30005.

6. Respondent ChoicePoint Services Inc. is a corporation organized, existing and doing business under and by virtue of the laws of Georgia, with its office and principal place of business located at 1000 Alderman Drive, Alpharetta, Georgia 30005.

7. Respondent ChoicePoint Government Services LLC is a Georgia limited liability company with its office and principal place of business located at 1000 Alderman Drive, Alpharetta, Georgia 30005.

8. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents and the proceeding is in the public interest.

**ORDER****I.**

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

- A. “Reed Elsevier NV” means Reed Elsevier NV, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Reed Elsevier NV, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Reed Elsevier PLC” means Reed Elsevier PLC, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Reed Elsevier PLC, and the

## Decision and Order

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

- C. “Reed Elsevier Group plc” means Reed Elsevier Group plc, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Reed Elsevier Group plc, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. “Reed Elsevier Inc.” means Reed Elsevier Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions (including, but not limited to LexisNexis), groups, and affiliates controlled by Reed Elsevier Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- E. “ChoicePoint Inc.” means ChoicePoint, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by ChoicePoint Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- F. “ChoicePoint Services Inc.” means ChoicePoint Services Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by ChoicePoint Services Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- G. “ChoicePoint Government Services LLC” means ChoicePoint Government Services LLC, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by ChoicePoint Government Services LLC, and

## Decision and Order

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

- H. “Reed Elsevier” means Reed Elsevier NV, Reed Elsevier PLC, Reed Elsevier Group plc, and Reed Elsevier Inc.
- I. “ChoicePoint” means ChoicePoint Inc., ChoicePoint Services Inc., and ChoicePoint Government Services LLC.
- J. “Commission” means the Federal Trade Commission.
- K. “Respondents” means Reed Elsevier and ChoicePoint individually and collectively, *provided, however*, that, after the Closing Date, Respondents does not mean ChoicePoint Government Services LLC.
- L. “Acquisition” means the February 20, 2008, proposed acquisition by Reed Elsevier for which a filing was made pursuant to the Hart-Scott-Rodino Antitrust Improvements Act on February 28, 2008, pulled and refiled on March 28, 2008, by Reed Elsevier.
- M. “Assets to Be Divested” means the Employees, the CLEAR Assets, and the AutoTrackXP Assets; *provided, however*, that the use of the AutoTrackXP Assets, whether alone or with the CLEAR Assets, shall be limited to use only in the Field; *provided further* that Respondents shall retain joint ownership rights in the AutoTrackXP Software and AutoTrackXP Intellectual Property for use outside the Field.
- N. “AutoTrackXP Assets” means:
  - 1. the source code and the object code of those software components and data modules that host or support the execution and required data movements (i.e., “middleware”) for the application known as AutoTrackXP (“the AutoTrackXP Middleware”) and the documentation corresponding to the AutoTrackXP

## Decision and Order

Middleware, in each case as existing on the Closing Date;

2. the source code and the object code of the user interface programs known as AutoTrackXP (“the AutoTrackXP User Interface”) and the documentation corresponding to the AutoTrackXP User Interface, in each case as existing on the Closing Date;
  3. a license to third party software used with the AutoTrackXP Software in the Field, excluding commercially available software;
  4. access to all AutoTrackXP Data during the term of the Transition Services Agreement included in the Purchase Agreement attached to this Order as non-public Appendix 1, or, if Thomson Reuters is not the Commission-approved Acquirer, for a period of two (2) years;
  5. all rights to sue for infringement or misappropriation of any of the AutoTrackXP Intellectual Property in the Field; and
  6. all services and sales contracts relating to the use of the AutoTrackXP Software in the Field, if any.
- O. “AutoTrackXP Data” means all data used in connection with the AutoTrackXP Software in the Field, including, but not limited to data concerning individuals, businesses, and entities.
- P. “AutoTrackXP Intellectual Property” means all Intellectual Property that (1) is embodied by or used in the AutoTrackXP Software, or (2) has claims that cover the AutoTrackXP Software or the use thereof, in each case as existing on the Closing Date;

## Decision and Order

- Q. “AutoTrackXP Software” means the AutoTrackXP Middleware and the AutoTrackXP User Interface.
- R. “CLEAR Assets” means:
1. the source code and the object code of the user interface programs known as Consolidated Lead Evaluation and Reporting (“CLEAR”) and launched as the commercial product “ChoicePoint CLEAR” on May 28, 2008 (“the CLEAR user Interface”), and the documentation corresponding to the CLEAR User Interface, in each case as existing on the Closing Date;
  2. all Intellectual Property that (i) is embodied by or used in the CLEAR User Interface, or (ii) has claims that cover the CLEAR User Interface or the use thereof, together (“the CLEAR User Interface Intellectual Property”);
  3. a license to third party software that is used with the CLEAR User Interface, excluding commercially available software;
  4. access to all CLEAR Data during the term of the Transition Services Agreement included in the Purchase Agreement attached to this Order as non-public Appendix 1, or, if the Commission-approved Acquirer is not Thomson Reuters, for a period of two (2) years;
  5. all rights to sue for past infringement or misappropriation of the CLEAR User Interface and the CLEAR User Interface Intellectual Property; and
  6. all services and sales contracts for products or services relating to the use of the CLEAR User Interface, if any.
- S. “CLEAR Data” means all data used in connection with the CLEAR User Interface, including, but not limited to data concerning individual, businesses, and entities.

## Decision and Order

- T. “Closing Date” means the date on which Respondents (or a Divestiture Trustee) and a Commission-approved Acquirer consummate a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey the Assets to Be Divested and , if Thomson Reuters is not the Commission-approved Acquirer, the Supplemental Assets, pursuant to this Order.
- U. “Commission-approved Acquirer” means the following: (1) an entity that is specifically identified in this Order to acquire particular assets that the Respondents are required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order and that has been approved by the Commission to accomplish the requirements of this Order in connection with the Commission’s determination to make this Order final; or (2) an entity approved by the Commission to acquire particular assets that the Respondents are required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.
- V. “Confidential Business Information” means all information owned by, or in the possession or control of, Respondents that is not in the public domain related to the development, marketing, commercialization, distribution, importation, exportation, cost, pricing, supply, sales, sales support, or use of the AutoTrackXP Assets and the Clear Assets.
- W. “Day(s)” means the period of time prescribed under this Order as computed pursuant to 16 C.F.R. § 4.3 (a).
- X. “Direct Cost” means the cost of direct labor and direct material used to provide the relevant assistance or service, *provided, however*, that where the costs associated with the provision of the relevant assistance or service are allocated costs rather than direct costs, then Direct Cost means the amount of cost allocated to the provision of the relevant assistance or service calculated in accordance with reasonable cost allocation methodologies, and, if Thomson

## Decision and Order

Reuters is not the Commission-approved Acquirer, any controversy, dispute, or claim to be resolved by an independent arbitrator, whose resolution shall be conclusive and binding upon the parties.

- Y. “Divestiture Trustee” means a trustee appointed by the Commission pursuant to the relevant provisions of this Order.
- Z. “Effective Date” means the date on which the Acquisition occurs.
- AA. “Employees” means the employees identified in the non-public Appendix II attached to this Order.
- BB. “Field” means Public Records Services provided to (1) Governmental Agencies and (2) any systems integrator, contractor, or outsourcer accessing content or services for the purpose of servicing any Governmental Agency.
- CC. “Governmental Agency” means any (1) federal, state, local, municipal, foreign, or other government; (2) federal, state, local or foreign governmental or quasi-governmental authority of any nature (including any agency, branch, department, board, commission, court, tribunal or the Federal Reserve System Board of Governors, and the twelve regional Federal Reserve Banks); or (3) body exercising, or entitled to exercise, any administrative, executive, judicial, legislative, police, regulatory, or taxing authority or power, including any court or arbitrator.
- DD. “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.
- EE. “Intellectual Property” means any or all of the following and all rights arising out of or associated therewith: (1) all

## Decision and Order

patents and applications therefor and all reissues, divisions, renewals, extensions, provisionals, continuations and continuations-in-part thereof; (2) all inventions (whether patentable or not), invention disclosures, improvements, proprietary information, know-how, technology, technical data and customer lists, and all documentation relating to any of the foregoing (exclusive, however, of all databases and data collections and all rights therein); (3) all copyrights, copyright registrations and applications therefor, and all other rights corresponding thereto; (4) all industrial designs and any registrations and applications therefor; (5) all internet uniform resource locators, domain names, trade names, logos, slogans, designs, common law trademarks and service marks, trademark and service mark registrations and applications therefor; (6) all moral and economic rights of authors and inventors, however denominated; and (7) any similar or equivalent rights to any of the foregoing; *provided, however*, that except with respect to the historical data listed on Schedule G to the Software Joint Ownership, Trademark Assignment, and Trademark License Agreement (subject to the terms of use contained therein) of the Purchase Agreement, Intellectual Property does not include rights in and to data or content used or distributed in connection with the Software.

- FF. “Interim Monitor” means any monitor appointed pursuant to the relevant provisions of this Order.
- GG. “Law” means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Governmental Entity having the effect of law.
- HH. “Marketing Materials” means all marketing materials related to the Assets to Be Divested and, if Thomson Reuters is not the Commission-approved Acquired, the Supplemental Assets, as of the Closing Date, including, without limitation, all advertising materials, training materials, product data, price lists, mailing lists, sales materials (e.g., detailing



## Decision and Order

reports; vendor lists; sales data; reimbursement data), marketing information (e.g., competitor information; research data; market intelligence reports; statistical programs (if any) used for marketing and sales research; customer information, including customer sales information; sales forecasting models; and advertising and display materials; promotional and marketing materials, and other similar materials.

- II. “Public Records Services” means an integrated solution utilizing multiple sources of data and search, retrieval, linking, and reporting analytics concerning individuals, businesses or other organizations, and property.
- JJ. “Purchase Agreement” means the Membership Interest Purchase Agreement, by and among Reed Elsevier Inc., ChoicePoint, Thomson Reuters, and Thomson Reuters U.S. Inc., dated as of August 29, 2008, and amendments, exhibits, attachments, agreements, and schedules thereto (including, without limitation, the Software Joint Ownership, Trademark Assignment, and Trademark License Agreement, the Transition Services Agreement, and the Service Supply Agreement) related to the AutoTrackXP Assets to Be Divested and the CLEAR Assets to Be Divested, that have been approved by the Commission to accomplish the requirements of this Order. The Purchase Agreement is attached to this Order as non-public Appendix I.
- KK. “Remedial Agreement” means the following: (1) the Purchase Agreement; and/or (2) any agreement between the Respondent(s) and a Commission-approved Acquirer (or between a Divestiture Trustee and a Commission-approved Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets to be assigned, granted, licensed, divested, transferred, delivered,

## Decision and Order

or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of this Order.

LL. “Software” means the AutoTrackXP Software and the CLEAR User Interface.

MM. “Supplemental Assets” means the following, to the extent and in the form such assets are in the possession of, or will become in the possession of Reed Elsevier pursuant to the Acquisition, and to the extent such assets are requested by a Commission-approved Acquirer other than Thomson Reuters:

1. past and present lists of customers for AutoTrackXP products or services in the Field, including the name, address, and relevant contact person of each such customer, a detailed list of each prospective customer in the Field of ChoicePoint that has previously received a sales quote for AutoTrackXP products or services from ChoicePoint including the name, address and relevant contact person of each prospective customer of AutoTrackXP products or services accompanied by all ChoicePoint quote reports, and all other data and information relating to said customers and ChoicePoint sales activities relating thereto;
2. all vendor lists detailing the name, address, and relevant contact person for each past and present vendor supplying to ChoicePoint products or services relating to the AutoTrackXP Software;
3. all Marketing Materials related to the use of the AutoTrackXP Software in the Field;
4. as existing on the Closing Date, all data and information relating to any of ChoicePoint’s approvals, clearances, certifications, qualifications, licenses, registrations, permits, franchises, product registrations or

## Decision and Order

authorizations issued by any federal, state, municipal, or foreign authority, or any third party test house, registrar or certification body, relating to the use of the AutoTrackXP Software in the Field;

5. past and present customer lists for products or services related to the CLEAR User Interface, including the name, address, and relevant contact person of each such customer, a detailed list of each prospective customer of ChoicePoint that has previously received a sales quote for products or services related to the CLEAR User Interface from ChoicePoint including the name, address and relevant contact person of each prospective customer of products or services related to the CLEAR User Interface accompanied by all ChoicePoint quote reports, and all other data and information relating to said customers and ChoicePoint sales activities relating thereto to the extent and in the form such information was provided to Reed Elsevier pursuant to the Acquisition;
6. all vendor lists detailing the name, address, and relevant contact person for each past and present vendor supplying to ChoicePoint products or services related to the CLEAR User Interface;
7. all Marketing Materials for products or services related to the CLEAR User Interface;
8. as existing on the Closing Date, all data and information relating to any of ChoicePoint's approvals, clearances, certifications, qualifications, licenses, registrations, permits, franchises, product registrations or authorizations issued by any federal, state, municipal, or foreign authority, or any third party test house, registrar or certification body, relating to the CLEAR User Interface and the CLEAR User Interface Intellectual Property;

## Decision and Order

9. as existing on the Closing Date, all knowhow, goodwill, technology, trade secrets technical information, protocols, quality control information relating to the AutoTrackXP Assets and the CLEAR Assets, and the modifications or improvements thereto; and
  10. as existing on the Closing Date, all Intellectual Property licensed to a Respondent and used with the AutoTrackXP Assets or the CLEAR Assets, to the extent the licensor will agree to the transfer, but excluding commercially available software and excluding modifications and improvements to the Intellectual Property that are not licensed to a Respondent.
- NN. "Thomson Reuters" means Thomson Reuters (Legal) Inc., a corporation organized under the laws of Minnesota, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Thomson Reuters (Legal) Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- OO. "Trademark Term" means two (2) years from the Effective Date.

## Decision and Order

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

- A. Not later than fifteen (15) Days after the Effective Date, Respondents shall divest the Assets to Be Divested, absolutely and in good faith, to Thomson Reuters pursuant to and in accordance with the Purchase Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of Thomson Reuters or to reduce any obligations of the Respondents under such agreement), and such agreement, if it becomes the Remedial Agreement related to the Assets to Be Divested, is incorporated by reference into this Order and made a part hereof. If Respondents do not divest the Assets to Be Divested to Thomson Reuters within fifteen (15) Days after the Effective Date, the Commission may appoint a Divestiture Trustee to divest the Assets to Be Divested;

*provided, however,* that if Respondents have divested the Assets to Be Divested to Thomson Reuters after the Commission has accepted this Order for public comment but prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Thomson Reuters is not an acceptable purchaser of the Assets to Be Divested, then Respondents shall immediately rescind the transaction with Thomson Reuters and shall divest the Assets to Be Divested and the Supplemental Assets within six (6) months from the date the Order becomes final, absolutely and in good faith, at no minimum price, to a Commission-approved Acquirer and only in a manner that receives the prior approval of the Commission;

*provided further* that if the Respondents have divested the Assets to Be Divested to Thomson Reuters after the

## Decision and Order

Commission has accepted this Order for public comment but prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies the Respondents that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct the Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Assets to Be Divested to Thomson Reuters (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

- B. Respondents shall comply with all terms of the Remedial Agreement which shall be incorporated by reference and made a part of this Order. Failure by Respondents to perform under or comply with the Remedial Agreement shall also constitute a violation of this Order. Notwithstanding any paragraph, section, or other provision of the Remedial Agreement, Respondents shall not, without the prior approval of the Commission, modify any term of the Remedial Agreement or fail to satisfy each condition to the Commission-approved Acquirer's obligation to acquire the Assets to Be Divested, and, if Thomson Reuters is not the Commission-approved Acquirer, the Supplemental Assets (in each case whether or not waived). The terms of the Remedial Agreement shall not be construed to vary from or contradict the terms of this Order.
- C. Respondents shall:
1. submit to the Commission-approved Acquirer, at Respondents' expense, all Confidential Business Information;
  2. deliver such Confidential Business Information as follows: (1) in good faith; (2) as soon as practicable, avoiding any delays in transmission of the respective

## Decision and Order

information; and (3) in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;

3. pending complete delivery of all such Confidential Business Information to the Commission-approved Acquirer, provide the Commission-approved Acquirer and the Interim Monitor (if any has been appointed) with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files related to the Assets to Be Divested and, if the Commission-approved Acquirer is not Thomson Reuters, the Supplemental Assets that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order;
4. not use, directly or indirectly, any such Confidential Business Information, other than as necessary to comply with the following: (1) the requirements of this Order; (2) the Respondents' obligations to the Commission-approved Acquirer under the terms of any Remedial Agreement related to the Assets to Be Divested and, if Thomson Reuters is not the Commission-approved Acquirer, the Supplemental Assets; or (3) applicable Law; *provided, however*, that Respondents may use Confidential Business Information which does not relate solely to the AutoTrackXP Assets in the Field during the Trademark Term;
5. not disclose or convey any such Confidential Business Information, directly or indirectly, to any person except the Commission-approved Acquirer; and
6. provide written notification of the restrictions on the use of the Confidential Business Information to all Respondents' employees who are involved in the development, distribution, sale, or marketing of the

## Decision and Order

Assets to Be Divested and the Supplemental Assets or who may have Confidential Business Information [“Designated Employees”]; and Respondents shall require each Designated Employee to execute an acknowledgment of his or her obligation regarding the Confidential Business Information. Respondents shall provide a copy of such notification to the Commission-approved Acquirer. Respondents shall maintain complete records at the its principal place of business regarding the provision of notification to Designated Employees and shall provide an officer’s certification to the Commission stating that such notification program has been implemented and is being complied with. Respondents shall provide the Commission-approved Acquirer with copies of all certifications, notifications and reminders sent to Designated Employees.

- D. If the Commission-approved Acquirer is not Thomson Reuters:
1. for a period of up to two (2) years from the Closing Date, upon reasonable notice and request by the Commission-approved Acquirer, Respondents shall make available to the Commission-approved Acquirer, at no greater than Direct Cost, such personnel, technical support, assistance, and training to enable the Commission-approved Acquirer to implement the Assets to Be Divested and the Supplemental Assets; and
  2. no later than ten (10) days before the Closing Date and for a period of two (2) years from the date the Order becomes final use commercially reasonable efforts (1) to license to the Commission-approved Acquirer the AutoTrackXP Data and the CLEAR Data that the Respondents own or control; (2) to obtain consents from the vendor or supplier parties to each of the contracts for the AutoTrackXP Data and the CLEAR Data for the supply by the Respondents of the data, content, source



## Decision and Order

documents, and other information (“Data”) covered by such contracts for use in the provision of Public Records Services in the Field and any redistribution rights to the contributed content to the maximum extent allowable under each such Data contract with Respondents; and (3) in assisting the Commission-approved Acquirer in reaching agreements directly with the vendors or suppliers party to each of the contracts for AutoTrackXP Data and CLEAR Data as promptly as possible, including waiving any exclusivity provisions with such third party, as needed.

3. Respondents shall:
  - a. no later than ten (10) days before the Closing Date; (1) provide to the Commission-approved Acquirer a list of all Employees; (2) allow the Commission-approved Acquirer an opportunity to interview any Employee; and (3) allow the Commission-approved Acquirer to inspect the personnel files and other documentation relating to such Employees, to the extent permissible under applicable laws;
  - b. (1) not offer any incentive to any Employee to decline providing employee services to the Commission-approved Acquirer; (2) remove any contractual impediments with Respondents, that may deter any Employee from providing employee services to the Commission-approved Acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondents that would affect the ability of the Employees to provide employee services to the Commission-approved Acquirer; and (3) not interfere with any Employee providing employee services to the Commission-approved Acquirer; and

## Decision and Order

- c. for a period of one (1) year from the date this Order becomes final, not, directly or indirectly, enter into any arrangement for the services of any Employee providing employee services to the Commission-approved Acquirer, unless the services of such Employee have been terminated by the Commission-approved Acquirer without that Employee's consent.
- E. Pending divestiture of the Assets to Be Divested and the Supplemental Assets, Respondents shall take such actions as are necessary to maintain the viability, marketability, and competitiveness of the Assets to Be Divested and the Supplemental Assets, and to prevent the destruction, removal, deterioration, or impairment of any of the Assets to Be Divested or any of the Supplemental Assets.
- F. The purpose of the divestiture of the Assets to Be Divested and, if Thomson Reuters is not the Commission-approved Acquirer, the Supplemental Assets is to ensure the continued use of the assets in the same business in which the Assets to Be Divested and the Supplemental Assets were engaged at the time of the announcement of the proposed Acquisition by Respondents and to remedy the lessening of competition alleged in the Commission's complaint.

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

- A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint one or more Interim Monitors to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order and the Remedial Agreement.
- B. The Commission shall select the Interim Monitor, subject to the consent of Respondents, which consent shall not be

## Decision and Order

unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) Days after notice by the staff of the Commission to Respondents of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.

- C. Not later than ten (10) Days after the appointment of the Interim Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents' compliance with the relevant requirements of the Order in a manner consistent with the purpose of the Order.
- D. If one or more Interim Monitors are appointed pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of each Interim Monitor:
  - 1. The Interim Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and asset maintenance obligations and related requirements of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Order, and in consultation with the Commission, including, recommending that the Commission direct the Respondents to effect such modifications to the manner of divestiture of the Assets to Be Divested to Thomson Reuters (including, but not limited to, entering into additional agreements or arrangements) as are necessary to satisfy the requirements of this Order;

## Decision and Order

2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission;
3. The Interim Monitor shall serve until the completion by Respondents of the divestiture of the Assets to Be Divested, and, if Thomson Reuters is not the Commission-approved Acquirer, the Supplemental Assets pursuant to the Decision and Order in a manner that fully satisfies the requirements of the Order and notification by the Commission-approved Acquirer to the Interim Monitor that it is fully capable of implementing and marketing the Assets to Be Divested and, if Thomson Reuters is not the Commission-approved Acquirer, the Supplemental Assets independently of Respondents. As necessary or appropriate, the Commission may extend or modify this period to accomplish the purposes of the Order;
4. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with their obligations under the Order, including, but not limited to, their obligations related to the relevant assets. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Order;
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

## Decision and Order

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 gross negligence, willful or wanton acts, or bad faith by the Interim Monitor;
7. Respondents shall report to the Interim Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondents, and any reports submitted by the Commission-approved Acquirer with respect to the performance of Respondents' obligations under the Order or the Remedial Agreement. Within one (1) month from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Orders; and
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.

## Decision and Order

- E. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.
- F. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.
- G. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.
- H. The Interim Monitor appointed pursuant to this Order may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order.

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

- A. If Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver or otherwise convey relevant assets as required by this Order, the Commission may appoint a Divestiture Trustee(s) to assign, grant, license, divest, transfer, deliver or otherwise convey the assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed pursuant to each of the relevant Paragraphs in a manner that satisfies the requirements of each such Paragraph. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the

## Decision and Order

Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver or otherwise convey the relevant assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) Days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- C. Not later than ten (10) Days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by the Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

## Decision and Order

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed.
2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court; *provided, however*, the Commission may extend the divestiture period only two (2) times.
3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or 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.



## Decision and Order

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

## Decision and Order

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 gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.
7. In the event that the Divestiture Trustee determines that he or she is unable to assign, grant, license, divest, transfer, deliver or otherwise convey the relevant assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed in a manner that preserves their marketability, viability and competitiveness and ensures their continued use in the development, distribution, marketing, promotion, sale, or after-sales support of Public Records Services provided to customers in the Field, the Divestiture Trustee may assign, grant, license, divest, transfer, deliver or otherwise convey such additional assets of Respondents and effect such arrangements as are necessary to satisfy the requirements of this Order.
8. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed by this Order.
9. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60)

## Decision and Order

Days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

10. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph.
- F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.
- G. The Divestiture Trustee appointed pursuant to this Paragraph may be the same person appointed as Interim Monitor pursuant to the relevant provisions of this Order.

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

- A. Within five (5) Days of the Acquisition, Respondents shall submit to the Commission a letter certifying the date on which the Acquisition occurred.
- B. Within thirty (30) Days after the date this Order becomes final, and every sixty (60) Days thereafter until Respondents have fully complied with Paragraph II of this Order, Respondents shall submit to the Commission a verified

## Decision and Order

written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order. Respondents shall submit at the same time a copy of their report concerning compliance with this Order to the Interim Monitor, if any Interim Monitor has been appointed. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraph II, including a description of all substantive contacts or negotiations related to the divestiture of the relevant assets and the identity of all parties contacted. Respondents shall include in their reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing the obligations.

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

## Decision and Order

**VI.**

**IT IS FURTHER ORDERED** that Respondents shall provide a copy of this Order to each of Respondent's officers, employees, or agents having managerial responsibility for any of Respondent's obligations under Paragraphs II through V of this Order, no later than ten days from the date this Order becomes final.

**VII.**

**IT IS FURTHER ORDERED** that each Respondent shall notify the Commission:

- A. of any change in its principal address within twenty (20) days of such change in address; and
- B. at least thirty (30) days prior to any proposed: (1) dissolution of Respondent; (2) acquisition, merger, or consolidation of Respondent; or (3) any other change in Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

**VIII.**

**IT IS FURTHER ORDERED** that, for the purpose 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 a Respondent, that Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

1. access, during office hours of Respondent, and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession, or under the control, of Respondent relating

## Decision and Order

to compliance with this Order, which copying services shall be provided by Respondent at its expense; and

2. to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

**IX.**

**IT IS FURTHER ORDERED** that this Order shall terminate on June 1, 2019.

By the Commission.

