

# **FEDERAL TRADE COMMISSION DECISIONS**

**FINDINGS, OPINIONS, AND ORDERS  
JULY 1, 2009, TO DECEMBER 31, 2009**

PUBLISHED BY THE COMMISSION

**VOLUME 148**



Compiled by  
The Office of the Secretary  
Robert F. Swenson, Editor  
Daniel R. Freer, Editorial Assistant

**MEMBERS OF THE FEDERAL TRADE COMMISSION  
DURING THE PERIOD  
JULY 1, 2009 TO DECEMBER 31, 2009**

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Took oath of office September 3, 2004.

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Took oath of office January 4, 2006.

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

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

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# FEDERAL TRADE COMMISSION DECISIONS

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FINDINGS, OPINIONS, AND ORDERS  
JULY 1, 2009, TO DECEMBER 31, 2009

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IN THE MATTER OF

## **ALTA BATES MEDICAL GROUP, INC.**

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

*Docket No. C-4260; File No. 051 0260  
Complaint, July 10, 2009 – Decision, July 10, 2009*

This consent order addresses Alta Bates Medical Group, Inc.'s fixing of prices charged to those offering coverage for health care services in the Berkeley and Oakland, California, areas and refusing to deal with such payors except on a collectively determined basis. Since at least 2001, ABMG, acting as a combination of its physician members, and in conspiracy with its members, has acted to restrain competition with respect to 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 ABMG members refrain from negotiating individually with payors or contracting on terms other than those approved by ABMG. The order prohibits ABMG from entering into or facilitating any agreement 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 other than through ABMG. The order also prohibits ABMG from facilitating exchanges of information between health care providers concerning whether, or on what terms, to contract with a payor. However, ABMG is not precluded from engaging in conduct that is reasonably necessary to form or participate in legitimate "qualified risk-sharing" or "qualified clinically-integrated" joint arrangements.

### *Participants*

For the *Commission*: Linda Badger and Sylvia Kundig.

For the *Respondents*: Donald J. Bouey, Bouey & Black LLP.

## Complaint

**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 Alta Bates Medical Group, Inc. (“ABMG”), 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 health plans, other third-party payors, and third-party networks (“payors”), to refuse to deal with certain payors, and to refuse to deal with payors except on collectively agreed terms.

**RESPONDENT**

2. Alta Bates Medical Group, Inc., 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 2000 Powell Street, Suite 830, Emeryville, CA 94608. ABMG consists of multiple, independent medical practices with a total of approximately 600 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, ABMG’s physician members have been, and are now, in competition with each other for the provision of physician services in and around Berkeley and Oakland, California.

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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. § 45.

6. The general business practices of Respondent, including the acts and practices alleged herein, affect the interstate movement of patients, the interstate purchase of supplies and products, and the interstate flow of funds, and are in or affect “commerce” as defined in the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

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

7. Individual physicians and physician group practices contract with payors, including 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. 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 subscribers. These contracts may reduce payors’ costs and enable them to lower the price of insurance or of providing health benefits, thereby resulting in lower medical costs for subscribers.

8. Physicians and physician group practices sometimes form or participate in financially integrated joint ventures to provide physician services under agreements with payors who seek 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.

9. Physicians and physician group practices may also participate in joint ventures that do not involve financial integration, but involve clinical integration, by implementing an



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active and ongoing program to evaluate and modify practice patterns by the physician participants and create a high degree of interdependence and cooperation among the physicians to control costs and ensure quality.

10. 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 their subscribers, and what prices they will accept as payment for their services pursuant to such contracts.

**RESPONDENT'S OPERATION**

11. Since its formation, ABMG has entered into contracts with payors for and on behalf of its respective physician members, under which ABMG received capitated payments from the payors in exchange for the medical practices' agreement to provide their professional medical services to subscribers of 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 subscribers of a payor's program would be provided by ABMG's physician members for the predetermined capitation charge, regardless of the actual quantity or type of services needed and provided.

12. The member physicians' participation in ABMG, and their offering of services through ABMG's capitated contracts, was not, however, the member physicians' exclusive 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 ABMG to individual patients and through contracts individually and directly entered into with payors.

**ANTICOMPETITIVE CONDUCT**

13. Since at least 2001, ABMG, acting as a combination of its physician members, and in conspiracy with its members, has acted to restrain competition with respect to fee-for-service contracts by, among other things, facilitating, entering into, and implementing agreements, express or implied, to fix the prices

### Complaint

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 ABMG members refrain from negotiating individually with payors or contracting on terms other than those approved by ABMG.

### **Collective Negotiations with Payors**

14. ABMG refers to its fee-for-service contracting system as a “messenger model.” Competing physicians sometimes use a “messenger” to facilitate their contracting with payors, in ways that do not constitute an unlawful agreement on prices and other competitively significant terms. Messenger arrangements can reduce contracting costs between payors and physicians. For example, a payor may submit a contract offer to the messenger, with the understanding that the messenger will transmit that offer to a group of physicians and inform the payor how many physicians across specialties accept the offer or have a counteroffer. Alternatively, the messenger may receive authority from the individual physicians to accept contract offers that meet certain criteria. A lawful messenger arrangement does not involve negotiation on prices or other competitively significant terms and does not facilitate coordination among physicians on their responses to contract offers. Additionally, a lawful messenger arrangement does not discourage physicians from dealing individually with a payor.

15. As part of its fee-for-service contracting system, approximately 95 percent of ABMG's physicians signed “powers of attorney” (“POA”) granting ABMG authority to contract with PPO health plans on their behalf. The POA states that the individual ABMG physician appoints ABMG:

- a. To facilitate, execute, revise, modify, or amend an agreement (“Agreement”) with PPO networks that is consistent with the financial and other language parameters identified by PHYSICIAN.
- b. To execute the Agreement on PHYSICIAN'S behalf without further consultation with or authority of PHYSICIAN, provided the Agreement meets the PHYSICIAN'S parameters.

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16. Despite the POA provisions, ABMG did not rely on financial and other language parameters identified by its individual physician members regarding what rates and/or terms they would unilaterally accept. Instead, ABMG decided, on behalf of the group, what rates and/or terms it used in its communications with the PPO health plans. Therefore, ABMG did not employ a lawful messenger arrangement as described in Paragraph 14.

17. Rather than employ a lawful messenger arrangement, ABMG, on behalf of its physician members, has orchestrated collective negotiations for fee-for-service contracts with some payors who do business in and around Berkeley and Oakland, California. Since at least 2001, ABMG negotiated with these payors on price, making proposals and counter-proposals, as well as accepting or rejecting offers, without consulting with its individual physician members regarding the prices they would accept, and without transmitting the payors' offers to its individual physician members until ABMG had approved the negotiated prices.

18. ABMG's conduct, which constituted unlawful agreements between its individual physician members on the prices and other terms, included, but was not limited to:

- a. Approaching payors and suggesting contract rates and/or terms that it represented the ABMG physician members would accept, without obtaining price and term criteria from its individual physician members;
- b. Expressing its opinion about whether or not the ABMG physicians would likely accept contract rates and/or terms proposed by a payor and suggesting that payors reconsider offers it deemed inadequate, without obtaining price and term criteria from its individual physician members;
- c. Failing to submit payor proposals or counter proposals to its individual physician members to determine if each physician member would unilaterally accept the rates and/or terms being offered;

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- d. Submitting to ABMG physician members, on an opt-out basis, only those payor proposals for which ABMG had accepted the rates and terms; and
- e. Periodically providing its member physicians with a list of payors with which ABMG had negotiated contracts, and cautioned them about dealing individually with payors, because the individual contracts may have less favorable contract rates and/or terms. For example, during one negotiation ABMG sent the following notice to its individual member physicians:

As a general rule of caution, please scrutinize all contract solicitations that are mailed to your office, as many of these contracts do not represent the best interests of physicians. In the event that you may have signed these documents and returned them to [the PPO], you may certainly contact [the PPO] and say that you did not mean to sign the agreement because you should already be participating through ABMG and therefore the Individual Contract is superfluous.

### **Concerted Refusal to Deal**

19. ABMG physicians and the Permanente Medical Group compete in the sale of physician services to consumers in and around Berkeley and Oakland, California. Because the Permanente Medical Group exclusively sells its physicians' services to Kaiser Foundation Health Plans, this competition occurs when a consumer chooses either a Kaiser Foundation Health Plan HMO, which allows the subscriber to access only the Permanente Medical Group, or an open-panel payor.

20. In 2006, a payor, Kaiser Permanente Insurance Corporation ("KPIC"), co-owned by the Permanente Medical Group and Kaiser Foundation Health Plans, began actively marketing an open-panel PPO. KPIC's PPO subscribers would access physician services through a third-party network. With

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this development, the Kaiser system could offer one-stop shopping to employers who want to offer their employees a choice between an open-panel PPO product (one that would allow subscribers to access physicians who are not members of the Permanente Medical Group), and Kaiser's traditional closed-panel HMO. This would result in more competition between ABMG physicians and the Permanente Medical Group in the sale of physician services through employers.

21. Under a prior contract with the third-party network referenced in Paragraph 20, the ABMG physicians had agreed to sell their physician services at a discount to payors who contract to access that network. In response to KPIC's initiative, however, ABMG decided, on behalf of the group, that ABMG physicians would not be available to KPIC's subscribers through the third-party network.

22. In furtherance of this decision, ABMG provided notice to the third-party network that its prior contract "is hereby amended to state that the physicians who are participating physicians of [ABMG] shall not provide services to members of Kaiser Health Plans ... ." Although ultimately unsuccessful, the sole purpose of this action was to impede competition in the provision of physician services in and around Berkeley and Oakland, California.

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

23. Respondent's negotiation of fees and other competitively significant terms and concerted refusal to deal on behalf of its competing member physicians, 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 ABMG.

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

24. Respondent's actions described in Paragraphs 12 through 20 of this Complaint have had, have tended to have, or if

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successful would have had, the effect of restraining trade unreasonably and hindering competition in the provision of physician services in and around Berkeley and Oakland, California, in the following ways, among others:

- a. unreasonably restraining price and other forms of competition among physicians who are members of ABMG;
- 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.

25. 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.

**WHEREFORE, THE PREMISES CONSIDERED,** the Federal Trade Commission on this tenth day of July, 2009, issues its Complaint against Respondent Alta Bates Medical Group, Inc.

By the Commission.

**DECISION AND ORDER**

The Federal Trade Commission (“Commission”), having initiated an investigation of certain acts and practices of Alta Bates Medical Group, Inc., herein sometimes referred to as “Respondent,” and Respondent having been furnished thereafter

## Decision and Order

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 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 Alta Bates Medical Group, Inc. 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 2000 Powell Street, Suite 830, Emeryville, CA 94608.
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.

## Decision and Order

**ORDER****I.**

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

- A. “Respondent” means Alta Bates Medical Group, Inc., its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- 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 (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.”).



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- 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 Alta Bates Medical Group, Inc., pursuant to Paragraph VII.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 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:

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

**II.**

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

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- A. Entering into, adhering to, Participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any Physicians with respect to their provision of Physician services:
1. To negotiate on behalf of any Physician with any Payor;
  2. To refuse to deal, or threaten to refuse to deal, with any Payor, in furtherance of any conduct or agreement that is prohibited by any other provision of Paragraph II of this Order;
  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;
- 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

## Decision and Order

Paragraph IV of this Order, is reasonably necessary to form, Participate in, or take any action in furtherance of, a Qualified Arrangement.

**III.**

**IT IS FURTHER ORDERED** that, for three (3) years from 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 to be implemented to limit possible anticompetitive effects of the proposed arrangement, such as those prohibited by this Order.

**IV.**

**IT IS FURTHER ORDERED** that:

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

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- 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.

**V.**

**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 V Arrangement”), Respondent shall notify the Commission in writing (“Paragraph V 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

## Decision and Order

- 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.

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

- A. Paragraph V Notification shall include the following information regarding the Qualified Arrangement pursuant to which the Respondent intends to engage in the above identified conduct:
1. the total number of Physicians and the number of Physicians in each specialty participating in the Qualified Arrangement;
  2. a description of the Qualified Arrangement, including its purpose and geographic area of operation;
  3. a description of the nature and extent of the integration and the efficiencies resulting from the Qualified Arrangement;
  4. an explanation of the relationship of any agreement on prices, or contract terms related to price, to furthering the integration and achieving the efficiencies of the Qualified Arrangement;
  5. a description of any procedures proposed to be implemented to limit possible anticompetitive effects resulting from the Qualified Arrangement or its activities; and
  6. 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.

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- B. If, within sixty (60) days from the Commission's receipt of the Paragraph V 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 V.A or Paragraph V.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;
- C. 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 Qualified Arrangement does or does not violate this Order or any law enforced by the Commission;
- D. The absence of notice that the proposed Qualified Arrangement has been rejected, regardless of a request for additional information, shall not be construed as a determination by the Commission, or its staff, that the proposed Qualified Arrangement has been approved;
- E. Receipt by the Commission of any Paragraph V Notification regarding participation pursuant to a proposed Qualified Arrangement is not to be construed as a determination by the Commission that any such proposed Qualified Arrangement does or does not violate this Order or any law enforced by the Commission; and
- F. Paragraph V Notification shall not be required prior to participating in any Qualified Arrangement for which Paragraph V Notification has previously been given.

## Decision and Order

**VII.**

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

- A. Within thirty (30) days from 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, 2001; 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, 2001 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;
- 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 VII.A.2 of this Order, at the earlier of: (1) receipt by Respondent Alta Bates Medical Group, Inc. 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.



## Decision and Order

*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 Alta Bates Medical Group, Inc. 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 Alta Bates Medical Group, Inc. 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 VII.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 VII.B of this Order, distribute, by first-class mail, return receipt requested, or electronic mail with return confirmation, a copy of that request to each Physician Participating in such contract as of the date that Respondent Alta Bates Medical Group, Inc. 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, or electronic mail with return confirmation, a copy of this Order and the Complaint to:
    - 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;

## Decision and Order

- 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 and/or on the physician-access portion of Respondent's website, a copy of this Order and the Complaint with such prominence as is given to regularly featured articles, and send the report or newsletter to, or notify by electronic mail that such report or newsletter is published on the website, all Physicians who participate in Respondent.
- 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;
  2. the name, address, and telephone number of each Payor with which the Respondent has had any contact, during the one (1) year period preceding the date for filing such report, except for Payors

## Decision and Order

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;

3. The identity of each Payor sent a copy of the letter attached as Appendix A, the response of each Payor to that letter, and the status of each contract to be terminated pursuant to that letter; and
4. copies of the delivery confirmations, signed return receipts, or electronic mail with return confirmations required by Paragraph VII.A.I, and copies of the signed return receipts required by Paragraphs VII.A.2, VII.C, and VII.D.

**VIII.**

**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.

**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 Respondent, 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 July 10, 2029.

By the Commission.

Decision and Order

**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 Alta Bates Medical Group, Inc.

Pursuant to Paragraph V.B of the Order, Alta Bates Medical Group, Inc. must allow you to terminate, upon your written request without any penalty or charge, any contracts with Alta Bates Medical Group, Inc. 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 Alta Bates Medical Group, Inc. 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 nevertheless still terminate the contract at any time.

Sincerely,

[Alta Bates Medical Group, Inc. 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 Alta Bates Medical Group, Inc., (“ABMG” or “Respondent”). The agreement settles charges that ABMG 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 Berkeley and Oakland, California, area and refusing to deal with payors except on a collectively determined basis. 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.

**Alta Bates Medical Group, Inc.**

ABMG is a multi-specialty independent practice association (“IPA”) comprised of multiple, independent medical practices serving the Berkeley and Oakland, California area. It has a total of approximately 600 physician members, of which approximately 200 are devoted to primary care. Since its formation, ABMG has negotiated group contracts with payors under which it receives 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 of contracting is a form of financial integration, so for antitrust purposes, the IPA is treated as a single

## Analysis to Aid Public Comment

entity for purposes of these contract negotiations, and not as a group of competing physicians. The complaint does not challenge ABMG's activities concerning these contracts.

ABMG, however, also contracts on behalf of its member physicians with health plans to provide fee-for-service medical care. Under these arrangements, the payor compensates physicians or group practices for services actually rendered pursuant to agreed-upon fee schedules. In the absence of financial risk-sharing or clinical integration on the part of providers, the IPA members are competitors for purposes of antitrust analysis. It is ABMG's negotiation of fee-for-service contracts that is the subject of the allegations in the Commission's Complaint.

**The Complaint**

Since at least 2001, ABMG, acting as a combination of its physician members, and in conspiracy with its members, has acted to restrain competition with respect to 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 ABMG members refrain from negotiating individually with payors or contracting on terms other than those approved by ABMG. This type of collective conduct by competitors is inherently suspect under the antitrust laws.

At times, however, IPAs will act as a conduit between physician members and health plans regarding fee-for-service contracts to facilitate the contracting process. Under this model, the IPA merely acts as a messenger and does not negotiate the terms of the contract.

Although claiming to employ a lawful messenger arrangement, ABMG, on behalf of its physician members, instead orchestrated collective negotiations for fee-for-service contracts. Specific acts by ABMG that are alleged in the complaint are: making proposals and counter-proposals, as well as accepting or rejecting offers, without consulting with its individual physician members regarding the prices they unilaterally would accept, and

Analysis to Aid Public Comment

without transmitting the payors' offers to its individual physician members until ABMG had approved the negotiated prices.

The complaint also alleged a concerted refusal to deal intended to impede competition by one of ABMG's major competitors, the Permanente Medical Group, which provides physician services exclusively to Kaiser Foundation Health Plan, Inc. In 2006, Kaiser<sup>1</sup> was expanding a fee-for-service product, under which covered individuals could access physician services through a national third-party network that included ABMG physicians. This expansion by Kaiser threatened ultimately to reduce ABMG's business under its capitated contracts, by giving Kaiser the ability to offer employers both a capitated and fee-for-service health plan option. To impede this expansion, ABMG attempted a concerted refusal to serve Kaiser fee-for-service enrollees. Although ABMG's refusal to deal was ultimately unsuccessful, the sole purpose of this action was to impede competition in the provision of physician services in and around Berkeley and Oakland, California.

ABMG did not engage in any activity that might justify collective agreements on the prices its members would accept for their services. For example, the physicians in ABMG have not clinically or financially integrated their practices to create efficiencies sufficient to justify their acts and practices. As a consequence, the Respondent's actions have restrained price and other forms of competition among physicians in the Berkeley and Oakland, California, area and thereby harmed consumers (including health plans, employers, and individual consumers) by increasing the prices for physician services.

### **The Proposed Consent Order**

The proposed Consent Order is designed to prevent the continuance and recurrence of the illegal conduct alleged in the complaint while it allows ABMG to engage in legitimate, joint conduct. The proposed Consent Order does not affect ABMG's activities in contracting with the payors on a capitated basis.

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<sup>1</sup> Kaiser is a trade name for an association of three entities: Kaiser Foundation Health Plan, Inc.; Kaiser Foundation Hospitals; and the Permanente Medical Groups.



## Analysis to Aid Public Comment

Paragraph II.A prohibits Respondent from entering into or facilitating any agreement 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 other than through ABMG.

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 payors, certain kinds of agreements are excluded from the general bar on joint negotiations. Paragraph II does not preclude ABMG 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.

Paragraphs III through VI require ABMG to notify the Commission before it initiates certain contacts regarding contracts with payors. Paragraphs III and IV apply to arrangements under which ABMG would be acting as a messenger on behalf of its member physicians. Paragraphs V and VI discuss arrangements under which ABMG plans to achieve financial or clinical integration.

## Analysis to Aid Public Comment

Paragraph VII.A requires ABMG to send a copy of the Complaint and Consent Order to its physician members, its management and staff, and any payors who communicated with ABMG, or with whom ABMG communicated, with regard to any interest in contracting for physician services, at any time since January 1, 2001.

Paragraph VII.B requires ABMG to terminate, without penalty, pre-existing payer contracts that it had entered into since 2001, at the earlier of (1) receipt by ABMG of a written request for termination by the payer; or (2) the termination date, renewal date, or anniversary date of the contract. This provision is intended to eliminate the effects of ABMG's illegal collective behavior. The payer can delay the termination for up to one year by making a written request to ABMG.

Paragraph VII.D contains three-year notification provisions relating to future contact with physicians, payors, management and staff. This provision requires ABMG to distribute a copy of the Complaint and Consent Order to each physician who begins participating in ABMG; each payor who contacts ABMG regarding the provision of physician services; and each person who becomes an officer, director, manager, or employee for five years after the date on which the Consent Order becomes final. In addition, Paragraph VII.D requires ABMG to publish a copy of the Complaint and Consent Order, annually, in any official publication that it sends to its participating physicians.

Paragraphs VII.E and VIII-IX impose various obligations on ABMG to report or to provide access to information to the Commission to facilitate monitoring its compliance with the Consent Order.

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

Complaint

IN THE MATTER OF

**TENDER CORPORATION**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4261; File No. 082 3188*  
*Complaint, July 13, 2009 - Decision, July 13, 2009*

This consent order addresses Tender Corporation's marketing and sale of "Fresh Bath" brand moist hand and body wipes. The complaint alleges that respondent violated Section 5 of the FTC Act by making false and misleading representations that its products and packaging were "biodegradable," when in fact, customary disposal methods do not allow for respondent's products or packaging to break down completely and return to nature. The complaint further alleges that respondent failed to substantiate its "biodegradable" claim. The consent order prohibits respondent from engaging in similar acts and practices by prohibiting respondent from making representations its products are biodegradable or environmentally beneficial unless substantiated by competent and reliable scientific evidence. Additionally, the order requires respondent to specify whether its biodegradability claim applies to the product, package, or components and to keep copies of relevant advertisements and their materials substantiating the claim.

*Participants*

For the *Commission*: Michael J. Davis and Laura Schneider.

For the *Respondents*: Rebecca Dandeker and Lawrence Lanpher, K&L Gates.

**COMPLAINT**

The Federal Trade Commission, having reason to believe that Tender Corporation ("respondent"), has violated provisions of the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Tender Corporation is a Delaware corporation with its principal office or place of business at 106 Burndy Road, Littleton, New Hampshire 03561.

## Complaint

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

3. Respondent advertises, labels, offers for sale, sells, and/or distributes goods under the brand name Fresh Bath to the public throughout the United States, including Fresh Bath Wipes and Fresh Bath Travel Wipes. Respondent advertises and offers these goods for sale through its Internet site [www.adventuremedicalkits.com](http://www.adventuremedicalkits.com) and through its catalog. Respondent also advertises, offers for sale, sells, or distributes these goods to retailers throughout the United States.

4. To induce consumers and retailers to purchase Fresh Bath Wipes and Fresh Bath Travel Wipes, respondent disseminates, has disseminated, or has caused to be disseminated advertisements, including product labeling and other promotional materials, including but not limited to the attached Exhibit A. In these advertisements, respondent prominently states or has stated that Fresh Bath Wipes and Fresh Bath Travel Wipes and/or the packaging for Fresh Bath Wipes and Fresh Bath Travel Wipes are “bio-degradable.” Respondent does not define, describe, or qualify such biodegradability, and placement of the term “bio-degradable” on the packaging does not make clear whether this purported benefit refers to the product, its packaging, or a portion or component of the product or packaging.

5. Approximately 91 percent of total municipal solid waste in the United States is disposed of in either landfills, incinerators, or recycling facilities. These disposal methods do not present conditions that would allow for either Fresh Bath Wipes or Fresh Bath Travel Wipes or their packaging to completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time.

**VIOLATIONS OF SECTION 5 OF THE FTC ACT****FALSE OR MISLEADING REPRESENTATIONS**

6. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that:

## Complaint

- a. Fresh Bath Wipes and Fresh Bath Travel Wipes will completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time after customary disposal; and
  - b. The packaging of Fresh Bath Wipes and Fresh Bath Travel Wipes will completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time after customary disposal.
7. In truth and in fact:
- a. Fresh Bath Wipes and Fresh Bath Travel Wipes will not completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time after customary disposal because a substantial majority of total municipal solid waste is disposed of by methods that do not present conditions that would allow for Fresh Bath Wipes and Fresh Bath Travel Wipes to completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time; and
  - b. The packaging of Fresh Bath Wipes and Fresh Bath Travel Wipes will not completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time after customary disposal because a substantial majority of total municipal solid waste is disposed of by methods that do not present conditions that would allow for the packaging of Fresh Bath Wipes and Fresh Bath Travel Wipes to completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time.
8. Therefore, the representations set forth in Paragraph 6 were, and are, false or misleading.

## Complaint

UNSUBSTANTIATED REPRESENTATIONS

9. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 6, at the time the representations were made.

10. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 6 at the time the representations were made.

11. Therefore, the representation set forth in Paragraph 9 was, and is, false or misleading.

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

**THEREFORE**, the Federal Trade Commission, on this thirteenth day of July, 2009, has issued this complaint against respondent.

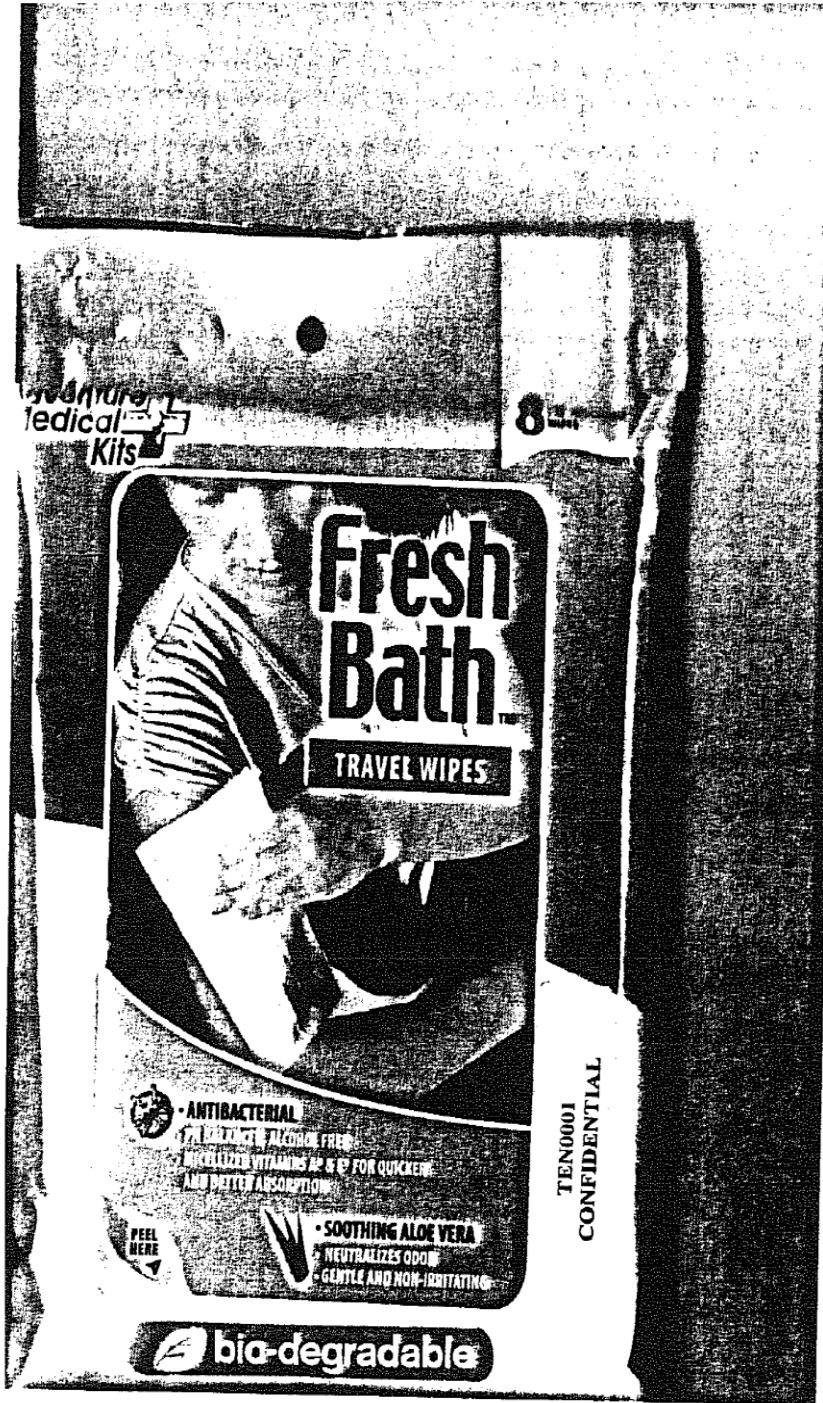
By the Commission.

Complaint

**Exhibit A**



Complaint





## Decision and Order

**DECISION AND ORDER**

The Federal Trade Commission (“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.*; and

The Respondent and counsel for the Commission having thereafter executed an agreement containing a 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 the Respondent that the law has been violated as alleged in the 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 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 for the receipt and consideration of public comments, 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 Tender Corporation is a Delaware corporation with its principal office or place of business at 106 Burndy Road, Littleton, New Hampshire 03561.
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:

- A. Unless otherwise specified, “Respondent” shall mean Tender Corporation and its successors and assigns and its officers, agents, representatives, and employees.
- B. “Clearly and prominently” shall mean as follows:
  - 1. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. *Provided, however,* that in any advertisement presented solely through video or audio means, the disclosure may be made through the same means in which the ad is presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it. In addition to the foregoing, in interactive media the disclosure shall also be unavoidable and shall be presented prior to the consumer incurring any financial obligation;
  - 2. In a print advertisement, promotional material, or instructional manual, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears. In a catalog, the disclosure shall appear on the same page as each representation;

## Decision and Order

3. On a product label, the disclosure shall be in a type size and location on the principal display panel sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears; and
  4. Regardless of the medium, 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, promotional material, instructional manual, package, or label.
- C. For any representation, a disclosure elsewhere shall be deemed to be “in close proximity” to such representation if there is a clear and conspicuous cross-reference to the disclosure. The use of an asterisk or other symbol shall not constitute a clear and conspicuous cross-reference. A cross-reference shall be deemed clear and conspicuous if it is of sufficient prominence to be readily noticeable and readable by an ordinary consumer when examining the part of the advertisement, promotional material, instructional manual, package, or label on which the representation appears.
- D. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
- E. “Competent and reliable scientific evidence” shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.
- F. “Is degradable, biodegradable, or photodegradable” shall mean that the entire product or package will completely decompose into elements found in nature within a reasonably short period of time after customary disposal.

## Decision and Order

- G. “Product or package” means any towel or wipe, including but not limited to antibacterial, cleaning, lotion, sunblock, or repellent wipe, or any similar product, or any package containing such product, that is (a) offered for sale, sold, or distributed by respondent, under the brand name Fresh Bath, Tender, Adventure Medical Kits, or any other brand name of respondent; or (b) sold or distributed by third parties under private labeling agreements with respondent.

**I.**

**IT IS ORDERED** that respondent, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or package, in or affecting commerce, shall not represent, in any manner, expressly or by implication:

- A. That any such product or package is degradable, biodegradable, or photodegradable, unless the representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation; or
- B. That any such product or package offers any other environmental benefit, unless the representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

**II.**

**IT IS FURTHER ORDERED** that respondent, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or package, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication

## Decision and Order

concerning whether such product or package is degradable, biodegradable, or photodegradable, unless:

- A. The representation applies to the entire product and entire package; or
- B. Respondent discloses clearly, prominently, and in close proximity to such representation, whether such representation refers to the entire product, the entire package, or a portion or component of the product or package.

**III.**

**IT IS FURTHER ORDERED** that respondent Tender Corporation, 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 Commission for inspection and copying:

- A. All advertisements, labeling, packaging and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation;
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in its 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; and
- D. All acknowledgments of receipt of this order, obtained pursuant to Part IV.

**IV.**

**IT IS FURTHER ORDERED** that for a period of five (5) years after the date of issuance of this order, respondent Tender Corporation, and its successors and assigns, shall deliver a copy

## Decision and Order

of this order to: (1) all current and future principals, officers, and directors; and (2) all current and future managers who have responsibilities with respect to the subject matter of this order. Respondent shall secure from each such person a signed and dated statement acknowledging receipt of the order, with any electronic signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq.* Respondent shall deliver this order to such current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

**V.**

**IT IS FURTHER ORDERED** that respondent Tender Corporation, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change with regard to Tender Corporation or any business entity that respondent directly or indirectly controls, or has an ownership interest in, that may affect compliance obligations arising under this order, including but not limited to formation of a new business entity; a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor entity; 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 business or corporate name or address. *Provided, however,* that, with respect to any proposed change 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.

**VI.**

**IT IS FURTHER ORDERED** that respondent Tender Corporation, and its successors and assigns, shall, within sixty (60) days after the date of service of this order file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which respondent has complied

## Decision and Order

with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondent shall submit additional true and accurate written reports.

**VII.**

This order will terminate on July 13, 2029, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in 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 (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from Tender Corporation, a corporation (“respondent”).

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

This matter involves Tender’s marketing and sale of Fresh Bath brand moist hand and body wipes, packaged in plastic that prominently states “bio-degradable” without qualification on the front of the package. Tender’s website and promotional materials also made the claim. According to the FTC complaint, respondent represented that Fresh Bath Wipes and Fresh Bath Travel Wipes and their packages will completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time after customary disposal. The complaint alleges respondent’s biodegradable claim is false because a substantial majority of total household waste is disposed of either in landfills, incinerators, or recycling facilities and these customary disposal methods do not present conditions that would allow for the wipes and their packaging to completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time. The complaint further alleges that respondent failed to have substantiation for the biodegradable claim. The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts and practices in the future.

Part I.A of the proposed order prohibits respondent from making a representation that certain of its products are degradable unless the representation is true, not misleading, and substantiated by competent and reliable scientific evidence. Part I.B prohibits respondent from making any other environmental benefit claim



## Analysis to Aid Public Comment

about such products, unless at the time the representation is made, it is truthful and not misleading, and substantiated by competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence.

Part II of the proposed order requires respondent to specify whether its degradability claim applies to the product, package, or components of either.

Parts III through VI require respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements; to provide copies of the order to certain of their personnel; to notify the Commission of changes in corporate structure that might affect compliance obligations under the order; and to file compliance reports with the Commission and respond to other requests from FTC staff. Part VII provides that the order will terminate after twenty (20) years under certain circumstances.

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

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

*Docket No. C-4263; File No. 082 3186*  
*Complaint, July 15, 2009 - Decision, July 15, 2009*

This consent order addresses Kmart Corporation's marketing and sale of American Fare paper plates. The complaint alleges that respondent violated Section 5 of the FTC Act by making false and misleading representations that its products and packaging were "biodegradable," when in fact, customary disposal methods do not allow for respondents products or packaging to break down completely and return to nature. The complaint further alleges that respondent failed to substantiate its "biodegradable" claim. The consent order prohibits respondent from engaging in similar acts and practices by prohibiting respondent from making representations its products are biodegradable or environmentally beneficial unless substantiated by competent and reliable scientific evidence. Additionally, the order requires respondent to specify whether its biodegradability claim applies to the product, package, or components and to keep copies of relevant advertisements and their materials substantiating the claim

*Participants*

For the *Commission: Michael J. Davis and Laura Schneider.*

For the *Respondents: Charulata Pagar, Manatt, Phelps & Philips.*

**COMPLAINT**

The Federal Trade Commission, having reason to believe that Kmart Corporation ("respondent"), has violated provisions of the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Kmart Corporation is a Michigan corporation with its principal office or place of business at 3333 Beverly Road, Hoffman Estates, Illinois 60179.

## Complaint

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

3. Respondent advertises, labels, offers for sale, sells, and/or distributes goods under the brand name American Fare to the public throughout the United States, including American Fare paper plates. Respondent advertises and offers these goods for sale through print ads and in its Kmart retail outlets throughout the United States.

4. To induce consumers to purchase American Fare paper plates, respondent disseminates, has disseminated, or has caused to be disseminated advertisements, including product labeling and other promotional materials, including but not limited to the attached Exhibit A. In these advertisements, respondent prominently states or has stated that American Fare plates are “biodegradable.” Respondent does not define, describe, or qualify such biodegradability.

5. Approximately 91 percent of total municipal solid waste in the United States is disposed of in either landfills, incinerators, or recycling facilities. These disposal methods do not present conditions that would allow for American Fare paper plates to completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time.

**VIOLATIONS OF SECTION 5 OF THE FTC ACT****FALSE OR MISLEADING REPRESENTATIONS**

6. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that American Fare paper plates will completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time after customary disposal.

7. In truth and in fact, American Fare paper plates will not completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time after customary disposal because a substantial majority of total

## Complaint

municipal solid waste is disposed of by methods that do not present conditions that would allow for American Fare paper plates to completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time.

8. Therefore, the representation set forth in Paragraph 6 was, and is, false or misleading.

UNSUBSTANTIATED REPRESENTATIONS

9. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representation set forth in Paragraph 6, at the time the representation was made.

10. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representation set forth in Paragraph 6 at the time the representation was made.

11. Therefore, the representation set forth in Paragraph 9 was, and is, false or misleading.

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

**THEREFORE**, the Federal Trade Commission, on this fifteenth day of July, 2009, has issued this complaint against respondent.

By the Commission.

Complaint

**Exhibit A**



Complaint



## Decision and Order

**DECISION AND ORDER**

The Federal Trade Commission (“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.*; and

The Respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a 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 the Respondent that the law has been violated as alleged in the 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 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 for the receipt and consideration of public comments, 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 Kmart Corporation is a Michigan corporation with its principal office or place of business at 3333 Beverly Road, Hoffman Estates, Illinois 60179.
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:

- A. Unless otherwise specified, “Respondent” shall mean Kmart Corporation, a corporation, and its successors and assigns, and its officers, agents, representatives, and employees.
- B. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
- C. “Competent and reliable scientific evidence” shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.
- D. “Is degradable, biodegradable, or photodegradable” shall mean that the entire product or package will completely decompose into elements found in nature within a reasonably short period of time after customary disposal.
- E. “Product or package” means any paper product or disposable tableware product, or package containing such product, that is (a) offered for sale, sold, or distributed by respondent, under the American Fare brand name or any other brand name of respondent; or (b) sold or distributed by third parties under private labeling agreements with respondent.

**I.**

**IT IS ORDERED** that respondent, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising,



## Decision and Order

promotion, offering for sale, sale, or distribution of any product or package, in or affecting commerce, shall not represent, in any manner, expressly or by implication:

- A. That any such product or package is degradable, biodegradable, or photodegradable, unless the representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation; or
- B. That any such product or package offers any other environmental benefit, unless the representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

**II.**

**IT IS FURTHER ORDERED** that respondent Kmart Corporation, 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 Commission for inspection and copying:

- A. All advertisements, labeling, packaging and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation;
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in its 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; and

## Decision and Order

- D. All acknowledgments of receipt of this order, obtained pursuant to Part III.

**III.**

**IT IS FURTHER ORDERED** that respondent Kmart Corporation, and its successors and assigns, shall deliver a copy of this order to: (1) all current and future principals, officers, and directors; and (2) all current and future managers who have responsibilities with respect to the subject matter of this order. Respondent shall secure from each such person a signed and dated statement acknowledging receipt of the order, with any electronic signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq.* Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

**IV.**

**IT IS FURTHER ORDERED** that respondent Kmart Corporation, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in respondent or any business entity that respondent directly or indirectly controls, or has an ownership interest in, that may affect compliance obligations arising under this order, including but not limited to formation of a new business entity; a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor entity; 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 business or corporate name or address. *Provided, however,* that, with respect to any proposed change about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

## Decision and Order

**V.**

**IT IS FURTHER ORDERED** that respondent Kmart Corporation, and its successors and assigns, shall, within sixty (60) days after the date of service of this order file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which respondent has complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondent shall submit additional true and accurate written reports.

**VI.**

This order will terminate on July 15, 2029, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This orders 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 (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from Kmart Corporation, a corporation (“respondent”).

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

This matter involves Kmart's marketing and sale of American Fare paper plates with shrink-wrap packaging that prominently states “biodegradable” without qualification on the front of the wrapper. According to the FTC complaint, respondent represented that American Fare paper plates will completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time after customary disposal. The complaint alleges respondent's biodegradable claim is false because a substantial majority of total household waste is disposed of either in landfills, incinerators, or recycling facilities and these customary disposal methods do not present conditions that would allow for the paper plates to completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time. The complaint further alleges that respondent failed to have substantiation for its biodegradable claim. The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts and practices in the future.

Part I.A of the proposed order prohibits respondent from making a representation that certain of its products are degradable unless the representation is true, not misleading, and substantiated by competent and reliable scientific evidence. Part I.B prohibits respondent from making any other environmental benefit claim about such products, unless at the time the representation is made, it is truthful and not misleading, and substantiated by competent

## Analysis to Aid Public Comment

and reliable evidence, which when appropriate must be competent and reliable scientific evidence.

Parts II through V require respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements; to provide copies of the order to certain of their personnel; to notify the Commission of changes in corporate structure that might affect compliance obligations under the order; and to file compliance reports with the Commission and respond to other requests from FTC staff. Part VI provides that the order will terminate after twenty (20) years under certain circumstances.

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

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

*Docket No. C-4262; File No. 082 3145  
Complaint, July 27, 2009 - Decision, July 27, 2009*

This consent order addresses respondent's, Kellogg Company, product called "Frosted Mini-Wheats." According to the complaint, the respondent, a producer of cereal and convenience foods, violated Section 5 of the FTC Act by making false and misleading representations that eating a bowl of Kellogg's Frosted Mini-Wheats cereal for breakfast is clinically shown to improve kids' attentiveness by nearly 20%. The complaint alleges that this claim is false or misleading because the clinical study referred to in respondent's advertisements showed roughly only half the kids who ate Frosted Mini-Wheats cereal showed any improvement after three hours as compared to their pre-breakfast baseline. And, only one in seven kids who ate the cereal improved their attentiveness by 18% or more. The consent order prevents respondent from engaging in similar acts and practices in the future by prohibiting representation, unless the representation is true and non-misleading. In addition to filing compliance reports to the FTC, the Respondent must possess and maintain competent and reliable scientific evidence for its claims.

*Participants*

For the *Commission: Kial S. Young*

For the *Respondents: Richard J. Leighton and Richard F. Mann, Keller and Heckman LLP*

**COMPLAINT**

The Federal Trade Commission, having reason to believe that Kellogg Company, a corporation ("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 Kellogg Company is a Delaware corporation with its principal office or place of business at One Kellogg Square, P.O. Box 3599, Battle Creek, Michigan, 49016.

## Complaint

2. Respondent has labeled, advertised, promoted, offered for sale, sold, and distributed Kellogg's® Frosted Mini-Wheats® cereal to consumers.

3. Kellogg's® Frosted Mini-Wheats® cereal is a "food" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

4. The acts and practices of respondent, as alleged herein, have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

5. Respondent has disseminated or caused to be disseminated advertisements for Kellogg's® Frosted Mini-Wheats® cereal, including but not limited to the attached Exhibits A through H. These advertisements contain the following statements:

- a. **Television Advertisement:** "Where Were We?"  
(Exhibit A - CDROM and storyboard)

Teacher: "Okay. Where were we?"

School Boy: "We were on the third paragraph of page 57 and you were explaining that the stone structures made by Ancient Romans were called aqueducts. And as you were writing that up on the board, your chalk broke. Into three pieces."

Teacher: "Right."

Mini-Wheat: "I've never been so proud."

Female Announcer: "A clinical study showed kids who had a filling breakfast of Frosted Mini-Wheats cereal improved their attentiveness by nearly 20 percent."

On screen: [appears in small, white font, for five seconds, against two different backgrounds, the first of which is in motion]

## Complaint

“Based upon independent clinical research, kids who ate Frosted Mini-Wheats cereal for breakfast had up to 18% better attentiveness three hours after breakfast than kids who ate no breakfast. For more information, visit [www.frostedminiwheats.com](http://www.frostedminiwheats.com).”

On screen: “20%”

Mini: “Nearly twenty percent? Okay, even I’m impressed by me.”

Female Announcer: “Keeps ‘em full. Keeps ‘em focused.”

b. **Television Advertisement:** “Crossing Guard”  
(Exhibit B- CDRom and storyboard)

Mini-Wheat 1: “Ah, the first day of school. New pencils, new books.”

Mini-Wheat 2: “New backpack. Looks good.”

Mini-Wheat 1: “Just trying to look our best.”

Mini-Wheat 2: “It’s going to take more than looks. From what I hear, Ms. Haskins is a toughie.”

Mini-Wheat 1: “Oh, we had a good breakfast, so we’re ready.”

Mini-Wheat 3: “Gonna be another great year, huh guys?”

Mini-Wheat 1: “You bet your eight layers.”

Mini-Wheat 2: “Oh, yeah, long distance high five.”

Mini-Wheat 3: “Whoa.”



## Complaint

Female Announcer: “A clinical study showed kids who had a filling breakfast of Frosted Mini-Wheats cereal improved their attentiveness by nearly 20 percent when compared to kids who missed out on breakfast.”

On Screen: [appears in small, white font, for approximately five seconds, against three different backgrounds, the first of which is in motion]

“Based upon independent clinical research, kids who ate Frosted Mini-Wheats cereal for breakfast had up to 18% better attentiveness three hours after breakfast than kids who ate no breakfast. For more information, visit [www.frostedminiwheats.com](http://www.frostedminiwheats.com).”

On Screen: “Nearly 20%”

Mini-Wheat 3: “Look, a new kid.”

Female Announcer: “Now available in blueberry muffin. Keeps ‘em full, keeps ‘em focused.”

c. **Product Packaging** (Exhibit C)

Appearing at the top of the front and back panels of Frosted Mini-Wheats cereal boxes:



Appearing at the bottom of the back panel of Frosted Mini-Wheats boxes, in small type:

## Complaint

“Based upon independent clinical research, kids who ate Kellogg’s® Frosted Mini-Wheats® cereal for breakfast had up to 18% better attentiveness three hours after breakfast than kids who ate no breakfast. For more information, visit [www.frostedminiwheats.com](http://www.frostedminiwheats.com).”

- d. **Internet Website** [www.mini-wheats.com](http://www.mini-wheats.com) (excerpts)  
(Exhibit D) From the homepage:

“A breakfast of Frosted Mini-Wheats® cereal is clinically shown to improve kids’ attentiveness by nearly 20%.\*

\* Based upon independent clinical research, kids who ate Kellogg’s® Frosted Mini-Wheats® cereal for breakfast had up to 18% better attentiveness three hours after breakfast than kids who ate no breakfast.”

From the “News” page:

“The Daily Wheat: Attentiveness Put to the Test:

This is Mini™, reporting from an event that has captured our attention. A team of kids are attempting to show that a breakfast of Kellogg’s® Frosted Mini-Wheats® cereal can help keep them attentive all morning long.

It was apparent from the first test that the Frosted Mini-Wheats® team’s attentiveness was strong. And as the morning progressed, it didn’t waiver.

In the end, a round of enthusiastic cheers could be heard coming from the moms’ viewing section as the 8-layers of whole grain fiber in Frosted Mini-Wheats® cereal proved to improve kids’ attentiveness by nearly 20%\*!

\* Based upon independent clinical research, kids who ate Kellogg’s® Frosted Mini-Wheats® cereal

## Complaint

for breakfast had up to 18% better attentiveness three hours after breakfast than kids who ate no breakfast.”

e. **Other Internet Advertising** (Exhibit E)

Sponsored Link on Google.com - results of search for “frosted mini-wheats”:

“Frosted Mini Wheats®  
www.mini-wheats.com Frosted Mini-Wheats® has clinically improved kids’ attentiveness by 20%”

f. **Milk Carton Labels** (Exhibit F)

**Clinically Shown  
to Improve Kids'  
Attentiveness  
By Nearly ...  
20%\***

\* Based upon independent clinical research, kids who ate *Kellogg's®* Frosted Mini-Wheats® cereal for breakfast had up to 18% better attentiveness three hours after breakfast than kids who ate no breakfast. For more information, visit [www.frostedminiwheats.com](http://www.frostedminiwheats.com).

g. **Print Advertising** (Exhibit G)**“3 Strategies to Start Their Day Off Right**

Does your child need to pay more attention in school? Use the following tips to help keep your little ones ahead of the class:

## Complaint

\* \* \*

**Start the Day with Breakfast.**

Kids need an energy boost after a long night's sleep. A recent clinical study showed that a whole grain and fiber-filled breakfast of Frosted Mini-Wheats helps improve children's attentiveness by nearly 20%.\*

\* \* \*

\* Based upon independent clinical research, kids who ate Kellogg's® Frosted Mini-Wheats® cereal for breakfast had up to 18% better attentiveness three hours after breakfast than kids who ate no breakfast.

For more information, visit [www.frostedminiwheats.com](http://www.frostedminiwheats.com)."

h. **Press Release** (Exhibit H)**"HELP YOUR KIDS EARN AN "A" FOR ATTENTIVENESS WITH A BOWL OF FROSTED MINI-WHEATS® CEREAL FOR BREAKFAST**

*Eating a Bowl May Increase Attentiveness by Nearly 20 Percent*

Battle Creek, Mich., March 12, 2008—Today's parents are going to great lengths to help their kids do their best in school. They sign them up for tutoring services, buy special learning software and pack their schedules with enrichment activities. While all of these things are great, it's important that parents not neglect one of the simplest ways to help ensure their kids do their best - a healthy breakfast.

A recent study commissioned by Kellogg helps demonstrate how eating a healthy, nutritious breakfast can help kids stay full and avoid the distraction of mid-morning hunger to help them do their best in school. The study, conducted by an independent research group, shows that eating a

## Complaint

breakfast of *Frosted Mini-Wheats*® cereal helped improve kids' attentiveness by nearly 20 percent.\*

\* \* \*

**Keeping 'Em Full and Focused**

Kellogg recently commissioned research to measure the effect on kids of eating a breakfast of *Frosted Mini-Wheats*® cereal. An independent research group conducted a series of standardized, cognitive tests on children ages 8 to 12 who ate either a breakfast of *Frosted Mini-Wheats*® cereal or water. The result? The children who ate a breakfast of *Frosted Mini-Wheats*® cereal had a nearly 20% improvement in attentiveness.

\* \* \*

\* Based upon independent clinical research, kids who ate Kellogg's® Frosted Mini-Wheats® cereal for breakfast had up to 18% better attentiveness three hours after breakfast than kids who ate no breakfast. For more information, visit [www.frostedminiwheats.com](http://www.frostedminiwheats.com).”

6. Through the means described in Paragraph 5, including the statements contained in the advertisements attached as Exhibits A and C through H, among others, respondent has represented, expressly or by implication, that eating a bowl of Kellogg's® Frosted Mini- Wheats® cereal for breakfast is clinically shown to improve kids' attentiveness by nearly 20%.

7. In truth and in fact, eating a bowl of Kellogg's® Frosted Mini-Wheats® cereal for breakfast is not clinically shown to improve kids' attentiveness by nearly 20%. In the clinical study referred to in respondent's advertisements, for example, only about half the kids who ate Frosted Mini-Wheats® cereal showed any improvement after three hours as compared to their pre-breakfast baseline. In addition, overall, only one in seven kids who ate the cereal improved their attentiveness by 18% or more, and only about one in nine improved by 20% or more. Therefore, the representation set forth in Paragraph 6 was, and is, false or misleading.

## Complaint

8. Through the means described in Paragraph 5, including the statements contained in the advertisement attached as Exhibit B, among others, respondent has represented, expressly or by implication, that eating a bowl of Kellogg's® Frosted Mini-Wheats® cereal for breakfast is clinically shown to improve kids' attentiveness by nearly 20% compared to kids who ate no breakfast.

9. In truth and in fact, eating a bowl of Kellogg's® Frosted Mini-Wheats® cereal for breakfast is not clinically shown to improve kids' attentiveness by nearly 20% compared to kids who ate no breakfast. In the clinical study referred to in respondent's advertisements, for example, kids who ate Frosted Mini-Wheats® had an average of 10.6% better attentiveness three hours later than kids who had skipped breakfast; relatively few kids experienced better attentiveness near the 20% level. Therefore, the representation set forth in Paragraph 8 was, and is, false or misleading.

10. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce, in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

**THEREFORE**, the Federal Trade Commission, this twenty-seventh day of July, 2009, has issued this complaint against respondent.

By the Commission.

Complaint

**Exhibit A**



Complaint

**Exhibit B**





Complaint

**Exhibit C**



Complaint

10/10/2010 10:10:10 AM



Complaint

**Exhibit D**



Complaint

Do not write in this space



Complaint

**Exhibit E**



Complaint

© Kellogg Company 2011

A large, empty rectangular box with a thin black border, intended for a complaint. In the top-left corner of this box, there is a small, faint copyright notice: "© Kellogg Company 2011".

Decision and Order

**Exhibits F, G, and H****Redacted as****CONFIDENTIAL****DECISION AND ORDER**

The Federal Trade Commission (“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.*; and

The Respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a 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 the Respondent that the law has been violated as alleged in the complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it 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 prescribed in Section 2.34

## Decision and Order

of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Kellogg Company (“Kellogg”) is a Delaware corporation with its principal office or place of business at One Kellogg Square, Battle Creek, Michigan, 49016.
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:

- A. Unless otherwise specified, “respondent” shall mean Kellogg Company, a corporation, its successors and assigns and their officers, and each of the above’s agents, representatives, and employees.
- B. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
- C. “Competent and reliable scientific evidence” shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.
- D. “Food” shall mean “food” as defined in Section 15 of the FTC Act, 15 U.S.C. § 55.
- E. The term “including” in this Order shall mean “without limitation.”



## Decision and Order

- F. The terms “and” and “or” in this Order shall be construed conjunctively or disjunctively as necessary, to make the applicable phrase or sentence inclusive rather than exclusive.

**I.**

**IT IS ORDERED** that respondent, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of Kellogg’s® Frosted Mini-Wheats® cereal, in or affecting commerce, shall not represent, in any manner, expressly or by implication, that:

- A. eating a bowl of Kellogg’s® Frosted Mini-Wheats® cereal for breakfast is clinically shown to improve children’s attentiveness by nearly 20%, or by any other specific percentage; or
- B. eating a bowl of Kellogg’s® Frosted Mini-Wheats® cereal for breakfast is clinically shown to improve children’s attentiveness by nearly 20%, or by any other specific percentage, compared to children who ate no breakfast, unless, at the time it is made, the representation is true and non-misleading.

**II.**

**IT IS FURTHER ORDERED** that respondent, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of Kellogg’s® Frosted Mini-Wheats® cereal or any other morning food or snack food, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of a trade name or endorsement, about the benefits, performance, or efficacy of such product for cognitive function, cognitive processes, or cognitive health, unless the representation is true, non-misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

## Decision and Order

**III.**

**IT IS FURTHER ORDERED** that respondent, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any morning food or snack food, 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 nothing in this order shall prohibit respondent from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

**V.**

**IT IS FURTHER ORDERED** that respondent Kellogg Company, 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 reasonable notice make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

## Decision and Order

**VI.**

**IT IS FURTHER ORDERED** that respondent Kellogg Company, and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and other employees having primary responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

**VII.**

**IT IS FURTHER ORDERED** that respondent Kellogg 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, 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.

**VIII.**

**IT IS FURTHER ORDERED** that respondent Kellogg Company, and its successors and assigns, shall, within sixty (60) days after service of this order, and, upon reasonable notice, at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in

## Decision and Order

detail the manner and form in which they have complied with this order.

**IX.**

This order will terminate on July 27, 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.

## Analysis to Aid Public Comment

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

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from Kellogg Company (“Respondent”).

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

This matter involves the advertising and promotion of Kellogg’s Frosted Mini-Wheats, a well-known breakfast cereal. According to the FTC complaint, Respondent represented, in various advertisements, that eating a bowl of Kellogg’s Frosted Mini-Wheats cereal for breakfast is clinically shown to improve kids’ attentiveness by nearly 20%. The complaint alleges that this claim is false or misleading because, in fact, in the clinical study referred to in respondent’s advertisements, only about half the kids who ate Frosted Mini-Wheats cereal showed any improvement after three hours as compared to their pre-breakfast baseline. In addition, overall, only one in seven kids who ate the cereal improved their attentiveness by 18% or more, and only about one in nine improved by 20% or more.

The FTC complaint also charges that Respondent represented, in other advertising, that eating a bowl of Kellogg’s Frosted Mini-Wheats cereal for breakfast is clinically shown to improve kids’ attentiveness by nearly 20% *when compared to kids who ate no breakfast*. The FTC alleges that this claim is also false or misleading, because in fact, kids in the clinical study who ate Frosted Mini-Wheats had an average of 10.6% better attentiveness three hours later than kids who had skipped breakfast. In addition, relatively few kids experienced better attentiveness near the 20% level.

The proposed consent order contains provisions designed to prevent Respondent from engaging in similar acts and practices in

## Analysis to Aid Public Comment

the future. Part I of the proposed order prohibits Respondent from representing that (a) eating a bowl of Kellogg's Frosted Mini-Wheats cereal for breakfast is clinically shown to improve kids' attentiveness by nearly 20%, or any other specific percentage; and (b) eating a bowl of Kellogg's Frosted Mini-Wheats cereal for breakfast is clinically shown to improve kids' attentiveness by nearly 20%, or any other specific percentage, compared to kids who ate no breakfast, unless the representation is true and non-misleading at the time it is made.

Part II of the proposed order prohibits Respondent from making any representations in advertising for Frosted Mini-Wheats or any other morning food or snack food about the benefits, performance, or efficacy of the product for cognitive function, processes, or health, unless the representation is true and non-misleading. In addition, Respondent must possess competent and reliable scientific evidence for such claims.

Part III of the proposed order prohibits Respondent from making misrepresentations in advertising for any morning food or snack food about the existence, contents, validity, results, conclusions, or interpretations of any test, study or research.

Part IV of the proposed order states that the order does not prohibit Respondent from making 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.

Parts V through VIII of the proposed order require Respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements; to provide copies of the order to certain of their personnel; to notify the Commission of changes in corporate structure that might affect compliance obligations under the order; and to file compliance reports with the Commission. Part IX 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

*Analysis to Aid Public Comment*

interpretation of the agreement and proposed order or to modify in any way their terms.

## Complaint

## IN THE MATTER OF

**SEARS HOLDINGS MANAGEMENT  
CORPORATION**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket No. C-4264; File No. 082 3099  
Complaint, August 31, 2009 - Decision, August 31, 2009*

This consent order addresses Sears Holdings Management Corporation's ("respondent") advertising and dissemination from April 2007 through January 2008 of a software application that tracked nearly all of the Internet activities that took place on the computers of consumers who installed it. According to the complaint, respondent represented, in the process of soliciting consumers to download and install the application, that it would track consumers' "online browsing." The complaint alleges that this claim is deceptive because respondent failed to disclose adequately that the application would monitor nearly all of the Internet behavior that occurs on consumers' computers and tracked certain non-Internet-related activities taking place on those computers. The order prevents respondent from engaging in similar acts and practices in the future and sets out the definition of a "Tracking Application". In advertising or disseminating any Tracking Application the respondent must obtain express consent from consumers prior to downloading or installing a Tracking Application.

*Participants*

For the *Commission*: David K. Koehler and Carl H. Settlemyer, III.

For the *Respondents*: Charulata Pagar, Virtual Law Partners, LLP.

**COMPLAINT**

The Federal Trade Commission, having reason to believe that Sears Holdings Management Corporation, a corporation, 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 Sears Holdings Management Corporation ("respondent" or "SHMC") is a Delaware corporation with its



## Complaint

principal office or place of business at 3333 Beverly Road, Hoffman Estates, Illinois 60179. SHMC, a subsidiary of Sears Holdings Corporation (“SHC”) with shares owned by Sears, Roebuck and Co. and Kmart Management Corporation, handles marketing operations for the Sears Roebuck and Kmart retail stores, and operates the sears.com and kmart.com retail Internet websites.

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

3. From on or about April 2007 through on or about January 2008, SHMC disseminated or caused to be disseminated via the Internet a software application for consumers to download and install onto their computers (the “Application”). The Application was created, developed, and managed for respondent by a third party in connection with SHMC’s “My SHC Community” market research program.

4. The Application, when installed, runs in the background at all times on consumers’ computers and transmits tracked information, including nearly all of the Internet behavior that occurs on those computers, to servers maintained on behalf of respondent. Information collected and transmitted includes: web browsing, filling shopping baskets, transacting business during secure sessions, completing online application forms, checking online accounts, and, through select header information, use of web-based email and instant messaging services.

5. SHMC, during the relevant time period, presented fifteen out of every hundred visitors to the sears.com and kmart.com websites with a “My SHC Community” pop-up box (Exhibit A) that said:

Ever wish you could talk directly to a retailer? Tell them about the products, services and offers that would really be right for you?

If you’re interested in becoming part of something new, something different, we’d like to invite you to become a member of My SHC Community. My SHC Community,

### Complaint

sponsored by Sears Holdings Corporation, is a dynamic and highly interactive on-line community. It's a place where your voice is heard and your opinion matters, and what you want and need counts!

The pop-up box made no mention of the Application. Likewise, the general "Privacy Policy" statement accessed via the hyperlink in the pop-up box did not mention the Application.

6. The pop-up box message further invited consumers to enter their email address to receive a follow-up email from SHMC with more information. Subsequently, invitation messages (Exhibit B) were emailed to those consumers who supplied their email address. These emails stated, in pertinent part:

From shopping, current events, social networking, to entertainment and email, it seems that the Internet is playing a bigger and bigger role in our daily lives these days.

If you're interested in becoming part of something new, something different, we'd like to invite you to join a new and exciting online community; My SHC Community, sponsored by Sears Holdings Corporation. *Membership is absolutely free!*

My SHC Community is a dynamic and highly interactive online community. It's a place where your voice is heard and your opinion matters, and what you want and need counts! As a member of My SHC Community, you'll partner directly with the retail industry. You'll participate in exciting, engaging and on-going interactions – always on your terms and always by your choice. My SHC Community gives you the chance to help shape the future by sharing and receiving information about the products, services and offers that would really be right for you.

To become a member of My SHC Community, we simply ask you to complete the registration process which includes providing us with your contact information as well as answering a series of profile questions that will help us get to know you better. You'll also be asked to

## Complaint

take a few minutes to download software that is powered by (VoiceFive). This research software will confidentially track your online browsing. This will help us better understand you and your needs, enabling us to create more relevant future offerings for you, other community members, and eventually all shoppers. You can uninstall the software at any time through the Add/Remove program utility on your computer. During the registration process, you'll learn more about this application software and you'll always have the opportunity to ask any and every question you may have.

Once you're a member of My SHC Community, you'll regularly interact with My SHC Community members as well as employees of Sears Holdings Corporation through special online engagements, surveys, chats and other fun and informative online techniques. We'll ask you to journal your shopping and purchasing behavior. Again, this will be when you want and how you want to record it – always on your terms and always by your choice. We'll also collect information on your internet usage. Community engagements are always fun and always voluntary!

The email invitation message then described what consumers would receive in exchange for becoming a member of the My SHC Community, including a \$10 payment for joining the “online community,” contingent upon the consumer retaining the Application on his or her computer for at least one month. Consumers who wished to proceed further would need to click a button, at the bottom, center portion of the invitation email, that said “Join Today!”

7. Consumers who clicked on the “Join Today!” button in the email invitation were directed to a landing page (Exhibit C) that restated many of the aforementioned representations about the potential interactions between members and the “community” and about the putative benefits of membership. The landing page did not mention the Application.

8. Consumers who clicked on the “Join Today” button in the landing page were directed to a registration page (Exhibit D). To

### Complaint

complete registration, consumers needed to enter information, including their name, address, age, and email address. Below the fields for entering information, the registration page presented a “Privacy Statement and User License Agreement” (“PSULA”) in a “scroll box” that displayed ten lines of the multi-page document at a time (“Printable version” attached as Exhibit E). A description of the Application’s specific functions begins on approximately the 75<sup>th</sup> line down in the scroll box:

Computer hardware, software, and other configuration information: Our application may collect certain basic hardware, software, computer configuration and application usage information about the computer on which you install our application, including such data as the speed of the computer processor, its memory capacities and Internet connection speed. In addition, our application may report on devices connected to your computer, such as the type of printer or router you may be using.

Internet usage information: Once you install our application, it monitors all of the Internet behavior that occurs on the computer on which you install the application, including both your normal web browsing and the activity that you undertake during secure sessions, such as filling a shopping basket, completing an application form or checking your online accounts, which may include personal financial or health information. We may use the information that we monitor, such as name and address, for the purpose of better understanding your household demographics; however we make commercially viable efforts to automatically filter confidential personally identifiable information such as UserID, password, credit card numbers, and account numbers. Inadvertently, we may collect such information about our panelists; and when this happens, we make commercially viable efforts to purge our database of such information.

The software application also tracks the pace and style with which you enter information online (for example, whether you click on links, type in webpage names, or use shortcut keys), the usage of cookies, and statistics about your use of online applications (for example, it may

## Complaint

observe that during a given period of use of a computer, the computer downloaded X number of bytes of data using a particular Internet enabled gaming application).

Please note: Our application does not examine the text of your instant messages or e-mail messages. We may, however, review select e-mail header information from web-based e-mails as a way to verify your contact information and online usage information.

The PSULA went on to describe how the information the Application would collect was transmitted to respondent's servers, how it might be used, and how it was maintained. It also described how consumers could stop participating in the online community and remove the Application from their computers. Respondent stated in the PSULA that it reserved the right to continue to use information collected prior to a consumer's "resignation."

9. Below the scroll box on the registration page was a link that consumers could click to access a printable version of the PSULA, and a blank checkbox next to the statement: "I am the authorized user of this computer and I have read, agree to, and have obtained the agreement of all computer users to the terms and conditions of the Privacy Statement and User License Agreement." To continue with the registration process, consumers needed to check the box and click the "Next" button at the bottom of the registration page.

10. Consumers who completed the required information, checked the box, and clicked the "Next" button on the registration page, were directed to an installation page (Exhibit F) that explained the Application download and installation process. Consumers were required to click a "Next" button to begin the download, and then click an "Install" or "Yes" button in a "security warning" dialog box to install the Application. Nothing on the installation page provided information on the Application.

11. When installed, the Application functioned and transmitted information substantially as described in the PSULA. The Application, when installed, would run in the background at all times on consumers' computers. Although the Application

### Complaint

would be listed (as “mySHC Community”) in the “All Programs” menu and “Add/Remove” utilities of those computers, and the Application’s executable file name (“srhc.exe”) would be listed as a running process in Windows Task Manager, the Application would display to users of those computers no visible indication, such as a desktop or system tray icon, that it was running.

12. The Application transmitted, in real time, tracked information to servers maintained on behalf of respondent. The tracked information included not only information about websites consumers visited and links that they clicked, but also the text of secure pages, such as online banking statements, video rental transactions, library borrowing histories, online drug prescription records, and select header fields that could show the sender, recipient, subject, and size of web-based email messages.

13. Through the means described in paragraphs 3-12, respondent has represented, expressly or by implication, that the Application would track consumers’ “online browsing.” Respondent failed to disclose adequately that the software application, when installed, would: monitor nearly all of the Internet behavior that occurs on consumers’ computers, including information exchanged between consumers and websites other than those owned, operated, or affiliated with respondent, information provided in secure sessions when interacting with third-party websites, shopping carts, and online accounts, and headers of web-based email; track certain non-Internet-related activities taking place on those computers; and transmit nearly all of the monitored information (excluding selected categories of filtered information) to respondent’s remote computer servers. These facts would be material to consumers in deciding to install the software. Respondent’s failure to disclose these facts, in light of the representations made, was, and is, a deceptive practice.

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

**THEREFORE**, the Federal Trade Commission this thirty-first day of August, 2009, has issued this complaint against respondent.

Complaint

By the Commission.

**EXHIBIT A**

**Redacted as**

**CONFIDENTIAL**

Complaint

Exhibit B

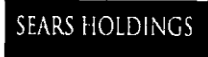
My SHC Community - Yahoo! Mail

Page 1 of 2



My SHC Community

From: "Searsholdings@mysthccommunity.com" <Searsholdings@mysthccommunity.com>  
To: [redacted]@yahoo.com



From shopping, current events, social networking, to entertainment and email, it seems that the Internet is playing a bigger and bigger role in our daily lives these days.



If you're interested in becoming part of something new, something different, we'd like to invite you to join a new and exciting online community; My SHC Community, sponsored by Sears Holdings Corporation. *Membership is absolutely free!*

My SHC Community is a dynamic and highly interactive online community. It's a place where your voice is heard and your opinion matters, and what you want and need counts! As a member of MY SHC Community, you'll partner directly with the retail industry. You'll participate in exciting, engaging and on-going interactions - always on your terms and always by your choice. My SHC Community gives you the chance to help shape the future by sharing and receiving information about the products, services and offers that would really be right for you.

To become a member of My SHC Community, we simply ask you to complete the registration process which includes providing us with your contact information as well as answering a series of profile questions that will help us get to know you better. You'll also be asked to take a few minutes to download software that is powered by (VoiceFive). This research software will confidentially track your online browsing. This will help us better understand you and your needs, enabling us to create more relevant future offerings for you, other community members, and eventually all shoppers. You can uninstall the software at any time through the Add/Remove program utility on your computer. During the registration process, you'll learn more about this application software and you'll always have the opportunity to ask any and every question you may have.

Once you're a member of My SHC Community, you'll regularly interact with My SHC Community members as well as employees of Sears Holdings Corporation through special online engagements, surveys, chats and other fun and informative online techniques. We'll ask you to journal your shopping and purchasing behavior. Again, this will be when you want and how you want to record it - always on your terms and always by your choice. We'll also collect information on your internet usage. Community engagements are always fun and always voluntary! In exchange for becoming a member of My SHC Community:

- You'll gain entry into the My SHC Community Registration Sweepstakes<sup>1</sup>, with sweepstake drawings worth \$5,000, \$2,500, and \$1,000! Prizes are distributed every two months so there are lots of opportunities to win!
- \$10 sent to you after one month of active membership, just for joining this online community and installing the software application<sup>2</sup>.
- Be among the first to try new products and take advantage of special offers.
- You may receive information directly from Sears Holdings Corporation. You'll have the chance to share your thoughts and feelings about products, services and offers. And you'll always have the opportunity to ask any and every question you have.
- You'll partner directly with employees of Sears Holdings Corporation. The more you engage in and interact with the community, the more opportunity you'll have to shape the future of retail experiences - in-store, on-line, and services!

To become a member now, simply click on the "join now" link below and follow the registration instructions.





Complaint



Decision and Order

**Exhibits C, D, E, and F**

**Redacted as**

**CONFIDENTIAL**

**DECISION AND ORDER**

The Federal Trade Commission (“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.*; and

The Respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a 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 the Respondent that the law has been violated as alleged in the complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it 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

## Decision and Order

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 Sears Holdings Management Corporation is a Delaware corporation with its principal office or place of business at 3333 Beverly Road, Hoffman Estates, Illinois 60179.
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:

- A. Unless otherwise specified, “respondent” shall mean Sears Holdings Management Corporation, its successors and assigns, and its officers, agents, representatives, and employees.
- B. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
- C. “Computer” shall mean any desktop or laptop computer, handheld device, telephone, or other electronic product or device that has a platform on which to download, install, or run any software program, code, script, or other content and to play any digital audio, visual, or audiovisual content.
- D. “Tracking Application” shall mean any software program or application disseminated by or on behalf of respondent, its subsidiaries or affiliated companies, that is capable of being installed on consumers’ computers and used by or on behalf of respondent to

## Decision and Order

monitor, record, or transmit information about activities occurring on computers on which it is installed, or about data that is stored on, created on, transmitted from, or transmitted to the computers on which it is installed.

- E. “Affected Consumers” shall mean persons who, prior to the date of issuance of this order, downloaded and installed a Tracking Application on a computer in connection with the My SHC Community program or “on-line community.”
- F. “Collected Information” shall mean any information or data transmitted from a computer by a Tracking Application, installed prior to the date of issuance of this order, to any computer server owned by, operated by, or operated for the benefit of, Sears Holdings Management Corporation, its subsidiaries, or affiliated companies.
- G. “Clearly and prominently” shall mean:
1. In textual communications (*e.g.*, printed publications or words displayed on the screen of a computer), the required disclosures are of a type, size, and location sufficiently noticeable for an ordinary consumer to read and comprehend them, in print that contrasts with the background on which they appear;
  2. In communications disseminated orally or through audible means (*e.g.*, radio or streaming audio), the required disclosures are delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend them;
  3. In communications disseminated through video means (*e.g.*, television or streaming video), the required disclosures are in writing in a form consistent with subparagraph (A) of this definition and shall appear on the screen for a duration sufficient for an ordinary consumer to read and

## Decision and Order

comprehend them, and in the same language as the predominant language that is used in the communication;

4. In communications made through interactive media, such as the Internet, online services, and software, the required disclosures are unavoidable and presented in a form consistent with subparagraph (A) of this definition, in addition to any audio or video presentation of them; and
5. In all instances, the required disclosures are presented in an understandable language and syntax, and with nothing contrary to, inconsistent with, or in mitigation of the disclosures used in any communication of them.

**I.**

**IT IS ORDERED** that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or dissemination of any Tracking Application, in or affecting commerce, shall, prior to the consumer downloading or installing it:

- A. Clearly and prominently, and prior to the display of, and on a separate screen from, any final “end user license agreement,” “privacy policy,” “terms of use” page, or similar document, disclose: (1) all the types of data that the Tracking Application will monitor, record, or transmit, including but not limited to whether the data may include information from the consumer’s interactions with a specific set of websites or from a broader range of Internet interaction, whether the data may include transactions or information exchanged between the consumer and third parties in secure sessions, interactions with shopping baskets, application forms, or online accounts, and whether the information may include personal financial or health information; (2) how the

## Decision and Order

data may be used; and (3) whether the data may be used by a third party; and

- B. Obtain express consent from the consumer to the download or installation of the Tracking Application and the collection of data by having the consumer indicate assent to those processes by clicking on a button or link that is not pre-selected as the default option and that is clearly labeled or otherwise clearly represented to convey that it will initiate those processes, or by taking a substantially similar action.

**II.**

**IT IS FURTHER ORDERED** that respondent, directly or through any corporation, subsidiary, division, or other device, shall:

- A. Within thirty (30) days after the date of service of this order, notify Affected Consumers that they have installed respondent's Tracking Application on their computers, that the Tracking Application collects and transmits to respondent and others the data described in the My SHC Community "Privacy Statement & User License Agreement," and notify them how to uninstall the Tracking Application. Notification shall be by the following means:
1. For two (2) years after the date of service of this order, posting of a clear and prominent notice on the [www.myshccommunity.com](http://www.myshccommunity.com) website; and
  2. For three (3) years after the date of service of this order, informing Affected Consumers who complain or inquire about any Tracking Application; and
- B. Provide prompt, toll-free, telephonic and electronic mail support to help Affected Consumers uninstall any Tracking Application.

## Decision and Order

**III.**

**IT IS FURTHER ORDERED** that respondent, directly or through any corporation, subsidiary, division, or other device, shall:

- A. Within three (3) days after the date of service of this order, cease collecting any data transmitted by any Tracking Application installed before the date of service of this Order; and
- B. Within five (5) days after the date of service of this order, destroy any Collected Information.

**IV.**

**IT IS FURTHER ORDERED** that respondent, Sears Holdings Management Corporation, and its successors and assigns, shall maintain, and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of each document relating to compliance with the terms and provisions of this order, including but not limited to:

- A. For a period of four (4) years, any documents, whether prepared by or on behalf of respondent, that:
  - 1. Comprise or relate to complaints or inquiries, whether received directly, indirectly, or through any third party, concerning a Tracking Application, and any responses to those complaints or inquiries;
  - 2. Are 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, terms of this order, and all reports submitted to the Commission pursuant to this order; and
  - 3. Contradict, qualify, or call into question respondent's compliance with this order; and

## Decision and Order

- B. For a period of four (4) years after the last public dissemination thereof, all advertisements, terms of use, end-user license agreements, frequently asked questions, privacy policies, and similar documents relating to respondent's dissemination of any Tracking Application.

**V.**

**IT IS FURTHER ORDERED** that respondent, Sears Holdings Management Corporation, and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, managers, employees, agents, and representatives having responsibilities with respect to the subject matter of this order. Respondent, Sears Holdings Management Corporation, and its successors and assigns, shall deliver this order to current personnel within thirty (30) days after the date of service of the order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

**VI.**

**IT IS FURTHER ORDERED** that respondent, Sears Holdings Management Corporation, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the entity 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 entity; 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 entity name or address. *Provided, however,* that with respect to any proposed change in the entity about which respondent, Sears Holdings Management Corporation, and its successors and assigns, learns less than thirty (30) days prior to the date such action is to take place, respondent, Sears Holdings Management Corporation, 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 Ave., N.W., Washington, D.C. 20580.



## Decision and Order

**VII.**

**IT IS FURTHER ORDERED** that respondent, Sears Holdings Management Corporation, 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 the manner and form in which respondent has complied with this order.

**VIII.**

This order will terminate on August 31, 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 of 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 a complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

*Provided, further*, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld *on appeal*, then the order will terminate according to this Part as though the complaint had never been filed, except that this order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

## Analysis to Aid Public Comment

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

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from Sears Holdings Management Corporation (“Respondent”).

The proposed consent order (“proposed 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.

This matter involves the advertising and dissemination from April 2007 through January 2008 of a software application (the “Application”) that tracked nearly all of the Internet activities that took place on the computers of consumers who installed it as part of Respondent’s “My SHC Community” market research program. According to the FTC complaint, Respondent represented, in the process of soliciting consumers to download and install the Application, that the Application would track consumers’ “online browsing.” The complaint alleges that this claim is deceptive because Respondent failed to disclose adequately that the Application, when installed, would do much more. Only in a lengthy user license agreement did Respondent disclose that the Application would: monitor nearly all of the Internet behavior that occurs on consumers’ computers, including information exchanged between consumers and websites other than those owned, operated, or affiliated with Respondent, information provided in secure sessions when interacting with third-party websites, shopping carts, and online accounts, and headers of web-based email; track certain non-Internet-related activities taking place on those computers; and transmit nearly all of the monitored information (excluding selected categories of filtered information) to Respondent’s remote computer servers.

The proposed order contains provisions designed to prevent Respondent from engaging in similar acts and practices in the

## Analysis to Aid Public Comment

future. The proposed consent order defines a “Tracking Application” as “any software program or application . . . that is capable of being installed on consumers’ computers and used by or on behalf of respondent to monitor, record, or transmit information about activities occurring on computers on which it is installed, or about data that is stored on, created on, transmitted from, or transmitted to the computers on which it is installed.” Part I requires that Respondent, in advertising or disseminating any Tracking Application, disclose certain information clearly and prominently, prior to the downloading or installing of the application, and on a separate screen from any final “end user license agreement” or similar document. That information would include all the types of data that the Tracking Application will monitor, record, or transmit; how the data may be used; and whether the data may be used by a third party. In describing the types of data, Respondent would be required specifically to disclose: whether the data may include information from the consumer’s interactions with a specific set of websites or from a broader range of Internet interaction; whether the data may include transactions or information exchanged between the consumer and third parties in secure sessions, interactions with shopping baskets, application forms, or online accounts; and whether the information may include personal financial or health information. Respondent must also obtain express consent from consumers prior to downloading or installing a Tracking Application.

Part II of the proposed order requires Respondent to post a clear and prominent notice on the myshccommunity.com website advising consumers that the types of information the Application actually collected and transmitted to Sears and advising them how to uninstall the Application. It also requires Sears to provide prompt, toll-free, telephonic and email support to help affected consumers uninstall the Application.

Part III of the proposed order requires that Respondent, to the extent it has not already done so, cease collecting any data transmitted by any previously installed Tracking Application and to destroy any previously collected data.

Parts IV through VII of the proposed order require Respondent: to keep copies of relevant consumer complaints and

Analysis to Aid Public Comment

inquiries, documents demonstrating order compliance, and advertisements and other documents relating to dissemination of any Tracking Application; to provide copies of the order to certain of their personnel; to notify the Commission of changes in corporate structure that might affect compliance obligations under the order; and to file compliance reports with the Commission. Part VIII 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

**ENHANCED VISION SYSTEMS, INC.**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4265; File No. 092 3010**Complaint, September 3, 2009 - Decision, September 3, 2009*

This consent order addresses the respondent, Enhanced Vision Systems, Inc., a developer of technology to assist the visually impaired. The complaint alleges that respondent violated Section 5(a) of the FTC Act through claiming false or misleading information on where its products were produced. The respondent advertised the products were purportedly “Made in the U.S.A.”, but a significant portion of their components are of foreign origin. The consent order contains a provision designed to prevent respondent from engaging in similar acts and practices in the future. The order prohibits respondent from representing the extent to which its vision-related products are made in the United States unless the representation is true and not misleading.

*Participants*For the *Commission: Laura Schneider.*For the *Respondents: Amy Ralph Mudge and Randal Shaheen, Arnold and Porter, LLP***COMPLAINT**

The Federal Trade Commission, having reason to believe that Enhanced Vision Systems, Inc. (“respondent”) has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Enhanced Vision Systems, Inc. is a California corporation with its principal office or place of business at 5882 Machine Drive, Huntington Beach, California 92649.
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.

## Complaint

3. Respondent advertises, labels, develops, manufactures, offers for sale, sells, and/or distributes goods to the public throughout the United States, including vision enhancement products such as the Merlin desktop magnifier and Acrobat 3-in-one LCD portable video magnifier, and the Merlin and Acrobat family of products. Respondent sells these products to the public through dealers and retail outlets.

4. Respondent has disseminated or has caused to be disseminated advertisements, including in national print publications, on shipping boxes, and on data sheets provided to dealers and consumers, for certain of its products, including but not necessarily limited to the attached Exhibits A through E. The advertisements contain the following statements or depictions:

**A. Enhanced Vision ad featuring the 3-in-1 Acrobat Magnifier, Exhibit A**

“made in the USA”

*Newsweek*, May 12, 2008 and June 16, 2008

**B. Enhanced Vision ad featuring the Desktop Merlin Magnifier, Exhibit B**

“made in the USA”

*AAA Journey - Maine, New Hampshire, Vermont*,  
September 2008

**C. Enhanced Vision Ad, featuring the Desktop Merlin Magnifier, the handheld Amigo magnifier, and the 3-in-one Acrobat Magnifier, Exhibit C**

“made in the USA”

*VFW Magazine*, August 2008

**D. Acrobat LCD Data Sheet, Exhibit D**

In text: “Acrobat, like all Enhanced Vision products is made in the U.S.A.”

## Complaint

Under Enhanced Vision Logo and contact information:  
“*MADE IN THE U.S.A.*”

**E. Merlin Plus Data Sheet, Exhibit E**

1. Under Enhanced Vision Logo and contact information in red ink: “Made in the USA”

5. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that certain of its vision enhancement products, including the Merlin and Acrobat family of products, are made in the United States.

6. In truth and in fact, a significant portion of the components of such products is, or has been, of foreign origin. Therefore, the representation set forth in Paragraph 5 was, and is, false or misleading.

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

**THEREFORE**, the Federal Trade Commission this third day of September, 2009, has issued this complaint against respondent.

By the Commission.

Complaint

**Exhibit A**

**Your vision is your independence.**  
**With Enhanced Vision,**  
**you can get both back!**

Now you can read, watch TV, and function outside your home independently with affordable, high quality, made in the USA, low vision solutions.

Enhanced Vision offers the widest selection of innovative low vision aids, from desktop to portable devices. One simple call will get you one step closer to getting your independence back.

**The 3-in-1 Acrobat magnifier**

**Call (888)811-3161 today for a no obligation demonstration.**  
**Or visit us at [EnhancedVision.com](http://EnhancedVision.com)**

**enhanced**  
**VISION**

More choices. More solutions.

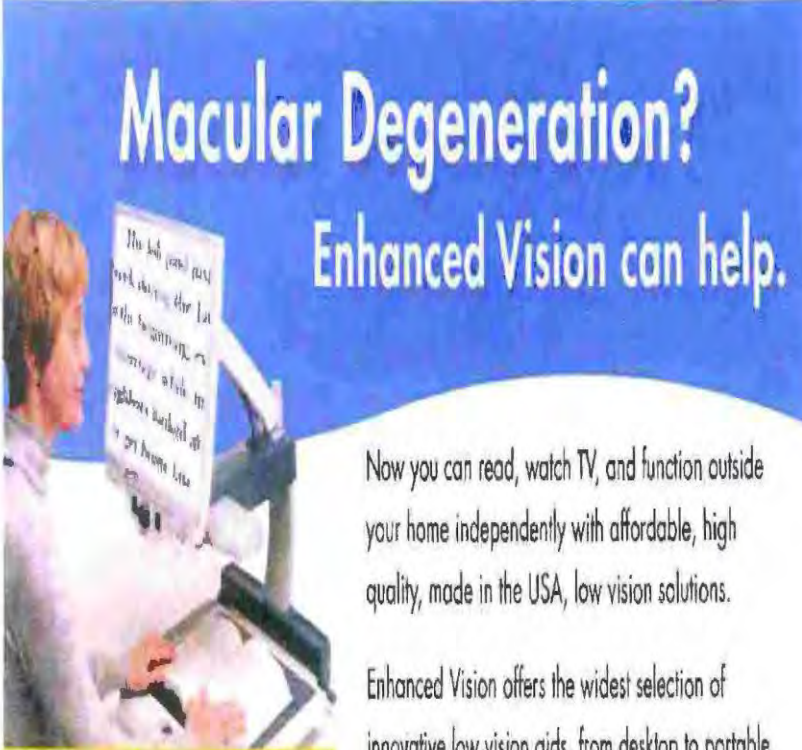
*You'll see*

**(888)811-3161**

**Newsweek 50 Plus Edition - 5/12/08 & 6/16/08 Issues - 4.653 x 4.375 inches**



Complaint

**Exhibit B**


**Macular Degeneration?**  
Enhanced Vision can help.

The desktop **Merlin** magnifier

Now you can read, watch TV, and function outside your home independently with affordable, high quality, made in the USA, low vision solutions.

Enhanced Vision offers the widest selection of innovative low vision aids, from desktop to portable devices. One simple call will get you one step closer to getting your independence back.

**enhanced**  
**vision**

More choices. More solutions. You'll see.

EnhancedVision.com

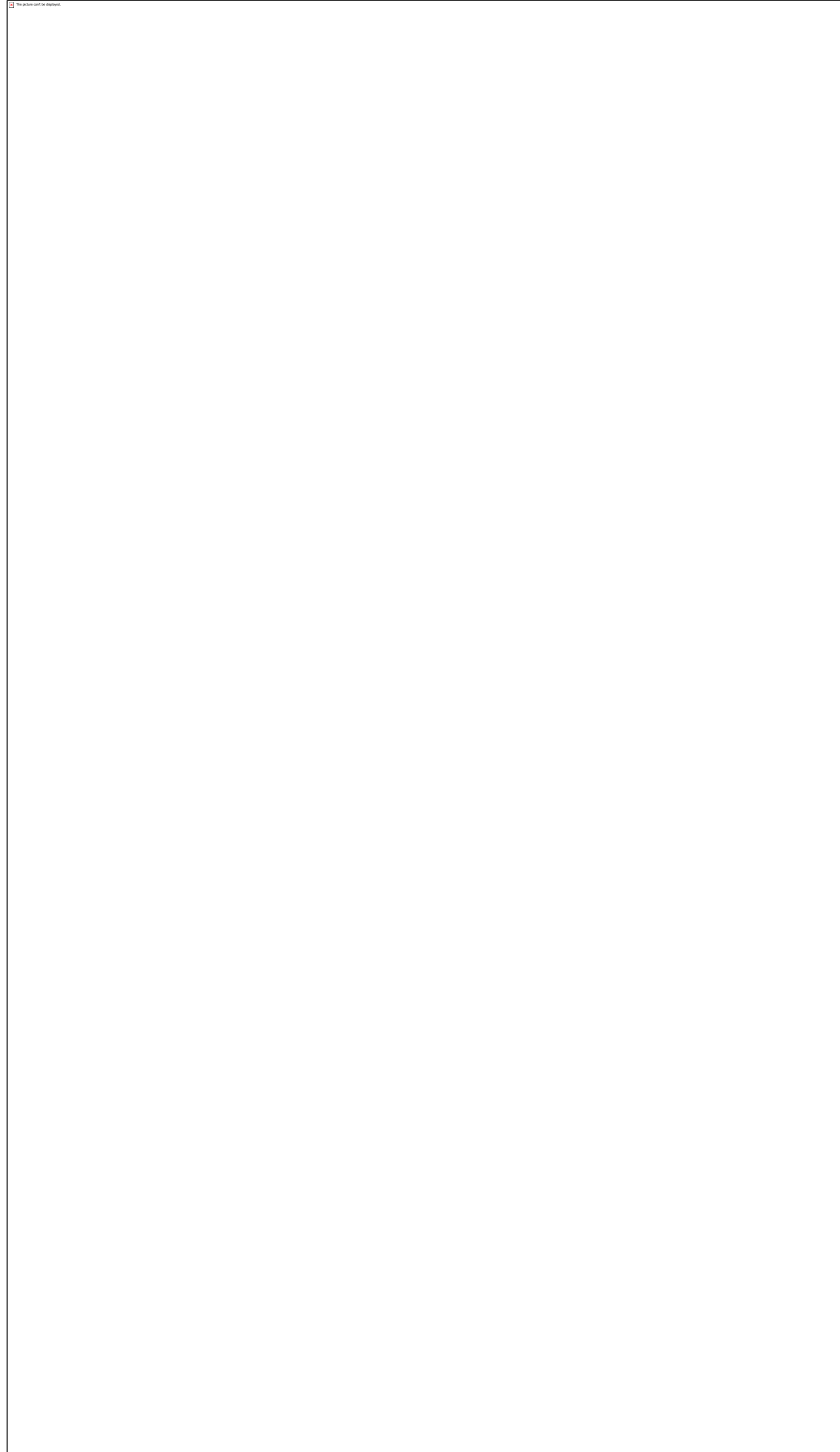
Call (888) 811-3161 today  
for a no obligation demonstration.

**AAA members receive \$50 off!**

AAA Journey - Maine, New Hampshire, Vermont - September 2008 Issue - 6.875 x 4.625 inches

Complaint

**Exhibit C**




Complaint

**Exhibit D**



Complaint

© 2000 Microsoft Corporation. All rights reserved. Microsoft, the Microsoft Dynamics logo, and "Your business. Our passion." are either registered trademarks or trademarks of Microsoft Corporation in the United States and/or other countries.



Complaint



Complaint

© 2000-2001 Enhanced Vision Systems, Inc.



Complaint

**Exhibit E**



Complaint

© 2000 Enhanced Vision Systems, Inc.





Decision and Order

**DECISION AND ORDER**

The Federal Trade Commission (“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.*; and

The Respondent and counsel for the Commission having thereafter executed an agreement containing a 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 the Respondent that the law has been violated as alleged in the 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 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 for the receipt and consideration of public comments, now in 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 Enhanced Vision Systems, Inc. is a California corporation with its principal office or place of business at 5882 Machine Drive, Huntington Beach, California 92649. Respondent assembles its vision-related products from domestic and foreign components at that location.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the

## Decision and Order

Respondent, and the proceeding is in the public interest.

**ORDER****DEFINITIONS**

For purposes of this order, the following definitions shall apply:

- A. Unless otherwise specified, “Respondent” shall mean Enhanced Vision Systems, Inc., and its successors and assigns and its officers, agents, representatives, and employees.
- B. “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, partnership, subsidiary, division, or other device, in connection with the manufacturing, marking, labeling, packaging, advertising, promotion, offering for sale, sale, or distribution of any vision-related product or package, in or affecting commerce, shall not represent, in any manner, expressly or by implication, the extent to which any such product or package is made in the United States, unless the representation is true and not misleading.

**II.**

**IT IS FURTHER ORDERED** that Respondent Enhanced Vision Systems, Inc., and its successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Commission for inspection and copying:

- A. All advertisements, labeling, packaging, and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation;

## Decision and Order

- C. All tests, reports, studies, surveys, demonstrations, or other evidence in its 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; and
- D. All acknowledgments of receipt of this order, obtained pursuant to Part III.

**III.**

**IT IS FURTHER ORDERED** that for a period of three (3) years after the date of issuance of this order, Respondent Enhanced Vision Systems, Inc., and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

**IV.**

**IT IS FURTHER ORDERED** that Respondent Enhanced Vision Systems, Inc., and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in respondent or any business entity that respondent directly or indirectly controls, or has an ownership interest in, that may affect compliance obligations arising under this order, including but not limited to formation of a new business entity; a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor entity; 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 business or corporate name or address. *Provided, however,* that, with respect to any proposed change about which respondent learns less than thirty (30) days prior to

## Decision and Order

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 Enhanced Vision Systems, Inc., and its successors and assigns shall, within sixty (60) days after the date of service of this order file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which respondent has complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondent shall submit additional true and accurate written reports.

**VI.**

This order will terminate on September 3, 2029, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in 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

## Analysis to Aid Public Comment

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” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from Enhanced Vision Systems, Inc., a corporation (“respondent”).

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

This matter involves respondent’s marketing and sale of vision enhancement products purportedly “Made in the U.S.A.” According to the FTC complaint, respondent represented that certain of its vision enhancement products were made in the United States, when, in fact, a significant portion of their components are of foreign origin. *See* Enforcement Policy Statement on U.S. Origin Claims (1997) (“A product that is all or virtually all made in the United States will ordinarily be one in which all significant parts and processing that go into the product are of U.S. origin.”). Thus, the complaint alleges that respondent’s claim is false or misleading in violation of Section 5(a) of the FTC Act.

The proposed consent order contains a provision designed to prevent respondent from engaging in similar acts and practices in the future. Part I of the proposed order prohibits respondent from

*Analysis to Aid Public Comment*

representing the extent to which its vision-related products are made in the United States unless the representation is true and not misleading. Parts II through V require respondent to keep copies of advertisements and materials relied upon in disseminating any representation covered by the order; to provide copies of the order to certain of its personnel, agents, and representatives having responsibilities with respect to the subject matter of the order; to notify the Commission of changes in corporate structure that might affect compliance obligations under the order; and to file compliance reports with the Commission and respond to other requests from FTC staff. Part VI provides that the order will terminate after twenty (20) years under certain circumstances.

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

**CONSTELLATION BRANDS, INC.**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4266; File No. 092 3035*  
*Complaint, October 2, 2009 - Decision, October 2, 2009*

This consent order addresses respondent Constellation Brands, Inc., an International producer and marketer of wine, beer, and spirits. The complaint alleged unsubstantiated claims made in advertising for the beverage alcohol product “Wide Eye” schnapps. According to the complaint, the company represented, expressly or by implication, that consumers who drink “Wide Eye” will remain alert when consuming alcohol, but could not substantiate the representation at the time it was made. Therefore, the representation was, and is, in violation of Section 5 of the FTC Act by being false and misleading. The consent order prohibits the company from advertising that consumers who drink its product will remain alert when consuming alcohol unless that representation is true, non-misleading, and, at the time it is made, the company possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

*Participants*For the *Commission: Janet M. Evans.*For the *Respondents: Marc E. Sorini, McDermott, Will & Emery, LLP.***COMPLAINT**

The Federal Trade Commission, having reason to believe that Constellation Brands, Inc. 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 Constellation Brands, Inc. (“respondent”) is a Delaware corporation with its principal office or place of business at 207 High Point Drive, Building 200, Victor, NY 14561.

## Complaint

2. Respondent has advertised, offered for sale, sold, and distributed beverage alcohol products to the public, including Wide Eye, a caffeinated schnapps introduced by the company in 2007. Wide Eye is a “food” within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

4. To induce customers to purchase Wide Eye, respondent has disseminated, or caused to be disseminated, advertisements, including but not necessarily limited to the attached Exhibits A through D. These advertisements contain the following statements and depictions:

- A. Video appearing on [www.wideeye.com](http://www.wideeye.com) and [vids.myspace.com](http://vids.myspace.com) (Exhibit A, transcript, and Exhibit B, DVD containing ad).

[Music, with alarm sounds, plays in the background.]

CLOSE UP IMAGE OF AN UNIDENTIFIED WOMAN: Come on, take your shot.

**ON SCREEN: I am your wake up call. Wide Eye**

WOMAN: Take it cold.

**ON SCREEN: Finely Distilled Schnapps Combined with Caffeine**

WOMAN: Take it crisp.

**ON SCREEN: Caffeinated Schnapps is here.**  
[images of product logo, people partying and dancing, and a boxer, flash on the screen]

WOMAN: Take it now.

**ON SCREEN: Wide Eye**



## Complaint

WOMAN: I demand to be served as coldly as your soul.

**ON SCREEN: I demand to be served as coldly as your soul. Get Yours @ WideEye.com**

WOMAN: Take your shot.

**ON SCREEN: Wake Up@WideEye.com**

WOMAN: Cold as your soul.

**ON SCREEN: Cherry Bomb** [product image]

WOMAN: Cold as your soul.

**ON SCREEN: Mango Chili** [product image]

WOMAN: Cold as your soul.

**ON SCREEN: Pomegranate Spice** [product image]  
[images of product logo, people partying and dancing, and a boxer, flash on the screen]

WOMAN: Cold as your soul.

**ON SCREEN: Wide Eye. Wake Up@WideEye.com**

B. Text on [www.wideeye.com](http://www.wideeye.com) (Exhibit C).

3 Rounds of Flavor. Introducing caffeinated schnapps. Wakes up sweet, then goes off like an alarm.

When you party with the world's first caffeinated schnapps it'll seem like the rest of the world is sleepwalking through life.

C. Print ad (Spin magazine) (Exhibit D).

## Complaint

[depiction of a woman boxer holding a bottle of Wide Eye]

This is your wake up call. Caffeinated schnapps is here. Get yours at wideeye.com.

5. Through the means described in Paragraph 4, including the statements and depictions contained in the advertisements attached as Exhibits A through D, among others, respondent has represented, expressly or by implication, that consumers who drink Wide Eye will remain alert when consuming alcohol.

6. Through the means described in Paragraph 4, including the statements and depictions contained in the advertisements attached as Exhibits A through D, among others, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representation set forth in Paragraph 5 at the time the representation was made.

7. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representation set forth in Paragraph 5 at the time the representation was made. Therefore, the representation set forth in Paragraph 6 was, and is, false and misleading.

8. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce, in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

**THEREFORE**, the Federal Trade Commission this second day of October, 2009, has issued this complaint against respondent.

By the Commission.

Complaint

**Exhibit A**



Complaint

**Exhibit B**



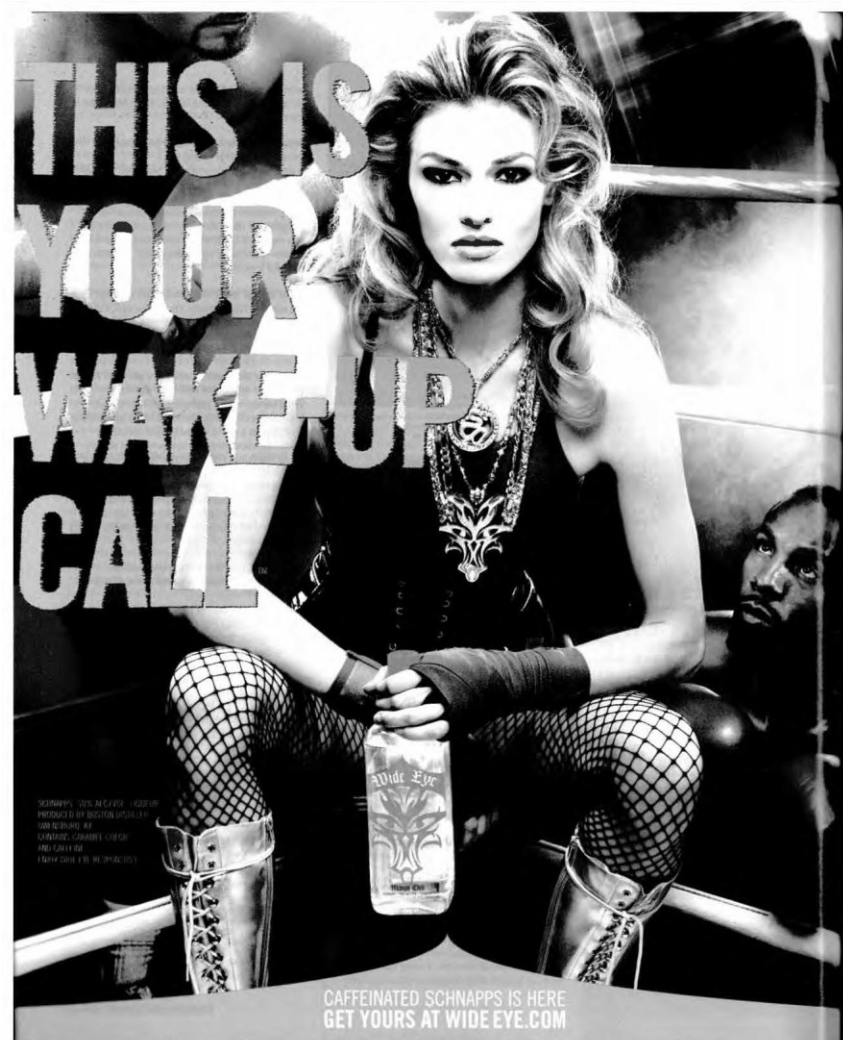
Complaint

Exhibit C



Complaint

**Exhibit D**



## Decision and Order

**DECISION AND ORDER**

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq.*; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by the respondent that the law has been violated as alleged in such complaint, or that any of the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that the respondent has violated the Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, and having duly considered the comments filed thereafter by interested persons pursuant to § 2.34 of its Rules, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Constellation Brands, Inc. is a Delaware corporation with its principal office or place of business at 207 High Point Drive, Building 200, Victor, NY 14561.
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 the purposes of this order, the following definitions shall apply:

- A. Unless otherwise specified, “respondent” shall mean Constellation Brands, Inc., its successors and assigns and their officers, and each of the above’s agents, representatives, and employees.
- B. “Wide Eye” shall mean respondent’s distilled spirit beverage alcohol product, a caffeinated schnapps containing 30% alcohol by volume.
- C. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
- D. “Competent and reliable scientific evidence” shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

**I.**

**IT IS ORDERED** that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of Wide Eye or any other beverage alcohol product containing caffeine, ginseng, taurine, guarana, or any stimulant, in or affecting commerce, shall not represent, in any manner, expressly or by implication, including through the use of a product name or endorsement, that consumers who drink such product will remain alert when consuming alcohol, unless the representation is true, non-misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.



## Decision and Order

**II.**

**IT IS FURTHER ORDERED** that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any beverage alcohol product, in or affecting commerce, shall not represent, in any manner, expressly or by implication, including through the use of a product name or endorsement, that such product or any ingredient therein will counteract the effects of alcohol consumption, unless the representation is true, non-misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

**III.**

**IT IS FURTHER ORDERED** that respondent Constellation Brands, Inc. and its successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon reasonable notice make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in its 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.

**IV.**

**IT IS FURTHER ORDERED** that respondent Constellations Brands, Inc. and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors,

## Decision and Order

and other employees with managerial authority having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

**V.**

**IT IS FURTHER ORDERED** that respondent Constellation Brands, Inc. and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

**VI.**

**IT IS FURTHER ORDERED** that respondent Constellation Brands, Inc. and its successors and assigns shall, within sixty (60) days after service of this order, and, upon reasonable notice, at such 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.

## Analysis to Aid Public Comment

**VII.**

This order will terminate on October 2, 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 this order, whichever comes later; *provided, however*, that the filing of such complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

*Provided, further*, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, Commissioner Harbour recused.

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

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, an agreement containing a consent order from Constellation Brands, Inc. ("the company"). The proposed consent order has been placed on the public record

## Analysis to Aid Public Comment

for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

This matter involves alleged unsubstantiated claims made in advertising for the beverage alcohol product Wide Eye schnapps, introduced by the company in 2007. Wide Eye contains 30% alcohol by volume plus caffeine. The company promoted Wide Eye through Internet advertising, including web video and print ads. Among other things, the company made the following claims about Wide Eye: "Wake up @ WideEye.com," "I am your wake up call," "Wakes up sweet, then goes off like an alarm," and "When you party with the world's first caffeinated schnapps it'll seem like the rest of the world is sleepwalking through life."

According to the FTC complaint, the company represented, expressly or by implication, that consumers who drink Wide Eye will remain alert when consuming alcohol. The complaint alleges that the company did not possess and rely upon a reasonable basis that substantiated the representation at the time it was made. Therefore, the representation was, and is, false and misleading.

The proposed consent order contains provisions designed to prevent the company from engaging in similar acts and practices in the future. Part I of the proposed consent order prohibits the company, in connection with the advertising, sale, or distribution of Wide Eye or any other beverage alcohol product containing caffeine, ginseng, taurine, guarana, or any stimulant, from representing, expressly or by implication, including through the use of a product name or endorsement, that consumers who drink such a product will remain alert when consuming alcohol unless that representation is true, non-misleading, and, at the time it is made, the company possesses and relies upon competent and reliable scientific evidence that substantiates the representation. Part II of the consent order further prevents the company from representing, expressly or by implication, including through the use of a product name or endorsement, that any beverage alcohol product or any ingredient therein will counteract the effects of alcohol consumption, unless that representation is true, non-

## Analysis to Aid Public Comment

misleading, and, at the time it is made, the company possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

Parts III through VI of the consent order require the company to keep copies of relevant advertisements and promotional materials, to provide copies of the order to certain of its personnel, to notify the Commission of changes in corporate structure, and to file compliance reports with the Commission. Part VII provides that the order will terminate after twenty (20) years with certain exceptions.

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

## Complaint

## IN THE MATTER OF

**REALCOMP II, LTD.**

COMPLAINT IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT; INITIAL DECISION; AND OPINION OF THE COMMISSION AND ORDER REVERSING AND VACATING THE INITIAL DECISION.

*Docket No. 9320; File No. 061 0088*

*Complaint, October 10, 2006 - Initial Decision, December 10, 2007*

*Opinion and Order, October 30, 2009*

The Commission issued an administrative complaint, alleging that Realcomp II Ltd. restrained competition in the provision of residential real estate brokerage services by combining or conspiring to hinder the ability of real estate brokers in Southeastern Michigan to offer residential real estate brokerage services on terms other than those contained in the traditional form of listing agreement known as an Exclusive Right to Sell Listing. In his Initial Decision, Chief Administrative Law Judge Stephen J. McGuire dismissed the Complaint after determining that Complaint Counsel had not met its burden of demonstrating that the Realcomp policies unreasonably restrained or substantially lessened competition in the relevant market. Complaint Counsel appealed the Initial Decision. On appeal, the Commission unanimously reversed and vacated the Initial Decision. The Commission ordered Realcomp to cease and desist from adopting or enforcing any policy, rule, practice or agreement to deny, restrict or interfere with the ability of Realcomp Members to enter into Exclusive Agency Listings or Other Lawful Listing agreements with the sellers of properties.

*Participants*

For the *Commission*: Sean P Gates.

For the *Respondents*: Scott L. Mandel, Foster, Swift, Collins & Smith, P.C.