**CONFIDENTIAL APPENDIX I****PURCHASE AGREEMENT**

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

**CONFIDENTIAL APPENDIX II****EMPLOYEES**

**[Redacted From the 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 Orders (“Consent Agreement”) from Reed Elsevier NV, Reed Elsevier PLC, Reed Elsevier Group plc, and Reed Elsevier Inc. (collectively “Reed Elsevier”), and ChoicePoint Inc., ChoicePoint Services Inc., and ChoicePoint Government Services LLC (collectively “ChoicePoint”). The purpose of the proposed Consent Agreement is to remedy the anticompetitive effects that would otherwise result from Reed Elsevier’s proposed acquisition of ChoicePoint in the U.S. market for electronic public records services to law enforcement customers. Under the terms of the proposed Consent Agreement, Reed Elsevier and ChoicePoint are required to divest assets related to ChoicePoint’s AutoTrackXP and Consolidated Lead Evaluation and Reporting (“CLEAR”) electronic public records services.

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, modify it, or make it final.

Pursuant to an Agreement and Plan of Merger dated February 20, 2008, Reed Elsevier has agreed to acquire ChoicePoint for approximately \$4.1 billion (“Proposed Acquisition”). The Commission’s complaint alleges that the Proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening competition in the market for electronic public record services sold to law enforcement customers in the United States. The proposed

## Analysis to Aid Public Comment

Consent Agreement would remedy the alleged violations by replacing the competition that would be lost in this market as a result of the Proposed Acquisition.

**II. The Parties**

Reed Elsevier is a worldwide, leading information services provider and publisher with headquarters in London, Amsterdam, and New York. Reed Elsevier's LexisNexis division provides information and risk management products and services to financial, business, law enforcement, and government customers. LexisNexis's Risk and Information Analytics Group ("RIAG") provides public records services and risk management and information analytics applications designed to assist customers in managing risk through fraud detection and prevention, identity authentication and verification, and background screening. Reed Elsevier reported revenues of , 4.6 billion (\$9.3 billion) for 2007.

ChoicePoint, headquartered in Alpharetta, Georgia, is a leading provider of a variety of services used by customers to manage economic risk. ChoicePoint has four primary service groups: Insurance Services, Screening and Authentication Services, Business Services, and Marketing Services. For 2007, ChoicePoint reported revenues of \$982 million.

**III. Electronic Public Records Services to Law Enforcement Customers**

Electronic public records encompasses a wide array of public and non-public records about individuals and businesses, including credit header data, criminal records, motor vehicle records, property records, and employment records. Electronic public records service providers such as LexisNexis and ChoicePoint compile these records, either by going directly to the source or by purchasing these records from third parties, and present them to end users via an online, web-based interface.



## Analysis to Aid Public Comment

Law enforcement customers utilize electronic public records services as an investigatory tool in complex criminal investigations, such as combating terrorism, locating fugitives, and detecting illegal drug transactions. Unlike other consumers of electronic public records services, such as collections agencies who use these services for simple and discrete tasks such as locating an individual, law enforcement customers use electronic public records services to uncover previously unknown information and to generate leads in their investigations. Law enforcement customers, therefore, only work with electronic public records services providers with the most comprehensive, up-to-date, and accurate records available, as deficiencies in the underlying database could cost them a critical lead in an investigation. In addition to demanding the most complete database of electronic public records, law enforcement customers require that the provider have sophisticated search algorithms, sometimes called analytics, that identify and display non-obvious relationships between records.

The relevant geographic market in which to assess the impact of the Proposed Acquisition is the United States. Market participants indicate that successful participation in this market requires an established U.S. sales and support presence. As a practical matter, there are no firms serving non-U.S. customers that a law enforcement customer located in the United States could turn to as an alternative.

The market for electronic public records services to law enforcement customers is highly concentrated, with LexisNexis, primarily through its Accurint for Law Enforcement service, and ChoicePoint, with its AutoTrackXP service, accounting for over 80 percent of this approximately \$60 million market. The Proposed Acquisition would significantly increase market concentration and eliminate substantial competition between the only two significant suppliers of electronic public records services to law enforcement customers in the United States.

The anticompetitive implications of such a dramatic increase in concentration are buttressed by evidence of intense head-to-head

## Analysis to Aid Public Comment

competition that would be lost with the Proposed Acquisition. Law enforcement customers have benefitted from the rivalry between LexisNexis and ChoicePoint in the form of lower prices, improved products, and better service and support. In addition, this fierce competition prompted ChoicePoint to introduce CLEAR -- a new and advanced electronic public records service -- designed specifically for law enforcement customers. Left unremedied, the Proposed Acquisition likely would cause anticompetitive harm by enabling LexisNexis to profit by unilaterally raising the prices of electronic public records services to law enforcement customers, as well as reducing its incentives to innovate and develop new services.

New entry or fringe expansion into the market for the sale of electronic public records services to law enforcement customers sufficient to deter or counteract the competitive effects of the proposed transaction is unlikely to occur within two years. Firms existing in the market would need to improve their software and underlying analytics substantially, increase the breadth and depth of their public records data, and overcome the resistance of many law enforcement customers to switch to a product that lacks the track record of effectively serving the needs of the law enforcement community in order to seriously contend for the customers that currently work with LexisNexis or ChoicePoint. As a result, new entry or fringe expansion sufficient to achieve a significant market impact within two years is unlikely.

**IV. The Consent Agreement**

The proposed Consent Agreement effectively remedies the Proposed Acquisition's likely anticompetitive effects in the market for electronic public records services to law enforcement customers. The proposed Consent Agreement preserves competition by requiring the divestiture of assets related to ChoicePoint's AutoTrackXP and CLEAR electronic public records services to Thomson Reuters Legal Inc. ("West") within fifteen (15) days after the Proposed Acquisition is consummated.

## Analysis to Aid Public Comment

The Commission is satisfied that West is a well-qualified acquirer of the AutoTrackXP and CLEAR assets. West has the resources, capabilities, experience, and reputation to ensure that it will be an effective competitor in the market for electronic public records services to law enforcement customers. West, headquartered in Eagan, Minnesota, is a subsidiary of Thomson Reuters, one of the world's leading information service providers to the legal and business community. West already has a large and experienced sales force with existing relationships with many law enforcement agencies which use West's legal research services. With the divested assets, West will be particularly well-situated to replicate ChoicePoint's success and compete against the combined firm immediately after the Proposed Acquisition.

The proposed Consent Agreement contains several provisions designed to ensure that the divestiture of the AutoTrackXP and CLEAR assets to West is successful. First, the proposed Consent Agreement requires Reed Elsevier to provide various transitional services such as customer service, billing support, and database and network maintenance for up to two years to enable West to compete against Reed Elsevier immediately following the divestiture. Second, the proposed Consent Agreement ensures that Reed Elsevier will maintain the viability and marketability of the AutoTrackXP and CLEAR assets prior to the divestiture. Finally, the proposed Consent Agreement allows the Commission to appoint an Interim Monitor to ensure that Reed Elsevier fulfills all of its obligations related to the divestiture of the assets.

In order to ensure that the Commission remains informed about the status of the AutoTrackXP and CLEAR assets pending divestiture, and about the efforts being made to accomplish the divestiture, the proposed Consent Agreement requires Reed Elsevier to file periodic reports with the Commission until the divestiture is accomplished.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement, and it is not intended to constitute

*Analysis to Aid Public Comment*

an official interpretation of the proposed Consent Agreement or to modify its terms in any way.

## Complaint

## IN THE MATTER OF

**JAMES B. NUTTER & COMPANY**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND THE  
GRAMM-LEACH-BLILEY ACT SAFEGUARDS RULE*Docket No. C-4258; File No. 072 3108**Complaint, June 12, 2009 – Decision, June 12, 2009*

This consent order addresses James B. Nutter & Company's ("JBN") failure to provide reasonable and appropriate security for sensitive information obtained from or about its consumers when making and servicing mortgage loans throughout the United States. According to the complaint JBN failed to: (1) develop, implement, and maintain a comprehensive written information security program; (2) identify reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information; (3) design and implement information safeguards to control the risks to customer information and regularly test and monitor them; (4) investigate, evaluate, and adjust the information security program in light of known or identified risks; and (5) oversee service providers and require them by contract to implement safeguards to protect respondent's customer information. Additionally, disseminated privacy notices that did not comply with the GLB Privacy Rule. The order requires JBN to establish and maintain a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of sensitive consumer information (whether in paper or electronic format) and prohibits JBN from violating any provision of the GLB Safeguards Rule and Privacy Rule.

*Participants*

For the *Commission*: *Loretta H. Garrison and Alain Sheer.*

For the *Respondent*: *Jonathan Rosen, Shook, Hardy & Bacon, L.L.P.*

**COMPLAINT**

The Federal Trade Commission ("Commission"), having reason to believe that James B. Nutter & Company has violated the provisions of the Commission's Standards for Safeguarding

## Complaint

Customer Information Rule (“Safeguards Rule”), 16 C.F.R. Part 314, issued pursuant to Title V, Subtitle A of the Gramm-Leach-Bliley Act (“GLB Act”), 15 U.S.C. § 6801-6809, and the Commission’s Privacy of Customer Financial Information Rule (“Privacy Rule”), 16 C.F.R. Part 313, issued pursuant to the GLB Act; and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent James B. Nutter & Company is a privately-held Missouri company with its principal office or place of business at 4153 Broadway, Kansas City, Missouri 64111.

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 (“FTC Act”).

3. Respondent makes and services single-family residential mortgage loans throughout the United States.

4. Respondent routinely collects sensitive personal information from or about consumers. The information includes, among other things: name; street and email addresses; telephone number; Social Security number; driver’s license number; date of birth; bank and credit card account numbers; mortgage information; and income, debt, employment, and credit histories (collectively, “personal information”).

5. Respondent operates a computer network in conducting its lending business. Among other things, it uses the network to: (1) obtain personal information from consumers (through [www.jamesbnutter.com](http://www.jamesbnutter.com)) and others, such as credit reporting agencies; (2) maintain and store personal information; (3) prepare paper documents that contain personal information, such as loan applications; (4) approve and decline loan applications; (5) store electronic copies of closing documents for approved loans; (6) service loans and maintain loan servicing histories; and (7) prepare back-up tapes that contain the personal information of borrowers.

## Complaint

Further, respondent uses the network to provide email service and internet access.

6. Since at least September 1, 2004 until at least November 2008, respondent engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for personal information. In particular, respondent:

a. did not develop, implement, and maintain a comprehensive written information security program;

b. did not implement reasonable policies and procedures in areas such as employee training in safeguarding personal information;

c. stored personal information in clear readable text on its computer network, creating an unnecessary risk to the information;

d. did not employ sufficient measures to prevent or detect unauthorized access to personal information on its computer network or to conduct security investigations, such as monitoring and controlling connections between the network and the internet or regularly reviewing activity on the network;

e. did not assess risks to the personal information it collected and stored on its computer network and in paper files; and

f. provided back-up tapes containing personal information in clear readable text to a third-party service provider but did not require the service provider by contract to protect the security and confidentiality of the information.

As a result, an intruder was able to direct respondent's computer network to send millions of outgoing spam emails without its knowledge, and could have accessed personal information without authorization.

## Complaint

7. Respondent began providing privacy notices to customers in 2004. The notices it provided: (1) did not set out respondent's security practices; (2) did not accurately inform customers that respondent disclosed customer information to third parties, such as credit reporting agencies; and (3) informed customers that they had 30 days in which to exercise their opt-out rights, even though the Privacy Rule provides that they can opt out at any time during the course of their loans.

**VIOLATIONS OF THE SAFEGUARDS RULE**

8. The Safeguards Rule, which implements Section 501(b) of the GLB Act, 15 U.S.C. § 6801(b), was promulgated by the Commission on May 23, 2002, and became effective on May 23, 2003. The Rule requires financial institutions to protect the security, confidentiality, and integrity of customer information by developing a comprehensive written information security program that contains reasonable administrative, technical, and physical safeguards, including: (1) designating one or more employees to coordinate the information security program; (2) identifying reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information, and assessing the sufficiency of any safeguards in place to control those risks; (3) designing and implementing information safeguards to control the risks identified through risk assessment, and regularly testing or otherwise monitoring the effectiveness of the safeguards' key controls, systems, and procedures; (4) overseeing service providers, and requiring them by contract to protect the security and confidentiality of customer information; and (5) evaluating and adjusting the information security program in light of the results of testing and monitoring, changes to the business operation, and other relevant circumstances.

9. Respondent is a "financial institution," as that term is defined in Section 509(3)(A) of the GLB Act.



## Complaint

10. As set forth in Paragraph 6, respondent failed to implement reasonable security policies and procedures, and thereby engaged in violations of the Safeguards Rule, by, among other things:

- a. failing to develop, implement, and maintain a comprehensive written information security program;
- b. failing to identify reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of personal information;
- c. failing to design and implement safeguards to control the risks to personal information and failing to regularly test and monitor them;
- d. failing to investigate, evaluate, and adjust the information security program in light of known or identified risks; and
- e. failing to oversee service providers and to require them by contract to implement safeguards to protect personal information.

**VIOLATIONS OF THE PRIVACY RULE**

11. The Privacy Rule, which implements Sections 501-509 of the GLB Act, 15 U.S.C. §§ 6801-6809, was promulgated by the Commission on May 24, 2000, and became effective on July 1, 2001. The Rule requires financial institutions to provide customers, no later than when a customer relationship arises and annually for the duration of that relationship, a notice that, among other things, sets out the institution's security practices, accurately describes its disclosures of customer information to third parties, and accurately informs customers of their opt-out rights. 16 C.F.R. Part 313.

12. As set forth in Paragraph 7, respondent violated the Privacy Rule by failing to provide privacy notices for several years after the Rule became effective, and thereafter by providing notices that failed to set out respondent's security practices; did not accurately

## Decision and Order

describe to customers that customer information would be disclosed to third parties, such as credit reporting agencies; and informed customers that they had 30 days in which to exercise their opt-out rights even though the Rule provides that they can opt out at any time during the course of their loans.

13. Pursuant to the GLB Act, violations of the Safeguards Rule and the Privacy Rule are enforced through the FTC Act.

**THEREFORE**, the Federal Trade Commission this twelfth day of June, 2009, has issued this complaint against respondent James B. Nutter & Company.

By the Commission.

**DECISION AND ORDER**

The Federal Trade Commission having initiated an investigation of certain acts and practices of the Respondent named in the caption hereof, and the Respondent having been furnished thereafter with a copy of a draft Complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the Respondent with violation of the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq*;

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

## Decision and Order

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

The Commission having thereafter considered the matter and having determined that it has reason to believe that the Respondent has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having thereupon accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its Complaint, makes the following jurisdictional findings and enters the following Order:

1. Respondent James B. Nutter & Company is a Missouri corporation with its principal office or place of business at 4153 Broadway, Kansas City, Missouri 64111.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

**ORDER****DEFINITIONS**

For purposes of this order, the following definitions shall apply:

1. "Personal information" shall mean individually identifiable information from or about an individual consumer including, but not limited to: (a) a first and last name; (b) a home or other physical address, including street name and name of city or town; (c) an email address or other online contact information, such as an instant messaging user identifier or a screen name; (d) a telephone number; (e) a Social Security number; (f) a driver's license number; (g) a bank, loan, mortgage, credit card, or debit card account number; (h) a persistent identifier, such as a customer number held in a

## Decision and Order

“cookie” or processor serial number, that is combined with other available data that identifies an individual consumer; or (i) any information that is combined with any of (a) through (h) above.

2. Unless otherwise specified, “respondent” shall mean James B. Nutter & Company and its subsidiaries, divisions, and affiliates, and successors and assigns.
3. All other terms are synonymous in meaning and equal in scope to the usage of such terms in the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 *et seq.*, or as may hereafter be amended.
4. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

**I.**

**IT IS ORDERED** that respondent, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall, no later than the date of service of this order, establish and implement, and thereafter maintain, a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers.

Such program, the content and implementation of which must be fully documented in writing, shall contain administrative, technical, and physical safeguards appropriate to the size and complexity of respondent’s operations, the nature and scope of respondent’s activities, and the sensitivity of the personal information collected from or about consumers, including:

- A. the designation of an employee or employees to coordinate and be accountable for the information security program;

## Decision and Order

- B. the identification of material internal and external risks to the security, confidentiality, and integrity of personal information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, and assessment of the sufficiency of any safeguards in place to control these risks. At a minimum, this risk assessment should include consideration of risks in each area of relevant operation, including, but not limited to: (1) employee training and management; (2) information systems, including network and software design, information processing, storage, transmission, and disposal; and (3) prevention, detection, and response to attacks, intrusions, or other systems failures;
- C. the design and implementation of reasonable safeguards to control the risks identified through risk assessment and regular testing or monitoring of the effectiveness of the safeguards' key controls, systems, and procedures;
- D. the development and use of reasonable steps to select and retain service providers capable of appropriately safeguarding personal information they receive from respondent, and requiring service providers by contract to implement and maintain appropriate safeguards; and
- E. the evaluation and adjustment of respondent's information security program in light of the results of the testing and monitoring required by sub-Part C, any material changes to respondent's operations or business arrangements, or any other circumstances that respondent knows or has reason to know may have a material impact on the effectiveness of respondent's information security program.

## Decision and Order

**II.**

**IT IS FURTHER ORDERED** that respondent, and its officers, agents, representatives, and employees, shall not, directly or through any corporation, subsidiary, division, or other device, violate any provision of:

- A. the Standards for Safeguarding Customer Information Rule, 16 C.F.R. Part 314; or
- B. the Privacy of Customer Financial Information Rule, 16 C.F.R. Part 313.

In the event that either of these Rules is hereafter amended or modified, compliance with that Rule as so amended or modified shall not be a violation of this order.

**III.**

**IT IS FURTHER ORDERED** that, in connection with its compliance with Parts I and IIA of this order, respondent, and its officers, agents, representatives, and employees, shall obtain initial and biennial assessments and reports (“Assessments”) from a qualified, objective, independent third-party professional, who uses procedures and standards generally accepted in the profession. The reporting period for the Assessments shall cover: (1) the first one hundred and eighty (180) days after service of the order for the initial Assessment, and (2) each two (2) year period thereafter for ten (10) years after service of the order for the biennial Assessments. Each Assessment shall:

- A. set forth the specific administrative, technical, and physical safeguards that respondent has implemented and maintained during the reporting period;
- B. explain how such safeguards are appropriate to the size and complexity of respondent’s operations, the nature and scope

## Decision and Order

of respondent's activities, and the sensitivity of the personal information collected from or about consumers;

- C. explain how the safeguards that have been implemented meet or exceed the protections required by Parts I and IIA of this order; and
- D. certify that respondent's security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of personal information is protected and has so operated throughout the reporting period.

Each Assessment shall be prepared and completed within sixty (60) days after the end of the reporting period to which the Assessment applies by a person qualified as a Certified Information System Security Professional (CISSP) or as a Certified Information Systems Auditor (CISA); a person holding Global Information Assurance Certification (GIAC) from the SysAdmin, Audit, Network, Security (SANS) Institute; or a similarly qualified person or organization approved by the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

Respondent shall provide the initial Assessment to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, within ten (10) days after the Assessment has been prepared. All subsequent biennial Assessments shall be retained by respondent until the order is terminated and provided to the Associate Director for Enforcement within ten (10) days of request.

**IV.**

**IT IS FURTHER ORDERED** that respondent shall maintain, and upon request, make available to the Federal Trade Commission for inspection and copying:

## Decision and Order

- A. for a period of five (5) years, a print or electronic copy of each document relating to compliance, including but not limited to documents, prepared by or on behalf of respondent that contradict, qualify, or call into question respondent's compliance with this order; and
- B. for a period of three (3) years after the date of preparation of each Assessment required under Part III of this order, all materials relied upon to prepare the Assessment, whether prepared by or on behalf of respondent, including but not limited to all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, and any other materials relating to respondent's compliance with Parts I and IIA of this order, for the compliance period covered by such Assessment.

**V.**

**IT IS FURTHER ORDERED** that respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. Respondent shall deliver this order to such current personnel within thirty (30) days after service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

**VI.**

**IT IS FURTHER ORDERED** that respondent shall notify the Commission at least thirty (30) days prior to any change in the company 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 company; 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 company name or address. *Provided, however,* that, with



## Decision and Order

respect to any proposed change in the company about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

**VII.**

**IT IS FURTHER ORDERED** that respondent 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 with this order.

**VIII.**

This order will terminate on June 12, 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 that is not named as a defendant in such complaint; and
- C. this order if such complaint is filed after the order has terminated pursuant to this Part.

*Provided, further*, that if such complaint is dismissed or a federal court rules that respondent 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

## Analysis to Aid Public Comment

the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

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

The Federal Trade Commission has accepted, subject to final approval, a consent agreement from James B. Nutter & Company (“JBN”).

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement’s proposed order.

The Commission’s proposed complaint alleges that JBN is in the business of making and servicing mortgage loans throughout the United states. In doing so, JBN routinely obtains information from or about its customers, including, but not limited to, name; address; Social Security number; financial information; employment history; credit scores; and information contained in credit reports.

The complaint further alleges that JBN engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for sensitive information from consumers and employees, in violation of the Gramm-Leach-Bliley (“GLB”) Act

## Analysis to Aid Public Comment

Safeguards Rule. In particular, JBN: (1) did not develop, implement, and maintain a comprehensive written information security program; (2) did not implement reasonable policies and procedures in areas such as employee training; (3) stored personal information in clear text on its computer network; (4) did not employ sufficient measures to prevent or detect unauthorized access to personal information on its computer network or to conduct security investigations; (5) did not assess risks to personal information it collected and stored on its computer network and in paper files; and (6) provided back-up tapes containing personal information in clear text to a third party service provider but did not require the service provider by contract to protect the security and confidentiality of the information.

According to the complaint, JBN's practices violated the Safeguards Rule by, among other things, failing to: (1) develop, implement, and maintain a comprehensive written information security program; (2) identify reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information; (3) design and implement information safeguards to control the risks to customer information and regularly test and monitor them; (4) investigate, evaluate, and adjust the information security program in light of known or identified risks; and (5) oversee service providers and require them by contract to implement safeguards to protect respondent's customer information.

In addition, the proposed complaint alleges that JBN disseminated privacy notices that did not comply with the GLB Privacy Rule. In particular: (1) JBN began providing notices in 2004 even though under the Rule notices were to be provided starting on July 1, 2001; and (2) the notices it provided did not: set out its security practices; accurately describe that customer information would be disclosed to third parties; or accurately inform customers that they could exercise their opt-out rights at any time during the course of their loans.

The proposed order applies to personal information from or about consumers that JBN collects in connection with its lending

## Analysis to Aid Public Comment

business. The proposed order contains provisions designed to prevent the company from engaging in the future in practices similar to those alleged in the complaint.

Part I of the proposed order requires JBN to establish and maintain a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of such information (whether in paper or electronic format) from or about consumers. The security program must contain administrative, technical, and physical safeguards appropriate to JBN's size and complexity, the nature and scope of its activities, and the sensitivity of the information collected from or about consumers and employees. Specifically, the order requires JBN to:

- Designate an employee or employees to coordinate and be accountable for the information security program.
- Identify material internal and external risks to the security, confidentiality, and integrity of customer information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, and assess the sufficiency of any safeguards in place to control these risks.
- Design and implement reasonable safeguards to control the risks identified through risk assessment, and regularly test or monitor the effectiveness of the safeguards' key controls, systems, and procedures.
- Develop and use reasonable steps to select and retain service providers capable of appropriately safeguarding personal information they receive from JBN and require service providers by contract to implement and maintain appropriate safeguards.
- Evaluate and adjust its information security programs in light of the results of testing and monitoring, any material changes to operations or business arrangements, or any other

## Analysis to Aid Public Comment

circumstances that it knows or has reason to know may have material impact on its information security program.

Part II of the order prohibits JBN from violating any provision of the GLB Safeguards Rule and Privacy Rule.

Part III of the proposed order requires JBN to obtain within one year, and on a biennial basis thereafter for a period of ten (10) years, an assessment and report from a qualified, objective, independent third-party professional, certifying, among other things, that: (1) it has in place a security program that provides protections that meet or exceed the protections required by Part I of the proposed order; and (2) its security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of sensitive consumer and employee information has been protected.

Parts IV through VIII of the proposed order are reporting and compliance provisions. Part IV requires JBN to retain documents relating to its compliance with the order. For most records, the order requires that the documents be retained for a five-year period. For the third-party assessments and supporting documents, JBN must retain the documents for a period of three years after the date that each assessment is prepared. Part V requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part VI ensures notification to the FTC of changes in company status. Part VII mandates that JBN submit a compliance report to the FTC within 60 days, and periodically thereafter as requested. Part VIII is a provision “sunsetting” the order after twenty (20) years, with certain exceptions.

## Analysis to Aid Public Comment

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.

## Complaint

## IN THE MATTER OF

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

*Docket No. C-4259; File No. 072 3119*  
*Complaint, June 18, 2009 – Decision, June 18, 2009*

This consent order addresses CVS Caremark Corporation's failure to provide reasonable and appropriate security for sensitive information routinely obtained from consumers and employees. The complaint alleges that CVS failed to: (1) implement policies and procedures to dispose securely of such information, including, but not limited to, policies and procedures to render the information unreadable in the course of disposal; (2) adequately train employees to dispose securely of such information; (3) use reasonable measures to assess compliance with its established policies and procedures for the disposal of such information; or (4) employ a reasonable process for discovering and remedying risks to such information. Additionally, CVS pharmacies discarded materials containing sensitive information in clear readable text in unsecured, publicly-accessible trash dumpsters on numerous occasions. The order prohibits misrepresentations about the security, confidentiality, and integrity of sensitive information and requires CVS to establish and maintain a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of sensitive personal information (whether in paper or electronic format) about consumers, employees, and those seeking to become employees.