**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 Realcomp II Ltd. (hereinafter sometimes referred to as “Respondent” or “Realcomp”), 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

## Complaint

the public interest, hereby issues this complaint stating its charges as follows:

**NATURE OF THE CASE**

This matter concerns a corporation, owned by a group of shareholder Boards of Realtors in Southeastern Michigan, that operates a Multiple Listing Service, which is designed to foster real estate brokerage services by sharing and publicizing information on properties for sale by customers of real estate brokers. Realcomp has adopted policies that limit the 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. The policies limit the publication of information about such properties on popular internet real estate web sites, and make it more difficult for brokers to search for such listings on the Realcomp MLS. These policies discriminate against certain kinds of lawful contracts between listing real estate brokers and their customers, and lack any pro-competitive justification. These rules constitute an anticompetitive concerted refusal to deal except on specified terms with respect to key inputs for the provision of residential real estate brokerage services, and violate the antitrust laws.

**RESPONDENT AND ITS MEMBERS**

1. Respondent Realcomp II Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business at 28555 Orchard Lake Road, Suite 200, Farmington Hills, Michigan 48334. Respondent is owned by several realtor boards and associations. The members of Respondent are real estate brokers doing business in Southeastern Michigan.

2. Respondent is organized for the purpose of serving its members' interests, including their economic interests, by promoting, fostering, and advancing the real estate brokerage services industry in Southeastern Michigan. One of the primary functions of Respondent is the operation of the Realcomp Multiple Listing Service. A multiple listing service ("MLS") is a clearinghouse through which member real estate brokerage firms regularly and systematically exchange information on listings of

### Complaint

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

3. The Realcomp shareholder Boards are affiliated with the National Association of Realtors (“NAR”), thereby requiring Realcomp to abide by the NAR rules. Realcomp has more than 14,500 real estate professionals as members. All of the Realcomp members hold either an active real estate license or an active appraiser license and are active in the real estate profession.

4. The large majority of residential real estate brokerage professionals in Southeastern Michigan are members of Realcomp. These professionals compete with one another to provide residential real estate brokerage services to consumers.

5. Realcomp services the territory within Southeastern Michigan, including Livingston County, Oakland County, Macomb County, St. Clair County and Wayne County. (“Realcomp 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 Southeastern Michigan; and
- b. Affect the transmission of real estate listing information to public real estate web sites that are intended for a national audience, including Realtor.com.



## Complaint

**THE CHALLENGED CONDUCT**

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

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 Services to consumers. Unbundled Real Estate Brokerage Services are lawful arrangements pursuant to which a listing broker will cause the property offered for sale to be listed on the MLS, but the listing broker will not provide some or all of the additional services offered by traditional real estate brokers, or will only offer such additional services as may be chosen from a menu of services for a fee.

11. Brokers offering Unbundled Real Estate Brokerage Services often provide home sellers with exposure of their listing

## Complaint

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

13. In 2001, Realcomp adopted and approved a rule that stated: "Listing information downloaded and/or otherwise displayed pursuant to IDX shall be limited to properties listed on an exclusive right to sell basis" (the "Web Site Policy").

14. The Web Site Policy prevents information concerning certain lawful residential property listings provided to Realcomp, including "Exclusive Agency Listings," from being transmitted to real estate web sites, based on the contractual relationship between the home seller and the real estate agent the seller employs to promote the property.

15. The Web Site Policy specifically prevents information concerning Exclusive Agency Listings from being published on web sites otherwise approved by Realcomp to receive information concerning Realcomp MLS listings (collectively, "Approved Web Sites"). Such web sites include (1) the NAR-operated "Realtor.com" web site; (2) the Realcomp-owned "Moveinmichigan.com" web site; and (3) Realcomp-member web sites.

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16. In or about the fall of 2003, Respondent changed the Realcomp MLS search screen to default to Exclusive Right to Sell Listings (“Search Function Policy”). In order to view any other listing types, including Exclusive Agency Listings, Realcomp members have to select the additional listing types in the search screen.

**REALCOMP HAS MARKET POWER**

17. The provision of residential real estate brokerage services to sellers and buyers of real property in the Southeastern Michigan and/or the Realcomp Service Area is a relevant market.

18. The publication and sharing of information relating to residential real estate listings for the purpose of brokering residential real estate transactions is a key input to the provision of real estate brokerage services, and represents a relevant input market. Publication of listings through the Realcomp 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 Realcomp Service Area.

19. Participation in Realcomp 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 Realcomp Service Area. Participation significantly increases the opportunities of brokerage firms to enter into listing agreements with residential property owners, 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 Realcomp Service Area.

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

### Complaint

21. The most efficient, and at least in some cases the only, means for Realcomp members to have their listed properties visible to the public on the Approved Web Sites is by having Realcomp transmit those listings.

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

### **THE REALCOMP POLICIES HAVE NO EFFICIENCY BENEFIT**

23. 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**

24. In adopting the policies and engaging in the acts and practices described herein, Realcomp has combined or conspired with its members or others, or acted as a combination or conspiracy of its members or others, to restrain trade in the provision of residential real estate brokerage services within Southeastern Michigan and/or the Realcomp Service Area.

25. The acts and practices of Realcomp described herein constitute an agreement that only listings based exclusively on traditional contract terms as dictated by Realcomp will be forwarded by the Realcomp MLS to be shown to the general public on 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.

26. The acts and practices of Realcomp described herein constitute a concerted refusal to deal by competitors, except on specified terms, with respect to services that are necessary for the provision of effective residential real estate brokerage services. As such, the acts and practices are inherently suspect restraints of

## Complaint

trade that have no cognizable and plausible efficiency justifications.

27. The purposes, capacities, tendencies, or effects of the policies, acts, or practices of Realcomp and its members as described herein have been and are unreasonably to restrain competition among brokers, and to injure consumers, in the market for provision of residential real estate brokerage services within Southeastern Michigan and/or the Realcomp Service Area.

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

**NOTICE**

Notice is hereby given to the Respondent that the eighth day of January, 2007, at 10:00a.m., or such later date as determined by an Administrative Law Judge of the Federal Trade Commission, is hereby fixed as the time and Federal Trade Commission offices, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580, as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the FTC Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded to you to file with the Commission an answer to this complaint on or before the twentieth (20<sup>th</sup>) 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 facts to be true. Such an answer shall constitute

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a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings and the right to appeal the initial decision to the Commission under Rule 3.52.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions, and order.

The ALJ will schedule an initial prehearing scheduling conference to be held not later than 14 days after the last answer is filed by any party named as a Respondent in the complaint. Unless otherwise directed by the ALJ, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within 5 days of receiving a Respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

**NOTICE OF CONTEMPLATED RELIEF**

The following is the form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint. If, however, the Commission should conclude from record facts developed in any adjudicative proceedings in this matter that the proposed order provisions might be inadequate to fully remedy the violation of the FTC Act, the Commission may order such other or further relief as it finds necessary or appropriate.

## Complaint

**DEFINITIONS**

For the purposes of this Order, the following definitions shall apply:

- A. “Respondent” or “Realcomp” means Realcomp II Ltd., a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business at 28555 Orchard Lake Road, Suite 200, Farmington Hills, Michigan 48334. The term also means the Realcomp Owners, Board of Directors, its predecessors, divisions and wholly or partially owned subsidiaries, affiliates, licensees of affiliates, partnerships, and joint ventures; and all the directors, officers, shareholders, participants, employees, consultants, agents, and representatives of the foregoing. The terms “subsidiary,” “affiliate” and “joint venture” refer to any person in which there is partial or total ownership or control by Realcomp, and is specifically meant to include Realcomp MLS and/or each of the Realcomp Websites.
- B. “Owners” means the current and future Boards and Associations of Realtors that are the sole shareholders of Realcomp, which included the Dearborn Board of REALTORS, Detroit Association of REALTORS, Livingston Association of REALTORS, Metropolitan Consolidated Association of REALTORS, North Oakland County Board of REALTORS, Eastern Thumb Association of REALTORS and Western-Wayne Oakland County Association of REALTORS at the time of entry of this 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 and offering compensation in and facilitating real estate transactions.

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- D. “Realcomp MLS” means the Realcomp MLS or any other MLS owned, operated or controlled, in whole or in part, directly or indirectly, by Realcomp, any of its Owners, predecessors, divisions and wholly or partially owned subsidiaries, affiliates, and all the directors, officers, employees, agents, and representatives of the foregoing.
- E. “Realcomp Member” means any person authorized by Realcomp to use or enjoy the benefits of the Realcomp MLS, including but not limited to Members and Subscribers as those terms are defined in the Realcomp Rules and Regulations.
- F. “IDX” means the internet data exchange process that provides a means or mechanism for MLS listings to be integrated within a Website.
- G. “IDX Website” means a Website that is capable of integrating the IDX listing information within the Website.
- H. “Moveinmichigan.com” means the Website owned and operated by Realcomp that allows the general public to search information concerning real estate listings from Realcomp.
- I. “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 Realcomp.
- J. “Approved Website” means a Website to which Realcomp or Realcomp MLS provides information concerning listings for publication including, but not limited to, Realcomp Member IDX Websites, Moveinmichigan.com, and Realtor.com.



## Complaint

- K. “Exclusive Right to Sell Listing” means a listing agreement under which the property owner or principal appoints a real estate broker as his or her exclusive agent for a designated period of time, to sell the property on the owner’s stated terms, and agrees to pay the broker a commission when the property is sold, whether by the broker, the owner or another broker, or any other definition that Realcomp ascribes to the term “Exclusive Right to Sell Listing.”
- L. “Exclusive Agency Listing” means a listing agreement that authorizes the listing broker, as an exclusive agent, to offer cooperation and compensation on a blanket unilateral basis, but also reserves to the seller a general right to sell the property on an unlimited or restrictive basis, or any other definition that Realcomp ascribes to the term “Exclusive Agency Listing.”
- M. “Services of the MLS” means the benefits and services provided by the MLS to assist Realcomp Members in selling, leasing and valuing property and/or brokering real estate transactions. With respect to real estate brokers or agents representing home sellers, Services of the MLS shall include, but are not limited to:
1. having the property included among the listings in the MLS in a manner so that information concerning the listing is easily accessible by cooperating brokers; and
  2. having the property publicized through means available to the MLS, including, but not limited to, information concerning the listing being made available on Moveinmichigan.com, Realtor.com and IDX Websites.

**II.**

**IT IS ORDERED** that Respondent Realcomp, its successors and assigns, and its Board of Directors, officers, committees, agents, representatives, and employees, directly or indirectly, or through any corporation, subsidiary, division, or other device, in

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connection with the operation of a Multiple Listing Service or Approved Websites in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, shall forthwith cease and desist from adopting or enforcing any policy, rule, practice or agreement of Realcomp to deny, restrict or interfere with the ability of Realcomp Members 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 Realcomp Members from offering or accepting Exclusive Agency Listings;
- B. prevent Realcomp Members from cooperating with listing brokers or agents that offer or accept Exclusive Agency Listings;
- C. prevent Realcomp Members, or the sellers of properties who have entered into lawful listing agreements with Realcomp Members, from publishing information concerning listings offered pursuant to Exclusive Agency Listings on the Realcomp MLS and 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 searching, sorting, ordering, transmission, downloading, or displaying of information pertaining to such listings.

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

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**III.**

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

**IV.**

**IT IS FURTHER ORDERED** that, within ninety (90) days after the date this Order becomes final, Respondent shall (1) inform each Realcomp Member of the amendments to its rules and regulations to conform to the provisions of this Order; and (2) provide each Realcomp Member 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 Realcomp'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 Realcomp Member whose email address is known to Realcomp; (B) mail to any Realcomp Member whose email address is unknown 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; and (C) placing on the publicly accessible Realcomp Website ([www.Realcomp.com](http://www.Realcomp.com)) a statement that there has been a change to the rule and an Order, along with a link to the amended rule and the Order. Respondent shall modify its Website as described above no later than five (5) business days after the date the Order becomes final, and shall display such modifications for no less than ninety (90) days from the date this Order becomes final. The Order shall remain accessible through common search terms and archives on the Website for five (5) years from the date it becomes final.

**V.**

**IT IS FURTHER ORDERED** that Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in Respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation or any other

## Initial Decision

proposed changes in the corporation which may affect compliance obligations arising out of the Order.

**VI.**

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

**VII.**

**IT IS FURTHER ORDERED** that this Order shall terminate ten (10) years from the date the Order is issued.

**WHEREFORE, THE PREMISES CONSIDERED**, the Federal Trade Commission on this tenth day of October, 2006, issues its Complaint against Respondent Realcomp II Ltd.

By the Commission.

**INITIAL DECISION****I. INTRODUCTION****A. Summary of the Initial Decision and Pleadings**

The Federal Trade Commission (“FTC”) issued the Complaint in this matter on October 10, 2006, against Realcomp II, LTD. (“Respondent”), a compendium of several local realtor boards and associations located in Southeastern Michigan. Respondent’s central function is to operate the Realcomp Multiple Listing Service (“Realcomp MLS”), the largest MLS in Michigan, for the benefit of its member brokers. The Complaint alleges that

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Respondent, in violation of Section 5 of the FTC Act, restrained competition in the provision of residential real estate brokerage services by combining or conspiring with its members to hinder, unreasonably, the ability of certain discount real estate brokers to offer residential real estate brokerage services on terms other than those contained in an Exclusive Right to Sell listing. Complaint ¶ 7.

An Exclusive Right to Sell (“ERTS”) listing is the traditional form of a real estate listing and is typically offered through full service brokers who charge commissions. Complaint ¶ 8; Answer ¶ 8. “Full service” listings are generally considered to be those in which the broker agrees to arrange appointments for cooperating brokers to show the property, accept and present offers procured by a cooperating broker, assist the home seller in developing, communicating, and presenting counter offers, and participate on behalf of the seller in negotiations leading to the sale. Traditional ERTS brokers typically charge a percentage of the sale price as a commission (usually 6%), which includes any compensation paid to a cooperating broker (usually 3%), at settlement. In instances where there is no cooperating broker, traditional ERTS brokers typically retain the entire commission. Until recently, Realcomp defined ERTS listings synonymously with full service agreements, such that a listing agreement was required to be full service in order to be categorized as ERTS on the Realcomp MLS.

An alternative form of listing agreement is an Exclusive Agency (“EA”) listing. Complaint ¶ 9; Answer ¶ 9. EA brokers typically provide far fewer services to home sellers than full service ERTS brokers. EA listings are frequently offered on a flat fee basis. The narrowest category of limited service agreement is an “MLS-Entry Only” agreement, in which the broker agrees only to place the property listing on the MLS and otherwise provides no assistance to the home seller. For simplicity of reference in this Initial Decision, the term “EA listing” refers to all types of non-ERTS listings.

The Complaint charges Respondent with unreasonable restraint of trade through two policies which are alleged to limit the publication and marketing of certain properties based on the terms of the listing contract: the “Website Policy” and the “Search

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Function Policy.” Complaint ¶¶ 13-16. Pursuant to the Website Policy, Realcomp transmits only full service, ERTS listings to a network of public real estate websites (“Approved Websites”) and the Internet Data Exchange (“IDX”) of local brokers’ and agents’ websites, which offer additional, direct exposure to prospective home buyers. While limited service, EA listings are entered into the MLS and made available to all members, including discount EA brokers, they are not transmitted by Realcomp to the Approved Websites or the IDX.

Pursuant to the Search Function Policy, the Realcomp MLS search engine automatically defaults to capture only ERTS listings. In order to view other various types of listings, Realcomp members need to take the additional step of clicking their computer mouse on the “additional listings” categories provided in the search screen. In addition to these policies, Realcomp required member brokers using ERTS listings to provide full services to its clients through the imposition of a “Minimum Services Requirement.”

The Complaint alleges that Respondent’s policies, acts and practices discriminate against discount EA listings by limiting the accessibility, transmission and publication of information about such properties on popular Internet real estate websites and by making it more difficult for brokers to search EA listings on the Realcomp MLS. Complaint at 1. The Complaint further charges that Respondent has market power in the Realcomp Service Area of Southeastern Michigan. Complaint ¶¶ 17-22. Finally, the Complaint alleges that there are no efficiency justifications for the challenged conduct. Complaint ¶ 23.

Through its Answer, filed on November 20, 2006, Respondent denies the material allegations of the Complaint and asserts that the Complaint fails to state a claim upon which relief can be granted and is not in the public interest. Answer at 9-10. The Answer also asserts that Respondent lacks market power. Answer at 10. The Answer further avers that the challenged conduct has significant procompetitive justifications that outweigh any alleged anticompetitive effects. Answer at 10.

Upon review of the evidence, nothing short of a plenary market examination allows the Court to confidently draw

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conclusions regarding the principal tendencies and competitive effects of the alleged restraints. Thus, the challenged restraints can be properly scrutinized only under the traditional rule of reason analysis. Applying this standard, the Court examines such factors as the nature of the restraints, market power, evidence of actual effects, and the procompetitive justifications offered by Respondent.

Upon such analysis, with respect to the Website Policy (including the Minimum Services Requirement) the record shows that Complaint Counsel has made a *prima facie* showing as to the anticompetitive nature of the alleged restraints. It has not, however, upon full review of the accepted empirical evidence and Respondent's procompetitive justifications, demonstrated that this policy actually culminated in anticompetitive effects or actionable consumer harm.

As to the Search Function Policy (including the Minimum Services Requirement), Complaint Counsel has not made the initial showing that the nature of the alleged restraint was anticompetitive or unduly hindered consumer choice. As such, the Court need not inquire further as to whether any adverse competitive effects may have resulted from such policy.

The record in this case illustrates that much of the economic evidence presented is unreliable due to deficiencies in methodology and/or flaws in analytic interpretation. Such evidence therefore is of little probative value to the Court. The remaining empirical and factual evidence demonstrates that, despite Realcomp's market power and the implementation of the Website Policy, discount EA brokerage services continue to be widely available in the established, relevant market. As such, there is insufficient evidence that consumer welfare has in fact, been unduly diminished, or otherwise significantly harmed as a result of the challenged policy. Such evidence does *not* reliably demonstrate that the Realcomp Website Policy: (1) has eliminated or limited consumer choice of a desired product; (2) has excluded discount EA listings from substantial exposure on the Realcomp MLS or other public websites; (3) has unreasonably impeded the ability of discount brokers to compete in Southeastern Michigan; or (4) has forced discount brokers to exit the market or deterred market entry. As such, Complaint Counsel has not demonstrated

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that Realcomp unreasonably restrained competition, thereby resulting in significantly increased economic costs for consumers. Absent such empirical and factual proof, the Court cannot conclude that the Realcomp Website Policy substantially lessened competition in violation of Section 5.

What the evidence does show is that despite the Website Policy, discount brokers offering EA listings have been able to market their products and compete successfully in the Realcomp Service Area, without having to labor under an unreasonable competitive disadvantage. Similarly, consumers have been able to freely select from among a myriad of choices of brokerage services available in the geographic market. Discount listings are sufficiently accessible on the Realcomp MLS, which continues to be the most important marketing vehicle for listing such information and offers substantial, if not near maximum exposure to prospective home buyers. Additional exposure on Realtor.com is available through the dual-listing of EA listings or by data-exchange agreements between Realcomp and other MLSs, at a nominal cost to brokers and home sellers alike. In selecting from a host of both bundled and unbundled real estate services, the evidence indicates that consumers in the Realcomp Service Area are able to choose a brokerage service product that best fits their needs. Many such choices are readily available in the Realcomp Service Area, including certain flat fee ERTS listings, which offer full exposure to the Approved Websites and the IDX. Thus, under the rule of reason analysis, Complaint Counsel has not shown sufficient competitive effects to establish an antitrust violation as a result of the Realcomp Website Policy.

Given Respondent's market power, even should the Court's analysis necessarily *presume* anticompetitive effects as a result of utilizing an abbreviated review standard, there is sufficient evidence of Respondent's plausible procompetitive justifications to establish the "reasonable necessity" of its Website Policy. Under such analysis, weighing the totality of the empirical and record evidence, including the net effects of Respondent's policy and justifications, there is insufficient evidence of actual anticompetitive effects to demonstrate a substantial lessening of competition or an unreasonable restraint of trade.



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Thus, Complaint Counsel having ultimately failed to meet its burden of establishing a violation under Section 5 of the FTC Act, the Complaint is DISMISSED.

**B. Settlement**

On July 30, 2007, the Parties filed a Joint Stipulation Regarding Respondent's Search Function Policy. The Joint Stipulation bars Realcomp from treating EA listings in a less advantageous manner than ERTS listings with respect to the Search Function Policy in the Realcomp MLS. Moreover, it eliminates Realcomp's Minimum Services Requirement for ERTS listings. It does not, however, address Realcomp's Website Policy which remains in dispute. At the request of the parties, the Court, apart from its findings on liability, incorporates the stipulated relief into the Initial Decision, which shall be binding on the parties. This Joint Stipulation is attached to this Initial Decision as Attachment # 1.

**C. Procedural Background**

The final prehearing conference in this case was held on June 14, 2007, with trial commencing on June 19, 2007. Over 800 exhibits were admitted and eight witnesses testified at trial. The testimonial portion of the trial concluded on June 28, 2007. On July 31, 2007, the parties filed concurrent post-trial briefs, proposed findings of fact, and conclusions of law. The parties filed concurrent responses to each other's briefs and proposed findings on August 16, 2007 and August 17, 2007. Closing arguments were heard on September 6, 2007.

The hearing record was closed pursuant to Commission Rule 3.44(c) by Order dated September 7, 2007. Rule 3.51(a) of the Commission's Rules of Practice states that an Initial Decision shall be filed "within ninety (90) days after closing the hearing record pursuant to § 3.44(c) . . . or within such further time as the Commission may by order allow upon written request from the Administrative Law Judge." 16 C.F.R. § 3.51(a). Ninety days from the close of the record is December 10, 2007.

Rule 3.51(a) also states that an Initial Decision shall be filed within one year "after the issuance of the administrative

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complaint, except that the Administrative Law Judge may, upon a finding of extraordinary circumstances, extend the one-year deadline for a period of up to sixty (60) days.” 16 C.F.R. § 3.51(a). The Complaint in this matter was issued on October 12, 2006. One year from the issuance of the Complaint was October 11, 2007. By Order dated October 10, 2007, extraordinary circumstances were found to extend the one-year deadline for a period of up to sixty days, until December 10, 2007.

#### D. Evidence

This Initial Decision is based on the exhibits properly admitted in evidence, the transcripts of trial testimony, the briefs, proposed findings of fact and conclusions of law, and replies thereto submitted by the parties. Citations to specific numbered findings of fact in this Initial Decision are designated by “F.”<sup>1</sup>

Under the Commission’s Rules of Practice, a party or a non-party may file a motion seeking *in camera* treatment for material, or portions thereof, offered into evidence. 16 C.F.R. § 3.45(b). The Administrative Law Judge may order that such material be placed *in camera* only after finding that its public disclosure will likely result in a clearly defined, serious injury to the entity requesting *in camera* treatment. 16 C.F.R. § 3.45(b). Pursuant to Commission Rule 3.45(b), several orders were issued granting *in camera* treatment to material that met the Commission’s strict

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<sup>1</sup> References to the record are abbreviated as follows:

- CX - Complaint Counsel’s Exhibit
- RX - Respondent’s Exhibit
- JX - Joint Exhibit
- Tr. - Transcript of Testimony before the Administrative Law Judge
- Dep. - Transcript of Deposition
- CCFF - Complaint Counsel’s Proposed Findings of Fact
- CCRFF - Complaint Counsel’s Response to Respondent’s Proposed Findings of Fact
- CCB - Complaint Counsel’s Post Hearing Brief
- CCRB - Complaint Counsel’s Post Hearing Reply Brief
- RFF - Respondent’s Proposed Findings of Fact
- RRFF - Respondent’s Response to Complaint Counsel’s Proposed Findings of Fact
- RB - Respondent’s Post Hearing Brief
- RRB - Respondent’s Post Hearing Reply Brief

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standards. In addition, when the parties sought to elicit testimony at trial that revealed information that had been granted *in camera* treatment, the hearing went into an *in camera* session.

In instances where a document or trial testimony had been given *in camera* treatment, but the portion of the material cited to in this Initial Decision does not require *in camera* treatment, such material is disclosed in the public version of this Initial Decision, pursuant to Commission Rule 3.45(a) (the AU “may disclose such *in camera* material to the extent necessary for the proper disposition of the proceeding”) and *In re General Foods Corp.*, 95 F.T.C. 352, 356 n.7 (1980) (“Recognizing that in some instances the ALJ or Commission cannot know that a certain piece of information may be critical to the public understanding of agency action until the Initial Decision or the Opinion of the Commission is issued, the Commission and the ALJs retain the power to reassess prior *in camera* rulings at the time of publication of decisions.”). *In camera* material that is used in this Initial Decision is indicated in bold font and braces (“{ }”) in the *in camera* version; it is redacted from the public version of the Initial Decision, in accordance with 16 C.F.R. § 3.45(f).

This Initial Decision is based on a consideration of the whole record relevant to the issues and addresses the material issues of fact and law. All findings of fact in this Initial Decision are supported by reliable, probative, and substantial evidence, as required by 16 C.F.R. § 3.51(c)(1); see *In re Chicago Bridge & Iron Co.*, 2005 WL 120878, Dkt. No. 9300, at 2 n.4 (Op. of FTC Comm’n January 6, 2005) (also available at <http://www.ftc.gov/os/adjpro/d9300/index.htm>). Administrative Law Judges are not required to discuss the testimony of each witness or all exhibits that are presented during the administrative adjudication. *In re Amrep Corp.*, 102 F.T.C. 1362, 1670 (1983). Further, administrative adjudicators are “not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are ‘material.’” *Minneapolis & St. Louis Ry. Co. v. United States*, 361 U.S. 173, 193-94 (1959). Proposed findings of fact not included in this Initial Decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations of the Complaint or the defenses thereto.

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**II. FINDINGS OF FACT****A. Industry Background****1. Types of Real Estate Brokers**

1. Nationwide, the provision of residential real estate brokerage services was at least a 65 billion dollar industry in 2005. (RX 154-A-006).
2. Both real estate agents and brokers are involved in buying and selling real estate. (Murray, Tr. 147).
3. A real estate broker is a licensed real estate professional who acts as a representative for either home buyers or home sellers, and who is authorized to engage in the sale of real estate and to provide services in connection with such sales. (JX 1-02). A broker can own and operate their own real estate firm, referred to as a “brokerage.” (Mincy, Tr. 312; Murray, Tr. 146).
4. A real estate agent is a licensed real estate professional who works for, or under the supervision of, a real estate broker. (JX 1-02; *see also* Murray, Tr. 146).
5. To be licensed as a real estate broker in Michigan, a person must have at least three years of experience in the real estate industry with a certain sales record, a state issued license, 90 hours of education, and must pass a broker’s exam. (Mincy, Tr. 312; CX 498-A-008).
6. A transaction coordinator is someone who processes the paperwork for a real estate transaction, but who does not have a fiduciary obligation to either the home seller or the home buyer. (RX 154-A-011; CX 42 (Nead, Dep. at 10-11); CX 205-064).
7. Michigan law requires brokers to explain the type of agency relationship they have with their client. (Mincy, Tr. 354).

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8. Real estate brokers tend to specialize in the provision of either residential or commercial brokerage services. (CX 531-009; CX 415 (Nowak, Dep. at 15-16)). The commercial brokerage industry is substantially different than the residential brokerage industry. (Murray, Tr. 176-77; RX 154-A-006; CX 415 (Nowak, Dep. at 15-16)).
9. Brokers belonging to Realcomp tend to specialize in residential real estate services. (Mincy, Tr. 312-13; CX 40 (Elya, Dep. at 8); CX 410 (Cooper, Dep. at 17); CX 41 (Mulvihill, Dep. at 6); CX42 (Nead, Dep. at 17-18)).
10. Sellers of residential properties can either hire a real estate broker to handle parts or all of the transaction, or they can sell their property themselves, which is commonly referred to as “For Sale By Owner,” or “FSBO.” (Murray, Tr. 149; CX 373-007). Home sellers often choose the FSBO method because they want to save the cost of a commission. (RX 154-A-007-008; CX 373-088).
11. Selling a home as a FSBO can be challenging. (RX 154-A-008; Murray, Tr. ISO; *see also* CX 373-089 (listing tasks FSBO sellers reported as “the most difficult” to perform in selling their home, including “understanding and preparing the paperwork” and “attracting potential buyers”)).
12. Home sellers often use a real estate broker because they “consider selling their home or buying a home one of the most stressful things they ever do.” (Murray, Tr. ISO; RX 154-A- 008; CX 536-007).
13. The vast majority of home sellers choose to hire a real estate broker to assist with some or all of the tasks associated with the typical residential real estate transaction. In 2006, between 80-88% of home sellers nationwide used a real estate broker to sell their property. (Murray, Tr. 149-50; CX 373-071 (finding

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that 84% of all home sellers nationwide, and 81% of home sellers in the Midwest, used a broker to sell their home)). “The share of home sellers who used an agent or broker has risen over time from about 80 percent in the late 1990s to 84 percent [in 2006].” (CX 373-072; CX 406 (Bishop, Dep. at 106)).

14. The Multiple Listing Services, or “MLS,” is a database of information about properties for sale (exclusive of FSBO properties) that can be viewed and searched by all other local brokers who practice in the area and participate in the MLS. (RX 154-A-009).
15. The MLS is “[a] facility for the orderly correlation and dissemination of listing information among [p]articipants so that they may better serve their clients and customers and the public . . .” (CX 220).
16. The National Association of Realtors® (“NAR”) is the national trade association for real estate professionals. Approximately 89% (800 out of 900) of MLSs in the United States belong to NAR. (CX 414 (Niersbach, Dep. at 7-8,73); CX 411 (Dawley, Dep. at 14- 15)).
17. MLSs that are owned and/or operated by local Associations of Realtors, such as Realcomp, must comply with NAR’s mandatory rules regarding the operation of their MLSs and agree to abide by NAR’s code of ethics. (CX 414 (Niersbach, Dep. at 8-9, 11, 36-39)).
18. A typical residential real estate transaction, *i.e.*, one involving the use of real estate brokers, will involve two brokers: a “listing broker,” who works with home sellers; and a “cooperating broker,” who works with home buyers. (RX 154-A-008-009).
19. Brokers typically do not specialize as either listing brokers or cooperating brokers. (Murray, Tr. 148; RX 154-A-011). In its 2005 Member Profile, NAR found that only 11% of brokers who specialized in residential real estate brokerage services worked exclusively with

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buyer clients and only 9% worked exclusively with seller clients. (CX 531-024).

**a. Listing Brokers**

20. A listing broker is the broker hired by the seller as its agent to sell the home. (JX 1-02).
21. There is a wide variety of services that a listing broker may provide to a home seller. These include: determining the initial asking price of the home; showing the property to prospective buyers; presenting and explaining purchase offers to the seller; putting the “listing” (a collection of information about the seller’s property, such as the number of bedrooms and baths) on the MLS; marketing the listing on the Internet; holding open houses; putting a for sale sign in the yard; and helping the home seller with the “closing,” *i.e.*, when the title of the home transfers from the home seller to the home buyer. (Murray, Tr. 145, 148-49; CX 373-070; CX 78-002-006; CX 534-054; RX 154-A-006).
22. The state of Michigan does not require that a listing broker provide a minimum set of services to a home seller. (CX 410 (Cooper, Dep. at 12)).
23. The services provided by a listing broker vary from listing broker to listing broker, and are determined by agreement with the home seller. (Murray, Tr. 149).

**(i) Listing Agreements**

24. The agreement between a listing broker and home seller, called a listing agreement, is a contract spelling out the nature of their relationship concerning the sale of the home. (JX 1-02).
25. The listing agreement typically includes provisions that specify the duration of the contract (also known as the listing period), the compensation to be paid to the listing broker, and the offer of compensation to any

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cooperating broker who brings the buyer who purchases the home. (JX 1-02; Murray, Tr. 156; *see also* F. 40-46 (defining offers of compensation)).

26. Under the listing agreement, the listing broker owes a fiduciary duty to his or her client, the home seller. (CX 410 (Cooper, Dep. at 13)).
27. A listing agreement is valid regardless of the level of services that a listing broker provides to the home seller. (CX 29; CX 36 (Kage, IHT at 139-40)).

**(ii) Commission Structure**

28. Under the listing agreement, listing brokers may be compensated in a variety of ways, including a flat fee paid up-front at the time the listing agreement is signed, a commission based on a percentage of the selling price of the home to be paid at closing, or some combination of the two. (Murray, Tr. 150-51).
29. Home sellers and listing brokers are free to negotiate the compensation paid by the seller for brokerage services to the listing broker. (Sweeney, Tr. 1358; CX 410 (Cooper, Dep. at 13)).
30. Even though the home seller typically is responsible for the payment of the brokerage commission, the home buyer bears part of the cost of the brokerage fee to the extent that some or all of the commission is passed on in the sale price of the home. (CX 498-A-011).

**b. Cooperating Brokers**

31. A cooperating broker is a broker who works with buyers interested in purchasing a home. (JX 1-02). Cooperating brokers assist the buyer by searching the MLS for homes that fit their criteria, going out to tour homes and neighborhoods, and, once their buyer finds the right home and reaches an agreement on the



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purchase of that home, assist the buyer in the closing of the home. (Murray, Tr. 151).

32. There are two types of cooperating brokers: selling brokers and buyer's brokers. (Murray, Tr. 152).

**(i) Selling Brokers**

33. A selling broker is a cooperating broker who works with a buyer, but whose fiduciary duty is to the home seller in the real estate transaction. A selling broker acts as a "sub-agent" of the listing broker. (JX 1-02-03; Murray, Tr. 152).

**(ii) Buyer's Brokers**

34. A buyer's broker is a cooperating broker who represents the interests of the buyer, and not the seller, either through an agency disclosure or a "buyer's agency agreement." (JX 1-03). A buyer's broker works practically, as well as legally, for the buyer. (Murray, Tr. 152; RX I54-A-010; CX 38 (Gleason, Dep. at 14-16)).
35. Buyer's agency agreements can be exclusive, which means that the buyer's broker is paid regardless of whether the broker actually helped the buyer find and purchase the home that was ultimately bought. (RX J54-A-010-011). For example, even if the buyer found a property on an Internet site, went directly to the seller, and purchased the home without the assistance of the buyer's broker, the buyer's broker would be entitled to compensation. (CX 42 (Nead, Dep. at 113-17)).
36. Buyers benefit from entering into a buyer's agency agreement because they then have their own legal representative to help them find the right home and negotiate on their behalf. (Murray, Tr. 152-53).
37. Brokers benefit from entering into a buyer's agency agreement because the agreement may call for the

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payment of their commission. (RX 154-A-010-01 I; Murray, Tr. 153; Sweeney, Tr. 1359-60; CX 40 (Elya, Dep. at 11-12)).

38. Buyer's agency agreements are common nationwide. (CX 373-051). In its annual Profiles of Home Buyers and Sellers, NAR found that between, 2003 and 2006, 63-64% of home buyers nationwide worked with an agent who represented only their interests. (CX 373-051; CX 372-047; CX 371-045).
39. Buyer's agency agreements are widely used by Realcomp members in Southeastern Michigan. (Sweeney, Tr. 1335, 1360; CX 410 (Cooper, Dep. at 14); CX 42 (Nead, Dep. at 11-12); CX 40 (Elya, Dep. at 10-11); CX 416 (Rademacher, Dep. at 23); CX 415 (Nowak, Dep. at 7-8); CX 421 (Whitehouse, Dep. at 146); CX 39 (Taylor, Dep. at 31-33); Mincy, Tr. 350; CX 413 (Kersten, Dep. at 27-28). One Realcomp member's agents enter into buyer agency agreements with over 80% of the buyers represented by that firm. (Sweeney, Tr. 1360).

**(iii) Offer of Compensation**

40. The cooperating broker is typically paid by the home seller through the listing broker. (Murray, Tr. 153-54). The listing broker makes an offer to compensate, known as an offer of compensation, to any cooperating broker who is a procuring cause of the sale, *i.e.*, finds the buyer that purchases the home. (JX 1-02; Murray, Tr. 153-55; RX 154-A-010).
41. The commission paid by the home seller to the listing broker therefore contains two components: the compensation paid by the seller to the listing broker for the listing broker's services; and the offer of compensation paid by the seller to the listing broker that is then offered by the listing broker to potential cooperating brokers through the MLS. (CX 498-A-043).

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42. The offer of compensation is unconditional except that the cooperating broker must be the procuring cause of the sale. (JX 1-02; Murray, Tr. 155).
43. The listing broker, and not the home seller, is responsible for paying the offer of compensation to a cooperating broker that is the procuring cause of the sale. (CX 42 (Nead, Dep. at 103-04); CX 37 (Bowers, Dep. at 46); CX 43 (Hardy, Dep. at 115-16); CX 84-001-002; CX 456-006-007).
44. Brokers representing buyers under a buyer's agency agreement may be compensated by the buyer or by the offer of compensation, or both, depending on the terms of their agreement with the buyer. (RX 154-A-010; Murray, Tr. 153-54; Mincy, Tr. 351-52).
45. Every listing in the Realcomp MLS must have an offer of compensation associated with it. (JX 1-03; CX 100-010).
46. In the Realcomp Service Area, the offer of compensation to a buyer's agent is usually 3% of the sale price of the house. (CX 498-A-011).

**c. Brokers Sometimes Represent Only One Side of the Transaction**

47. It is not common for listing brokers to deal with unrepresented buyers. (Sweeney, Tr. 1361).
48. However, listing brokers sometimes do sell property directly to a buyer who is unrepresented by a cooperating broker. (JX 1-05; Sweeney, Tr. 1361, 1364; CX 413 (Kersten, Dep. at 9, 45-46)). *See also* CX 40 (Elya, Dep. at 55-56 (Realcomp Governor stating that he deals with unrepresented buyers when acting as a listing broker, that he does not turn the buyer away nor tell them to hire a broker, and that he closes real estate transactions with unrepresented buyers)).

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49. It is not uncommon for cooperating brokers representing buyers to complete a transaction with a FSBO seller. (RX 154-A-007). In cases where the FSBO seller did not know their buyer, nationwide, 26% of FSBO sellers reported in 2006 that the buyer was represented by a broker. (CX 373-089). This also occurs in Southeastern Michigan. (CX 415 (Nowak, Dep. at 9-10); CX 409 (Burke, Dep. at 42); CX 413 (Kersten, Dep. at 45); CX 40 (Elya, Dep. at 58-59)).

**2. Types of Listing Agreements**

50. There are two different types of listing agreements: Exclusive Right to Sell and Exclusive Agency. (Murray, Tr. 157).

**a. Exclusive Right to Sell Agreements**

51. An Exclusive Right to Sell listing (“ERTS”) is a listing agreement whereby the home seller 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. (CX 32-003 (Answer)).
52. Traditionally, brokers using an Exclusive Right to Sell listing provide a full set of real estate brokerage services. (RX 154-A-011; *see also* F. 64-66).
53. Traditionally, the listing broker is paid by the home seller a commission that is based on a percentage of the sale price of the home and 6% is common. (CX 498-A-010; CX 373-081; RX 159-A-011).
54. Typically, in an Exclusive Right to Sell listing, where the listing agreement calls for a 6% listing commission and an offer of compensation of 3%, if a broker brings a buyer, the seller pays the 6% listing commission and the listing broker keeps 3% and pays the cooperating

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broker the 3% offer of compensation. (Murray, Tr. 157-58).

55. Where there is no cooperating broker, the seller still pays the 6% listing commission and the listing broker will keep the entire 6% commission. (Murray, Tr. 157-58).
56. If the home seller finds the home buyer on his or her own (such as through a relative or a friend) rather than through the marketing efforts by the listing broker, the listing broker is still entitled to the entire negotiated commission. (Murray, Tr. 157-58; CX 498-A-015).
57. There are also in the Realcomp Service Area flat fee ERTS listings. In the flat fee ERTS listings offered by AmeriSell Realty, the seller pays the listing agent a flat fee of \$200 more than a non-ERTS listing and a 3% offer of compensation if a broker brings a buyer. (Kermath, Tr. 729-31, 782, 791; RX 12; Eisenstadt, Tr. 1451-52, 1474).

**b. Exclusive Agency Agreements**

58. An Exclusive Agency (“EA”) listing is a listing agreement whereby the listing broker acts as an exclusive agent of the home seller in the sale of a property, but reserves to the seller 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. (CX 32-004 (Answer); JX 1-07).
59. Exclusive Agency contracts allow sellers to save the cost of an offer of compensation to a cooperating broker -- money that under a traditional Exclusive Right to Sell listing would be paid to the listing broker -- if the seller sells the property to an unrepresented buyer themselves. (Mincy, Tr. 365; D. Moody, Tr. 489-90; CX 422 (Aronson, Dep. at 6); CX 205-063).

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60. Typically in an Exclusive Agency listing agreement, where the listing agreement calls for a payment of an up-front \$500 flat fee to the listing broker and a 3% offer of compensation, if a broker brings a buyer, the seller pays the up-front fee and the offer of compensation. But if the buyer went directly to the seller and there was no other broker involved, the seller will have paid the up-front \$500 flat fee, but would not owe any other additional commission. (Murray, Tr. 158-59).
61. For example, one EA broker advertises the potential savings of his EA listings using an example of the sale of a \$300,000 home. (Minc, Tr.374; illustrated in DX 4). Under a traditional full service listing at 6% commission, a seller would pay a commission of \$18,000, even if there is no cooperating broker involved in the transaction. (Mincy, Tr. 375-76; illustrated in DX 4). In contrast, under his EA listing, the seller would only pay \$495 if there is no cooperating broker involved, a savings of \$17,505. (Mincy, Tr. 375-76; illustrated in DX 4).
62. Exclusive Agency contracts are often used by brokers offering an a la carte, or unbundled, menu of brokerage services to the home seller. (RX 154-A-012-013; Murray, Tr. 159, 166).
63. Realcomp members that offer unbundled brokerage services use Exclusive Agency contracts and often charge their clients a flat fee, payable at the time of listing. (Mincy, Tr. 369-71; Kermath, Tr. 729-31; RX 1-001-002; D. Moody, Tr. 483-85; CX 435-001-002; CX 422 (Aronson, Dep. at 10-11)).

### **3. Brokerage Models**

#### **a. Traditional Full Service Brokerage Model**

64. Prior to the advent of widespread Internet usage in the late 1990's and early 2000's, most residential real estate transactions were done through traditional

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brokerages that provided a full set of services to home sellers and home buyers. (RX 154-A-015). The vast majority of these transactions were done using Exclusive Right to Sell contracts. (RX 154-A-015; CX 32-003-004 (Answer)).

65. Brokers in Southeastern Michigan use Exclusive Right to Sell contracts to provide full service brokerage services to their seller clients. (CX 40 (Elya, Dep. at 6,57); CX 421 (Whitehouse, Dep. at 14); CX 43 (Hardy, Dep. at 23-24,58); CX 38 (Gleason, Dep. at 37); CX 415 (Nowak, Dep. at 8, 12); Sweeney, Tr. 1319, 1322; CX 39 (Taylor, Dep. at 18); Mincy, Tr. 315-16, 320, 371).
66. A full service listing, under Realcomp's rules, is a listing agreement under which the listing broker will provide all of the following services to the home seller: (A) arrange appointments for cooperating brokers to show listed property to potential purchasers; (B) accept and present to the seller(s) offers to purchase procured by cooperating brokers; (C) advise the seller(s) as to the merits of the offer to purchase; (D) assist the seller(s) in developing, communicating, or presenting counteroffers; and (E) participate on behalf of seller(s) in negotiations leading to the sale of listed property. (Joint Glossary of Commonly Used Terms, p. 2; *see also* CX 100-005).
67. Full service listing brokers in Southeastern Michigan typically charge commission rates around 6%. (CX 42 (Nead, Dep. at 8-9); CX 301-004; CX 421 (Whitehouse, Dep. at 15- 16); CX 43 (Hardy, Dep. at 37-38); CX 40 (Elya, Dep. at 6-7); CX 413 (Kersten, Dep. at 30-31)).
68. However, AmeriSell Realty offers an ERTS listing for a flat fee of \$200 more than a non-ERTS listing. (Kermath, Tr. 729-31, 782, 791; RX 12; Eisenstadt, Tr. 1451-52, 1474).

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**b. Discount, Limited Service Brokerage Model**

69. Brokers offering unbundled services (“limited service brokers”) offer a low cost alternative to consumers of residential real estate brokerage services. (RX 154-A-015; Murray, Tr. 166).
70. The types of unbundled services offered by limited service brokers varies and there is often a menu of services or service packages from which home sellers can purchase only those services that they feel they require. (CX 498-A-013; RX 154-A-015; CX 533-040).
71. A limited service listing, under Realcomp’s rules, is a listing agreement under which the listing broker will provide at least one, but not all, of the following services to the home seller: (A) arrange appointments for cooperating brokers to show listed property to potential purchasers; (B) accept and present to the seller(s) offers to purchase procured by cooperating brokers; (C) advise the seller(s) as to the merits of the offer to purchase; (D) assist the seller(s) in developing, communicating, or presenting counteroffers; and (E) participate on behalf of seller(s) in negotiations leading to the sale of listing property. (Joint Glossary of Commonly Used Terms, p. 2; *see also* CX 100-005).
72. In effect, the limited brokerage service model allows home sellers to purchase a subset of the full range brokerage services (such as listing in an MLS), while self-supplying other services. (CX 498-A-014). For instance, a home seller may wish to list their home on the MLS, but show the property, hold open houses, negotiate with buyers, or close the transaction on their own without broker assistance. (CX 498-A-014; RX 154-A-012-013 (providing example that a broker may offer services separately for sale, such as listing the home on the MLS for \$500, helping run an open house for \$100, etc.)).



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73. Limited service brokers meet a “consumer demand for lower cost brokerage services where consumers are willing to carry out some of the home selling tasks themselves that otherwise would be performed by real estate professionals.” (CX 533-041 (noting that this consumer demand has been identified by “established franchisers and start-up companies alike”); RX 154-A-019 (“Limited Service Brokers are fulfilling a consumer demand for lower cost services”); Mincy, Tr. 381 (starting limited service brokerage in Southeastern Michigan when he realized that some consumers felt comfortable doing some real estate services themselves and therefore did not want to pay for those services); CX 534-012 (Consumers using limited service brokers “are making conscious tradeoffs of price for service.”)).
74. Realcomp members who offer low cost, unbundled services cater to cost-conscious home sellers who might otherwise have sold their properties as FSBO and who are comfortable performing some of the tasks associated with the real estate transaction themselves, such as holding open houses or negotiating their own contract. (D. Moody, Tr. 494-95; Mincy, Tr. 378, 381; CX 526 (Groggins, Dep. at 11)).

**(i) Unbundling of Services**

75. Limited service brokers compete by unbundling listing services - they offer to supply home sellers with only part of the full range of brokerage services. (Williams, Tr. 1096-97). As a result of this unbundling of brokerage service, limited service brokers allow home sellers (and indirectly home buyers) to avoid commission costs and thereby reduce the costs of selling a home. (CX 498-A-014; CX 533-041).
76. Some home sellers benefit from using Exclusive Agency arrangements, particularly if the seller has the time, expertise and wherewithal to do parts of the transaction themselves. (Sweeney, Tr. 1322-23, 1348; CX 349-001-002). Sellers using a limited service

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broker could save significantly on the price of a commission. (Sweeney, Tr. 1348; CX 350-003).

**(ii) Unbundling of Commissions**

77. Limited service brokers also compete by unbundling the commission structure. (Williams, Tr. 1097). Under a traditional Exclusive Right to Sell listing contract, the listing broker's commission is bundled with the cooperating broker's commission. (Williams, Tr. 1097).
78. Under an EA contract or a flat fee ERTS contract consumers of brokerage services only pay the commission for the cooperating broker if the cooperating broker procures the buyer. (Williams, Tr. 1098; Mincy, Tr. 365-66; CX 439; D. Moody, Tr. 489-90; CX 422 (Aronson, Dep. at 6); CX 205-063; RX I; Kermath, Tr. 729-31, 791).

**4. Competition Among Brokers****a. Competition and Cooperation Between Brokers**

79. Real estate brokers compete to obtain listings (to represent home sellers) and to represent home buyers. (Mincy, Tr. 360-61; CX 410 (Cooper, Dep. at 63) (brokers compete to obtain listings)).
80. Realcomp members, including its Realcomp Board of Governors, compete with one another to offer residential real estate brokerage services to consumers. (CX 32-002; CX 43 (Hardy, Dep. at 24-27); CX 211; CX 41 (Mulvihill, Dep. at 48-49)).
81. Brokers offering limited services and brokers offering traditional, full services also compete with one another for new listings. (CX 421 (Whitehouse, Dep. at 14-15,21); CX 525 (Adams, Dep. at 44-45); Mincy, Tr. 357, 359; CX 422 (Aronson, Dep. at 18)).

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82. Although brokers compete with one another to secure new listings, once a broker secures that listing, he or she may then potentially be in a cooperative relationship with those same or other brokers who are representing buyers. (Mincy, Tr. 361-63).

**(i) Competition is Local in Nature**

83. In its 2006 Profile of Real Estate Firms, NAR found that, “[g]iven the localized nature of many real estate activities, 59 percent of firms report that they primarily serve clients in a particular geographic area.” (CX 370-026; CX 406 (Bishop, Dep. at 34-35)).
84. Buyers tend to look for homes to purchase in specific, concentrated geographic areas. NAR found, in its 2006 Profile of Home Buyers and Sellers, that the median distance that buyers moved - from their previous residence to the home they purchased -- was 13 miles nationally, and 12 miles in the Midwest. (CX 373-025; *see also* CX 406 (Bishop, Dep. at 62)).
85. Brokers in Southeastern Michigan compete in often narrow geographic markets. (CX 410 (Cooper, Dep. at 64,61-62) (agreeing that “competition in the real estate industry is local in nature”); CX 40 (Elya, Dep. at 15) (“All real estate is local.”); CX 43 (Hardy, Dep. at 20) (Home sellers are more comfortable dealing with a local Realtor); CX 39 (Taylor, Dep. at 6) (Most house sales are within a 3 or 4 mile radius of his office); CX 41 (Mulvihill, Dep. at 10-11) (Selling homes within a 25 mile radius of his office)).

**(ii) Competition for Referrals**

86. Referrals are important for brokers when competing for business representing buyers or sellers. (CX 373-054, 077; CX 372-043, 065; CX 371-042, 061). “[R]ecommendations from friends or family and use of the agent in a previous transaction were two of the chief ways sellers chose an agent . . .” and over 50% of all buyers nationwide between 2003 and 2006 used

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an agent they found through a referral from a friend, a neighbor, or a relative, or who the buyer knew personally or from a previous transaction. (CX 373-054, 077; CX 372-043, 065; CX 371-042, 061; CX 406 (Bishop, Dep. at 97-98, 107-08)).

87. For both limited and full service brokers in Southeastern Michigan, a good reputation and a consequent stream of referral business from satisfied customers is important to compete for new business. (Sweeney, Tr. 1318 (Referrals are “the most important” source of new business); CX 42 (Nead, Dep. at 19) (80% of her business is from past clients or referrals); CX 40 (Elya, Dep. at 26) (50% of his business comes from referrals and repeat customers); CX 302-001 (referrals account for 60-70% of Mr. Whitehouse’s business)).

**b. Competition From Limited Service Brokers**

88. NAR found in 2003 that limited service brokerages have “the potential to change the competitive landscape of residential real estate brokerage.” (CX 533-040). NAR reasoned that, even though limited service brokers “may not currently command significant market share . . . their significance goes beyond their size. They may be serving a customer need that is not currently being served by the dominant players. In addition, they may play a larger role in selected markets or may serve a particular consumer segment better than the dominant models.” (CX 533-038).
89. However, agents offering EA listings do not provide the same level of personal service, and do not compete well with traditional models for trust and professionalism. (Murray, Tr. 292; CX 535-109). Albert Hepp does not meet any Michigan customers face-to-face. (Hepp, Tr. 695). Jeff Kermath rarely meets customers face-to-face. (Kermath, Tr. 799-800). Generally, Denise Moody does not physically meet her customers. (D. Moody, Tr. 570-71).

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**(i) Growth of the Limited Service Brokerage Model**

90. In 2003, limited service brokerages were estimated to have a 2% market share nationwide. (RX 154-A-016). In 2005, limited service brokerages had grown to 15% nationwide. (RX 154-A-016; Murray, Tr. 166-67; CX 534-039, 041).
91. But, between 2005 and 2006, alternative service brokers declined nationally from 15% to 8%, which is attributable to the softening of the housing market, meaning it was more of a buyer's market with a decrease in sales and increase in inventory. (Murray, Tr. 289-91; CX 535-116).
92. The growth of limited service brokers nationally from 2003 to 2005 is attributed in part to the rise of the Internet, which made it more efficient for brokers to reach potential buyers and to perform their services on behalf of sellers. (Murray, Tr. 167; RX 154- A-017 ("The Internet afforded Limited Service Brokers the ability to reach greater real estate professional and housing consumer audiences . . . [which] in turn, enabled firms to establish a real estate brokerage at lower costs than before."); CX 498-A-013 (Internet has contributed to the entry of several new models of real estate brokerage services); CX 375-029 ("The rise of the Internet has seen the emergence of [limited service brokers] as a significant competitor to full service brokerages.")).
93. The growth of limited service brokers nationally from 2003 to 2005 is also attributed in part to extraordinarily hot markets on the east and west coasts. (Murray, Tr. 167).
94. A strong housing market ("seller's market") makes some sellers think that they can sell their homes without the full range of brokerage services, while also creating a greater price differential between traditional full service brokers and limited service brokers, and

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thus may lead to an increase in limited services brokerages. (Murray, Tr. 168-69; 154-A-016-017).

95. A poor housing market (“buyer’s market”) can impact the use of limited service brokers in two opposite ways. F. 96-97.
96. First, the preponderance of evidence indicates that the use of limited service brokers can be expected to decline in a buyer’s market because where both the value of a home and the seller’s equity is constantly declining, more home sellers will want the professional marketing services of a full service broker. (Murray, Tr. 168-69; Sweeney, Tr. 1307, 1326-29)).
97. Second, limited evidence suggests that the use of limited service brokers can be expected to increase in a buyer’s market because of the high potential of “short sales,” where people, who may not have equity in their homes to afford a traditional commission and “are generally going to look for the lowest cost they can to get their homes sold.” (Murray, Tr. 169-71 (explaining that lack of home price appreciation, people taking out a hundred percent financing, and no equity in the home will lead people to look for the “lowest-cost alternative they can to sell their home because, whatever it is, they’re going to write a check to get out of their house”); RX 154-A-020-021.)
98. Brokers in Southeastern Michigan offering limited services also testified that their services often appealed to home sellers without equity in their homes. (Mincy, Tr. 382; Hepp, Tr. 598-99; G. Moody, Tr. 882 (limited services help people in “tough economic times”).

**(ii) Price Pressure on Commissions**

99. Limited service brokerages put price pressure on full service brokerage commissions. (Murray, Tr. 174; RX I54-A-0 18; CX 403-007, 009; CX 533-026 (noting that traditional brokerage firms “often are challenged

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by larger [firms) that provide a broader range of services, or by emerging firms who provide a-la-carte services at a lower price.”)).

100. In its 2003 *Change is Relentless* paper, NAR found that, “[a] growing percentage of consumers are asking agents to reduce their commissions. This has been sparked by awareness of discounted online and limited-service models, and remains a challenge for full service agents.” (CX 403-007; *see also* Murray, Tr. 175-76).
101. Seller awareness of limited service brokers has been growing steadily, which impacts competition between limited service brokers and full service brokers because “if more sellers are aware that there are alternatives that are lower cost, the more sellers are going to at least investigate it and see if that fits them.” (Murray, Tr. 174-75; RX 154-A- 019- 020; CX 403-007 (“Pricing pressures. A growing percentage of consumers are asking agents to reduce their commissions. This has been sparked by awareness of discounted online and limited-service models, and remains a challenge for full-service agents.”)).

##### **5. The Multiple Listing Services**

102. Cooperation among brokers operating in almost every local marketplace around the country is facilitated through the local MLS. (RX 154-A-029). A primary role of the MLS is to “provide a method for the [member] brokerage firms to cooperate with each other to better serve the buyers and sellers. This has included sharing information on properties that they have listed for sale . . . and creating rules governing how they will work and operate which includes the ability of one broker to offer compensation to another broker.” (CX 414 (Niersbach, Dep. at 23-24); CX 380-011).
103. A purpose of the MLS is to facilitate cooperation between participants. (CX 42 (Nead, Dep. at 134 (The

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MLS is “there to enhance the sharing of information.”); CX 43 (Hardy, Dep. at 140-41 (The “real reason [for the MLS] is to accumulate and disseminate information between participants.”))).

104. In addition to serving as a database of properties for sale, the MLS facilitates an orderly and efficient marketplace by providing systematic and enforceable rules governing the sale of listed properties. (RX 154-A-025-026; CX 375-021 (“Agents can conduct business confidently [through the MLS] because they are reasonably assured that transactions follow established rules.”); CX 414 (Niersbach, Dep. at 27)).
105. MLSs, such as Realcomp, that are affiliated with NAR must follow the mandatory provisions of NAR’s MLS Policies and Rules if they wish to remain compliant with NAR. (CX 414 (Niersbach, Dep. at 36-37)).

**a. The Closed MLS Database**

106. The general public cannot list their home in the MLS - or search the MLS for a home without using a real estate broker who is a member of the MLS. (JX 1-04;.RX 154-A-025).
107. FSBO sellers are generally not allowed to list their properties in their local MLS. (RX 154-A-007).
108. FSBO sellers are not allowed to list their properties in the Realcomp MLS. (JX 1-04, 08).

**(i) Disseminating Information Among Brokers**

109. The listing in the MLS will include details about the home, such as the number of bedrooms, baths and square footage, as well as the offer of compensation to any cooperating broker who is the “procuring cause” of a sale of the property, the type of listing agreement, and the level of services being provided by the listing broker. (Mincy, Tr. 327-35; CX 426; Murray, Tr. 155, 162-63; RX 154-A-009).



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110. In its Consumer Services White Paper, NAR found that, “[t]he most emphasized function of the MLS is the listings service: a central repository for ads for salable properties. These ads (listings) are submitted by a specific real estate agent or broker and serve as a way to notify other real estate professionals and the home buying public about the availability of a home.” (CX 375-021; CX 456-004).

**(ii) Means to Make Offers of Cooperation**

111. The MLS is the only mechanism of which NAR is aware “that provides a platform and rules or procedures for brokers to cooperate with each other.” (CX 414 (Niersbach, Dep. at 48)). MLS functions include rules enforcement and a means of agreeing on compensation among MLS participants. (CX 375-021).
112. The ability to include an offer of compensation, which is enforceable through binding arbitration, separates the MLS from all other aggregations of home listing information. (RX 154-A-026).
113. One of “the most important features that separate the MLS from mainstream advertising options [has] to do with . . . the inclusion of a blanket unilateral offer of compensation to Realtors for every listing in the MLS. While other advertising options may do a good job of providing exposure, their business models do not include protecting [realtors’] compensation.” (CX 220).

**b. Dissemination of Listings to Public Websites**

114. In addition to operating a closed database of information about properties for sale that are listed by its members, MLSs also disseminate listing information to certain public websites that can be searched by members of the public. (Murray, Tr. 145-46, 206-07; RX 154-A-034-035).

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115. Through public websites that are fed listing information by MLSs, home buyers have access to information regarding the thousands of listings by MLS members and have the ability to search them based on a variety of criteria, such as price, location, type of dwelling (single-unit, multi-unit, etc.), and characteristics of the property. (CX 498-A-012; RX 154-A-039).
116. MLSs do not provide all of the listing information that is on the MLS in their feed to public Internet websites, such as information about offers of compensation and agent remarks. (RX 154-A-035; CX 40 (Elya, Dep. at 81-82)). For example, members of the public searching Realcomp listings online do not typically know what type of listing agreement -- whether an Exclusive Agency or Exclusive Right To Sell listing -- is in place between the home seller and their listing broker. (JX 1-04).

**(i) Public Websites**

117. Many MLSs, including Realcomp, disseminate listing information to Realtor.com, the official consumer website for the National Association of Realtors. (CX 412 (Goldberg, Dep. at 25, 35); Murray, Tr. 206-07). Realtor.com is operated by Move, Inc., pursuant to an operating agreement with the National Association of Realtors. (CX 412 (Goldberg, Dep. at 6-7, 22-26); CX 360 (Operating Agreement)).
118. Many MLSs, including Realcomp, also operate their own public websites, known as MLS public websites. (RX 154-A-047-048; Murray, Tr. 207-08). For example, Realcomp provides an exclusive feed of listing information to MoveInMichigan.com, which Realcomp owns and operates, based on listings in the Realcomp MLS database. (RX 154-A-049; Murray, Tr. 207-08).

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**(ii) Internet Data Exchange (IDX)**

119. The majority of MLSs, including Realcomp, also provide listing information to the public websites of their broker members, known as “IDX websites.” (Murray, Tr. 208-10). IDX (Internet Data Exchange) is a set of rules and policies that set forth how a local brokerage firm may receive and display on the broker’s own website the listings of other MLS members. (Murray, Tr. 208-10; RX I 54-A-059-060; CX 414 (Niersbach, Dep. at 50,55)).
120. Through the IDX, broker websites are able to display listing information from their local MLS database so that consumers can go to the broker’s website and search for available properties of all participating MLS members. (Murray, Tr. 208-10; CX 405 (Baczkowski, Dep. at 85)). In essence, MLSs provide a feed of MLS property listings (referred to as an “IDX feed”) that enables MLS members, with the consent of listing brokers, to display MLS listing information on their own broker websites. (Murray, Tr. 208-10; RX 154-A-059-060; CX 414 (Niersbach, Dep. at 50))).
121. For the 91% of firm websites nationwide that contain searchable property listings, the IDX feed is how those firms obtain listings other than their own. (RX 154-A-060). For example, a customer in Southeastern Michigan can visit Remax.com, one of the large franchise brokerage websites, and view properties in Southeastern Michigan that are listed by all different brokers, such as Century 21, Town & Country, and Weir Manuel, in Realcomp’s MLS that participate in the IDX feed. (Murray, Tr. 209-10; RX 154-A-060-062).

**B. The Southeastern Michigan Residential Real Estate Market**

122. A “buyer’s market” is characterized as a softening of the residential real estate market with a decrease in sales and an increase in inventory. (Murray, Tr. 266).

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123. Southeastern Michigan has been in a buyer's market with respect to its residential real estate, for the past three years. (Murray, Tr. 267; Mincy, Tr. 454; G. Moody, Tr. 879-80; Hepp, Tr. 699).
124. For the last three years, the Detroit area has been one of the worst buyer's market in the country for residential real estate. (Murray, Tr. 268).
125. The Southeastern Michigan residential real estate market is currently the worst that it has been in the past 41 years due to the automobile industry and economic gridlock. (CX 413 (Kersten, Dep. at 53-54)).
126. The Southeastern Michigan residential real estate market is considerably worse than the national market, and has been for about three years, attributable to the loss of 350,000 jobs in the last several years. (Sweeney, Tr. 1306).
127. The Southeastern Michigan residential real estate market is very slow, meaning that listings are staying on the market for a long time and there are very few sales. (CX 407 (Bratt, Dep. at 29-30)).
128. Homes in Southeastern Michigan have been consistently losing value. (Sweeney, Tr.1309).
129. The state association has seen a decline overall throughout the state of Michigan in the number of brokers, with agents leaving the real estate business. (Kage, Tr. 1027).
130. One agent estimated that real estate agents are down in volume approximately 20%. (CX 525 (Adams, Dep. at 11)).
131. Unlike in robust real estate markets, Exclusive Agency listings have not made significant in-roads in the Southeastern Michigan market. (Sweeney, Tr. 1326, 1330 (While discount broker firms have emerged in

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Southeastern Michigan, there has not been a surge in growth)).

**C. Respondent: Realcomp II Ltd.****1. Realcomp's Corporate Structure**

132. Realcomp is a corporation organized, existing, and doing business under, and by virtue of, the laws of the state of Michigan. (JX 1-06).
133. Realcomp's office and principal place of business is located at 28555 Orchard Lake Road, Suite 200, Farmington Hills, Michigan 48334. (JX 1-06).
134. Realcomp was founded in November 1993 and started doing business in January 1994. (CX 36 (Kage, IHT at 10)). Realcomp started out with about 7,000 members and presently has approximately 13,800 members. (Kage, Tr. 1026; CX 36 (Kage, IHT at 10)).
135. Realcomp was formed in 1993 after seven boards and associations of Realtors merged to form Realcomp. (Kage, Tr. 900-01; CX 54; CX 56; CX 88).

**a. Realcomp's Ownership**

136. Realcomp is currently owned by seven shareholder Realtor boards and associations. (Kage, Tr. 900).
137. The seven shareholder owner boards of Realcomp are: The Dearborn Board of Realtors, Detroit Association of Realtors, Eastern Thumb Association of Realtors, Livingston Association of Realtors, Metropolitan Consolidated Association of Realtors, North Oakland County Board of Realtors, and the Western-Wayne Oakland County Association of Realtors. (JX 1-03).
138. Each Realcomp shareholder owner board is comprised of competing Realtor members. (Kage, Tr. 900-01; CX 32-002 (Answer)).

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139. A Realcomp shareholder must be a Realtor board or association that is a member in good standing of the National Association of Realtors. (JX 1-03).

**b. Realcomp's Governance**

140. The business and affairs of Realcomp are conducted by its Board of Governors who are selected by the shareholder boards and associations. (JX 1-03; CX 59-010).
141. Each Realcomp Governor must be a Realtor. (Kage, Tr. 901). One of the Governors from each shareholder must be "actively practicing real estate." (CX 59-011).
142. The Realcomp Board of Governors is made up of Realtors from numerous full service brokerage firms, including Century 21, SKBK Sotheby's, Coldwell Banker, Re/Max, and Realty Executives, which compete with one another for business in Southeastern Michigan. (JX 1-10; CX 211; CX 35 (Kage, Dep. 19-20); CX 43 (Hardy, Dep. at 23-24); CX 42 (Nead, Dep. at 7-8); Mincy, Tr. 320; CX 40 (Elya, Dep. at 6)).
143. Each shareholder owner of Realcomp selects their representatives on the Realcomp Board of Governors. (CX 36 (Kage, IHT at 12); JX 1-03). Each board member serves a three year term. (CX 36 (Kage, IHT at 13)).
144. The role of the Board of Governors is to be knowledgeable about the challenges and issues, provide oversight of the organization and focus on the best interests of Realcomp. (CX 217).
145. The Realcomp Board of Governors is ultimately responsible for the actions of Realcomp and its employees. (CX 42 (Nead, Dep. at 56-57)).
146. The Realcomp Board of Governors approves any changes to the Realcomp Policy Handbook. (CX 35 (Kage, Dep. at 15-16); CX 90).

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147. The Realcomp Board of Governors has the authority to set and approve the MLS rules, to authorize the officers to engage in activities to make the MLS work, and to make sure that the rules are effective for members. (CX 38 (Gleason, Dep. at 19); CX 36 (Kage, IHT at 11-12, 25); CX 415 (Nowak, Dep. at 31)).
148. The Board of Governors needs shareholder approval for certain actions. (CX 38 (Gleason, Dep. at 19)).
149. Karen Kage is the CEO of Realcomp. (Kage, Tr. 897). She has held this position since 1998 and has worked for Realcomp since 1993. (Kage, Tr. 898; CX 36 (Kage, IHT at 7, 9)). Her responsibilities as CEO include staffing, enforcing policies and rules, working within the Realcomp budget, and attending committee and Board of Governors meetings. (Kage, Tr. 898-99; CX 36 (Kage, IHT at 7)).
150. Karen Kage prepares the information packets for the Realcomp Board of Governors, including any proposed changes to the Realcomp Rules and Regulations that come out of the Realcomp MLS User Committee meetings. (CX 36 (Kage, IHT at 26-27)).
151. The MLS User Committee discusses issues regarding the MLS Rules and Regulations and can then make recommendations to the Realcomp Board of Governors. (Kage, Tr. 901). Karen Kage attends most MLS User Committee meetings. (Kage, Tr. 902).
152. As CEO of Realcomp, Karen Kage needs to be familiar with the Realcomp Rules and Regulations. (CX 36 (Kage, IHT at 25-26)). She stays current with the changes to the MLS Rules and Regulations. (CX 36 (Kage, IHT at 25-26)).
153. The Board of Governors decides whether or not to adopt recommendations from the MLS User Committee. (Kage, Tr. 902; CX 92).

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154. The Board of Governors passes a motion with the approval of the majority of the Governors. (CX 59-018; CX 54-027). If the Board of Governors adopts a recommendation from the MLS User Committee, then the Realcomp Rules and Regulations are changed accordingly. (Kage, Tr. 902-03).
155. The October 2006 Realcomp Rules and Regulations are the current Rules and Regulations and were approved by the Realcomp Board of Governors. (CX 35 (Kage, Dep. at 7-8); CX 100; Kage, Tr. 973).
156. Realcomp members have to abide by the Realcomp Rules and Policies. (CX 35 (Kage, Dep. at 16); CX 90).

**c. Realcomp's Membership**

157. Realcomp currently has over 2,200 real estate office members in Southeastern Michigan. (Kage, Tr. 903).
158. Realcomp currently has about 14,000 members, consisting of both real estate brokers and real estate agents, who "compete with one another to provide residential real estate brokerage service to customers." (CX 32-002 (Answer); Kage, Tr. 903).
159. Realcomp is the largest MLS in Michigan; it has the most members of any MLS in Michigan and accounts for almost half of all Realtors in the state. (Kage, Tr. 993; JX 1-06; CX 223).
160. Realcomp advertises to the public that it is the largest MLS in Michigan. (Kage, Tr.911).
161. Realcomp has told its members that "the goal of the Realcomp Board of Governors is to continue to merge with neighboring MLSs in order to bring you more information and eliminate the need for yet another property search database." (CX 31).



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162. A Realcomp member is any person authorized by Realcomp to access, use or enjoy the benefits of the Realcomp MLS in accordance with Realcomp's bylaws, policies, rules and regulations. (JX 1-03).
163. Realcomp's membership is open to any real estate broker who is a member of one of the shareholder boards. (Kage, Tr. 900-01; CX 410 (Cooper, Dep. at 26-28). Any Michigan licensed real estate broker can join NAR and one of the shareholder boards, and in turn join Realcomp. (Williams, Tr. 1100; CX 414 (Niersbach, Dep. at 9)).
164. Realcomp permits agents who offer discount services to be members of Realcomp. (JX 1-07-08).
165. All Realcomp members are NAR members. (JX 1-03; CX 100-003).
166. Each Realcomp member is required to hold an active real estate license, an active appraiser license, or both. (JX 1-06).
167. Some of the Realcomp members are appraisal companies, which also have agents. (Kage, Tr. 903; CX 127; CX 138).
168. Each broker member has to agree to abide by the Realcomp Rules and Regulations, and the policies and procedures in the Realcomp II Ltd. Policy Handbook. (JX 1-03; CX 212; CX 35 (Kage, Dep. at 20-22)).
169. Realcomp fines brokers for violating any of the Realcomp Rules or Policies. The fines are assessed to the broker, not the agent, because the broker is responsible for all listings from his or her office. (CX 36 (Kage, IHT at 105-06)).
170. Realcomp is organized for the purpose of serving its members' interests. (JX 1-06).

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**2. Realcomp's Association With the National Association of Realtors**

171. NAR handles policies, procedures and lobbying on behalf of its over 800 MLS board and association members. (Kage, Tr. 900).
172. Realcomp has been affiliated with NAR since its inception. (Kage, Tr. 972).
173. Each of the Realcomp shareholder owner boards is affiliated with NAR. (Kage, Tr. 900-01). Realcomp is affiliated with NAR by virtue of its ownership by NAR-affiliated Associations of Realtors. (CX 36 (Kage, IHT at 10-11)).
174. Realcomp's bylaws require that Realcomp abide by NAR's rules, so Realcomp adopts NAR changes into its own rules and then sends a communication out to Realcomp members letting them know of the rule changes. (Kage, Tr. 971-72; CX 36 (Kage, IHT at 27-28)).

**3. The Realcomp MLS Member Services**

175. Realcomp services the territory within Southeastern Michigan, including Livingston county, Oakland county, Macomb county and Wayne county. (JX 1-06).
176. Every Realcomp member pays the same basic fees to become a member: office fee of \$75.00 per quarter per participating office and usage fee of \$99.00 per quarter, per Realcomp participant. (Kage, Tr. 903-04; CX 222-002).
177. All members of Realcomp, including members who offer alternative business models, pay the same dues to Realcomp. (Kage, Tr. 903-04; CX 35 (Kage, Dep. at 22); CX 210).

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178. Realcomp sends a monthly magazine, Real Solutions, to its members to update them on the services offered by Realcomp. (CX 42 (Nead, Dep. at 53-54); CX 279 (marked as CX 105 at deposition)).

**a. The Realcomp MLS Database**

179. The main service that Realcomp offers its members is the MLS. (Kage, Tr. 907).

180. The Realcomp MLS online system (“Realcomp Online”) is available 24 hours a day. (Kage, Tr. 907). The Realcomp MLS online system enables members with Internet access to access the Realcomp MLS online from any computer. (Kage, Tr. 907-08).

181. Realcomp permits agents to enter non-ERTS listings into the Realcomp MLS. (JX 1-07).

182. The Realcomp MLS allows members to upload up to six photos per listing and each listing to include a virtual tour, which is like a rotating 360-degree photo of the home, enabling consumers or agents to get a better idea of all the rooms in the home. (Kage, Tr. 909).

183. Realcomp enables its members to email MLS listing information to consumers, and these emails include Google Maps, which are popular among consumers. (CX 237-001; CX 35 (Kage, Dep. at 107-09)). Realcomp has touted this new feature to its members. (CX 237-001; CX 35 (Kage, Dep. at 107-09)).

184. Realcomp wants the information in the Realcomp MLS to be accurate at all times and to be of the highest possible quality. (Kage, Tr. 908; CX 35 (Kage, Dep. at 29-30, 35-36)).

185. The most important features that separate the Realcomp MLS from mainstream advertising options are: (1) the accuracy and timeliness of the property database that is created and maintained by Realtors for

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Realtors, and (2) the “inclusion of a blanket unilateral offer of compensation to Realtors for every listing in the MLS. (CX 220; CX 35 (Kage, Dep. at 34-38)).

**(i) Requirements for Dissemination of Listings Among Members**

186. A home seller has to have a contract with a Realcomp member listing agent in order to get their listing onto the Realcomp MLS. (CX 36 (Kage, IHT at 37); Kage, Tr. 972; JX 1-04; CX 35 (Kage, Dep. at 97-98)).
187. Realcomp requires its members to input all of their listings into the Realcomp MLS, unless a seller chooses not to have their listing in the MLS. (CX 100-004; CX 36 (Kage, IHT at 28); CX 35 (Kage, Dep. at 8)).
188. Any listing submitted to the Realcomp MLS “is subject to the rules and regulations of the Service upon signature of the seller(s)/lessor(s)” (CX 100-004; CX 35 (Kage, Dep. at 8-9); Kage, Tr. 973).
189. Realcomp does not require that brokers who list properties pursuant to any listing agreement on the Realcomp MLS be compensated at all, whether by commission or otherwise. (JX 1-04; Kage, Tr. 976; CX 42 (Nead, Dep. at 105-07)).
190. There is no requirement under the Realcomp rules for a member to have a cooperating broker who is a Realcomp member. (Kage, Tr. 979; JX I-OS). A Realcomp member who has a listing in the Realcomp MLS can sell houses to a non-represented buyer, or to a buyer represented by a broker or agent who is not a Realcomp member. (Kage, Tr. 979).
191. When a Realcomp member inputs a listing into the Realcomp MLS, the member must fill in the listing type field with either Exclusive Right to Sell, Exclusive Agency, Limited Service or MLS Entry Only. (CX 36 (Kage, IHT at 35); Kage, Tr. 973-74).

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192. The listing type field became a mandatory field for Realcomp participants in late 2003. (Kage, Tr. 974). The listing type is shown in bold in the right hand corner of each Realcomp listing, making this information readily available to Realcomp members. (CX 248; CX 35 (Kage, Dep. at 129-30)).

**(ii) Offers of Compensation**

193. On each listing filed with the Realcomp MLS, the listing broker must make a unilateral offer of compensation to any Realcomp member who acts as a cooperating broker and procures a buyer who purchases the listing property. (JX 1-03). Offers of compensation to cooperating brokers are made through the Realcomp MLS, and are not displayed on public websites. (JX 1-07).
194. The most common offer of compensation to cooperating brokers in the Realcomp MLS is 3% of the sale price. (CX 42 (Nead, Dep: at 104-05)).
195. Under the Realcomp rules, the listing agent does not input the amount of compensation that he or she is receiving into the Realcomp MLS. (Kage, Tr. 975).
196. Realcomp does not set the commission rates for its members. (Kage, Tr. 976).
197. The compensation paid by a home seller to a Realcomp member listing broker is determined by negotiation between that home seller and that listing broker. (JX 1-04).

**(A) The Unilateral Offer**

198. Listing commissions are a requirement of the Realcomp MLS. A commission amount must be entered into at least one of the following commission fields: Sub Agency (SAC), Buyer Agency (BAC), or Non Agency (NAC). (CX 219-001; CX 35 (Kage, Dep. at 33-34)). This enables Realcomp members to

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know what commission is due to them if they are the procuring cause of the sale of the home. (CX 219-001; CX 35 (Kage, Dep, at 33- 34)).

199. The Realcomp MLS Rules and Regulations have a provision laying out the rules regarding compensation. (CX 100-010-011; Kage, Tr. 975). The compensation provision requires Realcomp members to enter the offer of compensation to any Realcomp participant who brings in the buyer. (CX 100-010-011). This provision in the Realcomp Rules and Regulations gives a mechanism for the selling agent to attempt to get the commission they earned if there were any problems. (CX 36 (Kage, IHT at 97-98)).
200. Under both an ERTS listing and an EA listing, there is always an offer of compensation to the cooperating broker who brings in the buyer. (CX 36 (Kage, IHT at 79)).
201. Realcomp has no rules specifying the minimum services that a cooperating broker must perform (other than performance as the procuring cause of sale) to be entitled to compensation in the event of a consummated transaction. (JX 1-05).

**(B) Protections for Cooperating Brokers**

202. Under the Realcomp rules, the listing broker must stand behind an offer of compensation; the listing broker is a guarantor of the offer. (CX 43 (Hardy, Dep. at 115-16); CX 42 (Nead, Dep. at 103-04); CX 421 (Whitehouse, Dep. at 136-37)).
203. Under the Realcomp rules, a listing broker and a cooperating broker are free to negotiate a new commission. (Kage, Tr. 979-80; JX 1-05).
204. The cooperating broker can rely on the offer of compensation. (CX 37 (Bowers, Dep. at 41)). Even if the listing broker decides to discount the total commission paid by the home seller, the cooperating

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broker is still entitled to the offer of compensation put on the Realcomp MLS. (CX 37 (Bowers, Dep. at 41)).

205. If a cooperating broker is not paid a commission that is rightfully due to him or her, the cooperating broker can file a grievance or arbitration through their shareholder board to resolve the issue. (CX 36 (Kage, IHT at 97-98)).
206. Realcomp does not handle commission disputes. (CX 36 (Kage, IHT at 85)).
207. The Realcomp Board of Governors does not get reports on grievance and arbitration proceedings from the Realcomp shareholder owner boards. (CX 36 (Kage, IHT at 86)).
208. NAR's Code of Ethics governs grievances against Realcomp members. (CX 42 (Nead, Dep. at 138); CX 126).
209. Selling agents may protect themselves and ensure that they receive a commission by entering into a contract with a buyer client that requires the home buyer to compensate the agent even if the agent is not the procuring cause of sale. (CX 42 (Nead, Dep. at 113-14)). Thus, even if the buyer found a property on Realtor.com or another Internet site, went directly to the seller, and purchased the home without the assistance of the agent, the agent would be entitled to compensation even though the agent was not the procuring cause of the sale. (CX 42 (Nead, Dep. at 114-17)).

**b. The Realcomp Feed of Listing Information to Approved Websites**

210. One of the services that Realcomp offers its members is Internet advertising to "Approved Websites." (Kage, Tr. 925).

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211. “Approved Websites” are those websites to which Realcomp provides information concerning Realcomp MLS listings for publication including, MoveInMichigan.com, Realcomp IDX participant websites, and Realtor.com. In addition, Realcomp’s information concerning Realcomp MLS listings appears on ClickOnDetroit.com which frames MoveInMichigan.com. (Kage, Tr. 925-26; JX 1-04).
212. Realcomp highlights its service of Internet advertising to its current and potential members: “FREE Internet Advertising - Brokers have the option of automatically advertising their office’s active listing inventory through Realcomp II Ltd. on the Realtor.com and MoveInMichigan.com websites. Once Broker approval is received, the Broker’s office inventory is exported to both Websites on a daily weekday basis.” (CX 222-006; CX 35 (Kage, Dep. at 44-45); CX 224-002-003).
213. To send listings to MoveInMichigan.com, Realcomp IDX participant websites, and Realtor.com, Realcomp creates a feed of data each day which they put on a file transfer protocol site, so that Realcomp members can “call in and grab the data and then load it onto their system.” (Kage, Tr. 928).
214. Realcomp assembles the MLS data from all brokers that have requested their listings be included. (Kage, Tr. 929).
215. Realcomp does not require that brokers whose listings are transmitted by Realcomp to the Approved Websites be compensated at all, whether by commission or otherwise. (JX 1-04).
216. Realcomp does not require that transactions facilitated through the Approved Websites involve a cooperating broker. (JX 1-05).
217. Realcomp does not identify the type of listing agreement in place between a home seller and a



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Realcomp member listing broker when transmitting listings to the Approved Websites. (JX 1-04).

**(i) Public Websites**

218. The Internet is important to the marketing and sale of homes. The “majority of home buying and selling now begins on the Internet, “so” if you miss that consumer connection, you miss a lot of potential commissions and fees.” (CX 221-001; CX 35 (Kage, Dep. at 38-39)).
219. Realtors benefit from having their listings shown on the Realcomp Approved Websites. (CX 254-002 (“If you consider the fact that the majority of home buyers and sellers want to be able to search for homes on the Internet before they buy or sell, it makes sense for Realtors to not only have Websites, but to also have their listings on those Websites and to provide listing search capabilities.”), CX 35 (Kage, Dep. at 146-47)).
220. The majority of home buyers and sellers want to be able to search for homes on the Internet before they buy or sell. (Kage, Tr. 925).
221. One of the pros of marketing properties through the Internet is “additional exposure for sellers” (CX 53).
222. Realcomp advertises the importance of MoveInMichigan.com, ClickOnDetroit.com and Realtor.com. (CX 98).
223. MoveInMichigan.com, ClickOnDetroit.com, Realtor.com, and Realcomp IDX websites provide value to MLSs and their member brokers. (CX 221-003).
224. One of the services that Realcomp provides its members is taking all of a broker’s listing data and sending it in one feed, “rather than each office having to have the technology within their own office to provide that service.” (CX 36 (Kage, IHT at 50)).

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225. Realcomp started giving its members the option of having MLS listing information on public real estate websites at the request of its broker members. (CX 36 (Kage, IHT at 50)).
226. When a listing is added or updated in the Realcomp MLS, the listing is automatically updated on Realtor.com, MoveInMichigan.com, ClickOnDetroit.com, and all of the IDX websites. (Kage, Tr. 931-32; CX 35 (Kage, Dep. at 30)).

**(A) Realtor.com**

227. Realcomp sends MLS listing information to Realtor.com, a national publicly accessible website affiliated with NAR, that contains for sale listings. (CX 36 (Kage, IHT at 46); Kage, Tr. 949; CX 20; CX 21). Realtor.com contains listing information from anywhere in the country. (Kage, Tr. 949).
228. Realcomp has an agreement with Realtor.com to allow Realcomp's MLS listings to be included on Realtor.com. (CX 19-CX 21).
229. The majority of Realcomp members send their listings to Realtor.com through the Realcomp MLS. (Kage, Tr. 931; CX 36 (Kage, IHT 47)).
230. In January 2007, Realcomp had 1,723 offices representing 13,184 Realcomp members participating in Realtor.com. (CX 33-014; CX 228-007; CX 35 (Kage, Dep. at 79-83)).

**(B) MoveInMichigan.com**

231. MoveInMichigan.com is a Realcomp-owned and operated publicly accessible website for showing Realcomp members' property listings for sale. (Kage, Tr. 932; CX 36 (Kage, IHT at 48)). MoveInMichigan.com is a valuable portal for any Michigan home buyer or seller, because it allows

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consumers to search for Realcomp real estate listings in Southeastern Michigan. (CX 36 (Kage, IHT at 71); CX 15; CX 222-009).

232. Realcomp unveiled MoveInMichigan.com in August 2002, telling members that it was an “additional value-added service and expanded Internet exposure!” (CX 102).
233. Realcomp controls all of the content on MoveInMichigan.com. (Kage, Tr. 932).
234. Realcomp highlights the importance of MoveInMichigan.com to its members and potential members: “This public Website allows consumers to search for Michigan real estate that has been listed by Realcomp II Ltd. Subscribers . . . This value-added service is offered to Realcomp II Ltd. Subscribers free of charge.” (CX 222-009; CX 224-002-003; CX 272; CX 15).
235. Realcomp describes MoveInMichigan.com to consumers as “one of the most comprehensive real estate listing sites in all of Southeastern Michigan.” (CX 15).
236. Realcomp highlighted to its members that Open Houses added to the Realcomp MLS would automatically be added to MoveInMichigan.com: “Open Houses display complete with a photo, property details, a map, driving directions and more.” (CX 266-001-003).
237. ClickOnDetroit.com is a Michigan website owned by a local TV station. (Kage, Tr. 936; CX 36 (Kage, IHT at 48)).
238. ClickOnDetroit.com frames the MoveIn Michigan.com website, allowing consumers to see all of the listings available on MoveInMichigan.com through the ClickOnDetroit.com website. (CX 36 (Kage, IHT at 49)).

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239. All of the Board of Governors were in agreement that Realcomp should enter into an exclusive advertising agreement with ClickOnDetroit.com. (CX 41 (Mulvihill, Dep. at 29, 32-33); CX 179).
240. Realcomp highlights the importance of ClickOnDetroit.com to its current and potential members:

MoveInMichigan.com is the exclusive provider of data for WDIV's real estate page on ClickOnDetroit.com. This public website operated by WDIV Channel 4 is the #1 local website in Southeast Michigan receiving over 3.3 million clicks a month. The ClickOnDetroit.com website actually frames specific functions of Realcomp's MoveInMichigan.com website, sending consumers searching for Realtors, properties and Open Houses to you and your listings.

(CX 222-009-010; *see also* CX 224-002-003; CX 35 (Kage, Dep. at 52-55, 157-67); CX 259-CX 263; CX 272; Kage, Tr. 937).

**(ii) The Realcomp IDX**

241. Realcomp member IDX websites are important websites for listing brokers and home sellers intending to reach home buyers directly. (CX 557-A-027; CX 373-046).
242. The Realcomp IDX is the Internet Data Exchange service that affords Realcomp members the option of authorizing the display of their active listings on other Realcomp members' websites. (JX 1-07; CX 36 (Kage, IHT at 51); Kage, Tr. 947). Home sellers have a choice of whether or not they want their listings included in the Realcomp IDX feed. (CX 35 (Kage, Dep. at 11-12); CX 100-024).

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243. Realcomp broker members can use the Realcomp IDX feed to populate their own websites. (Kage, Tr. 947-48).
244. Realcomp broker members can then allow their agents to “frame” the broker website. (Kage, Tr. 945; CX 13-002).
245. “Framing” means displaying third-party information (such as MLS listing data) within a company’s or individual’s proprietary border. (Kage, Tr. 947).
246. Agents can frame the MLS listing information received by their broker. (Kage, Tr. 946 (“If a consumer accesses an agent’s website, and there’s an option there that says search for property, the consumer could choose that option and what would open up would be a new box that would be actually the broker’s website that would then have that listing data in it.”)).
247. Realcomp highlights the importance of Internet advertising to its current and potential members: “Internet Data Exchange (IDX) - IDX is an optional service that enables Realcomp II Ltd. Broker participants to display their active listings on Realtor Websites affiliated with Realcomp II Ltd.’s IDX program.” (CX 222-009; CX 35 (Kage, Dep. at 47); CX 224-002-003).
248. The inclusion of photos in Realcomp’s IDX feed is a significant benefit to Realcomp members: “IDX now includes the availability of multiple property photos. The ability to display multiple photos on listings being advertised through Internet Data Exchange has long been awaited and is now available.” (CX 259-002; CX 35 (Kage, Dep. at 159-60); Kage, Tr. 949; CX 13-003).
249. The majority of Realcomp member brokers participate in the IDX. (Kage, Tr. 931; CX 245). As of January 2007, 82% of agents were licensed to brokers

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who said they would participate in the Realcomp IDX. (Kage Tr. 948-49).

**c. Other Realcomp MLS Member Services****(i) Data-Sharing**

250. One of the ways Realcomp is able to have so many MLS properties in its database is through data-sharing agreements. (Kage, Tr. 914).
251. Data-sharing agreements enable Realcomp members to see listings from other multiple listing services in the area without having to pay double dues. (Kage, Tr. 914; CX 36 (Kage, IHT at 14-15); CX 42 (Nead, Dep. at 58-59)).
252. Data-sharing increases the number of potential cooperating brokers for Realcomp listings. (Kage, Tr. 914-15).
253. Realcomp has data-sharing arrangements with the Flint Association of Realtors, Lapeer and Upper Thumb Association of Realtors, Ann Arbor Area Board of Realtors, Jackson Association of Realtors, Lenawee Association of Realtors, Monroe Association of Realtors, and the Down River Association of Realtors. (CX 36 (Kage, IHT at 182-83, 185); Kage, Tr. 916-17; CX 26).
254. The Flint Association of Realtors and the Lapeer and Upper Thumb Association of Realtors have combined their services, and together have one MLS. (CX 36 (Kage, IHT at 183)).
255. Realcomp has an agreement to exchange passwords with the Jackson Association of Realtors, Lenawee Association of Realtors, Monroe Association of Realtors, and the Down River Association of Realtors, enabling members of Realcomp and each of these Associations to access each others' MLS databases

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without paying duplicate dues. (CX 36 (Kage, IHT at 184-86,190-91); CX 26).

256. Through the data-sharing agreements in which passwords are exchanged, Realcomp members have access to additional listings that are not included in the over 548,000 MLS properties in the Realcomp MLS database. (Kage, Tr. 920-21).
257. Realcomp highlights its data-sharing agreements to potential members. (CX 222-007; CX 255-001).
258. Realcomp's data-sharing agreements increase the number of potential viewers for each Realcomp listing. (CX 271 (it is "an increased number of Realcomp listings being searched."); CX 257; CX 35 (Kage, Dep. at 150-51, 188)).
259. Realcomp's data-sharing agreements increase the amount of data available to Realcomp members at no additional cost. (CX 224-002).
260. Realcomp's data-sharing agreements resulted in an overall cost savings of \$420,000 per year in 2003 for Realcomp subscribers through the data-sharing agreements. (CX 279-002).
261. Data-share partners who take advantage of Realcomp's Listing Submission Service have to agree to abide by the Realcomp Rules and Regulations. (CX 273; CX 35 (Kage, Dep. at 192); CX 40 (Elya, Dep. at 48-49)).
262. One of the reasons that Realcomp signed data-sharing agreements with eight other MLSs was to help Realcomp members avoid paying duplicate MLS fees. (CX 274-CX 276, CX 278; CX 35 (Kage, Dep. at 192-99); JX 1-06).
263. Realcomp's data-sharing arrangements were also motivated, at least in part, by a desire to increase the number of listings available to Realcomp members. (JX 1-06).

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264. Realcomp does not send Ann Arbor's listings to Realtor.com and Ann Arbor does not send Realcomp's listings to Realtor.com. (CX 36 (Kage, IHT at 188)).
265. Realcomp charges its data-share participants that submit listings directly to Realcomp \$125 per listing if they want "Publication on MLS, IDX database, Internet, Open Houses if applicable & Home Preview Channel." (CX 273-001).

**(ii) New Technologies**

266. Realcomp offers its members ShowingAssist, which improves how home showings are scheduled, confirmed and recorded. (CX 214-002; CX 225; CX 35 (Kage, Dep. at 55-58)).
267. Realcomp offers its members Realcomp Mobile, which enables members to access the Realcomp MLS on any hand-held device that has Internet access. (Kage, Tr. 957; CX 377).
268. Realcomp gives its members the opportunity to advertise their listings on the Home Preview Channel, a cable television channel in Michigan that showcases real estate properties. (Kage, Tr. 953; CX 222-008; CX 35 (Kage, Dep. at 46, 184-85)).

**(iii) Information Provided**

269. Realcomp puts out a Statement of Real Property Information Services, aimed at giving information about Realcomp to potential members. (Kage, Tr. 911-12; CX 627).
270. In January 2007, and in May 2007, Realcomp put out a Statement of Real Property Information Services on the Realcomp website. (CX 222; CX 627).
271. As of May 2007, the Realcomp MLS included 548,441 MLS properties. (Kage, Tr. 912-13).



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272. Realcomp offers its members a public record database which contains information on every single parcel of land within a particular county so that members can see taxes, dimensions, mortgage, and other information. (Kage, Tr. 954; CX 61).
273. The Realcomp public record database contains over 6,799,000 public records. (CX 222-004; Kage, Tr. 955).
274. In January 2007, Realcomp advertised that it was “the ONLY Multiple Listing Service in Michigan that offers integrated MLS and PRO information . . . at NO ADDITIONAL COST to the MLS Subscriber.” (CX 222-004; Kage, Tr. 955).
275. Realcomp members can use the public record database, in conjunction with the MLS database, to determine comparables for a particular property. (Kage, Tr. 955-56).
276. Realcomp members also have access to historical sales information and information about the prices of comparable homes. (CX 42 (Nead, Dep. at 37-38). There is no other good source of information regarding comparable active listings. (CX 42 (Nead, Dep. at 39-40)).

**D. Adjacent Multiple Listing Services**

277. MiRealSource is the MLS located to the east of Realcomp. (CX 36 (Kage, IHT at 17)). MiRealSource also serves Southeastern Michigan. (JX J-08; Kage, Tr. 1057-58; CX 407 (Bratt Dep. at 8-9, 73-74).
278. There are numerous members of MiRealSource who are also members of Realcomp, because of the overlapping areas in Macomb county and parts of Oakland county. (CX 36 (Kage, IHT at 17); CX 55).
279. Realcomp and MiRealSource have had numerous discussions over several years about the possibility of

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merging to create one MLS. (CX 36 (Kage, IHT at 17-18); CX 14-001; CX 45, CX 51).

280. Realcomp and MiRealSource have discussed data-sharing and merger possibilities in part so that their members could stop paying double MLS dues. (CX 36 (Kage, IHT at 192, 198); CX 50-CX 51; CX 55; JX 1-06).
281. The Ann Arbor MLS focuses on Washtenaw county, and does not service Oakland, Livingston, or Macomb counties. (Hepp, Tr. 655, 658-59).

**E. Relevant Market****1. Product Markets**

282. A relevant product market is the set of products or services, if any, that constrain the ability of the supplier of the product in question to behave anticompetitively. (CX 498-A-021).
283. The standard economic framework for defining relevant antitrust markets is to identify the smallest group of products for which a “hypothetical monopolist” of such product could profitably impose a “small but significant and nontransitory increase in price” (SSNIP). (CX 498-A-021).
284. The assessment of whether a hypothetical monopolist would be able to profitably increase its prices above competitive levels involves an examination of the extent to which consumers could substitute to other products or services in response to such a price increase. (CX 498-A-021).
285. There are two relevant product markets in this case. The first market is for residential real estate brokerage services, which is the output market. (F. 287-97; Williams, Tr.1102; CX 498-A-021). The second market is for multiple listing services, which is the

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input market. (F. 298-315); Williams, Tr. 1102-03; CX 498-A-021).

286. Realcomp's members are in the real estate brokerage services market. (Williams, Tr.1107). Realcomp competes in the multiple listing services market. (Williams, Tr.1107).

**a. Real Estate Brokerage Services: the Output Market**

287. The relevant output product market is the supply of real estate brokerage services to home sellers and buyers of residential real estate. (CX 498-A-022). For the majority of home sellers and buyers, there are no reasonable substitutes to real estate brokerage services. (CX 498-A-022).
288. For a home seller, the only alternative to selling a home using a real estate broker is to sell the home on his or her own, which is typically referred to as for-sale-by-owner ("FSBO"). (CX 498-A-022). For the majority of home sellers, selling FSBO is not a reasonable substitute for using a real estate broker due to the significant advantages of using a real estate broker for selling a home. (CX 498-A-022).
289. One primary benefit of using a real estate broker is the ability to list the home in an MLS. (CX 498-A-022; F. 102-04). FSBO properties cannot be listed in an MLS because only members of the MLS, which must be real estate brokers, are permitted access to the MLS. (CX 498-A-022; F. 106-08).
290. The vast majority of home sellers hire the services of a listing broker to assist in the sale of their home. (CX 498-A-022). In 2006, FSBO transactions comprised only about 12% of real estate transactions. (CX 498-A-022; CX 373-083).
291. The vast majority of houses sold by real estate brokers are listed on an MLS. (CX 498A-022; CX 373-080)

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(showing 88% of home sellers using agents had homes listed on MLS)).

292. Selling FSBO is not a viable substitute for most home sellers because a significant portion of FSBO properties are sold to persons known by the home seller. (CX 498-A-022- 023). In 2006, of the 12% of houses sold by homeowners without the assistance of a broker (*i.e.* FSBO sales), approximately 40% were sold to persons known to the home seller such as family members or friends. (CX 498-A-023; CX 373-072).
293. In 91% of all residential real estate transactions, the home seller did not know the home buyer. (CX 498-A-023; CX 373-072). In these instances, only 4% of home sellers sold the property without a real estate broker. (CX 498-A-023; CX 373-072).
294. These statistics show that listing a home in an MLS is particularly important. (CX 498-A-023). Because FSBO sellers cannot list on the MLS, most home sellers will not perceive FSBO as a viable substitute for brokerage services. (CX 498-A-023).
295. A hypothetical monopolist of real estate brokerage services would be able to profitably increase commissions significantly above competitive levels. (CX 498-A-023). Such a price increase would be profitable because the vast majority of home sellers would not be willing to switch to selling their homes on their own (FSBO) in response to a price increase by a hypothetical monopolist of brokerage services. (CX 498-A-023).
296. Applying the standard market definition framework, a relevant product market is real estate brokerage services and does not include FSBOs. (CX 498-A-023).
297. Respondent's expert did not contest Complaint Counsel's expert's conclusion that the relevant output

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market in this case is the market for real estate brokerage services. (CX 557-A-008).

**b. Multiple Listing Services: the Input Market**

298. The relevant input market is the supply of multiple listing services to real estate brokers, which is the market in which Realcomp competes. (F. 299-315; CX 498-A-023; Williams, Tr. 1107).
299. There are various outlets where a real estate broker can list a property for sale (*e.g.*, print classified ads), but only an MLS uniformly provides for an offer of compensation to a cooperating broker. (CX 498-A-023-024; F. 111-13). Without access to the MLS, cooperating brokers would be required to directly contact (*e.g.*, by phone, fax, or email) the listing broker or home seller, significantly increasing the time involved in searching on behalf of home buyers. (CX 498-A-024).
300. Because the MLS is an important input for cooperating brokers searching on behalf of home buyers, the MLS is also an attractive venue for listing brokers to advertise houses being sold. (CX 498-A-024).
301. The greater the number of cooperating brokers using the MLS to search for homes, the shorter the expected time required to sell a home and/or the higher the expected offer price and thus the greater the value of the MLS to listing brokers. (CX 498-A-024).
302. The greater the number of listing brokers that list homes on the MLS, the greater the number and variety of homes available to cooperating brokers to choose from, which makes it more likely that cooperating brokers will quickly find a match for a home buyer and hence the greater the value of the MLS to cooperating brokers. (CX 498-A-024).
303. Multiple Listing Services exhibit “network effects.” (Williams, Tr. 1108; CX 498-A-024).

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304. “Network effects” are a type of demand-side economies of scale that occur when the value of a product or service to a customer depends on the number of other customers who also use the product or service. (CX 498-A-019).
305. Network effects exist where the value or quality of a service to one user increases as the number of other users of the same service increases. (Williams, Tr. 1108; CX 498-A-024). The classic example of network effects is a telephone network - the value of the telephone network increases as more users join the network, allowing a user to be able to call more persons. (Williams, Tr. 1108).
306. An MLS exhibits network effects from both sides of the market. (Williams, Tr. 1109).
307. From a home seller’s (or listing broker’s) point of view, the MLS is more valuable the more home buyers (or cooperating broker’s) are viewing the MLS. (Williams, Tr. 1109-10). The value of the MLS to listing brokers increases as the number of cooperating brokers increases because (a) the expected selling price increases with the number of home sellers that demand the house and/or (b) the time required to sell the house at a given asking price decreases. (CX 498-A-024).
308. From the home buyer’s (or cooperating broker’s) perspective, the MLS becomes more valuable as more home sellers (or listing brokers) have listed their properties on the MLS. (Williams, Tr. 1109-10). The value of the MLS to cooperating brokers searching for homes increases as the number of listings increases because (a) the closeness of the match between home characteristics will be greater for a given amount of time devoted to search and/or (b) the expected amount of time required to achieve a given match will decrease. (CX 498-A-024).
309. These forces reinforce one another such that both listing brokers and cooperating brokers will achieve

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greater efficiencies in the provision of brokerage services if they use an MLS. (CX 498-A-024).

310. The implications of network effects for brokers is that a broker that does not have access to the MLS is likely to be at a disadvantage vis-a-vis brokers with access. (Williams, Tr.1110). Because efficiencies grow with the number of users, other sources of listing services with fewer users are not economically viable substitutes for an MLS. (CX 498-A-024-25).
311. Listing brokers who do not have access to the MLS, and thus are required to advertise their listing by means other than an MLS, can expect that fewer cooperating brokers will see the property such that, at a given asking price, the likelihood of a sale will be lower and, if a sale occurs, the expected time to sell will be longer, all else equal. (CX 498-A-025).
312. Cooperating brokers who are unable or unwilling to use the MLS will need to contact listing brokers or home sellers directly to learn the compensation offer and at the same time may need to search over multiple sources in order to identify the same number and type of houses being offered for sale that are available on the MLS. (CX498-A-025). As a result, search costs, including time costs, would increase significantly compared to the search costs of using the MLS. (CX 498-A-025).
313. Brokers without full access to an MLS would therefore be at a significant competitive disadvantage. (CX 498-A-025).
314. Consistent with these benefits of using an MLS, the overwhelming majority of real estate brokers are members of an MLS and list all homes for sale in an MLS. (CX 498-A-025).
315. Applying the standard economic framework for defining relevant markets, the net result is that a hypothetical monopolist of MLS listing services would

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be able to implement a “small but significant and non-transitory increase in price” for access to the MLS because few brokers could withdraw from participating in an MLS even if the fees or other costs associated with participation substantially increased. (CX 498-A-025).

**2. Geographic Market**

316. The relevant geographic market defines the geographic scope of competition within a relevant product market. (CX 49S-A-025).
317. In defining the relevant geographic market, the objective is to identify the smallest geographic area in which a “hypothetical monopolist” could profitably impose a SSNIP above competitive levels. (CX 498-A-025). This assessment involves an examination of whether consumers could substitute to suppliers in other geographic areas in response to such a price increase. (CX 498-A-025).
318. In the case of multiple listing services, the scope of the geographic market will largely be determined by degree of substitutability between neighborhoods for home buyers. (CX 498-A-026). Suppose that a hypothetical monopolist of multiple listing services in a particular geographic area, implements a supracompetitive price increase for all houses listed in that MLS that are located in that area. (CX 498-A-026). For brokers representing home buyers and sellers in that particular area, MLSs prevalent in adjoining geographic areas are not effective substitutes to the hypothetical monopolist of MLS services in that particular area because a listing in an adjacent MLS will not be seen by the majority of cooperating brokers and home buyers searching for a home in that particular area. (CX 498-A-026).
319. Under the scenario in F. 318, listing brokers representing the sellers of homes located in the relevant geographic area cannot substitute away from



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MLS listing services in that area. (CX 498-A-026). Any broker representing the seller of a home located in that particular area would face the supracompetitive price for MLS listing services for houses located in that area. (CX 498-A-026). The higher cost of MLS listing services in the relevant area will be passed on in the form of higher brokerage fees for brokerage services supplied in that particular area. (CX 498-A-026).

320. Under the scenario in F. 318, for cooperating brokers working with home buyers in the relevant area, MLSs in adjacent geographic areas are not effective substitutes because the vast majority of homes for sale in the relevant area will be listed in the MLS of the hypothetical monopolist in the relevant area. (CX 498-A-026).
321. Network effects make the geographic markets for MLS listing services local in nature. (CX 498-A-026). As explained by Karen Kage, “location, location, location remains a guiding principle in real estate.” (CX 221-001).
322. The National Association of Realtors reports that real estate markets are local in nature. (CX 137-007).
323. Realcomp Governors admit that real estate markets are local in nature. (CX 40 (Elya, Dep. at 15)).
324. Home buyers can defeat an increase in the price of brokerage services in the relevant area only by buying a house in a neighborhood other than that particular area where the supracompetitive listing fees apply. (CX 498-A-026). If, for example, many home buyers consider an adjacent neighborhood a substitute for the relevant area in terms of house location, then that area is not the relevant geographic market. (CX 498-A-026). If, however, most home buyers are unwilling to purchase a house in a neighborhood other than the given area where supracompetitive MLS listing fees lead to elevated brokerage fees, then that particular

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area is a relevant geographic market for MLS listing services. (CX 498-A-026).

325. Applying the hypothetical monopolist framework generally to various subsets of an MLS service area, starting with any local geographic area (*e.g.*, neighborhoods or groups of neighborhoods), the relevant geographic markets will be determined by the degree of substitutability between neighborhoods for home buyers. (CX 498-A-026-027).
326. The main counties that Realcomp services are Livingston, Wayne, Macomb, and Oakland. (Kage, Tr. at 1059).
327. Data from Realcomp shows that {■■■■■■■■} of the listings on Realcomp are in those four counties. (Williams, Tr. 1113, *in camera*; CX 498-028, *in camera*; CX 499, *in camera*; illustrated in OX 6-001, *in camera*). Each of the other counties in which Realcomp has listings account for {■■■■■■■■■■■■} of Realcomp's listings. (Williams, Tr. 1113, *in camera*; CX 498-028, *in camera*; CX 499, *in camera*; illustrated in DX 6-001, *in camera*).
328. The relevant geographic market in this case are four counties in Michigan: Wayne, Oakland, Livingston, and Macomb. (Williams, Tr. I 106).

### 3. Network Effects and Barriers to Entry

329. The network effects inherent in MLSs suggest that market share is a good indicator of market power because the value of the MLS increases with the number of users. (Williams, Tr. 1110; CX 498-A-027).
330. Because of network effects in MLS listing services, the value of an MLS with a high market share in a given geographic market will be much greater to brokers (and home buyers and sellers) than the value of an MLS with a small market share. (CX 498-A-027). The greater the market share, the bigger the network

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effects and then the more likely the MLS is going to have much greater value to users. (Williams, Tr. 1110).

331. Network effects in the market for multiple listing services therefore create barriers to entry. Because of network effects, competitors cannot easily expand their share of listings. (CX 498-A-027).
332. Network effects create barriers to entry because such a shift in shares would require that both cooperating brokers and listing brokers simultaneously switch to the competing MLS. (CX 498-A-027-028). A listing broker has little incentive to list a property in an MLS with a small market share in a given area because there will be few cooperating brokers searching such an MLS for homes in that area. (CX 498-A-027). Similarly, a cooperating broker has little incentive to search an MLS with a small share of listings. (CX 498-A-027-028).
333. Successful entry by a rival MLS is improbable because of high collective switching costs. (CX 498-A-029).
334. Because of network effects, an individual listing broker has little or no unilateral incentive to switch to an alternative MLS in response to, *e.g.*, an increase in listing fees by the MLS, because there would be few, if any, cooperating brokers working with home buyers using the alternative MLS. (CX 498-A-030).
335. Because of network effects, an individual cooperating broker has little or no incentive to switch in response to an increase in the price of MLS listing services because there would be few, if any, listings to search. (CX 498-A-030).
336. Consequently, brokers on both the selling and buying sides will not perceive an alternative MLS as an economically viable substitute to the hypothetical MLS monopoly. (CX 498-A-030).

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337. MiRealSource is not an effective substitute for Realcomp. From 2002 to 2006, MiRealSource had {■■■■■■■■■■} listings in each area of Livingston county, most of Wayne county, and the majority of Oakland county. (Williams, Tr. 1123-24, *in camera*; CX 559, *in camera*; CX 557-017-018, *in camera*). In contrast, Realcomp had {■■■ ■■■} listings in almost all of Wayne, Oakland, and Livingston counties and in a majority of Macomb county. (CX 559, *in camera*). And, Realcomp had {■■■■■■■■} listings in substantial portions of each of these counties. (CX 559, *in camera*).
338. {■■■■■■■■■■■■■■■■■■■■} of MiRealSource members are also members of Realcomp. (CX 557-017, *in camera*). This suggests that for these brokers that are dual members, MiRealSource is *not* an effective substitute to Realcomp in certain geographic areas. (CX 557-A-017). If MiRealSource and Realcomp were effective substitutes in all areas where these brokers operate, then such dual membership would not be necessary. (CX 557-A-017).

#### 4. Realcomp's Market Shares

##### a. Market Share of New Listings

339. To calculate Realcomp's market share, Complaint Counsel's expert, Dr. Darrell Williams, used the listing data from Realcomp, MiRealSource, and all of Realcomp's data-sharing partners. (Williams, Tr. 1111). Dr. Williams first calculated Realcomp's share of "new listings" -- homes that were newly listed during a particular month. (CX 498-A-028; *see also* Williams, Tr. 1114, *in camera*). New listings include all listing types (*e.g.*, Exclusive Right to Sell and Exclusive Agency listings). (CX 498-A-028; *see also* Williams, Tr. 1120, *in camera*).
340. Realcomp's market share in terms of new listings for Wayne, Oakland, Livingston, and Macomb counties for 2002 to 2006 was {■■■■}. (Williams, Tr. 1114,

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*in camera*; CX 498-028, *in camera*; CX 505, *in camera*; illustrated in DX 6-003, *in camera*).

341. Since competition is likely to occur at the county level, and may even occur in more local areas, Dr. Williams also calculated market shares on a county basis. (CX 498-A-028-029). These calculations show that Realcomp's market share in terms of new listings in Wayne county is{■■■■},in Oakland County it is {■■■■}, in Livingston county it is {■■■■}, and in Macomb county it is{■■■■}. (Williams, Tr. 1115, *in camera*; CX 498-028, *in camera*; CX 506, *in camera*; see also CX 501-05, *in camera*; illustrated in OX 6-004, *in camera*).
342. Viewing Realcomp's market share in terms of new listings on a zip code basis demonstrates that Realcomp has a large market share in each county. (Williams, Tr.1115-16, *in camera*; CX 498-028, *in camera*; CX 507, *in camera*; illustrated in DX 6-005, *in camera*). Realcomp has an over {■■} market share of new listings in almost all of Wayne county and the vast majority of Oakland and Livingston counties. (Williams, Tr. 1115-16, *in camera*; CX 498-028, *in camera*; CX 507, *in camera*; illustrated in DX 6-005, *in camera*).

**b. Market Share of Unique Listings**

343. Market shares based on new listings, however, may understate the extent to which the Realcomp MLS is important to brokers. (CX 498-A-028; see also Williams, Tr. 1116, *in camera*). Particularly in areas in which two MLSs overlap, brokers may list on both MLSs. (CX 498-A-028; see also Williams, Tr. 1116-17, *in camera*). For instance, at the border of Macomb and Oakland counties, Realcomp has a lower share of new listings because Realcomp and MiRealSource overlap in that area. (Williams, Tr. 1117, *in camera*).
344. If there were 100 total listings and each was listed on both Realcomp and MiRealSource, Realcomp's share

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of new listings would only be 50% even though 100% of the listings are on Realcomp. (CX 498-A-029; *see also* Williams, Tr. 1117-18, *in camera*; illustrated in DX 6-006, *in camera*). The fact that 100% of the listings in that area are on the Realcomp MLS indicates that the Realcomp MLS is very important for the purpose of marketing the homes. (CX 498-A-029; *see also* Williams, Tr. 1118, *in camera*).

345. Because the share of new listings may understate the importance of the Realcomp MLS, Dr. Williams also calculated Realcomp's share of "unique" listings -- the share of all listed homes that are listed on Realcomp (whether or not listed on another MLS). (CX 498-A-028-029; Williams, Tr. 1118-19, *in camera*). Unique listings include all listing types (*e.g.*, Exclusive Right to Sell and Exclusive Agency listings). (CX 498-A-028-029; *see also* Williams, Tr. 1120, *in camera*).
346. Realcomp's market share in terms of unique listings for Wayne, Oakland, Livingston, and Macomb counties for 2002 to 2006 was {■■■■■}. (Williams, Tr. 1120-21, *in camera*; CX 498-029, *in camera*; CX 512, *in camera*; illustrated in DX 6-008, *in camera*).
347. Realcomp's market share in terms of unique listings in Wayne county is {■■■■■}, in Oakland county it is {■■■■■}, in Livingston county it is {■■■■■}, and in Macomb county it is {■■■■■}. (Williams, Tr. 1121, *in camera*; CX 498-029, *in camera*; CX 513, *in camera*; *see also* CX 508-012, *in camera*; illustrated in DX 6-009, *in camera*). These shares demonstrate the importance of the Realcomp MLS to brokers listing homes in those four counties. (Williams, Tr. 1121).
348. Viewing Realcomp's market share in terms of unique listings on a zip code basis demonstrates that Realcomp has a large market share in each county. (Williams, Tr.1121-22, *in camera*; CX 498-029, *in camera*; CX 514, *in camera*; illustrated in DX 6-010, *in camera*). Realcomp has an over {■■■■■} market share of the new listings in almost all of Wayne

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county, Oakland, and Livingston counties. (CX 507, *in camera*; illustrated in DX 6-010, *in camera*).

**F. The Nature of the Challenged Restraints****1. The Challenged Restraints****a. The Website Policy**

349. The Website Policy refers to rules adopted and approved by Realcomp that prevent Exclusive Agency, Limited Service and MLS Entry Only listings from being sent to the “Approved Websites.” (JX 1-07; CX 100-005; Kage, Tr. 974-75).
350. The Approved Websites are: Realtor.com; MoveInMichigan.com; and the Internet Data Exchange (“IDX”). (CX 32-006 (Answer); Kage, Tr. 925-26).
351. Realtor.com is the official website for the National Association of Realtors® (“NAR”), whose domain address is owned by NAR. (CX 412 (Goldberg, Dep. at 24-25). *See also* F. 227-30).
352. MoveInMichigan.com is a website that Realcomp owns and operates for the purpose of providing information on properties, brokers and agents. ( Kage, Tr. 932-33; CX 258). ClickOnDetroit.com frames MoveInMichigan.com. (Kage, Tr. 925-26, 947). *See also* F. 231-40.
353. Through the IDX, broker websites are able to display listing information from their local MLS database so that consumers can go to the broker’s website and search for available properties of all participating MLS members. (Murray, Tr. 208-10; CX 405 (Baczkowski, Dep. at 85). *See also* F. 241-49).
354. Realcomp provides listing information to the public websites of its broker members, known as “IDX websites.” (Murray, Tr. 208-10). Eighty-two percent of Realcomp’s members authorized their listing data to be

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included in the IDX feed. (Kage, Tr. 948-49). Offices that are members of Realcomp that participate in the IDX system can use and publish listings on their own websites, their private websites or office websites. (Murray, Tr. 208; Mincy, Tr. 337).

355. The Website Policy was adopted in 2001 (Kage, Tr. 958-59), but was not enforced until 2004 when Realcomp also put into place the Search Function Policy and, in turn, required members to designate the listing type, rather than making that optional. (Kage, Tr. 964-65; CX 18).
356. The current Realcomp Rules and Regulations were adopted in October 2006. (CX 100-001).
357. Realcomp enforces the Website Policy through the October 2006 Rules and Regulations. (Kage, Tr. 988-89).
358. The October 2006 Realcomp Rules and Regulations state: “Exclusive Agency, Limited Service and MLS Entry Only Listings will not be distributed to any Real Estate Internet advertising sites.” (CX 100-005; CX 35 (Kage, Dep. at 9); Kage, Tr. 974-75). Realcomp enforces this rule. (CX 100-013-016; CX 35 (Kage, Dep. at 9); CX 90).
359. The October 2006 Realcomp Rules and Regulations continue to state: “Listing information downloaded and/or otherwise displayed pursuant to IDX shall be limited to properties listed on an exclusive right to sell basis.” (CX 100-025; CX 35 (Kage, Dep. at 13-14); Kage, Tr. 984-86). Realcomp enforces this rule. (CX 100-025; CX 35 (Kage, Dep. at 13-14); CX 90).
360. The October 2006 Realcomp Rules and Regulations further state: “Non-MLS listings shall not be commingled with MLS listings on the Participant’s Internet Website.” (CX 100-026; CX 28-00 I). The rule “means properties that are not listed through an MLS [such as For Sale By Owner listings] cannot be co-



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mingled with the Realcomp listings,” on a broker’s website. (CX 35 (Kage, Dep. at 14-15); Kage, Tr. 986).

**b. The Search Function Policy**

361. The “Search Function Policy” refers to the default setting adopted by Realcomp in 2003, whereby all searches on the Realcomp MLS automatically are configured to include only Full Service/Exclusive Right to Sell listings and unknown listings. (CX 32-006 (Answer); CX 18-003; Kage, Tr. 965-66; CX 415 (Nowak, Dep. at 44); CX 36 (Kage, IHT at 72).
362. When agents enter into Realcomp Online, the Quick Search page comes up and displays the “Listing Type” choices. (Kermath, Tr. 749; RX 42-002).
363. Prior to April 2007, in order to see all of the available listing types in the Realcomp MLS (ERTS, EA, MLS Entry Only, and unknown), Realcomp members needed to specifically select the different listing types they wished to see or to select the button labeled “select all listings.” (Kage, Tr. 1042; CX 36 (Kage, IHT at 73-74)).
364. As a result of the Search Function Policy, prior to April 2007, if an agent wished to see EA listings he or she needed either to select the “all listings” or the “EA listings” button. Similarly, if an agent did not wish to see ERTS listings, he or she needed to de-select the “ERTS listings” button. (Kage, Tr. 963, 1042).
365. In addition, an agent can search for all properties by the MLS number. (D. Moody, Tr.523).
366. A user could permanently turn off or change the search default so that EA listings were always included in the output by saving changes to their settings. (Kage, Tr. 1048-49; CX 36 (Kage, IHT at 92-93)).

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367. To override the search default to run a search that includes all listings is very simple. (G. Moody, Tr. 878; Kage, Tr. 1048-49; RX 159). It does not require extra onerous steps to search all listings. (CX 415 (Novak Dep. at 45-46)). Instead, it requires one additional click of the mouse to see all listings. (Kage, Tr. 1039).
368. Agents with Exclusive Agency listings acknowledged they did not require any special training to learn how to override the search default. (D. Moody, Tr. 551; CX 526 (Groggins, Dep. at 43)).
369. A practical requirement of the job of a real estate agent is to be able to use a computer and log onto and use the MLS. (Sweeney, Tr. 1336-37; Murray, Tr. 264).
370. On April 27, 2007, Realcomp changed its Rules to repeal the Search Function Policy. (CX 626; Kage, Tr. 1045-47).
371. On April 27, 2007, the Realcomp Board of Governors passed the following motion:

A MOTION was made, SECONDED, and CARRIED to adopt Ms. Kage's recommendation to remove the "Listing Type" defaults that are currently on the search screen of RealcompOnline® and separate "Listing Type" from "Service Levels" making these mandatory fields that must be answered when users perform searches for properties and load listings. Additionally, a feature group for "Services Offered" will be added to all listings.

(CX 626-003).

**c. The Minimum Services Requirement**

372. In 2004, the Realcomp Policy manual was amended to include the following language:

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“The Listing Type field must be properly indicated to show the amount of contracted services that are to be provided as part of the listing agreement. The Listing Type must indicate if the listing is an Exclusive Right to Sell/Full Service, MLS Entry Only, Limited Service or Exclusive Agency contract . . .”

(CX 8-007).

373. Realcomp required its members to check a box disclosing the listing type for every listing entered into the Realcomp MLS. (CX 36 (Kage, IHT at 44-45)). A listing would not be accepted into the Realcomp MLS unless a listing type box was checked. (CX 36 (Kage, IHT at 45)).
374. Prior to April 27, 2007, under Realcomp’s rules, brokers listing properties were required to provide full service brokerage services if they wanted their listing to be considered an Exclusive Right to Sell listing. (CX 10-005; CX 29; CX 35 (Kage, Dep. at 52); *see also* F. 66).
375. On April 27, 2007, the Realcomp Board of Governors voted to eliminate its minimum services definition so that ERTS listings were no longer required to meet Realcomp’s full services definition. (CX 626-003). *See also* Joint Stipulation Regarding Respondent’s Search Function Policy, July 30, 2007 (Realcomp no longer requires that exclusive right to sell listings be full service listings).
376. Prior to April 27, 2007, under Realcomp’s rules, brokers listing properties under Exclusive Right to Sell listings were required to provide full service brokerage services. Further, if a home seller performed any duties that fell under the full service umbrella, the listing would be designated as limited service. (CX 18-003; Kage, Tr. 965-69; CX 100-005; CX 29; CX 35 (Kage, Dep. at 52)).

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377. Prior to April 2007, Realcomp defined the IDX Database in its Rules and Regulations to confirm that all listings other than full service Exclusive Right to Sell listings were excluded. (CX 4-021; CX 36 (Kage, IHT at 107-08 (The IDX rules were adopted separately from the rest of the Realcomp rules, so Realcomp had to make clear that they only included Exclusive Right to Sell listings.))).
378. Under the Realcomp MLS Rules and Regulations, only full service Exclusive Right to Sell listings were included in the IDX feeds to broker member websites prior to April 2007. (CX 36 (Kage, IHT at 52); CX 100-025).
379. Therefore, prior to April 2007, if a listing was not considered “full service,” it was not included in the feed to Realtor.com, MoveInMichigan.com, IDX websites, and not included in the Realcomp MLS search default. (Kage, Tr. 967-68).

**2. Enforcement of the Policies**

380. Realcomp actively enforces the Website Policy and Realcomp members have been fined if they try to submit an Exclusive Agency listing as an Exclusive Right to Sell listing. (CX 36 (Kage, IHT at 58-60, 117-18); CX 22-CX 25).
381. An associate broker for Coldwell Banker in Michigan filed a complaint with Realcomp regarding three listings by Greater Michigan Realty, an unbundled service provider in Michigan who offers both flat fee service and full service at a substantial discount. (CX 22-001; CX 36 (Kage, IHT at 169-71). The broker argued in her letter that all of the listings of Greater Michigan Realty should be “dropped from Realtor.com” because she assumed the listings were limited service. (CX 22-001).
382. In response to this complaint, Realcomp changed the listing type from Exclusive Right to Sell/Full Service

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to Limited Service, causing the listings to be removed from MoveInMichigan.com, Realcomp IDX websites, and Realtor.com. (CX 22-007).

383. Greater Michigan Realty was targeted with numerous complaints because some of its listings were on www.fsbo.com, had a FSBO sign in front of the property, and listed the home seller as the contact reference. (G. Moody, Tr. 841-42; RX 25-004; CX 24-001-002; CX 22-001; CX 23).
384. Realcomp threatened to impose a \$21,000 fine on Greater Michigan Realty (\$1000 fine per listing, with 21 listings at issue) because some home sellers who had entered into Exclusive Right to Sell/Full Service listing agreements with the company, had also taken steps themselves to try to find a buyer. (D. Moody, Tr. 504-07; CX 24-002). Such activity may have included displaying a “for sale by owner” yard sign on the property or advertising the home on a website that featured “for sale by owner” properties. (D. Moody, Tr. 504-07; CX 24-002).
385. Realcomp told another member: “Please be aware Realcomp has received notice that the above referenced listing may have an incorrectly identified Listing Type because it [sic] the seller is the contact and is making arrangements for showings and was submitted as an ERTS/FS Listing Type. This listing has been updated to reflect a Listing Type of Exclusive Agency and a fine has been assessed.” (CX 25-002; CX 36 (Kage, IHT at 58-59)).
386. Realcomp also told its members that the listing agent/office had to be the “exclusive provider” of each required service mandated by Realcomp’s rules in order to be considered a full service listing. (CX 25-003). For example, because in some listings Denise Moody’s listing contract said “we are responsible (with you) for . . .” this did not constitute the listing agent providing that service, and it must be considered limited service. (CX 22-007).

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387. There is no way for a Realcomp member to get their EA listings onto MoveInMichigan.com or ClickOnDetroit.com. (Kage, Tr. 989).

**3. Adoption of the Website Policy and Formulation of the Search Function Policy**

388. The Realcomp Board Minutes accurately describe the actions that the Realcomp Board of Governors took at each of their meetings. (Kage, Tr. 958-60).
389. The Realcomp Board minutes stated that on June 22, 2001, the Realcomp Board of Governors passed several motions regarding Exclusive Agency listings, Limited Service listings, and MLS Only listings, including adopting the Website Policy:

A MOTION was made, SECONDED, and CARRIED to approve the recommendation from the MLS/User Committee to add three new feature options under “Compensation Arrangements” for all property types. These options are:

Exclusive Agency Listing  
 Limited Service Listing  
 MLS Entry Only Listing.

It was further agreed that listings falling within these categories, will not be included in the data that is sent to the real estate Internet advertisers.

(CX 2-003; CX 36 (Kage, IHT at 125-28); Kage, Tr. 959).

390. At the June 2001 Board of Governors meeting, Realcomp decided to research options to limit the exposure of Exclusive Agency, Limited Service and MLS Entry Only listings in the Realcomp MLS. (CX 2-003; CX 36 (Kage, IHT at 129-30)).

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391. On September 28, 2001, after a discussion with legal counsel regarding Limited Service and MLS Entry Only listings, Realcomp adopted another motion regarding the listing information that would be included on the real estate websites:

A MOTION was made, SECONDED and CARRIED to exclude MLS only and limited service listings from all data extracts to the Internet real estate Web sites publishing Realcomp data.

(CX 3-002).

392. At the same Board meeting in September 2001, the idea of the Search Function Policy was again discussed. (CX 3-002). At this meeting, the Realcomp Board of Governors passed a motion “to establish separate search requirements on Realcomp*Online* in order to include MLS only and/or limited service listings in a basic search.” (CX 3-002).
393. In order to implement the Website Policy, Realcomp had to change its extract program (the MLS program that determined what data was included) to only pull listings that were marked Exclusive Right to Sell listings. (CX 36 (Kage, IHT at 57-58)).
394. After the data extract was changed, Realcomp amended its MLS Rules and Regulations in two separate sections stating that these listings were going to be excluded from the real estate websites and also be excluded from the Realcomp IDX member websites: Exclusive Agency, Limited Service and MLS Entry Only listings will not be distributed to any real estate Internet advertising sites. (CX 4-012; *see also* CX 5-007).
395. Realcomp’s decision to exclude Exclusive Agency, Limited Service, and MLS Entry Only listings was deliberate. (CX 36 (Kage, IHT at 53)).

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**4. Consideration of Excluding EA Listings From the Realcomp MLS**

396. In August 2002, the Realcomp Board of Governors reviewed a request to disallow Exclusive Agency, Limited Service, and MLS Entry Only listings as part of the MLS database. (CX 10-003; CX 36 (Kage, IHT at 142-43)).
397. During the August 2002 Board of Governors meeting, the Board discussed the current method of “flagging these listings in Realcomp and the fine for failure to comply.” (CX 10-003).
398. During the August 2002 meeting, the Board discussed NAR’s requirement to include Exclusive Agency, Limited Service and MLS Entry Only listings into the MLS. (CX 10-002-003).
399. NAR’s MLS Antitrust Compliance Policy bars MLSs from “prohibit[ing] or discourag[ing] participants from taking exclusive agency listings.” (CX 381-019, 023 (“Multiple listing services shall not establish or maintain any rule or policy prohibiting inclusion of Exclusive Agency listings that would be otherwise acceptable for inclusion in the compilation of current listing information.”); *see also* CX 382 (advising MLSs that NAR “requires” MLSs to include Exclusive Right to Sell and Exclusive Agency listings on the MLS)).
400. Realcomp at all times pertinent to this matter has permitted agents to enter Exclusive Agency, Limited Service, and MLS Entry Only listings in the Realcomp MLS. (JX 1-07-08).

**5. Consideration of a Policy to Require Listing Type**

401. On September 27, 2002, the Board revisited the issue of labeling Exclusive Agency, Limited Service, and MLS Entry Only listings in the Realcomp MLS. (CX 11-003; CX 36 (Kage, IHT at 144-46, 149)).



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402. In September 2002, the Board approved the following motion from the MLS/User Committee Meeting, increasing the fines for failing to indicate the proper listing type for Exclusive Agency, Limited Service and MLS Entry Only listings:

To recommend that the Board of Governors approve the addition of a mandatory field to the profile form for all property types that would indicate the type of listing being entered (exclusive right to sell, exclusive agency, MLS entry only or limited service). The first offense for failure to indicate the type of listing would be a fine of \$250, 2<sup>nd</sup> offense \$1000, 3<sup>rd</sup> offense \$2500, 4<sup>th</sup> offense would result in possible 45 day suspension from service for the entire office and 5<sup>th</sup> offense would be dismissal from Realcomp.

(CX 11-003; CX 36 (Kage, IHT at 144); Kage, Tr. 959-61).

403. Realcomp has fined its members for not checking the right listing type box, such as checking Exclusive Right to Sell when the Exclusive Agency box should be checked. (CX 36 (Kage, IHT at 59-60)).
404. In 2003, Realcomp's Policy Handbook stated that "MLS Entry Only, Limited Service or Exclusive Agency listings must be indicated with the proper flag in the Compensation Arrangements field." (CX 5-007).
405. In July 2003, Realcomp added language to its Rules and Regulations to give the Realcomp CEO the ability to change the listing type of a Realcomp listing if it was incorrectly labeled. (CX 4-015 ("Listing will be updated with the proper flag and removed from any public sites.")).

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**6. Adoption of the Search Function Policy**

406. In August 2003, Karen Kage informed the Realcomp Board of Governors that MiRealSource was no longer accepting Limited Service listings, including Exclusive Agency listings. (CX 9-003; Kage, Tr. 962; CX 36 (Kage, IHT at 146-47, 152,154)).
407. After the discussion of MiRealSource no longer accepting Limited Service listings, the Realcomp Board discussed the priority of defaulting all searches in the Realcomp MLS to Exclusive Right to Sell listings. (CX 9-003; Kage, Tr. 962-63).
408. After this discussion, the Board voted to expedite the enhancement of defaulting all searches to include only Exclusive Right to Sell listings and that the other listing types, including Exclusive Agency, Limited Service, and MLS Entry Only listings be shown only by specific request. (CX 9-003; Kage, Tr. 963).
409. The MLS search screen had to be changed to include the various listing types as an option, and then set up to automatically select the Exclusive Right to Sell or unknown listings as the default. (CX 36 (Kage, IHT at 90)).
410. The Search Function Policy was implemented in November or December of 2003. (Kage, Tr. 963).
411. Prior to the adoption of the Search Function Policy, the MLS search automatically defaulted to all available listing types, including Exclusive Agency, Limited Service, and MLS Entry Only listings. (CX 36 (Kage, IHT at 74); JX 1-07).
412. In November 2003, Realcomp officially notified its membership of the Search Function Policy through its Real Solutions Newsletter. (CX 14-002). In its Newsletter, Realcomp noted the change and laid out the additional steps that would be necessary to search for Exclusive Agency listings, Limited Services

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listings and/or MLS Entry Only listings. (CX 14-002; *see also* (CX 36 (Kage, IHT at 160))).

413. The Realcomp Policy Handbook describes how to submit and how to make changes to a listing. (CX 36 (Kage, IHT at 109). The Realcomp Policy Handbook does not contain any reference to the Search Function Policy. (CX 36 (Kage, IHT at 110-11); CX 100; CX 90).
414. The Realcomp Online Basics Training Workbook does not contain a written explanation on the steps the Realcomp members need to take in order to see all available listing types. (CX 35 (Kage, Dep. at 131-33); CX 249). The Realcomp Online Basics Training Workbook does, however, explain how to see all property types, such as Residential and Condos. (CX 35 (Kage, Dep. at 131-33); CX 249).

**7. Positions by Legal Counsel and NAR on Accepting Listings into the MLS**

415. In April 2004, Karen Kage told Realcomp members that one of the reasons that Realcomp allows Exclusive Agency listings into its MLS is that NAR “requires MLSs to accept all listing types.” (CX 29; Kage, Tr. 970-71; CX 36 (Kage, IHT at 138-39)).
416. Kage told Realcomp members that the second reason why Realcomp accepts Exclusive Agency listings, Limited Service listings and MLS Entry Only listings is because Realcomp has been advised from more than one legal counsel to accept and include these listings. (CX 29; Kage, Tr. 971; CX 36 (Kage, IHT at 139-40)).
417. In July 2004, Karen Kage told Realcomp members that she spoke with several MLSs across the country to determine if any of them had adopted rules that would prohibit listings that are not Full Service/Exclusive Right to Sell from being in their database. (CX 28-001). Karen Kage learned that none of the MLSs had adopted such a rule. (CX 28-001).

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**8. Position by NAR on MLS Feeds to Public Websites**

418. In November 2006, NAR amended its IDX rules to require MLSs to “include all current listings” in their IDX feeds. (CX 400-002). NAR’s rule amendment eliminated the ability of NAR member MLSs to exclude Exclusive Agency listings from their IDX feeds. (CX 400-002; CX 393-003-005, 009; CX 414 (Niersbach, Dep. at 95-96).
419. In November 2006, NAR also amended its IDX rules to allow individual brokers to independently choose which IDX listings will be displayed on their firm’s websites based on objective criteria, such as geography, list price, and type of listing. (CX 401-003 (amendments reflected in Rule 18.2.4); CX 414 (Niersbach, Dep. at 102, 118-20)).
420. The November 2006 IDX rule amendments are mandatory. (CX 400-002 (MLSs “must” include all current listings on their IDX feeds); CX 401-003 (designating rule change as “M,” or Mandatory)).
421. Mandatory rules must be followed in order to remain a member of NAR and to be covered by NAR’s errors and omissions insurance policy. (CX 414 (Niersbach, Dep. at 36-37); Kage, Tr. 1005-06).
422. Karen Kage is aware that in November 2006, NAR adopted a new IDX rule and that the new NAR IDX rule is contained in the NAR Handbook on Multiple Listing Policy for 2007. (CX 401; Kage, Tr. 996).
423. On April 27, 2007, the Realcomp Board of Governors voted against adopting the new NAR IDX policy. (CX 626-003; Kage, Tr. 998-99).
424. The Realcomp Board of Governors, through Karen Kage, tried, unsuccessfully, to get NAR to postpone its rule change requiring NAR affiliated MLSs to include all listing types on Realtor.com, IDX websites and any other websites to which the MLS sends listing

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information. (CX 233-CX 235; CX 35 (Kage, Dep. at 86-100, 102-05, 107)).

425. Karen Kage, on behalf of Realcomp, argued to NAR that without the Website Policy, the MLS would become a public utility and urged NAR to postpone the rule change since it could affect the operation of MLSs all over the country. (CX 234-003-004).
426. NAR rejected Realcomp's request and responded that EA listings on these feeds would not detract from the purposes of the MLS. (CX 234-003).
427. NAR's Vice President of Board Policy and Programs, Clifford Niersbach, testified that the reason NAR changed its IDX Policy was that "it wasn't worth fighting about" in light of the Federal Trade Commission's enforcement actions initiated against various MLSs around the country. (CX 414 (Niersbach, Dep. at 96-97). *See also* CX 234-004 ("Since NAR's existing policy is deemed to produce anticompetitive effects by the [Department of Justice] and the FTC, it would have been irresponsible for NAR to do nothing.")).

### **G. Exclusive Agency Brokers Not Excluded from Competition**

#### **1. Discount Brokers are Able to List Their Properties on Realcomp's MLS**

428. The MLS is the most significant thing that has happened in the real estate industry to promote competition. (Murray, Tr. 257).
429. The MLS levels the playing field between large and small brokers as, without the MLS, large real estate agencies would attract more consumers since they have larger marketing budgets. (Murray, Tr. 257).
430. The MLS is the most effective tool and substantially more important than any other tool for the sale of

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residential real estate in Southeastern Michigan. (Hepp, Tr. 706-08; CX 422 (Aronson, Dep. at 21-23)).

431. Eighty percent of all home buyers are reached by the MLS. (Mincy, Tr. 449-50; RX 109; *see also* Kermath, Tr. 795; RX 4; RX 5).
432. The EA agents themselves agree that while exposure is important, the MLS is by far the most important source of Internet exposure. (Hepp, Tr. 706 (The MLS is substantially more important than any other tool for the sale of residential real estate in Southeastern Michigan and finds a buyer three times more often than other home selling tools)); CX 422 (Aronson, Dep. at 21-23 (The MLS is, by a considerable extent, the most effective means of promoting residential real estate in Michigan.)).
433. At no time has Realcomp restricted EA brokers from being listed on its MLS. (JX 1- 0708).

**2. Discount Brokers are Able to List Their Properties on Realtor.com**

434. EA agents ranked Realtor.com as being the second most important tool for residential real estate sales in Southeastern Michigan, after the MLS itself. (Hepp, Tr. 709; G. Moody, Tr. 870-71, 886-89; CX 422 (Aronson, Dep. at 22)).
435. While eighty percent of home buyers are reached by the MLS, in combination with Realtor.com, ninety percent of all home buyers are reached. (Mincy, Tr. 449-50; RX 109; Kermath, Tr. 795; RX 4; RX 5).
436. Exclusive Agency listings can be listed on Realtor.com by dual-listing; that is, listing the property on another MLS, with which Realcomp has a data-sharing agreement and which downloads Exclusive Agency listings to Realtor.com. (Kage, Tr. 991-92; JX 1-07; Mincy, Tr. 438, 442; D. Moody, Tr. 552-53; Kermath, Tr. 789). Dual-listing is a common, if not prevalent,

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practice among discount broker firms. (CX 133-014-015).

437. However, an Exclusive Agency listing that is sent to Realtor.com from another MLS carries a different MLS listing number than a corresponding listing in the Realcomp MLS, making it harder for a cooperating broker to match an Exclusive Agency listing in Realtor.com with the corresponding listing in Realcomp. (Mincy, Tr. 412-15).
438. Realcomp has data-sharing arrangements with seven MLSs in Southeastern Michigan. (Kage, Tr. 916).
439. The Ann Arbor MLS, Flint MLS, Shiawassee County MLS, Downriver MLS, and Lapeer MLS are all Realcomp data-sharing partners that serve as potential bypass sources for Exclusive Agency listings to be sent to Realtor.com. (Kage, Tr. 1059-60). All of these MLSs border one of the four primary counties that comprise Realcomp's service area: Wayne, Oakland, Macomb and Livingston. (Kage, Tr. 1060).
440. EA agents use the Ann Arbor, Shiawassee and Flint MLSs to list their Exclusive Agency listings on Realtor.com. (Mincy, Tr. 410-11; D. Moody, Tr. 552-53; Kermath, Tr. 789).
441. EA agents can also have their listings sent to Realtor.com by placing them in MiRealSource in light of its consent decree with the FTC, which was expected to become effective in April 2007. (CX 407 (Bratt, Dep. at 13-14, 22)).
442. The costs associated with joining a bypass MLS are nominal and are comparable to those charged by Realcomp. (Sweeney, Tr. 1312). In addition to the annual membership fees, the Ann Arbor MLS charges \$55 a month to be a member. (Kermath, Tr. 789). The Flint MLS charges \$99 a quarter to be a member in addition to the annual dues. (D. Moody, Tr. 554). MiRealSource charges \$29 per licensee and broker and

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\$24 per office after the initiation fee is paid. (CX 407 (Bratt, Dep. at 19-20)).

443. The time costs associated with listing Exclusive Agency listings on more than one MLS to bypass Realcomp are nominal. It takes between forty minutes to two hours to update a listing over its life. (Hepp, Tr. 693; Mincy, Tr. 415-17; D. Moody, Tr. 561). EA agents pay anywhere from \$7.00 to \$20.00 per hour for data entry. (Hepp, Tr. 693; Mincy, Tr.436-37). It takes the Realcomp staff 10-15 minutes to enter a listing, and an additional one to five minutes to update a listing over its life. (Kage, Tr. 1055).
444. Some EA agents charge customers additional fees to cover the dual-listing cost. (Hepp, Tr. 701-02). MichiganListing.com charges an additional \$100. (Mincy, Tr. 430-31); Greater Michigan Realty charges an additional \$50. (D. Moody, Tr. 553).

**3. Discount Brokers are Able to Compete on the Internet**

445. The Internet is a dynamic process. (G. Moody, Tr. 890). The Internet sites that have the greatest value to the market are “a moving target.” (Sweeney, Tr. 1315-16).
446. Realtor.com and the other Approved Websites are among numerous Internet sources from which the general public can, and does, obtain information about real estate listings. (CX 133-016-017).
447. In its 2006 Profile of Home Buyers and Sellers, NAR found that home buyers visited four categories of websites in their home search much more than any others: MLS websites; Realtor.com; and the websites of real estate companies and real estate agents, also referred to as “IDX websites.” (CX 373-046 (40-50% of home buyers reported visiting these four categories of websites); CX 406 (Bishop, Dep. at 90-91)). NAR reached these same findings in its 2004 and 2005



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Profile of Home Buyers and Sellers. (CX 372-039 (most visited websites by home buyers in 2005 were Realtor.com, MLS websites, and IDX websites); CX 371-038 (most visited websites reported by home buyers in 2004 were Realtor.com, MLS websites, and the IDX websites)).

448. Public websites other than Realtor.com and the other Approved Websites are numerous, and listings reach those websites regardless of Realcomp's Policies. (CX 133-015-024).
449. Other publicly-available websites for EA agents, such as Google and Trulia, are growing in usage, although they do not reach nearly as many home buyers as the Approved Websites. (G. Moody, Tr. 888-89; Murray, Tr. 258-60). MLS systems across Michigan are beginning to put their data onto Google Base and Trulia. (G. Moody, Tr. 888).
450. Google presently has a site which is open to everyone and which takes Exclusive Agency listings without a charge for putting a listing into Google. (Murray, Tr. 259-60). Google has publicly announced that it intends to build as large and robust a real estate site as possible. (Murray, Tr. 259).
451. Mr. Moody testified in his deposition regarding the popularity of different real estate websites. Specifically, he ranked Google Base number four in popularity, behind MoveInMichigan.com, Realtor.com, and the IDX. (G. Moody, Tr. 887). He further stated that "in the near future, Google Base will be more important than IDX." (G. Moody, Tr. 887-88).
452. Trulia, a growing public website which also does not charge for listings, has grown substantially in the last several months. (Murray, Tr. 258). It is a recently launched site with real estate listings based on its relationships with brokers including Realogy, which gives it access to listings by Coldwell Banker, Century

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21, ERA and Sotheby's. (CX 417 (Simos, Dep. at 34). Trulia allows brokers and others to post listings for free on their website, but it is a relatively new website with problems with capital funding. (RX 154-A- 070; Murray, Tr. 242).

453. In light of their growing popularity, public websites besides the Approved Websites are an economically viable and effective channel for reaching prospective buyers. (CX 133-015-024).
454. Home sellers and their listing agents can effectively market properties to the public in the Realcomp Service Area under Exclusive Agency and other limited service contracts without access to the Approved Websites. (CX 133-007-008).

**4. Discount Brokers are not Excluded by the Search Function Policy**

455. A practical requirement of being a real estate agent is the ability to use a computer, and log on and use the MLS. (Sweeney, Tr. 1336). Persons utilizing the search function necessarily must be able to use a computer to at least some extent. (Murray, Tr. 264).
456. Under Realcomp's Search Function Policy, prior to April 2007, Exclusive Right to Sell listings are the default, and Exclusive Agency listings must be independently selected. (Kage, Tr. 906-07).
457. Under Realcomp's old search screen, if someone wanted to see all the listings from the Quick Search screen, he or she just had to click with the mouse one additional button for type of listings. (Kage, Tr. 1039; G. Moody, Tr. 864-65).
458. A user could also permanently change the search default or turn off the default search settings permanently, so that Exclusive Agency listings were always included in the output, by saving the changes to

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their settings. (CX 36 (Kage, IHT at 92-93); Kage, Tr.1048-49).

459. Users who wanted to view “all listings,” including Limited Service listings, could individually select the types of listings they wanted to view or click the select all listing types. (Kage, Tr. 1042).
460. Likewise, users could also utilize the qualifier on the right side of the screen that says “match any” or “exclude.” (Kage, Tr. 1042).
461. Searching “all listings” was very simple, and it was not difficult to override the search default. (G. Moody, Tr. 878; Kage, Tr. 1048-49; RX 159). It does not require extra steps to search “all listings.” (CX 415 (Nowak, Dep. at 45-46)).
462. Agents with Exclusive Agency listings have acknowledged they did not require any special training to figure out how to override the search default. (D. Moody, Tr. 551; CX 526 (Groggins, Dep. at 43)).

##### **5. Discount Brokers are Thriving in Southeastern Michigan Despite the Realcomp Policies**

463. In a declining or distressed market, where both the value of a home and the seller’s equity is constantly declining, home sellers are choosing full service ERTS listings over EA listings because they want and need the professional marketing services of a full service broker. (Sweeney, Tr. 1326-27).
464. Despite Michigan’s economic downturn, agents offering Exclusive Agency listings are thriving in Southeastern Michigan. F. 465-68.
465. AmeriSell has grown substantially since 2003-2004, with over \$46 million in listings and more listings statewide than any other company. (Kermath, Tr. 788, 793-94; RX 5; RX 6).

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466. MichiganListing.com has grown by 30% in its last full year of business, between 2005 and 2006, and was trending upward in 2007. Mr. Mincy is seeking to expand in Southeastern Michigan, and he expects his business to keep growing throughout Southeastern Michigan. (Mincy, Tr. 428-30).
467. Greater Michigan Realty has done very well, and is growing. (G. Moody; Tr. 881-84; RX 25-003). Denise Moody, of Greater Michigan Realty, had approximately 500 listings last year, when the industry average was 25. (G. Moody, Tr. 881-82; RX 29). Greater Michigan Realty generated \$23,275,000 in home sales in its first year of operation. (D. Moody, Tr. 567; RX 25-003).
468. Although it is not in the direct listing business in Southeastern Michigan, BuySelf is engaged in the referral business. BuySelf's business has grown 10% to 35% since 2004 in Southeastern Michigan. (Hepp, Tr. 604, 699).
469. Dr. Williams testified that, in the absence of artificial restrictions on competition, the market share of "discount" or limited service brokers is expected to increase in the future. (Williams, Tr. 1096 (noting that limited service brokers represent "a relatively new business model" and that model's "growth has been facilitated by the Internet").
470. Respondent's expert, Dr. David Eisenstadt testified that he had not seen "any type of projection as to what the future likely market share of these discount brokers is over time." (Eisenstadt, Tr. 1464).
471. Complaint Counsel's industry expert, Mr. Steve Murray, enunciated numerous reasons why he expects to see continued growth in the limited service brokerage model. (Murray, Tr. 167-71).
472. No agents offering Exclusive Agency listings suggested that they left Michigan because of

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Realcomp's Policies, except YourIgloo.com, whose Vice President testified that its decision to leave was "one-hundred percent" attributable to Realcomp's Policies. (CX 422 (Aronson, Dep. at 111, 118)).

473. YourIgloo is a discount real estate company, headquartered in Florida. (CX 422 (Aronson, Dep. at 4)).
474. YourIgloo used one broker in Michigan, Anita Groggins, to operate its business in Michigan from 2001 to 2004. (CX 422 (Aronson, Dep. at 9)).
475. YourIgloo withdrew from Michigan for numerous reasons, besides the Realcomp Policies, including: additional competition in 2004 which it did not face when it first started in Michigan in 2001; (CX 422 (Aronson, Dep. at 9-10 ("the industry became very competitive and very crowded"))); a conflict between the owners of YourIgloo and the associate broker in Michigan for YourIgloo who was let go, in part, because she would not come into the office during hours she was expected to be available; CX 526 (Groggins. Dep, at 8, 36-37)).
476. YourIgloo represented to MiRealSource, to which it also belonged (CX 422 (Aronson, Dep. at 15)), that it was leaving Michigan because it did not care for MiRealSource's procedures that required a broker in Michigan to be responsible for payments of MiRealSource's fees and charges. (CX 407 (Bratt. Dep. at 66-67)).
477. Yourigloo encountered problems in other states, and withdrew from two of the nine states in which it is licensed, Pennsylvania and New Jersey. (CX 422 (Aronson, Dep. at 31-32)).

## 6. Consumers Have a Choice of Products

478. Consumers can avoid the effects of Realcomp's Policies on the exposure of their listing by paying

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slightly more to the agents offering Exclusive Agency listings to have their listing sent to Realtor.com or to the agents offering flat fee Exclusive Right to Sell listings. F. 479-81.

479. AmeriSell Realty charges a flat fee of \$349, \$499 or \$699, depending upon the package. (Kermath, Tr. 729). It costs an additional \$200 to upgrade from AmeriSell's \$499 silver limited service listing to its ERTS package at \$699. (RX 1).
480. MichiganListing.com charges a flat fee of \$495 for an EZ-listing, plus an extra \$100 to be listed in Realtor.com for \$595. (Mincy, Tr. 411; CX 439; CX 109).
481. Greater Michigan Realty offers a bronze package for \$299, which includes a Limited Service, MLS Entry Only listing. For an extra \$50, customers can upgrade to the silver package for \$349 which includes a limited service, Exclusive Agency listing and inclusion in Realtor.com. The charge for its Exclusive Right to Sell package is \$599. (CX 435-001).

## **H. Effect on Competition**

### **1. Effect on Non-ERTS Share Not Significant**

482. Realcomp's antitrust economic expert, Dr. Eisenstadt testified that Realcomp's Policies' effect on the non-ERTS share in Realcomp was at most a 1% decrease in the percentage of non-ERTS listings. (Eisenstadt, Tr. 1408; F. 484-503).
483. Dr. Eisenstadt based this finding of an at most 1% decrease in the non-ERTS share in the Realcomp Service Area on: (a) a time series analysis; (b) a comparison to Dayton; (c) a comparison to Boulder; (d) a comparison to Washtenaw County of the Ann Arbor MLS; and (e) his probit regression analysis. (Eisenstadt, Tr. 1407-42; F. 484-503.).

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**a. Time Series Analysis**

484. The time series analysis, or before-and-after analysis, utilized by Complaint Counsel's expert, Dr. Williams in his April 3, 2007 Report, measures the share of non-ERTS new listings in the Realcomp MLS for the period of January 2002 through October 2006. (CX 498-A-096-098; CX 521; Eisenstadt, Tr. 1409).
485. Dr. Williams observed that average monthly share of new non-ERTS listings on the Realcomp MLS declined after the Realcomp Policies were implemented. (Williams, Tr.1150-60; CX 523).
486. Realcomp made the listing type field a mandatory field in late 2003 and by the middle of 2004, virtually all the listings contained the listing type. (Kage, Tr. 973-74; Williams, Tr.1152-53).
487. According to Dr. Williams' data, the percent of non-ERTS new listings in the Realcomp MLS was about 1.5% in May 2004 and about 0.75% in October 2006. (CX 498-A- 096-098, CX 521; Eisenstadt, Tr. 1409).
488. Thus, using Dr. Williams' data, Dr. Eisenstadt found the percentage decrease of non-ERTS new listings in the Realcomp MLS from the time at which the policies were in effect to the most recent time for which data was available, is approximately 0.75 percentage points. (Eisenstadt, Tr. 1409).
489. Dr. Williams also indicated that basing his measurement on the monthly average percent of new EA listings insulated the calculation from market flux because the percentage ratio of EA to ERTS listings should not change even if total listings decline. (Williams, Tr. 1149).

**b. Dayton MLS**

490. Dr. Williams also performed a benchmark comparison (F. 512-14) or cross-sectional comparison through

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which he compared data from the Realcomp MLS to nine other Metropolitan Statistical Areas (“MSAs”) for the period 2002 to 2006. (Williams, Tr.1157-58, 1243).

491. He selected a group of six MSAs where the MLSs were without restrictions similar to those of Realcomp and a group of four MSAs (including the Realcomp Service Area) where the MLSs were with restrictions similar to those of Realcomp. (Williams, Tr.1158-59).
492. The MSAs were ranked according to their similarity to Detroit in terms of certain economic and demographic characteristics of the area. (CX 498-A-070). The difference between Detroit and each MSA was estimated for certain variables, measured in standard deviations. (CX 498-A-070).
493. The MSA which had the smallest standard deviation and thus was closest in similarity to Detroit was Dayton, Ohio. (Williams, Tr. 1257).
494. Dayton had a non-ERTS share of 1.24% as contrasted with Realcomp’s non-ERTS share of 1.01% for the period 2002 to 2006. (Eisenstadt, Tr. 1422-25; CX 458).

**c. Boulder MLS**

495. In Dr. Williams’ benchmark comparison study, Boulder, Colorado was the only MLS that had a period of time without restrictions and a period of time with restrictions. (Williams, Tr. 1174; Eisenstadt, Tr. 1412).
496. In April 2003, the Boulder MLS imposed a restriction similar to the Website Policy challenged in this case. (Williams, Tr. 1174-75).
497. In the Boulder MLS, the average share of non-ERTS listings was 2.03% in the pre-restriction period and was 0.98% in the post-restriction period. (Eisenstadt,



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Tr. 1413). The difference is about one percentage point. (Eisenstadt, Tr. 1413).

498. Dr. Eisenstadt noted that there appeared to be a downward trend in the share of EA listings on the Boulder MLS during the last three months of the pre-restriction period, presumably for reasons unrelated to the restrictions, which had not yet taken effect. (Eisenstadt, Tr. 1412-14). If those last three months were used as a benchmark, rather than the entirety of the pre-restriction period, the percentage point reduction in EA listings would be even smaller than one percent. (Eisenstadt, Tr. 1413-14).

**d. Washtenaw County**

499. Discount brokers operating in Realcomp's Service Area, use the Ann Arbor MLS to list non-ERTS properties located in Livingston, Macomb, Oakland and Wayne counties, because the Ann Arbor MLS forwards those listings to certain websites, such as Realtor.com. (Eisenstadt, Tr. 1417; *see also* F. 439-40).
500. Because the Ann Arbor MLS is used as a bypass for non-ERTS listings in the Realcomp Service Area, an appropriate comparison between the Ann Arbor MLS and Realcomp is to look at non-ERTS listings in Washtenaw County on the Ann Arbor MLS. (Eisenstadt, Tr. 1417-18).
501. Washtenaw County is the principal county served by the Ann Arbor MLS; close to 80% of the listings on the Ann Arbor MLS are located in Washtenaw County. (Eisenstadt, Tr.1418).
502. The percentage of non-ERTS listings in Washtenaw County on the Ann Arbor MLS is 1.6%. (Eisenstadt, Tr. 1418). The percentage of non-ERTS listings on the Realcomp MLS is 0.74%. (Eisenstadt, Tr. 1419). The difference between the two is 0.86%. (Eisenstadt, Tr. 1419).

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**e. Probit Regression Analyses**

503. Under his probit regression analyses, Dr. Eisenstadt found that the decline in Realcomp's non-ERTS shares, as a consequence of the restrictions, was not statistically significant. (Eisenstadt, Tr. 1430). Dr. Eisenstadt's regression analyses are set forth at F. 557-67.

**2. Dr. Williams' Opinion did not Determine the Effect on Competition of the Access Restrictions Separately**

504. Dr. Williams' opinions are based on the combined effect of what he called "access restrictions" which are the Search Function Policy, Website Policy and Minimum Services Requirement. (Williams, Tr. 1236-37).

505. Dr. Williams cannot disentangle the effects of the Search Function Policy, Website Policy and Minimum Services Requirement. (Williams, Tr. 1236-38).

506. Dr. Williams did not have data available to analyze the impact of Realcomp's Search Function Policy, separate from the Website Policy and Minimum Services Requirement. (Williams, Tr. 1237-38).

507. Dr. Williams did not determine what the effect would be on competition if Realcomp eliminated the Search Function Policy or the Minimum Services Requirement. (Williams, Tr. 1237-39).

**3. Complaint Counsel's Expert's Testimony on Non-ERTS Share is Flawed**

508. Dr. Williams opined that the Realcomp Policies affect "every channel through which a potential home buyer could see" EA listings. (Williams, Tr. 1131).

509. Dr. Williams opined that the Realcomp MLS has a significantly smaller share of non-ERTS listings than

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MLSs without restrictions and supported this opinion by his benchmark analysis. (Williams, Tr. 1157-66; CX 524).

510. Dr. Williams opined that Realcomp's Policies effected a 5.5% decrease in non-ERTS listings in the Realcomp MLS which he found to be statistically significant and supported this opinion by his probit analysis. (Williams, Tr. 1166-84, 1678-79; CX 498-A-041-042,071; CX 560-011-014, 019-020).
511. Dr. Williams' opinion on the effect of Realcomp's Policies on non-ERTS shares is given little weight because: (a) his selection of comparative MSAs is flawed (F. 512-34); (b) his weighting of average EA percentage shares is flawed (F. 535-43); and (c) his probit analysis did not control for relevant factors. (F. 544-56).

**a. Dr. Williams' Selection of Comparative MSAs is Flawed**

512. In both his benchmark analysis and his probit analysis, Dr. Williams used data from 2002 to 2006 from the MSAs containing MLSs without restrictions in the following six geographic areas: Charlotte, NC; Dayton, OH; Denver, CO; Memphis, TN; Toledo, OH; and Wichita, KS (the "Control MSAs"). (CX 498-A-041, 073; RX 162).
513. In both his benchmark analysis and his probit analysis, Dr. Williams used data from 2002 to 2006 from Realcomp and three other MLSs that had and enforced restrictive policies that prevented Exclusive Agency listings from being included in the MLS feed of listings to public websites and the MLS's IDX. (CX 498-A-041, 073; Williams, Tr. 1283-87). The MSAs with MLSs with restrictions were located in: Williamsburg, VA; Green Bay/Appleton, WI; and Boulder, CO ("Restriction MSAs"). (CX 498-A-041-042, 073; Williams, Tr. 1283-87). The Boulder MLS changed its policy near the middle of the time period

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for which data was collected. (CX 498-A-041-042, 073).

514. In his benchmark analysis, Dr. Williams compared the prevalence of EA listings in MSAs without restrictions to that in MSAs with restrictions. This comparison was based on the overall average percentage of EA listings in each of the two groups and weighting the average according to the number of listings in each MSA. He observed that the weighted average percentage of EA listings is higher in MSAs without restrictions than the MSAs with restrictions. (Williams, Tr. 1161-84; CX 524).

**(i) Methodology for Selecting the Control MSAs**

515. Dr. Williams selected six MSAs without restrictions based on seven economic and demographic characteristics that he believes are “likely to affect the level of non-ERTS listings.” (Williams, Tr. 1247-50). Dr. Williams believed that each of the seven factors “theoretically may be related to the use” of EA listings, and therefore are “economically plausible criteria” affecting home sellers’ choice of listing contract type (*i.e.*, non-ERTS or ERTS). (Williams, Tr. 1158-60).
516. The values of the seven variables used as sample selection criteria vary across MSAs in the control sample. (CX 560-005 n.6).
517. Dr. Williams’ explanation of why he would expect any of his criteria (*i.e.*, the economic and demographic characteristics) to affect the choice of an EA contract and of why he gave all of the factors equal weight (*see* CX 560-005; Williams, Tr. 1291-92) is not convincing. Weighting each factor the same would make sense only if each factor had the same effect on the share of EA listings, a condition which is both implausible and counter to the facts. (CX 458-006).

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518. The list of potential choices from which Dr. Williams selected his Control MSAs omitted cities (*e.g.*, Pittsburgh, Cleveland, Milwaukee) (Williams, Tr. 1265) that intuitively might be thought more similar to Detroit in terms of being Midwestern industrial “rust belt” areas than, for example Charlotte or Memphis.
519. Dr. Williams did not seek to show why these cities were less similar than Detroit than those in his Control MSAs and testified that he did not even have data for the cities in question. (Williams, Tr. 1265).
520. Dr. Williams ranked his possible choices according to their respective closeness to Detroit across the economic and demographic characteristics. (RX 162; Williams, Tr.1250).
521. Dr. Williams computed the difference in standard deviation units from Detroit for each of the characteristics, and then summed the absolute value of those standard deviations for each MSA. (RX 162; Williams, Tr. 1254).
522. The percentage of EA listings in the Control MSAs ranges from a low of approximately 1% in Dayton to a high of almost 14% in Denver. (Eisenstadt, Tr. 1425).
523. Dayton, the MSA closest to Detroit under Dr. Williams’ methodology, had an EA share (1.24%) only slightly above Realcomp’s (1.01%). (Eisenstadt, Tr. 1423-25; Williams, Tr.1255).
524. The next lowest MSA, Toledo, had an EA share (3.4%) nearly three times that of Dayton. (RX 161-008; Williams, Tr. 1254-58).
525. The MSA with the highest EA share, Denver, which was 5th (out of 6) in closeness to Detroit, had a share of 14%, more than 10 times that of Dayton. (RX 161-008; Williams, Tr. 1254-58).

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526. If Dr. Williams had correctly identified economic and demographic factors that determine the share of EA contracts at the MSA level, one would expect the EA shares of the Control MSAs to be very similar. (CX 458-007-008). Instead, the wide variation demonstrates that Dr. Williams did not account for the factors that are actual determinants of the EA shares in the Control MSAs. (CX 458-007-008).
527. Significant differences exist among the six Control MSAs even with respect to the different economic and demographic characteristics that Dr. Williams used. Table III of Dr. Eisenstadt's Supplemental Report lists the six Control MSAs, and the MSA-by-MSA value of each of the eight economic and demographic variables. The table shows that there is significant sample variance, as measured by the sample coefficient of variation, for several of Dr. Williams' economic/demographic factors. These include the one year median price change, population, population density, and median house price. Differences in the levels of these variables may explain the substantial variation in the non-ERTS shares among the six Control MSAs. (RX 161-029; CX 458-008).
528. The Control MSAs that are statistically closest to the Detroit MSA (even though they may still be very distant in terms of housing market behavior and/or other economic and demographic characteristics) have lower EA shares than Control MSAs that are statistically more distant. (RX 161-036; Eisenstadt, Tr. 1425-26).

**(ii) Selection of the Restriction MSAs**

529. In addition to Realcomp, Dr. Williams' group of Restriction MSAs includes Green Bay, Williamsburg, and Boulder, all of which are much smaller urban areas than Detroit. (Williams, Tr. 1161-63; CX 458-009).

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530. The selection of this grouping was made not by Dr. Williams, but by FTC staff. (Williams, Tr. 1263-64 (“I didn’t pick anything”).)
531. The FTC provided Dr. Williams with data from three MLSs that had website policies similar to Realcomp’s, that enforced those policies, and that had entered into consent decrees with the Commission. (CX 498-A-041-042 n.103; Williams, Tr. 1263-64).
532. Dr. Williams did not use the same selection criteria for choosing the MSAs with restrictions as he did for the control group and testified that there were very few MLSs with restrictions from which a selection could be made. (CX 458-006-008; Williams, Tr.1263).
533. Dr. Williams’ own analysis shows that the MSA in which Williamsburg is located ranks 28th in terms of closeness to Detroit, significantly more distant than any of the Control MSAs. Further, the Green Bay-Appleton and Boulder MSAs each have populations of less than 500,000, and for that reason alone would have been excluded from Dr. Williams’ sample of Control MSAs. (CX 458-009).
534. Dr. Williams attributed differences in EA shares between Control MSAs and Restriction MSAs to the restrictions when, in fact, those differences in EA shares could instead be due to variations in his economic and demographic factors. (See CX 458-007-009).

**b. Dr. Williams’ Comparison of Average EA Shares for the Control MSAs and Restriction MSAs is not Probative**

535. Dr. Williams tracked and compared the EA shares of MSAs with restrictions to MSAs without restrictions over time. Dr. Williams found the difference in EA shares between the two types of MLSs to be between 5 and 6 percentage points. (Williams, Tr. 1169-85; CX 524).

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536. Dr. Williams testified that the average EA percentage in Restriction MSAs for the time period studied was 1.4%, and the average EA percentage in the Control MSAs was approximately 5.6%. (Williams, Tr. 1162-63).
537. The data set included over 1.08 million listings for the period 2002 to 200(), with an average of 17,000 new listings per month. (CX 498-A-041; Williams, Tr. 1161-62).
538. Dr. Williams' calculations of the average EA percentage share for the Control MSAs and the Restriction MSAs was weighted based on the number of listings. (Williams, Tr.1261-62).
539. Dr. Williams stated that he used a weighted average because Realcomp is a large MLS and he believed that the bigger MLSs are more comparable to Realcomp. (Williams, Tr.1291-92).
540. As a result of this weighting, the larger MSAs counted more toward the average than the smaller MSAs. Also, by combining all Control MSAs, the closeness of any MSA to Detroit (*i.e.*, the lowest summed standard deviations) was not a factor in Dr. Williams' estimate of the difference in EA shares in the two types of MSAs. (Williams, Tr. 1260-63).
541. Denver, the largest of the Control MSAs, is both (a) the second most dis-similar MSA in the Control MSAs from Detroit; and (b) the MSA with the highest EA share. (Williams, Tr. 1261-63).
542. Dr. Williams' method of analysis gave Denver significantly more weight in this comparison of Control MSAs to Restriction MSAs than, for example, Dayton - the Control MSA most similar (in Dr. Williams' analysis) to Detroit, but having the smallest EA share among the Control MSAs. (Williams, Tr. 1261-63).



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543. Dr. Eisenstadt also performed direct comparisons of the Detroit MSA to Dr. Williams' Control MSAs. Using Dr. Williams' rankings of the Control MSAs, it would be most logical to compare Realcomp to Dayton, the MSA least statistically different from Detroit. (Eisenstadt, Tr. 1426-27). As noted, Dayton's percentage of EA listings was 1.24%, as contrasted with Realcomp's percentage of EA listings of 1.01% during the same period. (Eisenstadt, Tr. 1423).

**c. Dr. Williams' Probit Analyses are Instructive, but not Conclusive**

544. Dr. Williams also relied on statistical regression ("probit") analyses in an attempt to predict the effects of the Realcomp Policies. (Williams, Tr. 1168-69).

545. Statistical regression analysis is a tool to measure the effects of different factors, called independent variables, on a particular outcome, called the dependent variable, to isolate the effect of the rule versus the effect of other things. (Williams, Tr. 1169, 1266).

546. In this case, the dependent variable is the type of listing contract a home seller chooses (EA versus ERTS), and the independent variables are factors other than the Realcomp Policies, that might explain the share of non-ERTS listings. (CX 458-14; Williams, Tr.1266).

547. In his probit analysis, Dr. Williams conducted a statistical analysis to control for other factors that might be related to the listing type (EA versus ERTS) to try to isolate the effects of the Realcomp Policies. (Williams, Tr. 1168-69).

548. It is not clear to what extent Dr. Williams actually used the seven economic and demographic factors used in his benchmark analysis (F. 515) as independent variables in his probit analysis. (See CX 498-A-070-071; CX 458-14).

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549. Dr. Williams conducted a total of ten statistical analyses. (CX 498-A-041-042, 071; CX 560-011-014, 019-020). The first three are contained in Dr. Williams' initial report. (CX 498-A-041-042, 071). The remaining seven are contained in Dr. Williams' surrebuttal report. (CX 560-011-014, 019-020).
550. In his ten statistical analyses, Dr. Williams controls for a wide range of economic and demographic variables, including those that Dr. Eisenstadt claimed should be included. (CX 498-A-041-042, 071; CX 560-011-014, 019-020). In his initial report, Dr. Williams' three regressions control for the year of the listing, the month of the listing, the list price of the home, the number of bedrooms, the square footage of the house, the size of the lot, and population density. (CX 498-A-071 ("Regression 1"; "Regression 2"; "Regression 3"). In his surrebuttal report, Dr. Williams controlled for twenty-five variables. (CX 560-019-020).
551. The three statistical analyses in Dr. Williams' initial report indicated that Realcomp's Policies are associated with a reduction in the share of EA listings of 5.51, 5.47, and 6.15 percentage points. (CX 498-A-042 n. 104, 071). In his surrebuttal report, Dr. Williams' analyses indicated that Realcomp's Policies are associated with a reduction in the share of EA listings of 5.5528 and 5.774. (CX 560-013-014).
552. From these analyses, Dr. Williams predicted that the percentage of EA listings in Realcomp would be higher, and the use of ERTS listings would be lower, in the absence of the Realcomp Policies. (Williams, Tr. 1165-67).
553. Dr. Eisenstadt challenged the methods used by Dr. Williams for failure to consider the economic and demographic characteristics of each local housing market and the demographic characteristics of home buyers and sellers in each market. (Eisenstadt, Tr.1422-27). Dr. Eisenstadt described how such factors would ordinarily be addressed in economic

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analysis, and the errors introduced into Dr. Williams' probit analyses by his failure to do so. (CX 458-013-015).

554. When Dr. Eisenstadt corrected Dr. Williams' errors, he found that the same data revealed no predictable difference in the percentage of EA listings due to the existence or absence of MLS restrictions in the MSAs. (Eisenstadt, Tr. 1429-35).
555. Dr. Williams added demographic variables to his probit model and re-estimated the model controlling for additional factors using both his data set (which included all of the Control MLSs) and Dr. Eisenstadt's data set (which excluded the other MLSs with website policies). (CX 560-012-014).
556. When Dr. Williams reran his statistical analysis adding economic and demographic variables that Dr. Eisenstadt believed were significant, he did not use all of Dr. Eisenstadt's explanatory variables. (CX 560-013; Eisenstadt, Tr. 1466-67).

**d. No Adverse Effect on EA Shares When Dr. Williams' Methodological Errors are Corrected**

557. Dr. Eisenstadt ran the same basic probit regression model that Dr. Williams used, but added a separate independent variable for the economic and demographic factors that Dr. Williams identified as relevant to the prevalence of EA listings. Dr. Eisenstadt excluded the variables of population and population density and added several other economic and demographic factors which he identified as likely to affect contract choice both across and within the MSAs. (Eisenstadt, Tr. 1428-29, 1569-70; CX 458-014-015).
558. Dr. Eisenstadt took into account the following variables which were only partially considered by Dr. Williams: the MSA-wide one-year change, by quarter, in the median housing price index; the MSA-wide

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five-year change, by quarter, in the median housing price index; county-level median household income; MSA-wide median household income; MSA-wide median household price; percent black population at the MSA and zip code level; percent Hispanic population at the MSA and zip code level; new housing permits per household at the MSA and county level; number of bedrooms; age of the home; median person age; percent change in the number of listings over the prior year at the MSA and county level; and percent change in days on market over the prior year at the MSA and county level. (Eisenstadt, Tr. 1435-45; CX 458-014-015).

559. Dr. Williams measured certain factors at the MSA level but did not control for certain variables at the local level, opining that to do so would duplicate measures of the same variables. (Eisenstadt, Tr. 1469; CX 560-008).
560. Certain variables should be measured at both the county or zip code level, as appropriate, as well as at the MSA level, in order to measure local neighborhood effects which might impact a home seller's decision as to what type of contract to enter into. (Eisenstadt Tr.1471-72).
561. Controlling for the same factor at both the MSA and zip code level is not measuring the same variable twice (or duplicative as Dr. Williams opined) because there are both neighborhood and metropolitan-wide characteristics of home buyers and sellers that you want to control for in the analysis. (Eisenstadt Tr. 1471-72 ("It's not completely duplicative.")).
562. Dr. Eisenstadt's re-estimation of Dr. Williams' work suggests that additional economic and demographic characteristics should have been considered as independent variables by Dr. Williams because a high number of them (thirteen) proved to be statistically significant at the generally-accepted level of

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- confidence. (Eisenstadt, Tr. 1435-42; CX 458-015-016).
563. From Dr. Eisenstadt's perspective, it is the characteristics of the home buyers the home seller is interested in attracting that would affect the seller's decision as to what kind of contract to use. (Eisenstadt, Tr. 1605-08 (It is "economically plausible" and "perfectly reasonable" for home sellers to take into account the expected characteristics of the buyers that they seek to attract)).
564. When other variables that are relevant to the choice of an EA listing were included in the analysis, Dr. Eisenstadt found that the effect of the Realcomp Policies on the share of EA contracts was 0.24 percent, and that this effect was not statistically different from zero. (CX 458-015-016, 031; Eisenstadt, Tr. 1429-31).
565. Dr. Eisenstadt then estimated the same basic regression equation with the inclusion of a separate "RULE" variable for each of the Restriction MSAs. (Eisenstadt, Tr. 1431-32). This step isolated the effects of the Realcomp Policies on choice of listing contract from the effects of the restrictions in the other Restriction MSAs. (Eisenstadt, Tr. 1431-32).
566. This analysis found that the effect of the Realcomp Policies on the percentage share of EA contracts in the Detroit MSA was less than one ten-thousandth of a percentage point, and was not statistically different from zero. (Eisenstadt, Tr. 1430-32; CX 458-015-016 n.21).
567. Dr. Eisenstadt's results demonstrated that all or virtually all of the difference between the percentage of EA listings in the Realcomp Service Area and the average EA share for Control MSAs is due to local economic and demographic factors and not to the Realcomp Policies. (Eisenstadt, Tr. 1434-35; CX 458-015-016).

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**e. Detroit MSA has More EA Listings Than Would be Expected**

568. Dr. Eisenstadt also estimated a regression using only the data from the six Control MSAs selected by Dr. Williams. He used the output from this regression to predict the EA share for the Realcomp Service Area under the assumption that it also had no restrictions. (Eisenstadt, Tr. 1429-30).
569. Considering the economic and demographic characteristics of the Realcomp Service Area, Dr. Eisenstadt predicted the share of non-ERTS listings in the absence of any restrictions to be about 0.3 percent, less than about one-third of Realcomp's actual non-ERTS share (1.01%). (CX 458-017; Eisenstadt, Tr. 1434).
570. Dr. Eisenstadt testified that this result indicates that there is no evidence that Realcomp's access restrictions have had a lowering effect on the level of non-ERTS share in the Realcomp MLS. Instead, it is the demographic characteristics of the Detroit MSA, which are being controlled for in the regression, that are largely responsible for the low non-ERTS share of listings in the Realcomp MLS. (Eisenstadt, Tr. 1434-35).

**4. Dr. Williams' Analysis Does Not Directly Estimate Harm to Consumers**

571. Dr. Williams attempted to measure only the effect of the Realcomp Policies (plus the Minimum Services Requirement) on the prevalence of EA listings. (Williams, Tr. 1235-36).
572. As Dr. Eisenstadt explained, Dr. Williams' analysis provides only an indirect test for anticompetitive effect. That is, Dr. Williams surmises from his prediction of reduced EA output that consumers pay higher prices for brokerage services (Williams, Tr. 1228-30), but Dr. Williams did not quantify any higher

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brokerage costs incurred by consumers who, as a consequence of Realcomp's Policies, substitute ERTS contracts for EA contracts. (*See* CX 458-018-019).

573. Dr. Williams also did not investigate whether home sellers of residential properties who used EA listings on the Realcomp MLS received higher or lower sales prices for their properties. (CX 458-018-019).
574. Dr. Williams did not analyze the effect of Realcomp's restrictions on the number of days that homes remain on the market, or whether commission rates on ERTS listings are higher when MLSs impose restrictions in the nature of the Realcomp Policies. (Williams, Tr. 1272).
575. Thus, even if Dr. Williams' test and statistical results were valid, they are inefficient to demonstrate that Realcomp's Policies caused measurable harm to price competition between traditional and non-traditional brokers or to consumers. (CX 458-018-019).

**5. Analysis of Days on Market and Sales Prices**

576. The concern of antitrust economics is the effect of challenged conduct on consumers. (Williams, Tr. 1692). Selling the home in a timely fashion and the sale price of the house are relevant to a home seller who contracts for brokerage services. (Williams, Tr. 1694).

**a. Days on Market**

577. Days on market is how long it takes for a listing, once it is on an MLS, to be sold. (Murray, Tr. 264-65).
578. Complaint Counsel's real estate expert has seen no data or information concerning days on market distinguishing between Exclusive Agency listings and Exclusive Right to Sell listings. (Murray, Tr. 265).

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579. Murray testified that it is generally expected that more exposure increases the chances that a broker is going to get their home sold faster and at a better price than otherwise. (Murray, Tr. 183). However, any conclusion that Realcomp's Website Policy caused home sellers with EA listings to have their homes spend longer times on the market due to lower exposure to potential buyers is not based on data or information on days on market in the Realcomp system distinguishing between Exclusive Agency listings and Exclusive Right to Sell listings. (Murray, Tr. 264-65).
580. Dr. Williams did not do an analysis of days on market. (Williams, Tr. 1271-72).
581. The only expert who analyzed days on market was Dr. Eisenstadt. Dr. Eisenstadt found that, in the Realcomp MLS, non-ERTS homes had 17% fewer days on market than comparable ERTS homes. (Eisenstadt, Tr. 1391-92).
582. The average number of days on market on the Realcomp MLS for non-ERTS properties is 118, compared to approximately 142 average days on market for ERTS properties, based upon data analyzed from January 2005 through October 2006. (Eisenstadt, Tr.1387-88).
583. However, Dr. Eisenstadt admitted that he did not control for certain factors that can affect how quickly a home sells. For instance, he did not control for whether the home has a remodeled kitchen, a remodeled bathroom, or was recently painted. (Eisenstadt, Tr.1558-59).
584. Mr. Mincy, an EA agent called by Complaint Counsel, has done no comparison but has not noticed a difference in the days on market between Exclusive Agency listings and Exclusive Right to Sell listings. (Mincy, Tr. 450).



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**b. Sales Price**

585. The only expert to analyze what, if any, effect there was on the sales price of Exclusive Agency listings in Realcomp was Dr. Eisenstadt who performed a sales price regression to compare sales prices of EA listings in the Realcomp Service Area with those in the Ann Arbor MLS and with the Control MSAs. (Eisenstadt, Tr. 1449-60; CX 133-044-046; CX 458-020-023).

**(i) Comparison to Ann Arbor**

586. Dr. Eisenstadt postulated that if Realcomp's Policies harmed consumers, home sellers of non-ERTS properties would realize lower selling prices than they would earn "but for" the Realcomp Policies. (CX 133-044).

587. To test that theory, in his April 17, 2007 Report, Dr. Eisenstadt compared the home sales prices for EA listed residential properties in the Realcomp MLS against those in the Ann Arbor MLS for the years 2005 and 2006 and concluded that home sellers of EA properties located in Realcomp's MLS appear to do about 14% better than home sellers of non-ERTS comparably sold properties in Ann Arbor. (Eisenstadt, Tr. 1545-47; CX 133-044-047).

588. However, Dr. Eisenstadt removed all of the Detroit listings from the data for the Realcomp MLS and removed all listings for properties outside of Washtenaw county from the data for the Ann Arbor MLS. (Eisenstadt, Tr. 1543-44; *see* F. 499-501 for discussion of the use of the Ann Arbor MLS as a bypass). Thus, Dr. Eisenstadt compared only part of the Realcomp MLS to only part of the Ann Arbor MLS. (Williams, Tr. 1657).

589. In removing the Detroit listings, Dr. Eisenstadt removed approximately 25,000 to 27,000 listings from the Realcomp Service Area and was left with only 100 or so properties that sold under Exclusive Agency

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listings in the remaining Realcomp MLS data. (Eisenstadt, Tr. 1544-47).

590. In comparing only Washtenaw county listings, Dr. Eisenstadt was left with only 24 or 25 properties that sold under EA listings in the Ann Arbor MLS data. (Eisenstadt, Tr. 1546-47).
591. Dr. Eisenstadt compared these data sets in order to compare suburban areas with suburban areas and because he thought that home sellers who live in very densely populated areas such as Detroit might place a different value on certain home characteristics when they are buying a home than home sellers who live in more suburban environments. (Eisenstadt, Tr. 1549-50).
592. Dr. Eisenstadt sought to account for differences in home characteristics and location characteristics that might also affect sales prices, as well as the use of EA vs. ERTS listing types, by means of statistical regression. This methodology permitted Dr. Eisenstadt to try to measure the effects of the Realcomp Policies on sales prices of EA-listed properties in the Realcomp Service Area relative to Ann Arbor, by holding constant differences in the sales prices of ERTS-listed properties in the two areas. (CX 133-044-045).
593. However, as with his days on market analysis, Dr. Eisenstadt did not control for certain factors that can affect the sales price of a home. For instance, he did not control for such factors as whether the home has a remodeled kitchen, a remodeled bathroom, or was recently painted. (Eisenstadt, Tr. 1558-59).
594. Dr. Eisenstadt admitted that home sellers who believe that their homes will sell easily would be more likely to use Exclusive Agency listings. (Eisenstadt, Tr. 1557-58). He also admitted that there are unobservable characteristics that could make it more likely that a home seller use an Exclusive Agency

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listing. (Eisenstadt, Tr. 1557). For instance, a home seller whose home has greater “curb appeal” may be more likely to use an Exclusive Agency listing. (Eisenstadt, Tr. 1557-58). He did not control for such factors. (CX 557-A-040).

595. Although in his initial report, Dr. Eisenstadt claimed that a coefficient in his regression equation represented “the proportional difference between the average price of the ERTS property sold in Realcomp relative to an ERTS property sold in Ann Arbor.” (CX 133-045-046; Eisenstadt, Tr. 1560-61), at trial, Dr. Eisenstadt admitted that he could not give an interpretation of that regression coefficient. (Eisenstadt, Tr. 1562-63; CX 460-002-003).
596. Dr. Eisenstadt’s sales price regression shows only a correlation between sales price and the presence of Realcomp’s Policies; but does not establish a causal connection. (Eisenstadt, Tr. 1551-52 (“I believe there is a theory that [would] expect it to be a causal relationship”).

**(ii) Comparison to Control MSAs**

597. In his May 31, 2007 Supplemental Expert Report, Dr. Eisenstadt compared the home sales prices of EA properties listed and sold in Realcomp to those listed and sold in five of the Control MSAs used by Dr. Williams. One of Dr. Williams’ Control MSAs was not used in this analysis because it did not provide sales price data. (CX 458-021-022).
598. Dr. Eisenstadt concluded that, after accounting for home characteristics, locational effects, and differences in the sale prices of ERTS properties, the Realcomp Policies did not depress the expected sale prices that home sellers using EA contracts received for their residential properties. Instead, Dr. Eisenstadt found, on average residential sellers in the Realcomp Service Area realized approximately 6% higher sales

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prices for their homes than sellers in the Control MSAs that used EA contracts. (CX 458-022-023).

- 599. When he did his sales price regression using these five other MLSs, Dr. Eisenstadt excluded all of the listings in Detroit from the Realcomp MLS data. (Eisenstadt, Tr.1550). He did not exclude any cities in any of the other MLSs. (Eisenstadt, Tr. 1550-51). Thus he compared only part of the Realcomp MLS to these other MLSs in their entirety. (Williams, Tr. 1658).
  
- 600. Dr. Eisenstadt's sales price analysis in his May 31, 2007 Report, in terms of methodology, is highly similar to the sales price analysis in his April 17, 2007 report. (CX 458-021-022). The flaws in Dr. Eisenstadt's methodology found in F. 593-96 apply with equal force to his May 31, 2007 report. (CX 560-15).

**I. Procompetitive Justifications**

- 601. Realcomp's Website Policy has procompetitive effects by eliminating a free rider problem and by reducing the bidding disadvantage for home buyers who are represented by a cooperating broker. (F. 602-19; 629-32). However, establishing a platform that favors ERTS listings has not increased participation in the MLS. (F. 620-28).

**1. Eliminating Free Riding**

- 602. Realcomp members pay fees to become members and to maintain their membership. (Kage, Tr. 903-04; CX 222-002).
  
- 603. Realcomp members' fees pay for the operation of the MLS and for Realtor.com and MoveInMichigan. (Kage, Tr. 1050).
  
- 604. Realcomp pays {■■■■■■■■■■■■■■■■■■} for the promotion of MoveInMichigan.com on ClickOnDetriot.com. (Kage, Tr. 940, *in camera*).

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605. In 2006, Realcomp paid {■■■■■■■■■■} for radio ads to promote MoveInMichigan.com and its realtor members. (Kage, Tr. 941-43, *in camera*).
606. A home seller who is not a Realcomp member does not pay membership dues to Realcomp. (Eisenstadt, Tr. 1401).
607. To the extent non-ERTS listings are available on public websites, home sellers may be better able to sell directly to buyers without using any broker. (Sweeney, Tr. 1333-34).
608. When home sellers use a non-ERTS listing and find their own buyer directly, the home sellers capture for themselves the commission that they would otherwise pay at settlement. (Eisenstadt, Tr. 1401). In this sense, home sellers using non-ERTS contracts are in competition with cooperating brokers for buyers. (CX 133-032).
609. The Website Policy limits the free distribution of information to buyers who do not intend to use the services of cooperating brokers. (Sweeney, Tr. 1333-34; CX 133-034).
610. The Website Policy protects Realcomp cooperating brokers from having to subsidize the cost that EA home sellers would otherwise have to incur to compete for buyers who do not use cooperating brokers. (CX 133-034; Eisenstadt, Tr. 1401-02).
611. Realcomp members should not have to subsidize or otherwise facilitate transactions that directly conflict with Realcomp members' business purpose. (*See* Sweeney, Tr. 1333-34).
612. Dr. Williams claimed that there is no free riding problem that justifies the Realcomp Policies. (Williams, Tr. 1639-56; F. 613-15).

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613. Dr. Williams testified that home sellers using EA listings do not free ride on listing agents because the listing agent participates in the transaction and is paid. (Williams, Tr.1641 -43).
614. Dr. Williams testified that home sellers using EA listings do not free ride on cooperating agents because: (1) they benefit by having the opportunity to participate in the transaction; (2) most brokers are both cooperating and listing brokers; and (3) 80% of the time a cooperating broker participates in a non-ERTS transaction. (Williams, Tr. 1643-51).
615. Dr. Williams testified that home sellers using EA listings do not free ride on the MLS itself as a platform because it is being compensated by membership fees, including fees paid by discount brokers; whether the brokers participate in transactions doesn't affect the amount of fees that the MLS is receiving. (Williams, Tr. 1652-54).
616. However, Dr. Williams failed to address the free riding by EA home sellers seeking IDX benefits to compete with Realcomp brokers for buyers, which by Dr. Williams' own estimate, occurs 20% of the time in non-ERTS transactions. (Eisenstadt, Tr. 1401, Williams, Tr. 1639-56).
617. Dr. Williams further opined that even- if a free rider problem exists, the Realcomp Policies do not eliminate the problem because a cooperating broker who belongs to an MLS other than Realcomp cannot assure that a Realcomp cooperating broker will participate in a given transaction. (Williams, Tr. 1224-27, 1645-47). However, Dr. Williams failed to recognize that Realcomp's data-sharing arrangements are reciprocal, so that Realcomp brokers get the same benefit that they give to brokers in other MLSs by participating in data-sharing. (Kage, Tr. 914-15).
618. The "Realcomp Call to Action," created after the FTC filed its Complaint against Realcomp, is the only

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document that the Board of Governors has approved stating the justifications for the Website Policy. (CX 38 (Gleason, Dep. at 115-16); CX 89; Kage, Tr. 994).

619. In the “Call to Action,” Realcomp describes its services as in high demand by consumers, argues that changing the Website Policy compromises the purpose of the cooperative, and urges that the use of the Realtors® website be reserved specifically for the purpose of marketing properties represented by Realtors®. (CX 89).

**2. Increasing Efficiencies****a. Increasing Participation**

620. An important characteristic of an MLS relevant to efficiency is the fact that an MLS is a platform that serves a two-sided market, similar to newspapers, credit card systems, and shopping malls. These platforms connect (*i.e.*, bring together) two distinct groups of users (in this case, real estate listing brokers and cooperating brokers). (CX 133-036; Eisenstadt, Tr. 1405-06).
621. An important characteristic of a two-sided market is that demand for the platform among users on one side increases as the number of participants on the other side increases. In the case of an MLS, all else equal, listing agents will have a higher demand for an MLS platform that also attracts more cooperating agents. (CX 133-036; Eisenstadt, Tr. 1404-07).
622. The customers on one side of a platform are not necessarily equal to one another in terms of creating indirect network effects for the customers on the other side of a platform. As Dr. Eisenstadt explained, an “anchor” department store in a shopping mall may be charged a lower rental rate than a boutique in the same mall because the anchor store can be expected to attract more customers to the mall. (CX 133-037; Eisenstadt, Tr. 1404-07).

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623. Dr. Eisenstadt opined, in the case of an MLS, different rules for promoting EA listings versus ERTS listings could be expected to increase the participation of cooperating brokers. This is because cooperating brokers would be expected to place less value on the number of EA brokers (*i.e.*, brokers with nontraditional business models) who belong to an MLS platform than on the number of traditional, full service brokers who belong, even if limited service and ERTS contracts each offered cooperating brokers identical commission rates. (CX 133-037-038; Eisenstadt, Tr. 1404-07).
624. Dr. Eisenstadt believed that these factors support the conclusion that cooperating agents would prefer a platform that favored ERTS listing contracts than one that had only limited service contracts of equivalent number on the other side. On this basis, he opined that the Realcomp Policies promote this result and thereby the efficiency of the cooperative MLS platform. (CX 133-037-038; Eisenstadt, Tr. 1404-07).
625. According to Dr. Eisenstadt, Realcomp is treating listing agents who use ERTS listings more favorably than listing agents who use non-ERTS listings on the basis that the ERTS listings are more effective in attracting cooperating agents to the other side of the platform to the MLS. (Eisenstadt, Tr. 1407).
626. However, most brokers compete as both listing and cooperative brokers, which would indicate that a member of an MLS will typically be on both sides of the platform. (Eisenstadt, Tr. 1582-83; Mincy, Tr. 361-63 (although brokers compete with one another to secure new listings, once a broker secures that listing, he or she may then potentially be in a cooperative relationship with those same or other brokers who are representing buyers.)).
627. Moreover, Dr. Eisenstadt's theory that limited service brokers contribute only "an equivalent number" of Exclusive Agency listings to the platform is incorrect.



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In his own report, Dr. Eisenstadt claimed to show that EA brokers bring more listings than full service brokers. (CX 133-067).

628. Further, Dr. Eisenstadt admitted that more listings attract more cooperating brokers. (Eisenstadt, Tr. 1530).

**b. Reducing Bidding Disadvantage**

629. Buyers who use cooperating brokers are at a bidding disadvantage relative to buyers who do not use a cooperating broker when both bid for properties listed under EA contracts. Because the home seller must pay a commission when a buyer uses a cooperating broker, the rational home seller will subtract the value of that commission when comparing offers made by prospective buyers who use cooperating brokers against offers from buyers who are unrepresented. (CX 133-032-033; Eisenstadt, Tr. 1402-03).
630. Buyers have more incentive to use the services of selling agents when they acquire ERTS properties than when they acquire EA properties, because they are economically disadvantaged as bidders in the latter case. (CX 133-032-034).
631. The Realcomp Website Policy, by not promoting EA properties to the same extent as ERTS properties, increases the probability that the client of a Realcomp member who is acting as a cooperating broker will make a successful offer for that property. (Eisenstadt, Tr. 1402; CX 133-032-033).
632. In addition, EA contracts can impose higher transaction costs (*e.g.*, scheduling on-site visits and completing paper work at closings) on cooperating brokers who must deal directly with owners rather than with listing brokers. (CX 133-037-038).

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**III. ANALYSIS AND CONCLUSIONS OF LAW****A. Burden of Proof**

Under Commission Rule of Practice 3.5 I (c)(1), “[a]n initial decision shall be based on a consideration of the whole record relevant to the issues decided, and shall be supported by reliable and probative evidence.” 16 C.F.R. § 3.51(c)(1). The parties’ burdens of proof are governed by Commission Rule 3.43(a), Section 556(d) of the Administrative Procedure Act (“APA”), and case law. FTC Rules of Practice, Interim rules with request for comments, 66 Fed. Reg. 17,622, 17,626 (April 3, 2001). Pursuant to Commission Rule 3.43(a), “[c]ounsel representing the Commission . . . shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto.” 16 C.F.R. § 3.43(a). Under the APA, “[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” 5 U.S.C. § 556(d). *See also Steadman v. SEC*, 450 U.S. 91, 102 (1981) (APA establishes preponderance of the evidence standard of proof for formal administrative adjudicatory proceedings).

The government bears the burden of establishing a violation of antitrust law. *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 334 (1961). “[T]he antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was [an anticompetitive] agreement.” *Monsanto Co. v. Spray-Rite Servo Corp.*, 465 U.S. 752, 763 (1984). Accordingly, Complaint Counsel bears the burden of demonstrating that Respondent’s actions in this case are anticompetitive. “[O]nce the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor.” *E. I. du Pont*, 366 U.S. at 334.

**B. Jurisdiction and Interstate Commerce**

The Complaint charges Respondent with violating Section 5 of the Federal Trade Commission Act, as amended (“FTC Act”). 15 U.S.C. § 45. Section 5(a)(2) of the FTC Act gives the Commission jurisdiction “to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce . . .” 15 U.S.C. § 45(a)(2); *Atlantic Ref Co.*, v.

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*FTC*, 381 U.S. 357, 363 (1965). The FTC Act defines “corporation” to include “any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members . . .” 15 U.S.C. § 44. *See also Community Blood Bank v. FTC*, 405 F.2d 1011, 1015-16 (8th Cir. 1969). The FTC Act definition of commerce includes “commerce among the several States.” 15 U.S.C. § 44.

In this case, the parties have stipulated that Respondent is subject to the jurisdiction of the Federal Trade Commission. Joint Stipulations of Law and Fact, June 14, 2007 at 9. The parties have also stipulated that Realcomp is a corporation, as “corporation” is defined by Section 4 of the FTC Act, 15 U.S.C. § 44; that Realcomp is engaged in commerce, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44; and that Realcomp’s acts and practices have been or are in or affecting commerce, as “commerce” is defined in the FTC Act. Joint Stipulations of Law and Fact, at 9. *See also Freeman v. San Diego Ass’n of Realtors*, 322 F.3d 1133, 1144 (9th Cir. 2003) (holding the MLS has a substantial effect on interstate commerce).

**C. Relevant Market**

Antitrust law is concerned with abuses of power by private actors in the marketplace. Therefore, before reaching the question of whether Respondent violated Section 5 of the FTC Act, it is necessary to confront the threshold issue of defining the relevant market. The relevant market has two components, a product market and a geographic market. *H.J., Inc. v. Int’l Tel. & Tel. Corp.*, 867 F.2d 1531, 1537 (8th Cir. 1989). “The burden is on the antitrust plaintiff to define the relevant market within which the alleged anticompetitive effects of the defendant’s actions occur.” *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 962 (6th Cir. 2004).

Complaint Counsel asserts that there are two, related relevant product markets in this case. CCB at 56. The first alleged relevant product market is the market for residential real estate brokerage services. CCB at 56. The second asserted relevant product market is the market for the supply of multiple listing services to real estate brokers. CCB at 56. Complaint Counsel

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argues that the relevant geographic market is comprised of four counties in Southeastern Michigan: Wayne, Oakland, Livingston, and Macomb. CCB at 56. In support of its proposed market definition, Complaint Counsel relies on the report of its economic expert, Dr. Darrell Williams.

Respondent contends that Complaint Counsel has failed to prove a legally sufficient relevant market. RRB at 28-33. It argues that, in assessing relevant markets, courts have emphasized two factors in particular: first, the extent to which defendant's product is reasonably interchangeable in use with alternative products; and second, the degree of cross-elasticity of demand between the defendant's product and the potential substitutes for it. RRB at 29.

Respondent criticizes Complaint Counsel's expert, Dr. Williams, for having failed to engage in a sufficiently rigorous economic examination of the interchangeability of products or suppliers, cross-elasticities of demand or supply, or the practicability of alternatives, particularly as they relate to the proposed geographic market. RRB at 31. Respondent further attacks Dr. Williams' failure to present any form of systematic examination of the evidence as articulated by the *Horizontal Merger Guidelines*. RRB at 30-31 (citing Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* (1992, amended Apr. 1997)). Respondent thus argues that, in lieu of presenting sufficient, viable economic support for its geographic market definition as the law requires, Complaint Counsel has merely offered a definition that comports to its "intuitive" wishes as to what it believes the geographic market should be. RRB at 31. In other words, Respondent asserts that by simply presenting evidence that Respondent provides most of its MLS services to brokers in four counties, Complaint Counsel seeks to show that the geographic market can be summarily defined as MLS services in those four counties. This, of course, is not the analysis that the law requires. See *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1052 (8th Cir. 1999); *FTC v. Freeman Hosp.*, 69 F.3d 260, 268 (8th Cir. 1995).

Complaint Counsel advances no direct argument in its briefs to rebut Respondent's assertions as to the sufficiency of its geographic market definition analysis, but rather relies on

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evidence establishing that Respondent has market power within the area of Southeastern Michigan where it competes. CCB at 56. However, as noted by the Fifth Circuit in *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980):

Courts in rule of reason cases seldom proceed to engage in the meticulous analysis of power that is associated with monopolization cases. The issue is not whether defendants possess monopoly power, but whether they possess a substantial degree of market power. On this issue, a truncated or threshold analysis will suffice. For example, if defendants possess substantial shares of the market for a well differentiated product such as cellophane, we would assume significant power without scrupulous inquiry into cross-elasticity of substitute products. Courts are understandably loath to move into the intricacies and imponderables of thorough-going analysis of power and tend to avoid doing so where the need is not insistent.

*Id.* at 1372 (quoting L. Sullivan, *Antitrust* 192 (1977)). As set forth below, and based upon the established legal standards herein discussed, the Court determines that the analysis provided by Dr. Williams is sufficient to meet Complaint Counsel's burden of defining the relevant market in this case.

### **1. Product Market**

The relevant product or service market is "composed of products that have reasonable interchangeability for the purposes for which they are produced - price, use and qualities considered." *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956). This "cross-elasticity of demand" represents product substitutability and the customer's ability to choose among competing products. *Id.* at 380, 394; *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 718 (D.C. Cir. 2001). The courts rely on various factors to determine how closely the products at issue compete. *E.g.*, *H.J. Heinz*, 246 F.3d at 718-19; *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 158-59 (D.D.C. 2000). "An element for consideration as to cross-elasticity of demand between products is the responsiveness of the sales of one product to price changes of the other." *E. I. du Pont*, 351 U.S. at 400.

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The *Merger Guidelines* delineate a product market by asking whether a hypothetical monopolist of the proposed product market could impose a “small but significant and nontransitory increase in price” (“SSNIP”) and not lose so much of its sales to alternative products that the price increase would be unprofitable. *Merger Guidelines* § 1.11; *Swedish Match*, 131 F. Supp. 2d at 160 (relevant question is whether the increase in the price of product B will induce substitution to product A to render product B’s “price increase unprofitable”). The assessment of whether a hypothetical monopolist would be able to profitably increase its prices above competitive levels involves an examination of the extent to which consumers could substitute to other products or services in response to such a price increase. *Merger Guidelines* § 1.11. Although the *Merger Guidelines* are not binding, courts have often adopted the standards set forth in the *Merger Guidelines* in analyzing antitrust issues and have looked to them in defining markets in Section 1 cases. *FTC v. PPG Indus. Inc.*, 798 F.2d 1500, 1503 n.4 (D.C. Cir. 1986); *Ball Mem. Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1336 (7th Cir. 1986); *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322,339 (S.D.N.Y. 2001).

The evidence in this case supports the two, related relevant product markets proffered by Dr. Williams. F. 285. The first established relevant product market is the market for residential real estate brokerage services; this is the market in which Realcomp’s members compete. F. 285-86. For the majority of home sellers, selling For Sale By Owner (“FSBO”) is not a reasonable substitute for using a real estate broker because of the significant advantages to using a real estate broker in selling a home. F. 288-92. The primary benefit of using a real estate broker is the ability to list a home in an MLS. F. 289. Because FSBO sellers cannot list on the MLS, most home sellers will not perceive FSBO as a viable substitute for brokerage services. F. 294. Thus, a hypothetical monopolist of real estate brokerage services would be able to profitably increase commissions significantly above competitive levels without risking sellers of homes switching to FSBO. F. 295. Because there is no other service that is reasonably interchangeable for consumers seeking to sell a home, residential real estate brokerage services constitute a relevant product market.

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The second relevant product market is found to be the market for the supply of multiple listing services to real estate brokers, which is the market in which Realcomp competes. F. 286, 298. Although there are various outlets through which a real estate broker can list a property for sale (*e.g.*, print classified ads), the MLS is an important input for cooperating brokers searching on behalf of home buyers and thus an attractive venue for listing brokers to advertise houses being sold. F. 299-300. Listing brokers that do not have access to the MLS, and thus are required to advertise their listings by means other than an MLS, can expect that fewer cooperating brokers will see the property. F. 311. Thus, at a given asking price, the likelihood of a sale will be lower and, if a sale occurs, the expected time to sell will be longer, all else equal. F. 311., Cooperating brokers who do not have access to the MLS would need to contact listing brokers or home sellers directly to learn the compensation offer and at the same time would need to search over multiple sources in order to identify the same number and type of houses being offered for sale that are available on the MLS. F. 312. As a result, search costs, including time costs, would increase significantly compared to the search costs of using the MLS. F. 312. Brokers without full access to the MLS would be at a significant competitive disadvantage. F. 313. Further, applying the standard economic framework for defining relevant markets, the net result is that a hypothetical monopolist of MLS listing services would be able to implement a “small but significant and non-transitory increase in price” for access to the MLS because few brokers could withdraw from participating in an MLS even if the fees or other costs associated with participation substantially increased. F. 315. As there is no other service that is reasonably interchangeable, the supply for multiple listing services to real estate brokers constitutes a relevant product market.

## 2. Geographic Market

The Supreme Court has defined the relevant geographic market as “the ‘area of effective competition . . . in which the seller operates, and to which the purchaser can practicably turn for supplies.’” *United States v. Philadelphia Nat ‘I Bank*, 374 U.S. 321, 359 (1963) (quoting *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961)). A geographic market has also been

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described as the area “in which the antitrust defendants face competition.” *Freeman Hosp.*, 69 F.3d at 268.

Respondent states that an assessment of the relevant geographic market requires an inquiry into the geographic area within which defendant’s customers can practicably turn to other sellers in the event of an attempted exercise of market power by the defendant. RRB at 30. As noted, Respondent asserts, simply because Realcomp provides most of its MLS services to brokers in four counties does not compel Complaint Counsel’s conclusion that the market can be summarily defined as MLS services in those four counties. RRB at 31.

As with the relevant product market, in defining the relevant geographic market, the objective is to identify the smallest geographic area in which a “hypothetical monopolist” could profitably impose a SSNIP above competitive levels. *Merger Guidelines* § 1.21. This assessment involves an examination of whether consumers could substitute to suppliers in other geographic areas in response to such a price increase. *Merger Guidelines* § 1.11.

Applying the hypothetical monopolist framework generally to various subsets of an MLS service area, starting with any local geographic area (*e.g.*, neighborhoods or groups of neighborhoods), the relevant geographic market will be determined by the degree of substitutability between neighborhoods for home buyers. F. 318. *See also Bathke v. Casey’s Gen. Stores, Inc.*, 64 F.3d 340, 346 (8th Cir. 1995) (considering the distance “customers will travel in order to avoid doing business at [the entity that has raised prices].” In the case of MLSs, the scope of the geographic market will largely be determined by degree of substitutability between neighborhoods for home buyers. F. 318

The evidence in this case demonstrates that, from a buyer’s perspective, MLSs prevalent in adjoining geographic areas are not effective substitutes to the MLSs operating in the counties in which a buyer is searching for a home because a listing in an adjacent MLS will not be seen by the majority of cooperating brokers and home buyers searching for a home in the particular area. F. 318. Thus, home buyers can defeat an increase in the



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price of brokerage services in the relevant area only by buying a house in a neighborhood other than that particular area where the supracompetitive listing fees apply. F. 324. But, from the home buyer's perspective, location is the guiding principle in real estate, F. 321, thus home buyers would not consider other locations to be adequate substitutes.

The evidence also demonstrates that, from a home seller's perspective, listing brokers representing the sellers of homes located in the relevant geographic area cannot substitute away from MLS listing services in that area because a listing in an adjacent MLS will not be seen by the majority of cooperating brokers and home buyers searching for a home in the particular area. F. 318. Because of the lack of substitutes, any broker representing the seller of a home located in that particular area would face the supracompetitive price for MLS listing services for houses located in that area. F. 318. Home sellers, obviously, cannot change the location of the house they are selling, thus cannot substitute away to another location.

In addition to evaluating the practicability of other locations or MLSs located in other locations as adequate substitutes, a proper line of inquiry is to determine, over what geographical region could a hypothetical monopolist impose a SSNIP. "The touchstone of market definition is whether a hypothetical monopolist could raise prices." *Coastal Fuels, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 198 (1st Cir. 1996). The evidence in this case, as discussed below, establishes that Respondent has market power, and thus could raise prices, throughout the four Michigan counties of Wayne, Oakland, Livingston, and Macomb. F. 317-28.

Realcomp's market shares in terms of new listings for Wayne, Oakland, Livingston, and Macomb counties for 2002 to 2006 was{■■■■}. F. 340. By county, Realcomp's market share in terms of new listings in Wayne county is{■■■■■}; in Oakland county it is{■■■■■}; in Livingston county it is {■■■■■}; and in Macomb county it is{■■■}. F. 341. Market shares based on new listings, however, may understate the extent to which the Realcomp MLS is important to brokers. F. 343. Particularly in areas in which two MLSs overlap, brokers may list on both MLSs. F. 343. Thus, an MLS's share of "unique" listings - the share of

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all listed homes that are listed on Realcomp (whether or not listed on another MLS) - is also an important indicator of market power. F. 345. Realcomp's market share in terms of unique listings for Wayne, Oakland, Livingston, and Macomb counties for 2002 to 2006 was {■■■■}. F. 346. Realcomp's market share in terms of unique listings in Wayne county is{■■■■■}; in Oakland county it is{■■■■■■}; in Livingston county it is{■■■■■■}; and in Macomb county it is {■■■■■■}. F. 347. A firm's high market share in the relevant market, plus the presence of barriers to entry, will support a finding of market power. *See, e.g., United States v. Microsoft Corp.*, 253 F.3d 34, 51-56 (D.C. Cir. 2001); *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995). These market shares are sufficiently high to indicate market power. *Cf United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (87% is predominant); *E. I. du Pont*, 351 U.S. at 379,391 (75%).

While MiRealSource also operates as an MLS in these four counties, it is not an effective substitute for Realcomp. From 2002 to 2006, MiRealSource had {■■■■■■■■} listings in each area of Livingston county, most of Wayne county, and the majority of Oakland county. F. 337. In contrast, Realcomp had {■■■■■■} listings in almost all of Wayne, Oakland, and Livingston counties and in a majority of Macomb county. F. 337. Realcomp had {■■■■■■} listings in substantial portions of each of these counties. F. 337. {■■■■■■■■■■■■■■■■} of MiRealSource members are also members of Realcomp. F. 338. This suggests that for these brokers that are dual members, MiRealSource is not an effective substitute to Realcomp in certain geographic areas. F. 338. If MiRealSource and Realcomp were effective substitutes in all areas where these brokers operate, then such dual membership would not be necessary. F. 338.

Respondent's market power is further enhanced by "network effects." Network effects are a type of demand-side economies of scale that occur when the value of a product or service to a customer depends on the number of other customers who also use the product or service. F. 304. Network effects exist where the value or quality of a service to one user increases as the number of other users of the same service increases. F. 305. The classic example of network effects is a telephone network - the value of

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the telephone network increases as more users join the network, allowing a user to be able to call more persons. F. 305.

Because of network effects, an individual listing broker has little or no unilateral incentive to switch to an alternative MLS in response to, *e.g.*, an increase in listing fees by the MLS, because there would be few, if any, cooperating brokers working with home buyers using the alternative MLS. F. 334. Because of network effects, an individual cooperating broker has little or no incentive to switch in response to an increase in the price of MLS listing services because there would be few, if any, listings to search. F. 335. Consequently, brokers on both the selling and buying sides will not perceive an alternative MLS as an economically viable substitute to the hypothetical MLS monopoly. F. 336. These network effects thus create barriers to entry, further enhancing Respondent's market power. F. 330-35.

Because Complaint Counsel has demonstrated the lack of reasonable substitutes and that Respondent has sufficient market power to raise prices in the counties of Wayne, Oakland, Livingston, and Macomb, it is established that these four Southeastern Michigan counties constitute the relevant geographic market.

#### **D. Analytical Framework**

The FTC Act's prohibition of unfair methods of competition encompasses violations of Section 1 of the Sherman Act, which prohibits agreements in restraint of trade. *California Dental Ass'n v. FTC*, 526 U.S. 756, 762 n.3 (1999). The Commission relies on Sherman Act law in adjudicating cases alleging unfair competition. *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 451-52 (1986); *In re California Dental Ass'n*, 121 F.T.C. 190, 292 n.5 (1996); *Fashion Originators' Guild, Inc. v. FTC*, 312 U.S. 457, 463-64 (1941). *See also Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 32 (D.C. Cir. 2005) ("analysis under § 5 of the FTC Act is the same in this case as it would be under § 1 of the Sherman Act."). Section 1 of the Sherman Act prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . ." 15 U.S.C. § 1. The ban on contracts in restraint of trade extends only to unreasonable restraints of trade, *i.e.*,

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restraints that impair competition. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997); *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

For alleged restraints of trade falling within Section 1 of the Sherman Act, “the Supreme Court has authorized three methods of analysis: (1) *per se* analysis, for obviously anticompetitive restraints, (2) quick-look analysis, for those [restraints] with some procompetitive justification, and (3) the full ‘rule of reason’ [analysis], for restraints whose net impact on competition is particularly difficult to determine.” *Continental Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 508-09 (4th Cir. 2002). The abbreviated rule of reason analysis, an intermediate standard, applies “in cases where *per se* condemnation is inappropriate but where no elaborate industry analysis is required to demonstrate the anticompetitive character” of an alleged restraint. *Gordon v. Lewiston Hosp.*, 423 F.3d 184, 209-10 (3d Cir. 2005). For instance, the Commission condemned under an abbreviated rule of reason analysis a joint venture’s moratorium on discounting and advertising for products outside of the venture, *In re Polygram Holding, Inc.*, 2003 FTC LEXIS 120 (Jul. 24, 2003), *aff’d*, 416 F.3d 29 (D.C. Cir. 2005), and a licensing board’s ban on advertising discounts by optometrists, *Massachusetts Bd. of Registration in Optometry*, 110 F.T.C. 549,607 (1988).

The dispute between the parties here concerns which rule of reason standard is most appropriate for the Court’s analysis. Complaint Counsel asserts that this matter should be adjudicated pursuant to the abbreviated “quick look” rule applied in *Polygram*, while Respondent argues that a full rule of reason examination, complete with proof of actual anticompetitive effects is required under the traditional theory. CCB at 45; RB at 8, 14. An examination of the parties’ arguments against established case precedent follows.

Complaint Counsel has never contended that the policies, acts, or practices in this case constitute *per se* illegal actions, as only conduct that is “manifestly anticompetitive” is appropriate for *per se* condemnation under the antitrust laws. *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988); *Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co.*, 472 U.S. 284, 289-90 (1985) (“The decision to apply the *per se*

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rule turns on “whether the practice facially appears to be one that would always or almost always would tend to restrict competition and decrease output.”). As such, the Court need not address Respondent’s arguments on the express inapplicability of *per se* analysis to the issues raised in this case.

“[M]ost antitrust claims are analyzed under a ‘rule of reason’ . . . “ *Khan*, 522 U.S. at to (citations omitted); *Chicago Bd. of Trade*, 246 U.S. at 238-39. Under this theory, the plaintiff bears the initial burden of showing that the alleged combination or agreement produced adverse, anticompetitive effects within the relevant market. *Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715, 722 (3d Cir. 1991); *Gordon*, 423 F.3d at 210. As noted by Complaint Counsel, agreements unreasonably restrain trade when they have, or are likely to have, a substantial anticompetitive effect in the relevant market, such as by increasing prices, reducing output, reducing quality, or reducing consumer choice. CCB at 41 (citing *Standard Oil Co. v. United States*, 283 U.S. 163, 179 (1931); *Hahn v. Oregon Physicians’ Serv.*, 868 F.2d 1022, 1026 (9th Cir. 1988)).

When proof of actual anticompetitive effects is impossible to make due to the difficulty of isolating or sustaining the market effects of challenged conduct, courts may allow proof of the defendant’s market power instead. *Gordon*, 423 F.3d at 210; *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993). “Market power, the ability to raise prices above those that would otherwise prevail in a competitive market, is essentially a surrogate for detrimental effects.” *Id.* (internal citations omitted). The nature of the restraint and market power, under certain facts, may establish presumed anticompetitive effects, in the absence of proof of actual anticompetitive effects. *See, e.g., Indiana Fed’n of Dentists*, 476 U.S. at 462 (restraint could be condemned “even absent proof that it resulted in higher prices or, as here, the purchase of higher priced services, than would occur in its absence”).

As noted in *California Dental*, the Supreme Court suggested that where the anticompetitive nature of a restraint is less obvious than a *per se* violation, the courts may not need to engage in a complete plenary market examination. 526 U.S. at 779 (the need for “a more extended examination of the possible factual

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underpinnings . . . is not, of course, necessarily to call for the fullest market analysis”). Rather, in examining agreements among competitors, the essential inquiry is “whether or not the challenged restraint enhances competition,” and the court need only conduct a sufficient analysis to arrive at a “confident conclusion about the principal tendency of a restriction.” *Id.* at 780-81.