*Participants*

For the *Commission*: *Loretta Garson and Alain Sheer.*

For the *Respondent*: *Anthony E. DiResta and Mark S. Melodia, ReedSmith LLP.*

**COMPLAINT**

The Federal Trade Commission (“Commission”), having reason to believe that CVS Caremark Corporation (“respondent” or “CVS”) has violated the provisions of the Federal Trade Commission Act,

## Complaint

and it appearing to the Commission that this proceeding is in the public interest, alleges:

5. Respondent CVS is a Delaware corporation with its principal office or place of business at One CVS Drive, Woonsocket, Rhode Island, 02895. It conducts business through several wholly-owned subsidiaries and limited liability companies, including, but not limited to, CVS Pharmacy, Inc.

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

**RESPONDENT’S BUSINESS**

7. At all relevant times, respondent has been in the business of selling prescription and non-prescription medicines and supplies, as well as other products. It operates, among other things, approximately 6,300 retail pharmacy stores in the United States (collectively, “CVS pharmacies”) and online and mail order pharmacy businesses. Respondent allows consumers buying products in CVS pharmacies to pay for their purchases with credit, debit and electronic benefit transfer cards (collectively, “payment cards”); insurance cards; personal checks; or cash.

8. In conducting its business, respondent routinely obtains information from or about its customers, including, but not limited to, name; telephone number; address; date of birth; bank account number; payment card account number and expiration date; driver’s license number or other government-issued identification; prescription information, such as medication and dosage, prescribing physician name, address, and telephone number, health insurer name, and insurance account number and policy number; and Social Security number (collectively, “personal information”). Respondent also collects sensitive information from or about its employees, including, but not limited to, Social Security number.



## Complaint

9. Respondent operates computer networks that connect various components of its business, including CVS pharmacies, parts of the online and mail order pharmacy businesses, corporate headquarters, and distribution centers. Among other things, respondent uses the networks to aggregate, store, and transmit personal information; fill orders for prescription medicines and supplies; and process sales, including to obtain authorization for payment card and insurance card transactions.

**RESPONDENT'S REPRESENTATIONS**

10. Since at least 2003, respondent has disseminated or caused to be disseminated statements and privacy policies, including, but not necessarily limited to, the following statement regarding the privacy and confidentiality of personal information:

CVS/pharmacy wants you to know that nothing is more central to our operations than maintaining the privacy of your health information ("Protected Health Information" or "PHI"). PHI is information about you, including basic information that may identify you and relates to your past, present, or future health or condition and the dispensing of pharmaceutical products to you. We take this responsibility very seriously. (CVS Privacy Policy, attached as Exhibit A.)

**RESPONDENT'S SECURITY PRACTICES**

11. Respondent has engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for personal information. Among other things, respondent has failed to: (1) implement policies and procedures to dispose securely of such information, including, but not limited to, policies and procedures to render the information unreadable in the course of disposal; (2) adequately train employees to dispose securely of such information; (3) use reasonable measures to assess compliance with its established policies and procedures for the disposal of such

## Complaint

information; or (4) employ a reasonable process for discovering and remedying risks to such information.

12. As a result of the failures set forth in Paragraph 7, CVS pharmacies discarded materials containing personal information in clear readable text (such as prescriptions, prescription bottles, pharmacy labels, computer printouts, prescription purchase refunds, credit card receipts, and employee records) in unsecured, publicly-accessible trash dumpsters on numerous occasions. For example, in July 2006 and continuing into 2007, television stations and other media outlets reported finding personal information in unsecured dumpsters used by CVS pharmacies in at least 15 cities throughout the United States. The personal information found in the dumpsters included information about both CVS's customers and its employees. When discarded in publicly-accessible dumpsters, such information can be obtained by individuals for purposes of identity theft or the theft of prescription medicines.

**VIOLATIONS OF THE FTC ACT**

9. Through the means described in Paragraph 6, respondent represented, expressly or by implication, that it implemented reasonable and appropriate measures to protect personal information against unauthorized access.

10. In truth and in fact, respondent did not implement reasonable and appropriate measures to protect personal information against unauthorized access. Therefore, the representation set forth in Paragraph 9 was, and is, false or misleading.

11. As set forth in Paragraph 7, respondent failed to employ reasonable and appropriate measures to prevent unauthorized access to personal information. Respondent's practices caused, or are likely to cause, substantial injury to consumers that is not offset by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. This practice was, and is, an unfair act or practice.

Complaint

**THEREFORE**, the Federal Trade Commission this eighteenth day of June, 2009, has issued this complaint against respondent.

By the Commission.



## Decision and Order

**DECISION AND ORDER**

The Federal Trade Commission having initiated an investigation of certain acts and practices of the Respondent named in the caption hereof, and the Respondent having been furnished thereafter with a copy of a draft Complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the Respondent with violation of the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq*;

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

The Commission having thereafter considered the matter and having determined that it has reason to believe that the Respondent has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having thereupon accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its Complaint, makes the following jurisdictional findings and enters the following Order:

1. Respondent CVS Caremark Corporation is a Delaware corporation with its principal office or place of business at One CVS Drive, Woonsocket, Rhode Island, 02895.

## Decision and Order

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

**ORDER****DEFINITIONS**

For purposes of this order, the following definitions shall apply:

1. Unless otherwise specified, “store” shall mean each pharmacy entity or store location that sells prescription medicines, drugs, devices, supplies, or services and/or non-prescription products and services.
2. Unless otherwise specified, “LLC” shall mean a limited liability company: (a) that owns, controls, or operates one or more stores (including, but not limited to, the companies identified in attached Exhibit A), and (b) in which CVS Caremark Corporation is a member, directly or indirectly.
3. Unless otherwise specified, “respondent” shall mean CVS Caremark Corporation, its subsidiaries, divisions, affiliates, and LLCs, and its successors and assigns.
4. “Personal information” shall mean individually identifiable information from or about an individual consumer including, but not limited to: (a) a first and last name; (b) a home or other physical address, including street name and name of city or town; (c) an email address or other online contact information, such as an instant messaging user identifier or a screen name; (d) a telephone number; (e) a Social Security number; (f) a driver’s license number or other government-issued identification number; (g) prescription information, such as medication and dosage, and prescribing physician name, address, and telephone number, health insurer name, insurance account number, or insurance policy number; (h) a bank account, debit card, or credit card account number; (i) a

## Decision and Order

persistent identifier, such as a customer number held in a “cookie” or processor serial number, that is combined with other available data that identifies an individual consumer; (j) a biometric record; or (k) any information that is combined with any of (a) through (j) above. For the purpose of this provision, a “consumer” shall include an “employee,” and an individual seeking to become an employee, where “employee” shall mean an agent, servant, salesperson, associate, independent contractor, and other person directly or indirectly under the control of respondent.

5. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

**I.**

**IT IS ORDERED** that respondent, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, limited liability company, division, or other device, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, the extent to which it maintains and protects the privacy, confidentiality, security, or integrity of personal information collected from or about consumers.

**II.**

**IT IS FURTHER ORDERED** that respondent, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, limited liability company, division, or other device, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall, no later than the date of service of this order, establish and implement, and thereafter maintain, a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers. Such program, the content and

## Decision and Order

implementation of which must be fully documented in writing, shall contain administrative, technical, and physical safeguards appropriate to respondent's size and complexity, the nature and scope of respondent's activities, and the sensitivity of the personal information collected from or about consumers, including:

- A. the designation of an employee or employees to coordinate and be accountable for the information security program.
- B. the identification of material internal and external risks to the security, confidentiality, and integrity of personal information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, and assessment of the sufficiency of any safeguards in place to control these risks. At a minimum, this risk assessment should include consideration of risks in each area of relevant operation, including, but not limited to: (1) employee training and management; (2) information systems, including network and software design, information processing, storage, transmission, and disposal; and (3) prevention, detection, and response to attacks, intrusions, or other systems failures.
- C. the design and implementation of reasonable safeguards to control the risks identified through risk assessment, and regular testing or monitoring of the effectiveness of the safeguards' key controls, systems, and procedures.
- D. the development and use of reasonable steps to select and retain service providers capable of appropriately safeguarding personal information they receive from respondent, and requiring service providers by contract to implement and maintain appropriate safeguards.
- E. the evaluation and adjustment of respondent's information security program in light of the results of the testing and monitoring required by subpart C, any material changes to respondent's operations or business arrangements, or any



## Decision and Order

other circumstances that respondent knows or has reason to know may have a material impact on the effectiveness of its information security program.

**III.**

**IT IS FURTHER ORDERED** that, in connection with their compliance with Part II of this order, respondent, and its officers, agents, representatives, and employees, shall obtain initial and biennial assessments and reports (“Assessments”) from a qualified, objective, independent third-party professional, who uses procedures and standards generally accepted in the profession. The reporting period for the Assessments shall cover: (1) the first year after service of the order for the initial Assessment, and (2) each two (2) year period thereafter for twenty (20) years after service of the order for the biennial Assessments. Each Assessment shall:

- A. set forth the specific administrative, technical, and physical safeguards that respondent has implemented and maintained during the reporting period;
- B. explain how such safeguards are appropriate to respondent’s size and complexity, the nature and scope of respondent’s activities, and the sensitivity of the personal information collected from or about consumers;
- C. explain how the safeguards that have been implemented meet or exceed the protections required by the Part II of this order; and
- D. certify that respondent’s security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of personal information is protected and has so operated throughout the reporting period.

Each Assessment shall be prepared and completed within sixty (60) days after the end of the reporting period to which the Assessment

## Decision and Order

applies by a person qualified as a Certified Information System Security Professional (CISSP) or as a Certified Information Systems Auditor (CISA); a person holding Global Information Assurance Certification (GIAC) from the SysAdmin, Audit, Network, Security (SANS) Institute; or a qualified person or organization approved by the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

Respondent shall provide the initial Assessment to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, within ten (10) days after the Assessment has been prepared. All subsequent biennial Assessments shall be retained by respondent until the order is terminated and provided to the Associate Director for Enforcement within ten (10) days of request.

**IV.**

**IT IS FURTHER ORDERED** that respondent shall maintain and, upon request, make available to the Federal Trade Commission for inspection and copying:

- A. for a period of five (5) years, a print or electronic copy of each document relating to compliance, including, but not limited to, documents, prepared by or on behalf of respondent, that contradict, qualify, or call into question respondent's compliance with this order; and
- B. for a period of three (3) years after the date of preparation of each Assessment required under Part III of this order, all materials relied upon to prepare the Assessment, whether prepared by or on behalf of respondent, including, but not limited to, all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, and any other materials relating to respondent's compliance with Parts II and III of this order, for the compliance period covered by such Assessment.

## Decision and Order

**V.**

**IT IS FURTHER ORDERED** that respondent CVS Caremark Corporation shall deliver a copy of this order to all its current and future subsidiaries (including LLCs and each store that is owned, controlled, or operated by respondent or an LLC), current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. Respondent shall deliver this order to such current subsidiaries and personnel within sixty (60) days after service of this order, and to such future subsidiaries and personnel within sixty (60) days after the respondent acquires the subsidiary or the person assumes such position or responsibilities.

**VI.**

**IT IS FURTHER ORDERED** that respondent shall notify the Commission at least thirty (30) days prior to any change in respondent 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 company; the creation or dissolution of a subsidiary (including an LLC), 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 respondent's name or address. *Provided, however,* that, with respect to any proposed change in respondent about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

**VII.**

## Decision and Order

**IT IS FURTHER ORDERED** that respondent shall, within ninety (90) days after service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

**VIII.**

This order will terminate on June 18, 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 that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

*Provided, further*, that if such complaint is dismissed or a federal court rules that respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

Decision and Order

**Exhibit A**

Privileged and Highly Confidential

CVS/pharmacy  
For Store Entities with Store Count

EntityName	Store Count by Entity	Owner
103rd Avenue CVS, L.L.C.	1	CVS Pharmacy, Inc.
25th Street CVS, Inc.	1	CVS Pharmacy, Inc.
295 Westport Ave. CVS, Inc.	1	CVS Pharmacy, Inc.
37th Minneapolis CVS, L.L.C.	1	CVS Pharmacy, Inc.
54th Western Chicago CVS, L.L.C.	1	CVS Pharmacy, Inc.
59th Ashland CVS, L.L.C.	1	CVS Pharmacy, Inc.
79th Street CVS, L.L.C.	1	CVS Pharmacy, Inc.
87th Avenue CVS, L.L.C.	1	CVS Pharmacy, Inc.
Abington CVS, Inc.	1	CVS Pharmacy, Inc.
Addison Chicago CVS, L.L.C.	1	CVS Pharmacy, Inc.
ADI Realty, Inc.	3	Arbor Drugs, Inc.
Admiral Douglas CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
Alabama CVS Pharmacy, L.L.C.	143	CVS Pharmacy, Inc.
Alabama Road CVS, Inc.	1	CVS Pharmacy, Inc.
Albemarle CVS, Inc.	1	CVS Pharmacy, Inc.
Alexandria Duke CVS, Inc.	1	CVS Pharmacy, Inc.
Allentown CVS, Inc.	1	CVS Pharmacy, Inc.
Allentown Village CVS, Inc.	1	CVS Pharmacy, Inc.
Almshouse CVS, Inc.	1	CVS Pharmacy, Inc.
American Drug Stores Delaware, L.L.C.	6	CVS Caremark Corporation
Ames Plaza CVS, Inc.	1	CVS Pharmacy, Inc.
Anderson House CVS, Inc.	1	CVS Pharmacy, Inc.
Angelini Ave. CVS, Inc.	1	CVS Pharmacy, Inc.
Angell Street CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
Annapolis Riva CVS, Inc.	1	CVS Pharmacy, Inc.
Aquila Harbor CVS, Inc.	1	CVS Pharmacy, Inc.
Aculdneck Drug CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
Aramingo Avenue CVS, Inc.	1	CVS Pharmacy, Inc.
Arbor Drugs - Civic, Inc.	1	Arbor Drugs, Inc.
Arbor Drugs, Inc.	189	CVS Caremark Corporation
Ardmore CVS, Inc.	1	CVS Pharmacy, Inc.
Arizona CVS Stores, L.L.C.	49	CVS RS Arizona, L.L.C.
Arlington 10th Street CVS, Inc.	1	CVS Pharmacy, Inc.
Arlington CVS, Inc.	1	CVS Pharmacy, Inc.
Arlington Pentagon CVS, Inc.	1	CVS Pharmacy, Inc.
Arlington South Eads CVS, Inc.	1	CVS Pharmacy, Inc.
Arlington-Walter Reed CVS, Inc.	1	CVS Pharmacy, Inc.

FEDERAL TRADE COMMISSION DECISIONS  
VOLUME 147

## Decision and Order

Privileged and Highly Confidential

CVS/pharmacy  
Rx Store Entities with Store Count

EntityName	Store Count by Entity	Owner
Armitage CVS, L.L.C.	1	CVS Pharmacy, Inc.
Army Trail Bartlett CVS, L.L.C.	1	CVS Pharmacy, Inc.
Asbury Evanston CVS, L.L.C.	1	CVS Pharmacy, Inc.
Ashburn Parkway CVS, Inc.	1	CVS Pharmacy, Inc.
Ashford Dunwoody CVS, Inc.	1	CVS Pharmacy, Inc.
Aston Township CVS, Inc.	1	CVS Pharmacy, Inc.
Atlanta Brookwood Village CVS, Inc.	1	CVS Pharmacy, Inc.
Atlanta Peachtree CVS, Inc.	1	CVS Pharmacy, Inc.
Atee CVS, Inc.	1	CVS Pharmacy, Inc.
Atwood Avenue CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
Augusta Belair CVS, Inc.	1	CVS Pharmacy, Inc.
Austell Road CVS, Inc.	1	CVS Pharmacy, Inc.
Aversboro Road CVS, Inc.	1	CVS Pharmacy, Inc.
Avon CVS, Inc.	1	CVS Pharmacy, Inc.
Avon OH CVS, Inc.	1	CVS Pharmacy, Inc.
Balfantyne Commons CVS, Inc.	1	CVS Pharmacy, Inc.
Baltimore Belair CVS, Inc.	1	CVS Pharmacy, Inc.
Bangor Route 512 CVS, Inc.	1	CVS Pharmacy, Inc.
Barkley CVS, Inc.	1	CVS Pharmacy, Inc.
Barrington CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
Battleground Avenue CVS, L.L.C.	1	CVS IN Distribution, Inc.
Bay Village CVS, Inc.	1	CVS Pharmacy, Inc.
Bedford Retailer, Inc.	1	CVS Pharmacy, Inc.
Bel Air CVS, Inc.	1	CVS Pharmacy, Inc.
Bel Air Maryland CVS, Inc.	1	CVS Pharmacy, Inc.
Bell Plaza CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
Bellevue CVS, Inc.	1	CVS Pharmacy, Inc.
Belpre CVS, Inc.	1	CVS Pharmacy, Inc.
Beltsville CVS, Inc.	1	CVS Pharmacy, Inc.
Bennington CVS, Inc.	1	CVS Pharmacy, Inc.
Bensalem CVS, Inc.	1	CVS Pharmacy, Inc.
Berlin CVS, Inc.	1	CVS Pharmacy, Inc.
Berwyn PA CVS, Inc.	1	CVS Pharmacy, Inc.
Bethel CVS, Inc.	1	CVS Pharmacy, Inc.
Bethel Drive CVS, Inc.	1	CVS Pharmacy, Inc.
Bethel OH CVS, L.L.C.	1	Revco Discount Drug Centers, Inc.
Bethlehem Broad St. CVS, Inc.	1	CVS Pharmacy, Inc.

## Decision and Order

Privileged and Highly Confidential

CVS/pharmacy  
Rx Store Entities with Store Count

EntityName	Store Count by Entity	Owner
Bethlehem West Fourth CVS, Inc.	1	CVS Pharmacy, Inc.
Big B Drugs, Inc.	71	CVS Pharmacy, Inc.
Black Rock Turnpike CVS, Inc.	1	CVS Pharmacy, Inc.
Blaine MN CVS, L.L.C.	1	CVS Pharmacy, Inc.
Blakeslee CVS, Inc.	1	CVS Pharmacy, Inc.
Blue Ridge CVS, L.L.C.	1	CVS VA Distribution, Inc.
Bolingbrook IL CVS, L.L.C.	1	CVS Pharmacy, Inc.
Borough of Hatboro CVS, Inc.	1	CVS Pharmacy, Inc.
Bowling Green CVS, L.L.C.	1	CVS VA Distribution, Inc.
Bowman Street CVS, Inc.	1	CVS Pharmacy, Inc.
Boyertown CVS, Inc.	1	CVS Pharmacy, Inc.
Branthaven CVS, Inc.	1	CVS Pharmacy, Inc.
Bremner Boulevard CVS, Inc.	1	CVS Pharmacy, Inc.
Bridge Street CVS, L.L.C.	1	CVS IN Distribution, Inc.
Bridgeport Boston Ave. CVS, Inc.	1	CVS Pharmacy, Inc.
Bridgeport-Merritt CVS, Inc.	1	CVS Pharmacy, Inc.
Bridgeview CVS, L.L.C.	1	CVS Pharmacy, Inc.
Bristol Bay CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
Bristol North Main CVS, Inc.	1	CVS Pharmacy, Inc.
Bristol Plaza CVS, Inc.	1	CVS Pharmacy, Inc.
Brittain Road CVS, Inc.	1	CVS Pharmacy, Inc.
Brittany Square CVS, Inc.	1	CVS Pharmacy, Inc.
Broadheadsville CVS, Inc.	1	CVS Pharmacy, Inc.
Broadway Maricopa CVS, L.L.C.	1	CVS Pharmacy, Inc.
Broadway Minneapolis CVS, L.L.C.	1	CVS Pharmacy, Inc.
Brookfield CVS, Inc.	1	CVS Pharmacy, Inc.
Brookfield IL CVS, L.L.C.	1	CVS Pharmacy, Inc.
Brookhaven Hilltop CVS, Inc.	1	CVS Pharmacy, Inc.
Brooklyn Commons CVS, Inc.	1	CVS Pharmacy, Inc.
Brooklyn Pennsylvania CVS, Inc.	1	CVS Pharmacy, Inc.
Broomall CVS, Inc.	1	CVS Pharmacy, Inc.
Brown Recker CVS, L.L.C.	1	CVS Pharmacy, Inc.
Bryans Road CVS, Inc.	1	CVS of DC and VA, Inc.
Buckeye AZ CVS, L.L.C.	1	CVS Pharmacy, Inc.
Buffalo Grove CVS, L.L.C.	1	CVS Pharmacy, Inc.
Buford Highway CVS, Inc.	1	CVS Pharmacy, Inc.
Bunker Lake CVS, L.L.C.	1	CVS Pharmacy, Inc.

FEDERAL TRADE COMMISSION DECISIONS  
VOLUME 147

Decision and Order

Privileged and Highly Confidential

CVS/pharmacy  
Rx Store Entities with Store Count

EntityName	Store Count by Entity	Owner
Busse CVS, L.L.C.	1	CVS RX Services, Inc.
Bustleton Nursery CVS, Inc.	1	CVS Pharmacy, Inc.
Camp Hill CVS, Inc.	1	CVS Pharmacy, Inc.
Canal CVS, Inc.	1	CVS Pharmacy, Inc.
Canton GA CVS, Inc.	1	CVS Pharmacy, Inc.
Canton Highway CVS, Inc.	1	CVS Pharmacy, Inc.
Capitol Heights CVS, L.L.C.	1	Bud's Price King, Inc.
Carmey CVS, Inc.	1	CVS Pharmacy, Inc.
Carroll Street CVS, Inc.	1	CVS Pharmacy, Inc.
Castor Avenue CVS, Inc.	1	CVS Pharmacy, Inc.
Cedar Park CVS, Inc.	1	CVS of DC and VA, Inc.
Centreville Road CVS, Inc.	1	CVS Pharmacy, Inc.
Chandler Dobson CVS, L.L.C.	1	CVS Pharmacy, Inc.
Chandler Gilbert CVS, L.L.C.	1	CVS Pharmacy, Inc.
Chandler Kyrene CVS, L.L.C.	1	CVS Pharmacy, Inc.
Chandler Warner CVS, L.L.C.	2	CVS Pharmacy, Inc.
Charhassen CVS, L.L.C.	1	CVS Pharmacy, Inc.
Charles Street Baltimore CVS, Inc.	1	CVS Pharmacy, Inc.
Charlott Street CVS, Inc.	1	CVS Pharmacy, Inc.
Cheltenham CVS, Inc.	1	CVS Pharmacy, Inc.
Cheshire CVS, Inc.	1	CVS Pharmacy, Inc.
Chester MD CVS, L.L.C.	1	CVS of Maryland, Inc.
Chesterfield CVS, Inc.	1	CVS Pharmacy, Inc.
Chestnut St CVS, Inc.	1	CVS Pharmacy, Inc.
Chicago Heights II CVS, L.L.C.	1	CVS Pharmacy, Inc.
Chicago Pufaski CVS, L.L.C.	1	CVS Pharmacy, Inc.
Chichester CVS, Inc.	1	CVS Pharmacy, Inc.
Chick Springs CVS, Inc.	1	CVS Pharmacy, Inc.
Cincinnati CVS, L.L.C.	1	Revco Discount Drug Centers, Inc.
Cin-Dayton CVS, Inc.	1	CVS Pharmacy, Inc.
Clairmont Road CVS, Inc.	1	CVS Pharmacy, Inc.
Clairton Boulevard CVS, Inc.	1	CVS Pharmacy, Inc.
Clarendon Boulevard CVS, Inc.	1	CVS Pharmacy, Inc.
Clayton CVS, Inc.	1	CVS Pharmacy, Inc.
Cleveland Lorain CVS, Inc.	1	CVS Pharmacy, Inc.
Clinton Post CVS, Inc.	1	CVS Pharmacy, Inc.
Cloppers Mill CVS, Inc.	1	CVS of DC and VA, Inc.



## Decision and Order

Privileged and Highly Confidential

CVS/pharmacy  
Rx Store Entities with Store Count

EntityName	Store Count by Entity	Owner
Clover CVS, L.L.C.	1	CVS VA Distribution, Inc.
Cochran CVS, L.L.C.	1	CVS VA Distribution, Inc.
Colchester CT CVS, Inc.	1	CVS Pharmacy, Inc.
Collegeville CVS, Inc.	1	CVS Pharmacy, Inc.
Columbus CVS, L.L.C.	1	Revco Discount Drug Centers, Inc.
Columbus High Street CVS, Inc.	1	CVS Pharmacy, Inc.
Columbus Polaris CVS, Inc.	1	CVS Pharmacy, Inc.
Compo Center CVS, Inc.	1	CVS Pharmacy, Inc.
Concord Crisco CVS, Inc.	1	CVS Pharmacy, Inc.
Connecticut Avenue CVS, Inc.	1	CVS Pharmacy, Inc.
Connecticut CVS Pharmacy, L.L.C.	2	CVS Pharmacy, Inc.
Conshohocken CVS, Inc.	1	CVS Pharmacy, Inc.
Constitution Blvd. CVS, Inc.	1	CVS Pharmacy, Inc.
Conyers CVS, Inc.	1	CVS Pharmacy, Inc.
Coon Rapids MN CVS, L.L.C.	1	CVS Pharmacy, Inc.
Coopersburg CVS, Inc.	1	CVS Pharmacy, Inc.
Copley CVS, Inc.	1	CVS Pharmacy, Inc.
Corbin Avenue CVS, Inc.	1	CVS Pharmacy, Inc.
Cornelius CVS, Inc.	1	CVS Pharmacy, Inc.
Cottage Grove CVS, Inc.	1	CVS Pharmacy, Inc.
Courtland Street CVS, Inc.	1	CVS Pharmacy, Inc.
Coventry CT CVS, Inc.	1	CVS Pharmacy, Inc.
Coventry Lake CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
Coventry Square CVS, Inc.	1	CVS Pharmacy, Inc.
Covington CVS, Inc.	1	CVS Pharmacy, Inc.
Cox CVS, Inc.	1	CVS Pharmacy, Inc.
Crabapple CVS, Inc.	1	CVS Pharmacy, Inc.
Craig Road CVS, L.L.C.	1	CVS Pharmacy, Inc.
Cranston Retailer, Inc.	1	Cranston-Reservoir CVS, Inc.
Cranston RI CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
Cranston-Reservoir CVS, Inc.	1	CVS Pharmacy, Inc.
Cressona Mall CVS, Inc.	1	CVS Pharmacy, Inc.
Crestwood KY CVS, Inc.	1	CVS Pharmacy, Inc.
Crismon Mesa CVS, L.L.C.	1	CVS Pharmacy, Inc.
Crofton MD CVS, L.L.C.	1	CVS of Maryland, Inc.
Cross Keys Place CVS, Inc.	1	CVS Pharmacy, Inc.
Croydon CVS, Inc.	1	CVS Pharmacy, Inc.

FEDERAL TRADE COMMISSION DECISIONS  
VOLUME 147

## Decision and Order

Privileged and Highly Confidential

CVS/pharmacy  
Rx Store Entities with Store Count

EntityName	Store Count by Entity	Owner
Cumberland Bear Hill CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
Cumberland Church CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
Cumberland Retailer, Inc.	1	Cranston-Reservoir CVS, Inc.
Cumru CVS, Inc.	1	CVS Pharmacy, Inc.
CVS 2874 Clearwater, L.L.C.	1	CVS VA Distribution, Inc.
CVS 2875 Tampa, L.L.C.	1	CVS IN Distribution, Inc.
CVS 28th and Eastern, Inc.	1	CVS Pharmacy, Inc.
CVS 2948 Henderson, L.L.C.	1	CVS Caremark Corporation
CVS 2972 Philadelphia, L.L.C.	1	CVS IN Distribution, Inc.
CVS 2989 Las Vegas, L.L.C.	1	CVS IN Distribution, Inc.
CVS 3284 Phoenix, L.L.C.	1	CVS VA Distribution, Inc.
CVS 3268 Gilbert, L.L.C.	1	CVS RS Arizona, L.L.C.
CVS 3436 Mesa, L.L.C.	1	CVS VA Distribution, Inc.
CVS 3745 Peoria, L.L.C.	1	CVS RS Arizona, L.L.C.
CVS 3755 St. Petersburg, L.L.C.	1	CVS IN Distribution, Inc.
CVS 3766 Dacula, L.L.C.	1	CVS MI Distribution, Inc.
CVS 4083 Largo, L.L.C.	1	CVS IN Distribution, Inc.
CVS 4269 Geneva, L.L.C.	1	CVS VA Distribution, Inc.
CVS 4772 East Vincent, L.L.C.	1	CVS IN Distribution, Inc.
CVS 4994 Miami, L.L.C.	1	CVS VA Distribution, Inc.
CVS 4998 Melbourne, L.L.C.	1	CVS VA Distribution, Inc.
CVS 4999 Suntree, L.L.C.	1	CVS VA Distribution, Inc.
CVS Albany, L.L.C.	323	CVS Pharmacy, Inc.
CVS Alpharetta GA, Inc.	1	CVS Pharmacy, Inc.
CVS Amherst Road, L.L.C.	1	CVS Pharmacy, Inc.
CVS Atlanta GA, Inc.	1	CVS Pharmacy, Inc.
CVS Aurora, L.L.C.	1	CVS Pharmacy, Inc.
CVS Bayberry Bensalem, Inc.	1	CVS Pharmacy, Inc.
CVS BDI, Inc.	83	Hook-SupeRx, L.L.C.
CVS Bellmore Avenue, L.L.C.	1	Melville Realty Company, Inc.
CVS Bensenville, L.L.C.	1	CVS Pharmacy, Inc.
CVS Bethesda Lawrenceville, Inc.	1	CVS Pharmacy, Inc.
CVS Bethesda, L.L.C.	1	Silver Hill CVS, Inc.
CVS Broadway Chicago, L.L.C.	1	CVS Pharmacy, Inc.
CVS Canfield OH, Inc.	1	CVS Pharmacy, Inc.
CVS Carmel Road Charlotte, Inc.	1	CVS Pharmacy, Inc.
CVS Central Charlotte, Inc.	1	CVS Pharmacy, Inc.

Decision and Order

Privileged and Highly Confidential

CVS/pharmacy  
Rx Store Entities with Store Count

EntityName	Store Count by Entity	Owner
CVS Clyde Park, Inc.	1	CVS Pharmacy, Inc.
CVS Crystal Derry, L.L.C.	1	CVS Pharmacy, Inc.
CVS Danbury Padanaram, Inc.	1	CVS Pharmacy, Inc.
CVS Dekalb Norristown, Inc.	1	CVS Pharmacy, Inc.
CVS Detroit 8275, L.L.C.	1	CVS MI Distribution, Inc.
CVS Dunkirk Marketplace, L.L.C.	1	Jumpers Hole CVS, Inc.
CVS Durham, Inc.	1	CVS Pharmacy, Inc.
CVS EGL 111th Kansas City MO, Inc.	1	CVS Pharmacy, Inc.
CVS EGL 118th Oklahoma, Inc.	1	CVS Pharmacy, Inc.
CVS EGL 15th Oklahoma City OK, Inc.	1	CVS Pharmacy, Inc.
CVS EGL 18th Baseline AZ, L.L.C.	1	CVS Pharmacy, Inc.
CVS EGL 23rd Independence MO, Inc.	1	CVS Pharmacy, Inc.
CVS EGL 23rd Oklahoma, Inc.	1	CVS Pharmacy, Inc.
CVS EGL 25th Gulfport MS, Inc.	1	CVS Pharmacy, Inc.
CVS EGL 37th St Petersburg FL, L.L.C.	1	CVS RX Services, Inc.
CVS EGL 49th Pinellas Park FL, L.L.C.	1	CVS RX Services, Inc.
CVS EGL 4th Chickasha OK, Inc.	1	CVS Pharmacy, Inc.
CVS EGL 4th Oklahoma City OK, Inc.	1	CVS Pharmacy, Inc.
CVS EGL 6th Winter Haven FL, L.L.C.	1	CVS RX Services, Inc.
CVS EGL 75th Bethany AZ, L.L.C.	1	CVS Pharmacy, Inc.
CVS EGL Atlantic Cocoa Beach FL, L.L.C.	1	CVS RX Services, Inc.
CVS EGL Barry Road MO, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Baseline Tempe AZ, L.L.C.	1	CVS Pharmacy, Inc.
CVS EGL Belt Saint Joseph MO, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Blossom Orlando FL, L.L.C.	1	CVS RX Services, Inc.
CVS EGL Briar Drive KS, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Broadmoor MS, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Broadway Tempe AZ, L.L.C.	2	CVS Pharmacy, Inc.
CVS EGL Brookside MO, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Camino Boca Raton FL, L.L.C.	1	CVS RX Services, Inc.
CVS EGL Carefree Cave Creek AZ, L.L.C.	1	CVS Pharmacy, Inc.
CVS EGL Chandler Phoenix AZ, L.L.C.	1	CVS Pharmacy, Inc.
CVS EGL Choctaw OK, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Classen Oklahoma City OK, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Commerce Ardmore OK, Inc.	1	CVS Pharmacy, Inc.
CVS EGL County Line Ridgeland MS, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Curry Ford Road FL, L.L.C.	1	CVS RX Services, Inc.

FEDERAL TRADE COMMISSION DECISIONS  
VOLUME 147

## Decision and Order

Privileged and Highly Confidential

CVS/pharmacy  
Rx Store Entities with Store Count

EntityName	Store Count by Entity	Owner
CVS EGL Daytona FL, L.L.C.	1	CVS RX Services, Inc.
CVS EGL Dixie South FL, L.L.C.	1	CVS Pharmacy, Inc.
CVS EGL Dunlap Phoenix AZ, L.L.C.	1	CVS Pharmacy, Inc.
CVS EGL East Camelback AZ, L.L.C.	1	CVS Pharmacy, Inc.
CVS EGL East Danforth OK, Inc.	1	CVS Pharmacy, Inc.
CVS EGL East Pass Gulfport MS, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Florence Casa AZ, L.L.C.	1	CVS Pharmacy, Inc.
CVS EGL Flowood MS, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Forest MS, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Fruitville Sarasota FL, L.L.C.	1	CVS RX Services, Inc.
CVS EGL Granada Ormond Beach FL, L.L.C.	1	CVS RX Services, Inc.
CVS EGL Greenwood MS, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Hardy Hattiesburg MS, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Highland Madison MS, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Hwy 152 Mustang OK, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Hwy 19 Meridian MS, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Hwy 19 North FL, L.L.C.	1	CVS RX Services, Inc.
CVS EGL Hwy 24 Independence MO, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Hwy 27 Haines City FL, L.L.C.	1	CVS RX Services, Inc.
CVS EGL Hwy 441 Mount Dora FL, L.L.C.	1	CVS RX Services, Inc.
CVS EGL Hwy 49 Gulfport MS, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Independence Shawnee OK, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Indian Scottsdale AZ, L.L.C.	1	CVS Pharmacy, Inc.
CVS EGL Jackson MS, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Johnson Mission KS, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Kissimmee FL, L.L.C.	1	CVS RX Services, Inc.
CVS EGL Kosciusko MS, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Lakeland FL, L.L.C.	1	CVS RX Services, Inc.
CVS EGL Laurel MS, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Leavenworth KS, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Lee Lawton OK, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Lees Summit MO, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Lenexa KS, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Liberty MO, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Macarthur OK, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Magee MS, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Main Kansas City MO, Inc.	1	CVS Pharmacy, Inc.

Decision and Order

Privileged and Highly Confidential

CVS/pharmacy  
Rx Store Entities with Store Count

EntityName	Store Count by Entity	Owner
CVS EGL Main Norman OK, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Margate Pompano FL, L.L.C.	1	CVS RX Services, Inc.
CVS EGL Martin Greenville MS, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Martin Luther King OK, Inc.	1	CVS Pharmacy, Inc.
CVS EGL May Oklahoma, Inc.	1	CVS Pharmacy, Inc.
CVS EGL McComb MS, Inc.	1	CVS Pharmacy, Inc.
CVS EGL McDowell Mesa AZ, L.L.C.	1	CVS Pharmacy, Inc.
CVS EGL McKellips Mesa AZ, L.L.C.	1	CVS Pharmacy, Inc.
CVS EGL Miesouri Ave FL, L.L.C.	1	CVS RX Services, Inc.
CVS EGL Moore OK, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Mur Len Olathe KS, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Nail Avenue KS, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Natchez MS, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Norman OK, Inc.	1	CVS Pharmacy, Inc.
CVS EGL North 16th AZ, L.L.C.	1	CVS Pharmacy, Inc.
CVS EGL North Belton MO, Inc.	1	CVS Pharmacy, Inc.
CVS EGL North Cleveland FL, L.L.C.	1	CVS RX Services, Inc.
CVS EGL North Davis MS, Inc.	1	CVS Pharmacy, Inc.
CVS EGL North Federal FL, L.L.C.	1	CVS RX Services, Inc.
CVS EGL North May OK, Inc.	1	CVS Pharmacy, Inc.
CVS EGL North Rockwell OK, Inc.	1	CVS Pharmacy, Inc.
CVS EGL North Santa Fe OK, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Oak Kansas City MO, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Oak Traffic Kansas City MO, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Ocean Springs MS, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Oklahoma City 44 Southwest, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Olathe KS, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Orlando Sanford FL, L.L.C.	1	CVS RX Services, Inc.
CVS EGL Orlando Winter Park FL, L.L.C.	1	CVS RX Services, Inc.
CVS EGL Pascagoula MS, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Pearl MS, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Picayune MS, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Piatte City MO, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Port Southwest FL, L.L.C.	1	CVS Pharmacy, Inc.
CVS EGL Prairie Village KS, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Reno Mustang OK, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Richland MS, Inc.	1	CVS Pharmacy, Inc.

FEDERAL TRADE COMMISSION DECISIONS  
VOLUME 147

## Decision and Order

Privileged and Highly Confidential

CVS/pharmacy  
Rx Store Entities with Store Count

EntityName	Store Count by Entity	Owner
CVS EGL Robinson Norman OK, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Rockwell Oklahoma City OK, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Rosemont Goodyear AZ, L.L.C.	1	CVS Pharmacy, Inc.
CVS EGL Santa Edmond OK, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Scottsdale AZ, L.L.C.	1	CVS Pharmacy, Inc.
CVS EGL Scottsdale Paradise AZ, L.L.C.	1	CVS Pharmacy, Inc.
CVS EGL Shartel Oklahoma, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Shawnee KS, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Skyline Tucson AZ, L.L.C.	1	CVS Pharmacy, Inc.
CVS EGL South Bryant OK, Inc.	1	CVS Pharmacy, Inc.
CVS EGL South Congress FL, L.L.C.	1	CVS RX Services, Inc.
CVS EGL South East 44th OK, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Speedway Tucson AZ, L.L.C.	1	CVS Pharmacy, Inc.
CVS EGL State Callahan FL, L.L.C.	1	CVS Pharmacy, Inc.
CVS EGL State Jackson MS, Inc.	1	CVS Pharmacy, Inc.
CVS EGL State Line Kansas City MO, Inc.	1	CVS Pharmacy, Inc.
CVS EGL State Line Road MO, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Stribling Brandon MS, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Suncrest Jackson MS, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Tamiami Punta Gorda FL, L.L.C.	1	CVS RX Services, Inc.
CVS EGL Tatum Phoenix AZ, L.L.C.	1	CVS Pharmacy, Inc.
CVS EGL Thunderbird Peoria AZ, L.L.C.	1	CVS Pharmacy, Inc.
CVS EGL Thunderbird Sun City AZ, L.L.C.	1	CVS Pharmacy, Inc.
CVS EGL Union Hills AZ, L.L.C.	1	CVS Pharmacy, Inc.
CVS EGL Val Vista AZ, L.L.C.	1	CVS Pharmacy, Inc.
CVS EGL Vandament Yukon OK, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Vivion Kansas City MO, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Walsingham Largo FL, L.L.C.	1	CVS RX Services, Inc.
CVS EGL Wemore Tucson AZ, L.L.C.	1	CVS Pharmacy, Inc.
CVS EGL West Britton OK, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Western Oklahoma City OK, Inc.	1	CVS Pharmacy, Inc.
CVS EGL Woodland De Land FL, L.L.C.	1	CVS RX Services, Inc.
CVS EGL Elkott City MD, L.L.C.	1	Bud's Price King, Inc.
CVS Falls Road MD, L.L.C.	1	Bud's Price King, Inc.
CVS Far Rockaway, L.L.C.	1	CVS Pharmacy, Inc.
CVS Farmington Hills, Inc.	1	CVS Pharmacy, Inc.
CVS Fuller Leonard, Inc.	1	CVS Pharmacy, Inc.

Decision and Order

Privileged and Highly Confidential

CVS/pharmacy  
Rx Store Entities with Store Count

EntityName	Store Count by Entity	Owner
CVS Gilbert 3272, L.L.C.	1	CVS RS Arizona, L.L.C.
CVS Gilford, L.L.C.	1	CVS Pharmacy, Inc.
CVS Green Mount, L.L.C.	1	CVS Pharmacy, Inc.
CVS Hartland 8285, L.L.C.	1	CVS MI Distribution, Inc.
CVS Hilliard OH, Inc.	1	CVS Pharmacy, Inc.
CVS Huntersville, Inc.	1	CVS Pharmacy, Inc.
CVS Keene, L.L.C.	1	CVS Pharmacy, Inc.
CVS Laconia, L.L.C.	1	CVS Pharmacy, Inc.
CVS Lake Norwood, Inc.	1	CVS Pharmacy, Inc.
CVS Lansdowne 3142, L.L.C.	1	CVS IN Distribution, Inc.
CVS Mack Drug of New York, L.L.C.	8	CVS Pharmacy, Inc.
CVS MaComb & Mile, Inc.	1	CVS Pharmacy, Inc.
CVS Mammoth Road, L.L.C.	1	CVS Pharmacy, Inc.
CVS Manchester NH, L.L.C.	5	CVS Pharmacy, Inc.
CVS Meriden East Main, Inc.	1	CVS Pharmacy, Inc.
CVS Merrimack Main Street, L.L.C.	1	CVS Pharmacy, Inc.
CVS Midlothian, L.L.C.	1	CVS Pharmacy, Inc.
CVS Morse, Inc.	1	CVS Pharmacy, Inc.
CVS Murrells, Inc.	1	CVS Pharmacy, Inc.
CVS Mystic CT, Inc.	1	CVS Pharmacy, Inc.
CVS Nations Ford Charlotte, Inc.	1	CVS Pharmacy, Inc.
CVS New Baltimore, Inc.	1	CVS Pharmacy, Inc.
CVS North Conway, L.L.C.	1	CVS Pharmacy, Inc.
CVS Odenton, L.L.C.	1	Jumpers Hole CVS, Inc.
CVS of Concord NH, L.L.C.	1	CVS Pharmacy, Inc.
CVS of DC and VA, Inc.	26	CVS Pharmacy, Inc.
CVS of Madison, Conn., Inc.	1	CVS Pharmacy, Inc.
CVS of Maryland, Inc.	79	CVS of DC and VA, Inc.
CVS of North Kingstown, Inc.	1	Cranston-Reservoir CVS, Inc.
CVS of Pennsylvania, Inc.	7	CVS of DC and VA, Inc.
CVS of Rutland, Vermont, Inc.	1	CVS Pharmacy, Inc.
CVS of Stroudsburg, Inc.	1	CVS Pharmacy, Inc.
CVS of Swarthmore, Inc.	1	CVS Pharmacy, Inc.
CVS of Virginia, Inc.	78	CVS of DC and VA, Inc.
CVS of West Virginia, Inc.	3	CVS of DC and VA, Inc.
CVS Orange Avenue, Inc.	1	CVS Pharmacy, Inc.
CVS Peachtree City, Inc.	1	CVS Pharmacy, Inc.

FEDERAL TRADE COMMISSION DECISIONS  
VOLUME 147

## Decision and Order

Privileged and Highly Confidential

CVS/pharmacy  
Rx Store Entities with Store Count

EntityName	Store Count by Entity	Owner
CVS Peachtree Suwanee, Inc.	1	CVS Pharmacy, Inc.
CVS Pharmacy, Inc.	478	CVS Caremark Corporation
CVS Plalstow, L.L.C.	1	CVS Pharmacy, Inc.
CVS Portsmouth Islington, L.L.C.	1	CVS Pharmacy, Inc.
CVS Prescription Center, Inc.	2	CVS of DC and VA, Inc.
CVS Reading PA 3242, L.L.C.	1	CVS IN Distribution, Inc.
CVS Richmond Alee, Inc.	1	CVS Pharmacy, Inc.
CVS Richmond Main, Inc.	1	CVS Pharmacy, Inc.
CVS Royal Ridge, L.L.C.	1	CVS Pharmacy, Inc.
CVS Rt. 199 Williamsburg, Inc.	1	CVS Pharmacy, Inc.
CVS Salem Stateine, L.L.C.	1	CVS Pharmacy, Inc.
CVS Seabrook, L.L.C.	1	CVS Pharmacy, Inc.
CVS Sharon Amity Charlotte, Inc.	1	CVS Pharmacy, Inc.
CVS Skippack, Inc.	1	CVS Pharmacy, Inc.
CVS Solomons MD, L.L.C.	1	Bud's Price King, Inc.
CVS South Canal Chicago, L.L.C.	1	CVS Pharmacy, Inc.
CVS State Capital, L.L.C.	17	CVS Pharmacy, Inc.
CVS Stratford Barnum, Inc.	1	CVS Pharmacy, Inc.
CVS Stratford Nichols, Inc.	1	CVS Pharmacy, Inc.
CVS Stratham, L.L.C.	1	CVS Pharmacy, Inc.
CVS Towson MD, L.L.C.	1	Bud's Price King, Inc.
CVS Trenton MI, L.L.C.	1	CVS MI Distribution, Inc.
CVS Upper Valley Drug, L.L.C.	1	CVS Pharmacy, Inc.
CVS Washington Wisconsin DC, L.L.C.	1	CVS of DC and VA, Inc.
CVS Wisconsin Avenue DC, L.L.C.	1	CVS of DC and VA, Inc.
CVS Wisteria Drive, L.L.C.	1	Jumpers Hole CVS, Inc.
CVS Woodward, Inc.	1	CVS Pharmacy, Inc.
Dallas GA CVS, Inc.	1	CVS Pharmacy, Inc.
Damen Chicago CVS, L.L.C.	1	CVS Pharmacy, Inc.
Danbury Central CVS, Inc.	1	CVS Pharmacy, Inc.
Danbury CVS, Inc.	1	CVS Pharmacy, Inc.
Darien CVS, Inc.	1	CVS Pharmacy, Inc.
Decatur CVS, Inc.	1	CVS Pharmacy, Inc.
Derby Center CVS, Inc.	1	CVS Pharmacy, Inc.
Derry Street CVS, Inc.	1	CVS Pharmacy, Inc.
Desert Buffalo CVS, L.L.C.	1	CVS Pharmacy, Inc.
Desert Eastern CVS, L.L.C.	1	CVS Pharmacy, Inc.



Decision and Order

Privileged and Highly Confidential

CVS/pharmacy  
For Store Entities with Store Count

EntityName	Store Count by Entity	Owner
Desert Inn CVS, L.L.C.	1	CVS Pharmacy, Inc.
Detroit Greenfield CVS, Inc.	1	CVS Pharmacy, Inc.
Dexter Plaza CVS, Inc.	1	CVS Pharmacy, Inc.
District of Columbia CVS Pharmacy, L.L.C.	2	CVS Pharmacy, Inc.
Division CVS, L.L.C.	1	CVS Pharmacy, Inc.
Downers Grove CVS, L.L.C.	1	CVS Pharmacy, Inc.
Downingtown CVS, Inc.	1	CVS Pharmacy, Inc.
Drexel Hill CVS, Inc.	1	CVS Pharmacy, Inc.
Duke Street CVS, Inc.	1	CVS Pharmacy, Inc.
Duluth CVS, Inc.	1	CVS Pharmacy, Inc.
Duncan SC CVS, Inc.	1	CVS Pharmacy, Inc.
Dundee Elgin CVS, L.L.C.	1	CVS Pharmacy, Inc.
Dunlap Phoenix CVS, L.L.C.	1	CVS Pharmacy, Inc.
Dunlop Farms CVS, Inc.	1	CVS Pharmacy, Inc.
Eagan MN CVS, L.L.C.	1	CVS Pharmacy, Inc.
Eagle Valley CVS, Inc.	1	CVS Pharmacy, Inc.
East Avenue CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
East Bradford Plaza CVS, Inc.	1	CVS Pharmacy, Inc.
East Greenwich CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
East Hartford CVS, Inc.	1	CVS Pharmacy, Inc.
East Hartford-Main Street CVS, Inc.	1	CVS Pharmacy, Inc.
East Haven Main Street CVS, Inc.	1	CVS Pharmacy, Inc.
East Main Bridgeport CVS, Inc.	1	CVS Pharmacy, Inc.
East Providence CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
East Putnam Avenue CVS, Inc.	1	CVS Pharmacy, Inc.
East Side CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
Easton Ave. CVS, Inc.	1	CVS Pharmacy, Inc.
Easton Maryland CVS, Inc.	1	CVS Pharmacy, Inc.
Easton Nazareth CVS, Inc.	1	CVS Pharmacy, Inc.
Easton Washington Street CVS, Inc.	1	CVS Pharmacy, Inc.
Edgewater CVS, Inc.	1	CVS Pharmacy, Inc.
Eleventh Street CVS, Inc.	1	CVS Pharmacy, Inc.
Elgin CVS, L.L.C.	1	CVS Pharmacy, Inc.
Elliot Tempe CVS, L.L.C.	1	CVS Pharmacy, Inc.
Elmwood City CVS, L.L.C.	1	CVS IN Distribution, Inc.
Elmhurst CVS, L.L.C.	1	CVS Pharmacy, Inc.
Emmaus Avenue CVS, Inc.	1	CVS Pharmacy, Inc.