Nevertheless, the Court also stressed that courts must have a solid theoretical basis for concluding that challenged practices have anticompetitive consequences under a “quick look” abbreviated analysis. *Id.* at 775 n.12 (when the facts and circumstances “are somewhat complex, assumption alone will not do”). As such, a “quick look” rule of reason analysis was deemed inappropriate in *California Dental*, where the challenged restrictions “might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition.” *Id.* at 771. *See also Paladin Assocs. v. Montana Power Co.*, 328 F.3d 1145, 1155 n.8 (9th Cir. 2003) (when a defendant advances plausible arguments that a practice is procompetitive, the rule of reason applies because courts are unable to conclude that the likelihood of anticompetitive effects is clear and the possibility of procompetitive effects is remote). As to plausibility, the issue is not whether the restrictions *were* procompetitive, but whether they *could be*. *California Dental*, 526 U.S. at 778 (“[T]he plausibility of competing claims about the effects of the professional advertising restrictions rules out the indulgently abbreviated review to which the Commission’s order was treated.”).

“If a plaintiff meets his initial burden of adducing adequate evidence of market power or actual anti-competitive effects, the burden shifts to the defendant to show that the challenged conduct promotes a sufficiently pro-competitive objective.” *Brown Univ.*, 5 F.3d at 669; *California Dental*, 526 U.S. at 775 n.12. “If no legitimate justifications are set forth, the presumption of adverse competitive impact prevails and ‘the court condemns the practice without ado.’” *Brown Univ.*, 5 F.3d at 669 (citations omitted).

“If the defendant offers sound procompetitive justifications, however, the court must proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason analysis.” *Brown Univ.*, 5 F.3d at 669. Courts then evaluate

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whether the challenged conduct is reasonably necessary to achieve the procompetitive objectives identified by a defendant. *NCAA v. Board of Regents of the University Okla.*, 468 U.S. 85, 114-15 (1984); *Hahn*, 868 F.2d at 1026; *Brown Univ.*, 5 F.3d at 678-79; *In re Brunswick Corp.*, 94F.T.C. 1174, 1275 (1979).

Courts have historically applied the abbreviated rule of reason analysis to MLS rules, but only as to certain types of restrictions. In *Realty Multi-List*, the membership criteria of an MLS, which required that members have a “favorable credit report and business reputation” and maintain an office “kept open during customary business hours” was challenged under Section 1. 629 F.2d at 1358. The Fifth Circuit, in evaluating these membership restraints, applied an abbreviated rule of reason analysis that “allows the courts to reach and void on its face any significantly restrictive rule of a combination or trade association with significant market power, which lacks competitive justification or whose reach clearly exceeds the combination’s legitimate needs.” *Id.* at 1370.

Under such factual analysis, once the antitrust plaintiff can demonstrate market power, the burden of proof is on the MLS to justify the challenged rule. *See Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1581 (11th Cir. 1991). The reasonableness of an association’s rule under such clearly defined circumstances, can then be determined by the court, by gauging on its face, the rule’s justification in terms “of the competitive needs of the association and by examining the rule itself to determine if it is drawn in such a manner as to further that need without unnecessarily trampling competitive opportunities.” *Realty Multi-List*, 629 F.2d at 1372. Under this test, if the rule is not “reasonably necessary” to the “competitive needs of the association” and “narrowly tailored to that end,” the rule “may be condemned on its face, without proof of past effect.” *Id.* at 1375.

The evidence in this case, however, unlike the issues presented in *Realty Multi-List*, establishes that Respondent does not deny membership in its MLS to brokers who use exclusive agency contracts, nor does it preclude brokers from placing such listings on the Realcomp MLS. F. 163-64, 181. Rather, the restraints challenged in the instant proceeding are completely unrelated to any membership criteria or rules considered in the

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previously mentioned cases. As such, Complaint Counsel's reliance on *Realty Multi-List*, et. al, as support for a truncated analysis, is of limited probative value.

Similarly, the Court rejects Respondent's argument that Complaint Counsel needs to demonstrate a "materially adverse effect on competition," pursuant to 15 U.S.C. § 45(n) (Policy Statement on Unfairness (FTC, Dec. 17, 1980)). RB at 14. The Commission's statement at § 45(n) is applicable specifically to consumer protection cases, involving an unfair "act or practice," such as deceptive advertising and should not be read to apply to cases such as here, which involve "unfair methods of competition." See 15 U.S.C. § 45(a)(I).

This conclusion, however, does not persuade the Court that a truncated analysis is appropriate under the circumstances of this case. In the years following the Supreme Court's decision in *California Dental*, several Circuits have specifically considered the applicability of an abbreviated rule of reason analysis. Apart from the D.C. Circuit's holding in *Polygram*, which Complaint Counsel cites in support of a quick look here, other Circuits appear to have tread more cautiously with respect to a less-than-traditional rule of reason analysis.

In *Brookins v. Int'l Motor Contest Ass'n*, 219 F.3d 849, 854 (8th Cir, 2000), the Eighth Circuit held that rules imposed by an auto racing governing body were "not the kind of 'naked restraint' on competition that justify foregoing the market analysis normally required in Section 1 rule-of-reason cases." Similarly, in *Worldwide Basketball*, 388 F.3d at 961, the Sixth Circuit ruled that an "abbreviated or 'quick-look' analysis may only be done where the contours of the market . . . are sufficiently well-known or defined to permit the court to ascertain without the aid of extensive market analysis whether the challenged practice impairs competition." Finally, in *Continental Airlines*, 277 F.3d at 512, 517, the Fourth Circuit rejected the quick look approach, finding that the procompetitive justifications offered by the defendant were, in fact, plausible.

It is not necessary for purposes of the Court's determination as to the appropriate review standard, here, to address Respondent's extensive arguments as to whether the *Polygram* decision and its



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“inherently suspect” approach is sanctioned by virtue of the Supreme Court’s holding in *California Dental*, or is legally inconsistent with the various Circuit Court decisions noted above. Nor is it useful to opine on whether the Commission’s construction of the “quick look” resembles an expanded *per se* rule, as Respondent strongly suggests. RRB at 15-16.

Complaint Counsel relies on *Polygram*, despite the fact that the challenged conduct there was an express agreement by the parties to cease price competition outside of the joint venture. Such conduct is clearly inapposite from the policies, acts and practices of Respondent here, which are stipulated by the parties to be *non-price* in nature. Joint Stipulations of Law and Fact at 4-5; F. 189, 196-97, 203. In addition, Complaint Counsel’s reliance on *Realty Multi-List* and *Thompson* is misplaced, as these cases pre-date *California Dental* and involved restrictive membership requirements not present in the instant case. Neither is of marked assistance to the Court as the rules in those cases sought to exclude certain brokers from the market altogether. Thus, Complaint Counsel’s efforts to condemn Respondent’s policies, acts, and practices as “facially” anticompetitive, based on dissimilar factual situations are ill-founded and must fail.

Although the evidence shows that Respondent possesses market power, F. 329-48, the Court must still determine from the empirical and evidentiary record, whether the nature of the challenged restraints encompassed by the Realcomp Policies were likely to result in anticompetitive effects on competition. *See California Dental*, 526 U.S. at 771. As such, Complaint Counsel has not demonstrated upon mere facial analysis, that such policies, acts or practices, together with Respondent’s proffered justifications, were sufficient to allow the Court to arrive at a “confident conclusion about the principal tendency of [the] restriction[s].” *Id.* at 781. Nor is it “immediately obvious” that the alleged restraint of trade likely impairs competition. *Indiana Fed’n of Dentists*, 476 U.S. at 459; *Polygram*, 416 F.3d at 36. Accordingly, for the reasons herein stated, this case can only be properly adjudicated utilizing the traditional rule of reason analysis. Such analysis examines the nature of the restraint, market power, and evidence of actual competitive effects.

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**E. Liability Under Section 5**

To determine whether Complaint Counsel has established that Respondent's actions violate Section 5 of the FTC Act, the critical issues to be determined are: (1) whether there was a contract, combination, or conspiracy; and, if so, (2) whether the contract, combination, or conspiracy unreasonably restrained trade. *Law v. NCAA*, 134 F.3d 1010, 1016 (10th Cir. 1998) (identifying elements of a violation of Section 1 of the Sherman Act). *See also* Joint Stipulations of Law and Fact at 9 (stipulating to these elements of a combination or conspiracy that unreasonably restrains trade).

**1. Whether There Was a Contract, Combination, or Conspiracy**

Respondent has stipulated that it "is a combination of its members with respect to the policies at issue." Joint Stipulations of Law and Fact at 10. This conclusion was inevitable. Realcomp is owned by seven associations of competing real estate brokers. F. 136-38. These associations of competitors appoint the members of Realcomp's Board of Governors. F. 140. The Board, which is comprised of competing real estate brokers, sets Realcomp's rules and policies. F. 142, 146-47. Realcomp's members are also competitors in the market for real estate brokerage services. F. 158.

Moreover, this stipulation is consistent with the holding of *Realty Multi-List*, 629 F.2d at 1361 n.20, where the Fifth Circuit found that members of an MLS engaged in the "concerted action necessary to establish a Section 1 violation" by adopting and applying MLS rules. *Accord San Diego Ass'n of Realtors*, 322 F.3d at 1150 (several real estate associations acting together to form a county-wide MLS were not a single entity and thus not immune from antitrust scrutiny). *See also Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1007 (3d Cir. 1994) (holding that association action taken on behalf of its competing members, such as when a board of directors or a committee adopts a rule or policy, is considered to be the concerted action of the competing members); *In re North Texas Specialty Physicians*, Dkt. No. 9312, 2005 FTC LEXIS 173, at \*37 (F.T.C. Nov. 29, 2005) ("The Commission has also held that when an organization is controlled by a group of competitors, the organization is viewed as a

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combination of its members, and their concerted actions will violate the antitrust laws if an unreasonable restraint of trade.”). Thus, it is established for purposes of Section 5, that here, a contract, combination, or conspiracy clearly existed. The inquiry must next turn to a determination of whether the challenged practices of Respondent unreasonably restrained trade.

## **2. Whether There Was an Unreasonable Restraint of Trade**

To determine whether the challenged practices of Respondent unreasonably restrained trade first requires an evaluation of the nature of the challenged restraints. If such analysis indicates that the restraints are likely to be anticompetitive, a further determination of Respondent’s market power and the competitive effects of the restraints is made. Finally, where effects are found or presumed, Respondent’s procompetitive justifications are considered as part of a net effects assessment.

### **a. The Nature of the Challenged Policies**

#### **(i) Synopsis of the Relevant Facts**

##### **(A) Minimum Services Requirement**

Prior to its repeal in April 2007, discussed below, in order for a Realcomp listing to be considered an Exclusive Right to Sell (“ERTS”) listing, the broker was required to provide full brokerage services. (“Minimum Services Requirement”). F. 374-76. A full services listing, under Realcomp’s rules, is a listing agreement under which the listing broker is required to provide all of the following five services to the home seller: (A) arrange appointments for cooperating brokers to show listed property to potential purchasers; (B) accept and present to the seller(s) offers to purchase procured by cooperating brokers; (C) advise the seller(s) as to the merits of the offer to purchase; (D) assist the seller(s) in developing, communicating, or presenting counteroffers; and (E) participate on behalf of seller(s) in negotiations leading to the sale of listed property. F. 66. Realcomp would not treat a listing as an ERTS listing if the listing broker failed to provide one or more of these services. F. 376. Moreover, if the home seller (rather than the broker) performed

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any duties that fell under the “full service” umbrella, the listing would be designated as limited service. F. 376.

The Complaint does not specifically delineate the Minimum Services Requirement as a challenged policy and Complaint Counsel has stated that it is “not a separate access restriction.” Complaint ¶ 7, CCRFF ¶ 141. However, the evidence demonstrates that the Minimum Services Requirement is clearly integrated into and is a component of both the Website Policy and the Search Function Policy. F. 379. Accordingly, the challenged “Realcomp Policies,” *i.e.*, the Website Policy and the Search Function Policy, encompass the Minimum Services Requirement.

**(B) Website Policy**

Realcomp transmits Realcomp MLS listing information to certain public Internet sites (“the Approved Websites”). F. 210-11, 350. These include Realcomp’s own website, MoveInMichigan.com, and Realtor.com, the website of the National Association of Realtors®. F. 211, 227, 231, 350. The MoveInMichigan website, in turn, is “framed” by ClickOnDetroit.com, another public website that contains a variety of information concerning the Detroit metropolitan area. F. 238, 352. In addition, Realcomp feeds listings to the individual websites of its member brokers through the Internet Data Exchange (“IDX”). F. 242-46, 353. Realcomp members that participate in the IDX system use and publish these listings on their own real estate websites. F. 353.

In 2001, Realcomp adopted the “Website Policy,” which provides that “[l]isting information downloaded and/or otherwise displayed pursuant to IDX shall be limited to properties listed on an exclusive right to sell basis.” F. 355, 359. Pursuant to Realcomp’s Website Policy, realtors were required to offer the full services described above, in order for their listings to be considered ERTS listings and be transmitted and displayed through the IDX. F. 359, 373.

**(C) Search Function Policy**

Realcomp members search the MLS for listed properties using Realcomp Online. F. 180. In or about the fall of 2003, Realcomp

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changed the Realcomp Online search program to default to Exclusive Right to Sell and “Unknown” listings (“Search Function Policy”). F. 361. Specifically, the search program requires a Realcomp member to select (by checking a box) any or all of the following listing types when preparing a search request: ERTS, EA (Exclusive Agent), MLS-Entry Only, and Unknown. F. 363. Pursuant to the Search Function Policy, the ERTS and Unknown types are pre-selected for each search query. F. 361. If a member wished to also search EA listings, for example, the member must either check the EA box or the “all listings” box on the search screen. F. 364. The necessary action required nothing more than a single click of the computer mouse. F. 367.

As noted in the Introduction, in April 2007, Realcomp repealed the Search Function Policy by a vote of its Board of Governors. F. 370-71. On July 31, 2007, the repeal of this policy as well as the Minimum Services Requirement, was memorialized by the parties pursuant to the “Joint Stipulation Regarding Respondent’s Search Function Policy,” appended hereto as “Attachment 1.”

**(ii) Arguments of the Parties**

The Complaint alleges that the challenged “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.” Complaint at 1. Complaint Counsel contends that Realcomp’s Policies restrict competition in two ways. First, Complaint Counsel asserts that “the Policies tend to exclude competition from discount brokers by disadvantaging the use of their primary competitive tool- the Exclusive Agency listing agreement.” CCB at 47. Second, Complaint Counsel argues that the Policies limit competition among Realcomp members by eliminating their ability to offer a particular package of services -- Exclusive Agency listings with full exposure through the Approved Websites. CCB at 47. Thus, Complaint Counsel concludes, the Policies deny consumers the benefits of competition and a product that they desire. CCB at 47.

Respondent takes the position that there is no credible evidence that there has been any material reduction in the availability of Exclusive Agency contracts as a consequence of

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Respondent's policies. RB at 1. Respondent further argues that there is no evidence that its challenged policies have diminished consumer welfare. RB at 1. As such, Respondent avers that the Court should decline to enjoin a practice for which competitive harm has not been demonstrated.

**(iii) Analysis of the Nature of the Challenged Policies**

It should again be noted that there is no price-related restraint at issue in this case. Joint Stipulations of Law and Fact at 4-5; F. 189, 196-97, 203. Respondent does not in any manner determine or otherwise regulate the commissions or prices to be charged by listing brokers, or the discounts that any listing broker may offer. Joint Stipulations of Law and Fact at 4-5; F. 189, 196-97. Likewise, Respondent does not determine or regulate the offer of compensation to cooperating brokers for any listing in the Realcomp MLS. Joint Stipulations of Law and Fact at 4-5; F. 203. In addition, this case does not contain the elements necessary for a classic economic boycott. *See Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield*, 373 F.3d 57, 64 (1st Cir. 2004). Discount brokers who are members of Realcomp can, and do, list their Exclusive Agency listings on the Realcomp MLS. *Infra* Section m.E.2.c.; F. 163-64, 181. The analysis, thus, turns to an assessment of the nature of the Realcomp Policies with respect to excluding competition and eliminating consumer choice.

**(A) Whether the Nature of the Challenged Policies Indicate Likely Exclusion of Competition From Discount Brokers**

In evaluating whether the challenged conduct is “in the nature of a group boycott,” it should be first made clear that “[a] group boycott traditionally occurs when a particular group or individual is prohibited from joining an organization.” *Reifert v. S. Central Wisconsin MLS Corp.*, 450 F.3d 312, 320 (7th Cir. 2006). Further, the boycotting group traditionally “combines to deprive would-be competitors of a trade relationship which they need in order to enter (or survive in) the level wherein the group operates.” *Northwest Real Estate Bd., Inc. v. Multiple Listing Service, Inc.*, 1991 U.S. Dist. LEXIS 11809, \*6 (N.D. Ill. 1991)

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(citing *Phil Tokan Datsun v. Greater Milwaukee*, 672 F.2d 1280, 1282 (7th Cir. 1982)).

In the MLS context, courts have long recognized the anticompetitive potential of MLS rules that deny MLS membership to some brokers. *Realty Multi-List*, 629 F.2d at 1370-71; *Thompson*, 934 F.2d at 1580. In *Realty Multi-List*, the Fifth Circuit held that a “concerted denial of access to [defendant’s] listing service, when [its] members have agreed to pool and share their listings, amounts to a group boycott of the nonmember.” 629 F.2d at 1361. In *Thompson*, the Eleventh Circuit held that excluding brokers from the MLS “reduces the competition among brokers and could result in less competition for brokerage fees.” *Thompson*, 934 F.2d at 1580. But, as previously noted, *Realty Multi-List*, *Thompson*, and other MLS cases relied upon by Complaint Counsel, address MLS rules that exclude brokers from participating in the MLS. There are no such allegations in this case. Instead, the evidence shows that limited service brokers are allowed to and do, join Realcomp. F. 163-64, 433. The evidence further shows that limited service brokers are allowed to and do, place their non-ERTS listings on the Realcomp MLS. F. 181, 433.

The question, thus, is whether the challenged policies which do not fully exclude competition, are nevertheless anticompetitive on the grounds that they place discount brokers at an unreasonable disadvantage. Complaint Counsel, relying on *Northwest Wholesale Stationers*, argues that denial of some services of a competitor collaboration can lead to the same competitive harm as a denial of all services. CCB at 49. In *Northwest Wholesale Stationers*, under the rules of the competitor collaboration, a buying cooperative, members effectively purchased supplies at prices significantly lower than nonmembers. 472 U.S. at 286. Plaintiff, who had been expelled from the cooperative, challenged his expulsion as a group boycott. *Id.* at 288. Plaintiff was not wholly excluded from the cooperative, as he was still able to purchase through the collaboration, albeit at higher, nonmember prices. *Id.*

*Northwest Wholesale Stationers*, however, does not compel a finding that the challenged policies are likely to exclude competition under the facts of this case. The issue decided in *Northwest Wholesale Stationers* was not whether disparate rules

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for nonmembers are generally proscribed by the Sherman Act under the rule of reason. Rather, the relevant issue there was whether such treatment constituted a *per se* violation of the Sherman Act, and the Court ruled that it was not. 472 U.S. at 286, 298.

Moreover, the Court's observations regarding disparate treatment were made wholly in the context of addressing the question of whether the conduct could be properly characterized as a group boycott. 472 U.S. at 295 n.6 ("Because Pacific has not been wholly excluded from access to Northwest's wholesale operations, there is perhaps some question whether the challenged activity is properly characterized as a concerted refusal to deal."). The Court did not generalize its determination to condemn all such disparate treatment. Indeed, the Court observed that disparate treatment "*might justify per se* invalidation *if* it placed a competing firm at a *severe* competitive disadvantage." *Id.* (emphasis added). As discussed in Section III.E.2.c, *infra*, the challenged activity in this case did not place discount brokers at a severe disadvantage.

Finally, *Northwest Wholesale* was a membership exclusion case, and the conduct in question concerned whether the defendant had an obligation under the antitrust laws to deal with nonmembers on the same terms as members. *Id.* at 289. The issue here, however, is whether the Realcomp cooperative can establish different rules for different brokerage products. That is a very different question than the issue presented in *Northwest Wholesale*. Thus, Complaint Counsel's reliance on *Northwest Wholesale* does not compel a conclusion that the nature of Realcomp's policies indicate a likely, unreasonable restraint of trade.

By contrast, the nature of the restraint in *Cantor v. Multiple Listing Service, Inc.*, 568 F. Supp. 424 (S.D.N.Y. 1983) is similar to the nature of the challenged restraints here and may suggest a finding that the Realcomp Policies are likely to exclude competition from discount brokers. In *Cantor*, the challenged restriction was a rule that required all brokers who were members of the MLS to use only MLS-branded yard signs, to the exclusion of signs branded by the specific brokerage (*e.g.*, "Century 21"). *Id.* at 427. The court in *Cantor* found the restrictions unlawful



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because some brokers had been discriminatorily prevented from advertising their listings. *Id.* at 430. The court observed, the MLS “virtually conceded” that the intent and purpose of this rule was to remove the competitive advantage that some MLS members might have over other MLS members. *Id.* The MLS rules condemned by the court in *Cantor* were found to have prevented brokers from using effective means of gaining exposure for their listings. *Id.* Here, it is only upon further examination, Section III.E.2.c, *infra*, that the Court concludes that discount brokers do, in fact, have effective means of exposure for their listings.

With respect to the Search Function Policy, including the requirement that, in order to be considered an ERTS listing, an agent must provide full brokerage services, it is evident that the nature of such restraint is *not* anticompetitive. Complaint Counsel argues that the Search Function Policy had the effect of excluding non-ERTS listings from the MLS. CCB at 30. The evidence, however, belies this claim. For a Realcomp member to perform a Quick Search on the online MLS to access all listing types, required nothing more than the single click of the computer mouse on the button clearly labeled “all listings.” F. 363. If a member wished to search exclusively for EA listings, for example, the member was merely required to check the EA box on the search screen. F. 364. Similarly, if the member did not want to search ERTS listings, the member could de-select the ERTS box. F. 364. The search function screen is not hidden on the Quick Search page. F.362. Complaint Counsel’s witnesses and a modicum of common sense, indicate that it was no impediment for brokers to add one more mouse click to conduct an effective search of any and all listings. F. 367-68.

It is also possible for an individual member to change the initial defaults on the search screen so that a different combination of listing types (or no listing type) is pre-selected. F. 366. In addition, a search by MLS number pulls up the appropriate listing, including EA listings, without having to select listing type. F.365.

The facts here are hardly comparable to those in *United Air Lines, Inc. v. Civil Aeronautics Bd.*, 766 F.2d 1107, 1110, 1113 (7th Cir. 1985), cited by Complaint Counsel for the proposition that search defaults can have negative competitive effects even if they are easy to override. CCB at 50. First, *United Air Lines* is a

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decision issued in 1985, when widespread acceptance of computers in everyday business and living was a long way into the future, and the court's observation regarding computer skills is unquestionably tied to the time period in which it was made. In this case, the Realcomp Online MLS is entirely computer-based. F. 180. Thus, a minimal facility with computers and databases is essential for brokers to effectively participate in today's real estate business. F. 369,455. Second, the ruling in *United Air Lines* was not an adjudication as to whether a private entity's decision to implement a computer search default violated the antitrust laws. Rather, *United Air Lines* was a challenge to a Civil Aeronautics Board rulemaking that concerned, in part, "biasing" in computerized reservation systems. 766 F.2d at 1109-10. It thus offers the Court little, if any, guidance for purposes of the instant discussion.

"[P]laintiffs have a burden to show more than a *de minimus* restraint." *Tunis Bros.*, 952 F.2d at 728. "The Sherman Act was designed to prohibit significant restraints of trade rather than to 'proscribe all unseemly business practices.'" *Id.* (citation omitted). Realcomp's decision to set the search default to bring up only ERTS listings unless the agent specifically selected to see all listings or selected to see EA listings, can, at best, be characterized as a *de minimus* restraint.

**(B) Whether the Nature of the Challenged Policies Indicate Likely Elimination of Consumer Choice**

Complaint Counsel additionally argues that the challenged Policies eliminate Realcomp members' ability to offer a particular package of services - Exclusive Agency listings with full exposure through the Realcomp MLS. CCB at 47. Relying on *Indiana Federation of Dentists*, Complaint Counsel asserts that an agreement among competitors to withhold from their customers a particular service that they desire unreasonably limits consumer choice and thereby unreasonably restrains trade. CCB at 51-54.

In *Indiana Federation of Dentists*, a group of dentists formed for the sole purpose of resisting insurers' requests for X rays, thereby hindering insurers' efforts to implement alternative benefits plans. 476 U.S. at 451, 454. Central to every element of

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*Indiana Federation* was the naked character of the restraint. The Indiana Federation of Dentists had no purpose other than to organize and enforce the boycott of dental insurance companies. *See* 476 U.S. at 451, 454.

By contrast, multiple listing services like Realcomp are collaborations that are generally considered procompetitive. *See, e.g., Realty Multi-List*, 629 F.2d at 1356 (“the benefits offered by a multiple listing service are manifest”). Courts have acknowledged that MLSs may impose restrictions related to the efficient functioning of the venture. *E.g., Reifert*, 450 F.3d at 321 (competitive restriction on “stealing” properties listed by another member). Thus, the analogy of Realcomp Policies to the dentists’ refusal to provide X rays to insurers, a naked-boycott, is not a compelling one.

In this case, Complaint Counsel asserts that the Realcomp Policies eliminate a “product,” namely “Exclusive Agency listings with full exposure,” and describes the Realcomp Policies as an agreement to limit the offering of a “package” of such services. CCB at 51-52. Even if one were to assume that this “package” of services is distinct and valued by consumers, there is substantial evidence in this case that consumers have always had options under Realcomp MLS rules to purchase varying levels of unbundled discount brokerage services and are able to acquire such a package if they choose to do so. F. 479-81. Nevertheless, the Court cannot reach this conclusion without expanded analysis of the competitive effects evidence.

**(iv) Summary of the Nature of the Challenged Policies**

With respect to the Search Function Policy, and the requirement that in order to be considered an ERTS listing, an agent must provide minimum brokerage services, a review of the evidence does not establish that the nature of the restraint is such that it likely precluded discount brokers from competition or eliminated consumer choice. Because discount brokers are not excluded from the MLS and because the MLS is overwhelmingly the most important source for real estate exposure (Section, III.E.2.c., *infra*), the restraint imposed by the Search Function Policy is, in fact, quite negligible. The nature of a restraint that

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simply requires brokers to undertake an additional click of a mouse in order to find all listings or specific kinds of listings contained on an MLS does not rise to the level of an unreasonable restraint of trade under Section 5. No further analysis of the effects of such *de minimus* restraint need therefore be performed.

With respect to the Website Policy, and the requirement that in order to be considered an ERTS listing, an agent must provide minimum brokerage services, the nature of the restraint is such that it is likely to be anticompetitive. Such conclusion, though not intuitively obvious, necessarily requires an expanded inquiry into whether competition was, in actuality, unreasonably restrained. When the “anticompetitive effects of the challenged restraints are far from intuitively obvious,” an inquiry into Respondent’s market power and the effects of those restraints must be performed. *California Dental*, 526 U.S. at 759. Thus, a review of Respondent’s market power and an analysis of the competitive effects of the restraint is necessary and follows.

#### **b. Market Power**

“While . . . a trade group like a multiple listing service may create significant competitive advantages both for its members and for the general public, there exists the potential for significant competitive harms when the group, having assumed significant power in the market, also assumes the power to exclude other competitors from access to its pooled resources.” *Realty Multi-List*, 629 F.2d at 1370.

As previously concluded in the Relevant Market Section, III.C, *supra*, Respondent does in fact, have market power in the relevant market. The evidence demonstrates that Realcomp would be able to profitably increase commissions significantly above competitive levels without risking sellers of homes switching to FSBO and that Realcomp would be able to implement a “small but significant and non-transitory increase in price” for access to the MLS because few brokers could withdraw from participating in an MLS even if the fees or other costs associated with participation substantially increased. F. 295, 315, 324. Realcomp’s market shares for Wayne, Oakland, Livingston, and Macomb counties for 2002 to 2006 in terms of new listings was {■■■■} and in terms of unique listings was {■■■■}. F.

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340, 346. Respondent's market power is further enhanced by network effects and barriers to entry. F. 330-35. There is no effective substitute to Realcomp in the relevant market. F. 336. However, as previously noted, because the alleged restraints are not intuitively obvious, even with Realcomp's substantial market power, under the rule of reason the review must proceed to an examination of the competitive effects of the challenged restraints. Such analysis is set forth below.

**c. Effects on Competition**

"In order to prevail in the absence of *per se* liability, [Complaint Counsel] has the burden of proving that the [challenged restraint] violated the Sherman Act because it unreasonably restrained competition." *Jefferson Parish Hosp. v. Hyde*, 466 U.S. 2, 29 (1984). "That burden necessarily involves an inquiry into the actual effect of the [restraint] on competition." *Id.* "Proof that defendant's activities had an impact upon competition in the relevant market is 'an absolutely essential element of the rule of reason case.'" *Supermarket of Homes, Inc. v. San Fernando Valley Ed. of Realtors*, 786 F.2d 1400, 1405 (9th Cir. 1986) (citation omitted). The fact that a case proceeds under Section 5 of the FTC Act does not alter the requirement that anticompetitive effects must be proved with evidence. *See California Dental Ass'n v. FTC*, 224 F.3d 942, 958-59 (9th Cir. 2000) (FTC's failure to demonstrate substantial evidence of a net anticompetitive effect resulted in remand with direction that the FTC dismiss its case).

The evidence in this case, including expert empirical analyses, as summarized below, establishes that the challenged restraints have not substantially lessened competition by discount brokers in the relevant market or harmed consumers, by either depriving them of choice or resulting in significantly increased economic costs.

**(i) Realcomp's Website Policy Did Not Unduly Hinder Competition by Discount Brokers**

At trial, Complaint Counsel offered the testimony of five EA brokers who claimed to have been competitively disadvantaged by the Realcomp Policies: Mr. Craig Mincy

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(MichiganListing.com); Mr. Albert Hepp (BuySelf Realty); Mr. Jeff Kermath (AmeriSell Realty); and Mr. Gary Moody and Ms. Denise Moody (Greater Michigan Realty). The testimony of those witnesses, as well as other record evidence, belies the theory that the Realcomp Website Policy has had a significant adverse effect on competition. Indeed, the evidence shows that EA brokers successfully sell their discount brokerage services in Southeastern Michigan and that perceived “impediments” faced by EA brokers are chiefly attributable to factors other than the Realcomp Website Policy.

All of the EA brokers who testified for Complaint Counsel admitted that their businesses are growing, even in the face of a difficult local housing market. The limited service brokerage firm, MichiganListing.com, has grown since it began in 2004. F. 466. Between 2005 and 2006, its business increased 30%, and was trending upward in February 2007. F. 466. BuySelf Realty’s business has grown 10% to 35% since 2004 in Southeastern Michigan. F. 468. AmeriSell has grown substantially since 2003-2004, with over \$46 million in listings and more listings statewide than any other company. F. 465. Greater Michigan Realty had approximately 500 listings in 2006, when the industry average was 25, and the company generated \$23,275,000 in home sales in its first year of operation. F. 467. This evidence is clearly inconsistent with Complaint Counsel’s theory that EA brokers have been competitively impaired by the Realcomp Website Policy. If the Realcomp Website Policy was severely impairing the ability to offer EA and limited service brokerage contracts, one would expect brokers in the market to testify that their revenues and profits have similarly declined. The testimony, however, is quite the contrary. *See* F. 463-68. Complaint Counsel’s argument that BuySelf Realty, having only a referral business in the Realcomp Service Area, was deterred from entering the market and becoming a direct competitor of Realcomp “because of the Realcomp Policies,” (CCRB at 11) though acknowledged, is insufficient to rebut substantial evidence to the contrary. *See* F. 468. Similarly, the fact that firms like MichiganListing.com and AmeriSell Realty encouraged customers to spend additional money on EA or flat fee ERTS listings to better their sales prospects, F. 479-81, does not, on its face, demonstrate that the Website Policy unreasonably restrained EA brokerage services in the relevant market.

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No EA broker testified that he or she was forced to exit the market by the Realcomp Policies, with the sole exception of Wayne Aronson, the vice president and general manager of YourIgloo, Inc., an EA real estate company located in Florida which did business in Michigan beginning in 2001. F. 472-74. Mr. Aronson testified that, due to Realcomp's rules, YourIgloo stopped doing business in Michigan in 2004. F. 472, 474.

However, the record reveals that YourIgloo's operations faced material problems prior to exiting the market that had nothing to do with Realcomp. F. 475. Among these problems was increased competition. F. 475. Mr. Aronson testified that in 2001, when YourIgloo first entered the Michigan market, it faced few competitors, but by 2004, when YourIgloo decided to exit the market, competition had increased and "the industry became very competitive and very crowded . . . ." F. 475. YourIgloo was also plagued by bad relations between the company's management and Ms. Groggins, its sole broker for the state of Michigan. F. 475. Ms. Groggins was let go by YourIgloo management in 2004 for failing to come into the office during hours that she was expected to be available. F. 475. There is no evidence that Ms. Groggins was ever replaced. This fact can be regarded as having undoubtedly played a role in YourIgloo's decision to leave the state of Michigan the same year that Ms. Groggins was terminated from her employment. It does not take a leap of reason to conclude that YourIgloo, an out-of-state firm, would have great difficulty conducting business in Michigan without the presence of a local broker. In addition, YourIgloo had been a member of MiRealSource, and evidence exists in MiRealSource's Bylaw Committee minutes of March 25, 2004, that casts further doubt as to the reasons YourIgloo decided to leave not only MiRealSource, but the state of Michigan, F. 476. The evidence further shows that YourIgloo had also encountered problems doing business successfully in other states, pulling out of two of the nine states in which it is licensed, Pennsylvania and New Jersey. F. 477.

In light of this evidence, Mr. Aronson's statement that his decision to leave Michigan was "one-hundred percent" attributable to Realcomp's Policies, F. 472, lacks credulity and is only of limited weight in support of Complaint's Counsel's position that Realcomp's Policies forced a competitor to exit the market. Despite Complaint Counsel's contentions that YourIgloo,

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exited the market only when it no longer wished to provide real estate brokerage services itself, (CCB at 31) it would appear that, unlike the five witnesses who testified that their discount brokerage businesses are growing and competing in Southeastern Michigan, YourIgloo suffered from some serious management problems that made it an ineffective competitor.

Requisite competitive harm is established if “the effect upon competition in the marketplace is substantially adverse.” *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 375 (1967), *overruled on other grounds by Continental TV., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). The record here, establishes that EA brokers have successfully marketed their discount brokerage services in the Realcomp Service Area despite the Realcomp Policies. F. 465-67. The evidence also clearly demonstrates that consumers have an abundant and broad range of services from which to choose, depending on their needs and financial abilities. F. 479-81. EA brokers are able to and do provide a full menu of unbundled services, from MLS only, to assisting with negotiations and closing assistance. F. 479-81. Flat fee ERTS services, which offer full exposure on the IDX and Approved Websites, are also available to consumers at reasonable costs. F. 481. As such, the evidentiary record indicates that Dr. Williams’ theory that consumers are forced to substitute ERTS contracts for EA contracts and thereby pay substantially higher prices for brokerage services as a result of the Realcomp Policies is unfounded. Accordingly, Complaint Counsel has not presented reliable evidence that demonstrates actual adverse harm to competition as a result of the Realcomp Website Policy.

**(ii) Realcomp’s Website Policy Did Not Exclude  
Non-ERTS Listings from the MLS**

Complaint Counsel asserts that the Website Policy limits public exposure of non-ERTS listings because such listings are not uploaded to the IDX system or MoveInMichigan.com. CCB at 17. However, the evidence is clear that non-ERTS listings have significant exposure through the Realcomp Online MLS.

By placing their EA listings into the Realcomp Online MLS, limited service brokers reach a projected 80% of all home buyers. F. 431. If one combines that with the option of also placing those



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EA listings onto Realtor.com, at a minimal additional cost, the combination reaches approximately 90% of all home buyers. F. 435. Complaint Counsel offers no evidence to refute these estimates or otherwise show that they are not reasonably accurate.

The evidence clearly shows that the most important source of Internet exposure is that provided by the MLS. F.428-30. Mr. Hepp, for example, testified that the MLS is substantially more important than any other tool for the sale of residential real estate in Southeastern Michigan, and that in his opinion, the MLS generally finds a buyer three times more often than any other home selling tool. F. 432. Similarly, Mr. Aronson testified at deposition that the MLS is, by a considerable extent, the most effective means of promoting residential real estate in Michigan. F. 432. The fact that such online MLS exposure is limited to member brokers, and is not accessible by the general public, does not change these basic, unrefuted facts.

The fact that realtors are able to reach 80% of home buyers through the online MLS alone, leads to the inescapable conclusion that there are clearly suitable marketing alternatives to the Approved Websites. In *Schwinn*, among the factors the court considered in determining the challenged restraint of trade was not an “unreasonable” restraint was the fact that other alternative products were available in the market. *Schwinn*, 388 U.S. at 381.

A few courts, in evaluating whether the denial of membership in an MLS is an antitrust violation, have stated that participation in the MLS “is a practical economic necessity” for the survival of realtors’ business. *Marin County Ed. of Realtors, Inc. v. Palsson*, 549 P.2d 833, 844 (Cal. 1976); see *Pope v. Mississippi Real Estate Comm’n*, 695 F. Supp. 253, 269 (N.D. Miss. 1988). See also *Thompson*, 934 F.2d at 1577 (noting the considerable evidence that “multilist services are a necessity for brokers” in evaluating defendant’s market power). The facts in this case, however, show that while participation in the Realcomp Online MLS may be “a practical economic necessity” - as it reaches the overwhelming majority of home buyers - the display of listings on the Approved Websites - which reaches only a relatively small additional percentage of home buyers - is not. Thus, the basic and undisputed fact that discount EA listings were not excluded from the most effective marketing tool in the local service area, the

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Realcomp Online MLS, undermines Complaint Counsel's argument that the Realcomp Website Policy constituted an unreasonable restraint of trade.

**(iii) Realcomp's Website Policy Did Not Prevent Discount Brokers From Utilizing Public Websites**

The evidence establishes that EA home sellers and their listing agents, despite some competitive disadvantages, can and do, effectively market properties in the Realcomp Service Area to the public without direct access to the Approved Websites. F.434-54. Thus, Complaint Counsel's assertion that the Realcomp Website Policy unreasonably limits public exposure of non-ERTS listings because non-ERTS listings are not uploaded to the IDX system or the Approved Websites is without sufficient evidentiary support.

Without denying the importance of Internet marketing generally, or marketing listings on the Approved Websites in particular, the Court cannot draw a conclusion that all available websites are of equal importance. They are not. As Complaint Counsel notes, in national studies, 40-50% of home buyers reported visiting MLS websites, Realtor.com, and the websites of real estate companies and agents. CCB at 21. The record shows that the Approved Websites, though important marketing tools for reaching prospective home buyers, are but a few among numerous Internet sources from which the general public can obtain information about real estate listings. F. 446. Other publicly available websites, such as Google and Trulia, are quickly growing in popularity and usage and are an economically viable and effective channel for reaching the approximately 10% of additional prospective home buyers not exposed to listings from the online MLS and Realtor.com. F. 449.

This is true even if such sites do not receive a significant number of visits by buyers in comparison to the Approved Websites. F. 449. Further, the evidence does not support Complaint Counsel's assertion that there are "significant" costs associated with a broker having to individually send each listing to such a website and update the listings every time there is a change in information. Complaint Counsel's own industry expert, Mr. Steve Murray, testified that Google presently has a site that is

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open to EA listings, and that there is no charge for putting a listing into Google. F. 450. He further testified that Google has publicly announced that it intends to build as large and robust a real estate site as possible. F. 450. Although this does not suggest that Google is presently an equal substitute for the Approved Websites, it is clearly indicative of the market's growing response to meeting consumer demand for making discount listings widely available at reasonable or no cost.

Mr. Murray also noted that Trulia is a public website that does not charge for listings and that has grown substantially in the last several months, despite issues with capital funding for the project. F. 452. Similarly, Complaint Counsel's witness, Mr. Moody, testified as to the growing significance of Google Base. F. 451. Mr. Moody testified in his deposition regarding the popularity of different real estate websites. Specifically, he currently ranks Google Base number four in popularity, behind MoveInMichigan.com, Realtor.com, and the IDX. F. 451. He stated, however, that "in the near future, Google Base will be more important than IDX." F. 451. Although somewhat speculative, such testimony reflects Mr. Moody's personal observations and substantial experience regarding current trends in real estate databases in Southeastern Michigan. He testified that MLSs across Michigan are beginning to put their data onto Google Base and Trulia. F. 449. If Mr. Moody's prognostication proves correct, EA home sellers will soon be able to place their listings on two of the top three most popular real estate websites at little or no cost (*i.e.*, Realtor.com and Google Base).

As demonstrated, the Internet is a dynamic and ever-changing marketing tool and the question of which alternative sites provide the greatest value to real estate marketing efforts is, as Mr. Sweeney described, a "moving target." F. 445. As Complaint Counsel has shown, however, numerous studies since 2004, have concluded that the most visited websites by home buyers are MLS websites, Realtor.com, and the websites of real estate companies and agents. F. 447. Despite this evidence, the fact remains that there is no evidentiary basis to conclude that access to the Approved Websites is essential to the ability of discount brokers to compete in the Southeastern Michigan real estate market.

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Furthermore, the evidence establishes that EA brokers are in fact, able to place their listings on Realtor.com by “dual-listing” the property with other MLSs which have data-sharing agreements with the Realcomp MLS. F. 436-40. Dual-listing is a common, if not prevalent, practice among EA brokerage firms. F. 436. Complaint Counsel does not dispute that EA brokers in the Realcomp Service Area use the Ann Arbor, Shiawassee and Flint MLSs to get their EA listings on Realtor.com. CCRFF ¶ 107; F. 439. Effective in April 2007, EA agents can also place their listings on Realtor.com by listing them in the MiRealSource MLS, following the consent decree between MiRealSource and the FTC. F. 441.

While dual-listing EA listings on another MLS (in addition to Realcomp) is an inconvenience and undoubtedly requires additional costs, the evidence shows that such costs are not unduly burdensome. The MLSs used by EA brokers to bypass the Realcomp rules charge annual membership fees comparable to those assessed by Realcomp. F. 442. In addition to the annual membership fees, the fees to belong to these MLSs range from \$55 per month, in the case of Ann Arbor; \$99 per quarter for Flint; and \$29 per licensee and broker and \$24 per office after an initiation fee is paid in the case of MiRealSource. F. 442. The labor cost associated with dual-listing is also not onerous. For example, Mr. Mincy places his listings from the Realcomp Service Area on public websites through the Shiawassee MLS. F. 440. He charges his clients a minimum additional fee of \$100 for dual-listing. F. 444. Greater Michigan Realty only charges an additional \$50. F. 444. EA agents pay anywhere from \$7.00 to \$20.00 per hour for data entry. F. 443. It takes the Realcomp staff 10 to 15 minutes to enter a listing, and an additional one to five minutes to update a listing over its life. F. 443. Thus, the relatively nominal cost and administrative effort involved in dual-listing with an MLS with a data-sharing agreement, if not *de minimus*, is not prohibitively expensive when allocated among a brokerage’s EA contracts. As such, it does not constitute an unreasonable restraint for discount brokers or their home selling clients.

“The antitrust laws do not guarantee competitors the right to compete free of encumbrances . . . so long as competition as a whole is not significantly affected.” *Clorox Co. v. Sterling*

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*Winthrop, Inc.*, 117 F.3d 50, 59 (2d Cir. 1997) (finding no liability even though “it may well be that the restrictions . . . prevent [plaintiff] from competing as effectively as it otherwise might”). See also *United States v. Topco Assocs. Inc.*, 405 U.S. 596, 606 (1972) (Congress did not intend to prohibit practices that might “in some insignificant degree” restrain competition). A review of the evidence, here, supports the conclusion that Realcomp’s Website Policy does not prevent discount EA brokers from accessing and utilizing public real estate websites, nor does the cost to dual-list or data-share an EA listing with the Realcomp MLS amount to an unreasonable restraint on competition or consumer harm.

**(iv) The Local Economy and National Trends  
Regarding Discount Brokerage Models Are  
Largely Responsible For Any Adverse  
Effects in Southeastern Michigan**

There is little dispute that Detroit and the surrounding area of Southeastern Michigan, for at least the past three years, has been a “buyers market” - *i.e.*, a difficult market for home sellers due to the effect of the decline of the automotive industry on the local economy and the softening of the residential real estate market. F. 122-25. It is considerably worse than the national market and, consequently, it is very difficult for brokerages to do business there. F. 126-29. Homes are steadily losing value and listings are staying on the market for extended periods of time with very few sales. F. 127-28. Real estate agents are in fact leaving the business because of these conditions, with one estimate indicating that agents are down in volume as much as 20%. F. 129-30.

The evidence demonstrates that discount EA brokers sell a different type of brokerage “product” than traditional, ERTS brokers. Unlike traditional full service ERTS brokers, EA brokers do not provide a high-level of personal service. F. 89. EA brokers almost never meet customers face-to-face, have very limited personal contact with their customers, and do not compete well with full service brokers for trust and professionalism. F. 89. Moreover, the testimony of Mr. Sweeney indicates that in a declining or distressed market, where both the value of a home and the seller’s equity are declining, more home sellers would choose full service ERTS listings over EA listings because they

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want the professional marketing services of a full service broker. F. 96.

Complaint Counsel's attempt to discredit such testimony by portraying it as "a self-interested sales pitch for his own business model" (CCRFF ¶ 197) is unpersuasive and ignores Mr. Sweeney's credentials as a real estate professional in the Southeastern Michigan market. Mr. Sweeney's testimony that "exclusive agency type firms" are appearing in Southeastern Michigan, but there has not been a surge in growth is also consistent with national surveys regarding the decline of discount brokerage services, especially since 2005. F. 91, 131.

Though EA brokers who testified at the hearing indicated that their discount brokerage services were, in fact, growing and competing in the face of the difficult local economy, EA listings have not made substantial inroads in Southeastern Michigan. F. 131. This again, is consistent with national statistics. EA listings grew significantly on a national basis between 2003 and 2005, from 2% to 15% of listings, which has been attributed in considerable part to a "hot" real estate market, particularly on the coasts. F. 90, 93. However, between 2005 and 2006, national surveys indicate that the percentage of EA listings fell from 15% to 8%, which Complaint Counsel's industry expert witness, Mr. Murray, attributes to a shift from a strong seller's market in 2005 to a softening of the housing market in 2006, meaning it was more of a buyers' market with a decrease in sales and increase in inventory. F. 91.

Thus, national trends, at least since 2005, would seem to demonstrate a substantial, if not severe, downturn in the number of EA listings throughout the country. This is true despite Complaint Counsel's proffered testimony of Mr. Murray, that the real estate market in Southeastern Michigan "could" provide opportunities for limited service brokers because of the fairly high incidence of "short sales," which refers to homeowners who do not have much equity in their homes and would have to issue a check at closing to pay off the remaining balance on their mortgage. F. 97. Similarly, testimony by some limited service brokers in Southeastern Michigan indicates that their services "often" appealed to home sellers without equity in their homes. F. 98. Such evidence might well be true, but is difficult to quantify. In

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any event, it does not refute the national studies regarding current, nationwide trends in the real estate industry. These trends must be acknowledged in the context of evaluating whether Realcomp's Website Policy was responsible for any adverse effects on discount competition in the local service area and any speculative evidence which might suggest that home sellers with no equity in Southeastern Michigan *might* turn to EA brokerage contracts.

Competition among real estate brokers is, of course, local in nature. F. 83-85. Although Dr. Williams concluded that in the absence of artificial restrictions on competition, the market share of discount brokers would be expected to increase in the future, F. 469, Respondent's expert, Dr. David Eisenstadt, opined that he had "not seen any type of projection as to what the future likely market share of these discount brokers is over time." F.470. Certainly Dr. Williams appears to be correct when he concludes that "limited service brokers represent a relatively new business model" and that that model's "growth has been facilitated by the Internet." F. 469. Likewise, Mr. Murray enunciated several reasons why he expects to see continued growth in the limited brokerage model. F. 471. However, it is not clear from such evidence that the limited service brokerage model is, or in fact should be, performing any better at the current time in the relevant market of Southeastern Michigan, than the national surveys indicate it is in the rest of the country.

**(v) Complaint Counsel's Expert Testimony  
Fails to Demonstrate Significant  
Competitive Effects as a Result of  
Realcomp's Website Policy**

Complaint Counsel relies on the report and testimony of Dr. Williams in an effort to give substance to the purported linkage between the Realcomp Policies and the alleged adverse effects on competition in the Southeastern Michigan real estate market. Dr. Williams testified that the effect of Realcomp's Website Policy is to restrict EA listings from the Approved Websites, and that, in combination with the Search Function Policy and the Minimum Services Requirement, "every" channel through which a potential home buyer could see an EA listing is affected. F. 508. Dr. Williams concluded that, combined, the Realcomp Policies

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effected a 5.5% reduction in the usage of EA listings, resulting in a decline of competition from limited service brokers. F. 510.

Dr. Williams' conclusions emanate from three sets of analytical work. The first technique was based on what he describes as a "time series" (*i.e.*, before-and-after) analysis. There, Dr. Williams observed that the percentage of EA listings on the Realcomp MLS declined after the Realcomp Policies were implemented. F. 484-85. Next, in his "benchmark analysis," Dr. Williams compared the prevalence of EA listings in Metropolitan Statistical Areas ("MSAs") where the local MLS had no restrictions similar to the Realcomp Policies during 2002 through 2006, to that in MSAs (including Southeastern Michigan) where such restrictions did exist during that period. F. 509, 512-14. Dr. Williams made these comparisons based on the overall average percentage of EA listings in each of the two groups, weighting the average according to the number of listings in each MLS. F. 514. As a result, he concluded that the weighted average percentage of EA listings is higher in MLSs without restrictions than in those MLSs that do employ such restrictions. F. 514. Thirdly, Dr. Williams utilized a statistical regression model ("probit analysis") to compare the prevalence of EA listings among the same previously-described groups of MSAs in an attempt to hold constant certain factors that may account for differences in the raw percentages of EA listings. F. 544, 547. As a result of this analysis, Dr. Williams testified to a statistically significant difference between the two groups, from which he concluded that the Realcomp Policies have reduced the share of EA listings compared to what would have existed had those policies not been in effect. F. 552.

Upon review of the entirety of the empirical evidence, the Court concludes that Dr. Williams' analyses are, in many areas, methodologically unsound as they make certain flawed assumptions, utilize arbitrarily selected MSA comparisons, and fail to control for certain economic and demographic factors likely to affect the prevalence of EA listings. As such, his conclusions regarding the adverse effects of the Realcomp Policies are, in large part, unreliable. Respondent's expert, Dr. Eisenstadt, whose analyses, in part are similarly flawed, nevertheless presented sufficient contradictory findings and testified specifically to the weaknesses and deficiencies in Dr. Williams' analysis. Upon



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rebuttal, Dr. Williams failed to credibly refute significant portions of Dr. Eisenstadt's accepted testimony sufficient to persuade the Court as to the asserted adverse effects of the challenged practices on competition.

**(A) Dr. Williams' Time Series Analysis Does  
Not Support a Finding of Adverse  
Effects**

In his before and after, time series analysis, Dr. Williams ascertained that the Realcomp Policies were responsible for certain adverse effects, based on his determination that the average monthly share of new EA listings (*i.e.*, as a percentage of total new listings) declined approximately 0.75 percentage points, from approximately 1.5% to approximately 0.75%, over the period of May 2004 to October 2006. F. 484-87. As such, it offers support for Dr. Eisenstadt's conclusion that, using Dr. Williams' data, Realcomp's Policies' effect on non-ERTS listings was found at most to account for a 1% decrease in the percentage of non-ERTS listings. F. 488.

Moreover, Dr. Williams indicated that basing his measurement on the monthly average percent of new EA listings insulated the calculation from market flux because the percentage ratio of EA to ERTS listings should not change even if total listings decline. F. 489. The greater weight of evidence, however, strongly suggests that this assumption is without proper foundation. Indeed, the preponderance of economic and factual evidence would indicate that in a continuing distressed market such as Southeastern Michigan, F. 123-30, one might well anticipate the relative percentage of EA listings to decline over time. F. 96. As noted, the evidence, with some exceptions, indicates that as the value and equity of a home declines, home sellers generally prefer to utilize full service brokerages. F.96. Though there is, as previously discussed, limited, unquantifiable testimony to the contrary, F. 97, no reliable empirical evidence refutes this fundamental, factual proposition. Upon review, Dr. Williams' time series, ratio analysis and specifically his attempt to factor a monthly average of new EA listings, neither fully accounts, nor reliably reflects this prevailing fact. Dr. Williams' conclusions regarding his time series analysis are, thus, unpersuasive and do not lend support to Complaint Counsel's

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competitive effects argument, as they failed to sufficiently consider the likely impact of declining economic conditions in the relevant market. Accordingly, Dr. Williams' time series analysis cannot be relied upon by the Court in determining whether there were significant adverse effects on competition as a result of the Realcomp Website Policy.

**(B) The Comparative MSA Analyses Are Unreliable Due to Significant Flaws in Analytical and Selection Methodologies**

Dr. Williams' remaining analyses rely on comparisons of the prevalence of EA listings in various MSAs from 2002 to 2006. F. 512-14. He compared "Control MSAs," those where the local MLSs did not have restrictions, to "Restriction MSAs," those where the local MLSs, including the Realcomp MLS, did have restrictions. F. 512-14. Analyzing the assumptions underpinning the conclusions emanating from these analyses, the Court concludes that material and fundamental errors occurred in Dr. Williams' methodology, both in the selection criteria for the Control MSAs, and the apparent arbitrariness of the selection of the Restriction MSAs.

Dr. Williams testified that he selected the Control MSAs (Charlotte, Dayton, Denver, Memphis, Toledo, and Wichita) on the basis of seven economic and demographic characteristics that he believed were "likely to affect the level of non-ERTS listings." F. 512, 515. Through this process, he selected the six Control MSAs by ranking his possible choices according to their respective closeness to Detroit across all of the economic and demographic characteristics. F. 520. This was done by computing the difference in standard deviation units from Detroit for each of the characteristics and then summing the absolute value of those differences for each MSA. F. 521.

It is not clear from the record, and Dr. Williams never adequately explained, why he would assume his economic and demographic criteria would impact the home seller's choice of an EA contract, or why he accorded all such factors equal weight. F. 517. As noted by Dr. Eisenstadt, there are several problems associated with Dr. Williams' methodology and its implementation. First, Dr. Eisenstadt concluded that "weighting

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each factor the same would only make sense if each factor had the same effect on the share of non-ERTS listings, a condition which is both theoretically implausible and counterfactual.” F. 517. To the extent that Dr. Williams did try to elucidate in his expert report why giving equal weight to all the several factors was the “prudent approach,” (CCRFF ¶ 201) his explanation is unconvincing. F. 517. Nor has Complaint Counsel provided additional empirical evidence to satisfy the Court that the “equal weight” criticism is not of sufficient validity to cast doubt on the reliability of Dr. Williams’ findings.

Additionally, the Court notes that the list of potential cities from which Dr. Williams selected his Control MSAs inexplicably omits such seemingly naturally comparable venues like Pittsburgh, Cleveland, and Milwaukee; cities that might intuitively be thought more similar to Detroit in terms of being Midwestern industrial “rust belt” areas than, for example, the Southern and seemingly thriving cities of Charlotte or Memphis. F. 518. Complaint Counsel’s explanation for why these cities were not part of the Control MSAs sheds no light on this lingering question. Its supposition that these cities were not included in the Control MSAs, in part, because the MLSs serving those cities could have restrictions similar to Realcomp’s restrictions, (CCRFF., 202) would lead a reasonable person to surmise that such venues might therefore be incorporated into the Restriction MSAs. However, they were not. *See* F. 529. In fact, Dr. Williams testified on cross-examination that he did not even have data for the cities in question and they were not included in his analysis. F. 519. Further, he did not seek to show why these cities were less similar to Detroit than every other city in his Control MSAs. F. 519. Such significant and unresolved doubts about the questionable selection of Dr. Williams’ comparable Control MSAs weigh heavily against the Court’s acceptance of such analyses as empirically reliable.

These doubts appear borne out by the seemingly disparate fluctuations in the percentage of EA listings within the Control MSAs. The percentages contained within the Control MSAs vary from a low of approximately 1% in the Dayton MLS to a high of almost 14% in the Denver MLS. F. 522. Dayton, the MSA closest to Detroit under Dr. Williams’ methodology, had an EA share (1.24%) only slightly above what Dr. Eisenstadt concluded was

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Realcomp's share (1.01%). F. 523. The next lowest MLS, Toledo, had an EA share (3.4%) nearly three times that of Dayton. F. 524. The MLS with the highest EA share, Denver, which was 5th (out of 6) in closeness to Detroit, had a share more than 10 times that of Dayton. F. 525.

It would seem that if Dr. Williams had correctly identified economic and demographic factors that determine the share of EA contracts at the MSA level, one would expect the EA shares of the Control MSAs to be very similar. Instead, the wide variation indicates that Dr. Williams has not accounted for the factors that are actual determinants of the EA shares in the Control MSAs. F. 526. Complaint Counsel seeks to belie such conclusion, arguing that even Dr. Eisenstadt acknowledges that the values of the seven variables used as sample selection criteria vary across MSAs in the control sample. CCRFF, 204. Despite such acknowledgment by Dr. Eisenstadt, the wide variation in Dr. Williams' Control MSAs makes the analyses appear biased, most notably as shown by RX 161-page 36, which demonstrates that MSAs that are statistically closest to the Detroit MSA, despite other factors, have lower EA shares than Control MSAs that are statistically more distant. F. 526. Table III of Dr. Eisenstadt's Supplemental Report shows there is a significant sample variance, as measured by the sample coefficient of variation, for several of Dr. Williams' economic and demographic factors. F. 527. Dr. Eisenstadt's conclusion that some of the characteristics used by Dr. Williams to create the control ranking were not statistically significant is empirically sound.

In addition, Dr. Williams' selection of Restriction MSAs was arbitrary and not the result of independent analysis. The Court thus concludes any findings based on a comparison to them to be outwardly unreliable. In addition to Detroit, Dr. Williams' group of Restriction MSAs includes Green Bay, Williamsburg, and Boulder, all of which are significantly smaller urban areas than Detroit. F. 529. The MSA in which Williamsburg is located ranks 28th in terms of closeness to Detroit, significantly more distant than any of the Control MSAs. F. 533. This alone casts doubt on the trustworthiness of Dr. Williams' selected Restriction MSA group. Equally notable is the fact that the Green Bay-Appleton and Boulder MSAs each have populations less than 500,000, a

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fact that would have disqualified them for inclusion in Dr. Williams' Control MSAs. F. 533.

Dr. Williams explained at trial that he could not use the same methodology he had used for the Control MSAs because there existed too few MLSs with restrictions. F. 532. This inconsistency in methodological approach is perhaps better explained, however, by the fact that the "selection" of the Restriction MSAs was not even made by Dr. Williams, but by Commission staff based on data from three MLSs which had entered into consent decrees with the FTC. F. 531. Dr. Williams "didn't pick anything," and thus did not independently look at any other data with respect to his Restriction MSA selections. F. 530. Consequently, Dr. Williams could describe no criteria nor defend the rationale for the selection process of the Restriction MSAs other than to assert that this was the information that had been made available to him by Commission staff. F. 530-31.

Dr. Williams' failure to select Restriction MSAs based on consistently applied, objectively researched and empirically tested economic variables calls into question the reliability of his MSA analyses with respect to his comparisons between the Control MSAs and Restriction MSAs. Though not disqualifying in and of itself, Dr. Williams' sole reliance on Commission generated Restriction MSA data, without more, casts heavy and unresolved doubt on Dr. Williams' conclusion that any such differences between these comparison groups could reliably be attributable to the Realcomp Policies, rather than other possible economic and demographic factors. Complaint Counsel's citation to Dr. Williams' numerous other statistical analyses affirming these results does not alter this fundamental conclusion with respect to his MSA analytical and methodological deficiencies. As such, they are of only limited probative value to the Court.

**(C) Dr. Williams' Comparison of Average  
EA Shares for the Control MSAs and  
Restriction MSAs is Not Probative**

As noted, Dr. Williams compared the shares of EA listings in MLSs with restrictions to the shares of EA listings in MLSs without restrictions over time. Dr. Williams calculated the difference in EA shares between the two types of MLSs to be

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between 5 and 6 percentage points. F. 535. Dr. Williams testified that the average EA percentage in the Restriction MSAs for the time period studied was 1.4%, and the average EA percentage in the Control MSAs was approximately 5.6% on average. F. 536. Dr. Williams explained that his calculation of the average EA percentage share for the Control MSAs and the Restriction MSAs was weighted based on the number of listings. F. 538. The data set he used had a total of over 1.08 million listings. F. 537. He stated that he used a weighted average because Realcomp is a large MLS; thus, to the extent that the size of the MLS matters, he concluded the bigger MLSs are more comparable to Realcomp. F. 539. Dr. Williams thus counted the larger MLSs more toward the average than the smaller MLSs. Further, by pooling or combining all Control MSAs together, the “closeness of any MSA to Detroit” (*i.e.*, the lowest summed standard deviations) was not a factor in Dr. Williams’ estimate of the difference between EA shares in the two types of MSAs. F. 540.

Denver, a larger MSA than Dayton, is both (a) the second most *dis-similar* Control MSA to Detroit and (b) the MSA with the highest EA share. F. 541. Although Dr. Williams’ method of analysis gave identical weight to MSA listings, he inexplicably gave Denver, as a whole, more weight in this comparison of Control MSAs to Restriction MSAs than, Dayton - the Control MSA most similar (in Dr. Williams’ analysis) to Detroit; but having the smallest EA share among the Control MSAs. F. 542.

Thus, it is wholly unsurprising that Dr. Williams was able to conclude that the Control MSAs had a higher percentage of EA listings. Unfortunately, such comparative MSA analysis cannot be relied upon by the Court to draw probative conclusions about the competitive effects of the Realcomp Website Policy as they appear, upon examination, to overstate such effects. Dr. Williams’ only opinion as to why Denver should have more influence in this analysis than Dayton or any of the other Control MSAs was that Denver was a bigger MLS. F. 539, 542. Without sufficient empirical explanation of this deviation, such analysis cannot be considered to be based on objective, scientific methods. It cannot be accorded substantial weight by the Court and therefore does not support Complaint Counsel’s allegations in this case.

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The Court notes that Respondent's expert, Dr. Eisenstadt, also performed direct comparisons of the Detroit MSA to Dr. Williams' Control MSAs. F. 543. Dr. Eisenstadt testified that, using Dr. Williams' rankings of the Control MSAs, it would be most logical to compare Realcomp to Dayton, the MSA most statistically similar to Detroit in terms of demographic and economic traits. F. 543. Doing so, it would appear Dayton's percentage of EA listings (1.24%) was not significantly different from Realcomp's EA share during the same period (1.01 %). F. 543. Complaint Counsel's rebuttal argument that it "makes no sense" to compare the Dayton and Realcomp MSAs, CCRFF ¶ 214, is without sufficient empirical foundation.

Dr. Eisenstadt also observed that the only MSA utilized by Dr. Williams in his study that had a period of time both without restrictions and with restrictions was the Boulder MSA. F. 495. Dr. Williams' data showed that Boulder had a pre-restriction average EA share of 2.03%, compared to an average EA share during the restriction period of 0.98%. F. 497. He also noted that there appeared to be a downward trend in the share of EA listings on the Boulder MSA during the last three months of the pre-restriction period, presumably for reasons unrelated to the restrictions, which had not yet taken effect. F. 498. Dr. Eisenstadt concluded that if those last three months were used as a benchmark, rather than the entirety of the pre-restriction period, the reduction in EA listings would be even smaller than one percentage point. F. 498. No evidence exists in the record to refute this observation.

Dr. Williams' comparative MSA analyses thus appear fundamentally flawed in the areas noted and leave the Court with substantial questions regarding the effect the Realcomp Website Policy actually had on the prevalence of EA listings in the Realcomp MLS. These questions remain as the Court continues with a review of Dr. Williams' statistical regression analyses.

**(D) Dr. Williams' Statistical Regression  
Analyses Are Instructive, But Not  
Conclusive**

Though cognizant that Dr. Williams' statistical regression analyses are based on the same data as the flawed MSA study, the

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Court finds them nevertheless instructive, though not conclusive, as to whether Realcomp's Website Policy likely affected the prevalence of EA listings in the Realcomp Service Area. In his probit analyses, Dr. Williams relied on statistical regressions to determine the effects of the Realcomp Policies. F. 544, 547. In all, Dr. Williams conducted a total of ten statistical analyses. F. 549. The first three regressions were contained in Dr. Williams' Initial Report and controlled for seven variables. F. 550. In his Surrebuttal Report, Dr. Williams controlled for approximately 25 variables. F. 550. Through the three statistical analyses in his Initial Report, Dr. Williams concluded that Realcomp's Policies are associated with a reduction in the share of EA listings of 5.51, 5.47 and 6.15 percentage points. F. 551. In his Surrebuttal Report, his analyses show that Realcomp's Policies are associated with a reduction in the share of EA listings of 5.55528 and 5.774. F. 551. From these analyses, Dr. Williams predicts that the percentage of EA listings in Realcomp would be higher, and the percentage of ERTS listings would be lower, in the absence of the Realcomp Policies. F. 552.

In drawing these conclusions, however, the evidence indicates that Dr. Williams did not adequately consider the economic and demographic differences between and among the MSAs he selected for his study (that is, the economic characteristics of each local housing market and the demographic characteristics of home buyers and sellers in each market). F. 553. Dr. Eisenstadt described the manner in which such factors ordinarily would be addressed in economic analysis, and the errors introduced into Dr. Williams' probit analyses by Dr. Williams' failure to do so. F. 553. Further, when Dr. Eisenstadt corrected Dr. Williams' perceived errors, he found that the same data revealed no predictable difference in the percentage of EA listings due to the existence or absence of MLS restrictions in the MSAs. F. 554.

Statistical regression analysis (such as probit analysis) is a tool to measure the effects of different factors (called independent variables) on a particular outcome (called the dependent variable). F. 545. As Respondent suggests, in designing a regression analysis, the analyst should attempt to identify independent variables likely to have a significant effect on the dependent variable and include them in the analysis. If important independent variables are omitted from the analysis, their effects



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on the dependent variable may end up being attributed to those independent variables that are included, which may overstate the causal relationship between the included independent variables and the dependent variable. RB at 31-32.

Here, the dependent variable of interest is the likelihood that a home seller will choose an EA listing contract. F. 546. The independent variables are the numerous economic and demographic variables that affect the choice of an EA contract versus an ERTS contract. F. 546. In his Surrebuttal Report, Dr. Williams added several, but not all, of the economic and demographic variables that Dr. Eisenstadt believed should be considered and re-estimated the regression model. F. 555-56. As such, Dr. Williams presented statistical analyses controlling for certain factors using both his data set and Dr. Eisenstadt's data set. F. 555. In doing so, the Court notes that these further analyses, though relatively consistent, leave open the question of what extent any excluded relevant independent variables might have caused Dr. Williams to overstate the relationship between the presence of restrictions and the choice of listing contract type.

As discussed above, in evaluating and selecting the MSAs to be used as comparators for his analysis (*i.e.*, the Control MSAs), Dr. Williams identified seven economic and demographic factors that he believed are "likely to affect the level of [EA] listings." F. 515. In other words, Dr. Williams believed that each of the seven factors "theoretically may be related to the use" of EA listings, and therefore are "economically plausible criteria" affecting home sellers' choice of listing contract type (*i.e.*, EA or ERTS). F. 515. Nonetheless, it is not clear to what extent Dr. Williams actually used these factors as independent variables in his probit analysis. F. 548. It is quite plausible that Dr. Williams believed that the seven factors affected the choice of listing contract type, but did not isolate the effects of those seven factors from the existence or absence of MLS restrictions in trying to decide whether MLS restrictions affected the use of EA contracts in the MSAs. Moreover, as Dr. Eisenstadt testified, although Dr. Williams reran his statistical analysis adding economic and demographic variables that Dr. Eisenstadt believed were significant, he did not utilize all of Dr. Eisenstadt's explanatory variables, F. 556, which Respondent contends would have accounted for different

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economic and market results at the MSA and local levels. This mayor may not be, however, empirically significant.

Further, Dr. Eisenstadt testified at trial that such variables should have been analyzed not only at the MSA level, but at the county and local zip code level to measure local, neighborhood effects which might impact a home seller's decision as to what type of listing contract to enter into. F. 560. Dr. Williams did not think it necessary to include such local variables after measuring characteristics at the MSA level, F. 559, but is unpersuasive in his explanation as to why such an approach would be so completely duplicative as to be of no empirical value.

Although the Court takes note of the plausibly different empirical conclusions which might well have resulted had Dr. Williams factored in the excluded demographic variables as discussed by Dr. Eisenstadt, it is also cognizant that many of Dr. Eisenstadt's criticisms were confined to the analyses performed by Dr. Williams in his Initial Report and did not fully speak to the conclusions reached in Dr. Williams' Surrebuttal Report. Such fact, therefore, cannot render Dr. Williams' probit analyses completely unreliable, as argued by Respondent, but neither does it persuasively establish that the Realcomp Website Policy is principally responsible for the effects on EA listings in the Realcomp Service Area, as suggested by the totality of Dr. Williams' statistical analyses. The empirical review must therefore continue with the re-evaluation of Dr. Williams' analyses by Dr. Eisenstadt.

**(E) Dr. Eisenstadt's Regression Results Cast  
Doubt on Dr. Williams' Probit Analysis  
and Shows No Significant Adverse Effect  
on EA Shares**

As noted, Dr. Eisenstadt implemented the same basic probit regression model that Dr. Williams used, but added separate independent variables for several of the economic and demographic factors that Dr. Williams identified as relevant to the prevalence of EA listings (excluding, however, the variables of population and population density), as well as several other economic and demographic factors which Dr. Eisenstadt identified as likely to affect contract choice both across and within

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the MSAs. F. 557. Dr. Eisenstadt took into account the following variables which were only partially considered by Dr. Williams: the MSA-wide one-year change, by quarter, in the median housing price index, the MSA-wide five-year change, by quarter, in the median housing price index, county-level median household income, MSA-wide median household income, MSA-wide median household price, percent black population at the MSA and zip code level, percent Hispanic population at the MSA and zip code level, new housing permits per household at the MSA and county level, number of bedrooms, age of the home, median person age, percent change in the number of listings over the prior year at the MSA and county level, percent change in days on market over the prior year at the MSA and county level. F. 558. Dr. Eisenstadt's re-estimation of Dr. Williams' work suggests, at least indirectly, that additional economic and demographic characteristics should have been considered as independent variables by Dr. Williams, because a high number of them proved to be statistically significant at the generally accepted level of confidence. F. 562.

As argued by Complaint Counsel, if such demographic variables like median income, or race matter at all, they should only matter at the level of the individual home seller, which it argues was not controlled for by Dr. Eisenstadt. CCRFF ¶ 228. Such theory, however, remains just that, as Dr. Eisenstadt testified that home sellers would take into account the expected characteristics of home buyers that they seek to attract to purchase their property when choosing what type of listing to use. F. 563. Such consideration appears to the Court to be not only economically plausible, but reasonable. F. 563.

When other such variables that are relevant to the choice of an EA listing were included in the analysis, Dr. Eisenstadt found that the effect of the Realcomp Policies on the share of EA contracts was less than one-quarter of one percentage point and that this effect was not statistically significant (*i.e.*, it was not predictably different from zero). F. 564. Moreover, Dr. Eisenstadt estimated the same basic regression equation with the inclusion of a separate "RULE" variable for each of the Restriction MSAs, which isolated the effects (on choice of listing contract type) of the Realcomp Policies from the effects of the restrictions in the other Restriction MSAs. F. 565. This analysis found that the adverse

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effect of the Realcomp Policies on the percentage share of EA contracts in the Detroit MSA was less than one ten-thousandth of a percentage point and was also not statistically significant. F. 566.

Additionally, as previously indicated, the weight of the evidence persuades the Court that Dr. Eisenstadt's variables are not duplicative merely because they measure demographic and economic variables at both the MSA metropolitan level and the local county or zip code level. F. 560. Rather, Dr. Eisenstadt presents persuasive testimony as to the propriety of measuring how both MSA and local neighborhood characteristics of home buyers and sellers should be controlled for without "measuring the same variable twice" and how it is "not completely duplicative." F. 561. Having so concluded, the Court need not further address Complaint Counsel's arguments that such variables are, in fact, duplicative, which may implicate a "multicollinearity" problem as surmised by Dr. Williams. (Williams, Tr. 1669).

As with the conclusions drawn by Dr. Williams, the Court weighs the previously noted flaws in the MSA data set, used also by Dr. Eisenstadt in his regression results, including his analysis of several additional economic and demographic variables, and finds such conclusions to be, nevertheless, of some limited probative value. To that extent, Dr. Eisenstadt's analyses cast a further degree of doubt on Dr. Williams' contrary conclusions that a large portion of the difference between the percentage of EA listings in the Realcomp Service Area, and the average EA share for Control MSAs is not due to local economic and demographic factors, but the restrictive Realcomp Policies. F. 567. Further confirmation of Dr. Eisenstadt's conclusions is found in his analysis of Dr. Williams' Control MSA findings.

**(F) Dr. Eisenstadt's Regression Analysis of the Control MSAs Shows the Detroit MSA Has More EA Listings Than Would be Expected**

The evidence shows that Dr. Eisenstadt performed a regression analysis not only using the additional economic and demographic variables noted above, but by utilizing only the data from the six Control MSAs selected by Dr. Williams. F. 568. He

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used the output from this regression to predict the EA share for the Realcomp Service Area under the assumption that it also had no restrictions. F. 568. Applying the economic and demographic characteristics of the Realcomp Service Area, Dr. Eisenstadt's predicted percentage of EA listings in the Realcomp Service Area in the absence of the Realcomp Policies is about 0.3 percent. F. 569. The actual percentage of EA listings in the Realcomp Service Area, however, was approximately three times larger (1.01%) for the corresponding time period. F. 569. This casts significant doubt on Dr. Williams' theory that Realcomp's Policies have had a substantial effect on the share of EA listings. *See* F. 570. It also indicates that additional factors other than the restrictive Realcomp Policies, *i.e.*, certain demographic characteristics of the Realcomp Service Area, might well therefore be responsible for the percentage of EA listings on the Realcomp MLS. F.570.

This additional, empirical evidence by Dr. Eisenstadt, which is unrebutted by reliable, probative evidence to the contrary, must be given significant weight in determining whether the statistical analyses done by Dr. Williams is sufficiently reliable to support Complaint Counsel's burden of proof. Complaint Counsel's attempt to disparage such evidence on the argument that it is but a "clever use of statistics . . . used to manipulate data in order to achieve a desired result . . . and . . . means that there is no procompetitive justification for collective action to impose restrictions aimed at competition from unbundled, discount brokers" (CCRFF ¶ 231), is merely argumentative and contrary to the preponderance of the empirical evidence. Such argument therefore offers little guidance to the Court.

**(vi) Realcomp's Website Policy Did Not  
Significantly Harm Consumers or Price  
Competition**

**(A) Dr. Williams' Analyses Do Not  
Demonstrate Direct Harm to Consumers**

Dr. Williams' various analyses sought to measure the effect of the Realcomp Policies, including the Minimum Services Requirement, on the prevalence of EA listings in the Realcomp Service Area. F. 571. Dr. Williams concluded from his

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*prediction* of reduced EA output that consumers, by necessity, pay substantially higher prices for brokerage services. F. 572. As Dr. Eisenstadt explained, however, Dr. Williams' analyses only provide an indirect test for anticompetitive effect regarding higher brokerage costs incurred by those consumers who, as a consequence of the Realcomp Policies, substitute ERTS contracts for EA contracts. F. 572. Dr. Williams did not investigate other such direct effects, *e.g.*, whether sellers of residential properties who used EA listings on the Realcomp MLS received higher or lower sales prices for their properties. F. 573. Also, Dr. Williams did not attempt to measure the effect of Realcomp's restrictions on the number of days that homes remain on the market before sale or whether commission rates on ERTS listings are higher when MSAs impose restrictions akin to the Realcomp Policies. F. 574. These are relevant factors to a determination of whether consumers actually pay appreciably higher prices as a consequence of the Realcomp Website Policy. Thus, Dr. Williams' analyses are insufficient to demonstrate that the Realcomp Website Policy caused measurable harm to consumers or to price competition between traditional and limited service brokers. F. 575.

**(B) Dr. Eisenstadt's Days on Market Does Show Lack of Consumer Harm**

The absence of consumer harm, at least to home sellers, is clearly indicated by Dr. Eisenstadt's "days on market" analysis. Days on market is a measure of the time it takes for a listing, once it is on a Multiple Listing Service, to be sold. F. 577. Dr. Williams agrees that when one looks at the justifications for the Realcomp Policies and is attempting to determine the effect of these restrictions from the consumer's standpoint, home sellers would be concerned about selling their houses in a timely fashion. F. 576.

Mr. Murray testified that he has seen no data or information concerning days on market distinguishing between EA listings and ERTS listings. F. 578. Nevertheless, he testified that it is generally expected that the more exposure a property is given, the better the chance the home will sell faster. F. 579. This conclusion, however, is not prefaced on data or an actual analysis of information of days on market in the Realcomp system

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distinguishing between EA listings and ERTS listings. F. 579. Likewise, Dr. Williams performed no analysis of days on market. F. 580.

The only expert who did analyze days on market was Dr. Eisenstadt, who performed a statistical analysis which controlled for a limited sample of non-ERTS homes on this issue and concluded that in the Realcomp MLS, the average days on market for EA listed homes was 17% *less* than for comparable ERTS listed homes. F. 581. Although Dr. Eisenstadt did not control for whether homes had been remodeled or recently painted, F. 583, it is not clear that this would have significantly altered the outcome. Dr. Eisenstadt found that the average days on market for Realcomp EA properties to be 118, compared to approximately 142 for ERTS properties, based upon data analyzed from January 2005 through October 2006. F. 582-83. Dr. Eisenstadt's empirical findings were not inconsistent with the factual testimony of Mr. Mincy, an EA agent, who stated that he knew of no difference in the days on market between EA listings and ERTS listings, but had done no comparison of the two. F. 584.

No EA broker offered contrary testimony and Complaint Counsel has not, through empirical evidence, contradicted the conclusion that the Realcomp Website Policy has not disadvantaged EA listed properties in terms of days on market. Thus, Dr. Eisenstadt's days on market analysis offers further probative support for the conclusion that Complaint Counsel has not met its burden of showing the requisite competitive harm to prove a violation of Section 5.

**(vii) Respondent's Evidence on Higher Sales  
Prices and Argument on Dr. Williams'  
Analysis on the Effect of the Combined  
Policies Lacks Merit**

**(A) Dr. Eisenstadt's Sales Price Regressions  
Do Not Establish Lack of Consumer  
Harm**

Dr. Eisenstadt conducted two regression studies in an effort to directly estimate the effects of the Realcomp Policies on the sales prices of homes sold under EA listings. These analyses are flawed

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in many respects and thus cannot support Respondent's theory that EA home sellers actually benefitted from Realcomp's Policies.

In his April 2007 report, Dr. Eisenstadt compared home sales prices for EA listed residential properties for the years 2005 and 2006 in the Realcomp Service Area against those in the Ann Arbor MLS (an MLS without policies comparable to the Realcomp Policies) during the same period. F. 587. Dr. Eisenstadt sought to account for differences in home characteristics and location characteristics that might affect sales prices, as well as the use of EA versus ERTS listing types, by means of statistical regression. F. 592. Dr. Eisenstadt then attempted to measure the effects of the Realcomp Policies on sales prices of EA listed properties in the Realcomp Service Area relative to Ann Arbor, by holding constant differences in sales prices of ERTS listed properties in the two areas. F. 592. Dr. Eisenstadt postulated that all else being equal, if home sellers in the Realcomp Service Area using EA listings were harmed by the Realcomp Policies, then, after controlling for differences between sales prices of ERTS properties in the two areas, they should realize lower sales prices for their homes than home sellers of EA listed properties in Ann Arbor. F. 586. Contrary to his hypothesis, his conclusions indicated that EA listed properties realized *higher* sales prices in the Realcomp MLS than in the Ann Arbor MLS. F. 587.

In his May 2007 report, Dr. Eisenstadt compared EA listed home sales prices in the Realcomp Service Area against those in five of Dr. Williams' Control MSAs. F. 597. One of Dr. Williams' six Control MSAs was not used in this analysis because that MLS did not provide sale price data. F. 597. Dr. Eisenstadt concluded that EA listed properties realized *higher* sales prices in the Realcomp MLS than in the Control MLSs. F. 587. Dr. Eisenstadt utilized the same methodology in both his April 2007 and May 2007 reports. F. 600.

As noted by Complaint Counsel, there are fundamental methodological deficiencies with Dr. Eisenstadt's approach that render his conclusions largely unreliable. Specifically, in preparing his analyses, Dr. Eisenstadt removed all of the approximately 25,000 to 27,000 Detroit city limits listings from



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the Realcomp Service Area data for his sales price regressions. F. 588-89. He did so because he believed that home sellers who lived in very densely populated areas such as Detroit might place a different value on certain home characteristics when they are buying a home than home sellers who live in more suburban areas and because he wanted to compare a suburban area to another suburban area, such as Washtenaw County. F. 591. Dr. Eisenstadt also removed all listings for properties outside of Washtenaw County from the Ann Arbor MLS. F. 588. He did so because the Ann Arbor MLS is used as a bypass for non-ERTS listings located in the Realcomp Service Area (including Detroit). F. 499-500. As a result of this methodology, Dr. Eisenstadt ended up comparing only part of the Realcomp MLS to part of the Ann Arbor MLS. F. 588. In addition, Dr. Eisenstadt did not control for whether the home had a remodeled kitchen or bathroom or was recently painted. F. 593. Complaint Counsel asserts that such methodological flaws render the sales regression analyses inherently untrustworthy.

True, as a result of his methodology, Dr. Eisenstadt ended up with a very small sample: only 100 or so properties that sold under EA listings in the remaining Realcomp MLS data and 24 or 25 such properties in the remaining Ann Arbor MLS data. F. 589-90. However, Dr. Eisenstadt provided compelling reasons for so doing. F. 500, 591. Such sample, despite the scope of the survey and questions regarding an element of the regression equation as it related to a particular coefficient error, F. 595, is not without some probative value.

The overwhelming flaw in Dr. Eisenstadt's sales price regression, however, is that it does not show a "causal" connection or "measure the effects of the Realcomp Policies on sales prices of EA listed properties." F. 596. At most, it shows a "correlation" between sales price and the presence of Realcomp's Policies. Although Dr. Eisenstadt believed, "there is theory that [would] expect it to be a causal relationship," F. 596, in the absence of a demonstrated economic basis for interpreting such correlation as causation, Dr. Eisenstadt's regression can only show that the higher sales prices and the Realcomp Policies both happen to exist in those limited parts of the Realcomp Service Area that Dr. Eisenstadt examined. It does not demonstrate that the Realcomp Policies actually *benefitted* consumers and certainly

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does not prove, as Respondent asserts, that home sellers of EA properties listed on Realcomp realized higher prices than those listed on the Ann Arbor MLS or in the Control MSAs.

Due to the substantial reliability questions concerning Dr. Eisenstadt's methodology, the Court need not address Dr. Eisenstadt's estimate of whether the supposed beneficial effect of higher sales prices for EA listed properties predicted by his analyses would be offset by higher brokerage fees caused by an artificial substitution of ERTS contracts for EA contracts or whether consumer welfare of home sellers in the Realcomp Service Area actually improved during the relevant period when the Realcomp Policies were in effect.

Dr. Eisenstadt's uncertain methodology, including errors in certain coefficient data, renders his sales price regression conclusions unreliable to the extent that such estimated effects on sale price were found to be higher for Realcomp EA listings. However, Complaint Counsel has offered no evidence to show that home sellers of EA properties listed on Realcomp realized lower sales prices than home sellers of EA properties listed on the Ann Arbor MLS or on the Control MSAs. The lack of the latter showing further weighs against a finding of anticompetitive effects.

**(B) Dr. Williams Analyzed The Combined  
Effect of Realcomp's Acts, Practices and  
Policies**

Respondent criticizes Dr. Williams' analyses for purporting to measure only the combined effects of *three* Realcomp Policies (Website Policy, Search Function Policy, and the Minimum Services Requirement), on the prevalence of EA listings, rather than assessing the effects of anyone policy by itself. RB at 36-37; RRB at 46. Such argument is rejected, however, as lacking merit.

As previously noted by the Court, the Minimum Services Requirement is *not* a separate, stand-alone access restriction. Rather, it was incorporated into the Website Policy and Search Function Policy. The fact that Dr. Williams testified that he could not "disentangle" the effects of the Search Function Policy,

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Website Policy, and Minimum Services Requirement, F. 505-07, is of no consequence to the Court's competitive effects analysis.

With regard to the Search Function Policy, the Court has determined that it was not anticompetitive in nature, so no assessment of the effects specifically attributable to it, whether separately or otherwise, is germane to the Court's competitive effects analysis. Moreover, Respondent erroneously implies that the Complaint challenges only the Website Policy and Search Function Policy. *See* Tr. 1922-23. The Minimum Services Requirement, however, falls clearly within the totality of the "acts, practices and policies" challenged in the Complaint with respect to the Realcomp MLS rules. The Minimum Services Requirement, being incorporated into the Website Policy, is directly relevant to the Court's competitive effects analysis, but need not be assessed separately in order to isolate the actual effects of the Website Policy itself.

The fact that Dr. Williams cannot determine whether all or a significant portion of the effects he purports to observe are due to anyone of the Realcomp Policies standing alone, or whether the repeal of any of these policies alters the significance of his testimony, does not detract from the probity of his analyses. Respondent fails to offer compelling argument to persuade the Court not to consider Dr. Williams' conclusions for what, in effect, is Complaint Counsel's reduced request for relief as to the Website Policy standing alone.

**(viii) Summary of Competitive Effects**

The Sherman Act "was designed to prevent restraints of trade which [have] a significant effect on . . . competition." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 n.15 (1940). The totality of the evidence in this case, empirical and otherwise, establishes that Realcomp's Website Policy, despite its anticompetitive nature, has not resulted in measurably significant competitive effects. Rather, the evidence shows that: (1) the Website Policy did not unduly restrict competition in the Realcomp Service Area as to EA discount brokers. Indeed, EA brokers continue to compete and grow in the Realcomp Service Area, despite the troubled local economy; (2) the Website Policy did not exclude non-ERTS listings from the MLS, which exposes

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such listings to approximately 80% of all buyers; (3) the Website Policy did not prevent EA brokers from utilizing alternative public websites, as the evidence shows that EA home sellers effectively market properties without direct access to the Approved Websites. Moreover, EA brokers can and do, place their listings on Realtor.com through dual-listing and data-sharing arrangements and on the Approved Websites through flat fee ERTS listings, without incurring unduly burdensome additional costs; (4) consistent with national trends, the competitive problems EA brokers face in Southeastern Michigan are principally due to the local economy and their business model; and (5) the empirical evidence presented by Complaint Counsel's economic expert does not demonstrate a significant effect on competition as: (a) the time series analysis is based on a fundamentally flawed assumption; *i.e.*, it failed to account for the likely impact of declining conditions in the relevant market; (b) the comparative MSA analyses are unreliable, due to significant flaws in the selection methodology, including the arbitrariness of the Restriction MSA selections; and (c) the probit analysis is instructive, but not conclusive, as to whether the Website Policy adversely affected the prevalence of EA listings in the relevant market.

Further empirical evidence in this case, though in part also flawed, is nevertheless instructive and: (1) casts doubt on Complaint Counsel's expert's probit analysis by demonstrating no significant effect on EA listings as a result of the Website Policy; (2) shows that additional economic and demographic factors other than the Website Policy might well be responsible for the percentage of listings on the Realcomp MLS; and (3) concludes that the Website Policy did not result in significantly increased costs for consumers or unreasonably restrain competition for discount brokerage services.

**d. Procompetitive Justifications**

As noted in *California Dental*, 526 U.S. at 774, and in conjunction with the Court's aforesaid conclusions with respect to (a) the nature of the challenged Website Policy; (b) market power; and (c) the competitive effects of such policy, it is useful to examine, as part of a net effects assessment, Respondent's procompetitive justifications. Generally, once a plaintiff has

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carried its burden of proving a substantial anticompetitive effect, the burden shifts to the defendant to come forward with a sufficiently procompetitive objective. *NCAA*, 468 U.S. at 113; *Brown Univ.*, 5 F.3d at 669. “[T]he rules must be shown to be justified by the legitimate competitive needs of the association.” *Realty Multi-List* 629 F.2d at 1374. Further, the “requirements of the rules themselves must be reasonably necessary to the accomplishment of the legitimate goals and narrowly tailored to that end.” *Id.* at 1375. If the defendant does produce evidence of procompetitive virtues, then the plaintiff must show that the challenged conduct is not reasonably necessary to achieve the stated objective. *Brown Univ.*, 5 F.3d at 669; *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 127 (2d Cir. 1995).

Although Complaint Counsel has not demonstrated significant competitive effects of the Website Policy, it *has* shown that the nature of the Website Policy is such that it could be anticompetitive and that Realcomp has market power in the relevant market. If, under *Brown Univ.*, 5 F.3d at 669, the Court were to presume effects applying an abbreviated review standard, the analysis would need to consider whether Realcomp can demonstrate that the challenged policy promotes a sufficiently procompetitive objective. Thus, an analysis of Respondent’s proffered procompetitive justifications ensues.

Respondent asserts two procompetitive justifications for the Website Policy: the elimination of a free rider problem and the creation of certain efficiencies, namely to increase participation of cooperating brokers and to address a “bidding disadvantage” concern. RB at 42-47. Respondent further asserts that the restraints are appropriately tailored to these limited objectives. RB at 48. Complaint Counsel disputes these contentions and specifically argues that the Website Policy not only fails to address an actual free riding problem, but that the asserted justification has been previously rejected by the Commission. CCB at 68-70. Such arguments, however, are unpersuasive.

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**(i) Realcomp's Website Policy Addresses a Free Rider Problem**

The parties agree that free riding can be basically defined as the diversion of value from a business rival's efforts without payment. *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667,675 (7th Cir. 1992). "It costs money to make a product attractive against other contenders for consumers' favor. Firms that take advantage of costly efforts without paying for them, that reap where they have not sown, reduce the payoff that the firms making the investment receive." *Id.* at 674. The Supreme Court has recognized that the control of free riding is an accepted justification for cooperation in antitrust jurisprudence. *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 189-90 (7th Cir. 1985) (citing *Monsanto*, 465 U.S. at 762-63; *Continental TV*, 433 U.S. at 55-57).

To the extent consumers obtain information from one retailer who invests in advertising costs and staff in order to provide product information to consumers, but then purchase the product from a second retailer, who does not, the second retailer is considered to free ride on the first retailer's investment in customer service. *See Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 937-38 (7th Cir. 2000) ("What the manufacturer does not want is for the shopper to visit the attractive store with highly paid, intelligent sales help, learn all about the product, and then go home and order it from a discount warehouse or (today) on-line discounters. The shopper in that situation has taken a 'free ride' on the retailer's efforts; the retailer never gets paid for them, and eventually it stops offering the services.").

Complaint Counsel argues that the free riding issue here is nothing more than Realcomp's attempt to justify the Website Policy which, Complaint Counsel argues, is designed essentially to protect a traditional cooperating broker's right to receive the unilateral offer of compensation if they procure a buyer for property. CCB at 68-69; CCRB at 37-39. As such, Dr. Williams testified that there can be no free riding because home sellers using EA listings do not free ride on: (1) listing brokers, as such brokers are paid for their listing services; (2) cooperating brokers, as they receive exactly what they pay for from the MLS, which is an opportunity to earn a commission for finding a buyer; or (3)

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the MLS, as the MLS is compensated for its services by member fees, which all brokers, including discount brokers, pay. F. 613-15.

The relevant component of Dr. Williams' testimony here is his conclusion that home sellers using EA listings do not free ride on Realcomp cooperating brokers. F. 614. As Dr. Williams stated, if a buyer independently finds a home on the Realcomp affiliated Website, "a cooperating broker is not entitled to receive a commission from the home buyer or the home seller if a non-ERTS listing is used. Therefore, the fact that a commission is not paid to the cooperating broker does not constitute a free rider problem by either buyer or the home seller; and Realcomp's access restrictions based on this rationale are not economically justified." (CX 498-052). Dr. Williams further opined that there is not a free riding issue because: (1) cooperating agents benefit by having the opportunity to participate in the transaction; (2) most brokers are both cooperating and listing brokers; and (3) 80% of the time a cooperating broker participates in a non-ERTS transaction. F. 614.

Complaint Counsel further denies the free rider justification, asserting "[h]ome sellers using Exclusive Agency listings are not using *any of the services* of a cooperating broker unless the cooperating broker procures a buyer, in which case the seller pays for that service through the offer of compensation." (CCRF ¶ 242; Williams, Tr. 1098 (emphasis added)). Such contentions, however, are incorrect, as they misstate both the real world competitive situation and the actual justification put forth by Respondent.

Specifically, the free riding problem that is of concern here is free riding by EA home sellers on Realcomp cooperating agents, not for their *services*, as Complaint Counsel and its expert opine, but in the fact that such home sellers seek member benefits in order to *compete* with Realcomp cooperating agents for *buyers*. F. 616. EA home sellers have an incentive to act as their own cooperating agent. If they sell their house without having to pay a cooperating agent a commission, they retain that compensation for themselves. F. 608. Thus, EA home sellers seek the benefits of being a full-fledged Realcomp "member," specifically the benefit derived from Realcomp's advertising of properties on the Internet

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through the IDX, *see* F. 604-05, to further their ability to compete with Realcomp cooperating brokers to attract buyers.

However, EA home sellers do not pay membership dues, or offer any type of compensation to Realcomp for the right to compete for buyers and serve as their own cooperating agent. F. 606. To the extent that such home sellers would receive, without charge, the benefits derived from Realcomp's advertising of properties on the Approved Websites, they would free ride on the Realcomp members who invest and participate in the MLS through the payment of dues and who otherwise undertake to support the cooperative endeavor of the MLS. F. 610. Realcomp members should not be required to subsidize or otherwise facilitate transactions that directly conflict with Realcomp's legitimate business purpose. F. 611. The Website Policy thus provides a plausible economic justification by insulating Realcomp's dues paying members from having to provide, free of charge, the costs that EA home sellers would normally have to incur themselves to compete with Realcomp members for such buyers. F. 609-10.

Dr. Williams' testimony that home sellers successfully act as their own cooperating brokers approximately 20% of the time confirms the presence of a free rider problem. F. 614. More importantly, however, Dr. Williams' analysis never addressed the fundamental point of Realcomp's argument regarding EA home sellers seeking IDX benefits in order to compete with Realcomp cooperating agents for buyers. F. 616. His conclusions, particularly his assertion that Realcomp cooperating brokers would not be subsidizing EA listings if they were allowed to go from the Realcomp MLS to the Approved Websites, therefore fail to refute the actual free riding justification put forth by Realcomp.

Moreover, Dr. Williams' contention that the Realcomp Policies benefit only cooperating brokers, and not consumers, is similarly unpersuasive. As Dr. Eisenstadt explained, the Website Policy could also benefit those home buyers who wish to work with a cooperating broker to purchase an EA property by enhancing the incentives of those brokers to show and promote EA properties to their buyer-clients. F. 631. Such justification, as further explained in the "bidding disadvantage" analysis which follows, is sufficiently plausible under *California Dental* to allow



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the Court to determine that such policy could well be procompetitive.

Complaint Counsel's additional arguments on the free rider issue are similarly unpersuasive. First, it cites to Dr. Williams' conclusions that even if a free rider problem does exist, the Website Policy does not eliminate the problem because a cooperating broker who belongs to an MLS other than Realcomp, or participates in data-sharing arrangements with another MLS cannot assure that a Realcomp cooperating broker will participate in a given transaction. F. 617. Such argument fails to acknowledge, however, that Realcomp's data-sharing arrangements are reciprocal, meaning they run both ways and that Realcomp members receive actual, mutual benefit from having their listings placed onto other MLSs. F. 617. No such mutual benefit exists for Realcomp members with respect to EA home sellers.

Second, Complaint Counsel's argument that the free rider justification is a *post-hoc* rationalization of the Website Policy, which was never raised in contemporaneous documents prior to trial, is misleading. The Realcomp "Call to Action Regarding Public Website Policies" (CX-89), is the only document that the Realcomp Board of Governors has approved stating the rationale for the Website Policy. F. 618. Though not gauged in precise legal language, and created only in response to the issued FTC Complaint, the "Call to Action" document nevertheless speaks implicitly to the central theme of the free rider justification when it describes Realcomp's "services" (including, no doubt, those benefits relating to the IDX and Approved Websites) as being "in high demand by consumers"; advocates that Realcomp is being forced to potentially compromise the "purpose of the cooperative," which ensures member compensation; and states that "use of this website should be reserved specifically for the purpose of marketing properties represented by Realtors." F. 619. Such statements no doubt encompass the clear, but broadly stated intent of the Realcomp Website Policy not to authorize EA home sellers access to Realcomp Internet services in order to compete with member agents for buyers without compensation to the cooperative.

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Thirdly, Complaint Counsel argues that Realcomp, in 2006, attempted to use such rationalizations to persuade the National Association of Realtors (“NAR”) not to amend its IDX rules to require MLSs to include all current listings in their IDX feeds, F. 424, but that NAR, through its general counsel, rejected such overtures. F. 426. Though certainly correct, such evidence must be considered in the appropriate context. Despite the fact that NAR officially concluded that EA listings on these feeds would not detract from the purposes of the MLS, F. 426, NAR’s vice president explained that the reason NAR changed its IDX Policy was that, in light of the FTC’s enforcement actions initiated against various MLSs around the country, the organization decided, “it wasn’t worth fighting about.” F. 427. Thus, the official NAR position, though clearly relevant, must be considered not only on the merits, but in the light of the litigation environment surrounding NAR at the time the position was taken.

Finally, Complaint Counsel argues that the Commission has previously rejected this very free rider justification. CCB at 69-70. In support of this assertion, Complaint Counsel relies on “*Analysis of Agreements Containing Consent Orders to Aid Public Comment*,” *In the Matter of Information and Real Estate Services. LLC*, File No. 06-10087 (2006) (“*Analysis*”). Such reliance, however, is misplaced. It is well established that consent decrees have no force or effect in law and are thus of no precedential value. “[T]he circumstances surrounding . . . negotiated [consent decrees] are so different that they cannot be persuasively cited in a litigation context.” *E. I. du Pont*, 366 U.S. at 331 n.12. Indeed, the related, but separate *Analysis* cited by Complaint Counsel here, is of even lesser probative value than the actual consent decree which it addresses. The *Analysis* acknowledges that its purpose is to “facilitate comment on the proposed consent orders [and] . . . does not constitute an official interpretation of the agreements and proposed orders.” *Analysis* at 1. For these reasons, Complaint Counsel’s argument fails.

“The free ride can become a serious problem for a partnership or joint venture because the party that provides capital and services without receiving compensation has a strong incentive to provide less, thus rendering the common enterprise less effective.” *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 212-13 (D.C. Cir. 1986). Here, Realcomp faced the

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very real problem of EA home sellers taking advantage of the services provided by Realcomp without paying dues required of Realcomp members (including discount brokers) and without providing any reciprocal benefit. Realcomp legitimately addressed this free riding concern by excluding EA listings from its feed to the Approved Websites. As such, Realcomp has demonstrated that implementation of its Website Policy was economically justified and plausibly procompetitive in effect.

In addition to the free rider justification, Respondent advances efficiency justifications for the Website Policy, as discussed below.

**(ii) Realcomp's Website Policy Created An Additional Efficiency**

In evaluating plausible procompetitive justifications, courts have accepted justifications which created operating efficiencies. *E.g.*, *Supermarket of Homes*, 786 F.2d at 1407 (enhancing ability of brokers to match homes and buyers); *Montgomery County Ass'n of Realtors, Inc. v. Realty Photo Master Corp.*, 783 F. Supp. 952,963 (D. Md. 1992) (“adverse [e]ffects [were] greatly outweighed by the benefits and opportunities the new database offers the real estate industry and the public”), *aff'd*, 993 F.2d 1538 (4th Cir. 1993) (unpublished opinion).

Here, Realcomp offers argument, through the testimony of Dr. Eisenstadt, on two alleged additional efficiencies created by the Website Policy. RB at 46-47; RRB at 44-45. One is shown to be of limited merit. The other is not. Addressing the latter first, it is noted that a multiple listing service is a cooperative arrangement by real estate brokers through local boards for the pooling of listings - the sharing of information about properties for sale so that all subscribers to the service may have an opportunity to act as subagents in procuring a buyer. *Realty Multi-List*, 629 F.2d at 1368.

As stated by Dr. Eisenstadt, an important characteristic of an MLS relevant to efficiency, is the fact that an MLS is a platform that serves a two-sided market, similar to newspapers, credit card systems, and shopping malls. F. 620. These platforms connect (*i.e.*, bring together) two distinct groups of users (in this case, real

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estate listing brokers and cooperating brokers). F. 620. An important characteristic of a two-sided market is that demand for the platform among users on one side increases as the number of participants on the other side increases. F. 621. In the case of an MLS, all else equal, listing agents will have a higher demand for an MLS platform that also attracts more cooperating agents. F. 621.

As Dr. Eisenstadt explained, customers on one side of a platform are not necessarily equal to one another in terms of creating indirect network effects for the customers on the other side of a platform. F. 622. He cited to the example of an anchor department store in a shopping mall which may be charged a lower rental rate than a boutique in the same mall because the anchor store can be expected to attract more customers to the mall. F. 622. He thus concluded that different rules for promoting ERTS listings versus EA listings could be expected to increase the participation of cooperating brokers, because cooperating brokers would be expected to place more value on the number of traditional, full service ERTS brokers who belong to the MLS than on the number of EA brokers, even if EA and ERTS contracts each offer cooperating brokers identical commission rates. F. 623. These factors, he asserts, support the conclusion that cooperating agents would prefer a platform that favors ERTS listing contracts. F.624. For these reasons, he concludes that the Realcomp Policies promote this result and thereby the efficiency of the cooperative MLS platform. F. 624.

Dr. Eisenstadt's conclusions, however, are not supported by the evidence. First, he himself concedes that most brokers compete as both listing and cooperative brokers, which would indicate that a member of an MLS will typically be on both sides of the two sided platform he described. F.626. The testimony of Mr. Mincy shows this to be the case in Southeastern Michigan. F. 626. Moreover, Dr. Eisenstadt's argument rests on an unfounded assumption that limited service brokers contribute only an equivalent number of EA listings to the platform. F. 627.

Dr. Eisenstadt's analysis is undermined by his admission that more listings attract more brokers and his own report, which shows that EA brokers bring more listings than full service brokers. F. 627-28. Under his own reasoning therefore, EA

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brokers should theoretically be more attractive to an MLS. As such, Dr. Eisenstadt's conclusions are not reliable and do not demonstrate how the Website Policy, in this regard, created an additional efficiency.

With respect to Respondent's second alleged efficiency argument, however, the Court finds that the Website Policy promotes limited efficiency by reducing the so called "bidding disadvantage" for buyers who are represented by a cooperating broker. F. 629. As explained by Dr. Eisenstadt, buyers who use cooperating brokers are disadvantaged relative to buyers who do not use a cooperating broker when both bid for properties listed under EA contracts. F. 629. Because the home seller must pay a commission when a buyer uses a cooperating broker, the rational home seller will subtract the value of that commission when comparing offers made by prospective buyers who use cooperating brokers against offers from buyers who are unrepresented. F. 629.

From a real world perspective, it might logically follow that buyers have more incentive to use the services of selling agents when they acquire ERTS properties than when they acquire EA properties. F. 630. Although this conclusion is not based on any economic findings, to the extent the Website Policy does not promote EA properties to the same extent as ERTS properties, such might well increase the probability that the client of a Realcomp member who is acting as a cooperating broker will make a successful offer for that property. F. 631.

Complaint Counsel's assertion that any disadvantage to the buyer using a cooperating broker simply reflects that the buyer must pay for the services of the cooperating broker (CCRFF ¶ 188), though true, does not negate the prospect that an EA home seller, when confronted by competing, equal offers from represented and unrepresented buyers, is by necessity, forced to factor in the cooperating agent's commission in computing net proceeds, which could well influence his selling decision. F. 629. Thus, by reducing any such bidding disadvantage incurred by home buyers who use cooperating brokers when they bid on EA listed properties, the Website Policy could plausibly promote the economic efficiency of the cooperative. F. 631.

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An even greater efficiency might occur to the extent the Website Policy values ERTS contracts over EA contracts due in part to the fact that cooperating brokers must deal directly with EA home sellers rather than with listing brokers. As such, cooperating brokers may often be forced to provide (though reluctantly), necessary transactional services that would ordinarily be performed by full service listing brokers. F. 632. In such circumstances, the Court could well imagine that the Website Policy might efficiently work to limit cooperating agents' exposure to legal liability as a result of being forced to provide such additional, professional services. As explained by Dr. Eisenstadt, Realcomp is treating listing agents who use ERTS listings more favorably than those using non-ERTS listings, because ERTS listings are more effective at attracting cooperative agents. F. 625.

**(iii) Realcomp's Website Policy Is Narrowly Tailored**

The effects of the information exchange through the MLS have been characterized as "enormously procompetitive." *Realty Multi-List*, 629 F.2d at 1368. "Certainly the antitrust laws must allow reasonably ancillary restraints necessary to accomplish these enormously procompetitive objectives." *Id.* However, the challenged restraints must be narrowly tailored to the accomplishment of legitimate goals. *Realty Multi-List*, 629 F.2d at 1375.

Here, the Website Policy is narrowly tailored to prohibit the distribution of EA listings to the Approved Websites, which directly addresses the free rider and the efficiency justifications described above. Realcomp's Policies are not so broad as to deny membership in the MLS to EA brokers or prevent brokers from placing EA listings on the MLS. F. 163-64, 181.

When a respondent has shown that the challenged conduct promotes a sufficiently procompetitive objective, Complaint Counsel has the burden of proving that the restraint is not reasonably necessary to achieve the stated objective. *Brown Univ.*, 5 F.3d at 669; *K.M.B. Warehouse Distributions*, 61 F.3d at 127 (requiring plaintiff to show that any legitimate objectives could be achieved in a substantially less restrictive manner). Here,

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Complaint Counsel has failed to do so. Based on the evidence discussed herein, the Court thus concludes that the Website Policy was reasonably necessary to the “legitimate competitive needs of the association” and “narrowly tailored to that end.” *Realty Multi-List*, 629 F.2d at 1375. It is, therefore, lawful under established antitrust precedents.