FEDERAL TRADE COMMISSION DECISIONS  
VOLUME 147

Decision and Order

Privileged and Highly Confidential

CVS/pharmacy  
Rx Store Entities with Store Count

EntityName	Store Count by Entity	Owner
Emmaus, Pennsylvania, CVS, Inc.	1	CVS Pharmacy, Inc.
Enfield Elm CVS, Inc.	1	CVS Pharmacy, Inc.
Enfield Phoenix CVS, Inc.	1	CVS Pharmacy, Inc.
Engleside Plaza CVS, Inc.	1	CVS of DC and VA, Inc.
Erdenheim Saints CVS, Inc.	1	CVS Pharmacy, Inc.
Erie CVS, Inc.	1	CVS Pharmacy, Inc.
Essex Eastern CVS, Inc.	1	CVS Pharmacy, Inc.
Essex Martin CVS, Inc.	1	CVS Pharmacy, Inc.
Evanston IL CVS, L.L.C.	1	CVS Pharmacy, Inc.
Evergreen City CVS, L.L.C.	1	CVS Pharmacy, Inc.
Fairfax CVS, Inc.	1	CVS of DC and VA, Inc.
Fairfax Main Street CVS, Inc.	1	CVS Pharmacy, Inc.
Fairfax Route 29 CVS, Inc.	1	CVS Pharmacy, Inc.
Fairfield Plaza CVS, Inc.	1	CVS Pharmacy, Inc.
Fairfield Rt. 1 CVS, Inc.	1	CVS Pharmacy, Inc.
Fairlane Village Mall CVS, Inc.	1	CVS Pharmacy, Inc.
Falls Church CVS, Inc.	1	CVS Pharmacy, Inc.
Farmington Ave. CVS, Inc.	1	CVS Pharmacy, Inc.
Farmington Plaza CVS, Inc.	1	CVS Pharmacy, Inc.
Feasterville CVS, Inc.	1	CVS Pharmacy, Inc.
Flamingo Road CVS, L.L.C.	1	CVS Pharmacy, Inc.
Flatwoods CVS, Inc.	1	CVS Pharmacy, Inc.
Florence CVS, Inc.	1	CVS Pharmacy, Inc.
Folsom CVS, Inc.	1	CVS Pharmacy, Inc.
Forbes Avenue CVS, Inc.	1	CVS Pharmacy, Inc.
Forest Drive CVS, Inc.	1	CVS Pharmacy, Inc.
Forest Hill MD CVS, L.L.C.	1	CVS of Maryland, Inc.
Forest Hills CVS, Inc.	1	CVS of DC and VA, Inc.
Forest Park CVS, Inc.	1	CVS Pharmacy, Inc.
Forks Township CVS, Inc.	1	CVS Pharmacy, Inc.
Fort Foote CVS, Inc.	1	CVS Pharmacy, Inc.
Foster Negle CVS, L.L.C.	2	CVS Pharmacy, Inc.
Foxon East Haven CVS, Inc.	1	CVS Pharmacy, Inc.
Franconia Road CVS, Inc.	1	CVS Pharmacy, Inc.
Frankfort CVS, Inc.	1	CVS Pharmacy, Inc.
Franklin Avenue CVS, Inc.	1	CVS Pharmacy, Inc.
Franklin TN CVS, Inc.	1	CVS Pharmacy, Inc.

Decision and Order

Privileged and Highly Confidential

CVS/pharmacy  
Rx Store Entities with Store Count

EntityName	Store Count by Entity	Owner
Frederick CVS, Inc.	1	CVS Pharmacy, Inc.
Gahanna OH CVS, Inc.	1	CVS Pharmacy, Inc.
Garden City CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
Garfield Beach CVS, L.L.C.	374	CVS Pharmacy, Inc.
Georgetown OH CVS, L.L.C.	1	Revco Discount Drug Centers, Inc.
Georgia CVS Pharmacy, L.L.C.	24	CVS Pharmacy, Inc.
German Dobson CVS, L.L.C.	14	CVS Pharmacy, Inc.
Germanstown Avenue CVS, Inc.	1	CVS Pharmacy, Inc.
Germanstown MD CVS, L.L.C.	1	Bud's Price King, Inc.
Gilbertsville CVS, Inc.	1	CVS Pharmacy, Inc.
Glastonbury CVS, Inc.	1	CVS Pharmacy, Inc.
Glebe Road CVS, Inc.	1	CVS of DC and VA, Inc.
Glen Allen CVS, Inc.	1	CVS Pharmacy, Inc.
Glen Burnie MD CVS, L.L.C.	1	CVS of Maryland, Inc.
Godfrey Avenue CVS, Inc.	1	CVS Pharmacy, Inc.
Godshall Franconia CVS, Inc.	1	CVS Pharmacy, Inc.
Goodwin Park CVS, Inc.	1	CVS Pharmacy, Inc.
Goodyear CVS, L.L.C.	1	CVS RX Services, Inc.
Goshen Village CVS, Inc.	1	CVS Pharmacy, Inc.
Graham Charlotte CVS, Inc.	1	CVS Pharmacy, Inc.
Granby CVS, Inc.	1	CVS Pharmacy, Inc.
Grand Schaefer CVS, Inc.	1	CVS Pharmacy, Inc.
Grand St. Paul CVS, L.L.C.	13	CVS Pharmacy, Inc.
Granite Street CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
Gratiot CVS, Inc.	1	CVS Pharmacy, Inc.
Gray's Southgate, Inc.	1	CVS of DC and VA, Inc.
Greenbelt CVS, Inc.	1	CVS Pharmacy, Inc.
Greenbelt-Cherrywood CVS, Inc.	1	CVS Pharmacy, Inc.
Greensboro GA CVS, Inc.	1	CVS Pharmacy, Inc.
Greenville CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
Greenwich 99 CVS, Inc.	1	CVS Pharmacy, Inc.
Grove City CVS, Inc.	1	CVS Pharmacy, Inc.
Guilford CVS, Inc.	1	CVS Pharmacy, Inc.
Gwinnett CVS, Inc.	1	CVS Pharmacy, Inc.
Hamden Plaza CVS, Inc.	1	CVS Pharmacy, Inc.
Hamilton CVS, L.L.C.	1	Revco Discount Drug Centers, Inc.
Hamlin CVS, Inc.	1	CVS Pharmacy, Inc.

FEDERAL TRADE COMMISSION DECISIONS  
VOLUME 147

## Decision and Order

Privileged and Highly Confidential

CVS/pharmacy  
Rx Store Entities with Store Count

EntityName	Store Count by Entity	Owner
Hanover CVS, L.L.C.	1	CVS Pharmacy, Inc.
Hard Columbus CVS, L.L.C.	1	Revco Discount Drug Centers, Inc.
Hardscrabble CVS, Inc.	1	CVS Pharmacy, Inc.
Harmon Las Vegas CVS, L.L.C.	1	CVS Pharmacy, Inc.
Harrisburg CVS, Inc.	1	CVS Pharmacy, Inc.
Harrisburg NC CVS, Inc.	1	CVS Pharmacy, Inc.
Harrison Bridge Road CVS, Inc.	1	CVS Pharmacy, Inc.
Hartford Blue Hills CVS, Inc.	1	CVS Pharmacy, Inc.
Hartford Main Street CVS, Inc.	1	CVS Pharmacy, Inc.
Haverford and City Line CVS, Inc.	1	CVS Pharmacy, Inc.
Haverford Avenue CVS, Inc.	1	CVS Pharmacy, Inc.
Havertown CVS, Inc.	1	CVS Pharmacy, Inc.
Haw Creek Circle CVS, Inc.	1	CVS Pharmacy, Inc.
Hawley CVS, Inc.	1	CVS Pharmacy, Inc.
Hazleton Plaza CVS Inc.	1	CVS Pharmacy, Inc.
Hellertown CVS, Inc.	1	CVS Pharmacy, Inc.
Henderson CVS, L.L.C.	1	CVS Pharmacy, Inc.
Henderson Horizon CVS, L.L.C.	1	CVS Pharmacy, Inc.
Henderson Road CVS, Inc.	1	CVS Pharmacy, Inc.
Henry Philadelphia CVS, Inc.	1	CVS Pharmacy, Inc.
Henrydale CVS, Inc.	1	CVS Pharmacy, Inc.
Hick Hwy CVS, Inc.	1	CVS Pharmacy, Inc.
Hickory CVS, Inc.	1	CVS Pharmacy, Inc.
High House Road CVS, Inc.	1	CVS Pharmacy, Inc.
Highland Center CVS, Inc.	1	CVS Pharmacy, Inc.
Highland Cheshire CVS, Inc.	1	CVS Pharmacy, Inc.
Highland Park CVS, L.L.C.	89	CVS Pharmacy, Inc.
Highway 17 Mt. Pleasant CVS, Inc.	1	CVS Pharmacy, Inc.
Highway Charlotte CVS, Inc.	1	CVS Pharmacy, Inc.
Highway Stockbridge CVS, Inc.	1	CVS Pharmacy, Inc.
Hilliard Darby CVS, Inc.	1	CVS Pharmacy, Inc.
Hillsboro Road CVS, L.L.C.	1	CVS MI Distribution, Inc.
Hillside II CVS, L.L.C.	1	CVS Pharmacy, Inc.
Holcomb CVS, Inc.	1	CVS Pharmacy, Inc.
Holiday CVS, L.L.C.	623	CVS Pharmacy, Inc.
Holly Springs CVS, Inc.	1	CVS Pharmacy, Inc.
Hook-SupeRx, L.L.C.	601	CVS Pharmacy, Inc.

Decision and Order

Privileged and Highly Confidential

CVS/pharmacy  
Rx Store Entities with Store Count

EntityName	Store Count by Entity	Owner
Hope Mills CVS, Inc.	1	CVS Pharmacy, Inc.
Hopewell CVS, Inc.	1	CVS Pharmacy, Inc.
Horsham CVS, Inc.	1	CVS Pharmacy, Inc.
Howell CVS, L.L.C.	1	CVS MI Distribution, Inc.
Hudson N.H. CVS, Inc.	1	CVS Pharmacy, Inc.
Hunting Park CVS, Inc.	1	CVS Pharmacy, Inc.
Huntingdon Valley CVS, Inc.	1	CVS Pharmacy, Inc.
Hurley MS CVS, Inc.	1	CVS Pharmacy, Inc.
Hurricane WV CVS, Inc.	1	CVS Pharmacy, Inc.
Hyattsville CVS, Inc.	1	CVS Pharmacy, Inc.
Indian 59th Phoenix CVS, L.L.C.	1	CVS Pharmacy, Inc.
Indian School Phoenix CVS, L.L.C.	1	CVS Pharmacy, Inc.
Iowa CVS Pharmacy, L.L.C.	10	CVS Pharmacy, Inc.
Irving Park CVS, L.L.C.	1	CVS Pharmacy, Inc.
Irving Street CVS, Inc.	1	CVS Pharmacy, Inc.
Jackson North West CVS, Inc.	1	CVS Pharmacy, Inc.
Jefferson CVS, Inc.	1	CVS Pharmacy, Inc.
Jenkintown CVS, Inc.	1	CVS Pharmacy, Inc.
Jennersville CVS, Inc.	1	CVS Pharmacy, Inc.
Jersey Shore PA CVS, Inc.	1	CVS Pharmacy, Inc.
Johnston Centre CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
Joliet CVS, L.L.C.	1	CVS Pharmacy, Inc.
Jones Hill CVS, Inc.	1	CVS Pharmacy, Inc.
Jonesboro CVS, Inc.	1	CVS Pharmacy, Inc.
K Street CVS, Inc.	1	CVS of DC and VA, Inc.
Kankakee IL CVS, L.L.C.	1	CVS Pharmacy, Inc.
Kansas CVS Pharmacy, L.L.C.	19	CVS Pharmacy, Inc.
Kennesaw CVS, Inc.	1	CVS Pharmacy, Inc.
Kennesaw Due West CVS, Inc.	1	CVS Pharmacy, Inc.
Kennett Square CVS, Inc.	1	CVS Pharmacy, Inc.
Kensington CVS, Inc.	1	CVS Pharmacy, Inc.
Kentucky CVS Pharmacy, L.L.C.	1	CVS Pharmacy, Inc.
Kentwood CVS, Inc.	1	CVS Pharmacy, Inc.
Keyser CVS, L.L.C.	1	CVS VA Distribution, Inc.
King Street CVS, Inc.	1	CVS Pharmacy, Inc.
Kingston Market CVS, Inc.	1	CVS Pharmacy, Inc.
Kingston Road CVS, Inc.	1	Cranston-Reservoir CVS, Inc.

FEDERAL TRADE COMMISSION DECISIONS  
VOLUME 147

Decision and Order

Privileged and Highly Confidential

CVS/pharmacy  
Rx Store Entities with Store Count

EntityName	Store Count by Entity	Owner
Knox Abbott Road CVS, Inc.	1	CVS Pharmacy, Inc.
Knoxville Emory CVS, Inc.	1	CVS Pharmacy, Inc.
Krocks Road CVS, Inc.	1	CVS Pharmacy, Inc.
L Street CVS, Inc.	1	CVS Pharmacy, Inc.
Lahser CVS, Inc.	1	CVS Pharmacy, Inc.
Lake Danbury CVS, Inc.	1	CVS Pharmacy, Inc.
Lake Forest CVS, L.L.C.	1	CVS Pharmacy, Inc.
Lake Mead Las Vegas CVS, L.L.C.	1	CVS Pharmacy, Inc.
Lake Pleasant Peoria CVS, L.L.C.	1	CVS Pharmacy, Inc.
Lancaster CVS, Inc.	1	CVS Pharmacy, Inc.
Landisville CVS, Inc.	1	CVS Pharmacy, Inc.
Lansdowne Avenue CVS, Inc.	1	CVS Pharmacy, Inc.
Lansing CVS, Inc.	1	CVS Pharmacy, Inc.
Las Vegas NV CVS, L.L.C.	1	CVS Pharmacy, Inc.
Laurel MD CVS, L.L.C.	1	CVS of Maryland, Inc.
Laurens Road CVS, Inc.	1	CVS Pharmacy, Inc.
Lavista Road CVS, Inc.	1	CVS Pharmacy, Inc.
Lawrence Chicago CVS, L.L.C.	1	CVS Pharmacy, Inc.
Lawrenceville CVS, Inc.	1	CVS Pharmacy, Inc.
Lee Highway CVS, Inc.	1	CVS of DC and VA, Inc.
Lehigh Street CVS, Inc.	1	CVS Pharmacy, Inc.
Lemont CVS, L.L.C.	1	CVS Pharmacy, Inc.
Levittown PA CVS, Inc.	1	CVS Pharmacy, Inc.
Liberty Park CVS, Inc.	1	CVS Pharmacy, Inc.
Liberty Road CVS, Inc.	1	CVS Pharmacy, Inc.
Library Road CVS, Inc.	1	CVS Pharmacy, Inc.
Liburn CVS, Inc.	1	CVS Pharmacy, Inc.
Liburn Harmony Grove CVS, Inc.	1	CVS Pharmacy, Inc.
Lima PA CVS, Inc.	1	CVS Pharmacy, Inc.
Limerick CVS, Inc.	1	CVS Pharmacy, Inc.
Lincoln Drive (Phil) CVS, Inc.	1	CVS Pharmacy, Inc.
Lindbergh CVS, Inc.	1	CVS Pharmacy, Inc.
Lionville CVS, Inc.	1	CVS Pharmacy, Inc.
Litchfield Park CVS, L.L.C.	1	CVS Pharmacy, Inc.
Litchfield Rt. 202 CVS, Inc.	1	CVS Pharmacy, Inc.
Lockport CVS, L.L.C.	1	CVS Pharmacy, Inc.
Locust Philadelphia CVS, Inc.	1	CVS Pharmacy, Inc.

## Decision and Order

Privileged and Highly Confidential

CVS/pharmacy  
Rx Store Entities with Store Count

EntityName	Store Count by Entity	Owner
Loehmann's Plaza CVS, Inc.	1	CVS Pharmacy, Inc.
Lombard CVS, L.L.C.	1	CVS Pharmacy, Inc.
Lombard-Light Streets CVS, Inc.	1	CVS Pharmacy, Inc.
Lone Oak KY CVS, Inc.	1	CVS Pharmacy, Inc.
Long Hill Road CVS, Inc.	1	CVS Pharmacy, Inc.
Long Shoals Road CVS, Inc.	1	CVS Pharmacy, Inc.
Louisiana CVS Pharmacy, L.L.C.	86	CVS Pharmacy, Inc.
Louisville CVS, Inc.	1	CVS Pharmacy, Inc.
Lower Makefield CVS, Inc.	1	CVS Pharmacy, Inc.
M Street CVS, Inc.	1	CVS of DC and VA, Inc.
Mableton Parkway CVS, Inc.	1	CVS Pharmacy, Inc.
MacArthur Boulevard CVS, Inc.	1	CVS Pharmacy, Inc.
Madison Chicago CVS, L.L.C.	1	CVS Pharmacy, Inc.
Main Annapolis CVS, L.L.C.	1	CVS of Maryland, Inc.
Main Devon Bartlett CVS, L.L.C.	1	CVS Pharmacy, Inc.
Main Montgomery CVS, L.L.C.	1	CVS VA Distribution, Inc.
Manassas CVS, Inc.	1	CVS Pharmacy, Inc.
Manchester North Main CVS, Inc.	1	CVS Pharmacy, Inc.
Mansfield Shopping Center CVS, Inc.	1	CVS Pharmacy, Inc.
Manton Avenue CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
Maple Glen CVS, Inc.	1	CVS Pharmacy, Inc.
Maple Grove MN CVS, L.L.C.	1	CVS Pharmacy, Inc.
Marietta CVS, Inc.	1	CVS Pharmacy, Inc.
Market Street CVS, Inc.	1	CVS Pharmacy, Inc.
Maryland CVS Pharmacy, L.L.C.	2	CVS Pharmacy, Inc.
Maryland Parkway CVS, L.L.C.	1	CVS Pharmacy, Inc.
Maryland St. Paul CVS, L.L.C.	1	CVS Pharmacy, Inc.
Mason CVS, Inc.	1	CVS Pharmacy, Inc.
Massachusetts Avenue CVS, L.L.C.	1	CVS of DC and VA, Inc.
Massachusetts CVS Pharmacy, L.L.C.	301	CVS Pharmacy, Inc.
Mayfield CVS, Inc.	1	CVS Pharmacy, Inc.
McNair Farms CVS, Inc.	1	CVS Pharmacy, Inc.
Meadowbrook Newark CVS, Inc.	1	CVS Pharmacy, Inc.
Media CVS, Inc.	1	CVS Pharmacy, Inc.
Merchant Plaza CVS, Inc.	1	CVS Pharmacy, Inc.
Meridan West Main CVS, Inc.	1	CVS Pharmacy, Inc.
Meriden Parkade CVS, Inc.	1	CVS Pharmacy, Inc.

FEDERAL TRADE COMMISSION DECISIONS  
VOLUME 147

## Decision and Order

Privileged and Highly Confidential

CVS/pharmacy  
Rx Store Entities with Store Count

EntityName	Store Count by Entity	Owner
Meriden Road CVS, Inc.	1	CVS Pharmacy, Inc.
Meriden Drug CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
Mesa Brown CVS, L.L.C.	1	CVS Pharmacy, Inc.
Michigan Chicago CVS, L.L.C.	1	CVS Pharmacy, Inc.
Middle River CVS, Inc.	1	CVS Pharmacy, Inc.
Middle Smithfield Township CVS, Inc.	1	CVS Pharmacy, Inc.
Middletown CVS, Inc.	1	CVS Pharmacy, Inc.
Middletown Township CVS, Inc.	1	CVS Pharmacy, Inc.
Milford Broad St. CVS, Inc.	1	CVS Pharmacy, Inc.
Millbourne CVS, Inc.	1	CVS Pharmacy, Inc.
Milwaukee Chicago CVS, L.L.C.	1	CVS Pharmacy, Inc.
Mineral Spring Ave. CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
Minnesota CVS Pharmacy, L.L.C.	1	CVS MN Holding Company, L.L.C.
Mint Hill CVS, Inc.	1	CVS Pharmacy, Inc.
Mississippi CVS Pharmacy, L.L.C.	3	CVS Pharmacy, Inc.
Missouri CVS Pharmacy, L.L.C.	30	CVS Pharmacy, Inc.
Mogadore CVS, Inc.	1	CVS Pharmacy, Inc.
Mokena CVS, L.L.C.	1	CVS Pharmacy, Inc.
Monroe CVS, Inc.	1	CVS Pharmacy, Inc.
Montana CVS Pharmacy, L.L.C.	8	CVS Caremark Corporation
Montrose Chicago CVS, L.L.C.	1	CVS Pharmacy, Inc.
Morrisville CVS, Inc.	1	CVS Pharmacy, Inc.
Morrow CVS, Inc.	1	CVS Pharmacy, Inc.
Mounds View MN CVS, L.L.C.	1	CVS Pharmacy, Inc.
Mount Carmel Plaza CVS, Inc.	1	CVS Pharmacy, Inc.
Mountain Avenue CVS, Inc.	1	CVS Pharmacy, Inc.
Mt. Joy CVS, Inc.	1	CVS Pharmacy, Inc.
Mt. Morris CVS, Inc.	1	CVS Pharmacy, Inc.
Mt. Pleasant CVS, Inc.	1	CVS Pharmacy, Inc.
Mundelein CVS, L.L.C.	1	CVS Pharmacy, Inc.
Murray CVS, Inc.	1	CVS Pharmacy, Inc.
Nashville CVS, L.L.C.	1	CVS IN Distribution, Inc.
Naugatuck Bridge St. CVS, Inc.	1	CVS Pharmacy, Inc.
Nebraska CVS Pharmacy, L.L.C.	4	CVS Pharmacy, Inc.
NEC Main CVS, Inc.	1	CVS Pharmacy, Inc.
NEC Montgomery CVS, L.L.C.	1	CVS Pharmacy, Inc.
Nevada CVS Pharmacy, L.L.C.	38	CVS NV Holding Company, L.L.C.



## Decision and Order

Privileged and Highly Confidential

CVS/pharmacy  
Rx Store Entities with Store Count

EntityName	Store Count by Entity	Owner
New Britain CVS, Inc.	1	CVS Pharmacy, Inc.
New Britain Township CVS, Inc.	1	CVS Pharmacy, Inc.
New Haven Crown CVS, Inc.	1	CVS Pharmacy, Inc.
New Hope MN CVS, L.L.C.	1	CVS Pharmacy, Inc.
New Jersey Avenue CVS, L.L.C.	1	CVS of DC and VA, Inc.
New Jersey CVS Pharmacy, L.L.C.	224	CVS Pharmacy, Inc.
New Lenox CVS, L.L.C.	1	CVS Pharmacy, Inc.
New London Ocean Avenue CVS, Inc.	1	CVS Pharmacy, Inc.
New London Turnpike CVS, Inc.	1	CVS Pharmacy, Inc.
Newark East Main CVS, Inc.	1	CVS Pharmacy, Inc.
Newington Cedar CVS, Inc.	1	CVS Pharmacy, Inc.
Newman CVS, Inc.	1	CVS Pharmacy, Inc.
Newport CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
Newtown CVS, Inc.	1	CVS Pharmacy, Inc.
Niles CVS, Inc.	1	CVS Pharmacy, Inc.
Niles CVS, L.L.C.	1	CVS Pharmacy, Inc.
Norristown CVS, Inc.	1	CVS Pharmacy, Inc.
North Carolina Acquisition Corp.	1	CVS Pharmacy, Inc.
North Carolina CVS Pharmacy, L.L.C.	18	CVS Pharmacy, Inc.
North Charleston SC CVS, Inc.	1	CVS Pharmacy, Inc.
North Grace Lombard CVS, L.L.C.	1	CVS Pharmacy, Inc.
North Haven CVS, Inc.	1	CVS Pharmacy, Inc.
North Las Vegas CVS, L.L.C.	1	CVS Pharmacy, Inc.
North Olmstead OH CVS, Inc.	1	CVS Pharmacy, Inc.
Northwest K Street CVS, Inc.	1	CVS Pharmacy, Inc.
Northwest M Street CVS, L.L.C.	1	CVS of DC and VA, Inc.
Norwalk Broad Street CVS, Inc.	1	CVS Pharmacy, Inc.
Norwich Main Street CVS, Inc.	1	CVS Pharmacy, Inc.
Notre Dame CVS, Inc.	1	CVS Pharmacy, Inc.
Oak Lane CVS, Inc.	1	CVS Pharmacy, Inc.
Oak Ridge NC CVS, Inc.	1	CVS Pharmacy, Inc.
Oakwood CVS, Inc.	1	CVS Pharmacy, Inc.
Ocean City MD CVS, L.L.C.	1	CVS of Maryland, Inc.
Ohio CVS Stores, L.L.C.	6	CVS Pharmacy, Inc.
Oklahoma CVS Pharmacy, L.L.C.	2	CVS Pharmacy, Inc.
Old Buncombe Road CVS, Inc.	1	CVS Pharmacy, Inc.
Old Greenwich CVS, Inc.	1	CVS Pharmacy, Inc.

FEDERAL TRADE COMMISSION DECISIONS  
VOLUME 147

## Decision and Order

Privileged and Highly Confidential

CVS/pharmacy  
Rx Store Entities with Store Count

EntityName	Store Count by Entity	Owner
Old Hickory CVS, Inc.	1	CVS Pharmacy, Inc.
Old National CVS, Inc.	1	CVS Pharmacy, Inc.
Old Saybrook CVS, Inc.	1	CVS Pharmacy, Inc.
Orange CVS, Inc.	1	CVS Pharmacy, Inc.
Oregon Avenue CVS, Inc.	1	CVS Pharmacy, Inc.
P Street CVS, Inc.	1	CVS Pharmacy, Inc.
PA CVS, Inc.	1	CVS Pharmacy, Inc.
Paoli, PA, CVS, Inc.	1	CVS Pharmacy, Inc.
Paria CVS, Inc.	1	CVS Pharmacy, Inc.
Park Street CVS, Inc.	1	CVS Pharmacy, Inc.
Parkwood Circle CVS, Inc.	1	CVS Pharmacy, Inc.
Parsonage CVS, Inc.	1	CVS Pharmacy, Inc.
Pataaskala CVS, L.L.C.	1	Revco Discount Drug Centers, Inc.
Pawtucket CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
Pawtucket Plaza CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
Paxton Square CVS, Inc.	1	CVS Pharmacy, Inc.
Pecos Gilbert CVS, L.L.C.	1	CVS Pharmacy, Inc.
Penn - Daw CVS, Inc.	1	CVS of DC and VA, Inc.
Pennsauken CVS, Inc.	1	CVS Pharmacy, Inc.
Pennsylvania Ave. CVS, Inc.	1	CVS of DC and VA, Inc.
Pennsylvania Avenue CVS, Inc.	1	CVS Pharmacy, Inc.
Pennsylvania CVS Pharmacy, L.L.C.	20	CVS Pharmacy, Inc.
Peoria AZ CVS, L.L.C.	1	CVS Pharmacy, Inc.
Perry Highway CVS, Inc.	1	CVS Pharmacy, Inc.
Pershing Drive CVS, Inc.	1	CVS Pharmacy, Inc.
Phila Sun CVS, Inc.	1	CVS Pharmacy, Inc.
Philadelphia Broad CVS, Inc.	1	CVS Pharmacy, Inc.
Philadelphia Foxchase CVS, Inc.	1	CVS Pharmacy, Inc.
Philadelphia Frankford CVS, Inc.	1	CVS Pharmacy, Inc.
Philadelphia Harbison CVS, Inc.	1	CVS Pharmacy, Inc.
Philadelphia PA CVS, Inc.	1	CVS Pharmacy, Inc.
Philadelphia South Street CVS, Inc.	1	CVS Pharmacy, Inc.
Philly Broad Street CVS, Inc.	1	CVS Pharmacy, Inc.
Pigeon Forge TN CVS, Inc.	1	CVS Pharmacy, Inc.
Pinal County AZ CVS, L.L.C.	1	CVS Pharmacy, Inc.
Pio Nono Avenue CVS, Inc.	1	CVS Pharmacy, Inc.
Piper Glen CVS, Inc.	1	CVS Pharmacy, Inc.