### 3. Summary of Liability Under Section 5

As noted in the Introduction, the Complaint in this case alleges that Respondent, in violation of Section 5 of the FTC Act, restrained competition in the provision of residential real estate brokerage services by combining or conspiring to hinder unreasonably, the ability of discount EA brokers to offer residential brokerage services on terms other than those contained in a traditional ERTS listing. Complaint ¶ 7. The Complaint charges Respondent with restraint of trade through two formal policies which are alleged to limit the publication and marketing of EA listings on approved Internet and IDX sites: the Search Function Policy and the Website Policy. A related policy, the Minimum Services Requirement, was imposed on Realcomp members and affected the implementation of the two stated policies, but is not separately evaluated.

The Court has determined that review of the challenged policies can only properly be conducted through a full rule of reason analysis. Upon such analysis, the evidence shows that Complaint Counsel has made a *prima facie* showing regarding the anticompetitive nature of the alleged restraints with respect to the Website Policy, but not with respect to the Search Function Policy. As such, the Court need not address the empirical evidence and Respondent’s procompetitive justifications as they pertain to the actual competitive effects of the Search Function Policy.

However, analyzing such evidence, including the empirical evidence of the competitive effects of the Website Policy, Complaint Counsel has not demonstrated that Realcomp, despite having market power in the relevant market, unreasonably restrained or substantially lessened competition, thereby resulting in consumer harm. Discount brokers in the relevant market have been shown to viably compete without having to labor under

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unreasonable, competitive disadvantages. EA listings are sufficiently accessible on public Internet sites and the Realcomp MLS, which continues to serve as the most important marketing vehicle for the sale of real estate in Southeastern Michigan and which offers near-maximum exposure for such listings.

The Realcomp Website Policy, which restricts dissemination of EA listings to the Approved Websites and the IDX, was implemented *inter alia*, to address the free rider problem of EA home sellers who sought to utilize the marketing benefits of such sites to compete with Realcomp cooperating brokers for buyers, without offering compensation or reciprocal benefits to the cooperative. In addition, it provided one limited efficiency of reducing the bidding disadvantage for buyers who are represented by a cooperating broker. Thus, the Website Policy is found to be a narrowly crafted, procompetitive justification for this concern and thus, reasonably necessary for the competitive needs of the association.

The evidence further indicates that consumers in the Realcomp Service Area can select from a wide-range of bundled or unbundled real estate brokerage services depending on their needs. As such, Complaint Counsel has not demonstrated that the Realcomp Website Policy has unreasonably restrained competition or resulted in consumer harm in violation of Section 5 of the FTC Act.

#### IV. CONCLUSIONS OF LAW

1. The parties have stipulated that Respondent is subject to the jurisdiction of the Federal Trade Commission. Joint Stipulations of Law and Fact, June 14, 2007 at 9.
2. The parties further stipulate that Realcomp is a corporation, as “corporation” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44; that Realcomp is engaged in commerce, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44; and that Realcomp’s acts and practices have been or are in or affecting commerce, as “commerce” is defined in the FTC Act. *Id.* at ¶ 9. *See also Freeman v. San Diego Ass’n of Realtors*, 322 F.3d 1133,



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1144 (9th Cir. 2003) (holding the MLS has a substantial effect on interstate commerce).

3. Under Commission Rule of Practice 3.43 (a), “[c]ounsel representing the Commission . . . shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto.” (The APA further establishes the preponderance of evidence standard for formal administrative adjudicatory proceedings.)
4. The burden is on the antitrust plaintiff “to define the relevant market within which the alleged anticompetitive effects of defendant’s actions occur.” *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 962 (6th Cir. 2004).
5. Based upon established legal standards, the analysis provided by Complaint Counsel’s expert is sufficient to meet Complaint Counsel’s burden in defining the relevant market.
6. There are two relevant product markets shown in this case: (1) the market for residential real estate brokerage services; and (2) the market for the supply of multiple listing services to real estate brokers.
7. The relevant geographic market in this case is shown to be the four counties in Southeastern Michigan of Wayne, Oakland, Livingston and Macomb.
8. The traditional rule of reason analysis is the most appropriate standard for the Court to analyze the challenged policies in this proceeding.
9. To determine whether Complaint Counsel has established that Respondent’s actions violate Section 5 of the FTC Act, the issues to be determined are: (1) whether there was a contract, combination, or conspiracy; and (2) whether the contract, combination, or conspiracy unreasonably restrained trade. *Law v. NCAA*, 134 F.3d 1010, 1016 (10th

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Cir. 1998) (identifying elements of a violation of Section I of the Sherman Act).

10. Respondent has stipulated that it “is a combination of its members with respect to the policies at issue.” Joint Stipulations of Law and Fact at 10.
11. To determine whether the challenged practices unreasonably restrain trade, requires an evaluation of the nature of the challenged restraints. If such analysis indicates that the restraints are likely to be anticompetitive, a further determination of Respondent’s market power and the actual effects of the restraints on competition is made. Where effects are found or presumed, Respondent’s procompetitive justifications are considered as part of a net effects assessment.
12. With respect to the Website Policy, and the requirement that in order to be considered an ERTS listing, an agent must provide full brokerage services, the nature of the restraint is such that it is likely to be anticompetitive. This finding requires an expanded inquiry into whether competition was unreasonably excluded through a determination of Respondent’s market power and the competitive effects of the restraints.
13. With respect to the Search Function Policy, including the requirement that in order to be considered an ERTS listing, an agent must provide full brokerage services, it is evident that the nature of such restraint is *not* anticompetitive. No further analysis of the effects of such restraint need therefore be performed.
14. Realcomp has market power in the relevant market.
15. Assessing the effects on competition as a result of the Website Policy, the relevant evidence, including the empirical evidence, demonstrates that the challenged restraints have not unreasonably restrained trade as they have not been shown to substantially lessen competition by discount brokers in the relevant market or been shown to result in significant increased costs to consumers.

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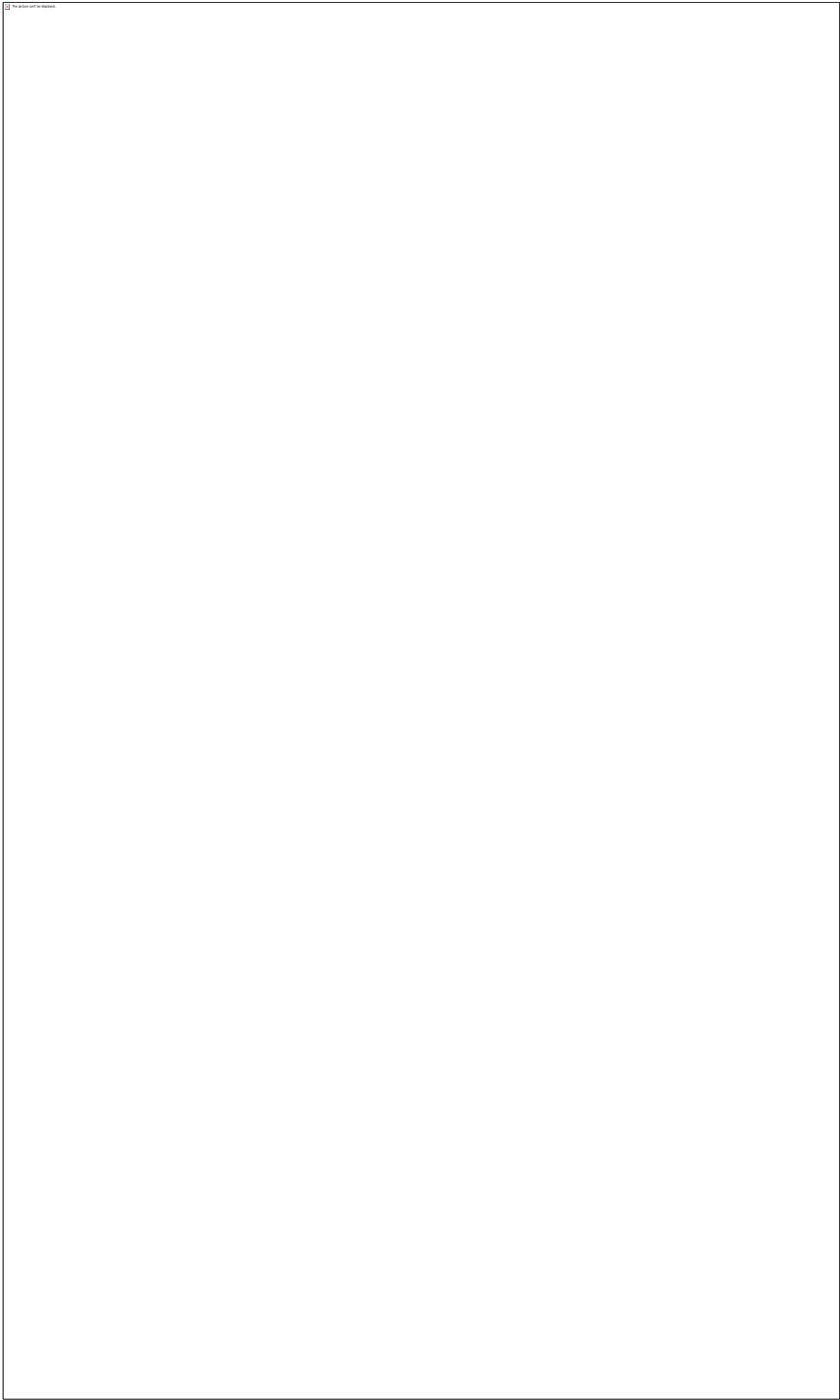
16. Although Complaint Counsel has not demonstrated significant competitive effects as a result of the Website Policy, it has shown Realcomp has market power in the relevant market. As such, if competitive effects could be presumed under an abbreviated review standard, the burden shifts to Respondent to show whether the challenged policies have a plausible, procompetitive justification.
17. A review of the evidence, including the empirical evidence, demonstrates that the Website Policy addresses a free rider problem by EA home sellers competing with Realcomp brokers for buyers and is, thus, plausibly procompetitive.
18. The Website Policy created a further, limited efficiency by addressing a bidding disadvantage problem that existed for Realcomp cooperating agents in competing with unrepresented home buyers for EA listed homes.
19. The Website Policy, to the extent it has been found procompetitive and efficient, is reasonably necessary to the competitive needs of the association and is narrowly tailored to that end.
20. Upon review of the totality of the evidence in this proceeding, it is determined that Complaint Counsel has not met its burden of demonstrating that the Realcomp Policies have unreasonably restrained or substantially lessened competition in the relevant market. As such, Complaint Counsel has not shown that such policies have resulted in actionable consumer harm in violation of Section 5 of the FTC Act.

**ORDER**

Accordingly, for the above-stated reasons, the Complaint in this proceeding is DISMISSED.

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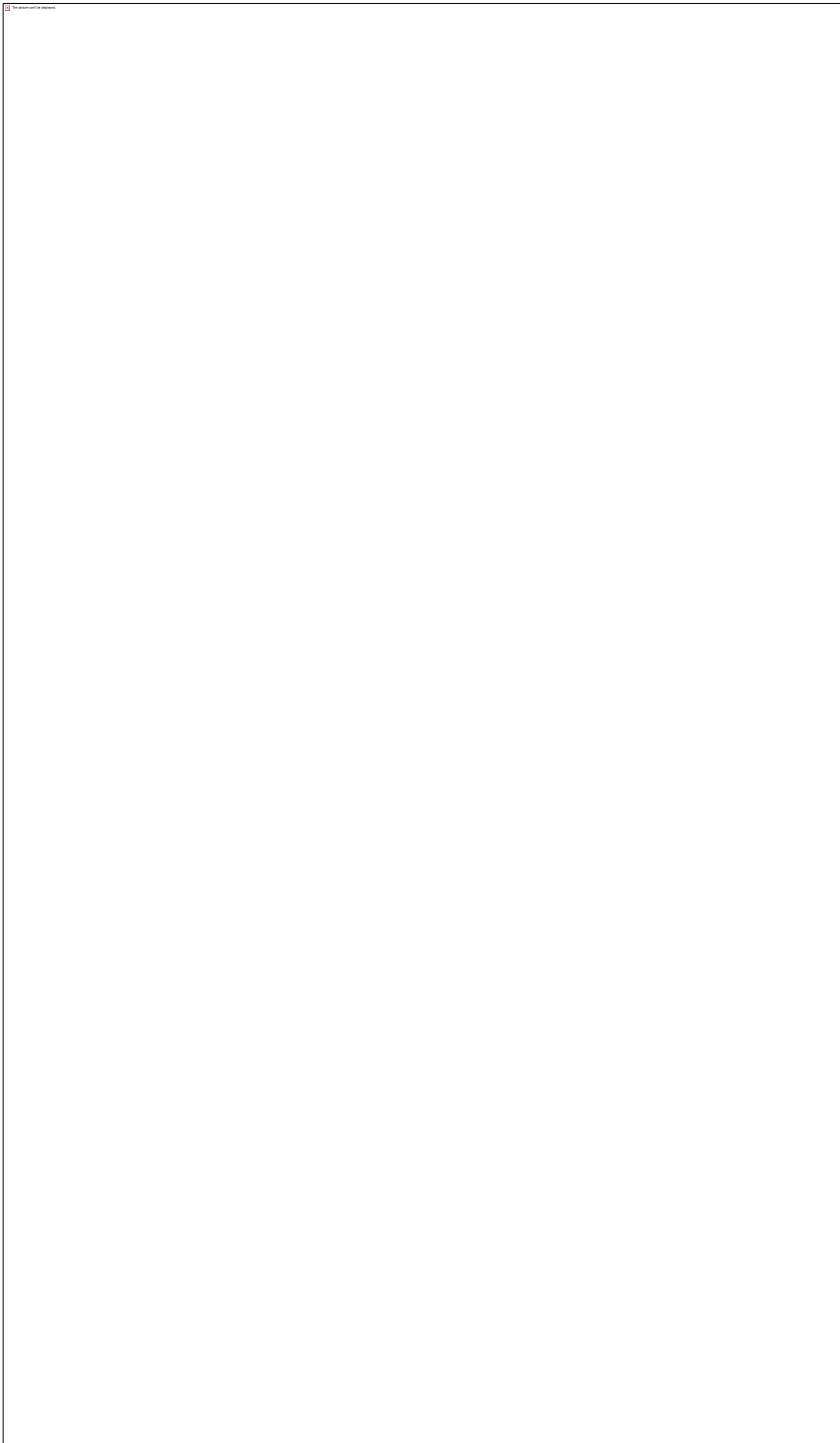
**Attachment # 1**



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Opinion of the Commission

**OPINION OF THE COMMISSION**

By Kovacic, Commissioner, For A Unanimous Commission:

For many consumers, the purchase or sale of a home is one of life's most important and memorable experiences. Realty transactions often entail great financial stakes and summon the deepest personal emotions that accompany leaving a beloved dwelling or acquiring a place that one hopes will be a reassuring retreat from the press of a daily routine. These characteristics imbue the conveyance of residential real estate with extraordinary national significance.

In this matter the Commission returns to issues associated with the operation of an integral element of the U.S. real estate sector – the multiple listing service.<sup>1</sup> Here the Commission considers whether an association of real estate brokers with market power may adopt rules and practices that restrict the ability of members to offer consumers products that create “price pressure” on more expensive products that most of the association's members provide. In doing so, we continue the Commission's efforts to clarify the application of antitrust standards governing concerted action by competitors.

We find that the practices at issue improperly limit consumers' access to information about the availability of these lower-priced alternatives, and we conclude that the association's acts and practices unreasonably restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. We reverse the

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<sup>1</sup> Real estate services, and the development of the multiple listing service, have occupied a substantial amount of the agency's attention as an adjudicatory tribunal and policymaking body in recent decades. Relevant FTC competition cases have included *Port Washington Real Estate Board, Inc.*, 120 F.T.C. 882 (1995); *Puget Sound Multiple Listing Service*, 113 F.T.C. 733 (1990); *Multiple Listing Service of the Greater Michigan City Area, Inc.*, 106 F.T.C. 95 (1985). Noteworthy examples of the Commission's policy work include U.S. Department of Justice & Federal Trade Commission, *COMPETITION IN THE REAL ESTATE BROKERAGE INDUSTRY* (Apr. 2007) (available at <http://www.ftc.gov/reports/realestate/V050015.pdf>); Federal Trade Commission, *THE RESIDENTIAL REAL ESTATE AND BROKERAGE INDUSTRY: LOS ANGELES REGIONAL OFFICE STAFF REPORT AND THE BUTTERS REPORT* (1983) (available at [http://www.ftc.gov/bc/realestate/work\\_shop/index.htm](http://www.ftc.gov/bc/realestate/work_shop/index.htm)).

## Opinion of the Commission

Initial Decision dismissing the complaint and enter a cease and desist order.

**I. Background**

Homes are not fungible commodities. Within a given price range in a specific geographic area, there can be many housing options. The array of possibilities concerning price, style, and location is so great that the search for the right match between the seller and the buyer requires considerable effort and knowledge. Most individuals engage a licensed real estate broker to guide them through the often daunting process of selling or buying a home. The conveyance of residential real estate is one of a number of transactions in which consumers turn to knowledgeable intermediaries to assist them in sorting through an abundance of complex information about product or service offerings. In real estate and other sectors that feature substantial information complexity, the contributions of, and competition among, expert intermediaries play crucial roles in helping consumers satisfy their preferences. Competition law has a major stake in seeing that rivalry presses expert intermediaries to improve the range of options from which consumers can choose.

Real estate brokers advise on marketing and sales strategy and, most important, provide access to the local multiple listing service (“MLS”). The MLS is a closed database system accessible only to member brokers and, in more limited form, to the general public through data feeds to various public websites. IDF 106, 117-118.<sup>2</sup> Each MLS listing includes details about the property for sale, (*e.g.*, the number of bedrooms and bathrooms, square footage), the type of listing agreement, and a description of the services provided by the listing broker, as well as an offer of compensation to any broker who procures a buyer for the property. IDF 109. The MLS enhances the sharing of information

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<sup>2</sup> We use the following abbreviations to refer to matters in the case record:

ID	Initial Decision
IDF	Initial Decision’s Findings of Fact
RPF	Respondent’s Proposed Findings of Fact
RRPF	Respondent’s Reply to Complaint Counsel’s Proposed Findings

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among its members and provides systematic, enforceable rules governing the sale of listed properties. IDF 103-105.

The development of the MLS has made major contributions to improvements in the economic performance of the real estate sector. The MLS is generally acknowledged to be a superior platform for matching home buyers and sellers. IDF 289, 432. Its effectiveness is unrivaled by other advertising methods, such as newspaper ads, flyers, and “For Sale” signs planted on a home’s front lawn. The MLS database itself, however, is not the only information-sharing product that real estate associations provide. The development of the Internet and the substantial increase in the number of broker websites have spurred these associations to create data feeds based on information the MLS contains. IDF 114, 117, 218. These data feeds are provided to certain websites available to the general public, though without all the information available in the MLS database. Through these data feeds, MLS associations today routinely supply home listing information to public websites, including their broker members’ own websites and to Realtor.com, the public website of the National Association of Realtors (“NAR”). IDF 117, 226. Buyers can access these websites, search for homes that meet their needs, and then either work with their own broker to pursue these leads or, if unrepresented by a broker, directly contact the seller’s broker.

The Internet and public access to MLS listings are not the only forces to change the real estate industry in recent years. In the traditional brokerage model, sellers pay approximately six percent of the sales price to their brokers. This amount usually is split between the seller’s broker and the broker who brings a buyer, or is kept entirely by the seller’s broker if the buyer is unrepresented. IDF 53, 54. Today the traditional model faces competition from brokers who discount their fees by offering lower commission rates, accept flat fees, or unbundle real estate services previously available only as a package. The limited service model offered by agents who unbundle their services is typically less expensive than the traditional model, and it allows consumers to customize a package of services that best fits their needs.

The changes sketched here illustrate how technological dynamism and organizational innovation can place enormous pressure on traditional business models and create possibilities for

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“the new commodity, the new technology, the new source of supply, the new type of organization”<sup>3</sup> that can transform markets. Because technological and organizational dynamism are powerful stimulants for economic progress, an especially important application of antitrust law is to see that incumbent service providers do not use improper means to suppress innovation-driven competition that benefits consumers.

Complaint counsel alleges that Realcomp II Ltd. (“Realcomp”) reacted to new forms of competition by adopting policies that (1) prohibited discount real estate broker listings from being distributed from Realcomp’s MLS to public websites and (2) limited the exposure of these listings on the closed MLS database. In the Complaint issued on October 10, 2006, the Commission alleged that Realcomp’s actions improperly restrained trade and competition in the provision of residential real estate brokerage services in southeastern Michigan and violated Section 5 of the FTC Act by:

- Prohibiting information about Exclusive Agency (EA) Listings and other forms of nontraditional listings from being transmitted from Realcomp’s Multiple Listing Service (MLS) to publicly accessible real estate Web sites;
- Excluding EA listings and other nontraditional listings from the default search setting in the Realcomp MLS; and
- Implementing a Minimum Service Requirement, which compelled brokers to provide full brokerage services in order to have their listing included in data feeds to public websites and the default search setting in the Realcomp MLS, and to gain access through Realcomp to publicly accessible real estate websites.

Complaint ¶¶ 13-16.

The Administrative Law Judge (“ALJ”), Stephen McGuire, held hearings over eight days in June 2007. He heard live testimony from eight witnesses and admitted into evidence

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<sup>3</sup> Joseph A. Schumpeter, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 84 (1942).

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deposition testimony excerpts from 28 witnesses and over 800 exhibits. In an extensive Opinion issued on December 10, 2007, Judge McGuire found that Realcomp's policies did not violate Section 5 of the FTC Act, and he dismissed the complaint. ID 2, 126-129. Complaint counsel filed a timely appeal, and Respondent did not cross-appeal. Oral argument took place on April 1, 2008.

In hearing this appeal, we exercise *de novo* review of the facts and the law. We base our review on careful study of the record, Judge McGuire's initial decision, and the written and spoken presentations of the parties. For reasons set out below, we reverse the Initial Decision and enter a cease and desist order.

## II. Facts

We adopt the ALJ's findings of fact to the extent that they are not inconsistent with our Opinion.<sup>4</sup>

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<sup>4</sup> We note, however, that substantial portions of the section of the Initial Decision labeled as "Findings of Fact" actually represent inferences that the ALJ drew from the facts or his opinions or legal conclusions. We adopt some, but not all, of those inferences, opinions and conclusions. *See infra*, note 11. As discussed below, we conclude that many of the ALJ's conclusions are inconsistent with governing law, established antitrust policy, or economic logic. We explain the basis for our disagreement with such conclusions in Section V of this Opinion.

Thus, for example, we decline to endorse the section headings in sections II.G, II.H, or II.I of the Initial Decision, which are argumentative in tone and appear to represent the ALJ's opinions or conclusions rather than findings of fact. *See, e.g.*, ID at 64 (§ II.H.3, "Complaint Counsel's Expert's Testimony on Non-ERTS Share is Flawed"); *compare* Section V.D.2, *infra* (explaining why the ALJ's analysis of the expert economic and econometric testimony was faulty and unsound). We also decline to endorse the purported "findings of fact" in certain numbered paragraphs that contain the ALJ's inferences or conclusions, rather than statements of fact. *See, e.g.*, IDF 442-443 (characterizing certain costs as "nominal" rather than simply stating the amount of such costs); IDF 511 (according "little weight" to complaint counsel's expert's opinion because, in the ALJ's view, certain of the methodologies he used were "flawed"); IDF 601 ("Realcomp's Website Policy has procompetitive effects \* \* \*").

In addition, the findings of fact in many of the numbered paragraphs in the Initial Decision – especially those in section II.H of the Initial Decision – summarize the opinions expressed or analysis conducted by an expert witness.

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***Real Estate Brokers/Agents***

A real estate broker is a licensed real estate professional who acts as a representative for either a home buyer or a home seller, and who is authorized to engage in the sale of real estate and provides services in conjunction with the sale. A real estate agent is a licensed real estate professional who works for, or under the supervision of, a real estate broker. IDF 3-4.<sup>5</sup>

More than 80 percent of homeowners hire a real estate broker to assist with some or all tasks associated with the typical real estate transaction. IDF 13. A residential real estate transaction usually involves two brokers: (1) a “listing broker,” whom the home seller retains and; (2) a “cooperating broker,” who assists home buyers. IDF 18.

***Listing Broker Services and Agreements***

A listing broker may provide a wide variety of services to a home seller. Among other activities, the listing broker may determine the home’s initial asking price, show the property to prospective buyers, present and explain purchase offers to the seller, list the home on a multiple listing service, advertise the listing on the Internet, hold open houses, put a “For Sale” sign in the yard, and assist the home seller with the closing of the sale. IDF 21.

The contract between a listing broker and a home seller is called a “listing agreement.” This contract defines the relationship between the listing broker and the home seller. The listing agreement usually specifies the contract’s duration and the

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We adopt those findings to the extent that they simply summarize such testimony or analysis, but without any implication that we endorse such opinions or analyses. *See, e.g.*, IDF 482 (“Realcomp’s antitrust economic expert, Dr. Eisenstadt testified that Realcomp’s Policies’ effect on the non-ERTS share in Realcomp was at most a 1% decrease in the percentage of non-ERTS listings.”). We accept this as an accurate factual summary of what Dr. Eisenstadt said, but we do not necessarily endorse the conclusion he expressed.

<sup>5</sup> Because a real estate agent is the broker’s agent, this Opinion does not refer separately to real estate agents.



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compensation to be paid to the listing broker. A listing contract typically includes an offer of compensation to any cooperating broker who obtains a buyer for the home. IDF 24-25. Listing agreements use different ways to pay listing brokers. Some agreements specify a commission based on a percentage of the home's selling price to be paid at closing. Others provide a flat fee paid at the time the listing agreement is signed. Still others use a combination of these methods. IDF 28.

Most compensation arrangements are commission-based. Full service listing brokers in Realcomp's service area typically charge a commission rate of approximately six percent of a home's selling price. IDF 53, 67. The offer of compensation to a cooperating broker commonly calls for the listing broker to share the commission with the cooperating broker. Although the home seller usually is responsible for paying the listing broker's brokerage commission, a home buyer bears part of the cost of the brokerage fee to the extent that the sale price of the home incorporates some or all of the commission. IDF 30.

This case focuses on two types of listing agreements. The first is an Exclusive Right to Sell ("ERTS") listing agreement. This type of agreement requires a home seller to appoint a real estate broker as the seller's exclusive agent for a designated time to sell the property on the seller's stated terms. IDF 50, 51. The seller agrees to pay the broker a commission when the property is sold, whether the sale occurs through the efforts of the listing broker, the owner, or another broker, or even if a buyer independently approaches the seller. IDF 51. Traditionally, brokers offering ERTS listings provide a full set of real estate brokerage services. These services are "bundled" in the sense that sellers must buy the entire package; sellers cannot customize contracts to pick and choose among the services offered. IDF 52.<sup>6</sup>

The second type of listing agreement is an Exclusive Agency ("EA") agreement. Under an EA listing, the listing broker acts as the seller's exclusive agent, but the seller reserves the right to sell

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<sup>6</sup> We refer to brokers offering ERTS listings as "full service brokers" and call their listings "full service listings."

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the property without further assistance from the listing broker.<sup>7</sup> IDF 58. An EA listing agreement calls for an initial, nonrefundable payment – in many instances, \$500 – to the listing broker. The seller owes the listing broker nothing more if a buyer approaches the seller directly without a cooperating broker’s assistance. IDF 60. With an EA listing, the seller need not pay for the services of a cooperating broker when an unrepresented buyer purchases the property. IDF 59. EA sellers are, however, obligated to pay cooperating brokers who procure a buyer for the home. Unlike ERTS brokers, brokers who offer EA contracts often provide an unbundled menu of brokerage services from which the home seller may choose. IDF 62. These contracts meet a “consumer demand for lower cost brokerage services where consumers are willing to carry out some of the homeselling tasks themselves that otherwise would be performed by real estate professionals.” CX 533-041. In general, EA listings and other unbundled services offered by limited service brokers offer consumers a low-cost alternative to traditional brokerage services. IDF 69.

One variant of the ERTS listing -- the flat-fee ERTS -- resembles the EA listing in some respects. The flat fee ERTS compensates the listing broker with a fixed fee, rather than a commission based on a percentage of the selling price. The fee set in a flat fee ERTS agreement ordinarily is higher than the fee established in an EA listing. For example, AmeriSell Realty charges \$200 more for a flat-fee ERTS listing than for a non-ERTS listing. IDF 57. As mentioned below, flat-fee ERTS listings offer 3 percent compensation to a cooperating broker who procures a buyer for the property. IDF 54.

***Cooperating Brokers***

A cooperating broker works with consumers who are interested in buying a home. IDF 31. Cooperating brokers assist the buyer in a number of ways. They search an MLS for homes that meet the buyer’s criteria, they tour homes and neighborhoods, and, once the buyer finds the right home and reaches an

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<sup>7</sup> We refer to brokers offering EA listings as “limited service brokers” and to their listings as “limited service listings.”

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agreement to purchase that home, they assist the buyer during the closing of the sale.

The listing broker ordinarily pays the cooperating broker. Regardless of the listing's form (ERTS or EA), the listing broker makes an offer of compensation to any cooperating broker who finds the buyer who purchases a house which the listing broker has offered. IDF 40, 43, 45-46, 193-194. The offer of compensation is unconditional, other than requiring the cooperating broker to find the buyer who purchases the house. IDF 42. Under a traditional ERTS listing, the listing broker's commission is bundled with the cooperating broker's commission. IDF 77. Thus, a sale of a home listed under an ERTS agreement and involving a cooperating broker would require the seller to pay a six percent listing commission; the listing broker would retain three percent and would pay the cooperating broker three percent. IDF 54. If no cooperating broker is involved in the transaction, the listing broker retains the entire six percent commission. IDF 55, 52. In contrast, home sales involving EA or flat-fee ERTS contracts require home sellers to pay a commission only if a cooperating broker finds the buyer who purchases the house. IDF 78. No additional commission or compensation is due to the listing broker under an EA or flat-fee ERTS agreement. IDF 60.

EA listings and flat-fee ERTS listings thus differ in an important respect when the seller obtains a buyer without the intervention of a cooperating broker. Under an EA listing, the seller pays the listing broker only the fixed fee negotiated in the listing agreement. The EA listing broker does not receive the commission that otherwise would have been paid to the cooperating broker. By contrast, under an ERTS flat fee arrangement, the listing broker absorbs the commission that would have been paid to a cooperating broker had the seller not procured the buyer through the seller's own efforts.

***A Multiple Listing Service ("MLS")***

As noted above, an MLS is an information sharing service that provides data about homes listed for sale by its member brokers within a geographic area. IDF 102-110. MLS listings contain details about a property's features, an offer of compensation to a cooperating broker, and other information concerning the

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purchase and sale of a home. IDF 109. By centralizing this information, the MLS makes the marketplace for homes more efficient and orderly. IDF 103, 105.

The creation of the MLS system has been one of the most significant competitive developments in the real estate industry. IDF 428. It is the most effective marketing tool and substantially more important than any other method of promoting the sale of residential real estate in southeastern Michigan. IDF 430. An MLS exposes listings to all other MLS members, “dramatically increasing” the listing brokers’ marketing reach. RX 154-A-026-027; Sweeney Tr. 1315 (the MLS provides “a huge buyer stream available” for brokers’ listings).

The Realcomp MLS accepts listings of all kinds, whether limited service or full service. IDF 181. Realcomp does not, however, provide equivalent services for the different types of listings. Realcomp’s Search Function Policy excluded EA listings from the default MLS search results. IDF 364. Realcomp’s Website Policy also excludes EA listings from data feeds to public websites. IDF 349-350.

Realcomp requires that all listings contain an offer of compensation to cooperating brokers, although it does not require that a cooperating broker be involved in a home sale. IDF 190, 193.

The MLS is an example of what economists call two-sided markets with network effects. IDF 620-628. In this framework, the MLS product is a “platform” for which there are two types of users. Each group of users regards the platform as more desirable if the platform succeeds in attracting the other category of users. “Network effects” are present when a product’s value to a purchaser depends on the number of other users. As we will see later in this Opinion, the value of an MLS increases as the number of properties listed on the MLS grows.

***Public Websites, Including IDX Websites***

In addition to operating a closed database of information about properties for sale listed by its members, an MLS ordinarily disseminates listing information to certain websites that members

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of the public can search. IDF 114, 218-221. Publicly available websites include NAR's Realtor.com, websites operated by the local MLS association itself, and member broker and agent websites, known as Internet Data Exchange ("IDX") websites. IDF 211. Using an IDX feed, broker websites can display listing information from their local MLS database. This practice allows consumers to visit the broker's website and search for properties listed for sale by all participating MLS members. IDF 120.

Not all listing information available in the MLS is provided in its feeds to public websites. Realcomp's IDX feeds, for example, do not provide information about the type of listing agreement under which a home is being sold (whether ERTS or EA), and the offer of compensation may also be omitted. IDF 116. A central focus of this case is Realcomp's practice of excluding EA listings completely from its IDX feeds to public websites.

***Realcomp***

Respondent Realcomp is a corporation organized, existing and doing business under, and by virtue of, the laws of the state of Michigan. Realcomp was founded in November 1993 and began doing business in January 1994. Its office and principal place of business are located in Farmington Hills, Michigan. IDF 132-134. Realcomp has over 2200 office members in Southeastern Michigan and a total of approximately 14,000 members. IDF 157-158. Realcomp is the largest MLS in Michigan and counts almost half of all realtors in Michigan as members. IDF 159. Realcomp's members consist of real estate brokers and real estate agents who compete with one another to provide residential brokerage services to customers. Most Realcomp members are full service brokers and their agents. IDF 90-91, 158.

Realcomp is currently owned by seven shareholder realtor boards and associations, each of which in turn consists of competing realtor members. IDF 136, 138. Realcomp's business and affairs are conducted by its Board of Governors, whose members are selected by the shareholder boards and associations. IDF 140. Each Realcomp Governor must be a realtor, and one Governor from each shareholder must be "actively practicing real estate." IDF 141.

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Realcomp serves a region within southeastern Michigan that includes Livingston County, Oakland County, Macomb County and Wayne County. IDF 175. Realcomp permits agents who offer discount services to become Realcomp members. All Realcomp members, including brokers and agents who offer limited services, pay the same fees to Realcomp. IDF 164, 176-177.

***Realcomp's Services***

Realcomp's primary member service is its MLS. IDF 179. The Realcomp MLS online system allows members access to the Realcomp MLS from any computer with Internet access. IDF 180. A key benefit of the Realcomp MLS is access to Internet advertising on "Approved Websites," which include MoveInMichigan.com, Realcomp's own site; IDX participant websites; and Realtor.com. IDF 210, 218, 231. Realcomp MLS listings also appear on ClickOnDetroit.com, a website operated by a television station which "frames," and takes its data exclusively from, MoveInMichigan.com. IDF 211, 237-240.

***Importance of Realcomp's Approved Websites***

In today's commercial environment, the Internet is vital to the marketing and sale of homes, and thus to brokers' earning of commissions. IDF 218; Murray Tr. 145-46, 206; RX 154-A-035 (explaining that the Internet has "revolutionized" the real estate brokerage industry). The Internet is the leading source of information to consumers when buying or selling a home. According to Realcomp's Chief Executive Officer, Karen Kage, the "majority of home buying and selling now begins on the Internet," so "[i]f you miss that consumer connection, you miss a lot of potential commissions and fees." CX 221-001. Most home buyers and sellers want to be able to search for homes on the Internet before they engage in a transaction. IDF 220. Realtors benefit from having their listings shown on the Realcomp Approved Websites, and sellers benefit from the additional exposure their listings gain. IDF 219; CX 254-02. Many Realcomp members advertise their ability to market homes on the Internet to potential home sellers. CX 357; CX 310-006, 013; CX 287; CX 43 (Hardy Dep.), at 80-81, 82-83; CX 288-001; CX 40 (Elya Dep.), at 30-32; CX 109-001.

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At the request of its broker members, Realcomp began offering its members the option of providing IDX feeds of MLS listing information to public real estate websites. IDF 223, 225. Eighty-two percent of Realcomp's members authorized their listing data to be included in the IDX feed. IDF 354. Ninety-one percent of broker websites contain searchable property listings, and those sites obtain their information about other broker's listings from IDX feeds. IDF 121.

No other MLS in Southeastern Michigan provides the geographic reach or membership size of Realcomp. IDF 159. Realcomp emphasizes the importance of its data feeds, including Realtor.com, MoveInMichigan.com, and, through MoveInMichigan.com, ClickonDetroit.com. IDF 221-222, 232, 234-235. One Realcomp document describes how Realcomp's MLS enables listing brokers to reach: (1) approximately 15,000 Realcomp MLS subscribing realtors; (2) millions of Internet users shopping for homes on MoveInMichigan.com, Realtor.com, and the Realcomp IDX websites; and (3) over 1,250,000 cable TV viewers in approximately 350,000 households subscribing to Comcast's Digital Cable-TV in Southeastern Michigan. CX 272.

Public websites provide great value to an MLS, its member brokers, and consumers. Marketing homes on certain key websites, such as MoveInMichigan.com, Realtor.com, and IDX websites, is "significant to a broker's ability to compete effectively because it exposes homes for sale to potential buyers who are now using the Internet as an integral part of their home search." RX 154-A-005; Murray Tr. 210-13 (explaining that the Realcomp IDX feed is significant because it feeds the websites "where the buyers are"). A paper prepared in 2006 by NAR explains that "[t]he brokerage firm of the future will need to embrace the realities of the new world order and learn to convert internet leads to paying customers in order to compete effectively." CX 380-008. Median brokerage firms derive 7 percent of their actual sales from leads generated by the firms' website, a "big chunk of business" to be derived from one marketing channel. Murray Tr. 218-19.

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***The Realcomp Policies***

Beginning in 2001, in response to entry by limited service brokers into its service area, Realcomp adopted a set of policies relating to the exposure of certain listing data available through its MLS. Realcomp first adopted a Website Policy, which prohibited the distribution of limited service listings from the Realcomp MLS to Approved Websites – i.e., Realtor.com, MoveInMichigan.com (and, through it, ClickOnDetroit.com), and the IDX. IDF 349-355. Realcomp began active enforcement of the Website Policy in 2004, after Realcomp had adopted its Minimum Service Requirement and amended a third policy, the Search Function Policy, to exclude discount listings from the default search results for those directly accessing the Realcomp MLS. IDF 355, 361-363, 372-374.

The Website Policy remains in place. Realcomp enforces the Policy with a range of penalties that includes fines of up to \$2,500 for each violation, lengthy suspension from the MLS, and expulsion from Realcomp. IDF 380-387; CX 6-014; CX 7-015.

In 2003, Realcomp adopted the “Search Function Policy.” By this measure, the default setting on the Realcomp MLS searched only full service listings and listings classified as “unknown.” IDF 361. Realcomp amended its policy manual in 2004 to require members to identify the listing type in their MLS submissions, which eliminated the “unknown” category of listings. Under the amended Policy, Realcomp refused to accept a listing into the Realcomp MLS unless the type of listing was specified. IDF 372-373. In other words, the default settings excluded properties listed by limited service brokers.

The Search Function Policy remained in place until April 2007. IDF 370. Until then, in order to see all of the available listings typed into Realcomp’s MLS (*e.g.*, EA or non-ERTS listings), Realcomp members needed to select the specific listing types they wished to see or to choose the button labeled “select all listings.” IDF 363. Thus, a broker who wished to see EA listings needed either to select “all listings” or the “EA listings” button. IDF 364. If a broker did not wish to see ERTS listings, the broker needed to de-select the “ERTS listings” button. IDF 364.



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Until April 2007, Realcomp also had a Minimum Service Requirement, which compelled brokers who listed properties to provide full brokerage services in order to qualify their listing as an ERTS listing. IDF 374-375. Until then, brokers had to provide all of the following services in order for a listing to be considered an ERTS listing: (1) arrange appointments for cooperating brokers to show listed property to potential purchasers; (2) accept and present to the sellers offers to purchase procured by cooperating brokers; (3) advise the sellers as to the merits of the offers to purchase; (4) assist the sellers in developing, communicating, or presenting counteroffers; and (5) participate on behalf of sellers in negotiations leading to the sale of listed property. IDF 66.

The combined effect of Realcomp's three Policies was to limit exposure of EA listings to brokers searching the MLS for homes to present to potential buyers, and to consumers searching public websites for homes to purchase. The Search Function Policy operated to suppress EA listings from the MLS's default search results and thus limit their exposure to brokers. IDF 361, 364. In conjunction with the Minimum Service Requirement, the Search Function Policy also operated to exclude all brokers who did not have full service listings from disclosure on the MLS default setting. IDF 363, 374. In conjunction with the Minimum Service Requirement, the Website Policy excluded brokers without an exclusive right to sell from exposure, through Realcomp, to the general public through publicly available websites such as Realtor.com, MoveInMichigan.com, and broker websites. IDF 349-350, 374.

***The National Association of Realtors***

Beginning in 2001, in response to entry by limited service brokers into its service area, Realcomp adopted a set of policies relating to the exposure of certain listing data available through its MLS. Realcomp first adopted a Website Policy, which prohibited the distribution of limited service listings from the Realcomp MLS to Approved Websites – i.e., Realtor.com, MoveInMichigan.com (and, through it, ClickOnDetroit.com), and the IDX. IDF 349-355. Realcomp began active enforcement of the Website Policy in 2004, after Realcomp had adopted its Minimum Service Requirement and amended a third policy, the Search Function Policy, to exclude discount listings from the

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default search results for those directly accessing the Realcomp MLS. IDF 355, 361-363, 372-374.

In November 2006, Realcomp's Board of Governors tried unsuccessfully to persuade NAR to postpone its rule change. IDF 424; CX 233, 234, 235. The Realcomp Board argued that, without the Website Policy, the MLS would become a public utility. IDF 424-425. NAR rejected Realcomp's request and responded that including EA listings on the IDX feeds would not detract from the purpose of an MLS. IDF 426. Nonetheless, in April 2007, the Board voted against adopting NAR's new IDX policy. IDF 423.

***The Relevant Product and Geographic Markets and Market Power***

There is no dispute in this appeal about the dimensions of the relevant market and Realcomp's significance within the relevant market. There are two relevant product markets in this case. The first consists of the supply of residential real estate brokerage services, in which Realcomp's broker members compete. IDF 285-286. The ALJ's decision referred to these services as the output market. The second relevant market consists of multiple listing services; Realcomp is a participant in this market. *Id.* The MLS is a vital input into the supply of residential real estate brokerage services.

The relevant geographic market in both product markets is local. It consists of four Michigan counties: Oakland, Livingston, Macomb, and Wayne. IDF 321, 328.

The ALJ determined that, within the relevant market, Realcomp enjoyed market shares that courts traditionally have relied upon to infer the presence of market power. ID 84-85; IDF 340-348. The ALJ also found that high barriers to entry protected Realcomp's market position. ID 85; IDF 329-338. Realcomp's position also is reinforced by "network effects" inherent in the cooperative nature of an MLS. The value or quality of the service to each MLS user rises as the number of other users of the MLS

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service increases. ID 85; IDF 305-310.<sup>8</sup> For these reasons, Judge McGuire concluded that Realcomp has “substantial market power” in the relevant market for multiple listing services. ID 84-85, 97. In this appeal, Realcomp does not contest the ALJ’s finding that the association has substantial market power in the relevant markets. Oral Argument Tr. 72-73.

***Competitive Pressure Exerted by Limited Service Brokers***

Real estate brokers compete to obtain listings and to represent home buyers. IDF 79. Brokers offering limited services and brokers offering traditional full services compete with one another for new listings. IDF 81. Limited service brokers are a fairly new and increasingly important form of competition in the real estate industry. RX 154-A-015-16; CX 534-039, 041. Brokers offering unbundled services (limited service brokers such as those using EA listing agreements) offer a low cost alternative to consumers of residential real estate brokerage services and put “price pressure” on full service brokerage commissions. IDF 69, 99. In effect, the limited brokerage service model allows home sellers to buy a subset of the full range of brokerage services while supplying other services by themselves. IDF 69, 72. Limited service brokers compete not only by unbundling listing services, but also by unbundling the commission structure. Sellers using a limited service broker can save significantly on the price of a commission. IDF 75-78.

Limited service brokerages grew from a 2 percent nationwide market share in 2003 to a 15 percent share in 2005, an increase partly attributable to the use of the Internet. IDF 90, 92. NAR explained that “a growing percentage of consumers are asking agents to reduce their commissions. This has been sparked by awareness of discounted online and limited-service models, and remains a challenge for full service agents.” IDF 100-101.<sup>9</sup>

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<sup>8</sup> Realcomp highlights to consumers the “market power and benefits of Multiple Listing Service.” CX 78-003.

<sup>9</sup> The ALJ found that the nationwide market share of limited service brokers fell in 2006 to about 8 percent, which he attributed to a softening of the housing market. IDF 91, 96. His finding rested principally on the opinion of a single full service broker. It is not so evident to us that a softening of the housing market would necessarily yield this result. A number of brokers

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**III. The Initial Decision**

The ALJ found that Realcomp had substantial market power in the supply of multiple listing services to real estate brokers in southeast Michigan, and stated, with respect to Realcomp's Website Policy and Minimum Service Requirement, that "the nature of the restraint is such that it is likely to be anticompetitive." ID 97, 128. The ALJ did not find that the Search Function Policy was likely to have an anticompetitive effect. *Id.* Despite his findings that Realcomp possessed substantial market power and that two of Realcomp's policies likely had anticompetitive effects, the ALJ ruled that Realcomp's practices did not violate Section 5 of the FTC Act and dismissed the complaint.

In reaching his conclusion about Realcomp's behavior, the ALJ rejected the use of any abbreviated rule of reason analysis. He declined to apply the analytical framework that the Commission articulated, and which the Court of Appeals endorsed, in *Polygram Holding, Inc.*, 136 F.T.C. 310 (2003), *aff'd*, *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005). ID 89. The ALJ instead conducted what he called a "traditional rule of reason analysis" and required complaint counsel to provide proof of "actual competitive effects." ID 90. On the basis of that "expanded inquiry," ID 97, the ALJ concluded that "the challenged restraints have not substantially lessened competition by discount brokers in the relevant market or harmed consumers, by either depriving them of choice or resulting in significantly increased economic costs." ID 98.

In requiring a more elaborate rule of reason analysis, the ALJ distinguished the use of truncated analyses in prior MLS cases on the ground that they involved membership requirements or other restrictions that entirely excluded discount brokers from the MLS.

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(including that very same full service broker) testified that, in a softening housing market, the demand for limited service brokers can be expected to increase as home sellers try to save on commissions by finding a buyer themselves. IDF 97-98. If the nationwide market share of limited service brokers actually declined after 2005, it is at least as plausible that any such decline reflects the fact that, before November 2006, NAR permitted members like Realcomp to adopt policies of the type challenged in this case. IDF 418-419.

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The ALJ emphasized that Realcomp's Policies do not entirely exclude discount listings from the MLS service. ID 88-89.

The ALJ also expressed skepticism that the Commission's *Polygram* framework was generally accepted among courts outside the D.C. Circuit. ID 89. He also interpreted *Polygram* to apply only to express agreements by co-venturers to cease price competition on products outside the joint venture. The ALJ characterized the restraints imposed by Realcomp as non-price in nature and therefore not governed by the *Polygram* approach. *Id.*

Proceeding under what he described as a full rule of reason analysis, the ALJ concluded that Realcomp's Policies did not violate Section 5 of the FTC Act because complaint counsel had not proven that the challenged Policies had an actual adverse effect on competition. ID 97-119, 126-27. In particular, the ALJ concluded that, despite some competitive disadvantages, limited service brokers can and do market their listings to the public in the Realcomp service area, without having direct access to Realcomp's Approved Websites. Further, the ALJ found that sellers who could not obtain access through Realcomp to Realtor.com could dual-list their listings with other MLSs and gain access to Realtor.com with relatively nominal cost and administrative effort. ID 101-03.

The ALJ found that any reduction in discount brokers' business could be attributed to local economic conditions and national trends, and not necessarily to Realcomp's Policies. ID 103-04. He said that expert testimony demonstrated no significant anticompetitive effects resulting from Realcomp's Policies. He was not persuaded that any of the three analyses performed by Dr. Darrell Williams, complaint counsel's economic expert, supported a finding of adverse effects. ID 105-19.

The ALJ also accepted two of Realcomp's proffered justifications for its Policies.<sup>10</sup> According to Realcomp, the

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<sup>10</sup> The ALJ correctly found without merit Realcomp's claim that, aided by the two-sided nature of the MLS platform, Realcomp's Policies can be expected to result in an efficiency-enhancing increase in its MLS participation. ID 123-24. Realcomp had argued that because listing brokers will have more demand for an MLS that attracts more cooperating brokers, its Policies promote a more efficient MLS because they are expected to result in more participation

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Policies addressed a free rider problem stemming from competition between home sellers using EA listings and cooperating agents. The ALJ accepted this argument. ID 120-23. According to the ALJ, allowing EA listings to be distributed to public websites and to appear on the default MLS search results would allow home sellers who were not Realcomp members to avail themselves of Realcomp's advertising services without paying dues or other fees to Realcomp, thus "free riding" on the cooperative efforts of Realcomp's member brokers.

The ALJ also agreed that the Realcomp Policies eliminated a "bidding disadvantage" faced by home buyers represented by cooperating brokers when bidding against an unrepresented home buyer for a home sold under an EA listing. ID 124-25. Because a home seller selling a home under an EA listing must pay a commission to the represented buyer's broker but not to the unrepresented buyer, all other things being equal, the seller is more likely to sell the home to the unrepresented buyer in order to save the cost of the commission.

Finally, the ALJ concluded that the restraints were narrowly tailored to address the problems raised by EA listings. ID 125-26. According to the ALJ, the restraints did not deny membership to EA brokers or prevent EA listings on the MLS and thus did not deprive them completely of Realcomp's services. Furthermore, the ALJ found the restraints reasonably necessary to support the cooperative nature of the MLS.

**IV. Question Raised on Appeal**

Complaint counsel argues that Realcomp's Policies are by their nature anticompetitive and, in combination with Realcomp's

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by cooperating brokers. The ALJ rejected this reasoning, first because the evidence shows that most brokers compete as both listing and cooperating brokers, so that each Realcomp member is typically operating on both sides of that two-sided market. Moreover, the ALJ rejected Realcomp's assumption that EA listings will result in fewer cooperating brokers, because the evidence shows that EA brokers bring in more listings, which should be more attractive to an MLS. ID 124. Realcomp did not pursue this argument on appeal.

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market power, are likely to harm competition and are unlawful under the Rule of Reason. We address this question *de novo*.<sup>11</sup>

## V. Analysis

### A. Summary of Analysis and Conclusions

In assessing whether the challenged Realcomp Policies violate Section 5 of the FTC Act, we follow the authoritative direction of the Supreme Court under Section 1 of the Sherman Act in a long series of cases culminating in *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999).<sup>12</sup>

Although the methodological instruction of those cases is clear, lower courts, scholars, and agencies have not always been consistent in the terminology they have used to describe the methodology laid out by the Supreme Court. In Section V.B., therefore, we review the case law and methodology we rely on in this Opinion.

We then analyze the Realcomp Policies using several related, although distinct, variations of the antitrust “rule of reason.” In Section V.C., we consider whether the Realcomp Policies can be

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<sup>11</sup> The *de novo* standard of review with regard to findings of facts and inferences drawn from those facts, as well as conclusions of law, is compelled by the Administrative Procedure Act, 5 U.S.C. § 557(b), and the FTC Act, 15 U.S.C. § 45(b) & (c). Consistently, the Supreme Court has confirmed that, unlike the standard that applies to courts of appeals reviewing district courts’ factual decisions, an agency has plenary authority to reverse ALJ decisions on factual as well as legal issues, including factual findings “based on the demeanor of a witness.” *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 364 (1955). Moreover, under the Administrative Procedure Act, the “highly deferential standard of review is not altered merely because the [Agency] disagrees with the ALJ, and [the courts] defer to the inferences that the [Agency] derives from the evidence, not to those of the ALJ.” *Varnadore v. Sec’y of Labor*, 141 F.3d 625, 630 (6th Cir. 1998) (citations omitted). See also *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 494 (1951).

<sup>12</sup> The Commission’s authority under Section 5 of the FTC Act extends to conduct that violates the Sherman Act. See, e.g., *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 394-95 (1953); *Fashion Originators’ Guild of America, Inc. v. FTC*, 312 U.S. 457, 463-64 & n.4 (1941); *California Dental*, 526 U.S. at 762 n.3. In the case at hand, our analysis under Section 5 is the same as it would be under Section 1 of the Sherman Act.

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condemned under the “inherently suspect” mode of analysis. We conclude that they can be -- in part because they closely “resemble[] practices that \* \* \* [the Supreme] Court has in the past stated \* \* \* are unlawful *per se*.” *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 458 (1986). We also consider in that section the “procompetitive justifications” that Realcomp offers in support of its Policies--a critical issue that must be addressed under either the “inherently suspect” analysis or one of the forms of rule of reason that considers anticompetitive effects. We assess whether those purported justifications are legitimate (*i.e.* “cognizable” and “plausible”); whether they are supported by evidence in the record; and whether the restraints they impose are a reasonably necessary means to achieve a legitimate, procompetitive end. We conclude that Realcomp has failed to satisfy its burden and that its proffered justifications are unconvincing. Nonetheless, we do not rest our decision solely upon the “inherently suspect” methodology. In Section V.D., we consider the anticompetitive effect of the challenged Policies on the relevant markets under a more elaborate rule of reason framework. The Supreme Court has instructed that such effect can be established either by evaluating market power, the nature of the conduct, and the characteristics of the market, or through direct evidence of effect. Accordingly, in Section V.D.1. we assess the first type of evidence, and in Section V.D.2. we consider the second.

Our conclusion, based on the rule of reason analytical framework summarized in the following section, is that the Realcomp Policies constitute unreasonable restraints on competition and are not justified by countervailing procompetitive considerations. Accordingly, we conclude that the Policies violate Section 1 of the Sherman Act and therefore Section 5 of the FTC Act, and we issue an order enjoining these practices. The remedy we adopt is discussed in Section VI below.

## **B. Overview of the Rule of Reason**

The Supreme Court’s development of the rule of reason – from *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), through *Indiana Federation*, to *California Dental* – has been extensively recounted in this Commission’s and the D.C. Circuit’s decisions in the *Polygram* case. See 136 F.T.C.



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at 325-52; 416 F.3d at 33-37. We do not repeat that history in detail here. For present purposes, two major features of the Court's modern jurisprudence stand out. First, the Court has generally distinguished between practices deemed "*per se* unlawful" because of their "pernicious effect on competition and lack of any redeeming virtue," *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958), and those that require more detailed analysis.<sup>13</sup> Second, in evaluating restraints that require more detailed analysis, the rule of reason calls for "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint," with the aim of reaching "a confident conclusion about the principal tendency of a restriction." *California Dental*, 526 U.S. at 781. Thus, the Court has generally "backed away from any reliance upon fixed categories and toward a continuum." *Polygram v. FTC*, 416 F.3d at 35.

The Court's two most recent cases that explore this issue -- *Indiana Federation* and *California Dental* -- warrant further elaboration, because their teachings provide the foundation for our analysis in the present case. *Indiana Federation* concerned a group of dentists who agreed to withhold x-rays from dental insurance companies that requested their use in benefits

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<sup>13</sup> Even with respect to restraints that superficially appear to be *per se* unlawful, the Court has been open to efficiency justifications that might call for rule-of-reason treatment, observing that "there is often no bright line separating *per se* from Rule of Reason analysis." *California Dental*, 526 U.S. at 779 (citing *National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 104 n.26 (1984) ("NCAA")). For example, in *NCAA* and in *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979) ("*BMP*"), the Court considered potential economic benefits of the challenged practices and concluded that they should be evaluated using the rule of reason, despite the practices' close resemblance to established *per se* unlawful categories. By contrast, in *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982) and *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990), the Court carefully considered the defendants' proffered justifications for their practices, but ultimately rejected them and evaluated the practices using *per se* standards. The Court also has ruled that certain types of arguments are not cognizable as arguments for rule-of-reason treatment. These include the contention that the prices set by a cartel were "reasonable," *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927); or that competition itself is contrary to the public interest, *Professional Engineers*, 526 U.S. at 695-96. See generally Thomas G. Krattenmaker, *Per Se Violations in Antitrust Law: Confusing Offenses with Defenses*, 77 *Geo. L.J.* 165 (1988).

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determination. The Court applied a rule of reason analysis and concluded -- affirming our finding -- that the practice violated Section 1 of the Sherman Act. In applying the rule of reason, the Court condemned the practice on two alternative grounds, and implicitly acknowledged and endorsed the existence of a third possible route to condemnation under the rule of reason (albeit one not applicable to the facts it confronted). Thus, the Court outlined three distinguishable -- but, as we shall see, not fully distinct -- modes of analysis under the rule of reason.

First, the Court held that it was faced with a type of restraint that, by its very nature, required justification even in the absence of a showing of market power. 476 U.S. at 459-60. According to the Court, because the practice was “a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire,” then “no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.” *Id.* at 459 (quoting *Professional Engineers*, 435 U.S. at 692). Accordingly, the practice “require[d] some competitive justification even in the absence of a detailed market analysis.” *Indiana Federation*, 476 U.S. at 460 (quoting *NCAA*, 468 U.S. at 110).<sup>14</sup> It is this form of analysis – assessment of “inherently suspect” restraints without proof of market power – that we explored in depth in our decisions in *Polygram* and *North Texas Specialty Physicians*, 140 F.T.C. 715 (2005), *aff’d*, *North Texas Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 1313 (2009).<sup>15</sup> We will briefly recapitulate the steps of that analysis in Section V.C. below.

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<sup>14</sup> In *NCAA*, the Supreme Court confirmed that “[t]here was no need for [plaintiffs] to establish monopoly power in any precisely defined market \* \* \* in order to prove the restraint unreasonable. \* \* \* [N]o matter how broadly or narrowly the market is defined[,] [defendants’] restrictions have reduced output, subverted [consumer] choice, and distorted pricing. Consequently, unless the controls have countervailing procompetitive justification, they should be deemed unlawful regardless of whether petitioner has substantial market power \* \* \*.” 468 U.S. at 110 n.42.

<sup>15</sup> Antitrust tribunals have used a variety of terms to address this approach, including “abbreviated,” “truncated,” or “quick look” analysis. See *California Dental*, 526 U.S. at 770-71 (collecting cases). For simplicity, we adhere to the “inherently suspect” terminology we used in *Polygram*.

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Second, the Court held that even if the restriction in question was “not sufficiently ‘naked’ to call this principle [of a restraint being anticompetitive by its very nature] into play, the Commission’s failure to engage in detailed market analysis [was] not fatal to its finding of a violation of the Rule of Reason,” because the record contained direct evidence of anticompetitive effect. 476 U.S. at 460. The Court reasoned that “[s]ince the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, ‘proof of actual detrimental effects, such as a reduction of output,’ can obviate the need for an inquiry into market power, which is but a ‘surrogate for detrimental effects’.” *Id.* at 460-61 (quoting 7 P. Areeda, ANTITRUST LAW ¶1511, at 429 (1986)). Significantly, the evidence that the Court accepted as direct proof of adverse effect did not involve elaborate econometric “proof that it resulted in higher prices,” 476 U.S. at 462, but rather simply that in two localities, over a period of years, insurers were “actually unable to obtain compliance with their requests for submission of x rays.” *Id.* at 460.

Third, the Court’s discussion of the “proof of actual detrimental effects” prong of the analysis made clear by implication that the traditional mode of analysis – inquiring into market definition and market power to determine whether an arrangement has the potential for genuine adverse effects on competition – was still available, although not applicable to the case before it because the Commission had not attempted to prove market power. Although the Court did not explore this mode of analysis in detail, it did observe that “the purpose of the inquiries into market definition and market power is to determine whether an arrangement *has the potential* for genuine adverse effects on competition. *Id.* (emphasis added). Numerous lower courts have confirmed that the Court’s conclusion in *Indiana Federation* that market power is “a surrogate for detrimental effects” logically compels the result that, if the tribunal finds that the defendants had market power and that their conduct tended to reduce competition, it is unnecessary to demonstrate directly that their practices had adverse effects on competition. *See, e.g., United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993); *Flegel v. Christian Hospital*, 4 F.3d 682, 688 (8th Cir. 1993); *Gordon v. Lewiston Hospital*, 423 F.3d 184, 210 (3d Cir. 2005); *Law v.*

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*National Collegiate Athletic Ass'n*, 134 F.3d 1010, 1019 (10th Cir. 1998); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000).

*California Dental* dealt specifically with the abbreviated rule of reason analysis. That case concerned a professional association's ethical canon against deceptive advertising that, as interpreted and enforced by the association, effectively prohibited members from advertising price discounts in most cases, and entirely precluded advertising regarding the quality of services. The FTC and the Ninth Circuit had concluded that the restrictions resulting from this rule were tantamount to naked restrictions on price competition and output, 526 U.S. at 762-64, and therefore applied an "abbreviated, or 'quick look' rule of reason analysis," and found them unlawful without a "full-blown rule of reason inquiry" or an "elaborate industry analysis." *Id.* at 763 (citing *NCAA*, 468 U.S. at 109-10 & n.39).

The Supreme Court agreed that restrictions with obvious anticompetitive effects, such as those in *Professional Engineers*, *NCAA*, and *Indiana Federation*, do not require a "detailed market analysis" and may be held unlawful under a rule of reason framework unless the defendants proffer some acceptable "competitive justification" for the practice. Such analysis is appropriate if "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *California Dental*, 468 U.S. at 769, 770. The Court found, however, that the particular advertising rules under review in that case might plausibly "have a procompetitive effect by preventing misleading or false claims that distort the market," particularly given the "disparities between the information available to the professional and the patient" and the "inherent asymmetry of knowledge" about the service. *Id.* at 771-72, 778. Thus, while "it is also \* \* \* possible that the restrictions might in the final analysis be anticompetitive[,] \* \* \* [t]he obvious anticompetitive effect that triggers abbreviated analysis has not been shown." *Id.* at 778.

While the Court accordingly called, in that case, for a "more sedulous" market analysis, *id.* at 781, it took pains to add that its ruling did "not, of course, necessarily \* \* \* call for the fullest

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market analysis. \* \* \* [I]t does not follow that every case attacking a less obviously anticompetitive restraint (like this one) is a candidate for plenary market examination.” *Id.* at 779. Rather, the Court stated, “[w]hat is required \* \* \* is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.” *Id.* at 781. The Court further warned against undue reliance on labels and categories: “The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like ‘per se,’ ‘quick look,’ and ‘rule of reason’ tend to make them appear.” *Id.* at 779. Even a term like “spectrum” or “sliding scale,” the Court warned, deceptively “suggests greater precision than we can hope for \* \* \*.” *Id.* at 780 (quoting *Areeda, supra*, ¶1507, at 402).

The latter warning is particularly apt in this case, where the traditional mode of analysis – requiring a proof of market power (in addition to the anticompetitive nature of the restraint) in order to draw an indirect inference that the challenged practice has anticompetitive effects – is even more straightforward than the direct mode of “proof of actual detrimental effects” on competition, *Indiana Federation*, 476 U.S. at 460 (quoting *Areeda, supra*, ¶1511, at 429), because respondent has conceded that it possesses market power in the relevant market. *See* Transcript of Oral Argument (Apr. 1, 2008), at 72-73.

In this Opinion, we analyze respondent’s conduct under each of these modes of analysis, and we explore the case law in more detail in the section devoted to each. It is important to note, however, that we could reasonably select just one of these modes of analysis and, if such a methodology supported a finding that the Policies are unlawful, it would be unnecessary for us to engage in the other versions of the rule of reason analysis. For example, if we conclude that the Policies are “inherently suspect” and have not been justified, we could condemn them without proof of market power or actual effects, as we did in *Polygram*. Alternatively, where market power is conceded and the Policies are shown to have “the potential for genuine adverse effects on competition,” *Indiana Federation*, 476 U.S. at 460, we could condemn them on that ground, without any need to establish actual marketplace effects. Finally, if we conclude that actual marketplace effects have been shown, as in *Indiana Federation* itself, that would be a basis for condemnation regardless of

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whether market power is shown. Here, for completeness, we address all three of these modes of analysis. Moreover, and perhaps more significantly, although it is convenient to treat each of these modes of analysis separately, the Court's decisions, particularly *California Dental*, also make clear that all of these forms of analysis are simply different means to pursue the same "essential inquiry \* \* \* – whether or not the challenged restraint enhances competition." 526 U.S. at 780 (quoting *NCAA*, 468 U.S. at 104). Further, the fact that the inherently suspect nature of the restraint, the indirect evidence, and the direct evidence all lead to the same result reinforces our conclusion that the restraints at issue are anticompetitive.

**C. Analysis of the Realcomp Policies Under *Polygram*'s  
"Inherently Suspect" Framework**

As we discussed above, "not all trade restraints require the same degree of fact-gathering and analysis." *Polygram*, 136 F.T.C. at 327 (citing *Standard Oil Co.*, 221 U.S. 1, 65 (1911)). Indeed, "*BMI*, *NCAA*, and [*Indiana Federation*] indicated that the evaluation of horizontal restraints takes place along an analytical continuum in which a challenged practice is examined in the detail necessary to understand its competitive effect." *Polygram*, 136 F.T.C. at 336; *see also California Dental*, 526 U.S. at 781 ("What is required \* \* \* is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint"). Thus, in *Polygram*, we held that in a limited but significant category of cases – when "the conduct at issue is inherently suspect owing to its likely tendency to suppress competition" – our "scrutiny of the restraint itself \* \* \* without consideration of market power" is sufficient to condemn the restraint, unless the defendant can articulate a legitimate justification (*i.e.* a "cognizable" and "plausible" procompetitive benefit) for that restraint. 136 F.T.C. at 344-45. *See also North Texas Specialty Physicians v. FTC*, 528 F.3d at 362 (physicians group's collective negotiations of fee-for-service contracts "bear a very close resemblance to horizontal price fixing" such that inherently suspect analysis was appropriate).

We also noted in *Polygram* that "inherently suspect" conduct "ordinarily encompasses behavior that past judicial experience and current economic learning have shown to warrant summary

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condemnation.” 136 F.T.C. at 344-45. Apparently misconstruing this language -- and, perhaps more importantly, judging a lack of urgency for application of the *Polygram* framework in light of the ALJ’s uncontested finding that Realcomp possessed substantial market power (*see* Oral Argument Tr., at 9) -- complaint counsel in this case disclaimed reliance on this mode of analysis, on the basis that courts have not had much experience with the particular restraint at issue here, albeit acknowledging that they have had a great deal of experience with closely analogous restraints. Complaint counsel is mistaken in this regard. First, our *Polygram* language was not intended to set up a threshold bar on this mode of analysis in cases where the exact challenged restraint had not been previously analyzed and adjudged to be anticompetitive. Such a bar would in fact run counter to the teachings of the Supreme Court, in cases such as *Indiana Federation* and *California Dental*, regarding the flexibility of the rule of reason analysis. Indeed, the Supreme Court in *Indiana Federation* applied the “quick look” analysis to a restraint that courts had not precisely seen before. Furthermore, as complaint counsel acknowledged, when Realcomp’s challenged policies are viewed, as they should be, as restraints on discounters’ advertising and on the dissemination of information to consumers regarding discounted services, there is ample judicial (and Commission, *see supra*, note 1) experience as to their competitive impact. We discuss such experience in more detail below.

At any rate, we are not bound by complaint counsel’s apparent concession, both because deciding the proper legal framework in any case is the province of the Commission, and because respondent has had a full opportunity to litigate over whether the challenged restraint was “inherently suspect,” and in fact did so before the ALJ and the Commission (*see, e.g.*, Complaint ¶¶25-26; RPF 280, 287-288; Respondent’s Post-Hearing Reply Brief (Aug. 17, 2007), at 10-34; Answering Brief of Respondent (Feb. 29, 2008), at 44-45).

### **1. Realcomp’s Policies are Inherently Suspect**

Accordingly, applying *Polygram*’s “inherently suspect” framework, we conclude that Realcomp’s Policies and related requirements can reasonably be characterized as “giv[ing] rise to an intuitively obvious inference of anticompetitive effect.”

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*California Dental*, 526 U.S. at 781.<sup>16</sup> As we detail below, both accepted economic theory and past judicial experience with

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<sup>16</sup> The ALJ appeared to question whether the *Polygram* framework had gained enough acceptance among the federal courts to supply a suitable basis for application in the case before us. ID 89. We do not understand either his doubts or his apparent belief that those doubts were permissible considerations for his decision. To begin, none of the cases the ALJ relied on to question *Polygram* is contrary to that decision.

In *Worldwide Basketball and Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 961 (6th Cir. 2004), the Sixth Circuit confirmed that – as the Supreme Court made clear in *California Dental* and consistent with our analysis in *Polygram* – an “extensive market and cross-elasticity analysis is not necessarily required” in order to use an “abbreviated or ‘quick-look’ analysis.” *Id.*, 388 F.3d at 961; accord, *California Dental*, 526 U.S. at 769-71; *Polygram*, 136 F.T.C. at 344-45. The court declined to rely on an abbreviated or “quick look” analysis in the *Worldwide Basketball* case because it found that the contours of the product market at issue in that case were not “sufficiently well-known or defined to permit the court to ascertain \* \* \* whether the challenged practice impairs competition.” 388 F.3d at 961. This is not inconsistent with *Polygram*, in which the Commission and the D.C. Circuit recognized that judicial experience and familiarity with a class of restraints may be important factors in deciding whether to utilize an “inherently suspect” analysis. See, e.g., *Polygram v. FTC*, 416 F.3d at 36-37.

Similarly, in *Continental Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 512 (4th Cir. 2002), the Court of Appeals declined to use an abbreviated rule of reason analysis because of the plausibility of defendants’ proffered justifications. Again, this is not inconsistent with the *Polygram* framework, in which, if and when the defendant “advances \* \* \* cognizable and plausible justifications” for the challenged conduct, the plaintiff must “make a more detailed showing that the restraints at issue are indeed likely, in the particular context, to harm competition.” 136 F.T.C. at 345, 348. And likewise, in *Brookins v. Int’l Motor Contest Ass’n*, the Court of Appeals held that an auto racing governing body’s rule modification, which resulted in the exclusion of a particular supplier’s product, could not be condemned summarily because, in the absence of evidence of the body’s collusion with rival suppliers, the plaintiff’s exclusion was merely “the incidental result of defining the rules of a particular game.” 219 F.3d 849, 854 (8th Cir. 2000). Accord, *Polygram*, 136 F.T.C. at 328, 347-48 n.42 (recognizing that restraints that are “ancillary” to legitimate collective conduct may constitute, or be linked to, cognizable procompetitive justifications for challenged restraints).

*Polygram* reflects a careful interpretation of decisions by the Supreme Court and the Courts of Appeals since the mid-1970s. The D.C. Circuit in *Polygram* and the Fifth Circuit in *North Texas Specialty Physicians* emphasized the soundness of the FTC’s interpretation in upholding the Commission’s decision. See also *Major League Baseball Properties, Inc. v.*



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analogous restrictions support our finding that “the experience of the market has been so clear about the principal tendency” of these restrictions so as to enable us to draw “a confident conclusion” that -- absent any legitimate justification advanced by Realcomp -- competition and consumers are harmed by Realcomp’s challenged Policies. *Id.* We need not rest our decision solely on such analysis, however, for, as we discuss in the next section, the application of a rule of reason analysis encompassing consideration of market power and competitive effects yields the same judgment as to Realcomp’s Policies.

**a. The Nature of Realcomp’s Policies**

Realcomp is an entity composed of horizontal competitors. IDF 285-286. The formation and existence of this collaboration among rivals are not at issue in this case. Antitrust doctrine recognizes that multiple listing services produce genuine efficiencies and improve economic performance in the sale and purchase of homes. *See, e.g., Realty Multi-List*, 629 F.2d at 1356. As a centralized information sharing service, an MLS provides benefits to consumers by facilitating the matching of home buyers and home sellers. Without the Realcomp MLS, home buyers and cooperating brokers in Southeastern Michigan, and home sellers and their agents, would have to rely on a variety of less comprehensive sources of information, including newspaper ads, television advertising, sales flyers, and word-of-mouth advertising.

The existence of a legitimate joint venture does not preclude antitrust scrutiny of all measures the venture undertakes. An association composed of horizontal rivals may adopt reasonable rules to control its membership and to determine the services it

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*Salvino, Inc.*, 542 F.3d 290, 338 (2d Cir. 2008) (Sotomayor, J., concurring) (citing *Polygram* favorably). These appellate decisions provide reliable indications that the federal courts regard the analytical approach of *Polygram* as sound. And of course, as a matter of administrative law, “once the agency has ruled on a given matter, \* \* \* it is not open to reargument by the administrative law judge[.]” *Iran Air v. Kugelman*, 996 F.2d 1253, 1260 (D.C. Cir. 1993) (Ruth Bader Ginsburg, J.) (citation omitted). ALJs thus are “entirely subject to the agency on matters of law.” Antonin Scalia, *The ALJ Fiasco – A Reprise*, 47 U. Chi. L. Rev. 57, 62 (1979).

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will provide its members. Yet it may not use the collaboration as a means to impose inappropriate limits on individual competitive initiative. *See, e.g., NCAA*, 468 U.S. at 99; *Professional Engineers*, 435 U.S. at 692-93, 696; *Major League Baseball*, 542 F.3d at 338-40 (Sotomayor, J., concurring). The issue in this case is whether Realcomp has adopted policies that unreasonably hinder the ability of some competitors to advertise, and disseminate information about, their service offerings.

The ALJ's Findings of Fact establish that Realcomp sent full-service listings, but not exclusive agency listings, to MLS-approved websites. IDF 349-360, 380-387. Realcomp also excluded EA listings from the default results of its internal search function. IDF 361-371. Realcomp's rules and policies, thus, discriminated against members who offer a product that creates "price pressure" against the offerings of other members. IDF 99. In our view, as discussed below, these policies improperly constrain competition and impede the emergence of a new business model that has considerable benefits for consumers.

**b. The Market Context: Threats to the Traditional Full-Service Brokerage Business Model Posed By Emerging Lower-Priced Brokerage Models and By Consumers' Use of the Internet**

Realcomp's adoption of the challenged practices took place amid market changes that threatened to upset, and perhaps, topple, the traditional, commission-based system for compensating real estate service providers. The rigidities of the traditional fee structure -- an unchanging six percent commission that was split evenly between the listing and cooperating brokers -- and consumer demand for a more flexible and less costly one, had induced some brokers to offer alternative fee structures. IDF 69, 73, 100. The EA listing, with its fixed fee and its relinquishment of the cooperating broker's portion if the seller procured a buyer independently, was the most dramatic experiment of this kind. Equally important was the development of the Internet as a conduit of information about listings. IDF 92. The posting of real estate offerings on the web greatly increased the ability of sellers and buyers to collect information without the assistance of a broker.

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Real estate brokers understood that these developments had the capacity to upset the traditional business model. In a paper issued in 2003, the National Association of Realtors said that limited service brokerages have “the potential to change the competitive landscape of residential real estate brokerage.” CX 533-040; IDF 88. NAR went on to observe that, even though some limited service brokers “may not currently command significant market share \* \* \* their significance goes beyond size. They may be serving a customer need that is not currently being served by the dominant players. In addition, they may play a larger role in selected markets or may serve a particular consumer segment better than the dominant models.” CX 533-038; IDF 88.

The ALJ found that brokers offering limited services, such as brokers with EA listings, compete for new listings with brokers offering traditional full services. IDF 81. He also found that limited service brokerages “put price pressure on full service brokerage commissions,” which typically are fixed at six percent. IDF 99-101, 53-55. The “price pressure” to which the ALJ referred -- which limited service brokers would normally exert absent Realcomp’s restraints -- promised to be a significant force in the future development of the real estate services sector in Southeastern Michigan. This price pressure is especially significant given the lack of price competition that currently exists among traditional full service brokers. There is little economic evidence that competition among traditional service brokers has led to significant reductions in the amount of brokerage commissions paid; most studies of full service brokerage show substantial rigidity in percentage brokerage rates. CX 498-A-11.<sup>17</sup>

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<sup>17</sup> The actual amount of brokerage commission paid in dollar terms also has closely tracked changes in housing prices. For example, it is reported that between 1991 and 2004, commission rates declined from 6.1 percent to 5.1 percent of the sale price, an apparent decrease of 16 percent. However, during this same period, the average brokerage commissions paid in dollar terms actually increased by 30 percent in response to housing price increases of 55 percent. CX 498-A-11; *see also* U.S. Department of Justice & Federal Trade Commission, COMPETITION IN THE REAL ESTATE BROKERAGE INDUSTRY, at 38-42 (Apr. 2007) (available at <http://www.ftc.gov/reports/realestate/V050015.pdf>).

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The pricing pressure imposed by the newly emerging business model intensified with the expanded use of the Internet as a means for sellers and buyers to directly perform research and acquire knowledge that previously had been the province of real estate professionals. Realcomp understood that the Internet could play a major role in accelerating the development of the limited service brokerage business model. As the ALJ found, the Internet is increasingly important to competition in the marketing and sale of homes. IDF 218-223, 428. Full-service brokers could no longer rely on being the sole conduit of information regarding the availability of homes for sale. The ALJ found that Realcomp disseminated certain information on its MLS by feeding it directly or indirectly to “Approved Websites,” including NAR’s Realtor.com and MoveInMichigan.com, and the Realcomp IDX participant websites. IDF 210, 224. He found that as of January 2007, 82 percent of agents were licensed to brokers who said they would participate in Realcomp’s IDX, and that for the 91 percent of firm websites that contain searchable property listings, the IDX feed is how these firms obtain listings other than their own. IDF 121, 249. Additionally, he found that Realcomp’s promotional activities have emphasized the competitive benefits of these Approved Websites. IDF 222-23, 234-35, 247.

**c. The Anticompetitive Tendency of Realcomp’s Policies: Penalizing Lower-Priced Competitors By Restricting the Availability of Competitively Significant Information to Consumers**

In sum (and as documented by the sources cited in the preceding paragraphs), the full-service real estate brokers who constituted a majority of Realcomp’s members perceived the possible expansion of limited service brokerage, in combination with consumers’ direct access to MLS listings via Internet websites, to pose extremely serious threats to their traditional business model. In this setting, Realcomp adopted the policies at issue in this case, which singled out the new limited-service brokerage business model and put it at a considerable competitive disadvantage, particularly in the context of the increasing competitive importance of certain key Internet websites to disseminate listing information to consumers. Through the Realcomp Policies, rival real estate firms agreed to limit the advertising of exclusive agency listings and to deny consumers

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information and service options that such consumers desire. The circumstances surrounding the establishment of the policies, and Realcomp's evident aim of retarding the emergence of a new business model, underscore the exclusionary impact of those policies. The policies would have their effect by limiting access to an input -- i.e. full exposure on the approved websites -- necessary for limited service brokers to compete effectively.

Seen in the context in which they arose, the restraints in question raise serious competitive concerns. In restricting the ability of the limited-service, lower-cost brokers to have the same level of exposure on the increasingly popular Internet websites as the full-service brokers, it is easy to see how "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *California Dental*, 526 U.S. at 770. Although not exactly the same conduct, the Realcomp Policies do bear a "close family resemblance," *Polygram v. FTC*, 416 F.3d at 37, to conduct that courts previously have treated with acute suspicion and, at times, have condemned without an assessment of the defendant's market power, or indeed without an opportunity for the defendant to offer any mitigating justifications. As we noted in *Polygram*, "[r]estrictions on truthful and nondeceptive advertising harm competition, because they make it more difficult for consumers to discover information about the price and quality of goods or services, thereby reducing competitors' incentives to compete with each other with respect to such features." 136 F.T.C. at 354-55.

In *Indiana Federation*, the Supreme Court condemned an agreement to deny insurers information about patient x-rays, even absent proof of market power, when there was no evidence of a procompetitive justification. 476 U.S. at 459-64. The Court also did not require proof of actual anticompetitive effects, such as higher prices, because the agreement was "likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices or, as here, the purchase of higher priced services, than would occur in its absence." *Id.* at 461-62. In the Court's view, "even if the desired information were in fact completely useless," competitors were "not entitled to pre-empt the working of the market by deciding for [themselves] that [their]

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customers do not need that which they demand.” *Id.* at 462. *See also Professional Engineers*, 435 U.S. at 692-93 (condemning “[o]n its face” restriction on the availability of information regarding costs of engineering services as “imped[ing] the ordinary give and take of the market place”).

When restrictions on advertising are aimed exclusively at rival discounters, with the effect of punishing their discounting behavior, some courts accordingly have treated them as if they were direct and naked restrictions on price or output. In *Denny’s Marina, Inc. v. Renfro Productions, Inc.*, 8 F.3d 1217, 1219-20 (7th Cir. 1993), the plaintiff alleged that the defendants, rival “marine dealers in the same market who compete with Denny’s to sell boats to Indiana consumers,” had excluded plaintiff from two annual trade shows “because its policy was to ‘meet or beat’ its competitors’ prices at the shows.” The district court granted defendants’ summary judgment because plaintiff failed to “make a sufficient showing of a potential market-wide impact resulting from defendants’ actions.” *Id.* at 1219 (internal quotation marks omitted). The Court of Appeals reversed. It held that, should it be proven at trial on remand, a “[c]oordinated action by dealers to protect themselves from price competition by discounters constitutes horizontal price fixing,” which can then be condemned without any further market inquiry as “*per se* an unreasonable restraint of trade.” *Id.* at 1221, 1220.

Restrictions on rivals’ modes of operations also have been found anticompetitive without extensive market analysis. In *Detroit Auto Dealers Ass’n v. FTC*, 955 F.2d 457 (6th Cir.1992), the Sixth Circuit upheld the FTC’s ruling that the restraint at issue – an agreement among competitors to restrict their showrooms’ hours of operation – was anticompetitive. *Id.* at 469-72.<sup>18</sup> The

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<sup>18</sup> The *Detroit Auto Dealers* panel majority, while affirming the Commission’s conclusion that the auto dealers’ limitation on showroom hours was an unlawful restraint of trade, expressed reservations about the Commission’s “inherently suspect” mode of analysis because it perceived that analysis to “arise[] from a *per se* approach” and believed that a rule of reason analysis should have been used instead. 955 F.2d at 470-71. Judge Ryan, in a separate opinion concurring in part and dissenting in part, agreed with the panel majority’s affirmance of the FTC’s bottom-line conclusion, but disagreed with the majority’s characterization of the FTC’s analytical framework. Judge Ryan stated that, in his view, the Commission “did not use a *per se* analysis” and that

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court found “legal basis and support for \* \* \* the Commission’s conclusion that hours of operation in this business is a means of competition [among dealers], and that such limitation [on hours of operation] may be an unreasonable restraint of trade.” *Id.*, 955 F.2d at 472. Significantly, the Sixth Circuit affirmed “the Commission’s conclusion on restraint of trade despite lack of [direct] evidence of increased prices” (*id.* at 472 n.15; *see also id.* at 471 n.13) or reductions in output (*see id.* at 470) -- without requiring proof of a relevant market or market power.<sup>19</sup> Like the restraint at issue in the present case -- and like the x-ray restriction in *Indiana Federation* -- the auto dealers’ concerted agreement to restrict showroom hours had the effect of limiting the availability of competitively relevant information to consumers or raising the cost of obtaining such information.<sup>20</sup>

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there was no need for it to have “conducted a full rule of reason analysis in this case.” 955 F.2d at 474 (Ryan, J., concurring in part and dissenting in part); *see also id.* at 475 (“Under a *per se* analysis, the agreement would have been invalid without any consideration of its procompetitive effects. The FTC, however, did consider the efficiency justifications offered by the respondents before concluding that the agreement had an anticompetitive effect.”). It is also significant that *Detroit Auto Dealers* was decided prior to the Supreme Court’s 1999 *California Dental* decision, and prior to the D.C. and Fifth Circuit decisions holding that the FTC’s “inherently suspect” analytical framework was fully consistent with *California Dental* and other recent Supreme Court decisions. *Polygram v. FTC*, 416 F.3d at 373-75; *North Texas Specialty Physicians v. FTC*, 528 F.3d 346, 359-363 (5th Cir. 2008). *See also Mass. Board of Registration in Optometry*, 110 F.T.C. 549, 602-04 (1988) (followed in *Detroit Auto Dealers Ass’n*, 111 F.T.C. 417, 493-94 (1989), as well as in *Polygram* and *North Texas Specialty Physicians*).

<sup>19</sup> By contrast, in the present case, it is undisputed that Realcomp has market power, ID 84-85; *see infra* Section V.D.1; and there is substantial evidence that Realcomp’s restrictive policies have had anticompetitive effects such as price increases and reductions in output. *See infra* Section V.D.2.

<sup>20</sup> The Commission had found that the auto dealers’ agreement “raises the opportunity cost to consumers of car shopping. This increase in costs encourages consumers to spend less time comparing prices, features, and service, and thereby reduces pressure on dealers to provide the prices, features and services consumers desire.” 111 F.T.C. at 495; *see also Indiana Federation*, 476 U.S. at 457, 461-62 (“The Federation’s collective activities resulted in the denial of the information the customers requested in the form that they requested it, and forced them to choose between acquiring that information in a more costly manner or forgoing it altogether. \* \* \* A concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular

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Further, Realcomp's policies directly limited the publication and distribution of EA listings and, in effect, operated as a restraint on advertising. Courts have long treated agreements among competitors to restrict advertising as posing serious dangers to competition and as having a great capacity to affect prices. *See, e.g., California Dental*, 526 U.S. at 773 (in ordinary markets, such as the one here, "[r]estrictions on the ability to advertise prices normally make it more difficult for consumers to find a lower price and for [rivals] to compete on the basis of price") (citations omitted) (first alteration original); *Morales v. Trans World Airlines*, 504 U.S. 374, 388 (1992) ("it is clear as an economic matter that \* \* \* restrictions on fare advertising have the forbidden significant effect upon fares"); *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977) ("Advertising \* \* \* serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system"); *Polygram v. FTC*, 416 F.3d at 37 ("agreements restraining autonomy in pricing and advertising 'impede the ordinary give and take of the market place'") (quoting *Indiana Federation*, 476 U.S. at 459); *Denny's Marina*, 8 F.3d at 1221 (exclusion of discounting rival from popular trade shows constitutes horizontal price-fixing).

Our examination of the nature of the restriction leads us to find that the Realcomp Policies create significant competitive hazards. By their nature, the Realcomp Policies tend to impose a significant impediment to access to limited service listings by contributing brokers seeking homes on behalf of buyers on the MLS, and by buyers directly seeking homes through public websites. Realcomp's Website Policy and related requirements prevented the dissemination of limited service listings by Realcomp on its Approved Websites, whose benefits Realcomp regularly emphasized. These measures have the further inherent

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purchase is cost justified is likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices or, as here, the purchase of higher priced services, than would occur in its absence." *Compare* IDF 220, 349, 447 ("The majority of home buyers and sellers want to be able to search for homes on the Internet before they buy or sell." But Realcomp's "Website Policy \* \* \* prevent[s] Exclusive Agency, Limited Service and MLS Entry Only listings from being sent" to the "four categories of websites [that home buyers visited] much more than any others[.]").



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tendency to reduce the “price pressure” that limited service brokerage has exerted on the full-service brokerage commission structure. By favoring ERTS listings, the Realcomp Policies bolster those contracts’ imposition of a requirement that sellers must pay for a cooperating broker whether one is used or not. D. Williams Tr. 1189-90. Realcomp’s minimum service requirements then add to and increase the price floor of ERTS listings by setting a minimum level of brokerage services that the listing broker must offer under ERTS listings. CX 498-A-044-45. Realcomp’s Search Function Policy and related requirements prevented default access to limited service listings on its MLS.

The Realcomp Policies are, in essence, an agreement among horizontal competitors to restrict the availability of information that consumers can use to evaluate the prices and other features of competing providers’ offerings, the effect of which is to make such information more difficult and costly to obtain. Such practices have been found to be particularly problematic where, as here, the incumbent providers are restricting such dissemination of information so as to impede the marketplace participation by relatively new entrants offering low-cost or discounted products or services. *See, e.g., Realty Multi-List, supra* (preventing MLS participation by real estate brokers who did not maintain full-service office open during customary business hours);<sup>21</sup> *Denny’s Marina, supra* (excluding discounter from popular trade shows). Realcomp’s Policies restrict (albeit not destroying entirely) the ability of low-cost, limited service brokerages to get their listings included on heavily used public websites, thereby making it more difficult and costly for them to participate fully in the marketplace. As a result, these policies tend to alleviate downward pricing pressure on traditional brokers’ commission-based pricing model. We accordingly conclude, under the first step of our *Polygram* analytical framework, that the Realcomp

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<sup>21</sup> As we discuss in Section V.D.1., below, *Realty Multi-List* relied on both the nature of the restraints at issue and the market power of the MLS, under what the Court of Appeals termed a “facial reasonableness” standard. As the *Polygram* “inherently suspect” framework we apply here eschews the requirement of market power, we cite that decision here only inasmuch as it discusses the nature of restraints that aim at punishing the discounting behavior of rivals in the real estate brokerage services market.

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Policies are inherently suspect and, thus, presumptively unreasonable.

## 2. Realcomp's Proffered Justifications

Next, the *Polygram* framework requires our consideration of whether Realcomp can overcome this presumption of unreasonableness by showing that the practice has “some countervailing procompetitive virtue -- such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services.” *Indiana Federation*, 476 U.S. at 459; *see also Chicago Professional Sports, L.P.*, 961 F.2d 667, 674 (7th Cir. 1992) (justification must provide “some explanation connecting the practice to consumers’ benefits”). If such justifications are both “cognizable” and “plausible,” then Respondents may be able to justify their practice and further examination would be warranted.<sup>22</sup> Otherwise, “the case is at an end and the practices are condemned.” *Polygram*, 136 F.T.C. at 345.

Realcomp argues that the Policies are justified because they eliminate two inefficiencies that arise from EA listings: (1) “free-riding” from home owners who opt to list their homes using EA listings and who then compete with cooperating brokers to find buyers for their home; and (2) a “bidding disadvantage” faced by buyers who use cooperating brokers when bidding against an unrepresented buyer for a home listed under an EA agreement. We reject both of those arguments.

As an initial matter, we note that both the “free riding” and “bidding disadvantage” arguments appear to be post-hoc

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<sup>22</sup> We also acknowledged in *Polygram* that a defendant can avoid liability by showing “why practices that are competitively suspect as a general matter may not be expected to have adverse consequences in the context of the particular market in question.” 136 F.T.C. at 345; *cf. California Dental*, 526 U.S. at 773 (noting that the professional context of the advertising restrictions there may ameliorate their presumptively anticompetitive nature, “‘normally’ found in the commercial world”). There is no record evidence here, however, that the market for real estate brokerage services in Southeast Michigan exhibited any such ameliorative characteristics, and Realcomp has not made any arguments to us along those lines.

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rationalizations rather than actual reasons for the policies' adoption.<sup>23</sup> Even apart from this consideration, we find both proffered defenses without merit.

**a. Free Riding**

For free riding to occur, there must be a product or service that is consumed by an individual or entity who does not pay for that product or service. For example, if certain retailers invest in showrooms staffed with knowledgeable personnel to provide information to consumers and thus promote the sale of a brand of merchandise, other retailers who sell the same brand but refrain from such investments may get a "free ride" on those investments if consumers can get the information from the retailers that make the investment and then buy the product at a lower price from the retailers who do not. The policy concern is that free-riding can diminish the incentives to make such investments at all. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 222-23 (D.C. Cir. 1986) (Bork, J.). In principle, measures to control free-riding are widely recognized as cognizable justifications under the antitrust laws. See, e.g., *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 55 (1977); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 762-63 (1984); *Business Electronics, Inc. v. Sharp Electronics, Inc.*, 485 U.S. 717, 731 (1988).

In this case, Realcomp argued (and the ALJ agreed) that the Website Policy is designed to prevent EA home sellers from free-riding by advertising their MLS listing on Realcomp's Approved Websites, but then selling their homes without the assistance of a cooperating broker who is a member of Realcomp, thus avoiding payment of a commission to the Realcomp member. The ALJ concluded that, without the website restrictions, home sellers with EA agreements "would free ride on the Realcomp members who invest and participate in the MLS through the payment of dues

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<sup>23</sup> The Board Resolutions adopting the Policies did not mention such "free-riding" or "bidding disadvantage" problems. CX 100, CX 32-005-06, CX 8-007. Realcomp offered those justifications long after the Board approved the Policies and after the FTC issued the Complaint in this matter. IDF 618-619. None of the Realcomp Governors knows why the Board adopted the Website Policy and Search Function Policy. CX 37 (Bowers Dep.), at 26, 28, 32; CX 43 (Hardy Dep.), at 100, 102-03, 117-118, 122; CX 40 (Elya Dep.), at 64-65, 70, 83; CX 38 (Gleason Dep.), at 20-25, 58.

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and who otherwise undertake to support the cooperative endeavor of the MLS.” ID 121.

This conclusion is erroneous, for the simple reason that there was no “free ride” at all here.<sup>24</sup> A simple way to see this is to ask what investments, and by whom, were being free-ridden upon. Was Realcomp, the provider of the MLS service, being free-ridden upon? Clearly not, because Realcomp charges membership fees for its services. The EA home seller makes use of the MLS only by virtue of retaining the services of a listing broker who is a Realcomp member. JX 1-04, 07 (Joint Stipulations of Fact Nos. 19, 55). Sellers who use EA listings pay fees to their listing brokers, and their listing brokers (like any other listing broker in the Realcomp MLS) pay dues and fees to Realcomp. Realcomp charges identical dues and fees to all of its members, regardless whether they offer their clients EA or ERTS listings. JX 1-05 (Joint Stipulations of Fact No. 36). Thus, the seller of an EA listed property does not have “free” access to Realcomp’s services. Rather, both EA sellers and ERTS sellers must make payments to listing brokers who, in turn, pay Realcomp for participation in the association.<sup>25</sup> Accordingly, the contention that EA sellers are “free riders” is erroneous. *Cf. Chicago Professional Sports L.P. v. Nat’l Basketball Ass’n*, 961 F.2d 667, 675 (7th Cir. 1992) (“What gives this the name *free-riding* is the lack of charge. \* \* \* When payment is possible, free-riding is not a problem because the ‘ride’ is not free. Here lies the flaw in the [defendant’s] story. It may (and does) charge members for value delivered”); *Toys “R” Us v. FTC*, 221 F.3d 928, 938 (7th Cir. 2000) (“the manufacturers were paying for the services TRU furnished, \* \* \* and thus these services were not susceptible to free riding”).

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<sup>24</sup> “A free ride occurs when one party to an arrangement reaps benefits for which another party pays, \* \* \* [and] the party that provides capital and services [does so] without receiving compensation.” *Rothery*, 792 F.2d at 212-13.

<sup>25</sup> Indeed, EA brokers pay the same amount of Realcomp dues as full-service brokers, but they do not receive the same level of services as Realcomp offers its other members. CX 415 (Nowak Dep.), at 43. For example, EA broker member dues help pay for Realcomp’s MoveInMichigan.com website, though EA broker Realcomp members do not get to have their listings included on it. *Id.* at 55. It could be said that full-service Realcomp members “free ride” on the dues paid by limited service Realcomp members.

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The lack of free-riding on Realcomp's services is and should be the end of the matter, because the only efficiency-enhancing joint activity advanced here was the creation and operation of the MLS, and the justifiability of any restriction must be tested by whether the restriction was reasonably necessary to achieve that end. See Federal Trade Commission and U.S. Dep't of Justice, *Antitrust Guidelines for Collaborations Among Competitors*, § 3.36(b) (April 2000). The ALJ, however, seemed to think that cooperating brokers were somehow being free-ridden upon, suggesting that Realcomp's restrictive policies are necessary to ensure "the incentives of [cooperating] brokers to show and promote EA properties to their buyer-clients." ID 121. Realcomp made no attempt to meet its burden of showing that such a reduction of incentives took place, and indeed the theory is implausible on its face. Under both ERTS and EA listings, when a cooperating broker brings in the buyer, that cooperating broker is entitled to the same level of compensation, IDF 200, 201, 204, creating ample incentive to show and promote EA properties. Moreover, Realcomp's Policies tolerate the practice of allowing an ERTS seller to retain the entire six-percent commission when the buyer is obtained without the services of a cooperating broker.<sup>26</sup> Because the ERTS listing broker presumably would prefer to have the full six-percent commission rather than split the six percent half and half with a cooperating broker, the listing broker has an incentive to complete the transaction without a cooperating broker if possible. For the ALJ's theory to work, therefore, a cooperating broker would have to have more to fear from an EA seller -- an amateur -- seeking to find a buyer without a cooperating broker than from a listing broker -- a seasoned professional -- given exactly the same three-percent incentive to do so. The record contains no such evidence.

If Realcomp gets the same fees from EA listings and ERTS listings, and cooperating brokers get the same three-percent commission from EA listings and ERTS listings, who actually loses from EA listings? Two categories of people come to mind: the listing broker who signs an EA contract for less compensation

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<sup>26</sup> Realcomp's rules do not require that a Realcomp cooperating broker be involved in any transaction facilitated through the Realcomp MLS or through Realcomp's feed of listings to the public websites. D. Williams Tr. 1224-25; JX 1-05 (Stipulations of Fact Nos. 29-32).

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than an ERTS contract would have provided, and the listing broker who insists upon an ERTS contract and loses a listing as a result. But neither broker is providing a service that is being free-ridden upon. The listing broker who signs an EA contract is providing brokerage services for which he is being compensated in exactly the manner for which he bargained. And he bargained for it because he knows that improved technology -- the Internet -- causes many buyers to come forward on their own, obviating the need for some of the services for which either he or a cooperating broker used to get paid three percent. And the listing broker who insists upon an ERTS contract and loses a listing as a result provides no services at all, and by definition cannot be free-ridden upon. In other words, these two categories of listing brokers are not losing money through free-riding; they are losing money through competition.

The courts are quite familiar with -- and have consistently rejected -- efforts to dress up as a “free-riding justification” what is in fact an effort to protect a less-demanded, higher-priced product from competition by a lower-priced product that consumers may prefer more strongly. *See NCAA*, 468 U.S. at 116-17; *see also Premier Elec. Construction Co. v. Nat’l Elec. Contractors Ass’n, Inc.*, 814 F.2d 358, 370 (7th Cir. 1987) (“A group of firms trying to extract a supra-competitive price therefore hardly can turn around and try to squelch lower prices -- as the [defendants] may have done -- by branding the lower prices ‘free riding’!”).<sup>27</sup> Realcomp’s purported “free-riding” justification is no more complicated than that.

We find that the underlying rationale for the Website Policy is to not to ensure the continued efforts of cooperating brokers, but

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<sup>27</sup> When a powerful group of competitors imposes restrictions that “increase its rivals’ costs of doing business, the better to eliminate a source of competition,” the members of the group may benefit both by “enabl[ing] the members to capture more of the market” and by “rais[ing] the market price to its own advantage” and to the disadvantage of consumers. *Premier Elec. Construction*, 814 F.2d at 368 (citing T. Krattenmaker & S. Salop, *Anticompetitive Exclusion: Raising Rivals’ Costs to Achieve Power Over Price*, 96 Yale L.J. 209 (1986)).

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to reduce “price pressure” on commissions.<sup>28</sup> Accordingly, Realcomp’s purported “free-riding” justification is entirely without merit.<sup>29</sup>

**b. The Bidding Disadvantage**

Realcomp also claims that its Policies are justified because they eliminate a “bidding disadvantage” faced by a buyer represented by a cooperating broker when bidding against an unrepresented buyer for a home sold under an EA listing. This argument is not a cognizable justification under the antitrust laws, and we accordingly reject it.

Insofar as buyers bid against each other for a home, they compete with each other. The antitrust laws protect that competition, and the fact that one competitor (*i.e.* one with no cooperating broker) may have a cost advantage over another does not make the competition unfair. To the contrary, it is regarded as an efficiency to which the low cost competitor is entitled. *C.B. Trucking, Inc. v. Waste Mgmt., Inc.*, 137 F.3d 41, 45 (1st Cir. 1998); *Tri-State Rubbish, Inc. v. Waste Mgmt., Inc.*, 998 F.2d 1073, 1080 (1st Cir. 1993). An EA seller has a preference for a buyer not bound to a cooperating broker, because the same nominal sale price will yield a higher net price. An ERTS seller does not share that preference, because he must pay the full six-percent commission, whether or not there is a cooperating broker. Thus, by eliminating the bidding disadvantage for a buyer represented by a cooperating broker, Realcomp’s Policies serve to prop up a commission structure that raises the cost of selling a home. The net effect of the Policies is to diminish the possibility of brokerage commissions falling substantially below the *de facto*

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<sup>28</sup> The fact that Realcomp established the challenged Policies between 2002 and 2006, when the market share for limited service brokerages was increasing more than fivefold, also supports an inference that the Policies were anticompetitive, not procompetitive, in purpose. IDF 90-91. The inference we draw is reinforced by Realcomp’s continued enforcement of its Website Policy, even though that Policy conflicts with NAR’s by-laws and thereby violates Realcomp’s own by-laws. IDF 418-423.

<sup>29</sup> We thus reject the ALJ’s purported “findings of fact” – more accurately characterized as inferences drawn from the evidence – regarding Realcomp’s free-riding argument. IDF 601-619.

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price floor created by the structure of the cooperative payment system that governs ERTS brokerage contracts. CX 498-A-046.<sup>30</sup>

As with Realcomp's free-riding argument, eliminating the so-called "bidding disadvantage" does not allow Realcomp or its members to "increase output, or improve product quality, service or innovation." *Polygram*, 136 F.T.C. at 346. In *Cantor*, the court rejected the defendant's justification for its policy -- restricting dissemination of information through yard signs -- because, rather than promoting competition, the practice made it easier for less diligent brokers to attract buyers and earn a commission. *Cantor v. Multiple Listing Serv. Of Dutchess County, Inc.*, 568 F. Supp. 424, 430-31 (C.D.N.Y. 1983). For the same reason, we reject Realcomp's bidding disadvantage justification.

Rather than saving the Policies from condemnation, Realcomp's argument reinforces the conclusion that they have an anti-competitive effect. The Policies do not enhance competition. They serve to prevent the cost of selling a home from dropping below the prevailing six-percent commission rate, and they hinder the exchange of information which Realcomp's creation was supposed to facilitate.<sup>31</sup> The Policies may protect brokers'

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<sup>30</sup> For example, one discount limited service broker, Craig Mincy of MichiganListing.com, advertises the potential savings of EA listings versus full-service listings through an example of the sale of a \$300,000 home. Mincy, Tr. 374 (illustrated by DX 4). Under a traditional full-service ERTS listing at 6% commission, a seller would pay a commission of \$18,000, even if there is no cooperating broker involved in the transaction. Mincy, Tr. 375-376 (illustrated by DX 4). In contrast, under the MichiganListing.com EA listing, the EZ-Listing, the seller would only pay \$495 if there is no cooperating broker involved, a savings of \$17,505. In the event a cooperating broker is involved, a seller using the EZ-Listing would pay \$9,495 (the \$495 fee to MichiganListing.com and a three percent, or \$9,000, commission to the cooperating broker), for a savings of \$8,505. Mincy, Tr. 376-377. Mr. Mincy puts this example on his website to "show the general public they don't necessarily have to pay six percent to sell their home." Mincy, Tr. 377-378.

<sup>31</sup> See *Professional Engineers*, 435 U.S. at 693 ("the anticompetitive purpose and effect of \* \* \* agreement" to withhold price information is "confirm[ed]" by expectation that it would "tend to maintain the price level"); *Indiana Federation*, 476 U.S. at 461-62 ("A concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified is likely



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commissions and the established commission-based business model, but they impede competition. “[T]he antitrust laws \* \* \* were enacted for ‘the protection of *competition*, not *competitors*.’” *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). Realcomp’s “bidding disadvantage” argument must, therefore, fail.<sup>32</sup>

Accordingly, under *Polygram*’s “inherently suspect” framework, we conclude that the Realcomp Policies are unreasonable and in violation of both Section 1 of the Sherman Act and Section 5 of the FTC Act.

We next consider whether a more elaborate rule of reason analysis, encompassing considerations of market power and effects, provides an alternative basis (*i.e.* regardless of whether Realcomp’s policies are inherently suspect) for our conclusion that those policies are anticompetitive.

**D. Analysis of the Realcomp Policies Under A Rule of Reason Encompassing Consideration of Market Power and Anticompetitive Effects**

As we noted above, under the circumstances of this case, we need not rely solely on the nature of the challenged restraints in order to determine whether Realcomp’s Policies violate the antitrust laws. In this section, we evaluate those policies under a more fulsome rule of reason analysis -- and reach the same conclusion. Under this framework, a plaintiff must show that the challenged restraints have resulted in, or are likely to result in, anticompetitive effects, in the form of higher prices, reduced output, degraded quality of products or services, retarded

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enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned”); *Detroit Auto Dealers*, 111 F.T.C. at 495 (competitors’ agreement to limit showroom hours “raises the opportunity cost to consumers” of obtaining comparative information “and thereby reduces pressure on dealers to provide the prices, services, and features consumers desire”).

<sup>32</sup> Accordingly, we reject the ALJ’s purported “findings of fact” -- more accurately characterized as conclusions or inferences drawn from the evidence -- regarding Realcomp’s “bidding disadvantage” argument. IDF 629-632.

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innovation, or other manifestations of harm to consumer welfare. Should the plaintiff carry its burden of showing actual or likely anticompetitive effects, the respondent -- in order to avoid condemnation -- must come forward with legitimate countervailing justifications.

As we indicated in Section V.B., *supra*, a plaintiff can carry out its affirmative case in either of two ways. It may make an indirect showing based on a demonstration of defendant's market power, which when combined with the anticompetitive nature of the restraints, provides the necessary confidence to predict the likelihood of anticompetitive effects. Or, plaintiff can provide direct evidence of "actual, sustained adverse effects on competition" in the relevant markets, which would be "legally sufficient to support a finding that the challenged restraint was unreasonable" -- whether or not plaintiff has made any showing regarding market power. *Indiana Federation*, 476 U.S. at 461. See *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 96 (2d Cir. 1998) (plaintiff has "two independent means by which to satisfy the adverse-effect requirement" -- direct proof of "actual adverse effect on competition" or "indirectly by establishing \* \* \* sufficient market power to cause an adverse effect on competition"); *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998) ("plaintiff may establish anticompetitive effect indirectly by proving that the defendant possessed the requisite market power within a defined market or directly by showing actual anticompetitive effects"); *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993) (same).

The ALJ found that Realcomp possessed substantial market power in the relevant markets, and Realcomp does not contest this finding.<sup>33</sup> In the ordinary case, the market definition/market power measurement exercise provides the most complex, resource-intensive element of what is called the "full rule of reason" analysis that courts and commentators describe as the most elaborate variant of the Section 1 analytical continuum. In

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<sup>33</sup> Even if the ALJ's reading of the courts of appeals decisions in *Worldwide Basketball*, *Continental Airlines*, and *Brookins*, to require complaint counsel here to delineate a relevant market and measure the respondent's market power, were correct (*see supra*, note 16), his finding of substantial market power satisfies those decisions as well.

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this matter, the often contentious and sometimes problematic issue of the respondent's market significance is resolved conclusively. The ALJ's uncontested finding that Realcomp has substantial market power eliminates the urgency to decide which variant of the rule of reason governs our assessment of whether Realcomp violated Section 5 of the FTC Act. This finding of market power, coupled with our earlier determination that the tendency of the challenged policies was to suppress competition, provide "indirect" evidence that those policies have or likely will have anticompetitive effects.

We also find that there is sufficient direct proof of actual detrimental effects on competition resulting from Realcomp's restrictive policies. Complaint counsel's economic expert witness, Dr. Darrell Williams, conducted a time-series analysis comparing the share of EA listings in the Realcomp MLS before and after the implementation of the challenged policies, and found significantly fewer discount listings after the policies at issue were implemented. Dr. Williams also conducted a benchmark study comparing the share of EA listings in a number of multiple listing services in geographic areas with and without listing restrictions similar to Realcomp's, and found significantly fewer discount listings in areas where the MLS imposed website restrictions similar to Realcomp's. Lastly, Dr. Williams's regression analysis, controlling for several variables, provides clear demonstration of the correlation between restrictive website policies such as Realcomp's and the minimization of EA listings.

Thus, under this fuller rule of reason analysis, we find ample support in the record for a conclusion that Realcomp's policies are anticompetitive and – unless Realcomp can establish a legitimate countervailing justification for them – unreasonable restraints of trade, in violation of Section 1 of the Sherman Act and Section 5 of the FTC Act.

**1. Indirect Evidence of Anticompetitive Effects: The Significance of Realcomp's Market Power in the Rule of Reason Analysis**

The ALJ ultimately interpreted the conduct at issue differently than we do. Yet his Opinion reflects an evident awareness that

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Realcomp's conduct posed noteworthy competitive hazards. Judge McGuire wrote:

With respect to the Website Policy, and the requirement that in order to be considered an ERTS listing, an agent must provide minimum brokerage services, the nature of the restraint is such that it is likely to be anticompetitive. Such conclusion, though not intuitively obvious, necessarily requires an expanded inquiry into whether competition was, in actuality, unreasonably restrained.

ID 97. Examining, as we have, the context in which Realcomp developed the challenged Policies and accounting for their apparent purpose, we agree that the nature of the Policies is such that they were likely to be anticompetitive. A fuller inquiry into the behavior in question reinforces that assessment.

As we discussed above, a crucial element of assessing indirect evidence of anticompetitive effects -- the fuller inquiry to which the ALJ refers -- is the examination of Realcomp's position in the relevant market. The ALJ found that Realcomp possessed substantial market power in two relevant markets in Southeastern Michigan: the market for residential real estate brokerage services and the market for multiple listing services, which is a vital input into the brokerage services market. Realcomp does not dispute these findings in this appeal.

Complaint counsel argues that the finding of market power, coupled with a determination that the nature of the challenged policies was to suppress competition, support an inference of actual or likely adverse competitive effects. We agree, and both case law and the commentary support that proposition. *See, e.g., Law v. NCAA*, 134 F.3d at 1019; *Tops Markets*, 142 F.3d at 96; *Levine v. Central Florida Medical Affiliates, Inc.*, 72 F.3d 1538, 1551 (11th Cir. 1996); *Brown Univ.*, 5 F.3d at 669; *see also* American Bar Association, Section of Antitrust Law, 1 ANTITRUST LAW DEVELOPMENTS, at 65 (6th ed. 2007); American Bar Association, Section of Antitrust Law, MONOGRAPH NO. 23, THE RULE OF REASON, at 161-63 (1999). The ALJ's contrary conclusion, ID 97, constitutes an error of law.

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The importance of market power as a tool for assessing the likely competitive effect of a concerted practice is also demonstrated in cases involving the real estate sector. A prominent example is *United States v. Realty Multi-List, Inc.*, *supra*, where the court applied a “facial unreasonableness” standard, which “allows the courts to reach and void on its face any significantly restrictive rule of a combination or trade association with significant market power, which lacks competitive justification or whose reach clearly exceeds the combination’s legitimate needs.” 629 F.2d at 1370. There was no evidence of an actual “pricing effect” in *Realty Multi-List*. Nonetheless, the Court of Appeals found “facially unreasonable” the rules of the defendant MLS, which, among other things, denied to non-members information in the MLS database and other members’ listings information. *Id.* at 1357, 1370. The court found that the rules harmed broker competition between non-members and members and also harmed real estate buyers and sellers. *Id.* at 1371-72. As the court explained, as a result of those rules, “the public is denied the incentive to competition \* \* \*.” *Id.* at 1371.

Other courts as well have held unlawful policies or practices of a combination of real estate brokers having market power that deny access to an MLS or to other information respecting services that consumers desire. *Thompson v. Metropolitan MultiList, Inc.*, 934 F.2d 1566 (11th Cir 1991), for example, held that an organization of real estate brokers controlling an MLS, whose rules excluded certain competitors’ access to the MLS, violated the Rule of Reason. *Marin County Board of Realtors v. Palsson*, 549 P.2d 833 (Cal. 1976) held the same thing. And, in *Cantor*, the court held that an organization of real estate brokers controlling an MLS, whose rules prohibited certain competitors from using yard signs that were not MLS-branded yard signs, also violated the Rule of Reason. 568 F. Supp. at 430-31. As the court observed in *Realty Multi-List*, “there exists the potential for significant competitive harms when the group, having assumed significant power in the market, also assumes the power to exclude other competitors from its pooled resources.” 629 F.2d at 1370. See also *United States v. VISA U.S.A., Inc.*, 344 F.3d 229, 242 (2d Cir. 2003) (joint venture rules prohibiting members from competing “with the others in a manner which the consortium considers harmful to its combined interests” was anticompetitive

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behavior). Realcomp's Policies similarly restrict competition by denying consumers a service they desire: access to EA listings with full public website exposure through the Realcomp MLS.

In light of Realcomp's acknowledged market power, and the facially restrictive nature of the policies at issue, no more is required, under the rule of reason, to support our conclusion that the Policies are unreasonable because they will predictably result in harm to competition.<sup>34</sup> The record evidence provides additional support for that conclusion, however, by detailing the mechanisms by which the Policies affect the workings of the market. Those Policies: (1) significantly restricted access by consumers to limited service brokerage listings on public websites; (2) effectively limited the reach of listings disseminated on the MLS itself, at least until the Search Policy was changed, and thereby (3) caused a reduction in the "pricing pressure" on the six-percent commissions typically charged by full-service brokers. These adverse effects on competition were established by the ALJ's findings respecting the importance of the Internet in general and the Approved Websites in particular to home buyers and sellers who want access to listings on public websites, *e.g.*, IDF 218-219; by the ALJ's findings that Realcomp's Policies severely restricted consumers' access to limited service listings on public websites, *e.g.*, IDF 349-350; by the testimony from limited service brokers about how Realcomp's Policies place them at a severe competitive disadvantage versus other geographic areas where the local MLS has no similar restrictions, *e.g.*, D. Moody Tr. 531-533; CX 526 (Groggins Dep.), at 29-31; CX 422

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<sup>34</sup> Thus, even if we accepted the ALJ's findings in total, we would still reverse his decision. Because the ALJ found that Realcomp had market power, ID 97, and that the Website Policy restricting the distribution of discount listing to public web sites was "likely to be anticompetitive," *id.*, those findings establish a *prima facie* case of illegality, *see, e.g., United States v. Brown Univ.*, 5 F.3d at 668-69, which Realcomp has failed to rebut. As discussed above, the justifications Realcomp offers are neither cognizable nor plausible. *See supra* Section V.C.2. Moreover, in light of these findings, the ALJ erred in requiring further proof regarding actual anticompetitive harm as an additional element of proof. *See also Indiana Federation*, 476 U.S. at 460 (quoting *Areeda, supra*, ¶1511, at 429); *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993); *Flegel v. Christian Hospital*, 4 F.3d 682, 688 (8th Cir. 1993); *Gordon v. Lewiston Hospital*, 423 F.3d 184, 210 (3d Cir. 2005); *Law v. National Collegiate Athletic Ass'n*, 134 F.3d 1010, 1019 (10th Cir. 1998); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000).

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(Aronson Dep.), at 74-76; G. Moody Tr. 821-823, 825-826; Kermath Tr. 741; and by the ALJ's findings that limited service listings exerted "price pressure" on the full-service brokerage commission structure, IDF 99-101.

The ALJ found that the Search Function Policy did not harm competition because users of the Realcomp MLS could override the default settings. The ALJ found that, until April 2007, by virtue of Realcomp's Search Function Policy and its Minimum Service Requirement, the default setting for Realcomp's MLS was such that all searches were automatically configured to include only full-service listings so that members wishing to view limited services listings needed to specifically select those listings or to select the button labeled "select all listings." IDF 361, 363, 374. The relevant question, however, is not whether Realcomp's Policies *completely* excluded discount brokers from advertising their listings on the MLS, but whether they tended to stifle competition. The Policies did so.<sup>35</sup> Realcomp data and broker testimony show that many brokers did not override the default search parameters.<sup>36</sup> On this point we rely upon the record evidence showing what brokers actually do.

For example, Realcomp data show that cooperating brokers viewed and emailed EA listings far less frequently than ERTS listings. CX 498-A-036. Realcomp kept statistics for each listing within the Realcomp MLS showing the number of times a Realcomp MLS user viewed the detailed report for that listing.

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<sup>35</sup> While we do not necessarily reject the ALJ's very limited factual findings regarding the impact of the Search Function policy (IDF 361-371, 455-462), we note that he inexplicably omitted the extensive record evidence cited and summarized in the following paragraphs regarding the exclusionary impact of this Policy. For the reasons set forth in the text, we disagree with and disavow the conclusion he expressed in the section heading accompanying those "findings of fact" ("Discount Brokers Are Not Excluded by the Search Function Policy"). ID 58.

<sup>36</sup> This is hardly surprising. Realcomp's restrictive practice was aimed at discount *listing* brokers. While cooperating brokers could override the default search criteria, there was nothing that discount listing brokers could do to ensure that the cooperating brokers did so. Thus, the default setting was equally effective in punishing discount brokers whether it relied on the cooperating brokers' inertia, or on some other, more technologically advanced, weapon of exclusion.

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CX 228-06. Dr. Williams determined, based on Realcomp's data, that between January 2004 and October 2006, ERTS listings were viewed, on average, 5.1 times per day, whereas EA listings were viewed only 3.2 times per day. CX 498-A-036; CX 517; CX 518. Realcomp also calculated that Realcomp MLS users viewed residential and condominium ERTS listings on average a total of 201 times per month, whereas they viewed EA residential and condominium listings an average of 94 times per month. CX 228-06-07.

Realcomp also kept statistics for each listing within the Realcomp MLS showing the number of times Realcomp MLS users sent out a listing via email, either as an individual listing or part of a group of listings. CX 228-06. Based on Realcomp data, Dr. Williams ascertained that in 2006, ERTS listings were sent via email from the Realcomp MLS an average of 6.9 times per day-on-market, whereas EA listings were sent via email an average of only 1.9 times per day-on-market. CX 498-A-036-037; CX 519; CX 520. Furthermore, Realcomp calculated that Realcomp MLS users emailed residential and condominium ERTS listings on average a total of 286 times per month, whereas residential and condominium EA listings were emailed on average a total of one time per month -- less than 0.4 percent as often. CX 228-06-07.

Furthermore, brokers testified that they received complaints from consumers who had been told by brokers that their EA listed homes were difficult to find in the MLS. RRPf 931, 933-35, 964, 986, 1042, 1048. Testimony from EA brokers reinforces this evidence. In her experience as a broker, Denise Moody of Greater Michigan Realty observed that her customers' limited service listings are viewed far less often by other Realcomp members and emailed to potential buyers less frequently than her customers' ERTS listings. D. Moody Tr. 531-533. Limited Service brokers also testified that they heard from other agents looking on the MLS that they could not find their customers' listings, and that this was because of Realcomp's Search Function Policy. CX 526-29-31 (Groggins Dep.). Limited Service brokers also received complaints from customers whom other agents told that their



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listings were not on the Realcomp MLS. *See, e.g.*, CX 422-62-63, -74-76 (Aronson Dep.); RX 67-06; RX 73-01.<sup>37</sup>

Craig Mincy, the owner of MichiganListing.com (*see supra*, note 30) testified that, when he was a full-service broker, he was not aware that Realcomp's default search screen excluded EA listings, and that he only became aware of it later when, as he began offering limited service listings, a customer informed him that the customer's listing was not on Realtor.com. Mincy Tr. 390-92.<sup>38</sup> Mr. Mincy believes that he missed properties when doing searches on behalf of buyers, in part due to Realcomp's Search Function Policy. *Id.* at 393, 400. Mr. Mincy also testified that he receives half a dozen calls per week from Realcomp brokers who, because of Realcomp's Search Function Policy, did not find his MichiganListing.com EA properties listed on the Realcomp MLS. *Id.* at 401-402. He testified that he has had no similar calls from Realcomp brokers regarding his ERTS listings or his listings in other MLSs. He only receives these calls regarding his limited service listings in Realcomp. *Id.* at 405-406.<sup>39</sup>

This evidence supports our finding that the Realcomp Search Function Policy was a significant factor accounting for the results we have described. One of complaint counsel's industry experts testified that he has "never heard of this kind of decline by agents

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<sup>37</sup> Greater Michigan Realty gets calls "weekly" from customers with listings in Realcomp who indicated they have been contacted by another Realtor who claims that the customer's listing can't be found or "didn't show up" on the MLS system. In the Realcomp area, this type of customer complaint is "one of the most significant challenges" that Greater Michigan Realty faces. G. Moody Tr. 821-823, 825-826; CX 443-002. AmeriSell Realty's broker-owner Jeff Kermath testified that he receives complaints from clients in the Realcomp service area "several times per week" that other Realtors "can't find the listing" on the MLS. Kermath Tr. 741.

<sup>38</sup> The only way Realcomp members find out about the Search Function Policy is through one training class at the very beginning of their membership. CX 36 (Kage IHT), at 94.

<sup>39</sup> Realcomp's Board of Governors received a request to change the default setting because brokers did not realize that default searches only resulted in ERTS listings. CX 35 (Kage Dep.), at 133-38; CX 250-02-03. One Realcomp Governor voted to change the default because he wanted the default to include all available listing types. CX 415 (Nowak Dep.), at 44-45.

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choosing saying [sic] I'm not going to look at that listing because it's Exclusive Agency \* \* \* and everything I've ever understood in my entire career is that cooperating brokers want to see every single home that's available on that MLS." Murray Tr. 194, 195-96. Realcomp's Search Function Policy places limited service listings at a disadvantage similar to being excluded from Realcomp altogether. RX 154-A-32; Murray Tr. 196-199.<sup>40</sup> This evidence bolsters our conclusion that the Search Function Policy, in tandem with the Minimum Service Requirement, likely had anticompetitive effects.

Turning to the Website Policy, although the MLS continues to be the most important tool for advertising real estate listings, the Internet has raised the importance of advertising on public Realtor websites. Unlike the Search Function Policy, which merely made it more difficult for EA listings to advertise effectively on the Realcomp MLS, the Website Policy barred discount brokers -- and continues to bar them -- from using Realcomp to advertise on public websites altogether.

Realcomp's Website Policy completely excludes limited service listings from Realcomp's highly promoted "MoveInMichigan.com" real estate company site, which Realcomp describes to consumers as "one of the most comprehensive Real Estate listing sites in all of Southeastern Michigan," CX 15, and from "ClickOnDetroit.com," the leading local website in southern Michigan. CX 222-009-010; IDF 234-235. Realcomp does not inform consumers that MoveInMichigan.com only includes ERTS listings (CX 150), so they are unaware that it is incomplete. Limited service brokers have no other way to place their listings on those websites, which are two of the top four public websites used by consumers in the relevant market. Kage Tr. 936-37, 989; CX 36 (Kage IHT), at 48-49 (brokers using these listings cannot post on MoveInMichigan.com or ClickOnDetroit.com because Realcomp has an exclusivity agreement for those websites); IDF 238, 387.

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<sup>40</sup> The Search Function Policy also affects other aspects of the Realcomp MLS, including Comparative Market Analyses. CX 251-253. The Realcomp training book regarding Comparative Market Analysis does not tell Realcomp members how to include all listing types in their analysis. *Id.* At least some Comparative Market Analysis reports generated by brokers through the Realcomp MLS default to ERTS listings. CX 253.

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Access to the majority of Realcomp's member IDX websites (another one of the top four public website sources for consumers' use in the relevant market) is also restricted severely. Even dual listing on other MLSs, such as MiRealSource, does not allow brokers to display EA listings on MoveInMichigan.com or most Realcomp member IDX websites. Murray Tr. 236-237; RX 154-A-065; CX 36-190; IDF 387.

The ALJ found that Realcomp's Website Policy and related requirements curbed access by consumers to limited service listings on all of Realcomp's Approved Websites, including Realtor.com. IDF 349-350. As for Realtor.com, NAR's own site and the fourth of the major sources of consumer websites in the relevant market, sellers who list with Realcomp still can get their listings on Realtor.com, notwithstanding Realcomp's restrictive policies, but only if limited service brokers "dual-listed" their listings on both the Realcomp MLS and another MLS that did not impose similar public website restrictions. IDF 436. This alternative imposes extra costs on the listing broker and added burden on any broker assisting such a customer (*i.e.* matching listing numbers that do not correspond to one another). IDF 437, 443-444.

Further, the dual listing alternative, which can provide some of the access that Realcomp's policies would otherwise restrict, is not costless, either in terms of time or money.<sup>41</sup> As we noted in

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<sup>41</sup> We reject the ALJ's finding that discount brokers must incur only "nominal" costs for dual-listing in Realcomp and another MLS in order to circumvent Realcomp's restrictive Website Policy. IDF 442-443. This finding is flatly inconsistent with the testimony of the witnesses that the ALJ cites in support of that proposition. *See, e.g.*, Mincy, Tr. at 417-419 (testifying that, over the course of a year, his company had to devote a total of about two full person-weeks maintaining "dual listings" in another MLS as well as Realcomp in order to circumvent Realcomp's restrictive Website Policy – time that took away from his ability to market services and expand his business, and that his listings still had less exposure than Realcomp ERTS listings due to being excluded from the IDX websites and updated less effectively); Sweeney, Tr. 1312, 1340 ("Q: And I would assume, then, your staff has to enter listings twice? A: Yes, that's actually a bigger cost is the administrative hassle of entering the listings in both systems. \* \* \* It's not just the double entry, \* \* \* it's the maintenance, every time there's a price change, you have to do it in two systems, any time there's any change whatsoever at least reported in the system, you have to do it twice. Yes, that is a burden. An administrative burden.").

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*Polygram*, restrictions on advertising likely harm consumers by raising their search costs and reducing sellers' incentives to lower prices. 136 F.T.C. at 354-55. Preventing discount listings from appearing on publicly available websites imposes costs on competitors who must seek out alternatives to Realcomp's IDX feeds and imposes costs on consumers, who must hunt through several sources of home listings in order to include EA listings in their home buying decisions.

The ALJ found that the Policies did not have an anticompetitive effect because they did not completely exclude discount brokers from the Realcomp MLS, but merely restricted access to some of its services. He attempted to distinguish this case from *Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co.*, 472 U.S. 284 (1985), on that ground. ID 94. Like the ALJ's emphasis on the lack of price effects, his emphasis on the lack of exclusion from Realcomp and from its MLS was an error of law; for complete exclusion is not the standard of liability here.<sup>42</sup> In *Northwest Wholesale Stationers*, the Supreme Court stated that a combination of competitors with market power need not exclude other competitors from their association in order to restrain trade unreasonably under Section 1. 472 U.S. at 295, n.6 ("Northwest's activity is a concerted refusal to deal with Pacific on substantially equal terms. Such activity might justify *per se* condemnation if it placed a competing firm at a severe competitive disadvantage.").

Similarly, in *Palsson*, the California Supreme Court made it clear that the problem with the exclusionary rules there was not that the MLS rules excluded competitors, but that they operated to "narrow consumer choice" and "hampered" non-members from competing "effectively." 549 P.2d at 842-43. The same thing was true in *Thompson*, where the court held that the MLS rule

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<sup>42</sup> The ALJ's "findings of fact" that discount brokers are not *entirely* excluded from the Realcomp MLS, IDF 428-433, and that there are measures they can take to obtain listings on Realtor.com and other websites, IDF 434-454, are thus irrelevant, even if they may not be entirely inaccurate. Similarly, the fact that some discount brokers are managing to compete, IDF 463-472, is irrelevant and has no bearing on the exclusionary impact of Realcomp's restrictive practices (*i.e.*, how much *more* effectively competitive the market would be in the absence of those policies).

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limiting membership to members of a real estate board violated the Rule of Reason, not because the rule excluded some Realtors but because it operated both to injure consumers by preventing the excluded brokers' listings from being "distributed as widely as possible," and to injure competition among brokers. 934 F.2d at 1580. And the challenged rule in *Cantor* was held illegal under the Rule of Reason because it deprived discount brokers from using an effective means of advertising their services, which had the same two anticompetitive effects. See 568 F. Supp. at 430. Thus, as a matter of law, there is liability under the Rule of Reason cases insofar as Realcomp's Policies operated to narrow consumer choice or hinder the competitive process.<sup>43</sup>

The ALJ's own findings and the uncontroverted evidence described above establish both of those effects. More specifically, those findings establish that (1) because of its database of listings, the Realcomp MLS is the most effective tool for the sale of residential real estate in Southeastern Michigan; (2) brokers offering limited service and brokers offering traditional, full-service brokers' services compete with one another for new listings; (3) limited service brokers' services potentially cost less than the services of brokers offering only full-service listings (they not only unbundle the services offered but also unbundle the commission structure); (4) limited service brokers' listings consequently exert "price pressure" on full-service brokers' listings; (5) Realcomp's Website Policy, coupled with its Minimum Service Requirement, severely restricted consumers' access to limited service listings because, as a result of those policies, the listings were not available on the most popular websites; and (6) Realcomp's Search Function Policy, coupled with its Minimum Service Requirement, impeded even brokers from accessing limited service listings on the Realcomp MLS because of the default settings. See, e.g., IDF 76-77, 81, 88, 97,

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<sup>43</sup> Of course, the point of policies that punish discounters need not be to drive them out of business entirely; all that is necessary is to detect and punish deviations enough to bring a sufficient number of discounters back into the fold to sustain the price at supracompetitive levels. Cf. U.S. Dep't of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* (rev'd April 8, 1997), § 2.1 ("Detection and punishment of deviations ensure that coordinating firms will find it more profitable to adhere to the terms of coordination than to pursue short-term profits from deviating, given the costs of reprisal.").

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100-101, 106-108, 114, 121, 210, 249, 349-50, 361, 363-64, 428, 430.

Each of these findings enjoys significant evidentiary support. For example, the impact on brokerage commissions of limited and full-service offerings is illustrated by the MichiganListing.com advertisement described above, *supra* note 30. The substantial “pricing pressure” exerted by limited service brokers on full-service brokers is supported, *inter alia*, by NAR’s description of that phenomenon. *See supra* (text accompanying note 9); CX 403-007. The impact of the Website Policy is demonstrated by the testimony of Realcomp’s witness, Mr. Sweeney, that brokers whose listings are not accessible in the Realcomp Approved Websites are at “a severe competitive disadvantage.” Sweeney Tr. 1344-47. The impact of the Search Function Policy is established by the statistics respecting the computer use of the Realcomp MLS to access limited service and full-service offerings. *See supra* (text accompanying notes 35-40). And the impact of all of the Policies combined is reflected in the testimony of limited-service brokers, who described the complaints they received from consumers who could not access Realcomp MLS limited-service offerings on the public websites. *See supra* (text accompanying notes 40-41); *see, e.g.*, CX 422-62-63, -74-76 (Aronson Dep.); CX 526-029-31; RX 67-06; RX 73-01. In the ALJ’s full Rule of Reason analysis, none of these findings, or the evidence supporting them, is mentioned. *See* ID 97-119.

This is not a case in which the Commission’s reversal of the ALJ is based on indifference to his findings of fact and conclusions of law. To the contrary, the result in this case is based almost exclusively on his findings<sup>44</sup> and our conviction that, based on those findings and examination of his conclusions, those conclusions were erroneous, as a matter of law.

Given the market structure and competitive dynamics of the residential real estate industry, we find that Realcomp’s Website Policy, the Search Function Policy, and the Minimum Service Requirement harmed competition and created a likelihood that valuable rivalry among real estate service providers would be suppressed. The Website Policy excluded discount listings from

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<sup>44</sup> *But see supra*, note 4.

## Opinion of the Commission

being advertised on websites available to the general public. The Search Function Policy significantly reduced the exposure of non-ERTS listings to brokers searching the MLS, while the Minimum Service Requirement limited the arrangements that discount brokers could make and still claim ERTS status. The latter requirement enhanced the discriminatory effects of the Website and Search Function policies. As a group these Policies improperly constrained competition between discount listings and full-service listings.

The ALJ concluded otherwise. He advanced several reasons to explain his view that, despite his recognition that the Website Policy was likely on its face to cause competitive harm, ID 97, the Policies did not injure competition. We believe that this reasoning slights the importance of Realcomp's market power in assessing the significance of its conduct. In our view, Realcomp's substantial market power, coupled with the clear tendencies of its restrictive policies to harm competition, establishes a basis for inferring actual or likely anticompetitive effects and, consistent with the case law, suffices to require Realcomp to provide reasonable justifications for the challenged restrictions, which, as we discuss above, it failed to do. We nonetheless also consider the other means by which a plaintiff may establish its prima facie case under the rule of reason – by direct evidence of anticompetitive effects.

## **2. Direct Evidence of Anticompetitive Effects**

We examine in this section the direct evidence of effects provided by complaint counsel, and we address the reasons advanced by the ALJ for his conclusion that complaint counsel's showing on the issue of competitive effects was wanting. Specifically, we examine the ALJ's findings that, first, the testimony of Realcomp's economic expert showed that the Realcomp policies did not adversely affect the market share of limited-service offerings or the sale prices or days-on-the-market of homes listed (IDF 482-600; ID 105-119); second, the challenged Policies did not prohibit limited-service brokers or agents from joining Realcomp (IDF 163-64, 185, 433; ID 94); third, the Policies did not exclude the listings of limited-service brokers from the Realcomp MLS itself (ID 95, 100-01); fourth, with specific reference to the Website Policy, access to the

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Approved Websites was not a major consideration in light of the accessibility of limited-service listings in Realcomp's MLS itself and possible listings by limited-service brokers and agents on Realtor.com and on other websites such as Google and Trulia (ID 101-102); and, fifth, the presence of four growing or successful EA brokers in the relevant market was "inconsistent with Complaint Counsel's theory that EA brokers have been competitively impaired," ID 98.

The ALJ concluded that the economic analyses performed by the FTC's expert were unpersuasive and had little probative value in showing that Realcomp's Policies adversely affected competition.<sup>45</sup> This conclusion appears to reflect an inadequate grounding on the ALJ's part in some of the technical matters for which adjudicators at an expert agency charged with handling competition matters should be expected to develop expertise.

For example, the ALJ accepted Dr. Eisenstadt's testimony that Dr. Williams's regressions were flawed because they failed to include several relevant variables, including zip code level data and MSA level data. But this critique is not supported by the underlying regression model or data. The relevant information was in fact captured with the county level explanatory variables (in other words, the additional variables, while relevant, are not independent). Indeed, county level data vary more than MSA or zip code level controls and, arguably, provide more detailed information. Therefore, adding the MSA level variables when county level data already have been factored in would decrease the number of degrees of freedom in the analysis, thus inflating the variance of the estimated parameters, without providing any more helpful information. Dr. Williams explored this relationship and correctly concluded that including both MSA and county level controls will introduce inefficiencies in the model, which "make[s] no economic sense," and would have resulted in inaccurate and meaningless results. CX 560-06.

There were other errors in the ALJ's decision as well, which we discuss below. In reviewing the record *de novo*, we find that

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<sup>45</sup> See ID 61-75 (IDF 482-600) (inferences or conclusions regarding the economic and econometric testimony mischaracterized as "findings of fact"); ID 105-119.



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the economic evidence provided by the FTC's economic expert and other record evidence support the proposition that Realcomp's Policies harmed competition.

Dr. Darrell Williams, the FTC's economic expert, conducted three analyses to determine how Realcomp's Policies affected competition: (1) a time-series analysis that compared the share of EA listings in the Realcomp MLS before the adoption of the Policies with the share of EA listings after their adoption; (2) a benchmark study that compared the share of EA listings in multiple listing services in geographic areas with and without listing restrictions similar to Realcomp's; and (3) a regression analysis to determine the correlation between restrictive listing policies and the share of EA listings.

Dr. Williams's time-series analysis showed that the monthly average share of EA listings in the Realcomp MLS fell from about 1.5 percent in May 2004 before the Policies were both in place and enforced, to about 0.75 percent in October 2006. IDF 487. With this drop, EA listings lost half of their toehold in the market. Noting that Realcomp's expert testified that the drop was at most one percentage point (IDF 482), the ALJ characterized the drop as "not significant." ID 61. In doing so, he confused the reduction in absolute percentage points with the relevant rate of change that showed non-traditional arrangements losing their toehold in the market.

The ALJ also discounted the results of the time-series analysis on the ground that the study did not account for other economic factors that might have caused the share of EA listings to fall. ID 103-04, 106. In anticipation of this criticism, Dr. Williams had performed two studies to compare Realcomp with MLSs in nine other Metropolitan Statistical Areas (MSAs). Six of these (the Control MSAs) had no restrictions throughout the period for which data was collected.<sup>46</sup> Of the other three (the Restriction MSAs), two had had policies, throughout the period for which data was collected, that prevented EA listings from being included

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<sup>46</sup> Charlotte, North Carolina; Dayton, Ohio; Denver, Colorado; Memphis, Tennessee; Toledo, Ohio; and Wichita, Kansas.

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in MLS feeds to public websites and the MLS's IDX;<sup>47</sup> the other (Boulder, Colorado) adopted such restrictions during the period under consideration. IDF 491-496.

Dr. Williams performed a statistical analysis comparing the share of EA listings in the Control MSAs with the Restriction MSAs (including Realcomp's MSA). IDF 512-513. The ALJ faulted Dr. Williams's selection of Control and Restriction MSAs. According to the ALJ, the selection of the Control MSAs was flawed by its inclusion of MSAs that were dissimilar from Detroit (the MSA which includes the relevant geographic market).

The ALJ determined that if Dr. Williams had correctly identified the economic and demographic factors that determine the share of EA contracts at the MSA level, then one would expect that the shares of EA listings in the Control MSAs would also be very similar. IDF 526. This conclusion is erroneous. Even if the seven variables used as criteria to select the control sample were perfect predictors of the percentage of EA listings, this would not imply that the percentages in each MSA would be equal or nearly equal to each other because the values of the seven explanatory variables are not equal. CX 560-05. Realcomp's expert, Dr. Eisenstadt, himself acknowledged that the values of the seven variables used as sample selection criteria vary across MLSs in the control sample, *see* RX 161-08, ¶13, so it's not clear why the ALJ would nonetheless expect the shares of EA listings in those Control MSAs to be "very similar." The fact that the Restriction MSAs all had very low shares of EA listings, despite different demographics, supports a conclusion that restrictive policies caused the reduction in EA shares. If these MSAs had few common characteristics other than restrictive multiple listing policies, yet all had low EA shares, it would be logical to conclude that the restrictive policies caused the lower shares.

Realcomp's expert, Dr. Eisenstadt, testified that a comparison of Detroit to Dayton (one of the Control MSAs) revealed the flaw in Dr. Williams's analysis. According to Dr. Eisenstadt, because Dayton and Detroit are demographically similar, any anticompetitive effect of the Policies should be readily evident from a comparison of those two markets. Dr. Eisenstadt testified

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<sup>47</sup> Williamsburg, Virginia and Green Bay/Appleton, Wisconsin.

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that the evidence did not bear this theory out: Dayton had a 1.24 percent share of EA listings, in comparison to Detroit's 1.01 percent share, a difference which the ALJ deemed insignificant. Comparing differences in absolute percentage points when the numbers are very low masks the magnitude of the difference. What is less than a quarter percentage point difference in absolute terms in this case in fact translates to a 19 percent difference between the two populations, a difference that we do not consider insignificant.

The ALJ also pointed to the statistics regarding the city of Boulder as further evidence that the Restrictions had no anticompetitive effect. The multiple listing service in Boulder operated both with and without restrictions during the time period studied by Dr. Williams. EA listings had a 2.03 percent share in the Boulder MLS in the period without restrictions and a 0.98 percent share in the period after restrictions were adopted. The ALJ once again characterized the decline in share as insignificant by comparing absolute percentage points, amounting to 1.05 percentage points. As we have discussed, when the numbers are very low, the rate of change in the EA share reveals the extent to which non-traditional arrangements have been losing their toehold in the market. In this case, EA listings in Boulder fell by 51 percent after the restrictions were adopted. Dr. Eisenstadt testified that there was a downward trend during the last three months of the pre-restriction period, and that if these last three months were used as a benchmark, the reduction in the share of EA listings would be even smaller than one percentage point (in absolute terms).<sup>48</sup> But a one percentage point drop in the share of EA listings in Boulder translates to a 49 percent decline in the market share of those listings; a half-percentage point drop equals a 25 percent decline in market share. We consider either of these declines to be competitively significant.

Finally, it is important to note the difficulty of proving, through evidence of this sort, a substantial loss of competition in cases involving new entrants who gain and then lose a toehold in

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<sup>48</sup> The actual size of the decline in these three months is unknown. During his testimony, Dr. Eisenstadt referred to an exhibit not admitted in evidence but did not state the actual size of the decline in his testimony. *See* Eisenstadt Tr. 1412-1414.

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a market. As demonstrated above, the magnitude of any effect is likely to be small in absolute market share terms, given the already small numbers to begin with. But, as the D.C. Circuit pointed out in *United States v. Microsoft*, the relevant question in dealing with emerging competition is not whether the new entrant would actually have developed into a viable substitute for the dominant product, but whether “the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant’s continued monopoly power \* \* \*.” 253 F.3d 34, 79 (D.C. Cir. 2001). The court in *Microsoft* concluded that “it would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will \* \* \*.” *Id.* The *Microsoft* court therefore did not require a showing of actual harm but only asked whether exclusionary acts designed to quash nascent competition, when undertaken by a firm with a large market share, were sufficient for a finding of a violation. Although the *Microsoft* court was analyzing a monopolization claim under Section 2 of the Sherman Act, we believe that the principle is equally applicable to this case.

In conclusion, we find unpersuasive the ALJ’s rejection of complaint counsel’s econometric evidence of anticompetitive effects. But even if we were to agree with the ALJ that the economic evidence was at best inconclusive, the inferences reasonably drawn from the other record evidence discussed in part V.D.1. above amply corroborates the conclusions of Dr. Williams that, by “inhibit[ing] the ability of nontraditional brokers to compete effectively,” thus “reduc[ing] the choices available to consumers of brokerage services,” and “protect[ing] the de facto price floor that supports the level of real estate brokerage commissions,” CX 498-A-07, Realcomp’s Policies have had a substantial restrictive effect on competition for real estate brokerage services in Southeastern Michigan.

Notwithstanding such conclusion, defendants generally may be able to defeat a finding of liability if their practices can be “justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive.” *Northwest Wholesale Stationers*, 472 U.S. at 294. The requisite beneficial effect ordinarily is one that stems from measures that

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increase output or improve product quality, service, or innovation. *Polygram*, 135 F.T.C. at 345-46.

As we discussed above in connection with our analysis under the *Polygram* “inherently suspect” analysis, however, Realcomp’s proffered justifications fail to satisfy those standards. We rejected Realcomp’s “free riding” claim as implausible on its face, and its “bidding disadvantage” argument as not cognizable under the antitrust laws. Accordingly, Realcomp has failed to overcome the anticompetitive effects of its Policies with any legitimate, procompetitive justifications.

**VI. Remedy**

Complaint counsel has proven that Realcomp violated Section 5 of the Federal Trade Commission Act by adopting anticompetitive policies that prohibited information on Exclusive Agency listings and other forms of nontraditional listings from being transmitted from its MLS to public real estate websites, and restricted their display in the Realcomp MLS’s search results. Realcomp’s Policies, adopted by a group of competing real estate brokers, are collective agreements that stifle competition from nontraditional listings.

The Commission has wide discretion in its choice of a remedy for violations of Section 5 of the FTC Act. *FTC v. Nat’l Lead Co.*, 352 U.S. 419, 428 (1957); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611 (1946). The Commission’s remedy must be reasonably related to the violation. *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Jacob Siegel*, 327 U.S. at 613. Complaint counsel’s proposed remedy, which we adopt here (with minor changes to paragraphs I.A, I.K, I.L, I.N, I.P, I.Q, and II), requires Realcomp to cease and desist from adopting or enforcing any policy, rule, practice or agreement that interferes with the ability of its broker members to enter into EA listings or other forms of nontraditional listings. The Order is consistent with the relief accepted in settlement of recent similar cases, and will remedy Realcomp’s illegal conduct while at the same time allowing Realcomp to continue to provide the competitively enhancing services of its MLS and public data feeds.

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Paragraph I of the Order defines terms used within the Order. Paragraph II prohibits Realcomp from engaging in behavior that discriminates against nontraditional listings. Realcomp may not, under the Order, treat nontraditional listings in a discriminatory manner. Specifically, Realcomp may not, among other things, prevent its members from offering or accepting EA listings; prevent its members from cooperating with brokers that offer or accept EA listings; or prevent the publication of EA listings on its MLS or public websites to which Realcomp provides data. Realcomp may, however, adopt policies relating to matters that are reasonably ancillary to its legitimate objectives, such as the payment of dues and participation requirements.

Paragraph III of the order requires Realcomp to amend its rules and regulations to conform to the Order, within 30 days after the date the Order becomes final. Paragraph IV requires Realcomp, within 90 days after the date the Order becomes final, to inform its members of the amendments required under Paragraph III, and to provide each of its members with a copy of the Order. Paragraph IV also requires that the Order be placed on Realcomp's publicly accessible website and to remain accessible for five years from the date it becomes final.

Paragraph V requires Realcomp to notify the Commission of any proposed dissolution, acquisition, merger or consolidation of Realcomp, or of any other change that might affect its compliance obligations. Paragraph VI requires Realcomp to file written reports setting forth the manner and form in which it has complied with the Order.

Paragraph VII provides that the Order will remain in effect for a period of ten years.

**VII. Conclusion**

We hold that Realcomp violated Section 5 of the Federal Trade Commission Act and we reverse the Initial Decision. We enter the attached Order, which, among other things, prohibits Realcomp from restricting nontraditional listings from the full range of services which it offers. Realcomp is required to amend its rules and regulations within thirty days after the Order becomes final, to inform each Realcomp member of the changes

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to its rules and regulations, and to provide a copy of the Order to each Realcomp member. The Order incorporates the parties' Joint Stipulation Regarding Respondent's Search Function Policy, in which Realcomp agreed to repeal its Search Function Policy.

**FINAL ORDER**

The Commission has heard this matter on the appeal of Counsel Supporting the Complaint from the Initial Decision and on briefs and oral argument in support of and in opposition to the appeal. For the reasons stated in the accompanying Opinion of the Commission, the Commission has determined to reverse and vacate the Initial Decision and enter the following order. Accordingly,

**I.**

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

- A. "Respondent" or "Realcomp" means Realcomp II Ltd., a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business at 28555 Orchard Lake Road, Suite 200, Farmington Hills, Michigan 48334. The term also means the Realcomp Owners, Board of Directors, its predecessors, successors, assigns, divisions and wholly or partially owned subsidiaries, committees, affiliates, licensees of affiliates, partnerships, and joint ventures; and all the directors, officers, shareholders, participants, employees, consultants, agents, and representatives of the foregoing. The terms "subsidiary," "affiliate" and "joint venture" refer to any person in which there is partial or total ownership or control by Realcomp, and is specifically meant to

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include Realcomp MLS and/or each of the Realcomp Websites.

- B. “Owners” means the current and future Boards and Associations of Realtors that are the sole shareholders of Realcomp, which included the Dearborn Board of REALTORS, Detroit Association of REALTORS, Livingston Association of REALTORS, Metropolitan Consolidated Association of REALTORS, North Oakland County Board of REALTORS, Eastern Thumb Association of REALTORS and Western-Wayne Oakland County Association of REALTORS at the time of entry of this 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 and offering compensation in and facilitating real estate transactions.
- D. “Realcomp MLS” means the Realcomp MLS or any other MLS owned, operated or controlled, in whole or in part, directly or indirectly, by Realcomp, any of its Owners, predecessors, divisions and wholly or partially owned subsidiaries, affiliates, and all the directors, officers, employees, agents, and representatives of the foregoing.
- E. “Realcomp Member” means any person authorized by Realcomp to use or enjoy the benefits of the Realcomp MLS, including but not limited to Members and Subscribers as those terms are defined in the Realcomp Rules and Regulations.
- F. “IDX” means the internet data exchange process that provides a means or mechanism for MLS listings to be integrated within a Website.



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- G. "IDX Website" means a Website that is capable of integrating the IDX listing information within the Website.
- H. "Moveinmichigan.com" means the Website owned and operated by Realcomp that allows the general public to search information concerning real estate listings from Realcomp.
- I. "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 Realcomp.
- J. "Approved Website" means a Website to which Realcomp or Realcomp MLS provides information concerning listings for publication including, but not limited to, Realcomp Member IDX Websites, Moveinmichigan.com, and Realtor.com.
- K. "Exclusive Right to Sell Listing" means a listing agreement under which the property owner or principal appoints a real estate broker as his or her exclusive agent for a designated period of time, to sell the property on the owner's stated terms, and agrees to pay the broker a commission when the property is sold, whether by the broker, the owner or another broker, and any additional definition that Realcomp ascribes to the term "Exclusive Right to Sell Listing."
- L. "Exclusive Agency Listing" means a listing agreement that authorizes the listing broker, as an exclusive agent, to offer cooperation and compensation on a blanket unilateral basis, but also reserves to the seller a general right to sell the property on an unlimited or restrictive basis, and any additional definition that Realcomp ascribes to the term "Exclusive Agency Listing."

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- M. “Services of the MLS” means the benefits and services provided by the MLS to assist Realcomp Members in selling, leasing and valuing property and/or brokering real estate transactions. With respect to real estate brokers or agents representing home sellers, Services of the MLS shall include, but are not limited to:
1. having the property included among the listings in the MLS in a manner so that information concerning the listing is easily accessible by cooperating brokers; and
  2. having the property publicized through means available to the MLS including, but not limited to, information concerning the listing being made available on Moveinmichigan.com, Realtor.com and IDX Websites.
- N. “Full Service” means a listing broker will provide all of the following services: (1) Arrange appointments for cooperating brokers to show listed property to potential purchasers; (2) Accept and present to the seller(s) offers to purchase procured by cooperating brokers; (3) Advise the seller(s) as to the merits of offers to purchase; (4) Assist the seller( s) in developing, communicating, or presenting counteroffers; and (5) Participate on behalf of the seller(s) in negotiations leading to the sale of the listed property.
- O. “Other Lawful Listing” means a listing agreement, other than an Exclusive Right to Sell Listing or Exclusive Agency Listing, which is in compliance with applicable state laws and regulations, including but not limited to, Limited Service listings and MLS Entry Only listings.
- P. “Limited Service Listing” means a listing agreement in which the listing broker will not provide one or more of the following services: (1) Arrange appointments for cooperating brokers to show listed property to potential purchasers; (2) Accept and present to the

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seller(s) offers to purchase procured by cooperating brokers; (3) Advise the seller(s) as to the merits of offers to purchase; (4) Assist the seller(s) in developing, communicating, or presenting counteroffers; and (5) Participate on behalf of the seller(s) in negotiations leading to the sale of the listed property.

- Q. “MLS Entry Only Listing” means a listing agreement in which the listing broker will not provide any of the following services: (1) Arrange appointments for cooperating brokers to show listed property to potential purchasers; (2) Accept and present to the seller(s) offers to purchase procured by cooperating brokers; (3) Advise the seller(s) as to the merits of offers to purchase; (4) Assist the seller(s) in developing, communicating, or presenting counteroffers; and (5) Participate on behalf of the seller(s) in negotiations leading to the sale of the listed property.

**II.**

**IT IS FURTHER ORDERED** that Respondent Realcomp, directly or indirectly, or through any corporation, subsidiary, division, or other device, in connection with the operation of a Multiple Listing Service or Approved Websites in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, shall forthwith cease and desist from adopting or enforcing any policy, rule, practice or agreement of Realcomp that denies, restricts or interferes with the ability of Realcomp Members 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 that:

- A. prevents Realcomp Members from offering or accepting Exclusive Agency Listings or any Other Lawful Listings;
- B. prevents Realcomp Members from cooperating with listing brokers or agents that offer or accept Exclusive Agency Listings or any Other Lawful Listings;

## Final Order

- C. prevents Realcomp Members, or the sellers of properties who have entered into lawful listing agreements with Realcomp Members, from publishing information concerning listings offered pursuant to Exclusive Agency Listings or any Other Lawful Listings on the Realcomp MLS and Approved Websites;
- D. denies or restricts the Services of the MLS to Exclusive Agency Listings or any Other Lawful Listings in any way that such Services of the MLS are not denied or restricted to Exclusive Right to Sell Listings;
- E. as pertaining to the searching, sorting, ordering, transmission, downloading, or displaying of information pertaining to such listings, treats 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, practice or agreement that:
  - 1. discriminates against Exclusive Agency Listings or Other Lawful Listings in the property search functions in the Realcomp MLS by defaulting to another listing type;
  - 2. defaults the searches in the Realcomp MLS to Exclusive Right to Sell/Full Service Listings and Unknown listings; or
  - 3. associates Exclusive Right to Sell Listings with Full Service, and/or that does not allow Exclusive Right to Sell/Limited Service Listings and Exclusive Right to Sell/MLS Entry Only Listings; or
- F. in any other respect, treats Exclusive Agency Listings, or any Other Lawful Listings, in a less advantageous manner than Exclusive Right to Sell Listings or any Other Lawful Listing.

*Provided, however,* that nothing herein shall prohibit the Respondent from adopting or enforcing any policy, rule, practice or agreement regarding subscription or participation requirements,

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payment of dues, administrative matters, or any other policy, rule, practice or agreement, that it can show is reasonably ancillary to the legitimate and beneficial objectives of the MLS.

**III.**

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

**IV.**

**IT IS FURTHER ORDERED** that, within ninety (90) days after the date this Order becomes final, Respondent shall (1) inform each Realcomp Member of the amendments to its rules and regulations to conform to the provisions of this Order; and (2) provide each Realcomp Member 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 Realcomp'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 Realcomp Member whose email address is known to Realcomp; (B) mail to any Realcomp Member whose email address is unknown 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; and (C) placing on the publicly accessible Realcomp Website ([www.Realcomp.com](http://www.Realcomp.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.

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**V.**

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

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

**VI.**

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

**VII.**

**IT IS FURTHER ORDERED** that this Order shall terminate on October 30, 2019.

By the Commission.

Complaint

IN THE MATTER OF

**K+S AKTIENGESELLSCHAFT  
AND  
INTERNATIONAL SALT COMPANY 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-4273; File No. 091 0086  
Complaint, November 9, 2009 - Decision, November 9, 2009*

This consent order addresses K+S AG's ("K+S"), and its subsidiary's, International Salt Company LLC ("ISCO"), acquisition of Morton International, Inc. ("Morton") and the anti-competitive effects that would result. The complaint alleges that the proposed acquisition would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, by lessening competition in Maine and Connecticut for the sale and delivery of bulk de-icing road salt. ISCO and Morton are the two principal bidders in the states of Maine and Connecticut for the sale and delivery of bulk de-icing salt. Post-acquisition, the combined entity will have a market share exceeding 70 percent in both Maine and Connecticut. To preserve the competition that otherwise would be eliminated by the acquisition, the consent agreement requires ISCO to divest to Commission-approved buyers, Eastern Salt and Granite State, assets sufficient to enable these buyers to become viable competitors for the de-icing salt business in the relevant markets beginning with the 2010-2011 bidding cycle. With the divested assets, Granite State will be well positioned to compete for future business in Connecticut and to deliver salt to customers in a timely manner.

*Participants*

For the *Commission*: Joseph Brownman, Michelle Fetterman, Jill M. Frumin, Jeanne Liu, and Stephanie Reynolds.

For the *Respondents*: Andrea Agathoklis, Daniel J. Fletcher, Bruce C. McCulloch and Paul L. Yde, Freshfields Bruckhaus Deringer US LLP; Jeremy Calsyn and George Cary, 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

## Complaint

by said Acts, the Federal Trade Commission (“Commission”), having reason to believe that Respondent K+S Aktiengesellschaft (“K+S”), a corporation, parent of Respondent International Salt Company LLC (“ISCO”), and The Dow Chemical Company (“Dow”), a corporation, both subject to the jurisdiction of the Commission, have agreed to an acquisition of Morton International, Inc. (“Morton”), from Dow 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 K+S is a German stock 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 Bertha-von-Suttner Str. 7, 34131 Kassel, Germany.

2. Respondent ISCO is a Delaware limited liability company, existing, and doing business under and by virtue of the laws of the United States as a wholly-owned subsidiary of K+S, with its offices and principal place of business located at 655 Northern Boulevard, Clarks Summit, Pennsylvania 18411.

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

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



Complaint

## II.

### **THE PROPOSED TRANSACTION**

5. Pursuant to a Stock Purchase Agreement dated April 1, 2009 (the “Agreement”), K+S proposes to acquire Morton, from Dow, for approximately \$1.675 billion (the “Acquisition”).

## III.

### **THE RELEVANT MARKETS**

6. The relevant product market in which to analyze the effects of the Acquisition is the sale and delivery of bulk de-icing salt.

7. The relevant geographic areas in within which to analyze the effects of the Acquisition are the states of Maine and Connecticut.

## IV.

### **STRUCTURE OF THE MARKET**

8. The markets for the sale and delivery of bulk de-icing salt to customers in Maine and Connecticut are highly concentrated as measured by the Herfindahl-Hirschman Index (“HHI”). Post-acquisition, a combined ISCO and Morton will have a market share in excess of 70 percent in both Maine and Connecticut. Post-merger HHIs for Maine and Connecticut are 5,142 and 5,834, and the acquisition will increase HHI levels by 1,914 and 2,642, respectively. These market concentration levels far exceed the thresholds set out in the *Horizontal Merger Guidelines* and thus create a presumption that the proposed merger will create or enhance market power.

9. ISCO and Morton are actual and substantial competitors in the relevant markets. They are two of a small number of firms in the relevant markets and are the principal bidders for the sale and delivery of bulk de-icing salt to customers in the states of Maine and Connecticut. The percentage of bids won by ISCO and

## Complaint

Morton exceeds 50 percent for each of these states during each of the last three years.

## V.

**ENTRY CONDITIONS**

10. Entry into the relevant markets would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the Acquisition as set forth in Paragraph 11 below. Entry into the relevant markets is a difficult process because of, among other things, the lack of acceptable stockpile space along the coasts of Maine and Connecticut upon which to store bulk de-icing road salt. As a result, new entry into the relevant markets sufficient to achieve a significant market impact within two years is unlikely.

## VI.

**EFFECTS OF THE ACQUISITION**

11. The effect 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 Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

- a. by eliminating actual, direct, and substantial competition between ISCO and Morton in the markets for the sale and delivery of bulk de-icing salt in Maine and Connecticut;
- b. by increasing the ability of ISCO to raise prices unilaterally in the markets for the sale and delivery of bulk de-icing salt in Maine and Connecticut; and
- c. by increasing the likelihood of coordinated interaction among ISCO and the few remaining firms in the markets for the sale and delivery of bulk de-icing salt in Maine and Connecticut.

Decision and Order

**VII.****VIOLATIONS CHARGED**

12. The Agreement described in Paragraph 5 constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

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

**WHEREFORE, THE PREMISES CONSIDERED**, the Federal Trade Commission on this ninth day of November, 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 of Morton International, Inc. (“Morton”), from The Dow Chemical Company (“Dow”), by K+S Aktiengesellschaft (“K+S”), the parent of International Salt Company LLC (“ISCO”), and K+S and ISCO, hereinafter sometimes referred to as “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 (AConsent Agreement”), containing an admission by

## Decision and Order

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

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

1. Respondent K+S is a German stock 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 Bertha-von-Suttner Str. 7, 34131 Kassel, Germany.
2. Respondent International Salt Company LLC is a Delaware limited liability company, existing and doing business under and by virtue of the laws of the United States as a wholly-owned subsidiary of K+S, with its offices and principal place of business located at 655 Northern Boulevard, Clarks Summit, Pennsylvania 18411.
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.

## Decision and Order

**ORDER****I.**

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

- A. “Acquisition” means the acquisition of Morton International, Inc., a subsidiary of The Dow Chemical Company, by K+S.
- B. “Commission” means the Federal Trade Commission.
- C. “Commission-approved Acquirer” means each acquirer approved by the Commission pursuant to Paragraph II. and Paragraph III. (or Paragraph VI.) of this Order. If approved by the Commission, “Commission-approved Acquirer” includes Eastern and Granite State.
- D. “Connecticut Book of Business” means all rights to contracts between Respondent ISCO and the State of Connecticut for delivery of Deicing Salt in the state for the period beginning in the winter season of 2009 through April 30, 2010, to no fewer than five divisions and underlying municipalities, approved by the appropriate governmental entities, with awarded volume of Deicing Salt totaling approximately 75,000 tons of Deicing Salt; provided, however, that for purposes of the Granite State Divestiture Agreement that is referenced and attached to this Order, “Connecticut Book of Business” means the Customer contracts as described in Disclosure Schedule 4.03 of that agreement. “Connecticut Book of Business” includes all books, records, and other information necessary to allow Granite State (or another Commission-approved Acquirer of the Connecticut Divestiture Assets) to perform under the included contracts but shall not include any of Respondent ISCO’s historical information (bid, cost, or pricing) relating to this or any other contract.

## Decision and Order

- E. “Connecticut Divestiture Assets” means
1. Connecticut Stockpile Space,
  2. Connecticut Book of Business,
  3. Other Services, and
  4. Connecticut Supply.
- F. “Connecticut Stockpile Space” means access to approximately 80,000 square feet of contiguous stockpile space with a capacity of approximately 70,000 tons located at the New Haven Terminal for a period at least through May 31, 2010.
- G. “Connecticut Supply” means a supply of Deicing Salt, consistent with Paragraph III.C. of this Order.
- H. “Customers” means the Connecticut and Maine governmental entities that acquire Deicing Salt on behalf of the respective states and municipalities as part of the Connecticut Book of Business or the Maine Book of Business.
- I. “Deicing Salt” means salt (sodium chloride) used to melt snow and ice on roads and highways.
- J. “Direct Cost” means the cost of: (1) labor, materials and other costs necessary to mine the Deicing Salt; (2) the transportation of the Deicing Salt from the mine to the loading port; (3) the cost of freight from the loading port to New Haven, CT, via ocean-going vessel; (4) the cargo insurance; and (5) an allocation of SPL’s overhead costs attributable to the Deicing Salt provided to ISCO in the ordinary course of business; provided however, that for purposes of the Connecticut Salt Supply Agreement between Respondents and Granite State that is referenced and attached to this Order, “Direct Cost” means the cost of supply as provided in that Agreement.

## Decision and Order

- K. “Divestiture Agreement” means the agreements, licenses, assignments, and all other agreements entered into between the Commission-approved Acquirers and Respondents and approved by the Commission pursuant to Paragraph II. and Paragraph III. (or Paragraph VI.) of this Order; if approved by the Commission, “Divestiture Agreement” includes the Eastern Divestiture Agreement, the Granite State Divestiture Agreement, and the Connecticut Salt Supply Agreement.
- L. “Divestiture Assets” means the assets required by this Order to be divested and includes all of the following:
1. Maine Divestiture Assets,
  2. Searsport Stockpile Space, and
  3. Connecticut Divestiture Assets.
- M. “Divestiture Trustee” means a trustee appointed by the Commission pursuant to Paragraph VI. of this Order.
- N. “Eastern” means Eastern Salt Company, Inc., 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 134 Middle Street, Suite 210, Lowell, MA 01852.
- O. “Eastern Divestiture Agreement” means the “Asset Purchase Agreement (Maine),” including all exhibits, appendices, and annexes, executed by Eastern and ISCO on September 10, 2009, and attached to this Order as Confidential Appendix A.
- P. “Gateway” means Gateway Terminal, the full service independent terminal operator headquartered in New Haven, Connecticut, which provides space for Deicing Salt and Other Services.

## Decision and Order

- Q. “Granite State” means Granite State Minerals, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of New Hampshire with its office and principal place of business located at 227 Market St., Portsmouth, NH 03801.
- R. “Granite State Divestiture Agreement” means the “Asset Purchase Agreement (Connecticut),” including all exhibits, appendices, and annexes, executed by Granite State and Respondents on September 10, 2009, and attached to this Order as Confidential Appendix B.
- S. “K+S” means K+S Aktiengesellschaft, its directors, officers, employees, agents, representatives, successors, and assigns; its parents, joint ventures, subsidiaries, divisions, groups and affiliates controlled by K+S, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- T. “ISCO” means International Salt Company LLC.
- U. “Maine Book of Business” means all rights to contracts between Respondent ISCO and the State of Maine Department of Transportation Region 1 (“Maine DOT Region 1”) requiring delivery of Deicing Salt, and between Respondent ISCO and Greater Portland Council of Governments (“GPCOG”), requiring delivery of untreated Deicing Salt, based on awarded volumes totaling approximately 100,000 tons of Deicing Salt in the state of Maine for the period beginning in the winter season of 2009 and ending in the spring of 2010, approved by the appropriate governmental entities in the state; provided, however, that for purposes of the Eastern Divestiture Agreement that is referenced and attached to this Order, “Maine Book of Business” means the Customer contracts as described in Disclosure Schedule 4.03(a) of that agreement. “Maine Book of Business” includes all books, records, and other information necessary to allow Eastern (or another



## Decision and Order

Commission-approved Acquirer of the Maine Divestiture Assets) to perform under the included contracts but shall not include any of Respondent ISCO's historical information (bid, cost, or pricing) relating to this or any other contract.

- V. "Maine Divestiture Assets" means:
1. Maine Stockpile Space,
  2. Maine Book of Business, and
  3. Other Services.
- W. "Maine Stockpile Space" means access to at least 40,000 square feet of contiguous stockpile space with a capacity of approximately 40,000 tons located at the Portland Terminal for a period at least through April 30, 2012.
- X. "McCabe" means McCabe Bait Co., Inc., a company providing general freight trucking and Other Services, located at 136 North St., Kennebunk, ME 04046.
- Y. "Monitor" means the independent third party appointed by the Commission pursuant to Paragraph V. of this Order.
- Z. "New Haven Terminal" means the terminal located at 400 Waterfront Street, New Haven, CT 06512, owned and operated by Gateway.
- AA. "Other Services" means all services provided in connection with Deicing Salt after the Deicing Salt has been transported by ship to the port, including but not limited to offloading the Deicing Salt from vessels, stevedoring, stockpiling or building the stockpile, transporting Deicing Salt from the vessel to the stockpile and from the stockpile to the ultimate customer, drayage of the product to the stockpile, wharfage, and scaling or weighing trucks.

## Decision and Order

- BB. “Portland Terminal” means the terminal located at 59 Main Street, South Portland, ME, owned and operated by Sprague.
- CC. “Respondents” means K+S and ISCO, individually and collectively.
- DD. “SPL” means Sociedad Punta de Lobos, a wholly-owned subsidiary of K+S, located at Tajamar 183, Las Condes, Santiago, Chile.
- EE. “Searsport Stockpile Space” means access to approximately 2.75 acres of contiguous stockpile space with a capacity of approximately 90,000 tons located at the Searsport Terminal for a period at least through April 30, 2011.
- FF. “Searsport Terminal” means the terminal located at Mack Point – Trundy Road, Searsport, ME 04974, owned and operated by Sprague.
- GG. “Sprague” means Sprague Energy Corp, headquartered in Portsmouth, New Hampshire, which provides space for Deicing Salt and Other Services.
- HH. “Stockpile” means a pile of salt at a storage terminal.
- II. “Third Party” means an entity other than Respondents or a Commission-approved Acquirer, including but not limited to the Maine Department of Transportation, the Greater Portland Council of Governments, Sprague, Gateway, McCabe, and the Connecticut Department of Transportation.

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

- A. By no later than twenty (20) days after the Acquisition occurs, Respondents shall divest the Maine Divestiture Assets to Eastern pursuant to and in accordance with the Eastern Divestiture Agreement, absolutely and in

## Decision and Order

good faith, and at no minimum price; *provided, however,* that if Respondents have divested the Maine Divestiture Assets to Eastern prior to the date this Order becomes final and if, at the time the Commission determines to make this Order final:

1. The Commission determines and notifies Respondents that Eastern is not an acceptable acquirer of the Maine Divestiture Assets, then Respondents shall immediately rescind the transaction with Eastern and shall divest the Maine Divestiture Assets no later than 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; or
  2. The Commission determines and notifies 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 VI. of this Order, to effect such modifications to the manner of divesting the Maine Divestiture Assets to Eastern (including, but not limited to, entering into additional agreements or arrangements) as may be necessary to satisfy the requirements of this Order.
- B. If Respondents have divested the Maine Divestiture Assets to Eastern (or another Commission-approved Acquirer) pursuant to the Eastern Divestiture Agreement (or another Divestiture Agreement), and the Commission has approved Eastern (or another Commission-approved Acquirer) and the manner in which the divestiture was accomplished, then solely at the option of Eastern (or another Commission-approved Acquirer), Respondents shall divest the Searsport Stockpile Space to Eastern (or another Commission-approved Acquirer) no later than August 15, 2010, pursuant to the terms applicable to

## Decision and Order

divestiture of the Searsport Stockpile Space as included in the Eastern Divestiture Agreement (or another Divestiture Agreement).

- C. Prior to completing the Acquisition, Respondents shall:
1. Obtain all consents and approvals from all Third Parties and satisfy all other conditions required to transfer all rights and divest all assets as required by Paragraph II.A., including obtaining any consents or waivers of, or making any payments to, Third Parties; and
  2. Provide written notification to all Customers that Deicing Salt provided as part of the Maine Book of Business divested to the Commission-approved Acquirer will be provided by the Commission-approved Acquirer and not by Respondents.
- D. The Eastern Divestiture Agreement (or any other Divestiture Agreement effectuating divestiture of the Maine Divestiture Assets) shall not limit or contradict, or be construed to limit 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 any Commission-approved Acquirer or to reduce any obligations of Respondents under such agreements, and each such agreement, if approved by the Commission as the Divestiture Agreement, shall be incorporated by reference into this Order and made a part hereof. Respondents shall comply with all terms of the Eastern Divestiture Agreement (or any other Divestiture Agreement effectuating divestiture of the Maine Divestiture Assets), and any breach by Respondents of any term of the Eastern Divestiture Agreement (or any other Divestiture Agreement effectuating divestiture of the Maine Divestiture Assets) shall constitute a violation of this Order. If any term of the Eastern Divestiture Agreement (or any other Divestiture Agreement effectuating divestiture of the Maine Divestiture Assets) varies from the terms of

## Decision and Order

this Order (“Order Term”), then to the extent that Respondents cannot fully comply with both terms, the Order Term shall determine Respondents’ obligations under this Order. Any material modification of the Eastern Divestiture Agreement (or any other Divestiture Agreement effectuating divestiture of the Maine Divestiture Assets) between the date the Commission approves the Divestiture Agreement and the Closing Date, 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 violation of this Order. Notwithstanding any paragraph, section, or other provision of the Divestiture Agreements, for a period of five (5) years after the relevant Closing Date, any modification of a Divestiture Agreement, without the approval of the Commission, shall constitute a failure to comply with this Order. Respondents shall provide written notice to the Commission not more than five (5) days after any modification (material or otherwise) of the Divestiture Agreement, or after any failure to meet any condition precedent (material or otherwise) to closing (whether waived or not).

- E. Until Respondents comply with Paragraph II. (and Paragraph VI.) of this Order, Respondents shall take such actions as are necessary to maintain the viability and marketability of the Maine Divestiture Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of the Maine Divestiture Assets.
- F. The purpose of the divestiture of the Maine Divestiture Assets, the Searsport Stockpile Space, and the additional requirements in Paragraph II. is to ensure the continued use of the assets in the same business in which the assets were engaged at the time of the announcement of the proposed Acquisition by Respondents and to remedy the lessening of competition in the sale and delivery of Deicing Salt in Maine resulting from the Acquisition as alleged in the Commission’s complaint.

## Decision and Order

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

- A. By no later than twenty (20) days after the Acquisition occurs, Respondents shall divest the Connecticut Divestiture Assets to Granite State pursuant to and in accordance with the Granite State Divestiture Agreement, absolutely and in good faith, and at no minimum price; *provided, however,* that if Respondents have divested the Connecticut Divestiture Assets to Granite State prior to the date this Order becomes final and if, at the time the Commission determines to make this Order final:
1. The Commission determines and notifies Respondents that Granite State is not an acceptable acquirer of the Connecticut Divestiture Assets, then Respondents shall immediately rescind the transaction with Granite State and shall divest the Connecticut Divestiture Assets no later than 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; or
  2. The Commission determines and notifies 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 VI. of this Order, to effect such modifications to the manner of divesting the Connecticut Divestiture Assets to Granite State (including, but not limited to, entering into additional agreements or arrangements) as may be necessary to satisfy the requirements of this Order.

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- B. Prior to completing the Acquisition, Respondents shall:
1. Obtain all consents and approvals from Third Parties and satisfy all other conditions required to transfer all rights and divest all assets as required by Paragraph III., including obtaining any consents or waivers of, or making any payments to, Third Parties;
  2. Provide written notification to all Customers that Deicing Salt provided as part of the Connecticut Book of Business divested to the Commission-approved Acquirer will be provided by the Commission-approved Acquirer and not by Respondents.
- C. To enable the Commission-approved Acquirer of the Connecticut Divestiture Assets to supply customers with Deicing Salt (“Connecticut Supply”) at an identical level, in an identical manner, and of identical quality as Respondents supplies customers with Deicing Salt, Respondents shall, pursuant to an agreement approved by the Commission (“Connecticut Salt Supply Agreement”):
1. Provide to the Commission-approved Acquirer of the Connecticut Divestiture Assets, at the option of the Commission-approved Acquirer
    - a. for a period of up to 36 consecutive months (the 36-month period to be determined by the Commission-approved Acquirer);
    - b. up to 120,000 tons of Deicing Salt per year, such quantity to be determined by the Commission-approved Acquirer of the Connecticut Divestiture Assets; provided, however, if the Connecticut Book of Business requires the Commission-approved Acquirer of the Connecticut Divestiture Assets to supply more than 120,000 tons of Deicing Salt in the

## Decision and Order

(1) 2009-2010 contract year for the Connecticut Book of Business, and (2) the 2010-2011 contract year if the state of Connecticut extends the period of performance for the Connecticut Book of Business, Respondent ISCO shall provide the required Deicing Salt to the Commission-approved Acquirer consistent with this paragraph;

- c. at no more than Direct Cost.
2. Use reasonable efforts to minimize its costs in connection with the supply of Deicing Salt to the Commission-approved Acquirer in a manner that is consistent with Respondents' efforts to provide Deicing Salt to its own New Haven stockpiles; and
  3. Ensure that in the event of any Deicing Salt supply disruption:
    - a. alternative arrangements shall be made for the required Deicing Salt delivery to the Commission-approved Acquirer to commence as soon as possible;
    - b. the Commission-approved Acquirer's priority to receive Deicing Salt shall be restored as if the disrupting event had not occurred; and
    - c. the Commission-approved Acquirer will not be prejudiced relative to Respondent's operations in relation to the transport and delivery of Deicing Salt for the Commission-approved Acquirer's own account or on behalf of any of its affiliates.
- D. The Granite State Divestiture Agreement and the Connecticut Supply Agreement (or any other Divestiture Agreements effectuating divestiture of the Connecticut Divestiture Assets) shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that nothing in



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this Order shall be construed to reduce any rights or benefits of any Commission-approved Acquirer or to reduce any obligations of Respondents under such agreements, and each such agreement, if approved by the Commission as the Divestiture Agreements, shall be incorporated by reference into this Order and made a part hereof. Respondents shall comply with all terms of the Divestiture Agreements, and any breach by Respondents of any term of the Divestiture Agreements shall constitute a violation of this Order. If any term of the Divestiture Agreements varies from the terms of this Order (“Order Term”), then to the extent that Respondents cannot fully comply with both terms, the Order Term shall determine Respondent’s obligations under this Order. Any material modification of any Divestiture Agreement between the date the Commission approves the Divestiture Agreement and the Closing Date, 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 violation of this Order. Notwithstanding any paragraph, section, or other provision of the Divestiture Agreements, for a period of five (5) years after the relevant Closing Date, any modification of a Divestiture Agreement, without the approval of the Commission, shall constitute a failure to comply with this Order. Respondents shall provide written notice to the Commission not more than five (5) days after any modification (material or otherwise) of the Divestiture Agreement, or after any failure to meet any condition precedent (material or otherwise) to closing (whether waived or not).

- E. Until Respondents comply with Paragraph III. (and Paragraph VI.) of this Order, Respondents shall take such actions as are necessary to maintain the viability and marketability of the Connecticut Divestiture Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of the Connecticut Divestiture Assets.

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- F. The purpose of the divestiture of the Connecticut Divestiture Assets and the additional requirements in Paragraph III. is to ensure the continued use of the assets in the same business in which the assets were engaged at the time of the announcement of the proposed Acquisition by Respondents and to remedy the lessening of competition in the sale and delivery of Deicing Salt in Connecticut resulting from the Acquisition as alleged in the Commission's complaint.

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

- A. If the Commission-approved Acquirer is unable to satisfy the terms of the Connecticut Book of Business or the Maine Book of Business, then ISCO shall perform under the terms as requested by the affected Customer as specified by the Customer in its formal consent to transfer its contract from ISCO to the Commission-approved Acquirer.
- B. Respondents shall not interfere with, or in any other way impede, the ability of the Commission-approved Acquirers to extend or enter into agreements with Sprague, Gateway, or other Third Parties, relating to the supply or sale of Deicing Salt in Connecticut and Maine.
- C. If any Customer, or person acting on behalf of any Customer, that would otherwise acquire Deicing Salt as part of the Connecticut Book of Business or the Maine Book of Business contacts Respondents with respect to placing an order, or places an order, for Deicing Salt, Respondents shall:
1. Notify the Customer-designated representative with responsibilities for procurement relating to that Customer, in such a manner that the representative receives the notification within 24 hours of the contact, or the placement of the order; and

## Decision and Order

2. Maintain an accurate and verifiable record of that contact.

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

- A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint a Monitor to assure Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order.
- B. 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 writing, including the reasons for opposing, the selection of any 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.
- C. Not later than ten (10) days after the appointment of the 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 relevant terms of the Order in a manner consistent with the purposes of the Order.
- D. If a Monitor is appointed by the Commission pursuant to this Paragraph V, 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 the Respondents' compliance with the terms of the Order, and shall exercise such power and authority and carry out the duties and

## Decision and Order

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 Respondents expeditiously comply with all of their obligations and perform all their responsibilities as required by the Order to Maintain Assets and the Decision and Order in this matter; and
  - b. monitoring Respondents compliance with the Granite State Supply Agreement.
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 Respondents' 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 the Respondents' compliance with their obligations under the 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 the Order.
  4. 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 necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all monies derived from the divestiture and all expenses incurred, including fees for services

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rendered, subject to the approval of the Commission.

5. 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 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 Monitor.
  6. The Monitor Agreement shall state that within one (1) month from the date the Monitor is appointed pursuant to this Paragraph V., and every sixty (60) days thereafter, the Monitor shall report in writing to the Commission concerning performance of their obligations under the Order.
  7. 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 the 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

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Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph V.

- 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 monitor appointed pursuant to the Order to Maintain Assets in this matter or the Divestiture Trustee pursuant to the relevant provisions of this Order.

**VI.**

**IT IS FURTHER ORDERED** that:

- A. If Respondents have not fully complied with their obligations to divest the Maine Divestiture Assets, the Searsport Stockpile Space, or the Connecticut Divestiture Assets as required by this Order, the Commission may appoint a trustee (“Divestiture Trustee”) to divest such assets and to effectuate the other provisions of this Order 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 divest the required assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

## Decision and Order

- B. The Commission shall select the Divestiture Trustee, subject to the consent of 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 effectuate the divestitures and satisfy the additional obligations required by Paragraph II. and Paragraph III. of 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 effectuate the divestitures and satisfy the additional obligations required by Paragraphs II. and III. of this Order.
  2. The Divestiture Trustee shall have twelve (12) months after the date the Commission approves the trust agreement described herein to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the Divestiture Trustee has submitted a plan to satisfy the obligations of Paragraphs II. and III., or

## Decision and Order

believes that such can be achieved within a reasonable time, the 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 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 divestitures. Any delays caused by Respondents shall extend the time 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 divestitures 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 or entities selected by Respondents from among those approved by the Commission; *provided further, however*, that



## Decision and Order

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 divestitures 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 divestitures 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.

## Decision and Order

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 divestitures.
  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 IV.
- 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 divestitures required by this Order.

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

- A. Within thirty (30) days after the date this Order becomes final, every sixty (60) Days thereafter until Respondents have fully complied with Paragraphs II.A. and II.C., III.A. and III.B (or Paragraph VI., as applicable), and every ninety (90) days thereafter until Respondents have complied with all remaining obligations of this Order and the Divestiture

## Decision and Order

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 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. A description of all substantive contacts or negotiations related to the divestitures 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 pursuant to Paragraph II. and Paragraph III. (or Paragraph VI., as applicable) of this Order.
- B. One year after the Order becomes final, annually for the next three (3) years on the anniversary of the date the Order becomes final, and at other times as the Commission may require, Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with the Order.

**VIII.**

**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.

**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

## Decision and Order

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.

By the Commission.

**Confidential Appendix A**

**[Redacted from Public Record Version but  
Incorporated by Reference]**

**Confidential Appendix B**

**[Redacted from Public Record Version but  
Incorporated by Reference]**

Analysis to Aid Public Comment

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

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") from K+S Aktiengesellschaft ("K+S"), and its subsidiary, International Salt Company LLC ("ISCO"), that is designed to remedy the anticompetitive effects that would otherwise result from K+S's proposed acquisition of Morton International, Inc. ("Morton"), from The Dow Chemical Company ("Dow"). Under the terms of the proposed Consent Agreement, K+S is required to divest assets related to its bulk de-icing salt business in Maine to an up-front buyer, Eastern Salt Company, Inc. ("Eastern Salt" or "Maine Purchaser"), and to divest assets related to its bulk de-icing salt business in Connecticut to an up-front buyer, Granite State Minerals, Inc. ("Granite State" or "Connecticut Purchaser").

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

Pursuant to a Stock Purchase Agreement dated April 1, 2009 (the "Agreement"), K+S proposes to acquire Morton from Dow for approximately \$1.675 billion (the "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 Maine and Connecticut for the sale and delivery of bulk de-icing road salt.

## Analysis to Aid Public Comment

**II. The Parties**

K+S is currently one of the world's leading suppliers of salt products. K+S sells salt into the United States through its U.S. subsidiary, ISCO. Morton, headquartered in Chicago, Illinois, and a wholly-owned subsidiary of Dow, is a leading salt vendor in North America. Morton produces consumer salt, industrial salt, and de-icing salt. The acquisition of Morton will make K+S the largest producer and distributor of de-icing road salt for customers in Maine and Connecticut.

**III. The Proposed Complaint**

According to the Commission's proposed Complaint, the relevant product market in which to assess the competitive effects of the proposed Acquisition is the sale and delivery of bulk de-icing salt. The evidence indicates that there are no practical substitutes for bulk de-icing salt to melt snow and ice. The relevant geographic markets in which to assess the impact of the proposed Acquisition are the states of Maine and Connecticut.

The relevant markets are highly concentrated. ISCO and Morton are the two principal bidders in the states of Maine and Connecticut for the sale and delivery of bulk de-icing salt. Post-acquisition, the combined entity will have a market share exceeding 70 percent in both Maine and Connecticut. Post-merger HHIs for Maine and Connecticut are 5,142 and 5,834, and the acquisition will increase HHI levels by 1,914 and 2,642, respectively. These market concentration levels far exceed the thresholds set forth in the *Horizontal Merger Guidelines* and thus create a presumption that the proposed merger will create or enhance market power.

Entry into the relevant markets is difficult because, among other things, there is a lack of acceptable stockpile space along the coasts of Maine and Connecticut. As a result, new entry sufficient to achieve a significant market impact within two years is unlikely.

Finally, the Complaint alleges that the proposed Acquisition will reduce competition in the relevant markets by eliminating direct and substantial competition between ISCO and Morton, and

## Analysis to Aid Public Comment

by increasing the likelihood that ISCO would increase prices either unilaterally or through coordinated interaction with the few remaining firms in the relevant markets.

#### **IV. The Consent Agreement**

To preserve the competition that otherwise would be eliminated by the Acquisition, the proposed Consent Agreement requires ISCO to divest to Commission-approved buyers, Eastern Salt and Granite State, assets sufficient to enable these buyers to become viable competitors for the de-icing salt business in the relevant markets beginning with the 2010-2011 bidding cycle. ISCO will divest to Eastern Salt the Maine Divestiture Assets, including: 1) stockpile space in the state, 2) all associated handling and trucking contracts, and 3) a book of de-icing salt business for the 2009-2010 winter season. ISCO will divest to Granite State the Connecticut Divestiture Assets, including: 1) stockpile space in the state, 2) all associated handling and trucking contracts, 3) a book of de-icing salt business for the 2009-2010 winter season, and 4) a three-year supply of de-icing salt at a price that is no more than ISCO's costs.

The Commission has preliminarily determined that Eastern Salt is a well-qualified buyer of the Maine Divestiture Assets and is well situated to replace the competition Morton provided in the state. Eastern Salt is a family-owned company that has been a de-icing salt supplier in other geographic markets along the East Coast for roughly 60 years. Eastern Salt is a vertically integrated supplier with a dependable, high-quality supply of de-icing salt. With the divested assets, Eastern Salt will be well positioned to compete for future business in Maine and to deliver salt to customers in a timely manner.

The Commission has preliminarily determined that Granite State is a well-qualified buyer of the Connecticut Divestiture Assets and is well situated to replace the competition Morton provided in the state. Granite State has experience supplying de-icing salt to customers in a number of states along the East Coast. The Consent Agreement requires ISCO to provide Granite State with a three-year supply of bulk de-icing salt at no more than ISCO's costs. The supply requirement will ensure that Granite State has a supply of salt in Connecticut during the 2010-2011 and

## Analysis to Aid Public Comment

2011-2012 bid cycles while Granite State develops the necessary supply arrangements to serve Connecticut customers in subsequent years. With the divested assets, Granite State will be well positioned to compete for future business in Connecticut and to deliver salt to customers in a timely manner.

The proposed Consent Agreement requires that the divestitures occur no later than twenty (20) days after the Acquisition is consummated. However, if ISCO divests the assets to Eastern Salt or Granite State during the public comment period, and if, at the time the Commission decides to make the Order final, the Commission notifies K+S or ISCO that either purchaser is not an acceptable acquirer or that the asset purchase agreement with the Maine Purchaser or Connecticut Purchaser is not an acceptable manner of divestiture, then ISCO must immediately rescind the transaction in question and divest those assets to another buyer within six (6) months of the date the Order becomes final. At that time, Respondents must divest those assets only to an acquirer and in a manner that receives the prior approval of the Commission. The proposed Consent Agreement also enables the Commission to appoint a trustee to divest any assets identified in the Order that K+S or ISCO has not divested to satisfy the requirements of the Order.

The proposed Consent Agreement further requires K+S and ISCO to maintain the viability and marketability of the Maine Divestiture Assets and the Connecticut Divestiture Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of those assets prior to divestiture.

In order to ensure that the Commission remains informed about the status of the divestitures, the proposed Consent Agreement requires K+S and ISCO to file reports with the Commission periodically until the divestitures are completed. Written reports describing how K+S and ISCO are complying with the Order must be filed one year after the Order becomes final and annually for the next three (3) years.

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



Complaint

IN THE MATTER OF

**EXPATEDGE PARTNERS, LLC**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4269; File No. 092 3138**Complaint, November 9, 2009 - Decision, November 9, 2009*

This consent order addresses respondent ExpatEdge Partners, LLC, providers of software and consulting services to businesses with employees residing outside of origin. Respondent manages tax and payroll issues for employees that work outside their country of residence. The complaint alleges the respondent violated Section 5 of the FTC Act by making false and misleading representations concerning ExpatEdge Partners's participation in the Safe Harbor privacy framework. Safe Harbor is an international program for international data transfer between the U.S. and the European Union. Respondent advertised an incorrect status as to its compliance with the program. The order prohibits ExpatEdge from making misrepresentations about its membership in any privacy, security, or any other compliance program sponsored by the government or any other third party.

*Participants*

For the *Commission*: Molly Crawford and Katie Ratté.

For the *Respondent*: David S. Kolb, President, *pro se*.

**COMPLAINT**

1. The Federal Trade Commission, having reason to believe that ExpatEdge Partners, LLC ("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 ExpatEdge Partners, LLC ("ExpatEdge") is a Minnesota limited liability corporation with its principal office or place of business at 750 Boone Avenue North, Suite 102, Minneapolis, Minnesota 55427.

2. Respondent is in the business of providing software and consulting services to businesses that offer "expatriate" programs to manage tax and payroll issues for

## Decision and Order

employees that work outside their country of residence, including through a website ([www.expatedge.com](http://www.expatedge.com)).

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

4. Since at least December 2002, respondent has set forth on its website, [www.expatedge.com](http://www.expatedge.com), privacy policies and statements about its practices, including statements related to its participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union (“U.S.-EU Safe Harbor Framework” or “Safe Harbor”).

#### **U.S.-EU SAFE HARBOR FRAMEWORK**

5. The U.S.-EU Safe Harbor Framework provides a method for U.S. companies to transfer personal data outside of Europe that is consistent with the requirements of the European Union Directive on Data Protection (“Directive”). Enacted in 1995, the Directive sets forth European Union (“EU”) requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission (“EC”) has made a determination that the recipient jurisdiction’s laws ensure the protection of such personal data. *See* Directive 95/46/EC of the European Parliament and of the Council (Oct. 24, 1995), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:HTML>. This determination is commonly referred to as meeting the EU’s “adequacy” standard.

6. To satisfy the EU adequacy standard for certain commercial transfers, the U.S. Department of Commerce (“Commerce”) and the EC negotiated the U.S.-EU Safe Harbor Framework, which went into effect in 2000. The Safe Harbor allows U.S. companies to transfer personal

## Complaint

data lawfully from the EU. To join the Safe Harbor, a company must self-certify to Commerce that it complies with seven principles and related requirements that have been deemed to meet the EU's adequacy standard.

7. Companies under the jurisdiction of the U.S. Federal Trade Commission ("FTC"), as well as the U.S. Department of Transportation, are eligible to join the Safe Harbor. A company under the FTC's jurisdiction that self-certifies to the Safe Harbor principles but fails to implement them may be subject to an enforcement action based on the FTC's deception authority under Section 5 of the Federal Trade Commission Act.

8. Commerce maintains a public website, [www.export.gov/safeharbor](http://www.export.gov/safeharbor), where it posts the names of companies that have self-certified to the Safe Harbor. The listing of companies indicates whether their self-certification is "current" or "not current." Companies are required to re-certify every year in order to retain their status as "current" members of the Safe Harbor framework. According to the Safe Harbor website, "Organizations should notify the Department of Commerce if their representation to the Department is no longer valid. Failure to do so could constitute a misrepresentation." See Safe Harbor List, available at <http://web.ita.doc.gov/safeharbor/shlist.nsf/webPages/safe+harbor+list>.

**VIOLATIONS OF SECTION 5 OF THE FTC ACT**

9. In November 2002, respondent submitted to Commerce a self-certification to the Safe Harbor, which it renewed in November 2003, November 2004, and November 2005.

10. In November 2006, respondent did not renew its self-certification to the Safe Harbor, and Commerce updated respondent's status to "not current" on its public website. To date, respondent has not renewed its self-certification to the Safe Harbor and remains in "not current" status on Commerce's website. (Exhibit A,

## Decision and Order

Declaration of Damon C. Greer).

11. From at least December 2002 until July 2009, respondent has disseminated or caused to be disseminated privacy policies and statements on the [www.expatedge.com](http://www.expatedge.com) website, including, but not limited to, the following statements:

ExpatEdge self-certifies the Policy to the U.S. Department of Commerce's Safe Harbor Privacy Program.

Exhibit B, December 2002 Privacy Policy; Exhibit C, Aug. 2004 Privacy Policy; Exhibit D, Dec. 2007 Privacy Policy; Exhibit E, Apr. 2009 Privacy Policy.

12. Through the means described in Paragraph 11, respondent represented, expressly or by implication, that it is a current participant in the Safe Harbor.

13. In truth and in fact, since November 2006, respondent has not been a current participant in the Safe Harbor. Therefore, the representations set forth in Paragraph 11 were, and are, false or misleading.

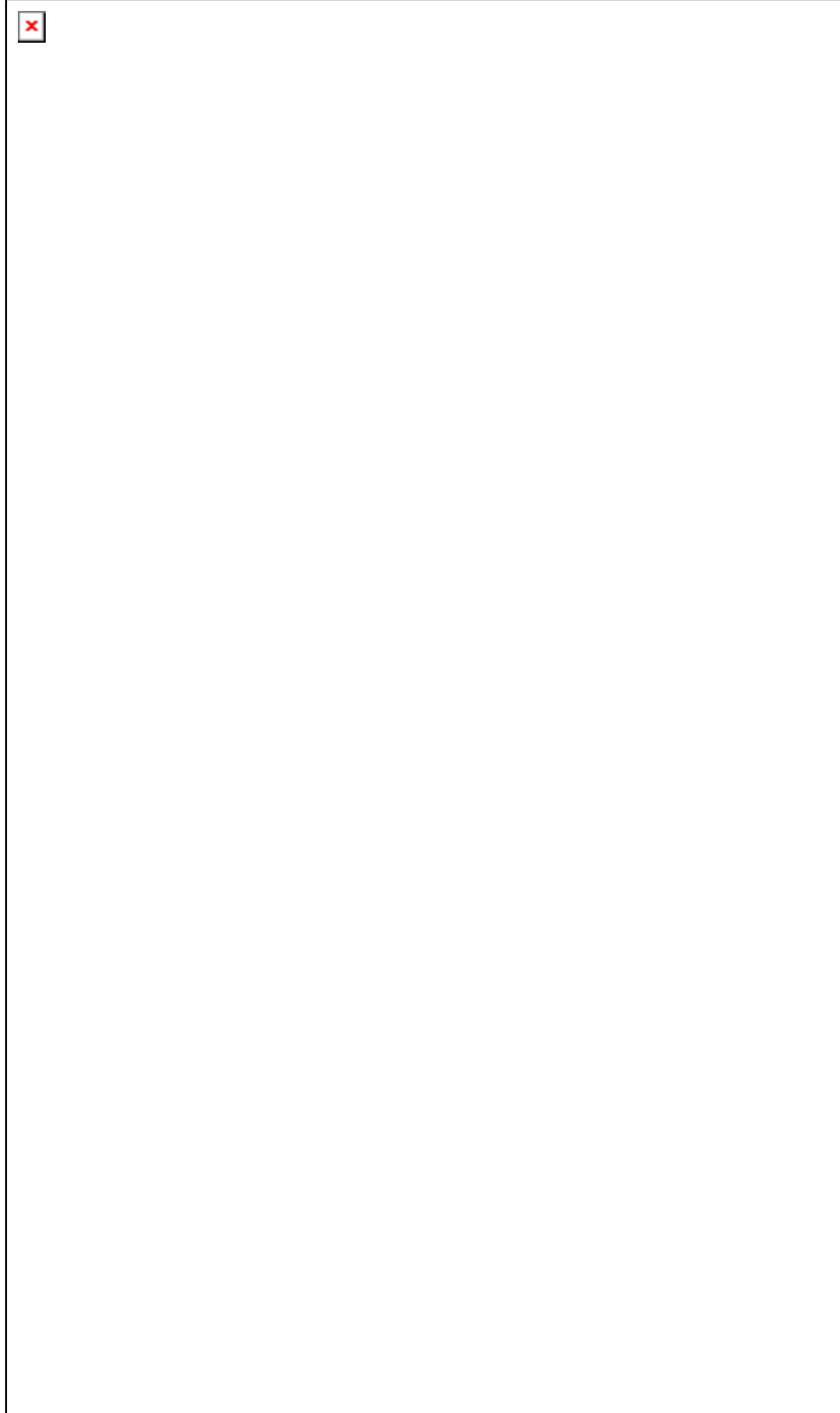
14. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

**THEREFORE**, the Federal Trade Commission this ninth day of November, 2009, has issued this complaint against respondent.

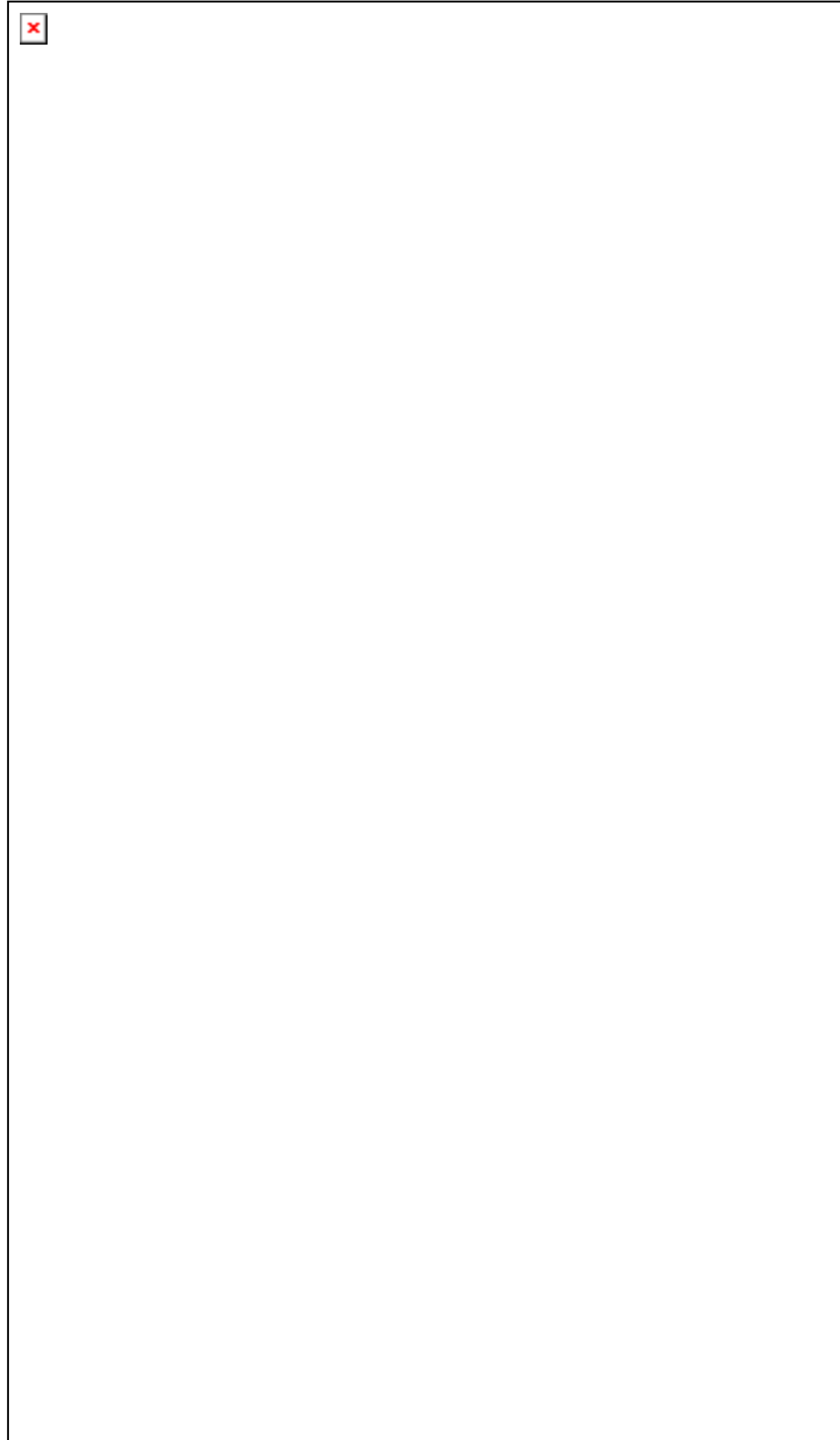
By the Commission.

Complaint

**Exhibit A**



Decision and Order



## Complaint

**Exhibit B**

ExpatEdge - Privacy Policy

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**EXPAT EDGE**

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**ExpatEdge® Privacy Policy**

This ExpatEdge, Inc. ("ExpatEdge") Privacy Policy (the "Policy") was developed as an extension of our commitment to combine the highest-quality products and services with the highest level of integrity in dealing with our valued customers, and the companies, businesses and organizations they represent (collectively, "you").

Sign up for our free newsletter

ExpatEdge self-certifies the Policy to the U.S. Department of Commerce's Safe Harbor Privacy Principles. If you have any questions about this Policy, wish to amend, delete or add to any of your information contained at the Site, or otherwise wish to contact ExpatEdge directly, please email us at [privacy@expatedge.com](mailto:privacy@expatedge.com) or call us at (650) 625-8161.

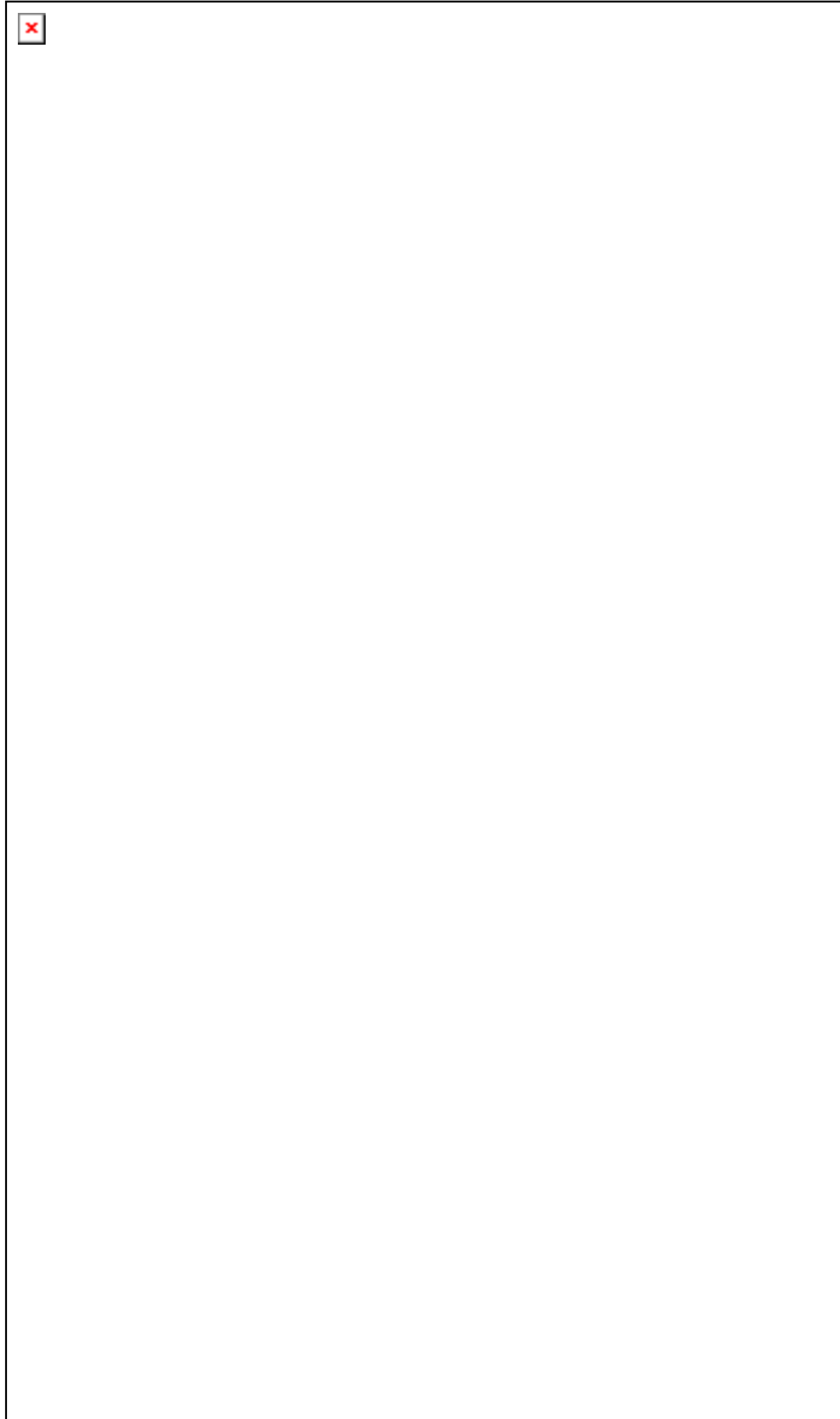
**IF YOU DO NOT AGREE TO THE POLICY, YOU SHOULD NOT USE THIS INTERNET WEBSITE (THE "SITE"). WE MAY MODIFY THE POLICY FROM TIME TO TIME AND POST THOSE MODIFICATIONS HERE. YOUR CONTINUED USE OF THE SITE AFTER ANY SUCH MODIFICATION CONSTITUTES YOUR ACCEPTANCE OF THE MODIFIED POLICY.**

**1. Information.** ExpatEdge obtains information from and about you in a number of different ways, including:

**A. General Information.** Some information is gathered automatically when you access the Site ("General Information"). This General Information (which includes Site pages visited, type of web browser used, type of operating system, and the domain name of your Internet Service Provider and similar Information) does not identify you personally.

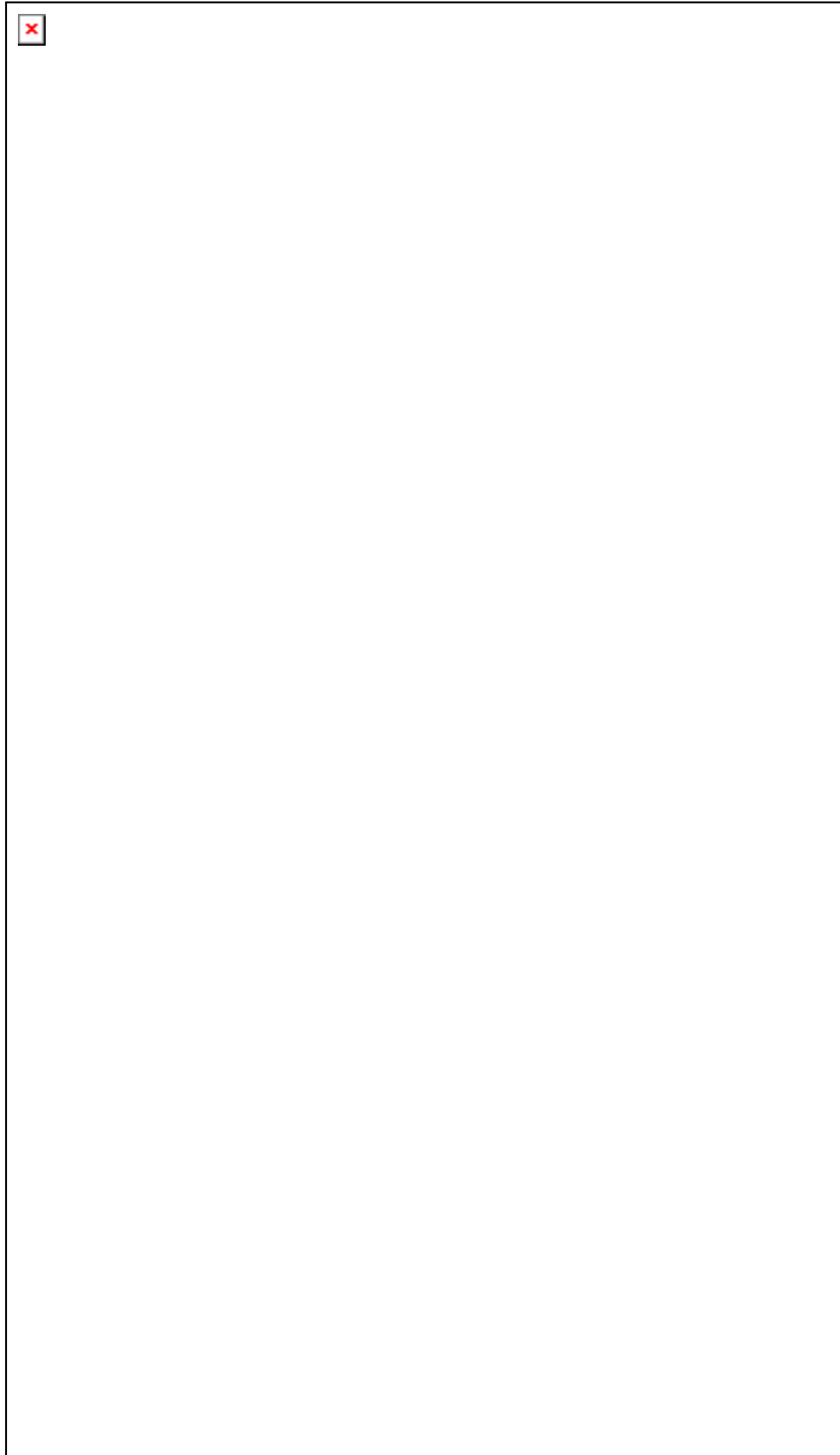
**B. Profile Information.** Some information is not gathered automatically, and is instead supplied by you voluntarily when you use or register for certain services at the Site ("Profile Information"). If you wish to provide Profile

Decision and Order

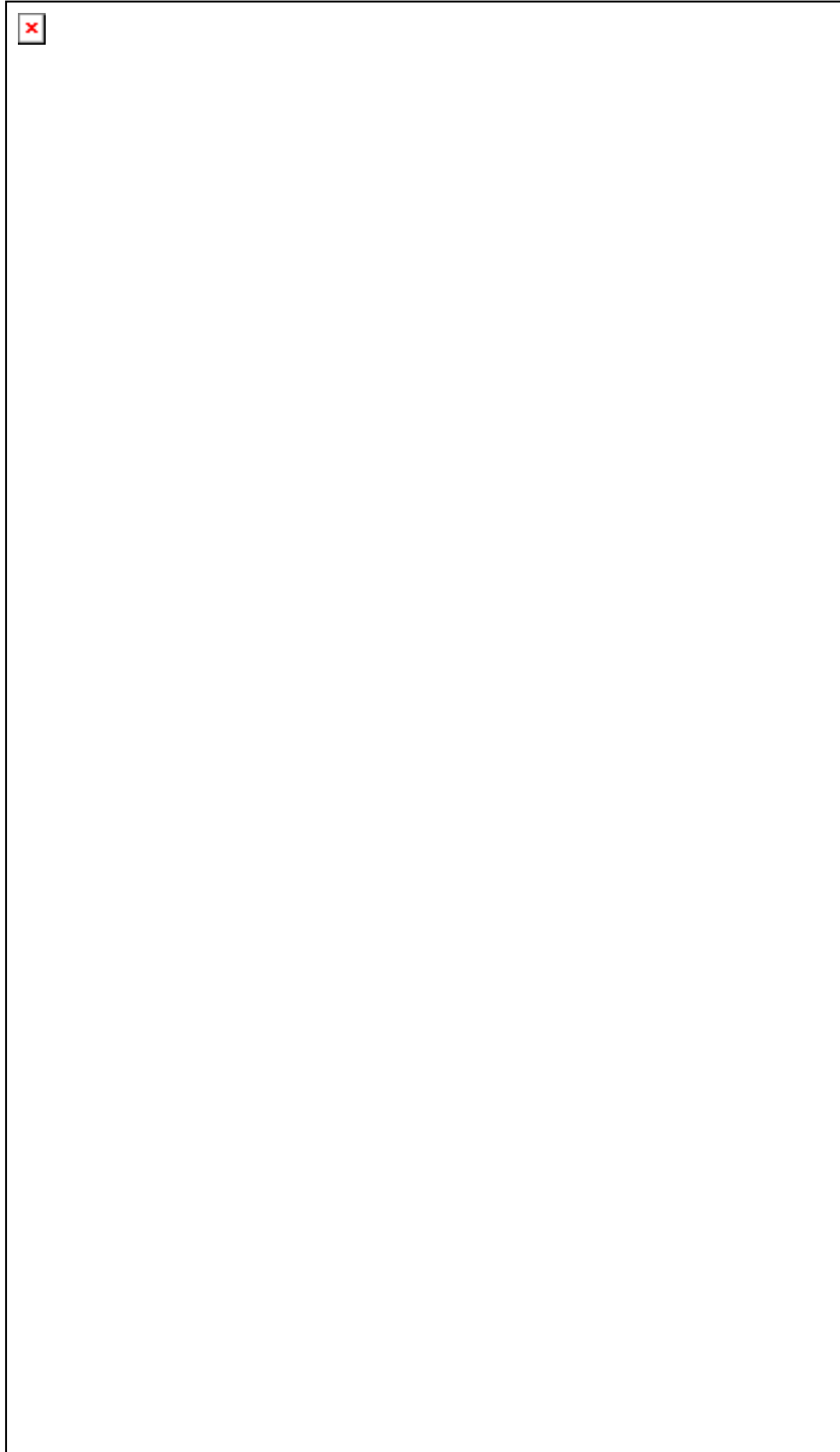




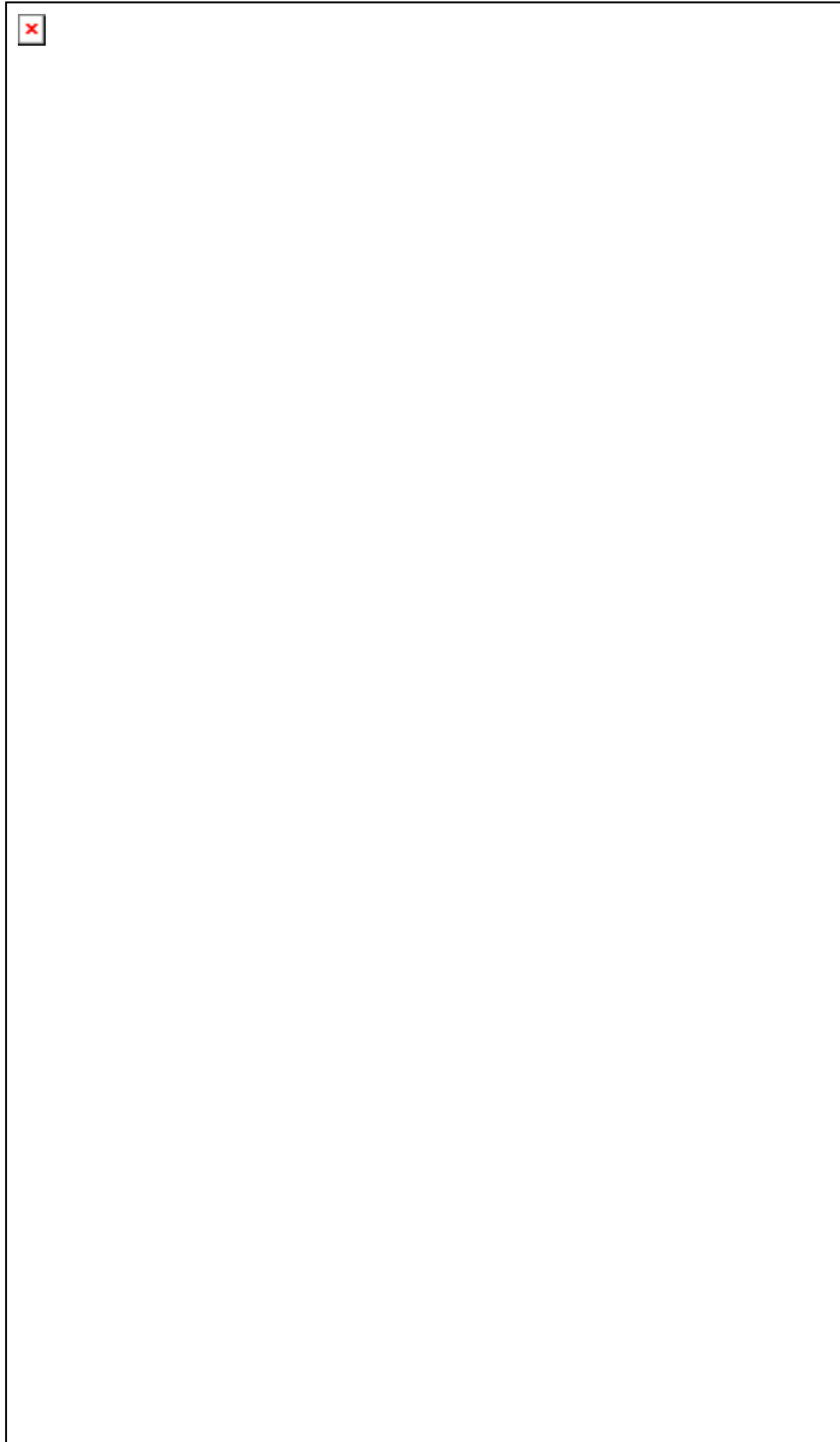
Complaint



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Complaint

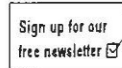
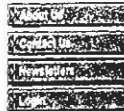


## Decision and Order

**Exhibit C**

ExpatEdge - Privacy Policy

Page 1 of 5

**ExpatEdge<sup>®</sup> Privacy Policy**

This ExpatEdge, Inc. ("ExpatEdge") Privacy Policy (the "Policy") was developed as an extension of our commitment to combine the highest-quality products and services with the highest level of integrity in dealing with our valued customers, and the companies, businesses and organizations they represent (collectively, "you").