## Decision and Order

Privileged and Highly Confidential

CVS/pharmacy  
Rx Store Entities with Store Count

EntityName	Store Count by Entity	Owner
Pittston CVS, Inc.	1	CVS Pharmacy, Inc.
Plainfield CVS, Inc.	1	CVS Pharmacy, Inc.
Plainfield IL CVS, L.L.C.	1	CVS Pharmacy, Inc.
Plainville East CVS, Inc.	1	CVS Pharmacy, Inc.
Plymouth MN CVS, L.L.C.	1	CVS Pharmacy, Inc.
Port Huron CVS, Inc.	1	CVS Pharmacy, Inc.
Porters Pass CVS, Inc.	1	CVS Pharmacy, Inc.
Portsmouth CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
Post Office Square CVS, Inc.	1	CVS Pharmacy, Inc.
Pottstown High Street CVS, Inc.	1	CVS Pharmacy, Inc.
Powell OH CVS, Inc.	1	CVS Pharmacy, Inc.
Prospect CVS, Inc.	1	CVS Pharmacy, Inc.
Prospect Park CVS, Inc.	1	CVS Pharmacy, Inc.
Providence Charlotte CVS, Inc.	1	CVS Pharmacy, Inc.
Providence Road CVS, Inc.	1	CVS Pharmacy, Inc.
Putnam Pike CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
Quakertown CVS, Inc.	1	CVS Pharmacy, Inc.
Queen Anne Plaza CVS, Inc.	1	CVS Pharmacy, Inc.
Quention Road CVS, Inc.	1	CVS Pharmacy, Inc.
Race Street CVS, Inc.	1	CVS Pharmacy, Inc.
Raleigh CVS, Inc.	1	CVS Pharmacy, Inc.
Raleigh Millbrook CVS, Inc.	1	CVS Pharmacy, Inc.
Ralph's Corner CVS, Inc.	1	CVS Pharmacy, Inc.
Ray McClintock CVS, L.L.C.	1	CVS Pharmacy, Inc.
Rea & Derick, Inc.	67	CVS of DC and VA, Inc.
Reading, Penna., CVS, Inc.	1	CVS Pharmacy, Inc.
Recker Mesa CVS, L.L.C.	1	CVS Pharmacy, Inc.
Reed Street CVS, Inc.	1	CVS Pharmacy, Inc.
Rehoboth Beach CVS, Inc.	1	CVS Pharmacy, Inc.
Reidville Drive CVS, Inc.	1	CVS Pharmacy, Inc.
Reston Plaza America CVS, Inc.	1	CVS Pharmacy, Inc.
Revco Discount Drug Centers, Inc.	895	CVS Caremark Corporation
Revco Drug Stores, Inc.	5	Revco Discount Drug Centers, Inc.
Reynoldsburg CVS, Inc.	1	CVS Pharmacy, Inc.
Rhode Island CVS Pharmacy, L.L.C.	2	CVS Pharmacy, Inc.
Richboro Market CVS, Inc.	1	CVS Pharmacy, Inc.
Richmond CVS, Inc.	1	CVS Pharmacy, Inc.

FEDERAL TRADE COMMISSION DECISIONS  
VOLUME 147

## Decision and Order

Privileged and Highly Confidential

CVS/pharmacy  
Rx Store Entities with Store Count

EntityName	Store Count by Entity	Owner
Richmond Highway CVS, Inc.	1	CVS Pharmacy, Inc.
Richmond RI CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
Richmond Woodman CVS, Inc.	1	CVS Pharmacy, Inc.
Ridgefield Grove CVS, Inc.	1	CVS Pharmacy, Inc.
Ridley Acres CVS, Inc.	1	CVS Pharmacy, Inc.
Ridley CVS, Inc.	1	CVS Pharmacy, Inc.
Rising Sun CVS, Inc.	1	CVS Pharmacy, Inc.
River Forest CVS, L.L.C.	1	CVS Pharmacy, Inc.
Riverdale IL CVS, L.L.C.	1	CVS Pharmacy, Inc.
Riverwatch CVS, Inc.	1	CVS Pharmacy, Inc.
Robious CVS, Inc.	1	CVS Pharmacy, Inc.
Rockingham CVS, L.L.C.	1	CVS MI Distribution, Inc.
Rockville MD CVS, L.L.C.	1	CVS of Maryland, Inc.
Rockville Pike CVS, Inc.	1	CVS Pharmacy, Inc.
Rocky Hill Cromwell CVS, Inc.	1	CVS Pharmacy, Inc.
Rocky Hill CVS, Inc.	1	CVS Pharmacy, Inc.
Rolling Meadows CVS, L.L.C.	1	CVS Pharmacy, Inc.
Roosevelt CVS, L.L.C.	1	CVS Pharmacy, Inc.
Roper Mountain Road CVS, Inc.	1	CVS Pharmacy, Inc.
Rosa Narg CVS, Inc.	1	CVS Pharmacy, Inc.
Rosemont PA CVS, Inc.	1	CVS Pharmacy, Inc.
Roswell CVS, Inc.	1	CVS Pharmacy, Inc.
Roswell Rivermont Station CVS, Inc.	1	CVS Pharmacy, Inc.
Round Lake CVS, L.L.C.	1	CVS Pharmacy, Inc.
Route 202 Whitpain CVS, Inc.	1	CVS Pharmacy, Inc.
Roxborough CVS, Inc.	1	CVS Pharmacy, Inc.
Royersford CVS, Inc.	1	CVS Pharmacy, Inc.
Russell FL Apache CVS, L.L.C.	1	CVS Pharmacy, Inc.
Sagev CVS, L.L.C.	1	CVS Pharmacy, Inc.
Sem Furr Road CVS, Inc.	1	CVS Pharmacy, Inc.
Sandusky CVS, Inc.	1	CVS Pharmacy, Inc.
Sandy Plains CVS, Inc.	1	CVS Pharmacy, Inc.
Sayre CVS, Inc.	1	CVS Pharmacy, Inc.
Schaumburg CVS, L.L.C.	1	CVS Pharmacy, Inc.
Schnecksville CVS, Inc.	1	CVS Pharmacy, Inc.
Scranton Davis CVS, Inc.	1	CVS Pharmacy, Inc.
Scranton Main CVS, Inc.	1	CVS Pharmacy, Inc.

Decision and Order

Privileged and Highly Confidential

CVS/pharmacy  
Rx Store Entities with Store Count

EntityName	Store Count by Entity	Owner
SEC CVS, Inc.	1	CVS Pharmacy, Inc.
Sedalia NC CVS, Inc.	1	CVS Pharmacy, Inc.
Sedwick Durham CVS, L.L.C.	1	CVS IN Distribution, Inc.
Senip CVS, L.L.C.	1	CVS Pharmacy, Inc.
Severn CVS, Inc.	1	CVS Pharmacy, Inc.
Seymour CVS, Inc.	1	CVS Pharmacy, Inc.
Shallowford Road CVS, Inc.	1	CVS Pharmacy, Inc.
Shamokin CVS, Inc.	1	CVS Pharmacy, Inc.
Sharon Hill CVS, Inc.	1	CVS Pharmacy, Inc.
Sheffield Avenue CVS, L.L.C.	1	CVS RX Services, Inc.
Shelby Township CVS, Inc.	1	CVS Pharmacy, Inc.
Shelbyville Main CVS, Inc.	1	CVS Pharmacy, Inc.
Shoemakerville CVS, Inc.	1	CVS Pharmacy, Inc.
Shoppers Village CVS, Inc.	1	CVS Pharmacy, Inc.
Shopperstown CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
Showalter CVS, Inc.	1	CVS Pharmacy, Inc.
Sibley Chicago CVS, L.L.C.	1	CVS Pharmacy, Inc.
Sillington Road CVS, Inc.	1	CVS Pharmacy, Inc.
Silver Hill CVS, Inc.	1	CVS Pharmacy, Inc.
Silverbrook CVS, Inc.	1	CVS Pharmacy, Inc.
Silverton CVS, Inc.	1	CVS Pharmacy, Inc.
Simsbury CVS, Inc.	1	CVS Pharmacy, Inc.
Skokie CVS, L.L.C.	1	CVS Pharmacy, Inc.
Smith Palatine CVS, L.L.C.	1	CVS Pharmacy, Inc.
Smyrna Concord Road CVS, Inc.	1	CVS Pharmacy, Inc.
Smyrna CVS, Inc.	1	CVS Pharmacy, Inc.
Snelville CVS, Inc.	1	CVS Pharmacy, Inc.
Snelville GA CVS, Inc.	1	CVS Pharmacy, Inc.
Socastee SC CVS, Inc.	1	CVS Pharmacy, Inc.
Souderton CVS, Inc.	1	CVS Pharmacy, Inc.
South Brook CVS, Inc.	1	CVS Pharmacy, Inc.
South Carolina CVS Pharmacy, L.L.C.	7	CVS Pharmacy, Inc.
South Carolina CVS, Inc.	1	CVS Pharmacy, Inc.
South Lincoln Newtown CVS, Inc.	1	CVS Pharmacy, Inc.
South Lyon CVS, Inc.	1	CVS Pharmacy, Inc.
South Philadelphia CVS, Inc.	1	CVS Pharmacy, Inc.
South Providence CVS, Inc.	1	Cranston-Reservoir CVS, Inc.

FEDERAL TRADE COMMISSION DECISIONS  
VOLUME 147

Decision and Order

Privileged and Highly Confidential

CVS/pharmacy  
Rx Store Entities with Store Count

EntityName	Store Count by Entity	Owner
South Wabaah CVS, L.L.C.	1	CVS RX Services, Inc.
South Windsor CVS, Inc.	1	CVS Pharmacy, Inc.
Southbury CVS, Inc.	1	CVS Pharmacy, Inc.
Southern Greenfield CVS, L.L.C.	1	CVS Pharmacy, Inc.
Southern Tempe CVS, L.L.C.	1	CVS Pharmacy, Inc.
Southington Main Street CVS, Inc.	1	CVS Pharmacy, Inc.
Southington Queen CVS, Inc.	1	CVS Pharmacy, Inc.
Sparkleberry Lane CVS, Inc.	1	CVS Pharmacy, Inc.
Springfield PA CVS, Inc.	1	CVS Pharmacy, Inc.
Springfield Spans CVS, Inc.	1	CVS Pharmacy, Inc.
Sproul Broomall CVS, Inc.	1	CVS Pharmacy, Inc.
St. Clair CVS, Inc.	1	CVS Pharmacy, Inc.
Stamford CVS, Inc.	1	CVS Pharmacy, Inc.
Stamford Hope Street CVS, Inc.	1	CVS Pharmacy, Inc.
Stamford Ridgeway CVS, Inc.	1	CVS Pharmacy, Inc.
Standard Drug Company	18	CVS Pharmacy, Inc.
State Park Road CVS, Inc.	1	CVS Pharmacy, Inc.
Stenton Avenue CVS, Inc.	1	CVS Pharmacy, Inc.
Sterrettanle Road CVS, Inc.	1	CVS Pharmacy, Inc.
Stone Mountain CVS, Inc.	1	CVS Pharmacy, Inc.
Stony Island Chicago CVS, L.L.C.	1	CVS Pharmacy, Inc.
Suffield CVS, Inc.	1	CVS Pharmacy, Inc.
Sugarloaf Parkway CVS, Inc.	1	CVS Pharmacy, Inc.
Sun Lakes CVS, L.L.C.	1	CVS Pharmacy, Inc.
Sunset Crossing CVS, Inc.	1	CVS Pharmacy, Inc.
Sunset Henderson CVS, L.L.C.	1	CVS Pharmacy, Inc.
Surprise CVS, L.L.C.	1	CVS Pharmacy, Inc.
Suwanee CVS, Inc.	1	CVS Pharmacy, Inc.
Swamp New Britain CVS, Inc.	1	CVS Pharmacy, Inc.
Swansea IL CVS, L.L.C.	1	CVS Pharmacy, Inc.
Swatara Square CVS, Inc.	1	CVS Pharmacy, Inc.
SWC CVS, Inc.	1	CVS Pharmacy, Inc.
Tannersville CVS, Inc.	1	CVS Pharmacy, Inc.
Tara Boulevard CVS, Inc.	1	CVS Pharmacy, Inc.
Telegraph CVS, Inc.	1	CVS Pharmacy, Inc.
Tennessee CVS Pharmacy, L.L.C.	5	CVS Pharmacy, Inc.
Third Lake CVS, L.L.C.	1	CVS Pharmacy, Inc.

Decision and Order

Privileged and Highly Confidential

CVS/pharmacy  
Rx Store Entities with Store Count

EntityName	Store Count by Entity	Owner
Thomas Phoenix CVS, L.L.C.	1	CVS RX Services, Inc.
Thornbury CVS, Inc.	1	CVS Pharmacy, Inc.
Thorndale PA CVS, Inc.	1	CVS Pharmacy, Inc.
Tiverton CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
Tolland CVS, Inc.	1	CVS Pharmacy, Inc.
Toombs Avenue CVS, L.L.C.	1	CVS IN Distribution, Inc.
Torresdale CVS, Inc.	1	CVS Pharmacy, Inc.
Torrington Main Street CVS, Inc.	1	CVS Pharmacy, Inc.
Towanda CVS, Inc.	1	CVS Pharmacy, Inc.
Tower CVS, Inc.	1	CVS Pharmacy, Inc.
Towne Lake Parkway CVS, Inc.	1	CVS Pharmacy, Inc.
Trappe CVS, Inc.	1	CVS Pharmacy, Inc.
Tucker CVS, Inc.	1	CVS Pharmacy, Inc.
Tucson AZ CVS, L.L.C.	1	CVS Pharmacy, Inc.
Twenty Third Falmount CVS, Inc.	1	CVS Pharmacy, Inc.
Tyrone CVS, Inc.	1	CVS Pharmacy, Inc.
Union Boulevard CVS, Inc.	1	CVS Pharmacy, Inc.
Union Lehigh CVS, Inc.	1	CVS Pharmacy, Inc.
University Mesa CVS, L.L.C.	1	CVS Pharmacy, Inc.
University St. Paul CVS, L.L.C.	1	CVS Pharmacy, Inc.
University-Wheaton CVS, Inc.	1	CVS of DC and VA, Inc.
Upper Gwynedd CVS, Inc.	1	CVS Pharmacy, Inc.
Upper Hembree CVS, Inc.	1	CVS Pharmacy, Inc.
Upper Uwchlan CVS, Inc.	1	CVS Pharmacy, Inc.
Valley Verde NV CVS, L.L.C.	1	CVS Pharmacy, Inc.
Vernon CVS, Inc.	1	CVS Pharmacy, Inc.
Village Plaza CVS, Inc.	1	CVS Pharmacy, Inc.
Vine & Taft CVS, Inc.	1	CVS Pharmacy, Inc.
Vinings Jubilee CVS, Inc.	1	CVS Pharmacy, Inc.
Virginia CVS Pharmacy, L.L.C.	10	CVS Pharmacy, Inc.
W. Ponce DeLeon CVS, Inc.	1	CVS Pharmacy, Inc.
Wadsworth CVS, Inc.	1	CVS Pharmacy, Inc.
Wadsworth High Street CVS, Inc.	1	CVS Pharmacy, Inc.
Wake Forest CVS, Inc.	1	CVS Pharmacy, Inc.
Waldorf MD CVS, L.L.C.	1	CVS of Maryland, Inc.
Walnut Hill Plaza CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
Walnut Street CVS, Inc.	1	CVS Pharmacy, Inc.

FEDERAL TRADE COMMISSION DECISIONS  
VOLUME 147

## Decision and Order

Privileged and Highly Confidential

CVS/pharmacy  
Rx Store Entities with Store Count

EntityName	Store Count by Entity	Owner
Warm Springs Rainbow CVS, L.L.C.	1	CVS Pharmacy, Inc.
Warm Springs Road CVS, L.L.C.	3	CVS Pharmacy, Inc.
Warner McQueen CVS, L.L.C.	1	CVS Pharmacy, Inc.
Warren Avenue CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
Warren CVS, L.L.C.	1	CVS MI Distribution, Inc.
Warren R.I. CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
Warwick City Hall CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
Warwick Neck CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
Washington Chicago CVS, L.L.C.	1	CVS Pharmacy, Inc.
Washington Connecticut CVS, Inc.	1	CVS Pharmacy, Inc.
Washington E Street CVS, Inc.	1	CVS Pharmacy, Inc.
Washington Lamb CVS, L.L.C.	1	CVS RX Services, Inc.
Waterbury Chase CVS, Inc.	1	CVS Pharmacy, Inc.
Waterbury West Main CVS, Inc.	1	CVS Pharmacy, Inc.
Waterbury Westwood CVS, Inc.	1	CVS Pharmacy, Inc.
Waterford Boston Post CVS, Inc.	1	CVS Pharmacy, Inc.
Waterway Drive CVS, Inc.	1	CVS Pharmacy, Inc.
Weukegan CVS, L.L.C.	1	CVS Pharmacy, Inc.
Waverly TN CVS, Inc.	1	CVS Pharmacy, Inc.
Wayne Avenue CVS, Inc.	1	CVS Pharmacy, Inc.
Wayne CVS, Inc.	1	CVS Pharmacy, Inc.
Webster Avenue CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
West Aspetuck CVS, Inc.	1	CVS Pharmacy, Inc.
West Avenue CVS, Inc.	1	CVS Pharmacy, Inc.
West Broad Street CVS, Inc.	1	CVS of DC and VA, Inc.
West Calhoun CVS, Inc.	1	CVS Pharmacy, Inc.
West Chester Pike CVS, Inc.	1	CVS Pharmacy, Inc.
West College Ave CVS, Inc.	1	CVS Pharmacy, Inc.
West Hartford Boulevard CVS, Inc.	1	CVS Pharmacy, Inc.
West Hartford CVS, Inc.	1	CVS Pharmacy, Inc.
West Hartford Route 4 CVS, Inc.	1	CVS Pharmacy, Inc.
West Hubbard CVS, L.L.C.	1	CVS Pharmacy, Inc.
West Hunter Street CVS, L.L.C.	1	CVS VA Distribution, Inc.
West Jackson CVS, L.L.C.	1	CVS Pharmacy, Inc.
West Lemon CVS, Inc.	1	CVS Pharmacy, Inc.
West Warwick CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
West Warwick Main Street CVS, Inc.	1	Cranston-Reservoir CVS, Inc.



Decision and Order

Privileged and Highly Confidential

CVS/pharmacy  
Rx Store Entities with Store Count

EntityName	Store Count by Entity	Owner
West Warwick Providence CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
Western Chic CVS, L.L.C.	1	CVS Pharmacy, Inc.
Westland MI CVS, L.L.C.	1	CVS Pharmacy, Inc.
Wethersfield CVS, Inc.	1	CVS Pharmacy, Inc.
Whalley Avenue CVS, Inc.	1	CVS Pharmacy, Inc.
Wheaton CVS, L.L.C.	1	CVS Pharmacy, Inc.
White Bear Lake CVS, L.L.C.	1	CVS Pharmacy, Inc.
White Cross Stores, Inc. No. 14	58	Ravco Discount Drug Centers, Inc.
White Lake CVS, Inc.	1	CVS Pharmacy, Inc.
Whitpain CVS, Inc.	1	CVS Pharmacy, Inc.
Williamsburg CVS, Inc.	1	CVS Pharmacy, Inc.
Willimantic Main Street CVS, Inc.	1	CVS Pharmacy, Inc.
Wilmer Road CVS, L.L.C.	1	CVS IN Distribution, Inc.
Wilmore Washington CVS, L.L.C.	1	CVS IN Distribution, Inc.
Wilson Boulevard CVS, Inc.	1	CVS of DC and VA, Inc.
Wilton CT CVS, Inc.	1	CVS Pharmacy, Inc.
Windsor Broad Street CVS, Inc.	1	CVS Pharmacy, Inc.
Windsor CVS, Inc.	1	CVS Pharmacy, Inc.
Windward Plaza CVS, Inc.	1	CVS Pharmacy, Inc.
Winfield CVS, L.L.C.	1	CVS Pharmacy, Inc.
Winsted CVS, Inc.	1	CVS Pharmacy, Inc.
Wisconsin CVS Pharmacy, L.L.C.	25	CVS Pharmacy, Inc.
Woodbridge CVS, Inc.	1	CVS Pharmacy, Inc.
Woodbury MN CVS, L.L.C.	1	CVS Pharmacy, Inc.
Woodlawn Avenue CVS, Inc.	1	CVS Pharmacy, Inc.
Woodlawn Chicago CVS, L.L.C.	1	CVS Pharmacy, Inc.
Woodridge CVS, L.L.C.	1	CVS Pharmacy, Inc.
Woodruff Road CVS, Inc.	1	CVS Pharmacy, Inc.
Woodward Detroit CVS, L.L.C.	13	CVS Pharmacy, Inc.
Woonsocket CVS, Inc.	1	Cranston-Reservoir CVS, Inc.
Woonsocket Prescription Center, Inc.	1	Cranston-Reservoir CVS, Inc.
Wyoming MI CVS, Inc.	1	CVS Pharmacy, Inc.
Yardley CVS, Inc.	1	CVS Pharmacy, Inc.
Yeadon (Pa.) CVS, Inc.	1	CVS Pharmacy, Inc.
York Road CVS, Inc.	1	CVS Pharmacy, Inc.
<b>Grand</b>	<b>6186</b>	

Analysis to Aid Public Comment

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

The Federal Trade Commission has accepted, subject to final approval, a consent agreement from CVS Caremark Corporation (“CVS”).

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement’s proposed order.

The Commission’s proposed complaint alleges that CVS is in the business of selling prescription and non-prescription medicines and supplies, as well as other products. It operates, among other things, approximately 6,300 retail pharmacy stores in the United States (collectively, “CVS pharmacies”) and online and mail order pharmacy businesses. The company allows consumers buying products in CVS pharmacies to pay for their purchases with credit, debit and electronic benefit transfer cards; insurance cards; personal checks; or cash.

The complaint alleges that in conducting its business, CVS routinely obtains information from or about its customers, including, but not limited to, name; telephone number; address; date of birth; bank account number; payment card account number and expiration date; driver’s license number or other government-issued identification; prescription information, such as medication and dosage, prescribing physician name, address, and telephone number, health insurer name, and insurance account number and policy number; and Social Security number. The company also collects and maintains employment information from its employees, which includes, among other things, Social Security numbers.

## Analysis to Aid Public Comment

The complaint further alleges that CVS engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for sensitive information from consumers and employees. In particular, CVS failed to: (1) implement policies and procedures to dispose securely of such information, including, but not limited to, policies and procedures to render the information unreadable in the course of disposal; (2) adequately train employees to dispose securely of such information; (3) use reasonable measures to assess compliance with its established policies and procedures for the disposal of such information; or (4) employ a reasonable process for discovering and remedying risks to such information.

The complaint alleges that as a result of these failures, CVS pharmacies discarded materials containing sensitive information in clear readable text (such as prescriptions, prescription bottles, pharmacy labels, computer printouts, prescription purchase refunds, credit card receipts, and employee records) in unsecured, publicly-accessible trash dumpsters on numerous occasions. For example, in July 2006 and continuing into 2007, television stations and other media outlets reported finding such information about customers and employees in unsecured dumpsters used by CVS pharmacies in at least 15 cities throughout the United States. When discarded in publicly-accessible dumpsters, such information can be obtained by individuals for purposes of identity theft or the theft of prescription medicines.

The proposed order applies to sensitive information about consumers and employees obtained by CVS. It contains provisions designed to prevent CVS from engaging in the future in practices similar to those alleged in the complaint.

Part I of the proposed order prohibits misrepresentations about the security, confidentiality, and integrity of sensitive information.

Part II of the order requires CVS to establish and maintain a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of such information (whether in paper or electronic format) about

## Analysis to Aid Public Comment

consumers, employees, and those seeking to become employees. The order covers health and other sensitive information obtained by all CVS entities, including, but not limited to, retail pharmacies and the pharmacy benefit management business. The security program must contain administrative, technical, and physical safeguards appropriate to CVS's size and complexity, the nature and scope of its activities, and the sensitivity of the information collected from or about consumers and employees. Specifically, the order requires CVS to:

- Designate an employee or employees to coordinate and be accountable for the information security program.
- Identify material internal and external risks to the security, confidentiality, and integrity of customer information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, and assess the sufficiency of any safeguards in place to control these risks.
- Design and implement reasonable safeguards to control the risks identified through risk assessment, and regularly test or monitor the effectiveness of the safeguards' key controls, systems, and procedures.
- Develop and use reasonable steps to select and retain service providers capable of appropriately safeguarding personal information they receive from CVS, and require service providers by contract to implement and maintain appropriate safeguards.
- Evaluate and adjust its information security programs in light of the results of testing and monitoring, any material changes to operations or business arrangements, or any other circumstances that it knows or has reason to know may have material impact on its information security program.