ExpatEdge self-certifies the Policy to the U.S. Department of Commerce's Safe Harbor Privacy Principles. If you have any questions about this Policy, wish to amend, delete or add to any of your information contained at the Site, or otherwise wish to contact ExpatEdge directly, please email us at [privacy@expatedge.com](mailto:privacy@expatedge.com) or call us at (650) 625-8161.

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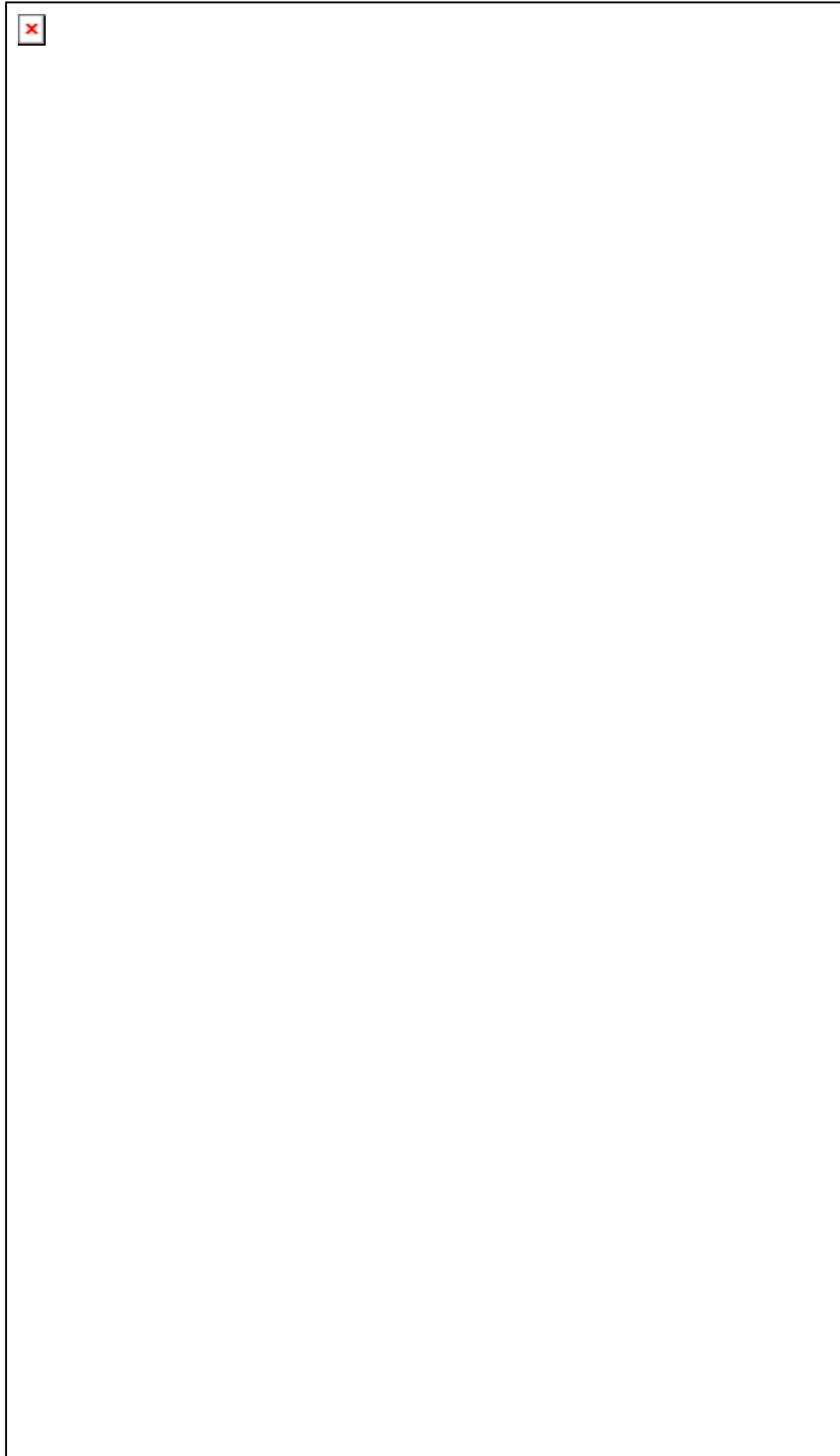
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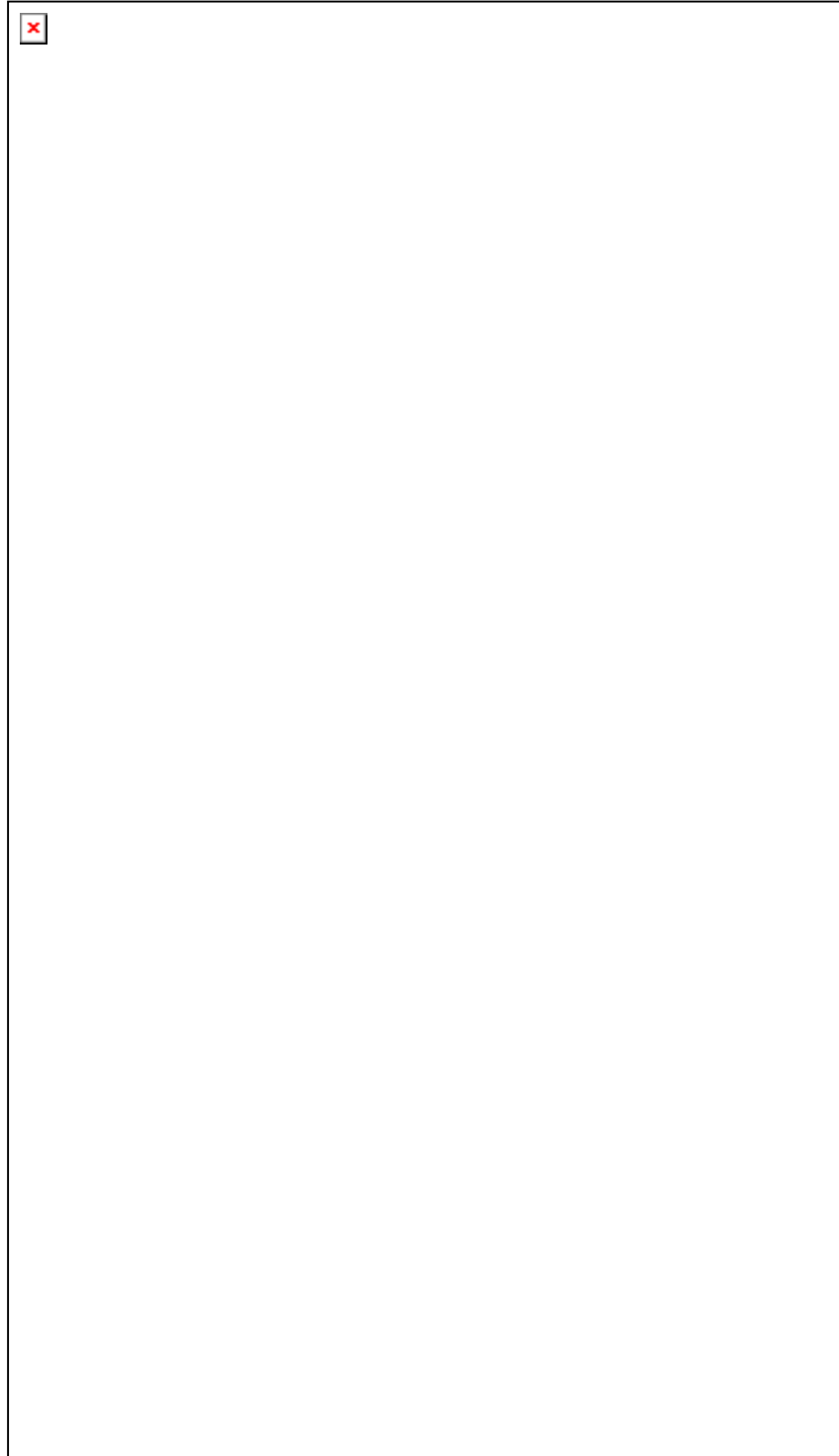
<http://web.archive.org/web/20040830015944/http://www.expatedge.com/privacy.jsp>

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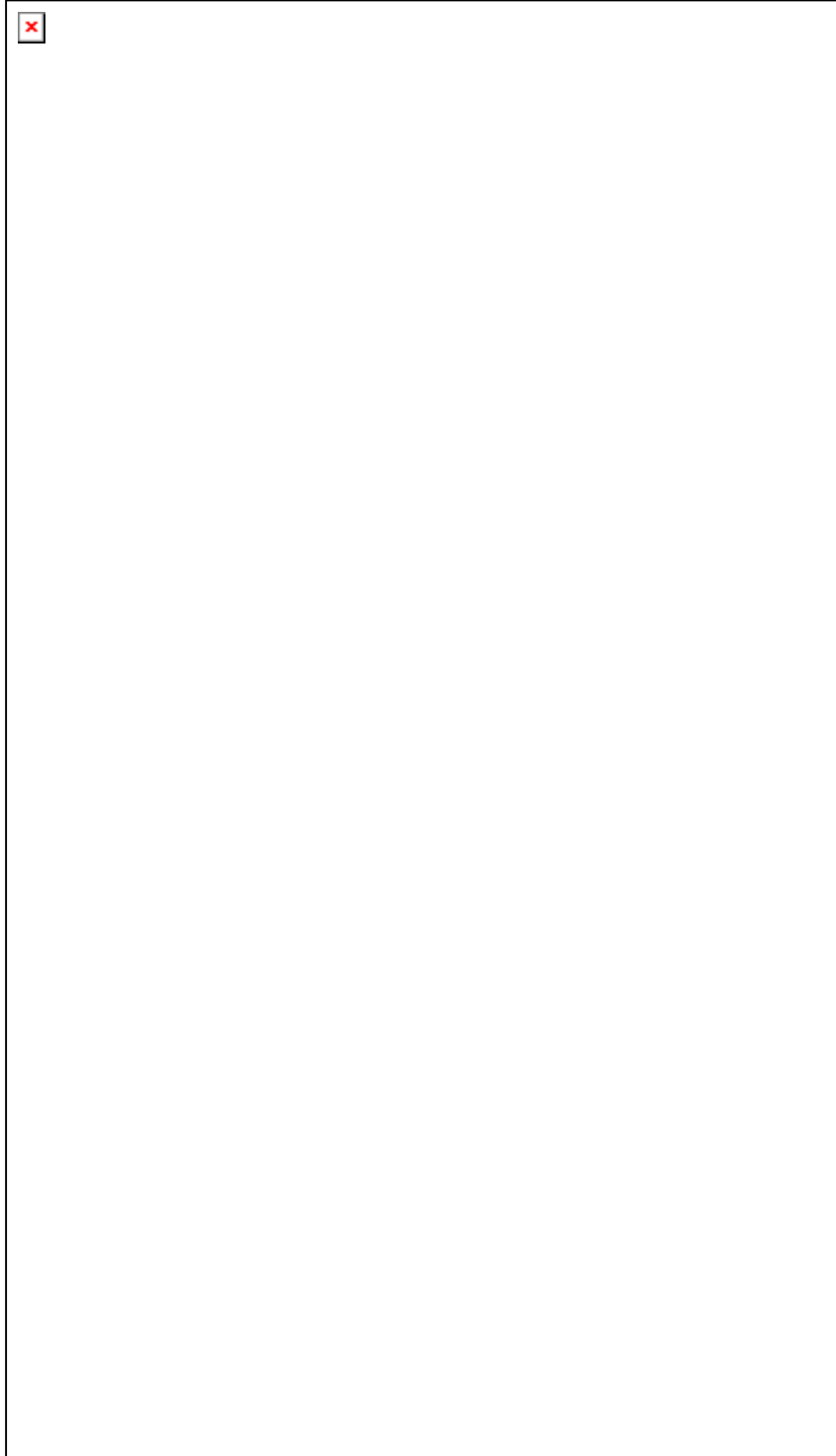
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Decision and Order



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## Complaint

## Exhibit D

ExpatEdge - Privacy Policy

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## ExpatEdge® Privacy Policy

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**A. General Information.** Some information is gathered automatically when you access the Site ("General Information"). This General Information (which includes Site pages visited, type of web browser used, type of operating system, and the domain name of your Internet Service Provider and similar information) does not identify you personally.

**B. Profile Information.** Some information is not gathered automatically, and is instead supplied by you voluntarily when you use or register for certain services at the Site ("Profile Information"). If you wish to provide Profile

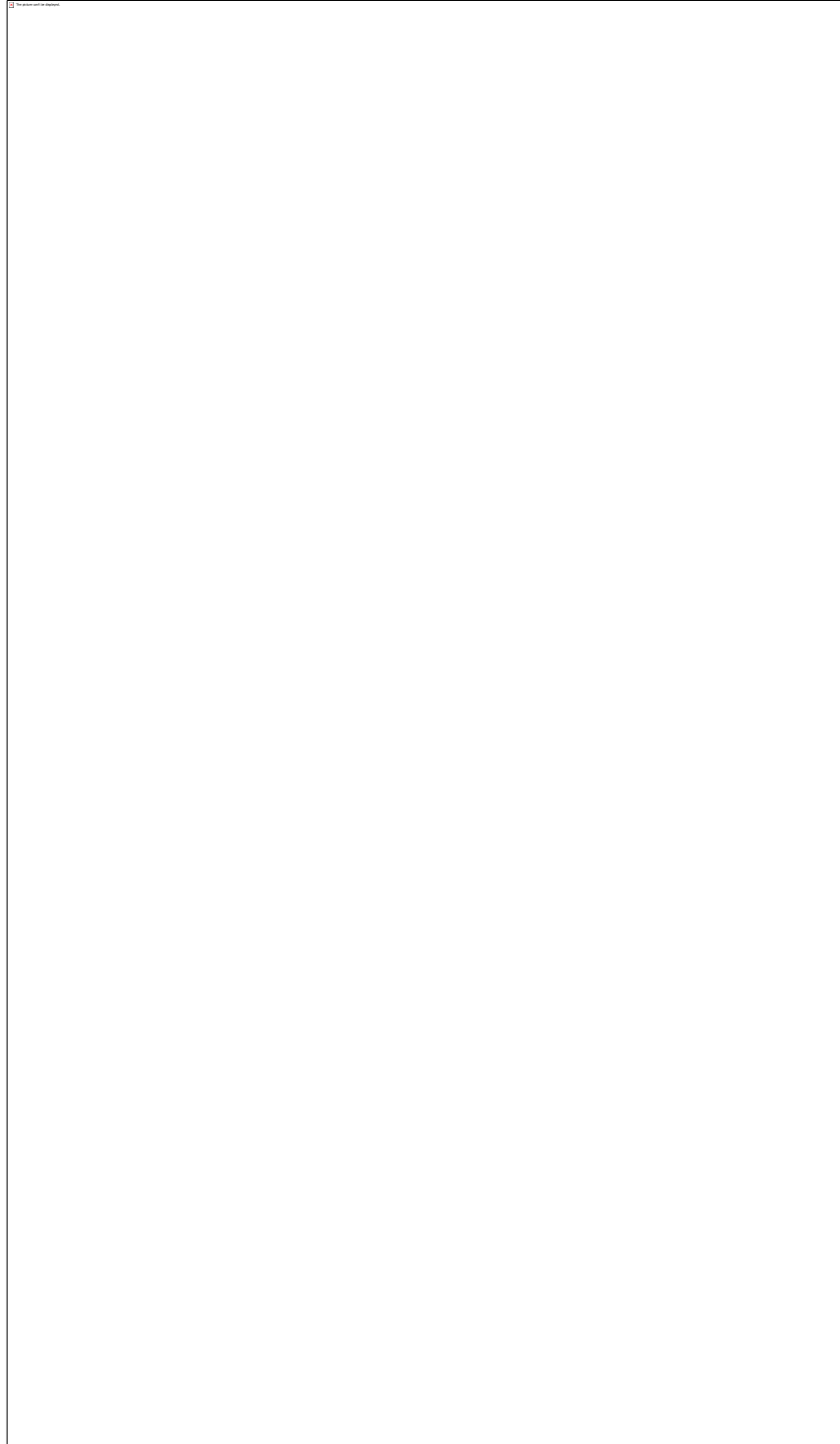
Decision and Order



Complaint



Decision and Order



Complaint



## Decision and Order

**Exhibit E**

ExpatEdge - Privacy Policy

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EXPATEDGE

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**ExpatEdge® Privacy Policy**

This ExpatEdge Partners, LLC ("ExpatEdge") Privacy Policy (the "Policy") was developed as an extension of our commitment to combine the highest-quality products and services with the highest level of integrity in dealing with our valued customers, and the companies, businesses and organizations they represent (collectively, "you").

ExpatEdge self-certifies the Policy to the U.S. Department of Commerce's Safe Harbor Privacy Principles. If you have any questions about this Policy, wish to amend, delete or add to any of your information contained at the Site, or otherwise wish to contact ExpatEdge directly, please email us at [privacy@expatedge.com](mailto:privacy@expatedge.com) or call us at (650) 566-1580.

**IF YOU DO NOT AGREE TO THE POLICY, YOU SHOULD NOT USE THIS INTERNET WEBSITE (THE "SITE"). WE MAY MODIFY THE POLICY FROM TIME TO TIME AND POST THOSE MODIFICATIONS HERE. YOUR CONTINUED USE OF THE SITE AFTER ANY SUCH MODIFICATION CONSTITUTES YOUR ACCEPTANCE OF THE MODIFIED POLICY.**

**1. Information.** ExpatEdge obtains information from and about you in a number of different ways, including:

**A. General Information.** Some information is gathered automatically when you access the Site ("General Information"). This General Information (which includes Site pages visited, type of web browser used, type of operating system, and the domain name of your Internet Service Provider and similar information) does not identify you personally.

**B. Profile Information.** Some information is not gathered automatically, and is instead supplied by you voluntarily when you use or register for certain services at the Site ("Profile Information"). If you wish to provide Profile

<http://www.expatedge.com/privacy.jsp>

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## Decision and Order

ExpatEdge - Privacy Policy

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royalty-free, irrevocable, perpetual, non-exclusive, transferable license (with a right to grant sublicenses through multiple tiers of sublicensees) to use, execute, display, copy, perform and modify such information as ExpatEdge sees fit for internal business purposes.

**8. General.** This Policy constitutes the entire and only agreement between ExpatEdge and you regarding this subject matter and supersedes all prior or contemporaneous agreements, representations, warranties and understandings with respect thereto. You agree to review this Policy prior to reviewing any information or obtaining any documents from the Site. Any action related to this Policy shall be governed by the substantive laws of the State of California, without regard to conflicts of law principles. The State and Federal courts located in Santa Clara County, California, shall have sole jurisdiction over any dispute arising hereunder, and the parties hereby consent to the personal jurisdiction of such courts and to extra-territorial service of process. The United Nations Convention on Contracts for the International Sale of Goods shall not apply to this Policy. Neither this Policy, nor any rights hereunder, may be assigned by operation of law or otherwise, in whole in part, by you without the prior, written consent of ExpatEdge. Any purported assignment without such permission shall be void. ExpatEdge may assign this Policy, in whole or in part, without notice to you. Any waiver of any rights of either party must be in writing, signed by the waiving party, and any such waiver shall not operate as a waiver of any future breach of this Policy. In the event any portion of this Policy is found to be illegal or unenforceable, such portion shall be severed, and the remaining terms shall be separately enforced. The language in this Policy shall be interpreted as to its fair meaning and not strictly for or against either party. This Policy may be modified or amended by you only in writing, signed by both parties. Any purported modification or amendment inconsistent with the foregoing shall be void.

Privacy Policy  
Copyright © 2000-2009 ExpatEdge Partners, LLC. All rights reserved.

<http://www.expatedge.com/privacy.jsp>

4/30/2009

## Decision and Order

**DECISION AND ORDER**

The Federal Trade Commission, having initiated an investigation of certain acts and practices of the Respondent named in the caption hereof, and the Respondent having been furnished thereafter with a copy of a draft of Complaint, which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued, would charge the Respondent with violation of the Federal Trade Commission Act; and

The Respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the Respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by the Respondent that the law has been violated as alleged in such complaint, or that any of the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the Respondent has violated the Federal Trade Commission Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, 16 C.F.R. § 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent ExpatEdge Partners, LLC is a Minnesota limited liability corporation with its principal office or place of business at 750 Boone Avenue North, Suite 102, Minneapolis, Minnesota 55427.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the

## Decision and Order

Respondent, and the proceeding is in the public interest.

**ORDER**

## DEFINITIONS

For purposes of this Order, the following definitions shall apply:

- A. Unless otherwise specified, “respondent” shall mean ExpatEdge Partners, LLC and its subsidiaries, divisions, affiliates, successors and assigns.
- B. “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, 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 respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy, security, or any other compliance program sponsored by the government or any other third party.

**II.**

**IT IS FURTHER ORDERED** that respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of, for a period of five (5) years from the date of preparation or dissemination, whichever is later, all documents relating to compliance with this order, including but not limited to:

- A. all advertisements, promotional materials, and any other statements containing any representations

## Decision and Order

covered by this order, with all materials relied upon in disseminating the representation; and

- B. any documents, whether prepared by or on behalf of respondent, that call into question respondent's compliance with this order.

**III.**

**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, and shall secure from each such person a signed and dated statement acknowledging receipt of the 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.

**IV.**

**IT IS FURTHER ORDERED** that respondent 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 respondent learns fewer 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.

## Decision and Order

**V.**

**IT IS FURTHER ORDERED** that respondent shall, within sixty (60) 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 it has complied with this order.

**VI.**

This order will terminate on November 9, 2029, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. any Part in this order that terminates in fewer than twenty (20) years;
- B. this order's application to any respondent that is not named as a defendant in such complaint; and
- C. this order if such complaint is filed after the order has terminated pursuant to this Part.

*Provided, further*, that if such complaint is dismissed or a federal court rules that respondent 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 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” or “Commission”) has accepted, subject to final approval, a consent agreement from ExpatEdge Partners LLC (“ExpatEdge”).

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.

This matter concerns alleged false or misleading representations that ExpatEdge made to consumers concerning its participation in the Safe Harbor privacy framework (“Safe Harbor”) agreed upon by the U.S. and the European Union (“EU”). It is among the Commission’s first cases to challenge deceptive claims about the Safe Harbor. The Safe Harbor provides a mechanism for U.S. companies to transfer data outside the EU consistent with European law. To join the Safe Harbor, a company must self-certify to the U.S. Department of Commerce (“Commerce”) that it complies with seven principles and related requirements. Commerce maintains a public website, [www.export.gov/safeharbor](http://www.export.gov/safeharbor), where it posts the names of companies that have self-certified to the Safe Harbor. The listing of companies indicates whether their self-certification is “current” or “not current.” Companies are required to re-certify every year in order to retain their status as “current” members of the Safe Harbor framework.

ExpatEdge provides software and consulting services to businesses that offer “expatriate” programs to manage tax and payroll issues for employees that work outside their country of residence, including through a website ([www.expatedge.com](http://www.expatedge.com)). According to the Commission’s complaint, from at least December 2002 until July 2009, ExpatEdge has set forth on its website privacy policies and statements about its practices, including statements that it is a current participant in the Safe Harbor.

## Analysis to Aid Public Comment

The Commission's complaint alleges that until July 2009, ExpatEdge falsely represented that it was a current participant in the Safe Harbor when, in fact, ExpatEdge has not been a current participant in the Safe Harbor since November 2006. The Commission's complaint alleges that in November 2002, ExpatEdge submitted to Commerce a self-certification to the Safe Harbor, which it renewed in November 2003, November 2004, and November 2005. ExpatEdge did not renew its self-certification to the Safe Harbor in November 2006, and Commerce updated its status to "not current" on the Commerce public website. To date, ExpatEdge has not renewed its self-certification to the Safe Harbor and remains in "not current" status on Commerce's website.

The proposed order applies to ExpatEdge's representations about its membership in any privacy, security, or any other compliance program sponsored by the government or any other third party. It contains provisions designed to prevent ExpatEdge from engaging in the future in practices similar to those alleged in the complaint.

Part I of the proposed order prohibits ExpatEdge from making misrepresentations about its membership in any privacy, security, or any other compliance program sponsored by the government or any other third party.

Parts II through VI of the proposed order are reporting and compliance provisions. Part II requires ExpatEdge to retain documents relating to its compliance with the order for a five-year period. Part III requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part IV ensures notification to the FTC of changes in corporate status. Part V mandates that ExpatEdge submit an initial compliance report to the FTC, and make available to the FTC subsequent reports. Part VI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of the 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

**ONYX GRAPHICS, INC.**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4270; File No. 092 3139**Complaint November 9, 2009 - Decision, November 9, 2009*

This consent order addresses respondent Onyx Graphics, providers of software and consulting services to businesses with employees residing outside of origin. Respondent manages tax and payroll issues for employees that work outside their country of residence. The complaint alleges the respondent violated Section 5 of the FTC Act by making false and misleading representations concerning Onyx Graphics' participation in the Safe Harbor privacy framework. Safe Harbor is an international program for international data transfer between the U.S. and the European Union. Respondent advertised an incorrect status as to its compliance with the program. The order prohibits Onyx Graphics from making misrepresentations about its membership in any privacy, security, or any other compliance program sponsored by the government or any other third party.

*Participants*For the *Commission: Molly Crawford and Katie Ratté*For the *Respondent: Jeb Hurley, Chief Executive Officer, pro se.***COMPLAINT**

The Federal Trade Commission, having reason to believe that Onyx Graphics, Inc. ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Onyx Graphics, Inc. ("Onyx Graphics") is a Delaware corporation with its principal office or place of business at 6915 South High Tech Drive, Salt Lake City, Utah 84101.
2. Respondent is in the business of developing and marketing commercial printing software and solutions for the digital color

## Complaint

printing marketplace, including through a website ([www.onyxgfx.com](http://www.onyxgfx.com)).

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

4. Since at least October 2006, respondent has set forth on its website, [www.onyxgfx.com](http://www.onyxgfx.com), privacy policies and statements about its practices, including statements related to its participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union (“U.S.-EU Safe Harbor Framework” or “Safe Harbor”).

### **U.S.-EU SAFE HARBOR FRAMEWORK**

5. The U.S.-EU Safe Harbor Framework provides a method for U.S. companies to transfer personal data outside of Europe that is consistent with the requirements of the European Union Directive on Data Protection (“Directive”). Enacted in 1995, the Directive sets forth European Union (“EU”) requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission (“EC”) has made a determination that the recipient jurisdiction’s laws ensure the protection of such personal data. *See* Directive 95/46/EC of the European Parliament and of the Council (Oct. 24, 1995), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:HTML>. This determination is commonly referred to as meeting the EU’s “adequacy” standard.

6. To satisfy the EU adequacy standard for certain commercial transfers, the U.S. Department of Commerce (“Commerce”) and the EC negotiated the U.S.-EU Safe Harbor Framework, which went into effect in 2000. The Safe Harbor allows U.S. companies to transfer personal data lawfully from the EU. To join the Safe Harbor, a company must self-certify to Commerce that it complies with seven principles and related requirements that have been deemed to meet the EU’s adequacy standard.

## Complaint

7. Companies under the jurisdiction of the U.S. Federal Trade Commission (“FTC”), as well as the U.S. Department of Transportation, are eligible to join the Safe Harbor. A company under the FTC’s jurisdiction that self-certifies to the Safe Harbor principles but fails to implement them may be subject to an enforcement action based on the FTC’s deception authority under Section 5 of the Federal Trade Commission Act.

8. Commerce maintains a public website, [www.export.gov/safeharbor](http://www.export.gov/safeharbor), where it posts the names of companies that have self-certified to the Safe Harbor. The listing of companies indicates whether their self-certification is “current” or “not current.” Companies are required to re-certify every year in order to retain their status as “current” members of the Safe Harbor framework. According to the Safe Harbor website, “Organizations should notify the Department of Commerce if their representation to the Department is no longer valid. Failure to do so could constitute a misrepresentation.” *See* Safe Harbor List, *available at* <http://web.ita.doc.gov/safeharbor/shlist.nsf/webPages/safe+harbor+list>.

**VIOLATIONS OF SECTION 5 OF THE FTC ACT**

9. In August 2006, respondent submitted to Commerce a self-certification to the Safe Harbor.

10. In August 2007, respondent did not renew its self-certification to the Safe Harbor, and Commerce updated respondent’s status to “not current” on its public website. Until July 2009, respondent did not renew its self-certification to the Safe Harbor and was in “not current” status on Commerce’s website. (Exhibit A, Declaration of Damon C. Greer).

11. Since at least October 2006 to the present, respondent has disseminated or caused to be disseminated privacy policies and statements on the [www.onyxgfx.com](http://www.onyxgfx.com) website, including, but not limited to, the following statements:

Safe Harbor Certified  
ONYX is Safe Harber [sic] Certified. For  
ONYX Safe Harbor Agreement, click here.

## Complaint

For more information on being Safe Harbor Compliant, click [here](#).

## Exhibit B, Privacy Policy.

Onyx has self-certified its privacy practices as consistent with the U.S.-E.U. Safe Harbor principles as published by the US Department of Commerce (the "Principles"). These include: Notice, Choice, Onward Transfer, Access and Accuracy, Security, and Oversight/Enforcement. More information about the U.S. Department of Commerce Safe Harbor Program can be found at <http://www.export.gov/safeharbor/>.

## Exhibit C, Onyx Safe Harbor Statement.

12. Through the means described in Paragraph 11, respondent represented, expressly or by implication, that it is a current participant in the Safe Harbor.

13. In truth and in fact, from August 2007 to July 2009, respondent was not a current participant in the Safe Harbor. Therefore, the representations set forth in Paragraph 11 were, and are, false or misleading.

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

**THEREFORE**, the Federal Trade Commission this ninth day of November, 2009, has issued this complaint against respondent.

By the Commission.

FEDERAL TRADE COMMISSION DECISIONS  
VOLUME 148

Complaint

**Exhibit A**

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	
ONYX GRAPHICS, INC.,	)	DOCKET NO.
a corporation.	)	
	)	
_____	)	

**DECLARATION OF DAMON C. GREER**

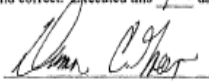
I, Damon C. Greer, based upon my personal knowledge concerning matters to which I am competent to testify, hereby declare as follows:

1. I am the Associate Director for Electronic Commerce in the Office of Technology and Electronic Commerce at the U.S. Department of Commerce ("Commerce"), and I am the lead administrator of the U.S.-E.U. Safe Harbor Framework.
2. Commerce is not a party to the captioned matter.
3. Commerce is responsible for developing and overseeing the U.S.-EU Safe Harbor Framework ("Safe Harbor"), a voluntary program that provides U.S. companies with a method for receiving personal data lawfully from the European Union. To join the Safe Harbor, a company must self-certify to Commerce that it complies with a set of principles that have been deemed to meet the EU's adequacy standard.
4. As Associate Director, I am responsible for maintaining an accurate list of those companies that self-certify to Commerce that they comply with the Safe Harbor principles. As part of my responsibilities, I oversee a public website, [www.export.gov/safeharbor](http://www.export.gov/safeharbor), where I post the names of companies that have self-certified. The listing of companies indicates, among other things, whether their self-certification is "current" or "not current." Companies are required to re-certify every year on the anniversary of the date they first self-certified in order to retain their status as "current" members of the Safe Harbor framework.
5. In August 2006, Onyx Graphics, Inc. ("Onyx") submitted a self-certification to Commerce. Onyx's next self-certification was due in August 2007.
6. Onyx did not submit a self-certification by the August 2007 deadline, and as a result I updated Onyx's status to "not current" on Commerce's public website. To date, I have

Complaint

not received any documents or information from Onyx to renew its self-certification.  
Onyx is still in "not current" status on the Commerce website.

I declare under penalty of perjury under the Laws of the United States of America that  
the foregoing is true and correct. Executed this 12 day of June, 2009, in Washington, D.C.



Damon C. Greer  
Associate Director for Electronic Commerce  
Office of Technology and Electronic Commerce  
U.S. Department of Commerce

Complaint  
**Exhibit B**

ONYX Graphics, Inc. - PosterShop inkjet RIP software and other leading RIP and Print w... Page 1 of 1



[PARTNER PORTAL](#) | [LOCATE A RESELLER](#) | [PRINTERS](#)

- About ONYX
- Privacy
- Industry Solutions
- Direct To Film/Inkjet
- Training
- Support
- Contact Us

**ONYX Graphics, Inc. Legal, Online Privacy and Security statements**

ONYX Graphics, Inc. understands that you may have concerns with how information we obtain about you is used and shared, as well as the security of this information. We would like to assure you that we will use any information you provide us with care. Because we gather certain types of information about the users on the ONYX Graphics, Inc. website, we feel you should fully understand the terms and conditions surrounding our acquisition and use of that information. ONYX Graphics, Inc. is committed to protecting your privacy on our website and has created this privacy statement in order to demonstrate our firm commitment. The following information describes our information gathering process, how we use the information, and what we do to secure it.

**Copyright**  
All Web site materials, including, without limitation, the ONYX logo, design, text, graphics, other files, and the selection and arrangement thereof are ALL RIGHTS RESERVED Copyright © ONYX Graphics Inc. You may electronically copy and print to hard copy portions of this Web site for the sole purpose of using materials it contains for informational and non-commercial, personal use only. Any other use of the materials on this Web site including any commercial use, reproduction for purposes other than described above, modification, distribution, republishing, display, or performance without the prior written permission of ONYX Graphics, Inc. is strictly prohibited.

**Logos, Trademarks and Registered Trademarks**  
ONYX, and specific ONYX Graphics, Inc. products referenced herein, are trademarks of ONYX Graphics, Inc. and may be registered in certain jurisdictions. Other product names, company names, marks, signs, and symbols referenced herein may be the trademarks or registered trademarks of their respective owners.

**Information Automatically Logged**  
We use your IP address to help diagnose problems with our server and to administer our Web site.

**Use of Cookies**  
A cookie is a file left on your computer when you visit a certain website. Should you return to the same site, the cookie allows the website to identify you as a return visitor. The ONYX Graphics, Inc. website uses cookies to save your password so you don't have to re-enter it each time you visit our site (where applicable). We also use cookies to track traffic to our website and for a variety of useful Internet applications. While you can disable cookies in your browser, we recommend that you leave them turned on to best experience our website and much of the Internet.

**Your Information**  
Our online registration form requires you to provide us with your contact information (such as your name, email, and postal address), and demographic information (such as your age, gender, and income level). The contact information we obtain from some forms is used to ship purchases and to get in touch with you when necessary. You may opt-out of receiving future mailings - see the [choose-opt-out](#) section below. Financial information that is collected is used to bill the user for products and services.

Please note that we do not sell, rent, and we do not provide your information to third parties.

**External Links**  
This site contains links to other sites. ONYX Graphics, Inc. is not responsible for the privacy practices or the content of such Web sites.

**Choose Opt Out**  
Our site provides you the opportunity to opt-out of receiving promotional/marketing information from us.

**Data Quality/Access**  
This site gives you the following options for changing and modifying information you previously provided:

- You can send mail to the following postal address: [webmaster@onyx.com](mailto:webmaster@onyx.com)
- You can call the following telephone number: 801-552-0900 and ask to speak to the Web Master.

Consulting the Web Site  
If you have any questions about this privacy statement, the practices of this site, or your dealings with this Web site, you can contact [webmaster@onyx.com](mailto:webmaster@onyx.com) a reasonable time frame, customers can contact the Federal Trade Commission at [www.ftc.gov/ftccomplaint.htm](http://www.ftc.gov/ftccomplaint.htm), or via phone at 1-877-435-7347.

**Sale Harbor Certified**  
ONYX is Sale Harbor Certified. For ONYX Sale Harbor Agreement, click [here](#). For more information on being Sale Harbor Compliant, click [here](#).

**Contacting the Web Site**  
If you have any questions about the privacy statement, the practices of this site, or your dealings with this Web site, you can contact [webmaster@onyx.com](mailto:webmaster@onyx.com).

USA | Latin America | Austria | Belgium | Australia | Japan  
© Copyright ONYX Graphics Inc. All rights reserved. [PRIVACY & LEGAL](#)

## Complaint

**Exhibit C**

Onyx Safe Harbor Statement - Rev C (Final Sep 1 2006-Corrected Aug 3, 2007)

**Introduction**

Onyx Graphics, Inc. is strongly committed to protecting the privacy of those who entrust us with their personal information. Our customers and workers have certain expectations and trust in relation to the way we protect their personal information. We are pleased to provide you with this information to inform you of the Onyx' practices with respect to the collection and use of personal information received from the European Economic Area (EEA) and the transfer of such information from countries in the EEA to the United States.

Onyx has self-certified its privacy practices as consistent with U.S.-E.U. Safe Harbor principles as published by the US Department of Commerce (the "Principles"). These include: Notice, Choice, Onward Transfer, Access and Accuracy, Security, and Oversight/Enforcement. More information about the U.S. Department of Commerce Safe Harbor Program can be found at <http://www.export.gov/safeharbor/>.

**Personal Data**

This statement applies to all personal information we handle (except as noted below), including on-line, off-line, and manually processed data. For purposes of this statement, "personal information" means information that:

- is transferred from the EU to the United States;
- is recorded in any form;
- is about, or pertains to, a specific individual; and
- can be linked to that individual.

It does not include information that pertains to a specific individual, but from which that individual could not reasonably be identified. This is known as "aggregate data" and is not tied to a specific individual.

**Principles Protecting Individuals' Privacy***Notice and Choice*

In accordance with Safe Harbor principles, we may process personal information in the course of providing professional services to our customers without the knowledge of individuals involved. Where we collect personal information directly from individuals in the E.U., we inform them about the types of personal information we collect from them, the purposes for which we collect and use it, and the types of non-agent third parties to which we disclose that information. We also inform those individuals about the choices and means, if any, we offer individuals for limiting the use or disclosure of their information.

*Disclosures and Transfers*



## Complaint

ONYX will not disclose an individual's personal information to third parties, except when one or more of the following conditions is true:

- We have the individual's permission to make the disclosure;
- The disclosure is required by law or professional standards;
- The disclosure is reasonably related to the sale or disposition of all or part of our business;
- The information in question is publicly available;
- The disclosure is reasonably necessary for the establishment or defense of legal claims; or
- The disclosure is to another Onyx entity or to persons or entities providing services on our or the individual's behalf (each a "transferee"), consistent with the purpose for which the information was obtained, if the transferee, with respect to the information in question:
  - is subject to law providing an adequate level of privacy protection; or,
  - has agreed in writing to provide an adequate level of privacy protection; or
  - subscribes to the Principles.

Permitted transfers of information, either to third parties or within Onyx include the transfer of data from one jurisdiction to another, including transfers to and from the United States of America. Because privacy laws vary from one jurisdiction to another, personal information may be transferred to a jurisdiction where the laws provide less or different protection than the jurisdiction in which the information originated.

*Data Security*

Onyx takes your security seriously and takes reasonable steps to protect your information. To prevent unauthorized access or disclosure, maintain data accuracy, and ensure the appropriate use and confidentiality of information, either for its own purposes or on behalf of our customers, Onyx has put in place appropriate physical, electronic, and managerial procedures to safeguard and secure the information we process. However, we cannot guarantee the security of information on or transmitted via the Internet.

*Data Integrity*

We process personal information only in ways compatible with the purpose for which it was collected or subsequently authorized by the individual. To the extent necessary for such purposes, we take reasonable steps to make sure that personal information is accurate, complete, current, and otherwise reliable with regard to its intended use.

*Access and Correction*

## Complaint

If an individual becomes aware that information we maintain about that individual is inaccurate, or if an individual would like to update or review his or her information, the individual may contact us using the contact information below. We will take reasonable steps to permit individuals to correct, amend, or delete information that is demonstrated to be inaccurate. The individual will need to provide sufficient identifying information, such as name, address, birth date, and/or a password. We may request additional identifying information as a security precaution. In addition, we may limit or deny access to personal information where providing such access would be unreasonably burdensome or expensive in the circumstances, or where we are otherwise permitted by the Safe Harbor Principles to do so. In some circumstances, we may charge a reasonable fee, where warranted, for access to personal information.

### *Enforcement and Dispute Resolution*

Onyx utilizes the self-assessment approach to assure its compliance with our privacy statement. Onyx periodically verifies that the policy is accurate, comprehensive for the information intended to be covered, prominently displayed, completely implemented, and in conformity with the Principles. We encourage interested persons to raise any concerns with us using the contact information below. We will investigate and attempt to resolve complaints and disputes regarding use and disclosure of personal information in accordance with the principles contained in this policy.

With respect to any complaints relating to this policy that cannot be resolved through our internal processes, we have agreed to participate in the dispute resolution procedures of the panel established by the EU data protection authorities to resolve disputes pursuant to the Safe Harbor Principles. In the event that we or such authorities determine that we did not comply with this policy, we will take appropriate steps to address any adverse effects and to promote future compliance.

### *Privacy Statement Changes*

This privacy statement may be changed from time to time, consistent with the requirements of the Safe Harbor. We will post any revised policy on this Web site, or a similar Web site that replaces this Web site.

### *Information Subject to Other Policies*

We are committed to following the Principles for all personal information within the scope of the Safe Harbor Agreement. However, certain information is subject to policies of the company that may differ in some respects from the general policies set forth in this statement.

Information obtained from or relating to customers or former customers is further subject to the terms of any privacy notice to the customer, any engagement letter or letters with the customer, and applicable laws and professional standards.

## Complaint

*How to Contact Us*

Questions, comments or complaints about Onyx's Safe Harbor Data Privacy Statement or data collection and processing practices can be e-mailed to [privacyoffice@onyxgfx.com](mailto:privacyoffice@onyxgfx.com), mailed to Privacy Office, Onyx Graphics, 6915 High Tech Drive, Salt Lake City, UT, 84047.

*EFFECTIVE DATE: September 1 2006*

## Decision and Order

**DECISION AND ORDER**

The Federal Trade Commission, having initiated an investigation of certain acts and practices of the Respondent named in the caption hereof, and the Respondent having been furnished thereafter with a copy of a draft of Complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued, would charge the Respondent with violation of the Federal Trade Commission Act; and

The Respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the Respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by the Respondent that the law has been violated as alleged in such complaint, or that any of the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the Respondent has violated the Federal Trade Commission Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, 16 C.F.R. § 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Onyx Graphics, Inc. is a Delaware corporation with its principal office or place of business at 6915 High Tech Drive, Salt Lake City, Utah 84047.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the

## Decision and Order

Respondent, and the proceeding is in the public interest.

**ORDER**

## DEFINITIONS

For purposes of this Order, the following definitions shall apply:

- A. Unless otherwise specified, “respondent” shall mean Onyx Graphics, Inc. and its subsidiaries, divisions, affiliates, successors and assigns.
- B. “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, 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 respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy, security, or any other compliance program sponsored by the government or any other third party.

**II.**

**IT IS FURTHER ORDERED** that respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of, for a period of five (5) years from the date of preparation or dissemination, whichever is later, all documents relating to compliance with this order, including but not limited to:

- A. all advertisements, promotional materials, and any other statements containing any representations

## Decision and Order

covered by this order, with all materials relied upon in disseminating the representation; and

- B. any documents, whether prepared by or on behalf of respondent, that calls into question respondent's compliance with this order.

**III.**

**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, and shall secure from each such person a signed and dated statement acknowledging receipt of the 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.

**IV.**

**IT IS FURTHER ORDERED** that respondent 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 respondent learns fewer 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.

## Decision and Order

**V.**

**IT IS FURTHER ORDERED** that respondent shall, within sixty (60) 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 it has complied with this order.

**VI.**

This order will terminate on November 9, 2029, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. any Part in this order that terminates in fewer than twenty (20) years;
- B. this order's application to any respondent that is not named as a defendant in such complaint; and
- C. this order if such complaint is filed after the order has terminated pursuant to this Part.

*Provided, further*, that if such complaint is dismissed or a federal court rules that respondent 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 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” or “Commission”) has accepted, subject to final approval, a consent agreement from Onyx Graphics, Inc. (“Onyx Graphics”).

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.

This matter concerns alleged false or misleading representations that Onyx Graphics made to consumers concerning its participation in the Safe Harbor privacy framework (“Safe Harbor”) agreed upon by the U.S. and the European Union (“EU”). It is among the Commission’s first cases to challenge deceptive claims about the Safe Harbor. The Safe Harbor provides a mechanism for U.S. companies to transfer data outside the EU consistent with European law. To join the Safe Harbor, a company must self-certify to the U.S. Department of Commerce (“Commerce”) that it complies with seven principles and related requirements. Commerce maintains a public website, [www.export.gov/safeharbor](http://www.export.gov/safeharbor), where it posts the names of companies that have self-certified to the Safe Harbor. The listing of companies indicates whether their self-certification is “current” or “not current.” Companies are required to re-certify every year in order to retain their status as “current” members of the Safe Harbor framework.

Onyx Graphics develops and markets commercial printing software and solutions for the digital color printing marketplace, including through a website ([www.onyxgfx.com](http://www.onyxgfx.com)). According to the Commission’s complaint, since at least October 2006, Onyx Graphics has set forth on its website privacy policies and statements about its practices, including statements that it is a current participant in the Safe Harbor.



## Analysis to Aid Public Comment

The Commission's complaint alleges that Onyx Graphics falsely represented that it was a current participant in the Safe Harbor when, in fact, from August 2007 until July 2009, Onyx Graphics was not a current participant in the Safe Harbor. The Commission's complaint alleges that in August 2006, Onyx Graphics submitted a self-certification to Commerce, which it did not renew in August 2007. Commerce then updated the company's status to "not current" on the Commerce public website. Onyx Graphics remained in "not current" status until it submitted a self-certification to Commerce in July 2009.

The proposed order applies to Onyx Graphics's representations about its membership in any privacy, security, or any other compliance program sponsored by the government or any other third party. It contains provisions designed to prevent Onyx Graphics from engaging in the future in practices similar to those alleged in the complaint.

Part I of the proposed order prohibits Onyx Graphics from making misrepresentations about its membership in any privacy, security, or any other compliance program sponsored by the government or any other third party.

Parts II through VI of the proposed order are reporting and compliance provisions. Part II requires Onyx Graphics to retain documents relating to its compliance with the order for a five-year period. Part III requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part IV ensures notification to the FTC of changes in corporate status. Part V mandates that Onyx Graphics submit an initial compliance report to the FTC, and make available to the FTC subsequent reports. Part VI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of the 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

**PROGRESSIVE GAITWAYS LLC**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4271; File No. 092 3141**Complaint, November 9, 2009 - Decision, November 9, 2009*

This consent order addresses respondent Progressive Gaitways LLC, providers of software and consulting services to businesses with employees residing outside of origin. Respondent manages tax and payroll issues for employees that work outside their country of residence. The complaint alleges the respondent violated Section 5 of the FTC Act by making false and misleading representations concerning Progressive Gaitways, LLC's participation in the Safe Harbor privacy framework. Safe Harbor is an international program for international data transfer between the U.S. and the European Union. Respondent advertised an incorrect status as to its compliance with the program. The order prohibits Progressive Gaitways, LLC from making misrepresentations about its membership in any privacy, security, or any other compliance program sponsored by the government or any other third party.

*Participants*

For the *Commission: Molly Crawford and Katie Ratté*

For the *Respondent: Sheila Heidmiller, Macheledt Bales & Heidmiller LLP.*

**COMPLAINT**

The Federal Trade Commission, having reason to believe that Progressive Gaitways LLC ("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 Progressive Gaitways LLC ("Progressive Gaitways") is a Colorado company with its principal office or place of business at 305 Society Drive, #C-3, Telluride, Colorado 81435.

## Complaint

2. Respondent is in the business of selling medical equipment, including through two websites ([www.theratogs.com](http://www.theratogs.com) and [www.gaitways.com](http://www.gaitways.com)).

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

4. Since at least December 2008, respondent has set forth on its website, [www.theratogs.com](http://www.theratogs.com), privacy policies and statements about its practices, including statements related to its participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union (“U.S.-EU Safe Harbor Framework” or “Safe Harbor”). Since at least June 2007, respondent has set forth on its website, [www.gaitways.com](http://www.gaitways.com), the same privacy policies and statements, including the statements related to participation in the Safe Harbor.

### **U.S.-EU SAFE HARBOR FRAMEWORK**

5. The U.S.-EU Safe Harbor Framework provides a method for U.S. companies to transfer personal data outside of Europe that is consistent with the requirements of the European Union Directive on Data Protection (“Directive”). Enacted in 1995, the Directive sets forth European Union (“EU”) requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission (“EC”) has made a determination that the recipient jurisdiction’s laws ensure the protection of such personal data. *See* Directive 95/46/EC of the European Parliament and of the Council (Oct. 24, 1995), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:HTML>. This determination is commonly referred to as meeting the EU’s “adequacy” standard.

6. To satisfy the EU adequacy standard for certain commercial transfers, the U.S. Department of Commerce (“Commerce”) and the EC negotiated the U.S.-EU Safe Harbor Framework, which went into effect in 2000. The Safe Harbor allows U.S. companies to transfer personal data lawfully from the EU. To join the Safe Harbor, a company must self-certify to

## Complaint

Commerce that it complies with seven principles and related requirements that have been deemed to meet the EU's adequacy standard.

7. Companies under the jurisdiction of the U.S. Federal Trade Commission ("FTC"), as well as the U.S. Department of Transportation, are eligible to join the Safe Harbor. A company under the FTC's jurisdiction that self-certifies to the Safe Harbor principles but fails to implement them may be subject to an enforcement action based on the FTC's deception authority under Section 5 of the Federal Trade Commission Act.

8. Commerce maintains a public website, [www.export.gov/safeharbor](http://www.export.gov/safeharbor), where it posts the names of companies that have self-certified to the Safe Harbor. The listing of companies indicates whether their self-certification is "current" or "not current." Companies are required to re-certify every year in order to retain their status as "current" members of the Safe Harbor framework. According to the Safe Harbor website, "Organizations should notify the Department of Commerce if their representation to the Department is no longer valid. Failure to do so could constitute a misrepresentation." See Safe Harbor List, available at <http://web.ita.doc.gov/safeharbor/shlist.nsf/webPages/safe+harbor+list>.

**VIOLATIONS OF SECTION 5 OF THE FTC ACT**

9. In November 2004, respondent submitted to Commerce a self-certification to the Safe Harbor on behalf of its [www.theratogs.com](http://www.theratogs.com) website. Respondent renewed that self-certification in November 2005.

10. In November 2006, respondent did not renew its self-certification to the Safe Harbor for the [www.theratogs.com](http://www.theratogs.com) website, and Commerce updated respondent's status to "not current" on its public website. To date, respondent has not renewed its self-certification to the Safe Harbor and remains in "not current" status on Commerce's website. (Exhibit A, Declaration of Damon C. Greer).

11. From at least December 2008 until June 2009, respondent has disseminated or caused to be disseminated privacy policies

## Complaint

and statements on the [www.theratogs.com](http://www.theratogs.com) website, including, but not limited to, the following statements:

TheraTogs is a participant in the Safe Harbor program developed by the U.S. Department of Commerce and the European Union. We have certified that we adhere to the Safe Harbor Privacy Principles agreed upon by the U.S. and the European Union. For more information about the Safe Harbor and to view our certification, visit the U.S. Department of Commerce's Safe Harbor website at <http://www.export.gov/safeharbor>.

## Exhibit B, December 2008 Privacy Policy

12. Through the means described in Paragraph 11, respondent represented, expressly or by implication, that it is a current participant in the Safe Harbor.

13. In truth and in fact, since November 2006, respondent has not been a current participant in the Safe Harbor. Therefore, the representations set forth in Paragraph 11 were, and are, false or misleading.

14. From at least June 2007 until June 2009, respondent has disseminated or caused to be disseminated privacy policies and statements on the [www.gaitways.com](http://www.gaitways.com) website, including, but not limited to, the following statements:

PGW [Progressive Gaitways] is a participant in the Safe Harbor program developed by the U.S. Department of Commerce and the European Union. We have certified that we adhere to the Safe Harbor Privacy Principles agreed upon by the U.S. and the European Union. For more information about the Safe Harbor and to view our certification, visit the U.S. Department of Commerce's Safe Harbor website at <http://www.export.gov/safeharbor>.

## Exhibit C, December 2008 Privacy Policy.

## Complaint

2. Respondent has never submitted a self-certification to the Safe Harbor on behalf of its [www.gaitways.com](http://www.gaitways.com) website. (Exhibit A, Declaration of Damon C. Greer).

3. Through the means described in Paragraph 14, respondent represented, expressly or by implication, that it is a current participant in the Safe Harbor.

4. In truth and in fact, respondent has never self-certified to the Safe Harbor for its [www.gaitways.com](http://www.gaitways.com) website. Therefore, the representations set forth in Paragraph 14 were, and are, false or misleading.

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

**THEREFORE**, the Federal Trade Commission this ninth day of November, 2009, has issued this complaint against respondent.

By the Commission.

FEDERAL TRADE COMMISSION DECISIONS  
VOLUME 148

Complaint

**Exhibit A**

**UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION**

In the Matter of  PROGRESSIVE GAITWAYS LLC, a limited liability company.	) ) ) ) ) )	DOCKET NO.
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**DECLARATION OF DAMON C. GREER**

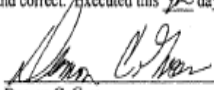
I, Damon C. Greer, based upon my personal knowledge concerning matters to which I am competent to testify, hereby declare as follows:

1. I am the Associate Director for Electronic Commerce in the Office of Technology and Electronic Commerce at the U.S. Department of Commerce (“Commerce”), and I am the lead administrator of the U.S.-E.U. Safe Harbor Framework.
  
2. Commerce is not a party to the captioned matter.
  
3. Commerce is responsible for developing and overseeing the U.S.-EU Safe Harbor Framework (“Safe Harbor”), a voluntary program that provides U.S. companies with a method for receiving personal data lawfully from the European Union. To join the Safe Harbor, a company must self-certify to Commerce that it complies with a set of principles that have been deemed to meet the EU’s adequacy standard.
  
4. As Associate Director, I am responsible for maintaining an accurate list of those companies that self-certify to Commerce that they comply with the Safe Harbor principles. As part of my responsibilities, I oversee a public website, [www.export.gov/safeharbor](http://www.export.gov/safeharbor), where I post the names of companies that have self-certified. The listing of companies indicates, among other things, whether their self-certification is “current” or “not current.” Companies are required to re-certify every year on the anniversary of the date they first self-certified in order to retain their status as “current” members of the Safe Harbor framework.
  
5. In November 2004, Progressive Gaitways LLC (“PGW”) submitted a self-certification to Commerce on behalf of its [www.theratogs.com](http://www.theratogs.com) website, which it renewed in November 2005. PGW’s next self-certification was due in November 2006.

## Complaint

6. PGW did not submit a self-certification by the November 2006 deadline, and as a result I updated PGW's status to "not current" on Commerce's public website. To date, I have not received any documents or information from PGW to renew its self-certification. PGW is still in "not current" status on the Commerce website.
7. PGW has never submitted a self-certification to the Safe Harbor on behalf of its [www.gaitways.com](http://www.gaitways.com) website.

I declare under penalty of perjury under the Laws of the United States of America that the foregoing is true and correct. Executed this 9<sup>th</sup> day of June, 2009, in Washington, D.C.



Damon C. Greer  
Associate Director for Electronic Commerce  
Office of Technology and Electronic Commerce  
U.S. Department of Commerce



## Complaint

**Exhibit B****Privacy Policy and Terms and Conditions of Use  
for TheraTogs, Inc.  
<www.theratogs.com>**

Welcome and thank you for visiting the TheraTogs™ product website owned by TheraTogs, Inc. (hereafter the "TheraTogs" website). As used herein, the words "you" and "your" refer to any person or entity accessing the TheraTogs website. The words "we," "us," and "our" refer to the TheraTogs website. The following describes how we handle information we may learn about you from your visit to our website or through other voluntary means and provides the rules that govern your use of our site.

**I. These Terms and Conditions Govern Your Use of Our Site**

**A. *Use of our site constitutes contractual agreement.*** AS A CONDITION TO AND IN CONSIDERATION OF ACCESSING AND USING OUR SITE, YOU AGREE TO BE BOUND BY THESE TERMS AND CONDITIONS OF USE AND BY OUR PRIVACY POLICY (COLLECTIVELY OUR "TERMS AND CONDITIONS"). USING THIS SITE CONSTITUTES YOUR ACCEPTANCE OF AND AGREEMENT TO BE BOUND BY THESE TERMS AND CONDITIONS. IF YOU DO NOT WISH TO BE BOUND BY THESE TERMS AND CONDITIONS, YOU SHOULD NOT USE/VISIT OUR SITE.

**B. *Amendments to these Terms and Conditions.*** We reserve the right to modify, alter, or otherwise update these Terms and Conditions at any time. Any changes will apply prospectively only, as of the effective date found at the bottom of these Terms and Conditions. It is your responsibility to review these Terms and Conditions before accepting them. We may of course change, move, or delete portions of our site, or add to our site from time to time.

**II. How to Contact Us**

If you have questions about our Terms and Conditions, your dealings with our website, or technical problems with the operation of our website, you may contact us as provided below:

By phone at: 888-634-0495 (toll free) or 970-728-7078

By email at: admin@theratogs.com

**III. Exceptions to Our Privacy Policy**

There are exceptions to our Privacy Policy in that, if required or allowed by law, it may be necessary for TheraTogs to release or use Personally Identifiable Information we in good faith believe is appropriate in connection with legal proceedings, or in response to a subpoena, warrant, court order, levy, attachment, order of a court-appointed receiver, or other comparable legal process, including subpoenas from private parties in a civil action.

**IV. No Medical Advice**

Any health or health-related material provided on this site is for information purposes only. It is intended to be general in nature and does not constitute medical advice. TheraTogs is not a health care professional, and any health or health-related material contained on this site should not be used as a substitute for medical advice from a health care professional. THERATOGS ASSUMES NO RESPONSIBILITY FOR HOW YOU USE OR MISUSE THE INFORMATION YOU OBTAIN FROM THIS SITE, AND THERATOGS EXPRESSLY DISCLAIMS ANY SUCH OBLIGATIONS.

**V. Policies for Children (Individuals Under the Age of 13)**

Our site is not directed to children under the age of 13. If you are under the age of 13, you may not disclose or provide Personally Identifiable Information on our site. Parents and guardians should supervise children's access to the Internet. In the event we discover that a child under the age of 13 has provided Personally Identifiable

## Complaint

Information to us, in accordance with the Children's Online Privacy Protection Act of 1998, we will delete the child's Personally Identifiable Information from our files to the extent possible.

### VI. Safe Harbor

TheraTogs is located in the U.S. If you are located outside the U.S., any information you provide to us will be transferred to the U.S. If you do not wish to have your Personally Identifiable Information leave your country, do not provide the information to us. TheraTogs is a participant in the Safe Harbor program developed by the U.S. Department of Commerce and the European Union. We have certified that we adhere to the Safe Harbor Privacy Principles agreed upon by the U.S. and the European Union. For more information about the Safe Harbor and to view our certification, visit the U.S. Department of Commerce's Safe Harbor website at <http://www.export.gov/safeharbor>. You may also contact us directly (see Section II above) regarding our participation in the Safe Harbor.

### VII. Notice

A. The TheraTogs™ product is a Class I medical device intended to be issued by and applied under the supervision of a licensed healthcare practitioner. This website exists for the purpose of fulfilling our mission, which is to improve the mobility and stability of people with lower extremity deformities and movement disorders related to neuromotor dysfunction and pathomechanics. In pursuit of that mission, we design and develop the TheraTogs™ product and other products, provide professional education and development to healthcare practitioners, and provide professional consultation to practitioners and facilities. We may collect, process, and store Personally Identifiable Information electronically and/or in hard copy form. The primary purpose for collecting such data is to further our mission. TheraTogs does not collect sensitive personal data (racial or ethnic origin, political opinions, religious or similar beliefs, trade union membership, physical or mental health, sexual orientation, or criminal records).

B. Types of information. Information you may provide in visiting our site falls into two broad categories: personally identifiable information, and aggregate information. "Personally Identifiable Information" is information that can be used to identify or contact you, such as your name, email address, or mailing address. "Aggregate Information" is information that does not identify you, and may include, for example, statistical information concerning the Web pages on our site that users most frequent, or anonymized medical data provided by clinicians. Our Privacy Policy governs both categories of Information. The information we receive depends upon what you do when you visit our site, as detailed below.

C. Personally Identifiable Information. We do not share with unrelated third parties any Personally Identifiable Information you provide to us. By "unrelated third parties" we mean anyone who is not directly involved in the maintenance, hosting, or running of our site, or not involved in fulfilling requests you make at our site. We use Personally Identifiable Information you provide to us only for the purposes for which you have provided it. For example, if you request information about our products, submit feedback and comments, register for an Interservice Kit, order a product, fill out a product/customer registration form, or send us an email, you may provide us with Personally Identifiable Information. We will use any such Personally Identifiable Information only to respond to and/or fulfill your requests. Please note that, if you register for an upcoming event and the event is co-sponsored with another entity (which will be stated), you may also be providing Personally Identifiable Information to the co-sponsor (as well as to us). In any such situation, we will request that any such co-sponsor use the Personally Identifiable Information only for purposes related to registration of the event. If, at any time, you decide you no longer wish to have us contact you and/or provide you with the information/goods/services you requested, simply notify us (see Section II above) to that effect.

D. Aggregate Information. We may collect Aggregate Information about your use of our site through cookies and similar computer/Internet technologies. "Cookies" are small pieces of information that a website transfers to your hard drive, where it is stored by your browser on your computer's hard drive for record-keeping purposes (such as storing user preferences). For instance, if you visit our site to browse or to read or download information, we may collect and store one or more of the following: the name of the domain name and host from which you access the Internet (for example, aol.com); the Internet Protocol (IP) address of the computer you are using; the browser software you use and your operating system; the date and time you access our site, and other activity on our site; and the

## Complaint

Internet address of the website from which you linked to our site. If we use cookies or other similar computer/Internet technologies, we use the Aggregate Information collected for system administration, to measure the number of visitors to our site, to improve site performance, to help us make our site more useful, to gather broad Aggregate Information, etc. If we use cookies or other similar computer/Internet technologies, they do not collect or retain Personally Identifiable Information, nor do we link Aggregate Information to Personally Identifiable Information. Additionally, we do not authorize any third parties to use cookies we may create at our site for their own purposes. Please be advised, however, that sites you link to from our site may use cookies or other similar computer/Internet technologies in other ways and for other purposes. You should read and understand the privacy policy of the site(s) you link to in order to determine whether and how a particular site uses such technologies. Please note that most browsers are initially set up to accept cookies. You can reset your browser to refuse all cookies or indicate when a cookie is being sent. You should consult the help section of your Web browser software to learn how to do this. Be advised, however, that disabling cookies may prevent you from viewing or using certain Web pages.

E. *Third-Party Payment Processing.* We use a third party to process online orders. This third party is currently Verisign. Please be advised that Verisign's privacy policy (rather than TheraTogs' Privacy Policy) applies to the processing of your payment and associated handling of your Personally Identifiable Information by Verisign. The privacy policy of Verisign is available on the Web pages where you make an online purchase. You should read the Verisign privacy policy before making an online purchase. If you do not wish to purchase our products online, please contact us (see Section II above) to make other arrangements.

#### VIII. Choice

You have the opportunity to choose whether your Personally Identifiable Information is disclosed to a third party or used for a purpose that is incompatible with the purpose for which it was originally collected. Currently, TheraTogs does not disclose Personally Identifiable Information to third parties (other than parties that perform functions on behalf of TheraTogs), and we do not use Personally Identifiable Information for any purpose that is incompatible with the purposes for which it was originally collected.

#### IX. onward Transfer and Limitations of Use, Disclosure

A. *Onward Transfer, Limitations of Use, Disclosure.* TheraTogs will only disclose or share Personally Identifiable Information with an outside entity or third party administrator if consistent with the principles of notice and choice, as specified above. By submitting Personally Identifiable Information to us, you authorize certain transfers of such information. For instance, if you request information about a product in a country in which we have a distributor located, we may forward your query to the distributor in that territory. The country in which the distributor is located may or may not be a country the European Union has deemed to have "adequate" data protection laws. However, we will request that the distributor or other party safeguard Personally Identifiable Information consistent with the principles of notice and choice in this Privacy Policy. Additionally, where TheraTogs has knowledge that an agent is using or disclosing Personally Identifiable in a manner contrary to this Privacy Policy, we will take reasonable steps to prevent or stop the use or disclosure.

#### X. Security

A. *Access and security.* Each of our employees abides by our Privacy Policy, and only authorized individuals have access to your Personally Identifiable Information. We have in place security control systems designed to help prevent loss or theft and unauthorized access, disclosure, copying, use, or modification of your Personally Identifiable Information. **DUE TO THE NATURE OF THE INTERNET AND DEVELOPING TECHNOLOGIES, HOWEVER, THERATOGS CANNOT GUARANTEE OR WARRANT THE SECURITY OF YOUR INFORMATION, AND THERATOGS EXPRESSLY DISCLAIMS ANY SUCH OBLIGATIONS.**

B. *Do not use or access this website via a wireless network.* Do not provide Personally Identifiable Information to us using a wireless network, computer, or other device. Even if your machine is running wireless encryption protocols, there is a high security risk inherent in wireless networks. It is impossible for us to make any assurances as to the security of any such transmissions.

## Complaint

C. Email. If you communicate with us via email, we will share your correspondence with employees, representatives, or agents most capable of addressing your correspondence. We will retain your communication until we have done our very best to provide you with a complete and satisfactory response and may subsequently retain your communication for our records. Please be advised that email does not provide a means for completely secure and private communications. Although reasonable efforts will be made to keep your information confidential, from a technical standpoint, there is still a risk and it is impossible for us to guarantee the security of such transmissions.

D. Password protected areas. TheraTogs does not warrant or represent that the information you submit to password protected areas of our website will be protected against loss, misuse, or alteration by third parties. You are solely responsible for taking all steps to ensure that no other person has access to password protected areas of our site accessed through your password or account. It is your sole responsibility to (1) control the dissemination and use of your password; (2) authorize, monitor, and control access to and use of your password and password protected areas of our site accessed through your password or account; and (3) promptly inform TheraTogs of any need to deactivate a password. You permit TheraTogs and all other persons or entities involved in the operation of our site to transmit, monitor, retrieve, store, and use your Personally Identifiable Information in connection with the operation of password protected areas of our site.

E. Assignment or Transfer of Personally Identifiable Information. TheraTogs might at any time sell certain assets or the company, or parts of it, may be sold, merged, or otherwise transferred. If such a transaction occurs, Personally Identifiable Information may be one of the transferred assets. TheraTogs may assign its rights and duties under these Terms and Conditions to any party at any time without notice to you. In the event TheraTogs assigns or transfers your Personally Identifiable Information and its rights hereunder to a third party, you agree that TheraTogs may do so, on the condition that any such third party agrees to abide by our Privacy Policy as it applies to any Personally Identifiable Information the third party may receive in the course of such assignment or transfer. **THERATOGS, HOWEVER, CANNOT GUARANTEE OR WARRANT THAT SUCH THIRD PARTY WILL IN FACT ABIDE BY OUR PRIVACY POLICY, AND THERATOGS EXPRESSLY DISCLAIMS ANY SUCH OBLIGATIONS.**

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TheraTogs will only collect Personally Identifiable Information relevant to its proposed use. Reasonable measures will be taken to ensure that the information is reliable for its intended use, accurate, complete, and current.

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You will generally have access through us to your Personally Identifiable Information, except where such access would impose a disproportionate burden or expense on TheraTogs, or would interfere with the privacy rights of third parties. You may also request, in certain circumstances, that we correct, amend, or delete your Personally Identifiable Information in accordance with local laws. Please understand that it may be impossible to remove information completely, due to backups and records of deletions. We reserve the right to limit the number of requests made under this Section, and to charge a fee for requests exceeding a certain number or if the process is abused or misused. Requests under this Section should be made using the contact information provided above in Section II.

### XIII. Enforcement and Accountability

TheraTogs will have compliance reviews conducted as part of the self-audit process, and provide appropriate training to those who have access to Personally Identifiable Information. Anyone who violates our Privacy Policy is subject to disciplinary action, up to and including termination where appropriate and permitted by applicable law.

### XIV. Dispute Resolution

Anyone who submits Personally Identifiable Information to TheraTogs who feels we have mishandled the Personally Identifiable Information in violation of the Safe Harbor requirements should contact us (see Section II

## Complaint

above) with a written description of the complaint. After receiving any such complaint, we will contact you to set up a time and manner to discuss the complaint. If these good faith efforts to resolve the complaint fail, you may contact an independent dispute resolution body. TheraTogs agrees to submit to mediation and/or arbitration through the American Arbitration Association for any such unresolved complaints. Any complaint shall be resolved in a manner consistent with the Safe Harbor principles in a manner necessary to remedy the effects of noncompliance and to assure that future processing of personal data will be in conformity with the Safe Harbor principles.

**XV. Links to Other Websites**

Our site may contain links to other sites ("Third Party Sites"). We do not necessarily endorse, sanction, or verify any of these Third Party Sites or anything posted on these sites, and we provide such links merely for the convenience of our users. Once you access a Third Party Site through a link on our site, you are subject to the privacy policy and terms and conditions of use of the Third Party Site. We have no control and bear no responsibility for any action or policy associated with any Third Party Site. Concerns regarding these sites should be directed to the Third Party Sites.

**XVI. Ownership of Site Contents; Downloading**

Unless otherwise noted, all text, images, illustrations, designs, icons, photographs, video clips, and other materials that are part of our site (collectively the "Materials") are copyrighted works, trademarks, trade dress, or other intellectual properties owned, controlled, or licensed by TheraTogs or used under principles of "fair use." The Materials of our site and the site as a whole are intended solely for your personal use. You may download or copy the Materials for such personal use, provided that you do not remove any copyright or other proprietary notices contained on the Materials. By allowing you to download these Materials for personal use, we expressly do not transfer to you any right, title, or interest in the Materials.

**XVII. User Comments**

All comments, feedback, postcards, suggestions, ideas, and other submissions disclosed, submitted, or offered to TheraTogs through our site or otherwise disclosed, submitted, or offered in connection with your use of our site (collectively "User Comments") shall be and remain the property of TheraTogs. You agree that TheraTogs may use or disclose User Comments in any manner consistent with our Privacy Policy. TheraTogs shall be free to use, without restriction and without compensation to you, any ideas, concepts, know-how, suggestions, or techniques contained in any User Comments you send to us for any purpose whatsoever. TheraTogs has no obligation to respond to any User Comments, and we reserve the right, but undertake no duty, to review, edit, move, or delete any User Comments, in our sole discretion and without notice.

**XVIII. Content of User-Posted Information; Other Use of Our Site**

You are prohibited from posting or transmitting any advertising "spam," unlawful material, or other material we deem otherwise inappropriate for our site. **THERATOGS DISCLAIMS ANY AND ALL RESPONSIBILITY OR LIABILITY ARISING FROM, CONNECTED TO, OR ASSOCIATED WITH THE CONTENT OF ANY USER POSTINGS.** You agree to refrain from undertaking any activity that imposes an unreasonable or disproportionate burden on our site. TheraTogs reserves the sole discretion to deny, revoke, or otherwise restrict the access privileges of any user who at any time fails to comply with these Terms and Conditions.

**XIX. Complaints Regarding Perceived Infringement**

TheraTogs respects intellectual property rights, and will deny access to our site to anyone who, in our discretion, repeatedly infringes the intellectual property rights of others. In addition, we will use reasonable efforts, in light of our resources, to accommodate generally accepted technical measures used by copyright owners to identify and protect their copyrighted works. If you believe materials posted on our site infringe rights you enjoy under copyright law in specific materials (collectively a "Work"), we request that you direct your concerns to our "Designated Agent" provided below, pursuant to the Digital Millennium Copyright Act (17 U.S.C. §512) (hereafter the "DMCA"). Your notice to our Designated Agent should follow the notice provisions set out in the DMCA.

## Complaint

Additional information about the DMCA can be obtained from the website of the Copyright Office located at <http://www.dsg.gov>. Upon receiving your notice, we agree to respond to it and, if appropriate, remove or disable access to material you believe infringes your Work.

Designated Agent: Sheila M. Heidmiller, Esq.  
 Macheledt Bales & Heidmiller LLP  
 Las Sendas Suites  
 7248 E. Tasman Street  
 Mesa, AZ 85207  
 Phone: 480-773-7807  
 Email: sheilah@mbh-law.com

**XX. Disclaimer and Limitation of Liability**

A. *Disclaimer.* While we use reasonable efforts to include accurate and up-to-date information on our site, we make no warranties or representations as to its accuracy. TheraTogs assumes no liability or responsibility for any errors or omissions in the content on our site. **OUR SITE AND ALL CONTENTS OF OUR SITE ARE PROVIDED ON AN "AS IS" BASIS WITHOUT WARRANTIES OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION WARRANTIES OF TITLE OR IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. YOU ACKNOWLEDGE THAT YOUR USE OF OUR SITE IS AT YOUR SOLE RISK, THAT YOU ASSUME FULL RESPONSIBILITY FOR ALL COSTS ASSOCIATED WITH ALL NECESSARY SERVICING OR REPAIRS OF ANY EQUIPMENT YOU USE IN CONNECTION WITH YOUR USE OF OUR SITE, AND THAT THERATOGS SHALL NOT BE LIABLE FOR ANY DAMAGES OF ANY KIND RELATED TO YOUR USE OF OUR SITE.** Please note that some jurisdictions may not allow the exclusion of implied warranties, so some of the above exclusions may not apply to you. Check your local laws for any restrictions or limitations regarding the exclusion of implied warranties.

B. *Limitation of Liability.* **NEITHER THERATOGS NOR ANY OTHER PARTY INVOLVED IN CREATING, PRODUCING, HOSTING, OR DEVELOPING OUR SITE SHALL BE LIABLE FOR ANY DIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL, INDIRECT, OR PUNITIVE DAMAGES ARISING OUT OF YOUR ACCESS TO OR USE OF OUR SITE. THE USE OF THE SERVICES OR THE DOWNLOADING OR OTHER USE OF ANY MATERIALS THROUGH OUR SITE IS DONE AT YOUR OWN DISCRETION AND RISK AND WITH YOUR AGREEMENT THAT YOU WILL BE SOLELY RESPONSIBLE FOR ANY DAMAGE TO YOUR COMPUTER SYSTEM, LOSS OF DATA, OR OTHER HARM THAT RESULTS FROM SUCH ACTIVITIES. THERATOGS ASSUMES NO LIABILITY FOR ANY COMPUTER VIRUS, WORM, OR OTHER SIMILAR SOFTWARE CODE THAT MAY BE DOWNLOADED TO YOUR COMPUTER FROM OUR SITE OR IN CONNECTION WITH ANY SERVICES OR MATERIALS OFFERED THROUGH OUR SITE. THERATOGS WILL NOT BE LIABLE FOR ANY DAMAGES OF ANY KIND ARISING FROM THE USE OF OUR SITE, INCLUDING, BUT NOT LIMITED TO DIRECT, INDIRECT, INCIDENTAL, PUNITIVE, OR CONSEQUENTIAL DAMAGES, WHETHER IN AN ACTION OF CONTRACT OR NEGLIGENCE OR OTHER TORTIOUS ACTION. Some jurisdictions prohibit the exclusion or limitation of liability for consequential or incidental damages. Accordingly, some of the limitations and exclusions set forth above may not apply to you.**

**XXI. Indemnification**

You agree to defend, indemnify and hold TheraTogs harmless from and against any and all claims, damages, costs, and expenses, including attorney's fees, arising from or in any way related to your failure to comply with these Terms and Conditions of your use of our site.

## Complaint

**XXII. Choice of Law and Jurisdiction**

Unless otherwise specified, our site and the Contents thereof are displayed solely for the purpose of promoting the mission of TheraTogs. Subject to Section XIV, these Terms and Conditions shall be construed in accordance with the laws of the State of Colorado, without regard to any conflict of law provisions. Subject to Section XIV, any dispute arising under these Terms and Conditions shall be resolved exclusively by the state or federal courts sitting in Colorado.

**XXIII. Headings**

The headings in these Terms and Conditions are included solely for convenience and will not limit or otherwise affect this Privacy Policy or any interpretation thereof.

**XXIV. Severability**

If for any reason a court of competent jurisdiction finds any provision of these Terms and Conditions, or any portion thereof, to be unenforceable, that provision shall be enforced to the maximum extent permissible so as to affect the intent of these Terms & Conditions, and the remainder of these Terms and Conditions shall continue in full force and effect.

**XXV. Non-Transferability**

Your right to use our site and your duties and obligations under these Terms and Conditions are NOT transferable.

© 2006 TheraTogs, Inc. All rights reserved.

Effective Date: January 10, 2006

## Complaint

**Exhibit C**

Privacy Policy and Terms and Conditions of Use  
for Progressive GaitWays, L.L.C.  
<www.gaitways.com>

Welcome and thank you for visiting the PGW product website owned by Progressive GaitWays, L.L.C. (hereafter the "PGW" website). As used herein, the words "you" and "your" refer to any person or entity accessing the PGW website. The words "we," "us," and "our" refer to the PGW website. The following describes how we handle information we may learn about you from your visit to our website or through other voluntary means and provides the rules that govern your use of our site.

**I. These Terms and Conditions Govern Your Use of Our Site**

*A. Use of our site constitutes contractual agreement.* AS A CONDITION TO AND IN CONSIDERATION OF ACCESSING AND USING OUR SITE, YOU AGREE TO BE BOUND BY THESE TERMS AND CONDITIONS OF USE AND BY OUR PRIVACY POLICY (COLLECTIVELY OUR "TERMS AND CONDITIONS"). USING THIS SITE CONSTITUTES YOUR ACCEPTANCE OF AND AGREEMENT TO BE BOUND BY THESE TERMS AND CONDITIONS. IF YOU DO NOT WISH TO BE BOUND BY THESE TERMS AND CONDITIONS, YOU SHOULD NOT USE/VISIT OUR SITE.

*B. Amendments to these Terms and Conditions.* We reserve the right to modify, alter, or otherwise update these Terms and Conditions at any time. Any changes will apply prospectively only, as of the effective date found at the bottom of these Terms and Conditions. It is your responsibility to review these Terms and Conditions before accepting them. We may of course change, move, or delete portions of our site, or add to our site from time to time.

**II. How to Contact Us**

If you have questions about our Terms and Conditions, your dealings with our website, or technical problems with the operation of our website, you may contact us as provided below:

By phone at: (888) 396-7241

By email at: [admin@gaitways.com](mailto:admin@gaitways.com)

**III. Exceptions to Our Privacy Policy**

There are exceptions to our Privacy Policy in that, if required or allowed by law, it may be necessary for PGW to release or use Personally Identifiable Information we in good faith believe is appropriate in connection with legal proceedings, or in response to a subpoena, warrant, court order, levy, attachment, order of a court-appointed receiver, or other comparable legal process, including subpoenas from private parties in a civil action.

**IV. No Medical Advice**

Any health or health-related material provided on this site is for information purposes only. It is intended to be general in nature and does not constitute medical advice. PGW is not a health care professional, and any health or health-related material contained on this site should not be used as a substitute for medical advice from a health care professional. **PGW ASSUMES NO RESPONSIBILITY FOR HOW YOU USE OR MISUSE THE INFORMATION YOU OBTAIN FROM THIS SITE, AND PGW EXPRESSLY DISCLAIMS ANY SUCH OBLIGATIONS.**

**V. Policies for Children (Individuals Under the Age of 13)**

Our site is not directed to children under the age of 13. **If you are under the age of 13, you may not disclose or provide Personally Identifiable Information on our site.** Parents and guardians should supervise children's access to the Internet. In the event we discover that a child under the age of 13 has provided Personally Identifiable



## Complaint

information to us, in accordance with the Children's Online Privacy Protection Act of 1998, we will delete the child's Personally Identifiable Information from our files to the extent possible.

#### VI. Safe Harbor

PGW is located in the U.S. If you are located outside the U.S., any information you provide to us will be transferred to the U.S. If you do not wish to have your Personally Identifiable Information leave your country, do not provide the information to us. PGW is a participant in the Safe Harbor program developed by the U.S. Department of Commerce and the European Union. We have certified that we adhere to the Safe Harbor Privacy Principles agreed upon by the U.S. and the European Union. For more information about the Safe Harbor and to view our certification, visit the U.S. Department of Commerce's Safe Harbor website at <http://www.export.gov/safeharbor>. You may also contact us directly (see Section II above) regarding our participation in the Safe Harbor.

#### VII. Notice

A. *Types of information.* Information you may provide in visiting our site falls into two broad categories: personally identifiable information, and aggregate information. "Personally Identifiable Information" is information that can be used to identify or contact you, such as your name, email address, or mailing address. "Aggregate Information" is information that does not identify you, and may include, for example, statistical information concerning the Web pages on our site that users most frequent, or anonymized medical data provided by clinicians. Our Privacy Policy governs both categories of information. The information we receive depends upon what you do when you visit our site, as detailed below.

B. *Personally Identifiable Information.* We do not share with unrelated third parties any Personally Identifiable Information you provide to us. By "unrelated third parties" we mean anyone who is not directly involved in the maintenance, hosting, or running of our site, or not involved in fulfilling requests you make at our site. We use Personally Identifiable Information you provide to us only for the purposes for which you have provided it. For example, if you request information about our products, submit feedback and comments, register for an Inservice Kit, order a product, fill out a product/customer registration form, or send us an email, you may provide us with Personally Identifiable Information. We will use any such Personally Identifiable Information only to respond to and/or fulfill your requests. Please note that, if you register for an upcoming event and the event is co-sponsored with another entity (which will be stated), you may also be providing Personally Identifiable Information to the co-sponsor (as well as to us). In any such situation, we will request that any such co-sponsor use the Personally Identifiable Information only for purposes related to registration of the event. If, at any time, you decide you no longer wish to have us contact you and/or provide you with the information/goods/services you requested, simply notify us (see Section II above) to that effect.

C. *Aggregate Information.* We may collect Aggregate Information about your use of our site through cookies and similar computer/Internet technologies. "Cookies" are small pieces of information that a website transfers to your hard drive, where it is stored by your browser on your computer's hard drive for record-keeping purposes (such as storing user preferences). For instance, if you visit our site to browse or to read or download information, we may collect and store one or more of the following: the name of the domain name and host from which you access the Internet (for example, aol.com); the Internet Protocol (IP) address of the computer you are using; the browser software you use and your operating system; the date and time you access our site, and other activity on our site; and the Internet address of the website from which you linked to our site. If we use cookies or other similar computer/Internet technologies, we use the Aggregate Information collected for system administration, to measure the number of visitors to our site, to improve site performance, to help us make our site more useful, to gather broad Aggregate Information, etc. If we use cookies or other similar computer/Internet technologies, they do not collect or retain Personally Identifiable Information, nor do we link Aggregate Information to Personally Identifiable Information. Additionally, we do not authorize any third parties to use cookies we may create at our site for their own purposes. Please be advised, however, that sites you link to from our site may use cookies or other similar computer/Internet technologies in other ways and for other purposes. You should read and understand the privacy policy of the sites you link to in order to determine whether and how a particular site uses such technologies. Please note that most browsers are initially set up to accept cookies. You can reset your browser to refuse all cookies or indicate when a cookie is being

## Complaint

sent. You should consult the help section of your Web browser software to learn how to do this. Be advised, however, that disabling cookies may prevent you from viewing or using certain Web pages.

D. Third-Party Payment Processing. We use a third party to process online orders. This third party is currently ECommerce Exchange. Please be advised that ECommerce Exchange's privacy policy (rather than PGW's Privacy Policy) applies to the processing of your payment and associated handling of your Personally Identifiable Information by ECommerce Exchange. The privacy policy of ECommerce Exchange is available on the Web pages where you make an online purchase. You should read the ECommerce Exchange privacy policy before making an online purchase. If you do not wish to purchase our products online, please contact us (see Section II above) to make other arrangements.

### VIII. Choice

You have the opportunity to choose whether your Personally Identifiable Information is disclosed to a third party or used for a purpose that is incompatible with the purpose for which it was originally collected. Currently, PGW does not disclose Personally Identifiable Information to third parties (other than parties that perform functions on behalf of PGW), and we do not use Personally Identifiable Information for any purpose that is incompatible with the purposes for which it was originally collected.

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## Complaint

D. Protection of password protected areas. PGW does not warrant or represent that the information you submit to password protected areas of our website will be protected against loss, misuse, or alteration by third parties. You are solely responsible for taking all steps to ensure that no other person has access to password protected areas of our site accessed through your password or account. It is your sole responsibility to (1) control the dissemination and use of your password; (2) authorize, monitor, and control access to and use of your password and password protected areas of our site accessed through your password or account; and (3) promptly inform PGW of any need to deactivate a password. You permit PGW and all other persons or entities involved in the operation of our site to transmit, monitor, retrieve, store, and use your Personally Identifiable Information in connection with the operation of password protected areas of our site.

E. Assignment or Transfer of Personally Identifiable Information. PGW might at any time sell certain assets or the company, or parts of it, may be sold, merged, or otherwise transferred. If such a transaction occurs, Personally Identifiable Information may be one of the transferred assets. PGW may assign its rights and duties under these Terms and Conditions to any party at any time without notice to you. In the event PGW assigns or transfers your Personally Identifiable Information and its rights hereunder to a third party, you agree that PGW may do so, on the condition that any such third party agrees to abide by our Privacy Policy as it applies to any Personally Identifiable Information the third party may receive in the course of such assignment or transfer. **PGW, HOWEVER, CANNOT GUARANTEE OR WARRANT THAT SUCH THIRD PARTY WILL IN FACT ABIDE BY OUR PRIVACY POLICY, AND PGW EXPRESSLY DISCLAIMS ANY SUCH OBLIGATIONS.**

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## Complaint

### XV. Links to Other Websites

Our site may contain links to other sites ("Third Party Sites"). We do not necessarily endorse, sanction, or verify any of these Third Party Sites or anything posted on these sites, and we provide such links merely for the convenience of our users. Once you access a Third Party Site through a link on our site, you are subject to the privacy policy and terms and conditions of use of the Third Party Site. We have no control and bear no responsibility for any action or policy associated with any Third Party Site. Concerns regarding these sites should be directed to the Third Party Sites.

### XVI. Ownership of Site Contents; Downloading

Unless otherwise noted, all text, images, illustrations, designs, icons, photographs, video clips, and other materials that are part of our site (collectively the "Materials") are copyrighted works, trademarks, trade dress, or other intellectual properties owned, controlled, or licensed by PGW or used under principles of "fair use." The Materials of our site and the site as a whole are intended solely for your personal use. You may download or copy the Materials for such personal use, provided that you do not remove any copyright or other proprietary notices contained on the Materials. By allowing you to download these Materials for personal use, we expressly do not transfer to you any right, title, or interest in the Materials.

### XVII. User Comments

All comments, feedback, postcards, suggestions, ideas, and other submissions disclosed, submitted, or offered to PGW through our site or otherwise disclosed, submitted, or offered in connection with your use of our site (collectively "User Comments") shall be and remain the property of PGW. You agree that PGW may use or disclose User Comments in any manner consistent with our Privacy Policy. PGW shall be free to use, without restriction and without compensation to you, any ideas, concepts, know-how, suggestions, or techniques contained in any User Comments you send to us for any purpose whatsoever. PGW has no obligation to respond to any User Comments, and we reserve the right, but undertake no duty, to review, edit, move, or delete any User Comments, in our sole discretion and without notice.

### XVIII. Content of User-Posted Information; Other Use of Our Site

You are prohibited from posting or transmitting any advertising, "spam," unlawful material, or other material we deem otherwise inappropriate for our site. **PGW DISCLAIMS ANY AND ALL RESPONSIBILITY OR LIABILITY ARISING FROM, CONNECTED TO, OR ASSOCIATED WITH THE CONTENT OF ANY USER POSTINGS.** You agree to refrain from undertaking any activity that imposes an unreasonable or disproportionate burden on our site. PGW reserves the sole discretion to deny, revoke, or otherwise restrict the access privileges of any user who at any time fails to comply with these Terms and Conditions.

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PGW respects intellectual property rights, and will deny access to our site to anyone who, in our discretion, repeatedly infringes the intellectual property rights of others. In addition, we will use reasonable efforts, in light of our resources, to accommodate generally accepted technical measures used by copyright owners to identify and protect their copyrighted works. If you believe materials posted on our site infringe rights you enjoy under copyright law in specific materials (collectively a "Work"), we request that you direct your concerns to our "Designated Agent" provided below, pursuant to the Digital Millennium Copyright Act (17 U.S.C. §3121) hereafter the "DMCA". Your notice to our Designated Agent should follow the notice provisions set out in the DMCA. Additional information about the DMCA can be obtained from the website of the Copyright Office located at [www.copyright.gov](http://www.copyright.gov). Upon receiving your notice, we agree to respond to it and, if appropriate, remove or disable access to material you believe infringes your Work.

## Complaint

Designated Agent: Sheila M. Heidmiller, Esq.  
Machelski Bales & Heidmiller LLP  
Las Sendas Suites  
7248 E. Tatum Street  
Mesa, AZ 85207  
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## XX. Disclaimer and Limitation of Liability

A. *Disclaimer.* While we use reasonable efforts to include accurate and up-to-date information on our site, we make no warranties or representations as to its accuracy. PGW assumes no liability or responsibility for any errors or omissions in the content on our site. **OUR SITE AND ALL CONTENTS OF OUR SITE ARE PROVIDED ON AN "AS IS" BASIS WITHOUT WARRANTIES OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION WARRANTIES OF TITLE OR IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. YOU ACKNOWLEDGE THAT YOUR USE OF OUR SITE IS AT YOUR SOLE RISK, THAT YOU ASSUME FULL RESPONSIBILITY FOR ALL COSTS ASSOCIATED WITH ALL NECESSARY SERVICING OR REPAIRS OF ANY EQUIPMENT YOU USE IN CONNECTION WITH YOUR USE OF OUR SITE, AND THAT PGW SHALL NOT BE LIABLE FOR ANY DAMAGES OF ANY KIND RELATED TO YOUR USE OF OUR SITE.** Please note that some jurisdictions may not allow the exclusion of implied warranties, so some of the above exclusions may not apply to you. Check your local laws for any restrictions or limitations regarding the exclusion of implied warranties.

B. *Limitation of Liability.* **NEITHER PGW NOR ANY OTHER PARTY INVOLVED IN CREATING, PRODUCING, HOSTING, OR DEVELOPING OUR SITE SHALL BE LIABLE FOR ANY DIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL, INDIRECT, OR PUNITIVE DAMAGES ARISING OUT OF YOUR ACCESS TO OR USE OF OUR SITE. THE USE OF THE SERVICES OR THE DOWNLOADING OR OTHER USE OF ANY MATERIALS THROUGH OUR SITE IS DONE AT YOUR OWN DISCRETION AND RISK AND WITH YOUR AGREEMENT THAT YOU WILL BE SOLELY RESPONSIBLE FOR ANY DAMAGE TO YOUR COMPUTER SYSTEM, LOSS OF DATA, OR OTHER HARM THAT RESULTS FROM SUCH ACTIVITIES. PGW ASSUMES NO LIABILITY FOR ANY COMPUTER VIRUS, WORM, OR OTHER SIMILAR SOFTWARE CODE THAT MAY BE DOWNLOADED TO YOUR COMPUTER FROM OUR SITE OR IN CONNECTION WITH ANY SERVICES OR MATERIALS OFFERED THROUGH OUR SITE. PGW WILL NOT BE LIABLE FOR ANY DAMAGES OF ANY KIND ARISING FROM THE USE OF OUR SITE, INCLUDING, BUT NOT LIMITED TO DIRECT, INDIRECT, INCIDENTAL, PUNITIVE, OR CONSEQUENTIAL DAMAGES, WHETHER IN AN ACTION OF CONTRACT OR NEGLIGENCE OR OTHER TORTIOUS ACTION. Some jurisdictions prohibit the exclusion or limitation of liability for consequential or incidental damages. Accordingly, some of the limitations and exclusions set forth above may not apply to you.**

## XXI. Indemnification

You agree to defend, indemnify and hold PGW harmless from and against any and all claims, damages, costs, and expenses, including attorney's fees, arising from or in any way related to your failure to comply with these Terms and Conditions or your use of our site.

## XXII. Choice of Law and Jurisdiction

Unless otherwise specified, our site and the Contents thereof are displayed solely for the purpose of promoting the mission of PGW. Subject to Section XIV, these Terms and Conditions shall be construed in accordance with the laws of the State of Colorado, without regard to any conflict of law provisions. Subject to Section XIV, any dispute

## Complaint

arising under these Terms and Conditions shall be resolved exclusively by the state or federal courts sitting in Colorado.

### **XXIII. Headings**

The headings in these Terms and Conditions are included solely for convenience and will not limit or otherwise affect this Privacy Policy or any interpretation thereof.

### **XXIV. Severability**

If for any reason a court of competent jurisdiction finds any provision of these Terms and Conditions, or any portion thereof, to be unenforceable, that provision shall be enforced to the maximum extent permissible so as to affect the intent of these Terms & Conditions, and the remainder of these Terms and Conditions shall continue in full force and effect.

### **XXV. Non-Transferability**

Your right to use our site and your duties and obligations under these Terms and Conditions are NOT transferable.

© 2007 Progressive GaitWays, LLC. All rights reserved.

Effective Date: May 1, 2007

Decision and Order

**DECISION AND ORDER**

The Federal Trade Commission, having initiated an investigation of certain acts and practices of the Respondent named in the caption hereof, and the Respondent having been furnished thereafter with a copy of a draft of Complaint, which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued, would charge the Respondent with violation of the Federal Trade Commission Act; and

The Respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the Respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by the Respondent that the law has been violated as alleged in such complaint, or that any of the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the Respondent has violated the Federal Trade Commission Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, 16 C.F.R. § 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Progressive Gaitways LLC is a Colorado company with its principal office or place of business at 305 Society Drive, #C-3, Telluride, Colorado 81435.
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:

- A. Unless otherwise specified, “respondent” shall mean Progressive Gaitways LLC and its subsidiaries, divisions, affiliates, successors and assigns.
- B. “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, 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 respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy, security, or any other compliance program sponsored by the government or any other third party.

**II.**

**IT IS FURTHER ORDERED** that respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of, for a period of five (5) years from the date of preparation or dissemination, whichever is later, all documents relating to compliance with this order, including but not limited to:

- A. all advertisements, promotional materials, and any other statements containing any representations covered by this order, with all materials relied upon in disseminating the representation; and



## Decision and Order

- B. any documents, whether prepared by or on behalf of respondent, that calls into question respondent's compliance with this order.

**III.**

**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, and shall secure from each such person a signed and dated statement acknowledging receipt of the 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.

**IV.**

**IT IS FURTHER ORDERED** that respondent 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 respondent learns fewer than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

**V.**

**IT IS FURTHER ORDERED** that respondent shall, within sixty (60) days after service of this order, and at such other times as the Commission may require, file with the Commission a

## Decision and Order

report, in writing, setting forth in detail the manner and form in which it has complied with this order.

**VI.**

This order will terminate on November 9, 2029, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. any Part in this order that terminates in fewer than twenty (20) years;
- B. this order's application to any respondent that is not named as a defendant in such complaint; and
- C. this order if such complaint is filed after the order has terminated pursuant to this Part.

*Provided, further*, that if such complaint is dismissed or a federal court rules that respondent 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 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” or “Commission”) has accepted, subject to final approval, a consent agreement from Progressive Gaitways, Inc.

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.

This matter concerns alleged false or misleading representations that Progressive Gaitways made to consumers concerning its participation in the Safe Harbor privacy framework (“Safe Harbor”) agreed upon by the U.S. and the European Union (“EU”). It is among the Commission’s first cases to challenge deceptive claims about the Safe Harbor. The Safe Harbor provides a mechanism for U.S. companies to transfer data outside the EU consistent with European law. To join the Safe Harbor, a company must self-certify to the U.S. Department of Commerce (“Commerce”) that it complies with seven principles and related requirements. Commerce maintains a public website, [www.export.gov/safeharbor](http://www.export.gov/safeharbor), where it posts the names of companies that have self-certified to the Safe Harbor. The listing of companies indicates whether their self-certification is “current” or “not current.” Companies are required to re-certify every year in order to retain their status as “current” members of the Safe Harbor framework.

Progressive Gaitways sells medical equipment, including through two websites ([www.theratogs.com](http://www.theratogs.com) and [www.gaitways.com](http://www.gaitways.com)). According to the Commission’s complaint, from at least December 2008 until June 2009, Progressive Gaitways’ [www.theratogs.com](http://www.theratogs.com) website set forth privacy policies and statements about its practices, including statements related to its participation in the Safe Harbor. From at least June 2007 until June 2009, respondent has set forth on its website, [www.gaitways.com](http://www.gaitways.com), the same privacy policies and statements,

## Analysis to Aid Public Comment

including the statements related to participation in the Safe Harbor.

The Commission's complaint alleges that until June 2009, Progressive Gaitways falsely represented that it was a current participant in the Safe Harbor when, in fact, Progressive Gaitways has not been a current participant in the Safe Harbor since November 2006 for its [www.theratogs.com](http://www.theratogs.com) website, and had never been a participant in the Safe Harbor for its [www.gaitways.com](http://www.gaitways.com) website. The Commission's complaint alleges that Progressive Gaitways submitted a Safe Harbor self-certification on behalf of its [www.theratogs.com](http://www.theratogs.com) website in November 2004 and renewed it in November 2005. It did not renew the self-certification in November 2006, at which point Commerce updated its status to "not current" on the Commerce public website. To date, Progressive Gaitways has not renewed its self-certification to the Safe Harbor on behalf of [www.theratogs.com](http://www.theratogs.com). The Commission's proposed complaint also alleges that Progressive Gaitways has never filed a Safe Harbor self-certification on behalf of its [www.gaitways.com](http://www.gaitways.com) website.

The proposed order applies to Progressive Gaitways' representations about its membership in any privacy, security, or any other compliance program sponsored by the government or any other third party. It contains provisions designed to prevent Progressive Gaitways from engaging in the future in practices similar to those alleged in the complaint.

Part I of the proposed order prohibits Progressive Gaitways from making misrepresentations about its membership in any privacy, security, or any other compliance program sponsored by the government or any other third party.

Parts II through VI of the proposed order are reporting and compliance provisions. Part II requires Progressive Gaitways to retain documents relating to its compliance with the order for a five-year period. Part III requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part IV ensures notification to the FTC of changes in corporate status. Part V mandates that Progressive Gaitways submit an initial compliance report to the FTC, and make available to the FTC subsequent reports. Part VI

## Analysis to Aid Public Comment

is a provision “sunsetting” the order after twenty (20) years, with certain exceptions.

The purpose of the 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

**COLLECTIFY LLC**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4272; File No. 092 3142**Complaint, November 9, 2009 - Decision, November 9, 2009*

This consent order addresses respondent Collectify, LLC, providers of software and consulting services to businesses with employees residing outside of origin. Respondent manages tax and payroll issues for employees that work outside their country of residence. The complaint alleges the respondent violated Section 5 of the FTC Act by making false and misleading representations concerning Collectify, LLC's participation in the Safe Harbor privacy framework. Safe Harbor is an international program for international data transfer between the U.S. and the European Union. Respondent advertised an incorrect status as to its compliance with the program. The order prohibits Collectify, LLC from making misrepresentations about its membership in any privacy, security, or any other compliance program sponsored by the government or any other third party.

*Participants*

For the *Commission: Molly Crawford and Katie Ratté*

For the *Respondents: Karl M. Zielaznicki, Troutman Sanders, LLP.*

**COMPLAINT**

The Federal Trade Commission, having reason to believe that Collectify LLC ("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 Collectify LLC ("Collectify") is a Delaware corporation with its principal office or place of business at 235 East 73rd Street, Suite 3C, New York, New York 10012.
2. Respondent is in the business of selling comprehensive cataloguing software to consumers over the internet, including through a website ([www.collectify.com](http://www.collectify.com)).

## Complaint

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

4. Since at least September 2001, respondent has set forth on its website, [www.collectify.com](http://www.collectify.com), privacy policies and statements about its practices, including statements related to its participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union (“U.S.-EU Safe Harbor Framework” or “Safe Harbor”).

**U.S.-EU SAFE HARBOR FRAMEWORK**

5. The U.S.-EU Safe Harbor Framework provides a method for U.S. companies to transfer personal data outside of Europe that is consistent with the requirements of the European Union Directive on Data Protection (“Directive”). Enacted in 1995, the Directive sets forth European Union (“EU”) requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission (“EC”) has made a determination that the recipient jurisdiction’s laws ensure the protection of such personal data. *See* Directive 95/46/EC of the European Parliament and of the Council (Oct. 24, 1995), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:HTML>. This determination is commonly referred to as meeting the EU’s “adequacy” standard.

6. To satisfy the EU adequacy standard for certain commercial transfers, the U.S. Department of Commerce (“Commerce”) and the EC negotiated the U.S.-EU Safe Harbor Framework, which went into effect in 2000. The Safe Harbor allows U.S. companies to transfer personal data lawfully from the EU. To join the Safe Harbor, a company must self-certify to Commerce that it complies with seven principles and related requirements that have been deemed to meet the EU’s adequacy standard.

7. Companies under the jurisdiction of the U.S. Federal Trade Commission (“FTC”), as well as the U.S. Department of

## Complaint

Transportation, are eligible to join the Safe Harbor. A company under the FTC's jurisdiction that self-certifies to the Safe Harbor principles but fails to implement them may be subject to an enforcement action based on the FTC's deception authority under Section 5 of the Federal Trade Commission Act.

8. Commerce maintains a public website, [www.export.gov/safeharbor](http://www.export.gov/safeharbor), where it posts the names of companies that have self-certified to the Safe Harbor. The listing of companies indicates whether their self-certification is "current" or "not current." Companies are required to re-certify every year in order to retain their status as "current" members of the Safe Harbor framework. According to the Safe Harbor website, "Organizations should notify the Department of Commerce if their representation to the Department is no longer valid. Failure to do so could constitute a misrepresentation." See Safe Harbor List, available at <http://web.ita.doc.gov/safeharbor/shlist.nsf/webPages/safe+harbor+list>.

**VIOLATIONS OF SECTION 5 OF THE FTC ACT**

9. In October 2001, respondent submitted to Commerce a self-certification to the Safe Harbor. Respondent renewed that self-certification in October 2002 and October 2003.

10. In October 2004, respondent did not renew its self-certification to the Safe Harbor, and Commerce updated respondent's status to "not current" on its public website. Until July 2009, respondent did not renew its self-certification to the Safe Harbor and was in "not current" status on Commerce's website. (Exhibit A, Declaration of Damon C. Greer).

11. Since at least September 2001 to the present, respondent has disseminated or caused to be disseminated privacy policies and statements on the [www.collectify.com](http://www.collectify.com) website, including, but not limited to, the following statements:

This Privacy Policy complies with the U.S. Department of Commerce Safe Harbor Privacy Principles, as approved by the European Commission.



## Complaint

Collectify is in the process of certifying its compliance with the U.S. Department of Commerce.

Exhibit B, Oct. 2001 Privacy Policy; Exhibit C, Feb. 2003 Privacy Policy; Exhibit D, Dec. 2004 Privacy Policy; Exhibit E, Dec. 2005 Privacy Policy; Exhibit F, Dec. 2008 Privacy Policy.

12. Through the means described in Paragraph 11, respondent represented, expressly or by implication, that it is seeking self-certification to, or is a current participant in, the Safe Harbor.

13. In truth and in fact, from October 2004 to July 2009, respondent did not seek self-certification to, and was not a current participant in, the Safe Harbor. Therefore, the representations set forth in Paragraph 11 were, and are, false or misleading.

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

**THEREFORE**, the Federal Trade Commission this ninth day of November, 2009, has issued this complaint against respondent.

By the Commission.