## Analysis to Aid Public Comment

Part III of the proposed order requires CVS to obtain within one year, and on a biennial basis thereafter for a period of twenty (20) years, an assessment and report from a qualified, objective, independent third-party professional, certifying, among other things, that: (1) it has in place a security program that provides protections that meet or exceed the protections required by Part II of the proposed order; and (2) its security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of sensitive consumer and employee information has been protected.

Parts IV through VIII of the proposed order are reporting and compliance provisions. Part IV requires CVS to retain documents relating to its compliance with the order. For most records, the order requires that the documents be retained for a five-year period. For the third-party assessments and supporting documents, CVS must retain the documents for a period of three years after the date that each assessment is prepared. Part V requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part VI ensures notification to the FTC of changes in corporate status. Part VII mandates that CVS submit a compliance report to the FTC within 90 days, and periodically thereafter as requested. Part VIII is a provision “sunsetting” the order after twenty (20) years, with certain exceptions.

The Commission conducted its investigation jointly with the Office for Civil Rights in the Department of Health and Human Services (“OCR-HHS”). Working together, the Commission and OCR-HHS each entered into separate but coordinated agreements with CVS to resolve all the issues of both agencies.

This is the Commission’s twenty-fourth case to challenge the failure by a company to implement reasonable information security practices, and the first case: (1) involving a health provider, (2) proceeding jointly with OCR-HHS, and (3) challenging the security of employee data.

*Analysis to Aid Public Comment*

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in anyway.

INTERLOCUTORY, MODIFYING,  
VACATING, AND MISCELLANEOUS  
ORDERS

---

IN THE MATTER OF

**WHOLE FOODS MARKET, INC.,  
AND  
WILD OATS MARKETS, INC.**

*Docket No. 9324      Order, January 28, 2009*

Order granting Whole Foods Market's motion to withdraw the matter from adjudication for the purpose of considering a consent agreement.

**ORDER WITHDRAWING MATTER FROM ADJUDICATION UNTIL  
FEBRUARY 5, 2009**

Respondent Whole Foods Market, Inc., has moved, pursuant to Rule 3.25(b) of the Commission Rules of Practice, to withdraw this matter from adjudication for the purpose of considering a proposed consent agreement. Respondent also requests that its motion and attachments thereto be treated as non-public. Complaint counsel have taken no position with respect to Respondent's motion. The ALJ has certified the motion to the Commission, pursuant to Rule 3.25(d).

Upon consideration of the motion, the Commission has determined to withdraw this matter from adjudication for five (5) business days. Absent another order by the Commission, this matter will revert to Part 3 adjudicative status at 12:01 a.m. on Thursday, February 5th.

With regard to Respondent's request for non-public treatment of its motion and attachments thereto, pursuant to Rule 3.25(b), Respondent's proposed Agreement Containing Consent Order and proposed Decision and Order will not be placed on the public record unless and until accepted by the Commission. We can discern no

## Interlocutory Orders, Etc.

good reason, however, for according non-public treatment to Respondent's motion and other attachments. There is a strong presumption that the public has a right to know what is happening in the Commission's litigation, and Respondent has made no showing to justify keeping these materials off the public record. Accordingly,

**IT IS ORDERED THAT** Respondent's request to withdraw this matter from adjudication is **GRANTED**. This matter is withdrawn from adjudication until 12:01 a.m. on Thursday, February 5, 2009, at which time it will return to adjudicative status under Part 3 of the Commission Rules of Practice.

**IT IS FURTHER ORDERED THAT** Respondent's request for non-public treatment of its motion and attachments thereto is **GRANTED IN PART AND DENIED IN PART**, as follows:

1. The attachments to Respondent's motion titled Agreement Containing Consent Order and proposed Decision and Order will not be placed on the public record unless and until accepted by the Commission, and
2. Respondent's motion and remaining attachments thereto will be placed on the public record.

By the Commission.



Interlocutory Orders, Etc.

IN THE MATTER OF

**NATIVE ESSENCE HERB COMPANY,  
MARK J. HERSHISER,  
AND  
MARIANNE HERSHISER**

*Docket No. 9328      Order, January 29, 2009*

Order granting complaint counsel's and respondents' joint motion to withdraw the matter from adjudication for the purpose of considering a consent agreement.

**ORDER WITHDRAWING MATTER FROM ADJUDICATION FOR THE  
PURPOSE OF CONSIDERING A PROPOSED CONSENT AGREEMENT**

Complaint Counsel and Respondents having jointly moved that this matter be withdrawn from adjudication to enable the Commission to consider a proposed Consent Agreement, and having submitted a proposed Consent Agreement containing a proposed Order, executed by the Respondents and by Complaint Counsel and approved by the Director of the Bureau of Consumer Protection, which, if accepted by the Commission, would resolve this matter in its entirety;

**IT IS ORDERED**, pursuant to Rule 3.25(c) of the Commission Rules of Practice, 16 C.F.R. § 3.25(c) (2009), that this matter in its entirety be and it hereby is withdrawn from adjudication, and that all proceedings before the Administrative Law Judge be and they hereby are stayed pending a determination by the Commission with respect to the proposed Consent Agreement, pursuant to Rule 3.25(f), 16 C.F.R. § 3.25(f); and

Interlocutory Orders, Etc.

**IT IS FURTHER ORDERED**, pursuant to Rule 3.25(b) of the Commission Rules of Practice, 16 C.F.R. § 3.25(b), that the proposed Consent Agreement not be placed on the public record unless and until it is accepted by the Commission.

By the Commission.

Interlocutory Orders, Etc.

**IN THE MATTER OF**

**CRH PLC,  
OLDCASTLE, INC.,  
OLDCASTLE ARCHITECTURAL, INC.,  
ROBERT SCHLEGEL,  
AND  
PAVESTONE COMPANY, LP**

*Docket No. 9335      Order, January 29, 2009*

Order granting complaint counsel's and respondents' joint motion to dismiss the complaint.

**ORDER DISMISSING COMPLAINT**

On January 14, 2009, the Federal Trade Commission issued the Administrative Complaint in this matter, having reason to believe that Respondents CRH plc ("CRH"), Oldcastle, Inc. (wholly owned by CRH), and Oldcastle Architectural, Inc. (an indirect subsidiary of CRH) -- and Robert Schlegel and Pavestone Company, LP (collectively, "Pavestone") -- had entered into an acquisition agreement which, 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. Complaint Counsel and the Respondents have now filed a Joint Motion to Dismiss Complaint, which states that the Respondents have decided not to proceed with the proposed acquisition by Oldcastle Architectural, Inc. of the Pavestone companies -- and that CRH has withdrawn its Hart-Scott-Rodino Notification and Report Forms filed for the proposed transaction -- and requests that the Commission dismiss the complaint.<sup>1</sup>

---

<sup>1</sup> *Joint Motion to Dismiss Complaint* (January 15, 2009) ("Joint Motion"), available on the Adjudicative Proceedings page for this case at <http://www.ftc.gov/os/adjpro/d9335/index.shtm>.

## Interlocutory Orders, Etc.

The Commission has determined to dismiss the Administrative Complaint without prejudice as the most important elements of the relief set out in the Notice of Contemplated Relief in the Administrative Complaint have been accomplished without the need for further administrative litigation.<sup>2</sup> In particular, the Respondents have announced that they have decided not to proceed with the proposed acquisition, and CRH has withdrawn its Hart-Scott-Rodino Notification and Report Forms filed for the proposed transaction. As a consequence, the Respondents would not be able to effect the proposed transaction without filing new Hart-Scott-Rodino Notification and Report Forms.

For the foregoing reasons, the Commission has determined that the public interest warrants dismissal of the Administrative Complaint in this matter. The Commission has determined to do so without prejudice, however, because it is not reaching a decision on the merits. Accordingly,

---

<sup>2</sup> See *In the Matter of Inova Health System Foundation, and Prince William Health System, Inc.*, Docket No. 9326, Order Dismissing Complaint (June 17, 2008), available at <http://www.ftc.gov/os/adjpro/d9326/080617orderdismisscmpt.pdf>; accord, *In the Matter of Red Sky Holdings LP, and Newpark Resources, Inc.*, Docket No. 9333, Order Dismissing Complaint (December 10, 2008), available at <http://www.ftc.gov/os/adjpro/d9333/081210redskycmpt.pdf>; *In the Matter of Equitable Resources, Inc., Dominion Resources, Inc., Consolidated Natural Gas Company, and The Peoples Natural Gas Company*, Docket No. 9322, Order Dismissing Complaint (January 31, 2008) (Public Version), available at <http://www.ftc.gov/os/adjpro/d9322/080204complaint.pdf>; *In the Matter of Swedish Match North America Inc., and National Tobacco Company, L.P.*, Docket No. 9296 (*Swedish Match*), Order Dismissing Complaint (January 4, 2001), available at <http://www.ftc.gov/os/2001/01/swedishdismisscmp.htm>; *In the Matter of H.J. Heinz Company, Milnot Holding Corporation, and Madison Dearborn Capital Partners, L.P.*, Docket No. 9295 (*H.J. Heinz*), Order Dismissing Complaint (December 4, 2001), available at <http://www.ftc.gov/os/2001/12/heinzorder.pdf>.

Interlocutory Orders, Etc.

**IT IS ORDERED THAT** the Administrative Complaint in this matter be, and it hereby is, dismissed without prejudice.

By the Commission.

Interlocutory Orders, Etc.

**IN THE MATTER OF****POLYPORE INTERNATIONAL, INC.***Docket No. 9327 Order, February 2, 2009*

Order granting complaint counsel's motion for court enforcement of a subpoena directed to Nippon Sheet Glass and certified to the Commission on January 23, 2009.

**ORDER**

On January 23, 2009, Complaint Counsel filed a Motion for Certification to the Commission for Court Enforcement of a subpoena in this matter, in order for Complaint Counsel to conduct a deposition of Nippon Sheet Glass ("NSG") in Japan. On January 28, 2009, Complaint Counsel filed a Supplemental Statement of Counsel. By email dated January 29, 2009, to the Office of Administrative Law Judges, Respondent indicated that it does not oppose Complaint Counsel's motion. On January 29, 2009, Administrative Law Judge D. Michael Chappell certified Complaint Counsel's motion to the Commission, with the recommendation that the Commission facilitate the procedures necessary to conduct a voluntary deposition of NSG's corporate representative in Japan. The Commission has determined to grant Complaint Counsel's motion. Accordingly,

**IT IS ORDERED THAT** the Acting General Counsel of the Commission or his delegate be, and he or she hereby is, authorized, pursuant to Section 9 of the Federal Trade Commission Act, and directed to take appropriate action to enforce complaint counsel's subpoena to Nippon Sheet Glass.

By the Commission.

Interlocutory Orders, Etc.

**IN THE MATTER OF**

**WHOLE FOODS MARKET, INC.,  
AND  
WILD OATS MARKETS, INC.**

*Docket No. 9324      Order, February 4, 2009*

Order granting an extension of the withdrawal from adjudication.

**ORDER EXTENDING WITHDRAWAL OF MATTER FROM  
ADJUDICATION UNTIL MARCH 6, 2009**

On January 28, 2009, the Commission withdrew this matter from adjudication until 12:01 a.m. on February 5, 2009. The Commission has now determined to extend the withdrawal of this matter from adjudication. Absent another order by the Commission, this matter will revert to Part 3 adjudicative status at 5:00 p.m. on Friday, March 6th. Accordingly,

**IT IS ORDERED THAT** the withdrawal of this matter from adjudication be, and it hereby is, extended until 5:00 p.m. on March 6, 2009, at which time it will return to adjudicative status under Part 3 of the Commission Rules of Practice.

By the Commission.

Interlocutory Orders, Etc.

**IN THE MATTER OF**

**GETINGE AB**  
**AND**  
**DATASCOPE CORPORATION**

*FTC File No. 091 0000 Decision, February 27, 2009*

**LETTER NOTIFYING OF THE APPOINTMENT OF AN INTERIM  
MONITOR**

Dear Ms. Williams:

This letter notifies Getinge AB (“Getinge”) that the Federal Trade Commission has approved the appointment of Quantic Regulatory Services, LLC as the Interim Monitor, and has approved the Interim Monitor agreement by and between Quantic Regulatory Services, LLC and Getinge AB, dated February 12, 2009, pursuant to Paragraph III of the Decision and Order in the above-referenced matter.

In according its approval, the Commission has relied on the information submitted and representations made by Getinge and has assumed them to be accurate and complete.

By direction of the Commission, Commissioner Harbour recused.



Interlocutory Orders, Etc.

**IN THE MATTER OF**

**WHOLE FOODS MARKET, INC.  
and  
WILD OATS MARKETS, INC.**

*Docket No. 9324 Decision, March 5, 2009*

Letter approving the Divestiture Trustee Agreement.

**LETTER APPROVING DIVESTITURE TRUSTEE AGREEMENT**

Dear Mr. Denis:

This letter notifies Respondent Whole Foods Market, Inc. (“Whole Foods”) that the Federal Trade Commission has approved the Divestiture Trustee Agreement Between The Food Partners LLC and Whole Foods Market, Inc. in this matter.

In according its approval, the Commission has relied upon the information submitted and representations made by Whole Foods and has assumed them to be accurate and complete.

By direction of the Commission.

Interlocutory Orders, Etc.

**IN THE MATTER OF**

**RAMBUS INCORPORATED**

*Docket No. 9302 Order, March 6, 2009*

Order granting complaint counsel's motion to withdraw the matter from adjudication.

**ORDER WITHDRAWING MATTER FROM ADJUDICATION**

The Federal Trade Commission has considered Complaint Counsel's Motion to Withdraw This Matter From Adjudication, in which Respondent Rambus, Incorporated concurs, and has determined to grant the Motion. Accordingly,

**IT IS ORDERED THAT** this matter be, and it hereby is, withdrawn from adjudication under Part 3 of the Commission Rules of Practice, 16 C.F.R. Part 3, for the purpose of considering the proper resolution of this matter in light of the mandate of the United States Court of Appeals For the District of Columbia Circuit, and the application of Commission Rule of Practice 4.7, 16 C.F.R. § 4.7, is hereby suspended.

By the Commission.

Interlocutory Orders, Etc.

**IN THE MATTER OF**

**WHOLE FOODS MARKET, INC.,  
AND  
WILD OATS MARKETS, INC.**

*Docket No. 9324      Order, March 6, 2009*

Order issued by the Motions Commissioner.

**ORDER WITHDRAWING MATTER FROM ADJUDICATION**

The Commission has now accepted for public comment an Agreement Containing Consent Orders, including a proposed Decision and Order, which, if made final, would resolve this matter in its entirety. The Commission has therefore determined to withdraw this matter from adjudication, pursuant to Commission Rules 3.25(c),(e),(f), 16 C.F.R. §§ 3.25(c),(e),(f), effective at 5 p.m. today. Accordingly,

**IT IS ORDERED THAT** this matter be, and it hereby is, withdrawn from adjudication, effective at 5:00 p.m. Eastern Standard Time today.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

**CCC HOLDINGS INC.,  
AND  
AURORA EQUITY PARTNERS III L.P.***Docket No. 9334      Order March 13, 2009*

Order granting complaint counsel's and respondents' joint motion to dismiss the complaint.

**ORDER DISMISSING COMPLAINT**

On November 25, 2008, the Federal Trade Commission issued the Administrative Complaint in this matter, having reason to believe that Respondents CCC Holdings Inc. ("CCC") and Aurora Equity Partners III L.P. ("Aurora") had entered into a merger agreement which, if consummated, would violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. Complaint Counsel and Respondents have now filed a Joint Motion to Dismiss Complaint in this matter. The Joint Motion states that Respondents have informed Complaint Counsel that they are abandoning the proposed merger; that CCC and Aurora have withdrawn their Hart-Scott-Rodino Notification and Report Forms filed for the proposed transaction; and that the complaint is now moot.<sup>1</sup>

The Commission has determined to dismiss the Administrative Complaint without prejudice, as the most important elements of the relief set out in the Notice of Contemplated Relief in the Administrative Complaint have been accomplished without the need

---

<sup>1</sup> *Joint Motion to Dismiss Complaint* (March 12, 2009), available on the *Adjudicative Proceedings* page for this case at <http://www.ftc.gov/os/adjpro/d9334/index.shtm>.

## Interlocutory Orders, Etc.

for further administrative litigation.<sup>2</sup> In particular, Respondents have announced that they have decided not to proceed with the proposed merger, and both CCC and Aurora have withdrawn the Hart-Scott-Rodino Notification and Report Forms they respectively filed for the proposed transaction. As a consequence, Respondents would not be able to effect the proposed transaction without filing new Hart-Scott-Rodino Notification and Report Forms.

For the foregoing reasons, the Commission has determined that the public interest warrants dismissal of the Administrative Complaint in this matter. The Commission has determined to do so without prejudice, however, because it is not reaching a decision on the merits. Accordingly,

**IT IS ORDERED THAT** the Administrative Complaint in this matter be, and it hereby is, dismissed without prejudice; and

**IT IS FURTHER ORDERED THAT** the Joint Motion To Amend the Hearing Date filed by Complaint Counsel and Respondents on March 9, 2009, and certified to the Commission by Administrative Law Judge Chappell, be, and it hereby is, denied as moot.

By the Commission, Commissioner Rosch recused.

---

<sup>2</sup> See *In the Matter of Inova Health System Foundation, and Prince William Health System, Inc.*, Docket No. 9326, Order Dismissing Complaint (June 17, 2008), available at <http://www.ftc.gov/os/adjpro/d9326/080617orderdismisscmpt.pdf>; accord, *In the Matter of CRH plc, et al.*, Docket No. 9335, Order Dismissing Complaint (January 29, 2009), available at <http://www.ftc.gov/os/adjpro/d9335/index.shtm>; *In the Matter of Red Sky Holdings LP, et al.*, Docket No. 9333, Order Dismissing Complaint (December 10, 2008), available at <http://www.ftc.gov/os/adjpro/d9333/081210redskycmpt.pdf>; *In the Matter of Equitable Resources, Inc., et al.*, Docket No. 9322, Order Dismissing Complaint (January 31, 2008) (Public Version), available at <http://www.ftc.gov/os/adjpro/d9322/080204complaint.pdf>.

Interlocutory Orders, Etc.

IN THE MATTER OF

**RAMBUS INCORPORATED***Docket No. 9302      Order, May 12, 2009*

Order to return the matter to adjudication and dismiss the complaint.

**ORDER RETURNING MATTER TO ADJUDICATION AND  
DISMISSING COMPLAINT**

On March 6, 2009, the Commission issued an Order granting Complaint Counsel's unopposed motion to withdraw this matter from adjudication – and suspending the application of Rule 4.7, 16 C.F.R. § 4.7 – for the purpose of considering the proper resolution of this matter in light of the mandate of the United States Court of Appeals for the District of Columbia Circuit. The Commission finds that further litigation in this matter would not be in the public interest. Accordingly,

**IT IS ORDERED** that this matter be, and it hereby is, returned to adjudication; and

**IT IS FURTHER ORDERED** that the complaint in this matter be, and it hereby is, dismissed.

By the Commission.

Interlocutory Orders, Etc.

**IN THE MATTER OF**

**WHOLE FOODS MARKET, INC.,  
AND  
WILD OATS MARKETS, INC.**

*Docket No. 9324      Order, May 21, 2009*

Order addressing Gelson's Markets' claims that Whole Foods Markets, Inc. violated the protective order by using Gelson's confidential documents for purposes that are outside the scope of the administrative proceeding.

**ORDER DENYING GELSON'S MARKETS' MOTION TO ENFORCE  
PROTECTIVE ORDER**

Gelson's Markets has filed a motion requesting that the Commission enforce the Protective Order Governing Confidential Information ("Protective Order") – which the Commission issued in this administrative proceeding on October 10, 2008 – and "direct Whole Foods' counsel to return all of Gelson's documents immediately without retaining copies or summaries thereof." The Commission has considered the arguments made by Gelson's Markets and by Whole Foods in response. In particular, the Commission notes that paragraph 12 of the Protective Order provides that "the parties shall return documents obtained in this action to their submitters . . ." at "the conclusion of [the administrative] proceeding . . ." This administrative proceeding has not yet ended; it will end when the Commission determines to accord final approval to the Decision and Order accepted for public comment, and the Decision and Order becomes final. Accordingly,

**IT IS ORDERED THAT** Gelson's Markets' request that the Commission order Whole Foods and its counsel to immediately return Gelson's confidential documents is **DENIED**; and

**IT IS FURTHER ORDERED THAT** when the Decision and Order in this matter becomes final, Whole Foods need not return any

## Interlocutory Orders, Etc.

third-party documents that are subject to any outstanding discovery requests (including, but not limited to outstanding requests in *Kottaras v. Whole Foods Market, Inc.*, no. 1:08-cv-01832 (D.D.C.)), provided that Whole Foods complies with its obligations set forth in paragraph 11 of the Protective Order. At that time, pursuant to paragraph 12 of the Protective Order, Whole Foods must return all other documents obtained in this action to their submitters.

By the Commission.



Interlocutory Orders, Etc.

**IN THE MATTER OF**

**HEXION LLC,  
AND  
HUNTSMAN CORPORATION**

*Docket No. C-4235 Order, June 4, 2009*

Order granting in part the respondents' petition to reopen and set aside the order.

**ORDER GRANTING IN PART PETITION TO REOPEN AND SET  
ASIDE ORDERS**

On February 5, 2009, Respondent Hexion LLC ("Hexion") and Respondent Huntsman Corporation ("Huntsman") jointly filed a "Petition of Hexion LLC and Huntsman Corporation to Reopen and Set Aside Orders" ("Petition") seeking to reopen and set aside the Commission's Decision and Order and Order to Maintain Assets contained in Docket No. C-4235 (collectively, the "Orders"), issued on November 13, 2008, and October 2, 2008, respectively. The Respondents' request was made pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.51. Respondents based their Petition on change of fact in that the Orders were premised upon Hexion's acquisition of Huntsman, but the Respondents have terminated their proposed merger, withdrawn their Premerger Notification Filings, and represent that they no longer intend to close the transaction.<sup>1</sup>

For the reasons stated herein, the Commission has determined to grant the Petition to reopen the matter and to set aside the Orders as to Respondent Huntsman. The Commission has further determined to set aside the Order to Maintain Assets and to modify the Decision and Order as to Respondent Hexion. The modification of the

---

<sup>1</sup> Petition at 5. Petition Exhibit 5 at ¶ 8; Petition Exhibit 6 at ¶ 13.

## Interlocutory Orders, Etc.

Decision and Order sets aside those requirements intended to remedy the anticompetitive effects of the proposed transaction, but imposes on Respondent Hexion a three (3) year requirement to seek the Commission's approval prior to any acquisition of any voting or nonvoting stock, share capital, equity, notes convertible into any voting or non-voting stock or certain assets of Huntsman, or any merger or other combination with Huntsman.

**I. BACKGROUND**

This matter arose from Hexion's proposed acquisition of Huntsman. Hexion and Huntsman entered into an agreement to merge on July 12, 2007, pursuant to which Hexion was to acquire all of Huntsman's outstanding voting securities. The Commission conducted an investigation after which the parties entered into an Agreement Containing Consent Orders in September 2008 ("Consent Agreement"). On October 2, 2008, the Commission issued a complaint ("Complaint") alleging that the merger would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, in two relevant markets: specialty epoxy resins and methyl diisocyanate (MDI).

In order to resolve competitive concerns, and as a part of the Consent Agreement, the Commission issued a Decision and Order and an Order to Maintain Assets. Both Huntsman and Hexion are direct competitors in the production of specialty epoxy resins. Accordingly, the Decision and Order requires Respondents to divest certain assets related to Hexion's specialty epoxy resin business not later than ten days after Hexion acquires Huntsman.<sup>2</sup>

The Commission identified other competitive concerns regarding the potential sharing of competitively sensitive information in the market for MDI. Hexion is a key supplier of formaldehyde, a critical component of MDI, to MDI producers. Huntsman is one of

---

<sup>2</sup> Decision and Order ¶ II.A. *See also* ¶ I.R.

## Interlocutory Orders, Etc.

only four MDI producers. To address these concerns, the Orders limit the Respondents' access to, and use of, information obtained from the other MDI producers. In effect, the Orders prohibit Hexion's business people that supply formaldehyde to MDI producers from sharing competitively sensitive information about these customers with the business people at Huntsman who compete directly against these other MDI producers.

The Commission also issued an Order to Maintain Assets requiring Respondents, *inter alia*, to maintain the "full economic viability, marketability and competitiveness of the Specialty Epoxy Resin Product Business through its full and complete transfer to the Acquirer."<sup>3</sup> At the same time as the Order to Maintain Assets was issued, the Commission appointed Mr. Ilan Kauffthal to act as an Interim Monitor in this matter pursuant to Paragraph IV. of the Order to Maintain Assets and, when final, Paragraph V. of the Decision and Order. Under the Orders, the Interim Monitor is charged with monitoring Respondents' maintenance and divestiture of the specialty epoxy resins business.

After the Commission issued the Orders, Huntsman and Hexion determined to terminate their agreement to merge. On December 14, 2008, Huntsman and Hexion, entered into an agreement to terminate the merger and to settle certain claims surrounding Hexion's proposed merger with Huntsman.

## II. THE PETITION

On February 5, 2009, Hexion and Huntsman filed their Petition. The Petition cites a number of burdens on Hexion caused by the continued application of the Orders, *inter alia*: (1) the Orders could limit Hexion's ability to respond to competitive conditions in the marketplace, because the Orders restrict Hexion's ability to close or

---

<sup>3</sup> Order to Maintain Assets ¶ I.I.K. The "Acquirer" specified in the Decision and Order was Spolek, a large chemical producer headquartered in the Czech Republic. Decision and Order ¶¶ I.HHH, I.A., and II.A.

## Interlocutory Orders, Etc.

reconfigure facilities;<sup>4</sup> (2) the Orders require Hexion to continue to compensate an Interim Monitor whose services are no longer needed to oversee the successful completion of the divestiture of the specialty epoxy resins business;<sup>5</sup> (3) the Orders prohibit Hexion from selling certain assets associated with its specialty epoxy resin business.<sup>6</sup> In addition, the Orders require both Respondents to establish and monitor compliance with procedures that control the flow of information related to the MDI products.<sup>7</sup> Hexion and Huntsman assert that the termination of their agreement to merge is a change of fact that eliminates the need for the Orders.<sup>8</sup>

### III. STANDARD FOR REOPENING AND MODIFYING A FINAL ORDER

The Orders may be reopened and modified on the grounds set forth in § 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b). First, Section 5(b) provides that the Commission shall reopen an order to consider whether it should be modified if the respondent makes “a satisfactory showing that changed conditions of law or fact require the rule or order to be altered, modified or set aside, in whole or in part.”<sup>9</sup> A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition.<sup>10</sup>

---

<sup>4</sup> Petition at 7.

<sup>5</sup> *Id.* at 7.

<sup>6</sup> *Id.* at 7.

<sup>7</sup> *Id.* at 7.

<sup>8</sup> *Id.* at 7.

<sup>9</sup> See 16 C.F.R. § 2.51(b).

<sup>10</sup> S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) (“Hart Letter”). See also *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th

## Interlocutory Orders, Etc.

Second, Section 5(b) provides that the Commission may also reopen and modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification.<sup>11</sup> In the case of “public interest” requests, FTC Rule of Practice 2.51(b) requires an initial “satisfactory showing” of how modification would serve the public interest before the Commission determines whether to reopen an order and consider all of the reasons for and against its modification.

A “satisfactory showing” requires, with respect to public interest requests, that the requester make a *prima facie* showing of a legitimate public interest reason or reasons justifying relief. A request to reopen and modify will not contain a “satisfactory showing” if it is merely conclusory or otherwise fails to set forth by affidavit(s) specific facts demonstrating in detail the reasons why the public interest would be served by the modification.<sup>12</sup> This showing requires the requester to demonstrate, for example, that there is a more effective or efficient way of achieving the purposes of the order, that the order in whole or part is no longer needed, or that there is some other clear public interest that would be served if the Commission were to grant the requested relief. In addition, this showing must be supported by evidence that is credible and reliable.

If, after determining that the requester has made the required showing, the Commission decides to reopen the order, the Commission will then consider and balance all of the reasons for and against modification. In no instance does a decision to reopen an

---

Cir. 1992) (“A decision to reopen does not necessarily entail a decision to modify the Order. Reopening may occur even where the petition itself does not plead facts requiring modification.”).

<sup>11</sup> Hart Letter at 5; 16 C.F.R. § 2.51.

<sup>12</sup> 16 C.F.R. § 2.51.

## Interlocutory Orders, Etc.

order oblige the Commission to modify it,<sup>13</sup> and the burden remains on the requester in all cases to demonstrate why the order should be reopened and modified. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders.<sup>14</sup> All information and material that the requester wishes the Commission to consider shall be contained in the request at the time of filing.<sup>15</sup>

**IV. THE ORDERS WILL BE REOPENED**

The Commission has determined to reopen the Orders and set aside the Orders as to Respondent Huntsman. Further, the Commission has determined to set aside the Order to Maintain Assets and to modify the Decision and Order as to Respondent Hexion. The Orders were issued to address the harm to competition arising from Hexion's acquisition of Huntsman. In fact, the Decision and Order explicitly states as its purpose "to remedy the lessening of competition alleged in the Commission's complaint in a timely and sufficient manner."<sup>16</sup> The Complaint alleges that the agreement between Hexion and Huntsman violates Section 5 of the FTC Act,<sup>17</sup> and "the [acquisition of Huntsman by Hexion], if consummated, would constitute a violation of Section 7 of the Clayton Act . . . and Section 5 of the FTC Act. . . ."<sup>18</sup> The Order to Maintain Assets is specifically designed to protect the divestiture assets pending their divestiture as required in the Decision and Order. The Interim Monitor's role is linked to Respondent's remedial obligations under these Orders. As noted above,

---

<sup>13</sup> See *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9<sup>th</sup> Cir. 1992) (reopening and modification are independent determinations).

<sup>14</sup> See *Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

<sup>15</sup> 16 C.F.R. § 2.51(b).

<sup>16</sup> Decision & Order ¶ I.R.4.

<sup>17</sup> Complaint ¶ 20.

<sup>18</sup> Complaint ¶ 21.

## Interlocutory Orders, Etc.

Respondents have terminated the acquisition agreement, withdrawn their HSR filings, and the merger was never consummated. Accordingly, the basic premise of the Orders, the illegal acquisition that they were intended to remedy, did not come to pass. Therefore, at this time, there is no reason to continue to require the Respondents to perform the remedial actions prescribed in the Orders.

The Commission has previously faced a similar situation (having issued a final order in a merger case where the merger ultimately did not occur) in *In the matter of Johnson & Johnson*, Docket No. C-4154. In that matter, Johnson & Johnson entered an agreement to acquire Guidant Corporation (“Guidant”). The Commission determined that the proposed acquisition raised competitive concerns in certain markets and accepted an agreement containing consent order. Before Johnson & Johnson could complete its acquisition of Guidant, Guidant agreed to be taken over by another company, *i.e.*, Boston Scientific Corporation.<sup>19</sup> Johnson & Johnson’s acquisition of Guidant never closed. Subsequently, Johnson & Johnson filed a petition seeking to set aside the order based on changed conditions of fact citing in support of its petition that the order was premised upon Johnson & Johnson’s acquisition of Guidant and that the acquisition was no longer possible. In setting aside that order, the Commission stated that “there is no reason to keep the Order in place” because “the basic premise of the Order, the unlawful acquisition that it was designed to remedy did not come to pass.”<sup>20</sup> Unlike Guidant, however, Huntsman has not entered an agreement to be acquired by another entity. Accordingly, the potential exists that Hexion could seek to acquire Huntsman in a subsequent transaction.

---

<sup>19</sup> Boston Scientific Corporation’s acquisition of Guidant resulted in a separate consent order and divestiture. Decision and Order, *In the Matter of Boston Scientific Corporation*, Docket No. C-4164, July 25, 2006.

<sup>20</sup> Order Reopening and Setting Aside Order, *In the Matter of Johnson & Johnson*, Docket No. C-4154, May 25, 2006.

## Interlocutory Orders, Etc.

The Commission invested significant resources in investigating Hexion's proposed acquisition of Huntsman. The investigation took over a year to complete. As a result of the investigation, the Commission found reason to believe that the proposed merger posed serious threats to competition. There has been no showing that the competitive conditions that gave rise to the Complaint no longer exist. Therefore, there is no reason to believe that such a combination of Hexion and Huntsman would not pose the same competitive concerns if it were consummated in the near future. Having already established the competitive effects presented by this acquisition, the Commission finds that it is in the public interest to avoid reinvestigating the issues that gave rise to the Complaint should the same or approximately the same combination be undertaken in the near term.

There still exists a credible risk that Hexion could seek to acquire Huntsman, especially in light of the current economic volatility. Huntsman remains an independent company. Deteriorating financial conditions and access to financing for the transaction as originally structured appear to have been the primary reasons the acquisition did not occur.<sup>21</sup> In fact, the parties attempted to close the transaction on October 28, 2008, but were deterred when the banking institutions that had originally committed to finance the transaction refused to do so.<sup>22</sup> This fact suggests that if the transaction could be restructured to address these financial issues, or if the economic climate were to change significantly, the acquisition could be revived. Accordingly, the Commission has determined to require Respondent Hexion to seek prior approval from the Commission before Hexion undertakes any acquisition of certain assets of Huntsman or any acquisition of, or merger or other combination with, Huntsman

This decision is consistent with the *Statement of the Federal Trade Commission Policy Concerning Prior Approval and Prior*

---

<sup>21</sup> See Petition at p. 5.

<sup>22</sup> Petition at p. 5. Petition Exhibit 5 ¶ 8. Exhibit 6 ¶ 11.



## Interlocutory Orders, Etc.

*Notice Provisions*<sup>23</sup> (“Policy Statement”). In the Policy Statement, the Commission said that prior approval provisions may be used “where there is a credible risk that a company that engaged or attempted to engage in any anticompetitive merger would, but for the provision, attempt the same or approximately the same merger.”

Given the aforementioned reasons, the Commission finds that such a credible risk exists here and, therefore, a limited prior approval requirement is the appropriate remedy to prevent the recurrence of anticompetitive conduct. Hexion has consented to the prior approval provisions contained in the modified Order.

The prior approval requirements of the modified Order exempt certain acquisitions of Huntsman stock by Apollo Investment Fund VI, L.P., and certain of its affiliates that acquired \$250,000,000 of senior notes convertible into Huntsman common stock (collectively “Apollo Group VI”) pursuant to a settlement agreement terminating the merger.<sup>24</sup> Those acquisitions could be construed as indirect acquisitions of Huntsman by Hexion because Apollo Group VI has an ownership interest in and a close relationship with Hexion. However, the Commission has concluded based on the terms of the agreements that define these acquisitions that the Commission does not need to undertake a further review of those third party acquisitions and has drafted the Order accordingly. Specifically, on December 14, 2008, several parties, including Huntsman, Hexion and Apollo Group VI, entered into an agreement to terminate Hexion’s proposed merger with Huntsman and to settle certain claims surrounding the proposed merger (“Settlement and Release Agreement”). If the notes acquired by Apollo Group VI are converted, Apollo Group VI would hold a minority stake in Huntsman.<sup>25</sup> However, these notes are subject to a Voting and

---

<sup>23</sup> 4 Trade Reg. Rep. (CCH) ¶ 13,241.

<sup>24</sup> See Settlement and Release Agreement contained in 8-K, filed December 15, 2008, Exhibit 10.1 and related Note Purchase Agreement. Contained in Appendix 1 to this Order.

<sup>25</sup> Given the conversion and anti-dilution provisions of the Note Purchase Agreement, it appears that conversion of all the notes would give Apollo Group IV

## Interlocutory Orders, Etc.

Standstill Agreement that imposes a number of passive investor requirements, including, *inter alia*, a prohibition from seeking or proposing to influence or control the management, board of directors, policies or affairs of Huntsman or its subsidiaries.<sup>26</sup> In reviewing the provisions of the Settlement and Release Agreement and related agreements, the Commission concluded that any acquisition by Apollo Group VI of voting securities in Huntsman pursuant to these agreements would not in fact be an acquisition by Hexion. Given these considerations, the Commission has determined specifically to exempt the conversion by Apollo Group VI of the notes that are the subject of the Note Purchase Agreement and the related Voting and Standstill Agreement from the prior approval requirements of Paragraph II of the Order and has included a specific proviso to that effect in the modified Order.

Accordingly,

**IT IS ORDERED**, that this matter be, and it hereby is, reopened, and the Order to Maintain Assets is set aside in its entirety;

**IT IS FURTHER ORDERED**, that, as to Respondent Huntsman, the Decision and Order is set aside; and

**IT IS FURTHER ORDERED**, that, as to Respondent Hexion, the provisions of the Decision and Order are modified to read as follows, including, *inter alia*, the addition of the following Paragraph II, additions and modifications to the definitions, and revisions to certain retained paragraphs, and all other provisions are set aside:

---

(not Hexion) an approximate 12 % share of the outstanding common stock of Huntsman.

<sup>26</sup> See Huntsman Corp Form 8-K, filed December 23, 2008, Exhibit 10.3. Contained in Appendix 1 to this Order. That agreement applies to Hexion as well as to Apollo Group VI.

Interlocutory Orders, Etc.

## ORDER

### I.

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

- A. “Hexion” or “Respondent” means Hexion LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Hexion (including, but not limited to, Hexion Specialty Chemicals, Inc. and Nimbus Merger Sub Inc.) and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Huntsman” means Huntsman Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Huntsman, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Commission” means the Federal Trade Commission.
- D. “Apollo Group VI” means the parties to the Note Purchase Agreement listed as purchasers, *i.e.*, Apollo Investment Fund VI, L.P., Apollo Overseas Partners VI, L.P., Apollo Overseas Partners (Delaware) VI, L.P., Apollo Overseas Partners (Delaware 892) VI, L.P., Apollo Overseas Partners (Germany) VI, L.P. and AAA Guarantor - Co-Invest VI, L.P.
- E. “Development” means all research and development activities, including, without limitation, the following: test method development; stability testing; toxicology; formulation, including without limitation, customized formulation for a particular customer(s); process

## Interlocutory Orders, Etc.

development; manufacturing scale-up; development-stage manufacturing; quality assurance/quality control development; statistical analysis and report writing; and conducting experiments for the purpose of obtaining any and all Product Approvals. “Develop” means to engage in Development.

- F. “Formulated System” means the exact combination and proportion of epoxy resins, curing agents, reactive diluents and other components that achieves a particular set of application and end-use characteristics in a final product.
- G. “Huntsman Advanced Materials” means the division of Huntsman that manufactures, develops, and sells epoxy resins and Specialty Epoxy Resins.
- H. “MDI” means methylene diphenyl diisocyanate and/or diphenylmethane diisocyanate.
- I. “Note Purchase Agreement” means the Note Purchase Agreement dated December 23, 2008, contained in Exhibit 10.1 of Huntsman Corporation Form 8-K filed on December 23, 2008, attached as Appendix 1 to this Order.
- J. “Specialty Epoxy Resins” means all value-added high performance epoxy resin products, including, without limitation, epoxy novolac resins, glycidyl amine resins, cycloaliphatic epoxy resins, brominated resins, mono and multifunctional reactive diluents, curing agents, specialty blends and solutions, and Formulated Systems, Developed, in Development, researched, manufactured, marketed or sold by Huntsman Advanced Materials.
- K. “Voting and Standstill Agreement” means the Voting and Standstill Agreement dated December 23, 2008, contained in Exhibit 10.3 of Huntsman Corporation Form 8-K filed on December 23, 2008, attached as Appendix 1 to this Order.

Interlocutory Orders, Etc.

## II.

**IT IS FURTHER ORDERED** that:

- A. Respondent Hexion shall not acquire, directly or indirectly, without the prior approval of the Commission,
1. any voting or non-voting stock, share capital, equity, notes convertible into any voting or non-voting stock, or other interest in Huntsman;
  2. any assets owned or controlled by Huntsman used in, or used within six (6) months of the acquisition in, the research, manufacture, distribution, marketing or sale of Specialty Epoxy Resins; or
  3. any assets owned or controlled by Huntsman located within North America that manufacture MDI or that have manufactured MDI within six (6) months of the acquisition.
- B. Respondent Hexion shall not consummate, directly or indirectly, without the prior approval of the Commission, any merger or other combination with Huntsman.

*Provided, however,* that Paragraph II.A. shall not apply to any conversion by Apollo Group VI of the Huntsman Corporation convertible senior notes held by Apollo Group VI into common stock of Huntsman Corporation pursuant to the Note Purchase Agreement if Apollo Group VI complies with the provisions of the Voting and Standstill Agreement.

## III.

**IT IS FURTHER ORDERED** that one (1) year after the date this modified Order becomes final, annually for the two (2) years on

## Interlocutory Orders, Etc.

the anniversary of the date this modified Order becomes final, and at other times as the Commission may require, Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this modified Order.

**IV.**

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

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

**V.**

**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 the Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of the Respondent related to compliance with this Order, which

Interlocutory Orders, Etc.

copying services shall be provided by the Respondent at the request of the authorized representative(s) of the Commission and at the expense of the Respondent; and

- B. to interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

Interlocutory Orders, Etc.

**VI.**

**IT IS FURTHER ORDERED** that this modified Order shall terminate on June 4, 2012.

By the Commission.

**APPENDIX 1****FORM 8-K****HUNTSMAN CORP - HUN****Filed: December 23, 2008 (period: December 23, 2008)****and****FORM 8-K****HUNTSMAN CORP - HUN****Filed: December 15, 2008 (period: December 15, 2008)**



Interlocutory Orders, Etc.

**IN THE MATTER OF**

**CSL LIMITED,  
AND  
CERBERUS-PLASMA HOLDINGS, LLC**

*Docket No. 9337 Order, June 22, 2009*

Order granting complaint counsel's and respondents' joint motion to dismiss the complaint.

**ORDER DISMISSING COMPLAINT**

On May 27, 2009, the Federal Trade Commission issued the Administrative Complaint in this matter, having reason to believe that Respondents CSL Limited (“CSL”) and Cerberus-Plasma Holdings, LLC (“Cerberus”) had entered into a merger agreement in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and which, if consummated, would violate Section 5 of the FTC Act, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. Complaint Counsel and the Respondents have now filed a Joint Motion to Dismiss Complaint, which states that the Respondents have decided not to proceed with the proposed merger – and that CSL and Cerberus have withdrawn their Hart-Scott-Rodino Notification and Report Forms filed for the proposed transaction – and requests that the Commission dismiss the complaint.<sup>1</sup>

The Commission has determined to dismiss the Administrative Complaint without prejudice as the most important elements of the relief set out in the Notice of Contemplated Relief in the Administrative Complaint have been accomplished without the need

---

<sup>1</sup> Joint Motion to Dismiss Complaint (June 15, 2009) (“Joint Motion”), available on the *Adjudicative Proceedings* page for this case at <http://www.ftc.gov/os/adjpro/d9337/090615jointmodismisscmplt.pdf>.

## Interlocutory Orders, Etc.

for further administrative litigation.<sup>2</sup> In particular, the Respondents have announced that they have decided not to proceed with the proposed acquisition, and CSL and Cerberus have withdrawn their Hart-Scott-Rodino Notification and Report Forms filed for the proposed transaction. As a consequence, the Respondents would not be able to effect the proposed transaction without filing new Hart-Scott-Rodino Notification and Report Forms.

For the foregoing reasons, the Commission has determined that the public interest warrants dismissal of the Administrative Complaint in this matter. The Commission has determined to do so without prejudice, however, because it is not reaching a decision on the merits. Accordingly,

**IT IS ORDERED THAT** the Administrative Complaint in this matter be, and it hereby is, dismissed without prejudice.

By the Commission, Commissioner Harbour and Commissioner Kovacic recused.

---

<sup>2</sup> See, e.g., *In the Matter of Inova Health System Foundation, and Prince William Health System, Inc.*, Docket No. 9326, Order Dismissing Complaint (June 17, 2008), available at <http://www.ftc.gov/os/adjpro/d9326/080617orderdismisscmpt.pdf>; accord, *In the Matter of Red Sky Holdings LP, and Newpark Resources, Inc.*, Docket No. 9333, Order Dismissing Complaint (December 10, 2008), available at <http://www.ftc.gov/os/adjpro/d9333/081210redskycmpt.pdf>; *In the Matter of Equitable Resources, Inc., Dominion Resources, Inc., Consolidated Natural Gas Company, and The Peoples Natural Gas Company*, Docket No. 9322, Order Dismissing Complaint (January 31, 2008) (Public Version), available at <http://www.ftc.gov/os/adjpro/d9322/080204complaint.pdf>; *In the Matter of Swedish Match North America Inc., and National Tobacco Company, L.P.*, Docket No. 9296 (*Swedish Match*), Order Dismissing Complaint (January 4, 2001), available at <http://www.ftc.gov/os/2001/01/swedishdismisscmp.htm>; *In the Matter of H.J. Heinz Company, Milnot Holding Corporation, and Madison Dearborn Capital Partners, L.P.*, Docket No. 9295 (*H.J. Heinz*), Order Dismissing Complaint (December 4, 2001), available at <http://www.ftc.gov/os/2001/12/heinzorder.pdf>.

## ADVISORY OPINION

---

IN THE MATTER OF

## ACA INTERNATIONAL

*FTC File No. P064803    Opinion, June 23, 2009*

**RE:    WHETHER THE FAIR DEBT COLLECTION PRACTICES ACT (“FDCPA”) PROHIBITS A DEBT COLLECTOR FROM RESPONDING TO A CONSUMER WHO DISPUTED A DEBT AFTER THE CONSUMER HAS SENT A WRITTEN “CEASE COMMUNICATION” TO THE COLLECTOR.**

Dear Ms. Anderson and Mr. Beato:

This responds to an issue raised in your comment filed on February 11, 2008, on behalf of American Collectors Association International, with the Federal Trade Commission (“Commission”) and other agencies charged by Congress in Section 312 of the FACT Act with writing regulations relating to certain duties of furnishers of information to consumer reporting agencies (“CRAs”). On pages 7-8 of your comment, you urged the following action:

To avoid a statutory conflict between the FDCPA and FACT Act, the regulation should clarify that the act of responding to a consumer dispute is not an attempt to collect a debt under the FDCPA. Further the regulation should clarify that a consumer that sends a written dispute to a furnisher *after* having invoked his or her cease communication rights under the FDCPA has revoked his or [her] cease communication instruction for purposes of communicating with the furnisher to process the dispute. (Emphasis yours)

The Commission is treating this portion of your comment as a request for an advisory opinion interpreting the Fair Debt Collection Practices Act (FDCPA) pursuant to Sections 1.1-1.4 of its Rules of

## Advisory Opinion

Practice. 16 C.F.R. §§ 1.1-1.4. The subject matter of the request and consequent publication of this Commission advice is in the public interest. 16 C.F.R. § 1.1(a)(2). Specifically, it is in the public interest for the Commission to clarify the intersection of the FDCPA and this new rule implementing the FACT Act, thus encouraging debt collector compliance with both laws.

The applicable provisions of the FDCPA and the furnisher disputes rule (Rule) are:

- Section 805(c) of the FDCPA provides that if a consumer has notified a debt collector in writing that “the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate with the consumer with respect to such debt” (with some exceptions not applicable here).
- The Rule requires furnishers of information to CRAs to report the results of a direct dispute to the consumer, 16 CFR § 660.4(e)(3), or notify the consumer if the furnisher determines the dispute is frivolous or irrelevant. 16 CFR § 660.4(f)(2).

The potential conflict arises when a consumer orders a debt collector in writing to cease communication, but at some future time submits a direct dispute about information the debt collector has provided to a CRA. The Rule requires the collector to notify the consumer either of the results of the investigation or of its determination that the dispute is frivolous or irrelevant. Section 805(c) of the FDCPA, however, prohibits the collector from communicating with that consumer with respect to the debt, which could be interpreted to include providing the notice that the Rule requires.

The Commission does not believe that providing the notice the Rule requires undermines the purpose of Section 805(c) of the FDCPA. Section 805(c) empowers consumers to direct collectors to cease contacting them to collect a debt so that consumers can be free

## Advisory Opinion

of the burden of being subject to unwanted communications. In contrast, communications from debt collectors which do nothing more than respond to disputes consumers themselves have raised do not impose such a burden. Rather, such communications benefit consumers through providing them with information demonstrating that collectors have been responsive to their disputes.

After reviewing the language of the FDCPA and the Rule, and considering the goals of the statute and the regulation, the Commission concludes that a debt collector does not violate Section 805(c) of the FDCPA if the consumer directly disputes information after sending a written “cease communication” to the collector, and the collector complies with the Rule by means of a communication that has no purpose other than complying with the Rule by stating (1) the results of the investigation or (2) the collector’s belief that the communication is frivolous or irrelevant.

By direction of the Commission.

# TABLE OF COMMODITIES

VOLUME 147

---

Acrylic Latex Polymers (for traffic paint) .....	402
AutoTrackXP .....	778
Avinza .....	78
Bismuth Vanadate Pigment.....	647
Butyl Acrylate.....	402
Carboplatin (Injectable) .....	127
Cardiac Surgery Devices .....	332
Chaparral Herb.....	591
Chlorzoxazone Tablets .....	127
CLEAR .....	778
Computer Systems .....	374
Consumer Electronics .....	374
Cyclosporine Capsules.....	127
Cyclosporine Liquid .....	127
Deferoxamine (Injectable) .....	127
Desmopressin Acetate Tablets.....	127
Digital Consumer Pregnancy Tests .....	1
Electronic Public Records.....	778
Endoscopic Vessel Harvesting Devices.....	332
Epoprostenol Sodium (Injectable) .....	127
Ethyl Acrylate.....	402
Fluoxetine Capsules .....	127
Flutamide Capsules.....	127
Glacial Acrylic Acid .....	402
Glipizide/Metformin Hydrochloride Tablets .....	127
Health Care Services.....	52
Hollow Sphere Particles.....	402
Home Loan Advertisements.....	264, 287, 310

## Table of Commodities

Indathrone Blue Pigment.....	647
Information Security .....	374, 821, 839
Kadian.....	78
Mai-T Mushroom Plus Formula .....	591
Maitake Mushroom Extract....	591
Medical Services.....	52
Metoclopramide Hydrochloride Tablets.....	127
Metronidazole Tablets .....	127
Mirtazapine Orally Disintegrating Tablets .....	127
MLS Services.....	242
Morphine Sulfate .....	78
Mortgage Loans .....	821
Musical Instruments.....	552
Native Essence (Rene Caisse) Formula .....	591
Native Essence Plus .....	591
Native Essence with Cat's Claw.....	591
Organic Supermarkets.....	727
Oxidates .....	527
Pregnancy Tests .....	1
Premium Natural Supermarkets.....	727
Real Estate Listing Services .....	242
Retail Grocery Stores.....	727
Rust Preventives .....	527
Services	
Medical .....	52
MLS .....	242
Real Estate Listing .....	242
Telephone.....	580

## Table of Commodities

Tamoxifen Citrate Tablets .....	127
Telephone Services .....	580
Telephones .....	580
Tetracycline Hydrochloride Capsules.....	127
Water-Soluble Dye Consumer Pregnancy Tests.....	1