Complaint

**Exhibit A**

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION

<p>In the Matter of</p> <p>COLLECTIFY LLC, a limited liability company.</p> <hr style="width: 100%;"/>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>DOCKET NO.</p>
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**DECLARATION OF DAMON C. GREER**

I, Damon C. Greer, based upon my personal knowledge concerning matters to which I am competent to testify, hereby declare as follows:

1. I am the Associate Director for Electronic Commerce in the Office of Technology and Electronic Commerce at the U.S. Department of Commerce ("Commerce"), and I am the lead administrator of the U.S.-E.U. Safe Harbor Framework.
2. Commerce is not a party to the captioned matter.
3. Commerce is responsible for developing and overseeing the U.S.-EU Safe Harbor Framework ("Safe Harbor"), a voluntary program that provides U.S. companies with a method for receiving personal data lawfully from the European Union. To join the Safe Harbor, a company must self-certify to Commerce that it complies with a set of principles that have been deemed to meet the EU's adequacy standard.
4. As Associate Director, I am responsible for maintaining an accurate list of those companies that self-certify to Commerce that they comply with the Safe Harbor principles. As part of my responsibilities, I oversee a public website, [www.export.gov/safeharbor](http://www.export.gov/safeharbor), where I post the names of companies that have self-certified. The listing of companies indicates, among other things, whether their self-certification is "current" or "not current." Companies are required to re-certify every year on the anniversary of the date they first self-certified in order to retain their status as "current" members of the Safe Harbor framework.
5. In October 2001, Collectify LLC ("Collectify") submitted a self-certification to Commerce, which it renewed in October 2002 and October 2003. Collectify's next self-certification was due in October 2004.
6. Collectify did not submit a self-certification by the October 2004 deadline, and as a result

FEDERAL TRADE COMMISSION DECISIONS  
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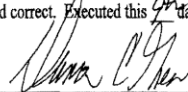
06/09/2009 15:57 FAX 2023263062

RECRDS/FILINGS OFFICE

003/004

have not received any documents or information from Collectify to renew its self-certification. Collectify is in "not current" status on the Commerce website.

I declare under penalty of perjury under the Laws of the United States of America that the foregoing is true and correct. Executed this 7<sup>th</sup> day of June, 2009, in Washington, D.C.



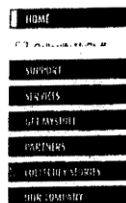
Damon C. Greer  
Associate Director for Electronic Commerce  
Office of Technology and Electronic Commerce  
U.S. Department of Commerce

## Complaint

## Exhibit B

Collectify || Privacy Policy

Page 1 of 4



This Privacy Policy governs Collectify LLC's ("Collectify") treatment of personally identifiable information that Collectify collects when you use its Collectify.com website ("Collectify.com"). This Privacy Policy also covers Collectify's treatment of any personally identifiable information that Collectify's business partners share with Collectify. This Privacy Policy does not apply to the practices of companies that Collectify does not own or control, or to people that Collectify does not employ or manage.

By using Collectify.com, you agree to the collection and use of your personal information, as described in this Privacy Policy.

This Privacy Policy was last updated on July 4, 2001. In the event that Collectify changes this Privacy Policy, Collectify will post notice of the change prominently on Collectify.com. In addition, if you have registered on Collectify.com, Collectify will contact you via email to notify you about the changes.

#### I. Information Collection Practices

##### A. Information Collectify Collects:

1. **Information You Provide:** Collectify collects information that identifies you personally when you register on Collectify.com, when you purchase Collectify software online, and when you use certain Collectify products or services. Collectify may also receive information that identifies you personally from its business partners.
  - a. When you register online, you share your email address and password.
  - b. When you use the services provided on Collectify.com, you share all information that you input.
  - c. When you order Collectify software online, you share your name, email address, telephone number, billing address, delivery address, credit/charge card number and credit/charge card expiration date.
2. **Information Collectify Automatically Receives:** Collectify automatically receives and records information on its server logs from your browser, including your IP address, cookie information, and the pages on the website you visited.
  - a. **Cookies:** A "cookie" is a small piece of information that a web browser can store temporarily on your hard drive. Most web browsers automatically accept cookies, unless you change your browser settings to prevent it from accepting them.
  - b. **Collectify Cookies:** Collectify may set and access Collectify.com cookies on your computer. These cookies may contain some of the personal information you have provided to Collectify.
  - c. **Third Party Cookies:** Collectify may also allow other companies that are presenting advertisements on Collectify.com to set and access their cookies on your computer. Other companies' use of their cookies are subject to their own privacy policies, not this one. Advertisers or other companies do not have access to Collectify.com's cookies.
3. **No Other Information:** Collectify does not collect any information from you, other than stated above. Collectify only uses information it collects about you in the ways described in this Privacy Policy. Collectify will not use your information in any other way without first obtaining your consent.

**Use of This Website By Children:** Collectify does not knowingly solicit information from children under 13, nor does it knowingly market to children under 13. If you

## Complaint

as a child under 13, please do not use Collectify.com. If you are a parent of a child under the age of 13, and your child has used Collectify.com, you may contact Collectify at [privacy@collectify.com](mailto:privacy@collectify.com), and Collectify will delete any personally identifiable information about your child as soon as reasonably possible.

## II. Information Use, Sharing, And Disclosure

- A. Information Collectify Uses: Collectify may use the information it collects to notify you about changes to Collectify.com, software updates, and special offers Collectify thinks that you will find valuable.
- B. Information Collectify Shares:
1. Service Providers: Collectify employs third party service providers to perform certain functions on its behalf. These service providers will have access to your personal information only to the degree it is necessary to provide the product or service you have requested. In addition, Collectify will require all service providers to afford the same level of privacy protection as required by this Privacy Policy.
    - a. Collectify shares your name, billing address, credit/charge card number and credit/charge card expiration date with the service providers that process Collectify's credit/charge card orders.
    - b. Collectify shares your delivery address and phone number with the facilities that fulfill orders, and the couriers that ship and deliver the software.
    - c. Collectify may share your email address with service providers that manage the email messages Collectify sends to Collectify.com users.
    - d. Collectify may share your personal information with a service provider that provides customer service for Collectify.
  2. Sale of Information: Collectify does not sell, trade, or rent your personal information to others without your permission. You may opt-in to allow Collectify to share or disclose your information to third parties when you register. You may change your preferences by sending an email message to [privacy@collectify.com](mailto:privacy@collectify.com).
  3. Aggregate Statistics: Collectify may provide aggregate statistics about its customers, sales, website traffic patterns, and related website information to reputable third parties. This aggregate information will not include any information that personally identifies you.
  4. Legal Reasons: Collectify will share your personal information, if required to do so by subpoena, court order, or other legal processes. Collectify may share your personal information if it finds that your actions on Collectify.com violate the Terms and Conditions or any of its other usage guidelines for specific products or services.

## III. Information Accuracy, Reliability and Security

### A. Checking And Correcting Your Information:

1. Checking Information: If you wish to know what information Collectify has collected about you, and how Collectify has used this information, please email Collectify at [privacy@collectify.com](mailto:privacy@collectify.com).
2. Correcting Information: Collectify gives you the ability to edit your account information and preferences at any time by sending an email message to [privacy@collectify.com](mailto:privacy@collectify.com).
3. Deleting Information: You may request deletion of your Collectify.com account or any other information Collectify has collected about you by sending an email message to [privacy@collectify.com](mailto:privacy@collectify.com).

### B. Reliability, Security and Integrity of Data:

1. Reliability: Collectify promises to keep the data it collects about you accurate and reliable. Collectify will use commercially reasonable efforts to prevent data it collects about you from being misused in any way.
2. Security: Collectify protects your account information with your password. In certain areas, Collectify uses industry standard security protocols (SSL, etc.) to protect data transmissions to Collectify.com.
3. Integrity: Collectify uses commercially reasonable efforts to ensure that your information is reliable for its intended use, accurate, complete, and

## Complaint

current

#### IV. Contacting Collectify

1. **Privacy Officer:** Patrick Bouge is the privacy compliance officer of Collectify. The privacy compliance officer is responsible for monitoring Collectify's compliance with this Privacy Policy. Patrick Bouge can be reached via the contact information below.
2. **Contact Information:** If you have any questions about this Privacy Policy, you may contact Collectify by any of the means listed below:
  - a. Email: [privacy@collectify.com](mailto:privacy@collectify.com).
  - b. Postal Mail: 2015 Drummond Street #401, Montreal, QC, H3G 1W7, Canada.
  - c. Telephone: (514) 932-1500.
  - d. Facsimile: (514) 932-4990.

#### V. Compliance with Laws and Enforcement

- A. **Compliance:** Collectify has used its best efforts to comply with all applicable laws.
  1. **Canada:** This Privacy Policy complies with the requirements of the Canadian Personal Information Protection and Electronic Documents Act and the Quebec Act Respecting The Protection of Personal Information In The Private Sector.
  2. **European Union:** This Privacy Policy complies with U.S. Department of Commerce Safe Harbor Privacy Principles, as approved by the European Commission. Collectify is in the process of certifying its compliance with the U.S. Department of Commerce.
  3. **United States:** This Privacy Policy complies with the requirements of the Children's Online Privacy Protection Act ("COPPA").
- B. **Enforcement:** If you believe that Collectify has violated this Privacy Policy or is violating any laws, or you wish to make a complaint about Collectify's use of your information, you may contact any of the government agencies listed below.
  1. **Canada:**
    - a. **Office of the Privacy Commissioner of Canada:** You may contact the Office of the Privacy Commissioner of Canada by mail at 112 Kent Street, Ottawa, Ontario, K1A 1H3, or by telephone at 1-800-282-1376. In addition, you may visit the Office of the Privacy Commissioner of Canada's website at <http://www.privcom.gc.ca>.
    - b. **La Commission d'accès à l'information du Québec:** You may contact La Commission by mail at 575, rue St. Amable, Bureau 110, Québec, Québec, G1R 2G4, or by telephone at 1-418-529-7741. In addition, you may visit La Commission's website at <http://www.cai.gouv.qc.ca>.
  2. **United States:**
    - a. **Federal Trade Commission (the "FTC"):** You may file a complaint with the FTC by visiting its website at <http://www.ftc.gov>.
    - b. **International Trade Administration (the "ITA"):** You may contact the ITA by visiting its website at <http://www.ita.doc.gov>, or by telephone at 1-800-USA-TRADE.
    - c. **Internet Fraud Complaint Center (the "IFCC"):** The IFCC is a partnership between the Federal Bureau of Investigation and the National White Collar Crime Center. The IFCC's mission is to address fraud committed over the Internet. You may file a complaint with the IFCC by visiting its website at <http://www.ifcc.gov>.
    - d. **New York State Attorney General:** You may file a complaint with the New York State Office of the Attorney General Internet Bureau by visiting the bureau's website at [http://www.oag.state.ny.us/internet\\_complaints/](http://www.oag.state.ny.us/internet_complaints/).
- C. **Dispute Resolution:** In the event you have a dispute with Collectify regarding this Privacy Policy, or Collectify's use of your personal information, you may also communicate with data protection authorities located in Europe, as well as the government agencies listed above.

Complaint

Collectify || Privacy Policy


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## Complaint

## Exhibit C



**collectify**

"Identify. Classify. Collectify. Definitive cataloging software."



**Privacy Policy**

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**Collectify**  
 IDENTIFY CLASSIFY COLLECTIFY

This Privacy Policy governs Collectify LLC's ("Collectify") treatment of personally identifiable information that Collectify collects when you use its Collectify.com website ("Collectify.com"). This Privacy Policy also covers Collectify's treatment of any personally identifiable information that Collectify's business partners share with Collectify. This Privacy Policy does not apply to the practices of companies that Collectify does not own or control, or to people that Collectify does not employ or manage.

By using Collectify.com, you agree to the collection and use of your personal information, as described in this Privacy Policy.

This Privacy Policy was last updated on July 4, 2001. In the event that Collectify changes this Privacy Policy, Collectify will post notice of the change prominently on Collectify.com. In addition, if you have registered on Collectify.com, Collectify will contact you via email to notify you about the changes.

## 1. Information Collection Practices

### A. Information Collectify Collects:

1. **Information You Provide:** Collectify collects information that identifies you personally when you register on Collectify.com, when you purchase Collectify software online, and when you use certain Collectify products or services. Collectify may also receive information that identifies you personally from its business partners.

- a. When you register online, you share your email address and password.
- b. When you use the services provided on Collectify.com, you share all information that you input.
- c. When you order Collectify software online, you share your name, email address, telephone number, billing address, delivery address, credit/charge card number and credit/charge card expiration date.

2. **Information Collectify Automatically Receives:** Collectify automatically receives and records information on its server logs from your browser, including your IP address, cookie information, and the pages on the website you visited.

- a. **Cookies:** A "cookie" is a small piece of information that a web browser can store temporarily on your hard drive. Most web browsers automatically accept cookies, unless you change your browser settings to prevent it from accepting them.
- b. **Collectify Cookies:** Collectify may set and access Collectify.com cookies on your computer. These cookies may contain some of the personal information you have provided to Collectify.
- c. **Third Party Cookies:** Collectify may also allow other companies that are presenting advertisements on Collectify.com to set and access their cookies on your computer. Other companies' use of their cookies are subject to their own privacy policies, not this one. Advertisers or other companies do not have access to Collectify.com's cookies.

3. **No Other Information:** Collectify does not collect any information from you, other than stated above. Collectify only uses information it collects about you in the ways described in this Privacy Policy. Collectify will not use your information in any other way without first obtaining your consent.

4. **Use of This Website by Children:** Collectify does not knowingly solicit information from children under 13, nor does it knowingly market to children under 13. If you are a child under 13, please do not use Collectify.com. If you are a parent of a child under the age of 13, and your child has used Collectify.com, you may contact



## Complaint

Collectify || Privacy Policy

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Collectify at [www.collectify.com](http://www.collectify.com), and Collectify will delete any personally identifiable information about your child as soon as reasonably possible.

#### II. Information Use, Sharing, and Disclosure

A. Information Collectify Uses: Collectify may use the information it collects to notify you about changes to Collectify.com, software updates, and special offers Collectify thinks that you will find valuable.

B. Information Collectify Shares:

1. Service Providers: Collectify employs third party service providers to perform certain functions on its behalf. These service providers will have access to your personal information only to the degree it is necessary to provide the product or service you have requested. In addition, Collectify will require all service providers to afford the same level of privacy protection as required by this Privacy Policy.
  - a. Collectify shares your name, billing address, credit/charge card number and credit/charge card expiration date with the service providers that process Collectify's credit/charge card orders.
  - b. Collectify shares your delivery address and phone number with the facilities that fulfill orders, and the couriers that ship and deliver the software.
  - c. Collectify may share your email address with service providers that manage the email messages Collectify sends to Collectify.com users.
  - d. Collectify may share your personal information with a service provider that provides customer service for Collectify.
2. Sale of Information: Collectify does not sell, trade, or rent your personal information to others without your permission. You may opt-in to allow Collectify to share or disclose your information to third parties when you register. You may change your preferences by sending an email message to [privacy@collectify.com](mailto:privacy@collectify.com).
3. Aggregate Statistics: Collectify may provide aggregate statistics about its customers, sales, website traffic patterns, and related website information to reputable third parties. This aggregate information will not include any information that personally identifies you.
4. Legal Reasons: Collectify will share your personal information, if required to do so by subpoena, court order, or other legal processes. Collectify may share your personal information if it finds that your actions on Collectify.com violate the Terms and Conditions or any of its other usage guidelines for specific products or services.

#### III. Information Accuracy, Reliability and Security

A. Checking And Correcting Your Information

1. Checking Information: If you wish to know what information Collectify has collected about you, and how Collectify has used this information, please email Collectify at [privacy@collectify.com](mailto:privacy@collectify.com).
2. Correcting Information: Collectify gives you the ability to edit your Account information and preferences at any time by sending an email message to [privacy@collectify.com](mailto:privacy@collectify.com).
3. Deleting Information: You may request deletion of your Collectify.com account or any other information Collectify has collected about you by sending an email message to [privacy@collectify.com](mailto:privacy@collectify.com).

B. Reliability, Security and Integrity of Data.

1. Reliability: Collectify promises to keep the data it collects about you accurate and reliable. Collectify will use commercially reasonable efforts to prevent data it collects about you from being misused in any way.
2. Security: Collectify protects your account information with your password. In certain areas, Collectify uses industry standard secure socket layer (SSL) encryption to protect data transmissions to Collectify.com.
3. Integrity: Collectify uses commercially reasonable efforts to ensure that your information is reliable for its stated use, accurate, complete and current.

## Complaint

### IV. Contacting Collectify

1. **Privacy Officer:** Patrick Rouge is the privacy compliance officer at Collectify. The privacy compliance officer is responsible for monitoring Collectify's compliance with this Privacy Policy. Patrick Rouge can be reached via the contact information below.
2. **Contact Information:** If you have any questions about this Privacy Policy, you may contact Collectify by any of the means listed below:
  - a. Email: [privacy@collectify.com](mailto:privacy@collectify.com).
  - b. Postal Mail: 2015 Drummond Street #401, Montreal, QC, H3G 1W7, Canada.
  - c. Telephone: (514) 932-1500.
  - d. Facsimile: (514) 932-8990.

### V. Compliance with Laws and Enforcement

- A. **Compliance:** Collectify has used its best efforts to comply with all applicable laws.
  1. **Canada:** This Privacy Policy complies with the requirements of the Canadian Personal Information Protection and Electronic Documents Act and the Quebec Act Respecting The Protection of Personal Information In The Private Sector.
  2. **European Union:** This Privacy Policy complies with U.S. Department of Commerce Safe Harbor Privacy Principles, as approved by the European Commission. Collectify is in the process of certifying its compliance with the U.S. Department of Commerce.
  3. **United States:** This Privacy Policy complies with the requirements of the Children's Online Privacy Protection Act ("COPPA").
- B. **Enforcement:** If you believe that Collectify has violated this Privacy Policy or is violating any laws, or you wish to make a complaint about Collectify's use of your information, you may contact any of the government agencies listed below.
  1. **Canada:**
    - a. **Office of the Privacy Commissioner of Canada:** You may contact the Office of the Privacy Commissioner of Canada by mail at 112 Kent Street, Ottawa, Ontario, K1A 0H3, or by telephone at 1-800-282-1376. In addition, you may visit the Office of the Privacy Commissioner of Canada's website at <http://www.priv.com.gc.ca>.
    - b. **La Commission d'accès à l'information du Québec:** You may contact La Commission by mail at 575, rue St. Amable, Bureau 110, Québec, Québec, G1R 2G4, or by telephone at 1-418-528-7741. In addition, you may visit La Commission's website at <http://www.cai.gouv.qc.ca>.
  2. **United States:**
    - a. **Federal Trade Commission (the "FTC"):** You may file a complaint with the FTC by visiting its website at <http://www.ftc.gov>.
    - b. **International Trade Administration (the "ITA"):** You may contact the ITA by visiting its website at <http://www.ita.doc.gov>, or by telephone at 1-800-USA-TRADE.
    - c. **Internet Fraud Complaint Center (the "IFCC"):** The IFCC is a partnership between the Federal Bureau of Investigation and the National White Collar Crime Center. The IFCC's mission is to address fraud committed over the Internet. You may file a complaint with the IFCC by visiting its website at <http://www.ifccfb.gov>.
    - d. **New York State Attorney General:** You may file a complaint with the New York State Office of the Attorney General Internet Bureau by visiting the bureau's website at [http://www.oag.state.ny.us/internet\\_complaint/](http://www.oag.state.ny.us/internet_complaint/).
- C. **Dispute Resolution:** In the event you have a dispute with Collectify regarding this Privacy Policy, or Collectify's use of your personal information, Collectify will cooperate with data protection authorities located in Europe, as well as the enforcement agencies listed above.

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## Complaint

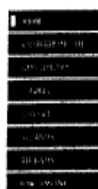
### Exhibit D

Collectify LLC || Great Cataloging Software || Privacy Policy

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"Identify. Classify. Collectify.  
Definitive cataloging software."



#### PRIVACY POLICY

This Privacy Policy governs Collectify LLC's ("Collectify") treatment of personally identifiable information that Collectify collects when you use its Collectify.com website ("Collectify.com"). This Privacy Policy also covers Collectify's treatment of any personally identifiable information that Collectify's business partners share with Collectify. This Privacy Policy does not apply to the practices of companies that Collectify does not own or control, or to people that Collectify does not employ or manage.

By using Collectify.com, you agree to the collection and use of your personal information, as described in this Privacy Policy.



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#### I. Information Collection Practices

##### A. Information Collectify Collects:

1. **Information You Provide:** Collectify collects information that identifies you personally when you register on Collectify.com, when you purchase Collectify software online, and when you use certain Collectify products or services. Collectify may also receive information that identifies you personally from its business partners.
  - a. When you register online, you share your email address and password.
  - b. When you use the services provided on Collectify.com, you share all information that you input.
  - c. When you order Collectify software online, you share your name, email address, telephone number, billing address, delivery address, credit/charge card number and credit/charge card expiration date.
2. **Information Collectify Automatically Receives:** Collectify automatically receives and records information on its server logs from your browser, including your IP address, cookie information, and the pages on the website you visited.
  - a. **Cookies:** A "cookie" is a small piece of information that a web browser can store temporarily on your hard drive. Most web browsers automatically accept cookies, unless you change your browser settings to prevent it from accepting them.
  - b. **Collectify Cookies:** Collectify may set and access Collectify.com cookies on your computer. These cookies may contain some of the personal information you have provided to Collectify.
  - c. **Third-Party Cookies:** Collectify may also allow other companies that are presenting advertisements on Collectify.com to set and access their cookies on your computer. Other companies' use of their cookies are subject to their own privacy policies, not this one. Advertisers or other companies do not have access to Collectify.com's cookies.
3. **No Other Information:** Collectify does not collect any information from you, other than stated above. Collectify only uses information it collects about you in the ways described in this Privacy Policy. Collectify will not use your information in any other way without first obtaining your consent.

- B. **Use of This Website by Children:** Collectify does not knowingly solicit information from children under 13, nor does it knowingly market to children under 13. If you are a child under 13, please do not use Collectify.com. If you are a parent of a child under the age of 13, and your child has used Collectify.com, you may contact Collectify at [privacy@collectify.com](mailto:privacy@collectify.com), and Collectify will delete any personally identifiable information about your child as soon as reasonably possible.

## Complaint

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**II. Information Use, Sharing, And Disclosure**

**A. Information Collectify Uses:** Collectify may use the information it collects to notify you about changes to Collectify.com, software updates, and special offers Collectify thinks that you will find valuable.

**B. Information Collectify Shares:**

**1. Service Providers:** Collectify employs third party service providers to perform certain functions on its behalf. These service providers will have access to your personal information only to the degree it is necessary to provide the product or service you have requested. In addition, Collectify will require all service providers to afford the same level of privacy protection as required by this Privacy Policy.

**a.** Collectify shares your name, billing address, credit/charge card number and credit/charge card expiration date with the service providers that process Collectify's credit/charge card orders.

**b.** Collectify shares your delivery address and phone number with the facilities that fulfill orders, and the couriers that ship and deliver the software.

**c.** Collectify may share your email address with service providers that manage the email messages Collectify sends to Collectify.com users.

**d.** Collectify may share your personal information with a service provider that provides customer service for Collectify.

**2. Sale of Information:** Collectify does not sell, trade, or rent your personal information to others without your permission. You may opt-in to allow Collectify to share or disclose your information to third parties when you register. You may change your preferences by sending an email message to [privacy@collectify.com](mailto:privacy@collectify.com).

**3. Aggregate Statistics:** Collectify may provide aggregate statistics about its customers, sales, website traffic patterns, and related website information to reputable third parties. This aggregate information will not include any information that personally identifies you.

**4. Legal Reasons:** Collectify will share your personal information, if required to do so by subpoena, court order, or other legal processes. Collectify may share your personal information if it finds that your actions on Collectify.com violate the Terms and Conditions or any of its other usage guidelines for specific products or services.

**III. Information Accuracy, Reliability and Security****A. Checking And Correcting Your Information:**

**1. Checking Information:** If you wish to know what information Collectify has collected about you, and how Collectify has used this information, please email Collectify at [privacy@collectify.com](mailto:privacy@collectify.com).

**2. Correcting Information:** Collectify gives you the ability to edit your account information and preferences at any time by sending an email message to [privacy@collectify.com](mailto:privacy@collectify.com).

**3. Deleting Information:** You may request deletion of your Collectify.com account or any other information Collectify has collected about you by sending an email message to [privacy@collectify.com](mailto:privacy@collectify.com).

**B. Reliability, Security and Integrity of Data:**

**1. Reliability:** Collectify promises to keep the data it collects about you accurate and reliable. Collectify will use commercially reasonable efforts to prevent data it collects about you from being misused in any way.

**2. Security:** Collectify protects your account information with your password. In certain areas, Collectify uses industry-standard secure socket layer ("SSL") encryption to protect data transmissions to Collectify.com.

**3. Integrity:** Collectify uses commercially reasonable efforts to ensure that your information is reliable for its intended use, accurate, complete and current.

**IV. Contacting Collectify**

**1. Privacy Officer:** Franklin Silverstone is the privacy compliance officer of Collectify. The privacy compliance officer is responsible for monitoring Collectify's compliance with this Privacy Policy. Franklin Silverstone can be reached via the contact information below.

**2. Contact Information:** If you have any questions about this Privacy Policy, you may contact Collectify by any of the means listed below.

## Complaint

- a. Email: [privacy@collectify.com](mailto:privacy@collectify.com).
  - b. Postal Mail: 2015 Drummond Street #401, Montreal, QC, H0G 1W7, Canada.
  - c. Telephone: (514) 932-1900.
  - d. Facsimile: (514) 932-8900.
- V. Compliance with Laws and Enforcement**
- A. Compliance:** Collectify has used its best efforts to comply with all applicable laws.
1. **Canada:** This Privacy Policy complies with the requirements of the Canadian Personal Information Protection and Electronic Documents Act and the Quebec Act Respecting The Protection of Personal Information In The Private Sector.
  2. **European Union:** This Privacy Policy complies with U.S. Department of Commerce Safe Harbor Privacy Principles, as approved by the European Commission. Collectify is in the process of certifying its compliance with the U.S. Department of Commerce.
  3. **United States:** This Privacy Policy complies with the requirements of the Children's Online Privacy Protection Act ("COPPA").
- B. Enforcement:** If you believe that Collectify has violated this Privacy Policy or is violating any laws, or you wish to make a complaint about Collectify's use of your information, you may contact any of the government agencies listed below.
1. **Canada:**
    - a. **Office of the Privacy Commissioner of Canada:** You may contact the Office of the Privacy Commissioner of Canada by mail at 112 Kent Street, Ottawa, Ontario, K1A 1H3, or by telephone at 1-800-282-1376. In addition, you may visit the Office of the Privacy Commissioner of Canada's website at <http://web.archive.org/web/20041206113441/http://www.privcom.gc.ca/>
    - b. **La Commission d'accès à l'information du Québec:** You may contact La Commission by mail at 575, rue St. Amable, Bureau 1.10, Québec, Québec, G1R 2G4, or by telephone at 1-418-528-7741. In addition, you may visit La Commission's website at <http://web.archive.org/web/20041206113441/http://www.cai.gouv.qc.ca/>
  2. **United States:**
    - a. **Federal Trade Commission (the "FTC"):** You may file a complaint with the FTC by visiting its website at <http://web.archive.org/web/20041206113441/http://www.ftc.gov/>.
    - b. **International Trade Administration (the "ITA"):** You may contact the ITA by visiting its website at <http://web.archive.org/web/20041206113441/http://www.ita.doc.gov/>, or by telephone at 1-800-USA-TRADE.
    - c. **Internet Fraud Complaint Center (the "IFCC"):** The IFCC is a partnership between the Federal Bureau of Investigation and the National White Collar Crime Center. The IFCC's mission is to address fraud committed over the Internet. You may file a complaint with the IFCC by visiting its website at <http://web.archive.org/web/20041206113441/http://www.ifccfb.gov/>.
    - d. **New York State Attorney General:** You may file a complaint with the New York State Office of The Attorney General Internet Bureau by visiting the bureau's website at [http://web.archive.org/web/20041206113441/http://www.osg.state.ny.us/internet\\_complaint/](http://web.archive.org/web/20041206113441/http://www.osg.state.ny.us/internet_complaint/).
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This webpage validates to the W3C's XHTML 1.0 and CSS specifications.

## Complaint

## Exhibit E


Collectify LLC || Great Cataloging Software || Privacy Policy

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**collectify**

"Identify. Classify. Collectify. Definitive cataloging software."



**PRIVACY POLICY**

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  - a. When you register online, you share your email address and password.
  - b. When you use the services provided on Collectify.com, you share all information that you input.
  - c. When you enter Collectify software online, you share your name, email address, telephone number, billing address, delivery address, credit/charge card number and credit/charge card expiration date.
2. **Information Collectify Automatically Receives:** Collectify automatically receives and records information on its server logs from your browser, including your IP address, cookie information, and the pages on the website you visited.
  - a. **Cookies:** A "cookie" is a small piece of information that a web browser can store temporarily on your hard drive. Most web browsers automatically accept cookies, unless you change your browser settings to prevent it from accepting them.
  - b. **Collectify Cookies:** Collectify may set and access Collectify.com cookies on your computer. These cookies may contain some of the personal information you have provided to Collectify.
  - c. **Third Party Cookies:** Collectify may also allow other companies that are providing advertisements on Collectify.com to set and access their cookies on your computer. Other companies' use of their cookies are subject to their own privacy policies, not this one. Advertisers or other companies do not have access to Collectify.com's cookies.
3. **No Other Information:** Collectify does not collect any information from you, other than stated above. Collectify only uses information it collects about you in the ways described in this Privacy Policy. Collectify will not use your information in any other way without first obtaining your consent.
4. **Use of Sites Intended for Children:** Collectify does not knowingly solicit information from children under 13, nor does it knowingly market to children under 13. If you are a child under 13, please do not use Collectify.com. If you are a parent of a child under the age of 13, and your child has used Collectify.com, you may contact Collectify at [admin@collectify.com](mailto:admin@collectify.com), and Collectify will delete any personally identifiable information about your child as soon as reasonably possible.

**II. Information Use, Sharing, and Disclosure**

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  1. **Service Providers:** Collectify employs third party service providers to perform certain business tasks on its behalf. These service providers will have access to your personal information only to the extent it is necessary to provide the product or service you have requested. In addition, Collectify will transfer all service providers to afford the same level of privacy.

## Complaint

## Information as required by this Privacy Policy

- A. Collectify stores your e-mail, home address, credit/debit card number and card number, and expiration date with the service providers that provide collectify.com, change card updates
  - B. Collectify shares your delivery address and phone number with the facilities that handle orders, and the courier that ship and deliver the software
  - C. Collectify may share your email address with service providers that manage the email messages collectify sends to Collectify.com users
  - D. Collectify may share your personal information with a service provider that provides customer service for Collectify.
2. **Sale of Information:** Collectify does not sell, trade, or rent your personal information to others without your permission. You may opt in to allow Collectify to share or disclose your information to third parties when you register. You may change your preferences by sending an email message to [privacy@collectify.com](mailto:privacy@collectify.com).
  3. **Aggregate Statistics:** Collectify may provide aggregate statistics about its customers, sales, website traffic patterns, and related website information to reputable third parties. This aggregate information will not include any information that personally identifies you.
  4. **Legal Reasons:** Collectify will share your personal information, if required to do so by subpoena, court order, or other legal processes. Collectify may share your personal information if it finds that your actions on Collectify.com violate the Terms and Conditions or any of its other usage guidelines for specific products or services.

## III. Information Accuracy, Reliability and Security

## A. Checking And Correcting your Information:

1. **Checking Information:** If you wish to know what information Collectify has collected about you, and how Collectify has used this information, please email Collectify at [privacy@collectify.com](mailto:privacy@collectify.com).
2. **Correcting Information:** Collectify gives you the ability to edit your account information and preferences at any time by sending an email message to [privacy@collectify.com](mailto:privacy@collectify.com).
3. **Deleting Information:** You may request deletion of your Collectify.com account or any other information Collectify has collected about you by sending an email message to [privacy@collectify.com](mailto:privacy@collectify.com).

## B. Reliability, Security and Integrity of Data:

1. **Reliability:** Collectify promises to keep the data it collects about you accurate and reliable. Collectify will use commercially reasonable efforts to prevent data it collects about you from being misused in any way.
2. **Security:** Collectify protects your account information with your password. In certain areas, Collectify uses industry-standard secure socket layer ("SSL") encryption to protect data transmissions to Collectify.com.
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  - a. Email: [privacy@collectify.com](mailto:privacy@collectify.com)
  - b. Postal Mail: 2015 Commercial Street - Unit, Montreal, QC, H 3A 1R7, Canada.
  - c. Telephone: (514) 932-1500
  - d. Facsimile: (514) 932-8780

## V. Compliance with Laws and Enforcement

- a. **Enforcement:** Collectify has used its best efforts to comply with all applicable laws.
  1. **Canada:** This Privacy Policy complies with the requirements of the Canadian Personal Information Protection and Electronic Information Act and the Quebec Act Respecting The Protection of Personal Information in the Private Sector.
  2. **European Union:** This Privacy Policy complies with U.S. Department of Commerce Safe Harbor Privacy Principles, as required by the European Commission. Collectify is in the process of achieving its compliance with the U.S. Department of Commerce.
  3. **United States:** This Privacy Policy complies with the requirements of the California Online Privacy Protection Act ("OPPA").



## Complaint

B. If you do not wish to be contacted by Collectify concerning this Privacy Policy or its use, you may wish to contact the appropriate authority listed below. You may also wish to contact any of the agencies listed below:

## 1. Canada

- Office of the Privacy Commissioner of Canada: You may contact the Office of the Privacy Commissioner at 41, rue St-Jacques, 1102 Kent Street, Ottawa, Ontario, K1A 1S2, or by telephone at 1-800-970-1336. In addition, you may visit the Office of the Privacy Commissioner of Canada's website at <http://web.archive.org/web/20051221185844/http://www.priv.gc.ca/>.
- La Commission d'accès à l'information du Québec: You may contact La Commission by mail at 575, rue St-Amand, Bureau 110, Québec, Québec, Q1P 1K8, or by telephone at 1-418-329-7741. In addition, you may visit La Commission's website at <http://web.archive.org/web/20051221185844/http://www.cai.quebec.ca/>.

## 2. United States

- Federal Trade Commission (the "FTC"): You may file a complaint with the FTC by visiting its website at <http://web.archive.org/web/20051221185844/http://www.ftc.com/>.
- International Trade Administration (the "ITA"): You may contact the ITA by visiting its website at <http://web.archive.org/web/20051221185844/http://www.ita.doc.gov/>, or by telephone at 1-800-USA-TRADE.
- Internet Fraud Complaint Center (the "IFCC"): The IFCC is a partnership between the Federal Bureau of Investigation and the National White Collar Crime Center. The IFCC's mission is to address fraud committed over the Internet. You may file a complaint with the IFCC by visiting its website at <http://web.archive.org/web/20051221185844/http://www.ifccbu.com/>.
- New York State Attorney General: You may file a complaint with the New York State Office of the Attorney General Internet Bureau by visiting the Bureau's website at <http://web.archive.org/web/20051221185844/http://www.oag.state.ny.us/interet/complaint/>.

C. Dispute Resolution: In the event you have a dispute with Collectify regarding this Privacy Policy, or Collectify's use of your personal information, Collectify will cooperate with data protection authorities located in Europe, as well as the following agencies listed above:

[Home](#) | [Collectify](#) | [Get Results](#) | [Services](#) | [Support](#) | [Affiliates](#) | [Affiliates](#) | [Our Company](#)

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This webpage adheres to the [W3C's HTML 4.0 and CSS specifications](#).

## Complaint

## Exhibit F

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## Privacy Policy

This Privacy Policy governs Collectify LLC's ("Collectify") treatment of personally identifiable information that Collectify collects when you use its Collectify.com website ("Collectify.com"). This Privacy Policy also covers Collectify's treatment of any personally identifiable information that Collectify's business partners share with Collectify. This Privacy Policy does not apply to the practices of companies that Collectify does not own or control, or to people that Collectify does not employ or manage.

By using Collectify.com, you agree to the collection and use of your personal information, as described in this Privacy Policy.

This Privacy Policy was last updated on October 31, 2007. In the event that Collectify changes this Privacy Policy, Collectify will post notice of the change prominently on Collectify.com. In addition, if you have registered on Collectify.com, Collectify will contact you via email to notify you about the changes.

### I. Information Collection Practices

#### A. Information Collectify Collects:

1. **Information You Provide:** Collectify collects information that identifies you personally when you register on Collectify.com, when you purchase Collectify software online, and when you use certain Collectify products or services. Collectify may also receive information that identifies you personally from its business partners.
  - a. When you register online, you share your email address and password.
  - b. When you use the services provided on Collectify.com, you share all information that you input.
  - c. When you order Collectify software online, you share your name, email address, telephone number, billing address, delivery address, credit/charge card number and credit/charge card expiration date.
2. **Information Collectify Automatically Receives:** Collectify automatically receives and records information on its server logs from your browser, including your IP address, cookie information, and the pages on the website you visited.
  - a. **Cookies:** A "cookie" is a small piece of information that a web browser can store temporarily on your hard drive. Most web browsers automatically accept cookies, unless you change your browser settings to prevent it from accepting them.
  - b. **Collectify Cookies:** Collectify may set and access Collectify.com cookies on your computer. These cookies may contain some of the personal information you have provided to Collectify.
  - c. **Third Party Cookies:** Collectify may also allow other companies that are presenting advertisements on Collectify.com to set and access their cookies on your computer. Other companies' use of their cookies are subject to their own privacy policies, not this one. Advertisers or other companies do not have access to Collectify.com's cookies.
3. **No Other Information:** Collectify does not collect any information from you, other than stated above. Collectify only uses information it collects about you in the ways described in this Privacy Policy. Collectify will not use

## Complaint

Collectify | Privacy Policy

<http://www.collectify.com/new/privacy.php>

your information in any other way without first obtaining your consent.

- B. Use of This Website By Children:** Collectify does not knowingly solicit information from children under 13, nor does it knowingly market to children under 13. If you are a child under 13, please do not use Collectify.com. If you are a parent of a child under the age of 13, and your child has used Collectify.com, you may contact Collectify at [privacy@collectify.com](mailto:privacy@collectify.com), and Collectify will delete any personally identifiable information about your child as soon as reasonably possible.

## II. Information Use, Sharing, And Disclosure

- A. Information Collectify Uses:** Collectify may use the information it collects to notify you about changes to Collectify.com, software updates, and special offers Collectify thinks that you will find valuable.
- B. Information Collectify Shares:**
1. **Service Providers:** Collectify employs third party service providers to perform certain functions on its behalf. These service providers will have access to your personal information only to the degree it is necessary to provide the product or service you have requested. In addition, Collectify will require all service providers to afford the same level of privacy protection as required by this Privacy Policy.
    - a. Collectify shares your name, billing address, credit/charge card number and credit/charge card expiration date with the service providers that process Collectify's credit/charge card orders.
    - b. Collectify shares your delivery address and phone number with the facilities that fulfill orders, and the couriers that ship and deliver the software.
    - c. Collectify may share your email address with service providers that manage the email messages Collectify sends to Collectify.com users.
    - d. Collectify may share your personal information with a service provider that provides customer service for Collectify.
  2. **Sale of Information:** Collectify does not sell, trade, or rent your personal information to others without your permission. You may opt-in to allow Collectify to share or disclose your information to third parties when your register. You may change your preferences by sending an email message to [privacy@collectify.com](mailto:privacy@collectify.com).
  3. **Aggregate Statistics:** Collectify may provide aggregate statistics about its customers, sales, website traffic patterns, and related website information to reputable third parties. This aggregate information will not include any information that personally identifies you.
  4. **Legal Reasons:** Collectify will share your personal information, if required to do so by subpoena, court order, or other legal processes. Collectify may share your personal information if it finds that your actions on Collectify.com violate the Terms and Conditions or any of its other usage guidelines for specific products or services.

## III. Information Accuracy, Reliability and Security

- A. Checking And Correcting Your Information:**
1. **Checking Information:** If you wish to know what information Collectify has collected about you, and how Collectify has used this information, please email Collectify at [privacy@collectify.com](mailto:privacy@collectify.com).
  2. **Correcting Information:** Collectify gives you the ability to edit your account information and preferences at any time by sending an email message to [privacy@collectify.com](mailto:privacy@collectify.com).
  3. **Deleting Information:** You may request deletion of your Collectify.com account or any other information Collectify has collected about you by sending an email message to [privacy@collectify.com](mailto:privacy@collectify.com).
- B. Reliability, Security and Integrity of Data:**
1. **Reliability:** Collectify promises to keep the data it collects about you accurate and reliable. Collectify will use commercially reasonable efforts to prevent data it collects about you from being misused in any way.
  2. **Security:** Collectify protects your account information with your password. In certain areas, Collectify uses industry standard secure socket layer ("SSL") encryption to protect data transmissions to Collectify.com.
  3. **Integrity:** Collectify uses commercially reasonable efforts to ensure that your information is reliable for its intended use, accurate, complete and current.

## Complaint

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<http://www.collectify.com/new/privacy.php>

### IV. Contacting Collectify

- A. **Privacy Officer:** Franklin Silverstone is the privacy compliance officer of Collectify. The privacy compliance officer is responsible for monitoring Collectify's compliance with this Privacy Policy. Franklin Silverstone can be reached via the contact information below.
- B. **Contact Information:** If you have any questions about this Privacy Policy, you may contact Collectify by any of the means listed below:
1. **Email:** [privacy@collectify.com](mailto:privacy@collectify.com).
  2. **Postal Mail:** 2015 Drummond Street #401, Montreal, QC, H3G 1W7, Canada.
  3. **Facsimile:** (514) 932-8990.

### V. Compliance with Laws and Enforcement

A. **Compliance:** Collectify has used its best efforts to comply with all applicable laws.

1. **Canada:** This Privacy Policy complies with the requirements of the Canadian Personal Information Protection and Electronic Documents Act and the Quebec Act Respecting The Protection of Personal Information In The Private Sector.
2. **European Union:** This Privacy Policy complies with U.S. Department of Commerce Safe Harbor Privacy Principles, as approved by the European Commission. Collectify is in the process of certifying its compliance with the U.S. Department of Commerce.
3. **United States:** This Privacy Policy complies with the requirements of the Children's Online Privacy Protection Act ("COPPA").

B. **Enforcement:** If you believe that Collectify has violated this Privacy Policy or is violating any laws, or you wish to make a complaint about Collectify's use of your information, you may contact any of the government agencies listed below.

1. **Canada:**
  - a. **Office of the Privacy Commissioner of Canada:** You may contact the Office of the Privacy Commissioner of Canada by mail at 112 Kent Street, Ottawa, Ontario, K1A 1H3, or by telephone at 1-800-282-1376. In addition, you may visit the Office of the Privacy Commissioner of Canada's website at <http://www.privcom.gc.ca>.
  - b. **La Commission d'accès à l'information du Québec:** You may contact La Commission by mail at 575, rue St. Amable, Bureau 1.10, Québec, Québec, G1R 2G4, or by telephone at 1-418-528-7741. In addition, you may visit La Commission's website at <http://www.ca.la.gouv.qc.ca>.
2. **United States:**
  - a. **Federal Trade Commission (the "FTC"):** You may file a complaint with the FTC by visiting its website at <http://www.ftc.gov>.
  - b. **International Trade Administration (the "ITA"):** You may contact the ITA by visiting its website at <http://www.ita.doc.gov>, or by telephone at 1-800-USA-TRADE.
  - c. **Internet Fraud Complaint Center (the "IFCC"):** The IFCC is a partnership between the Federal Bureau of Investigation and the National White Collar Crime Center. The IFCC's mission is to address fraud committed over the Internet. You may file a complaint with the IFCC by visiting its website at <http://www.ifccfbi.gov>.
  - d. **New York State Attorney General:** You may file a complaint with the New York State Office of The Attorney General Internet Bureau by visiting the bureau's website at [http://www.oag.state.ny.us/internet\\_complaint/](http://www.oag.state.ny.us/internet_complaint/).

C. **Dispute Resolution:** In the event you have a dispute with Collectify regarding this Privacy Policy, or Collectify's use of your personal information, Collectify will cooperate with data protection authorities located in Europe, as well as the enforcement agencies listed above.

Complaint

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## Decision and Order

**DECISION AND ORDER**

The Federal Trade Commission, having initiated an investigation of certain acts and practices of the Respondent named in the caption hereof, and the Respondent having been furnished thereafter with a copy of a draft of Complaint, which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued, would charge the Respondent with violation of the Federal Trade Commission Act; and

The Respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the Respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by the Respondent that the law has been violated as alleged in such complaint, or that any of the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the Respondent has violated the Federal Trade Commission Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, 16 C.F.R. § 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Collectify LLC is a Delaware corporation with its principal office or place of business at 235 East 73rd Street, Suite 3C, New York, New York 10012.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the

## Decision and Order

Respondent, and the proceeding is in the public interest.

**ORDER**

## DEFINITIONS

For purposes of this Order, the following definitions shall apply:

- A. Unless otherwise specified, “respondent” shall mean Collectify LLC and its subsidiaries, divisions, affiliates, successors and assigns.
- B. “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, 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 respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy, security, or any other compliance program sponsored by the government or any other third party.

**II.**

**IT IS FURTHER ORDERED** that respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of, for a period of five (5) years from the date of preparation or dissemination, whichever is later, all documents relating to compliance with this order, including but not limited to:

## Decision and Order

- A. all advertisements, promotional materials, and any other statements containing any representations covered by this order, with all materials relied upon in disseminating the representation; and
- B. any documents, whether prepared by or on behalf of respondent, that call into question respondent's compliance with this order.

**III.**

**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, and shall secure from each such person a signed and dated statement acknowledging receipt of the 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.

**IV.**

**IT IS FURTHER ORDERED** that respondent 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 respondent learns fewer 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.



## Decision and Order

**V.**

**IT IS FURTHER ORDERED** that respondent shall, within sixty (60) 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 it has complied with this order.

**VI.**

This order will terminate on November 9, 2029, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. any Part in this order that terminates in fewer than twenty (20) years;
- B. this order's application to any respondent that is not named as a defendant in such complaint; and
- C. this order if such complaint is filed after the order has terminated pursuant to this Part.

*Provided, further*, that if such complaint is dismissed or a federal court rules that respondent 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 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” or “Commission”) has accepted, subject to final approval, a consent agreement from Collectify, Inc. (“Collectify”).

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.

This matter concerns alleged false or misleading representations that Collectify made to consumers concerning its participation in the Safe Harbor privacy framework (“Safe Harbor”) agreed upon by the U.S. and the European Union (“EU”). It is among the Commission’s first cases to challenge deceptive claims about the Safe Harbor. The Safe Harbor provides a mechanism for U.S. companies to transfer data outside the EU consistent with European law. To join the Safe Harbor, a company must self-certify to the U.S. Department of Commerce (“Commerce”) that it complies with seven principles and related requirements. Commerce maintains a public website, [www.export.gov/safeharbor](http://www.export.gov/safeharbor), where it posts the names of companies that have self-certified to the Safe Harbor. The listing of companies indicates whether their self-certification is “current” or “not current.” Companies are required to re-certify every year in order to retain their status as “current” members of the Safe Harbor framework.

Collectify sells comprehensive cataloguing software to consumers over the internet, including through a website ([www.collectify.com](http://www.collectify.com)). According to the Commission’s complaint, since at least September 2001, Collectify has set forth on its website, [www.collectify.com](http://www.collectify.com), privacy policies and statements about its practices, including statements related to its participation in the Safe Harbor privacy framework.

## Analysis to Aid Public Comment

The Commission's complaint alleges that Collectify falsely represented that it was a current participant in the Safe Harbor when, in fact, from October 2004 until July 2009, Collectify was not a current participant in the Safe Harbor. The Commission's complaint alleges that in October 2001, Collectify submitted a Safe Harbor self-certification, which it renewed in October 2002 and October 2003. Collectify did not renew its self-certification in October 2004 and was in "not current" status on the Commerce website until it renewed its self-certification in July 2009.

Part I of the proposed order prohibits Collectify from making misrepresentations about its membership in any privacy, security, or any other compliance program sponsored by the government or any other third party.

Parts II through VI of the proposed order are reporting and compliance provisions. Part II requires Collectify to retain documents relating to its compliance with the order for a five-year period. Part III requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part IV ensures notification to the FTC of changes in corporate status. Part V mandates that Collectify submit an initial compliance report to the FTC, and make available to the FTC subsequent reports. Part VI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of the 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

**CSE, INC. D/B/A MAD MOD,  
CHRIS SAETVEIT,  
AND  
CYNDI SAETVEIT**

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND THE  
TEXTILE FIBER PRODUCTS IDENTIFICATION ACT

*Docket No. C-4280; File No. 082 3181  
Complaint, December 15, 2009 - Decision, December 15, 2009*

This consent order addresses allegations that CSE, Inc., also doing business as Mad Mod, a producer, seller and distributor of a textile fiber product called “Bamboo Comfort” throughout the United States, made deceptive advertising claims about its product in violation of Section 5 of the FTC Act. Respondents sold textile fiber products that were misbranded or falsely or deceptively advertised as bamboo fiber. The respondent did not comply with the Textile Act or the Textile Rules and Regulations. The order prohibits the respondents from advertising a product is made of bamboo, or bamboo fiber, or manufactured using an environmentally friendly process, or is anti-microbial, unless the representation is true, non-misleading, and, at the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

*Participants*

For the *Commission*: Melinda Claybaugh and Korin Ewing.

For the *Respondents*: Chris Saetveit and Cyndi Saetveit,  
*Owners, pro se.*

**COMPLAINT**

The Federal Trade Commission, having reason to believe that CSE, Inc. also doing business as Mad Mod (“Mad Mod”), a corporation, and Chris Saetveit and Cyndi Saetveit, individually and as owners of the corporation (“Respondents”), have violated the provisions of the Federal Trade Commission Act, 15 U.S.C. § 41, *et seq.*, the Textile Fiber Products Identification Act, 15 U.S.C. § 70, *et seq.*, and the Rules and Regulations promulgated

## Complaint

thereunder, 16 C.F.R. Part 303, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Mad Mod is a Tennessee corporation with its principal office or place of business at 504 4<sup>th</sup> Avenue South, Nashville, Tennessee 37210.

2. Respondents Chris Saetveit and Cyndi Saetveit are the owners of Mad Mod. Individually or in concert with others, they formulate, direct, or control the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. Their principal offices or places of business are the same as that of Mad Mod.

3. 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, 15 U.S.C. § 44.

4. Respondents manufacture, advertise, market, promote, offer to sell, sell, and distribute a line of textile fiber products called “Bamboo Comfort,” throughout the United States, using both Mad Mod’s own website, [www.mad-mod.com](http://www.mad-mod.com), and other retailers.

5. Respondents price the textile fiber products that they manufacture, market, promote, distribute, and sell at a premium compared to other, similar products in the marketplace.

6. In advertisements to induce consumers to purchase their textile fiber products, Respondents make or have made various claims, on their website and elsewhere, concerning the fiber content and anti-microbial characteristics of their textile fiber products, as well as the environmentally friendly manufacturing processes used to make their products, including, but not limited to, the following:

## Complaint

A. **Mad Mod Website ([www.mad-mod.com](http://www.mad-mod.com))**

## 1. bamboo comfort

Go to the Products page, then click Bamboo Comfort to see our line of 100% bamboo fiber items, including our new blankets!

(Homepage, Exhibit A at 1).

2. **Bamboo Comfort**

. . . By applying an exclusive, eco-friendly manufacturing process to the fastest growing plant on earth, Bamboo fiber offers comfort with a conscience. Bamboo Comfort, a new textile line at Mad Mod, introduces ultra-soft, 100% bamboo fiber textiles with socioeconomic and environmental benefits that aren't found in any other textile fibers in the market today.

\* \* \* \*

**Characteristics:**

- Bamboo fibers possess natural anti-microbial agents

\* \* \* \*

(“Products” page, Exhibit A at 2-3).

3. **Mad Mod – Established 2003**

\* \* \* \*

We have also developed our own line of 100% bamboo textiles. Back in 2005 before being ‘green’ was even popular, Bamboo Comfort was formed. We now offer 100% bamboo fiber towels

## Complaint

and blankets which are luxurious to the touch AND environmentally friendly.

(“About Us” page, Exhibit A at 4).

## 4. 100% Bamboo Bath Towel Set

This is our best and most durable 100% bamboo fiber bath towel set yet! They have an ultra-luxurious feel with 3 to 4 times the absorbency of cotton towels.

(“Shop Here” page, Exhibit A at 5).

B. **Product Label**

bamboo comfort

100% bamboo

(Exhibit B).

C. **Product Packaging**

bamboo comfort

Bamboo fiber is a sustainable textile that is highly absorbent, naturally antibacterial and luxuriously soft.

To care for your bamboo towels, machine-wash on delicate cycle and tumble-dry on low. Bleach and fabric softeners damage the bamboo fiber and should not be used on Bamboo Comfort products.

(Exhibit C).

7. The textile fiber products manufactured, marketed, promoted, distributed, and sold by Respondents consist of rayon and not actual bamboo fibers woven into fabric.

## Complaint

8. Rayon is the generic name for a type of regenerated, or manufactured, fiber made from cellulose. Rayon is manufactured by taking purified cellulose from a plant source, also called a cellulose precursor, and converting it to a viscous solution by dissolving it in one or more chemicals, such as sodium hydroxide. The chemical solution is then forced through spinnerets and into an acidic bath where it solidifies into fibers.

9. The process used to manufacture rayon from cellulose involves hazardous chemicals. *See* 40 C.F.R. Part 63 (“National Emissions Standards for Hazardous Air Pollutants: Cellulose Products Manufacturing”).

10. “[H]azardous air pollutants (HAP) emitted from cellulose products manufacturing operations” include carbon disulfide, carbonyl sulfide, ethylene oxide, methanol, methyl chloride, propylene oxide, and toluene. 40 C.F.R. § 63.5480.

11. Many plant sources may be used as cellulose precursors for rayon fabric, including cotton linters (short cotton fibers), wood pulp, and bamboo. Regardless of the source of the cellulose used, however, the manufacturing process involves the use of hazardous chemicals and the resulting fiber is rayon and not cotton, wood, or bamboo fiber.

12. Respondents do not state that their textile fiber products are rayon, nor, assuming that bamboo is the source of the cellulose used in their textile fiber products, do Respondents state that their textile fiber products are rayon made from bamboo. Moreover, on the pages of their website stating the claims set forth in Paragraph 6, Respondents do not provide any description of the chemical process used to manufacture their textile fiber products.

13. Respondents sell or have sold their textile fiber products without including in the proper place on the product label the name of the country where each such product was processed or manufactured.

14. Respondents advertise or have advertised their textile fiber products for sale on the [www.mad-mod.com](http://www.mad-mod.com) website without



## Complaint

including in the description of the product a clear and conspicuous statement that the product was either made in U.S.A., imported, or both.

**VIOLATIONS OF SECTION 5 OF THE FTC ACT****FALSE OR MISLEADING REPRESENTATIONS**

15. Through the means described in Paragraph 6, Respondents represent or have represented, expressly or by implication, that:

- A. Their textile fiber products are bamboo fiber;
- B. Their textile fiber products are manufactured using an environmentally friendly process; and
- C. Their textile fiber products retain anti-microbial properties of the bamboo plant.

16. In truth and in fact:

- A. Respondents' textile fiber products are not bamboo fiber, but instead are rayon, a regenerated cellulose fiber;
- B. Respondents' textile fiber products are not manufactured using an environmentally friendly process but rather a process that involves the use of toxic chemicals and results in the emission of hazardous air pollutants; and
- C. Respondents' textile fiber products do not retain anti-microbial properties of the bamboo plant.

17. Therefore, the representations set forth in Paragraph 15 were, and are, false or misleading, and the making of such representations constitutes a deceptive act or practice, in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act.

## Complaint

UNSUBSTANTIATED REPRESENTATIONS

18. Through the means described in Paragraph 6, Respondents represent or have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 15, at the time the representations were made.

19. In truth and in fact, Respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 15, at the time the representations were made.

20. Therefore, the representation set forth in Paragraph 18 was, and is, false or misleading, and the making of such representation constitutes a deceptive act or practice, in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act.

**TEXTILE FIBER PRODUCTS IDENTIFICATION ACT  
and RULES AND REGULATIONS**

21. The Textile Fiber Products Identification Act, 15 U.S.C. § 70, *et seq.* (“Textile Act”), governs, *inter alia*, the labeling and advertising of textile fiber products introduced, manufactured for introduction, delivered for introduction, sold, advertised, or offered for sale in commerce. *See* 15 U.S.C. § 70a.

22. Under the Textile Act, a textile fiber product is “misbranded if it is falsely or deceptively stamped, tagged, labeled, invoiced, advertised, or otherwise identified as to the name or amount of constituent fibers contained therein.” 15 U.S.C. § 70b(a).

23. Pursuant to the Textile Act, 15 U.S.C. § 70e(c), the Federal Trade Commission has promulgated Rules and Regulations for its administration and enforcement (“Textile Rules and Regulations”). *See* 16 C.F.R. Part 303. The Textile Rules and Regulations state:

- A. All textile fiber products must carry permanent, affixed labels stating the recognized generic names of

## Complaint

the constituent fibers, as well as indicating, among other things, the “percentages by weight of the constituent fibers present in the textile fiber product, excluding permissive ornamentation, in amounts of 5 percent or more,” as well as the “name of the country where such product was processed or manufactured.” 16 C.F.R. § 303.16(a)(1), (a)(3); *see also* 16 C.F.R. §§ 303.6, 303.15 and 303.33;

- B. In advertising textile fiber products in promotional materials disseminated to ultimate consumers in print or by electronic means, other than by broadcast, where the consumer is solicited to purchase such textile products without examining the actual product purchased, the description of the product must contain a clear and conspicuous statement that the product was either made in U.S.A., imported, or both. 16 C.F.R. § 303.34;
- C. In advertising and labeling textile fiber products, no generic name for a manufactured fiber may be used until such generic name has been “established or otherwise recognized by the Commission,” 16 C.F.R. § 303.8, and such generic names must be used when identifying the fiber content in the information required in such labels and advertisements, 16 C.F.R. § 303.6;
- D. The only generic terms for fibers manufactured from regenerated cellulose that have been established or otherwise recognized by the FTC are rayon, viscose, modal, cupro, and lyocell. *See* 16 C.F.R. § 303.7(d);
- E. “Words, coined words, symbols or depictions, (a) which constitute or imply the name or designation of a fiber which is not present in the product, (b) which are phonetically similar to the name or designation of such a fiber, or (c) which are only a slight variation of spelling from the name or designation of such a fiber shall not be used in such a manner as to represent or imply that such fiber is present in the product.” 16

## Complaint

C.F.R. § 303.18. Any term used in advertising, including internet advertising, that constitutes or connotes the name or presence of a textile fiber is deemed to be an implication of fiber content. 16 C.F.R. § 303.40; and

- F. Any information or representations included in advertising or labeling of a textile fiber product that is not required under the Textile Act or the Textile Rules and Regulations “shall in no way be false, deceptive, or misleading as to fiber content and shall not include any names, terms, or representations prohibited by the [Textile] Act and regulations. Such non-required information or representations shall not be set forth or so used as to interfere with, minimize, or detract from the required information.” 16 C.F.R. § 303.42(b); 16 C.F.R. § 303.41(d); *see also* 16 C.F.R. § 303.17.

24. A violation either of the Textile Act or of the Textile Rules and Regulations constitutes an unfair and deceptive act or practice in violation of the Federal Trade Commission Act. *See* 15 U.S.C. §§ 70a and 70e.

**VIOLATIONS OF THE TEXTILE ACT  
AND THE TEXTILE RULES AND REGULATIONS**

25. As set forth in Paragraph 6, Respondents have:

- A. labeled their textile fiber products as consisting of bamboo; and
- B. advertised the fiber content of their textile fiber products using the terms “bamboo” and “bamboo fiber.”

26. In truth and in fact, Respondents’ textile fiber products are not bamboo fiber but are rayon, a regenerated cellulose fiber.

## Complaint

27. As set forth in Paragraphs 13 and 14, Respondents have:

- A. failed to include in the proper place on the labels of their textile fiber products the name of the country where the products were processed or manufactured; and
- B. advertised and sold their textile fiber products on the [www.mad-mod.com](http://www.mad-mod.com) website without including in the description of each product a clear and conspicuous statement that the product was either made in U.S.A., imported, or both.

28. Through the means described in Paragraphs 6, 13, and 14, Respondents have manufactured for introduction, introduced, advertised, offered for sale, or sold textile fiber products that are misbranded or falsely or deceptively advertised, as prohibited by Sections 70a and 70b of the Textile Act, 15 U.S.C. § 70, *et seq.*, and in violation of Sections 303.6, 303.8, 303.16, 303.17, 303.18, 303.33, 303.34, 303.40, 303.41, and 303.42 of the Textile Rules and Regulations, 16 C.F.R. Part 303.

29. Respondents' violations of the Textile Act and of the Textile Rules and Regulations 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 fifteenth day of December, 2009, has issued this complaint against Respondents.

By the Commission.

Complaint

**Exhibit A**

Nashville, TN Modern Lifestyle Store - Mad Mod | Home

Page 1 of 1



Home | Products | Services | About | Contact  
 ©Mad Mod, All rights reserved  
 Webmaster: Jamie Renner, Renner Web Design

Complaint

**MAD MOD** MODERN LIFESTYLE STORE  
Furniture & Accessories | Local Flavor | Bamboo Comfort

Home  
Products  
Services  
About  
Contact

Often, it seems that people are given a choice: shop for quality or shop with integrity. Luckily, some products allow them to do both. By applying an exclusive, eco-friendly manufacturing process to the fastest growing plant on earth, Bamboo fiber offers comfort with a conscience. Bamboo Comfort, a new textile line at Mad Mod, introduces ultra-soft, 100% bamboo fiber textiles with socioeconomic and environmental benefits that aren't found in any other textile fibers in the market today.

**Environmental Aspects:**

- Bamboo fiber is 100% biodegradable and soil by microorganisms and ultraviolet rays from the sun.
- Bamboo naturally thrives without the use of pesticides or fertilizer.
- Bamboo's ability to achieve maximum growth in 1-5 years makes it a highly renewable and abundant resource.

Products available in the following colors:

Color availability varies based on product

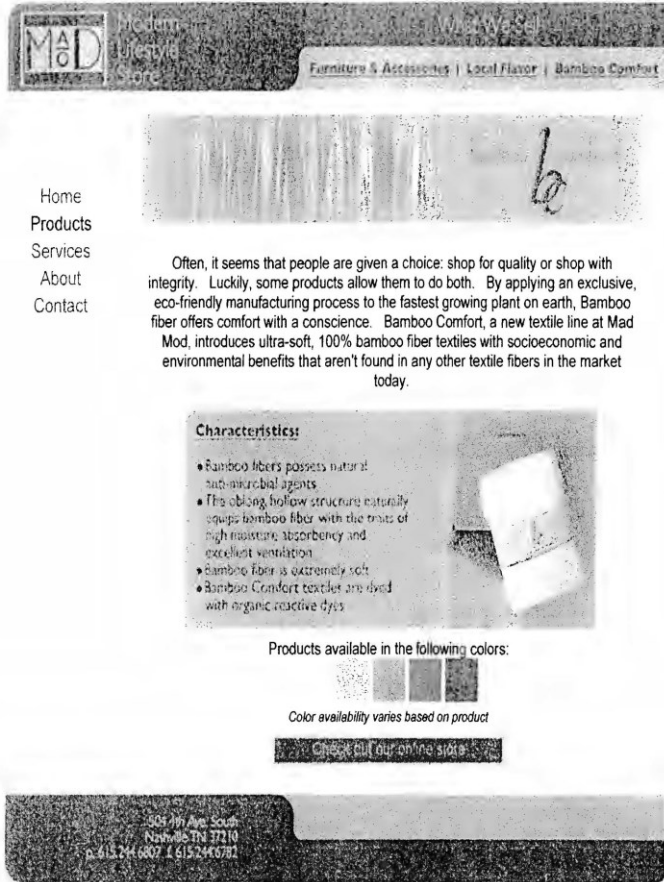
Call to see it all our on-line store

1011 W. South  
Nashville, TN 37216  
p 615.244.6807 f 615.244.6782

Home | Products | Services | About | Contact  
©Mad Mod. All rights reserved  
Webmaster: Jamie Renner, Renner Web Design

Complaint

Document #8





Complaint

Mad Mod - Modern Furniture, home accents, gifts

Page 1 of 1

**Mad Mod**  
a modern lifestyle store

SHOP! About Us Hours & Location Contact Us Privacy Policy

Terms and Conditions

**About Us**

**Mad Mod - Established 2003**

Mad Mod specializes in modern home furnishings, home accents, and gifts. Mad Mod carries everything modern including bedroom suites, luxury recliners, sofas, chairs, dining and coffee tables, vases, pillows, gifts, accessories and much more. We have also developed our own line of 100% bamboo textiles. Back in 2005 before being "green" was even popular, Bamboo Comfort was formed. We now offer 100% bamboo fiber towels and blankets which are luxurious to the touch AND environmentally friendly. More Bamboo Comfort products are being developed and will soon be offered to the general public. Bamboo Comfort products have been featured in *The Wall Street Journal*, *National Geographic's - Green Guide*, HGTV's - *I Want That! Baths*, *Aray* magazine, *Cool Green Stuff* (Book), *Renew* magazine (Australia) and other national and international publications.

In addition to our products, Mad Mod provides staging services for individuals or Realtors looking to sell residential property. We also provide staging services for other clients. *Staging services for residential clients.*

Mad Mod 524 4th Ave. S. Nashville, TN 37210 615 244 6807 p. 615 244 6782 f.  
Designer: Websites by FlashSiteBuilder.net 2005-2008. All Rights Reserved.

http://www.mad-mod.com/

Mad Mod - Modern Furniture, home accents, gifts

Page 1 of 1

Bamboo Comfort Bed Linens

Shipping Info Color

# BTS

Quantity 1 USD 69.00

VIEW CART

Hold the Ctrl key while clicking to add multiple quantities.

Mad Mod 524 4th Ave. S. Nashville, TN 37210 615 244 6807 p. 615 244 6782 f.  
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http://www.mad-mod.com/

Complaint

**Exhibit B**



**Exhibit C**

---

bamboo *be* comfort

Bamboo fiber is a sustainable textile that is highly absorbent, naturally antibacterial and luxuriously soft.

To care for your bamboo towels, machine-wash on delicate cycle and tumble-dry on low. Bleach and fabric softeners damage the bamboo fiber and should not be used on Bamboo Comfort products.

---

100% bamboo fiber

---

## Decision and Order

**DECISION AND ORDER**

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondents with violations of the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq.*, the Textile Fiber Products Identification Act, 15 U.S.C. § 70, *et seq.*, and the Rules and Regulations promulgated thereunder, 16 C.F.R. Part 303; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order (“consent agreement”), an admission by the 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 the respondents that the law has been violated as alleged in the 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 has reason to believe that the respondents have violated said Acts and Rules, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such consent agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons pursuant to section 2.34 of its Rules, now in 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 CSE, Inc. also doing business as Mad Mod, is a Tennessee corporation with its principal

## Decision and Order

place of business at 504 4<sup>th</sup> Avenue South, Nashville, Tennessee 37210.

2. Respondents Chris Saetveit and Cyndi Saetveit are the owners of Mad Mod. Individually or in concert with others, they formulate, direct, or control the policies, acts, or practices of the corporation. Their principal offices or places of business are the same as that of Mad Mod.
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:

- A. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
- B. “Competent and reliable scientific evidence” shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.
- C. “Covered product” shall mean any or all of the following: (1) any article of wearing apparel, costume or accessory, drapery, floor covering, furnishing, bedding, or other textile good of a type customarily used in a household, regardless of where used in fact, that is made, in whole or in part, of yarn or fabric; or (2) any fiber, yarn or fabric, whether in the finished or

## Decision and Order

unfinished state, used or intended for use in any such textile good.

- D. “Fiber trademark” shall mean a word or words used to identify a particular fiber sold by a person and to distinguish it from fibers of the same generic class sold by others, as defined in 16 C.F.R. § 303.1(r).
- E. “Generic name of any manufactured fiber” shall mean any name for a textile fiber established and defined by the Commission pursuant to Section 70e(c) of the Textile Fiber Products Identification Act, as set forth in 16 C.F.R. § 303.7.
- F. “Manufactured fiber” shall mean any fiber derived by a process of manufacture from any substance which, at any point in the manufacturing process, is not a fiber, as defined in 15 U.S.C. § 70(d).
- G. “Required information” shall mean such information as is required to be disclosed on labels or invoices and in advertising under the Textile Fiber Products Identification Act, 15 U.S.C. § 70 *et seq.*, and under the Rules and Regulations promulgated thereunder, 16 C.F.R. Part 303, as defined in 16 C.F.R. § 303.1(e).
- H. Unless otherwise specified, “respondents” shall mean CSE, Inc. also doing business as Mad Mod, a corporation, its successors and assigns and its officers and owners; Chris Saetveit and Cyndi Saetveit, individually and as owners of the corporation; and each of the above’s agents, representatives, and employees.

**I.**

**IT IS 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 covered product in or

## Decision and Order

affecting commerce, shall not make any representation, in any manner, expressly or by implication:

- A. That such covered product
1. is made of bamboo or bamboo fiber, including, but not limited to, through the use of a fiber trademark or other descriptive term or name for a product or product line, *e.g.*, Bamboo Comfort;
  2. is manufactured using an environmentally friendly process; or
  3. is anti-microbial or retains the anti-microbial properties of any material from which it is made,
- unless the representation is true, non-misleading, and, at the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; or
- B. About the benefits, performance, or efficacy of such covered product,
- unless the representation is true, non-misleading, and, at the time it is made, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

**II.**

*Provided, however,* that nothing in this order shall prohibit respondents from describing a covered product using the generic name of any manufactured fiber and identifying bamboo as the cellulose source for such fiber, *e.g.*, rayon made from bamboo, so long as such representation is true, non-misleading, complies with the Textile Fiber Products Identification Act, 15 U.S.C. § 70, *et seq.* (“Textile Act”) and with the Rules and Regulations promulgated thereunder, 16 C.F.R. Part 303 (“Textile Rules”), and, at the time such representation is made, respondents possess

## Decision and Order

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 covered product in or affecting commerce, shall not fail to comply with any provision of the Textile Fiber Products Identification Act, 15 U.S.C. § 70, *et seq.* (“Textile Act”), or of the Rules and Regulations promulgated thereunder, 16 C.F.R. Part 303 (“Textile Rules”), copies of which are attached hereto as “Appendix A,” or of the Textile Act or Textile Rules as they may hereafter be amended, including but not limited to:

- A. Selling, offering for sale, or advertising in commerce any covered product that is falsely or deceptively stamped, tagged, labeled, invoiced, advertised, or otherwise identified as to the name or amount of constituent fibers contained therein, 15 U.S.C. §§ 70a, 70b;
- B. Selling, offering for sale, or advertising in commerce any covered product that does not have a stamp, tag, label, or other means of identification on or affixed to the inside center of the neck midway between the shoulder seams or, if such product does not contain a neck, in the most conspicuous place on the inner side of such product, unless it is on or affixed on the outer side of such product, or in the case of hosiery items on the outer side of such product or package, 15 U.S.C. § 70b(j);
- C. Failing to use the recognized generic name of any manufactured fiber in the required information in any labels, invoices, or advertising of any covered product, 16 C.F.R. §§ 303.6 and 303.7;

## Decision and Order

- D. Failing to include all required information on labels for any covered product and in any written advertisement disseminated for a covered product that is used to aid, promote, or assist, directly or indirectly, in the sale or offering for sale of such covered product, including identifying:
1. the generic names and percentages by weight of the constituent fibers present in the covered product, in amounts of 5 percent or more and in the order of predominance set forth in 16 C.F.R. § 303.16(a)(1);
  2. the name or registered identification number issued by the Commission of the manufacturer or of one or more persons marketing or handling the covered product; and
  3. the name of the country where such covered product was processed or manufactured, as provided for in § 303.33,
- 15 U.S.C. § 70b(b); 16 C.F.R. §§ 303.16 and 303.42(a);
- E. Failing to ensure that any fiber trademark or generic name used on the label of or in any advertising for any covered product:
1. is not false, deceptive, or misleading as to fiber content; and
  2. does not indicate, directly or indirectly, that the covered product is composed wholly or in part of a particular fiber, when such is not the case,
- 16 C.F.R. §§ 303.17(d) and 303.41(d);
- F. Failing to ensure that any non-required information or representations used on the label of or in the advertising for any covered product:



## Decision and Order

1. do not interfere with, minimize, detract from, or conflict with required information;
2. do not include any names, terms, or representations prohibited by the Textile Act or Rules; and
3. are not false, deceptive, or misleading,

16 C.F.R. §§ 303.16(c) and 303.42(b);

- G. Where a covered product is advertised in such manner as to require disclosure of the information required by the Textile Act and Textile Rules, failing to include all parts of the required information in immediate conjunction with each other in legible and conspicuous type or lettering of equal size and prominence, 16 C.F.R. § 303.42(a);
- H. Failing to ensure that, where a covered product is advertised in print or by electronic means, other than by broadcast, using materials that solicit consumers to purchase such products by mail, telephone, electronic mail, or some other method without examining the actual product purchased, the description of the product includes a clear and conspicuous statement that the product was either made in U.S.A., imported, or both. 16 C.F.R. §§ 303.1(u) and 303.34;
- I. Where a fiber trademark is used in advertising a covered product, failing:
1. to include the generic name of the fiber contained in such covered product in immediate proximity to and in conjunction with such fiber trademark; and
  2. to include a full disclosure of the fiber content information required by the Textile Act and Textile Rules in at least one instance in any such advertisement,

16 C.F.R. § 303.41;

## Decision and Order

- J. Failing to ensure that any words, coined words, symbols or depictions used in the labeling or advertising of a covered product which:
1. constitute or imply the name or designation of a fiber;
  2. are phonetically similar to the name or designation of a fiber; or
  3. are only a slight variation of spelling from the name or designation of a fiber
- are not used in such a manner as to represent or imply that such fiber is present in the covered product, unless such fiber is actually present in that product, 16 C.F.R. § 303.18; and
- K. Failing to maintain for at least three years proper records for any covered products manufactured by respondents, including records showing the fiber content, 15 U.S.C. § 70d(b); 16 C.F.R. § 303.39.

**IV.**

**IT IS FURTHER ORDERED** that respondent CSE, Inc. also doing business as Mad Mod, and its successors and assigns, and respondents Chris Saetveit and Cyndi Saetveit 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, labeling, packaging and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation;
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the

## Decision and Order

representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations; and

- D. All acknowledgments of receipt of this order obtained pursuant to Part V.

**V.**

**IT IS FURTHER ORDERED** that respondent CSE, Inc. also doing business as Mad Mod, and its successors and assigns, and respondents Chris Saetveit and Cyndi Saetveit shall deliver a copy of this order to all current and future principals, members, 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.

**VI.**

**IT IS FURTHER ORDERED** that respondent CSE, Inc. also doing business as Mad Mod, and its successors and assigns, and respondents Chris Saetveit and Cyndi Saetveit shall notify the Commission at least thirty (30) days prior to any change with regard to CSE, Inc. also d/b/a Mad Mod, or any business entity that any respondent directly or indirectly controls, or has an ownership interest in, that may affect compliance obligations arising under this order, including but not limited to formation of a new business entity; a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor entity; 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 business or corporate name or address. *Provided, however*, that, with respect to any proposed change about which respondents

## Decision and Order

learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

**VII.**

**IT IS FURTHER ORDERED** that respondents Chris Saetveit and Cyndi Saetveit, for a period of five (5) years after the date of issuance of this order, each shall notify the Commission of the discontinuance of his or her current business or employment, or of his or her affiliation with any new business or employment. The notice shall include the respondent's new business address and telephone number, and a description of the nature of the business or employment and his or her duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

**VIII.**

**IT IS FURTHER ORDERED** that respondent CSE, Inc. also doing business as Mad Mod, and its successors and assigns, and respondents Chris Saetveit and Cyndi Saetveit shall, within sixty (60) days after the date of service of this order, file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which they have complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondents each shall submit additional true and accurate written reports.

**IX.**

This order will terminate on December 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

## Decision and Order

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 respondent 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.

By the Commission.

## Decision and Order

## Appendix A

From the U.S. Code Online via GPO Access  
 [wais.access.gpo.gov]  
 [Laws in effect as of January 3, 2006]  
 [CITE: 15USC70]

## TITLE 15--COMMERCE AND TRADE

CHAPTER 2--FEDERAL TRADE COMMISSION; PROMOTION OF EXPORT TRADE AND  
PREVENTION OF UNFAIR METHODS OF COMPETITION

## SUBCHAPTER V--TEXTILE FIBER PRODUCTS IDENTIFICATION

## Sec. 70. Definitions

As used in this subchapter--

- (a) The term "person" means an individual, partnership, corporation, association or any other form of business enterprise.
- (b) The term "fiber" or "textile fiber" means a unit of matter which is capable of being spun into a yarn or made into a fabric by bonding or by interlacing in a variety of methods including weaving, knitting, braiding, felting, twisting, or webbing, and which is the basic structural element of textile products.
- (c) The term "natural fiber" means any fiber that exists as such in the natural state.
- (d) The term "manufactured fiber" means any fiber derived by a process of manufacture from any substance which, at any point in the manufacturing process, is not a fiber.
- (e) The term "yarn" means a strand of textile fiber in a form suitable for weaving, knitting, braiding, felting, webbing, or otherwise fabricating into a fabric.
- (f) The term "fabric" means any material woven, knitted, felted, or otherwise produced from, or in combination with, any natural or manufactured fiber, yarn, or substitute therefor.
- (g) The term "household textile articles" means articles of wearing apparel, costumes and accessories, draperies, floor coverings, furnishings, beddings, and other textile goods of a type customarily used in a household regardless of where used in fact.
- (h) The term "textile fiber product" means--
- (1) any fiber, whether in the finished or unfinished state, used or intended for use in household textile articles;
  - (2) any yarn or fabric, whether in the finished or unfinished state, used or intended for use in household textile articles; and
  - (3) any household textile article made in whole or in part of yarn or fabric;

except that such term does not include a product required to be labeled under the Wool Products Labeling Act of 1939 [15 U.S.C. 60 et seq.].

(i) The term "effixed" means attached to the textile fiber product in any manner.

(j) The term "Commission" means the Federal Trade Commission.

(k) The term "commerce" means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation or between the District of Columbia and any State or Territory or foreign nation.

(l) The term "Territory" includes the insular possessions of the United States, and also any Territory of the United States.

(m) The term "ultimate consumer" means a person who obtains a textile fiber product by purchase or exchange with no intent to sell or exchange such textile fiber product in any form.

(Pub. L. 85-897, Sec. 2, Sept. 2, 1958, 72 Stat. 1717.)

## References in Text

The Wool Products Labeling Act of 1939, referred to in subsec.

## Decision and Order

(h) (3), is act Oct. 14, 1940, ch. 871, 54 Stat. 1128, as amended, which is classified generally to subchapter III (Sec. 68 et seq.) of this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 68 of this title and Tables.

## Effective Date

Section 15 of Pub. L. 85-897 provided that: "This Act [this subchapter] shall take effect eighteen months after enactment [Sept. 2, 1958], except for the promulgation of rules and regulations by the Commission, which shall be promulgated within nine months after the enactment of this Act. The Commission shall provide for the exception of any textile fiber product acquired prior to the effective date of this Act."

## Short Title

Section 1 of Pub. L. 85-897 provided: "That this Act [this subchapter] may be cited as the 'Textile Fiber Products Identification Act'."

## Separability

Section 13 of Pub. L. 85-897 provided that: "If any provision of this Act [this subchapter], or the application thereof to any person, as that term is herein defined, is held invalid, the remainder of the Act and the application of the remaining provisions to any person shall not be affected thereby."

## Decision and Order

From the U.S. Code Online via GPO Access  
 [wais.access.gpo.gov]  
 [Laws in effect as of January 3, 2006]  
 [CITE: 15USC70a]

## TITLE 15--COMMERCE AND TRADE

CHAPTER 2--FEDERAL TRADE COMMISSION; PROMOTION OF EXPORT TRADE AND  
PREVENTION OF UNFAIR METHODS OF COMPETITION

## SUBCHAPTER V--TEXTILE FIBER PRODUCTS IDENTIFICATION

## Sec. 70a. Violations of Federal Trade Commission Act

- (a) Introduction or manufacture for introduction into commerce, sale, advertising or offering for sale in commerce

The introduction, delivery for introduction, manufacture for introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States, of any textile fiber product which is misbranded or falsely or deceptively advertised within the meaning of this subchapter or the rules and regulations promulgated thereunder, is unlawful, and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act [15 U.S.C. 41 et seq.].

- (b) Sale, offering for sale, advertising, delivery, transportation of products advertised for sale in commerce

The sale, offering for sale, advertising, delivery, transportation, or causing to be transported, of any textile fiber product which has been advertised or offered for sale in commerce, and which is misbranded or falsely or deceptively advertised, within the meaning of this subchapter or the rules and regulations promulgated thereunder, is unlawful, and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act [15 U.S.C. 41 et seq.].

- (c) Sale, offering for sale, advertising, delivery, transportation of products after shipment in commerce

The sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, which is misbranded or falsely or deceptively advertised, within the meaning of this subchapter or the rules and regulations promulgated thereunder, is unlawful, and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act [15 U.S.C. 41 et seq.].

- (d) Application of section to common carrier, freight forwarder, etc.

This section shall not apply--

- (1) to any common carrier or contract carrier or freight forwarder with respect to a textile fiber product received, shipped, delivered, or handled by it for shipment in the ordinary course of its business;
- (2) to any processor or finisher in performing a contract for the account of a person subject to the provisions of this subchapter if the processor or finisher does not change the textile fiber content of the textile fiber product contrary to the terms of such contract;
- (3) with respect to the manufacture, delivery for transportation, transportation, sale, or offering for sale of a



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textile fiber product for exportation from the United States to any foreign country;

(4) to any publisher or other advertising agency or medium for the dissemination of advertising or promotional material, except the manufacturer, distributor, or seller of the textile fiber product to which the false or deceptive advertisement relates, if such publisher or other advertising agency or medium furnishes to the Commission, upon request, the name and post office address of the manufacturer, distributor, seller, or other person residing in the United States, who caused the dissemination of the advertising material; or

(5) to any textile fiber product until such product has been produced by the manufacturer or processor in the form intended for sale or delivery to, or for use by, the ultimate consumer: Provided, That this exemption shall apply only if such textile fiber product is covered by an invoice or other paper relating to the marketing or handling of the textile fiber product and such invoice or paper correctly discloses the information with respect to the textile fiber product which would otherwise be required under section 70b of this title to be on the stamp, tag, label, or other identification and the name and address of the person issuing the invoice or paper.

(Pub. L. 85-897, Sec. 3, Sept. 2, 1958, 72 Stat. 1718.)

## References in Text

The Federal Trade Commission Act, referred to in subsecs. (a) to (c), is act Sept. 26, 1914, ch. 311, 38 Stat. 717, as amended, which is classified generally to subchapter I (Sec. 41 et seq.) of this chapter. For complete classification of this Act to the Code, see section 58 of this title and Tables.

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 [Document affected by Public Law 9 Section ](2)]  
 [CITE: 15USC70b]

## TITLE 15--COMMERCE AND TRADE

CHAPTER 2--FEDERAL TRADE COMMISSION; PROMOTION OF EXPORT TRADE AND  
PREVENTION OF UNFAIR METHODS OF COMPETITION

## SUBCHAPTER V--TEXTILE FIBER PRODUCTS IDENTIFICATION

Sec. 70b. Misbranded and falsely advertised textile fiber  
products

## (a) False or deceptive identification

Except as otherwise provided in this subchapter, a textile fiber product shall be misbranded if it is falsely or deceptively stamped, tagged, labeled, invoiced, advertised, or otherwise identified as to the name or amount of constituent fibers contained therein.

## (b) Stamp, tag, label or other means of identification; contents

Except as otherwise provided in this subchapter, a textile fiber product shall be misbranded if a stamp, tag, label, or other means of identification, or substitute therefor authorized by section 70c of this title, is not on or affixed to the product showing in words and figures plainly legible, the following:

(1) The constituent fiber or combination of fibers in the textile fiber product, designating with equal prominence each natural or manufactured fiber in the textile fiber product by its generic name in the order of predominance by the weight thereof if the weight of such fiber is 5 per centum or more of the total fiber weight of the product, but nothing in this section shall be construed as prohibiting the use of a nondeceptive trademark in conjunction with a designated generic name: Provided, That exclusive of permissible ornamentation, any fiber or group of fibers present in an amount of 5 per centum or less by weight of the total fiber content shall not be designated by the generic name or the trademark of such fiber or fibers, but shall be designated only as "other fiber" or "other fibers" as the case may be, but nothing in this section shall be construed as prohibiting the disclosure of any fiber present in a textile fiber product which has a clearly established and definite functional significance where present in the amount contained in such product.

(2) The percentage of each fiber present, by weight, in the total fiber content of the textile fiber product, exclusive of ornamentation not exceeding 5 per centum by weight of the total fiber content: Provided, That, exclusive of permissible ornamentation, any fiber or group of fibers present in an amount of 5 per centum or less by weight of the total fiber content shall not be designated by the generic name or trademark of such fiber or fibers, but shall be designated only as "other fiber" or "other fibers" as the case may be but nothing in this section shall be construed as prohibiting the disclosure of any fiber present in a textile fiber product which has a clearly established and definite functional significance where present in the amount stated: Provided further, That in the case of a textile fiber product which contains more than one kind of fiber, deviation in the fiber content of any fiber in such product, from the amount stated on the stamp, tag, label, or other identification shall not be a misbranding under this section unless such deviation is in excess of reasonable tolerances

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which shall be established by the Commission: And provided further, That any such deviation which exceeds said tolerances shall not be a misbranding if the person charged proves that the deviation resulted from unavoidable variations in manufacture and despite due care to make accurate the statements on the tag, stamp, label, or other identification.

(3) The name, or other identification issued and registered by the Commission, of the manufacturer of the product or one or more persons subject to section 70a of this title with respect to such product.

(4) If it is an imported textile fiber product the name of the country where processed or manufactured.

(5) If it is a textile fiber product processed or manufactured in the United States, it be so identified.

(c) False or deceptive advertisement

For the purposes of this subchapter, a textile fiber product shall be considered to be falsely or deceptively advertised if any disclosure or implication of fiber content is made in any written advertisement which is used to aid, promote, or assist directly or indirectly in the sale or offering for sale of such textile fiber product, unless the same information as that required to be shown on the stamp, tag, label, or other identification under subsection (b)(1) and (2) of this section is contained in the heading, body, or other part of such written advertisement, except that the percentages of the fiber present in the textile fiber product need not be stated.

(d) Additional information allowed

In addition to the information required in this section, the stamp, tag, label, or other means of identification, or advertisement may contain other information not violating the provisions of this subchapter.

(e) Labelling of packages

For purposes of this subchapter, in addition to the textile fiber products contained therein, a package of textile fiber products intended for sale to the ultimate consumer shall be misbranded unless such package has affixed to it a stamp, tag, label, or other means of identification bearing the information required by subsection (b) of this section, with respect to such contained textile fiber products, or is transparent to the extent it allows for the clear reading of the stamp, tag, label, or other means of identification on the textile fiber product, or in the case of hosiery items, this section shall not be construed as requiring the affixing of a stamp, tag, label, or other means of identification to each hosiery product contained in a package if (1) such hosiery products are intended for sale to the ultimate consumer in such package, (2) such package has affixed to it a stamp, tag, label, or other means of identification bearing, with respect to the hosiery products contained therein, the information required by subsection (b) of this section, and (3) the information on the stamp, tag, label, or other means of identification affixed to such package is equally applicable with respect to each textile fiber product contained therein.

(f) Fabric severed from bolts, pieces or rolls of fabric

This section shall not be construed as requiring designation of the fiber content of any portion of fabric, when sold at retail, which is severed from bolts, pieces, or rolls of fabric labeled in accordance with the provisions of this section at the time of such sale: Provided, That if any portion of fabric severed from a bolt, piece, or roll of fabric is in any manner represented as containing percentages of natural or manufactured fibers, other than that which is set forth on the labeled bolt, piece, or roll, this section shall be applicable thereto.

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and the information required shall be separately set forth and segregated as required by this section.

(g) Advertisement of textile product by use of name or symbol of fur-bearing animal

For the purposes of this subchapter, a textile fiber product shall be considered to be falsely or deceptively advertised if the name or symbol of any fur-bearing animal is used in the advertisement of such product unless such product, or the part thereof in connection with which the name or symbol of a fur-bearing animal is used, is a fur or fur product within the meaning of the Fur Products Labeling Act (15 U.S.C. 69 et seq.): Provided, however, That where a textile fiber product contains the hair or fiber of a fur-bearing animal, the name of such animal, in conjunction with the word "fiber", "hair", or "blend", may be used.

(h) Reused stuffing

For the purposes of this subchapter, a textile fiber product shall be misbranded if it is used as stuffing in any upholstered product, mattress, or cushion after having been previously used as stuffing in any other upholstered product, mattress, or cushion, unless the upholstered product, mattress, or cushion containing such textile fiber product bears a stamp, tag, or label approved by the Commission indicating in words plainly legible that it contains reused stuffing.

(i) Mail order catalog or promotional material

For the purposes of this subchapter, a textile fiber product shall be considered to be falsely or deceptively advertised in any mail order catalog or mail order promotional material which is used in the direct sale or direct offering for sale of such textile fiber product, unless such textile fiber product description states in a clear and conspicuous manner that such textile fiber product is processed or manufactured in the United States of America, or imported, or both.

(j) Location of stamp, tag, label, or other identification

For purposes of this subchapter, any textile fiber product shall be misbranded if a stamp, tag, label, or other identification conforming to the requirements of this section is not on or affixed to the inside center of the neck midway between the shoulder seams or, if such product does not contain a neck, in the most conspicuous place on the inner side of such product, unless it is on or affixed on the outer side of such product, or in the case of hosiery items on the outer side of such product or package.

(k) Marking of certain sock products

(1) Notwithstanding any other provision of law, socks provided for in subheading 6115.92.90, 6115.93.90, 6115.99.18, 6111.20.60, 6111.30.50, or 6111.90.50 of the Harmonized Tariff Schedule of the United States, as in effect on September 1, 2003, shall be marked as legibly, indelibly, and permanently as the nature of the article or package will permit in such a manner as to indicate to the ultimate consumer in the United States the English name of the country of origin of the article. The marking required by this subsection shall be on the front of the package, adjacent to the size designation of the product, and shall be set forth in such a manner as to be clearly legible, conspicuous, and readily accessible to the ultimate consumer.

(2) Exceptions.--Any package that contains several different types of goods and includes socks classified under subheading 6115.92.90, 6115.93.90, 6115.99.18, 6111.20.60, 6111.30.50, or 6111.90.50 of the Harmonized Tariff Schedule of the United States, as in effect on September 1, 2003, shall not be subject to the requirements of paragraph (1).

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(Pub. L. 85-897, Sec. 4, Sept. 2, 1958, 72 Stat. 1719; Pub. L. 89-35, Secs. 1, 2, June 5, 1965, 79 Stat. 124; Pub. L. 98-417, title III, Secs. 301-303, Sept. 24, 1984, 98 Stat. 1603, 1604; Pub. L. 108-429, title II, Sec. 2004(h)(1), Dec. 3, 2004, 118 Stat. 2594.)

## References in Text

The Harmonized Tariff Schedule of the United States, referred to in subsec. (k), is not set out in the Code. See Publication of Harmonized Tariff Schedule note set out under section 1202 of Title 19, Customs Duties.

The Fur Products Labeling Act, referred to in subsec. (g), is act Aug. 8, 1951, ch. 298, 65 Stat. 175, as amended, which is classified generally to subchapter IV (Sec. 69 et seq.) of this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 69 of this title and Tables.

## Amendments

2004--Subsec. (k). Pub. L. 108-429 added subsec. (k).

1984--Subsec. (b)(5). Pub. L. 98-417, Sec. 301, added par. (5).

Subsec. (e). Pub. L. 98-417, Sec. 302, amended subsec. (e) generally. Prior to amendment, subsec. (e) read as follows: "This section shall not be construed as requiring the affixing of a stamp, tag, label, or other means of identification to each textile fiber product contained in a package if (1) such textile fiber products are intended for sale to the ultimate consumer in such package, (2) such package has affixed to it a stamp, tag, label, or other means of identification bearing, with respect to the textile fiber products contained therein, the information required by subsection (b) of this section, and (3) the information on the stamp, tag, label, or other means of identification affixed to such package is equally applicable with respect to each textile fiber product contained therein."

Subsecs. (i), (j). Pub. L. 98-417, Sec. 303, added subsecs. (i) and (j).

1965--Subsec. (b)(1). Pub. L. 89-35, Sec. 1, inserted "", but nothing in this section shall be construed as prohibiting the disclosure of any fiber present in a textile fiber product which has a clearly established and definite functional significance where present in the amount contained in such product".

Subsec. (b)(2). Pub. L. 89-35, Sec. 2, inserted "", but nothing in this section shall be construed as prohibiting the disclosure of any fiber present in a textile fiber product which has a clearly established and definite functional significance where present in the amount stated".

## Effective Date of 2004 Amendment

Pub. L. 108-429, title II, Sec. 2004(h)(2), Dec. 3, 2004, 118 Stat. 2594, provided that: "The amendment made by paragraph (1) [amending this section] shall take effect on the date that is 15 months after the date of enactment of this Act (Dec. 3, 2004), and on and after the date that is 15 months after such date of enactment, any provision of part 303 of title 16, Code of Federal Regulations, that is inconsistent with such amendment shall not apply."

## Effective Date of 1984 Amendment

Amendment by Pub. L. 98-417 effective 90 days after Sept. 24, 1984, see section 307 of Pub. L. 98-417, set out as a note under section 68b of this title.

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[CITE: 15USC70c]

## TITLE 15--COMMERCE AND TRADE

CHAPTER 2--FEDERAL TRADE COMMISSION; PROMOTION OF EXPORT TRADE AND  
PREVENTION OF UNFAIR METHODS OF COMPETITION

## SUBCHAPTER V--TEXTILE FIBER PRODUCTS IDENTIFICATION

## Sec. 70c. Removal of stamp, tag, label, or other identification

## (a) Removal or mutilation after shipment in commerce

After shipment of a textile fiber product in commerce it shall be unlawful, except as provided in this subchapter, to remove or mutilate, or cause or participate in the removal or mutilation of, prior to the time any textile fiber product is sold and delivered to the ultimate consumer, any stamp, tag, label, or other identification required by this subchapter to be affixed to such textile fiber product, and any person violating this section shall be guilty of an unfair method of competition, and an unfair or deceptive act or practice, under the Federal Trade Commission Act [15 U.S.C. 41 et seq.].

## (b) Substitution of stamp, tag, etc.

## Any person--

(1) introducing, selling, advertising, or offering for sale, in commerce, or importing into the United States, a textile fiber product subject to the provisions of this subchapter, or

(2) selling, advertising, or offering for sale a textile fiber product whether in its original state or contained in other textile fiber products, which has been shipped, advertised, or offered for sale, in commerce,

may substitute for the stamp, tag, label, or other means of identification required to be affixed to such textile product pursuant to section 70b(b) of this title, a stamp, tag, label, or other means of identification conforming to the requirements of section 70b(b) of this title, and such substituted stamp, tag, label, or other means of identification shall show the name or other identification issued and registered by the Commission of the person making the substitution.

## (c) Affixing of stamp, tag, etc. to individual unit of broken package

If any person other than the ultimate consumer breaks a package which bears a stamp, tag, label, or other means of identification conforming to the requirements of section 70b of this title, and if such package contains one or more units of a textile fiber product to which a stamp, tag, label, or other identification conforming to the requirements of section 70b of this title is not affixed, such person shall affix a stamp, tag, label, or other identification bearing the information on the stamp, tag, label, or other means of identification attached to such broken package to each unit of textile fiber product taken from such broken package.

(Pub. L. 85-897, Sec. 5, Sept. 2, 1958, 72 Stat. 1720.)

## References in Text

The Federal Trade Commission Act, referred to in subsec. (a), is act Sept. 26, 1914, ch. 311, 38 Stat. 717, as amended, which is classified generally to subchapter I (Sec. 41 et seq.) of this chapter. For

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complete classification of this Act to the Code, see section 58 of this title and Tables.

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## TITLE 15--COMMERCE AND TRADE

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## SUBCHAPTER V--TEXTILE FIBER PRODUCTS IDENTIFICATION

## Sec. 70d. Records

## (a) Maintenance and preservation by manufacturer

Every manufacturer of textile fiber products subject to this subchapter shall maintain proper records showing the fiber content as required by this subchapter of all such products made by him, and shall preserve such records for at least three years.

## (b) Maintenance and preservation by person substituting stamp, tag, etc.

Any person substituting a stamp, tag, label, or other identification pursuant to section 70c(b) of this title shall keep such records as will show the information set forth on the stamp, tag, label, or other identification that he removed and the name or names of the person or persons from whom such textile fiber product was received, and shall preserve such records for at least three years.

## (c) Neglect or refusal to maintain or preserve records

The neglect or refusal to maintain or preserve the records required by this section is unlawful, and any person neglecting or refusing to maintain such records shall be guilty of an unfair method of competition, and an unfair or deceptive act or practice, in commerce, under the Federal Trade Commission Act [15 U.S.C. 41 et seq.].

[Pub. L. 85-897, Sec. 6, Sept. 2, 1958, 72 Stat. 1721.]

## References in Text

The Federal Trade Commission Act, referred to in subsec. (c), is act Sept. 26, 1914, ch. 311, 38 Stat. 717, as amended, which is classified generally to subchapter I (Sec. 41 et seq.) of this chapter. For complete classification of this Act to the Code, see section 58 of this title and Tables.



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## SUBCHAPTER V--TEXTILE FIBER PRODUCTS IDENTIFICATION

## Sec. 70e. Enforcement

## (a) Enforcement by Federal Trade Commission

Except as otherwise specifically provided herein, this subchapter shall be enforced by the Federal Trade Commission under rules, regulations, and procedure provided for in the Federal Trade Commission Act [15 U.S.C. 41 et seq.].

## (b) Terms of Federal Trade Commission Act incorporated into this subchapter

The Commission is authorized and directed to prevent any person from violating the provisions of this subchapter in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act [15 U.S.C. 41 et seq.] were incorporated into and made a part of this subchapter; and any such person violating the provisions of this subchapter shall be subject to the penalties and entitled to the privileges and immunities provided in said Federal Trade Commission Act, in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though the applicable terms and provisions of the said Federal Trade Commission Act were incorporated into and made a part of this subchapter.

## (c) Rules and regulations by Federal Trade Commission

The Commission is authorized and directed to make such rules and regulations, including the establishment of generic names of manufactured fibers, under and in pursuance of the terms of this subchapter as may be necessary and proper for administration and enforcement.

## (d) Inspection, analyses, tests, etc.

The Commission is authorized to cause inspections, analyses, tests, and examinations to be made of any product subject to this subchapter.

(Pub. L. 85-897, Sec. 7, Sept. 2, 1950, 72 Stat. 1721.)

## References in Text

The Federal Trade Commission Act, referred to in subsecs. (a) and (b), is act Sept. 26, 1914, ch. 311, 38 Stat. 717, as amended, which is classified generally to subchapter I (Sec. 41 et seq.) of this chapter. For complete classification of this Act to the Code, see section 58 of this title and Tables.

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## TITLE 15--COMMERCE AND TRADE

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## Sec. 70f. Injunction proceedings

Whenever the Commission has reason to believe--

(a) that any person is doing, or is about to do, an act which by section 70a, 70c, 70d, 70g, or 70h(b) of this title is declared to be unlawful; and

(b) that it would be to the public interest to enjoin the doing of such act until complaint is issued by the Commission under the Federal Trade Commission Act [15 U.S.C. 41 et seq.] and such complaint is dismissed by the Commission or set aside by the court on review or until an order to cease and desist made thereon by the Commission has become final within the meaning of the Federal Trade Commission Act,

the Commission may bring suit in the district court of the United States or in the United States court of any Territory, for the district or Territory in which such person resides or transacts business, to enjoin the doing of such act and upon proper showing a temporary injunction or restraining order shall be granted without bond.

(Pub. L. 85-897, Sec. 8, Sept. 2, 1958, 72 Stat. 1721.)

## References in Text

The Federal Trade Commission Act, referred to in text, is act Sept. 26, 1914, ch. 311, 38 Stat. 717, as amended, which is classified generally to subchapter I (Sec. 41 et seq.) of this chapter. For complete classification of this Act to the Code, see section 58 of this title and Tables.

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## Sec. 70g. Exclusion of misbranded textile fiber products

All textile fiber products imported into the United States shall be stamped, tagged, labeled, or otherwise identified in accordance with the provisions of section 70b of this title, and all invoices of such products required pursuant to section 1484 of title 19, shall set forth, in addition to the matter therein specified, the information with respect to said products required under the provisions of section 70b(b) of this title, which information shall be in the invoices prior to their certification, if such certification is required pursuant to section 1484 of title 19. The falsification of, or failure to set forth the required information in such invoices, or the falsification or perjury of the consignee's declaration provided for in section 1485 of title 19, insofar as it relates to such information, is unlawful, and shall be an unfair method of competition, and an unfair and deceptive act or practice, in commerce under the Federal Trade Commission Act [15 U.S.C. 41 et seq.]; and any person who falsifies, or perjures the consignee's declaration insofar as it relates to such information, may henceforth be prohibited by the Commission from importing, or participating in the importation of, any textile fiber product into the United States except upon filing bond with the Secretary of the Treasury in a sum double the value of said products and any duty thereon, conditioned upon compliance with the provisions of this subchapter. A verified statement from the manufacturer or producer of such products showing their fiber content as required under the provisions of this subchapter may be required under regulation prescribed by the Secretary of the Treasury.

(Pub. L. 85-897, Sec. 9, Sept. 2, 1958, 72 Stat. 1722.)

## References in Text

The Federal Trade Commission Act, referred to in text, is act Sept. 26, 1914, ch. 311, 38 Stat. 717, as amended, which is classified generally to subchapter I (Sec. 41 et seq.) of this chapter. For complete classification of this Act to the Code, see section 58 of this title and Tables.

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[Laws in effect as of January 3, 2006]  
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## SUBCHAPTER V--TEXTILE FIBER PRODUCTS IDENTIFICATION

## Sec. 70h. Guaranty

## (a) Avoidance of liability; requirements

No person shall be guilty of an unlawful act under section 70a of this title if he establishes a guaranty received in good faith, signed by and containing the name and address of the person residing in the United States by whom the textile fiber product guaranteed was manufactured or from whom it was received, that said product is not misbranded or falsely invoiced under the provisions of this subchapter. Said guaranty shall be (1) a separate guaranty specifically designating the textile fiber product guaranteed, in which case it may be on the invoice or other paper relating to said product; or (2) a continuing guaranty given by seller to the buyer applicable to all textile fiber products sold to or to be sold to buyer by seller in a form as the Commission, by rules and regulations, may prescribe; or (3) a continuing guaranty filed with the Commission applicable to all textile fiber products handled by a guarantor in such form as the Commission by rules and regulations may prescribe.

## (b) Furnishing false guaranty

The furnishing of a false guaranty, except where the person furnishing such false guaranty relies on a guaranty to the same effect received in good faith signed by and containing the name and address of the person residing in the United States by whom the product guaranteed was manufactured or from whom it was received, is unlawful, and shall be an unfair method of competition, and an unfair and deceptive act or practice, in commerce, within the meaning of the Federal Trade Commission Act [15 U.S.C. 41 et seq.].

(Pub. L. 85-897, Sec. 10, Sept. 2, 1958, 72 Stat. 1722.)

## References in Text

The Federal Trade Commission Act, referred to in subsec. (b), is act Sept. 26, 1914, ch. 311, 38 Stat. 717, as amended, which is classified generally to subchapter I (Sec. 41 et seq.) of this chapter. For complete classification of this Act to the Code, see section 58 of this title and Tables.

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## Sec. 70i. Criminal penalty

(a) Any person who willfully does an act which by section 70a, 70c, 70d, 70g, or 70h(b) of this title is declared to be unlawful shall be guilty of a misdemeanor and upon conviction shall be fined not more than \$5,000 or be imprisoned not more than one year, or both, in the discretion of the court: Provided, That nothing in this section shall limit any other provision of this subchapter.

(b) Whenever the Commission has reason to believe that any person is guilty of a misdemeanor under this section, it may certify all pertinent facts to the Attorney General. If, on the basis of the facts certified, the Attorney General concurs in such belief, it shall be his duty to cause appropriate proceedings to be brought for the enforcement of the provisions of this section against such person.

(Pub. L. 85-897, Sec. 11, Sept. 2, 1958, 72 Stat. 1723.)

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## Sec. 70j. Exemptions

(a) None of the provisions of this subchapter shall be construed to apply to--

- (1) upholstery stuffing, except as provided in section 70b(h) of this title;
- (2) outer coverings of furniture, mattresses, and box springs;
- (3) linings or interlinings incorporated primarily for structural purposes and not for warmth;
- (4) filling or padding incorporated primarily for structural purposes and not for warmth;
- (5) stiffenings, trimmings, facings, or interfacings;
- (6) backings of, and paddings or cushions to be used under, floor coverings;
- (7) sewing and handicraft threads;
- (8) bandages, surgical dressings, and other textile fiber products, the labeling of which is subject to the requirements of the Federal Food, Drug and Cosmetic Act of 1938, as amended [21 U.S.C. 301 et seq.];
- (9) waste materials not intended for use in a textile fiber product;
- (10) textile fiber products incorporated in shoes or overshoes or similar outer footwear;
- (11) textile fiber products incorporated in headwear, handbags, luggage, brushes, lampshades, or toys, catamenial devices, adhesive tapes and adhesive sheets, cleaning cloths impregnated with chemicals, or diapers.

The exemption provided for any article by paragraph (3) or (4) of this subsection shall not be applicable if any representation as to fiber content of such article is made in any advertisement, label, or other means of identification covered by section 70b of this title.

(b) The Commission may exclude from the provisions of this subchapter other textile fiber products (1) which have an insignificant or inconsequential textile fiber content, or (2) with respect to which the disclosure of textile fiber content is not necessary for the protection of the ultimate consumer.

(Pub. L. 85-897, Sec. 12, Sept. 2, 1958, 72 Stat. 1723.)

## References in Text

The Federal Food, Drug and Cosmetic Act of 1938, referred to in subsec. (a) (8), is act June 25, 1938, ch. 675, 52 Stat. 1040, as amended, which is classified generally to chapter 9 (Sec. 301 et seq.) of Title 21, Food and Drugs. For complete classification of this Act to the Code, see section 301 of Title 21 and Tables.

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[wais.access.gpo.gov]  
[Laws in effect as of January 3, 2006]  
[CITE: 15USC70k]

## TITLE 15--COMMERCE AND TRADE

CHAPTER 2--FEDERAL TRADE COMMISSION; PROMOTION OF EXPORT TRADE AND  
PREVENTION OF UNFAIR METHODS OF COMPETITION

## SUBCHAPTER V--TEXTILE FIBER PRODUCTS IDENTIFICATION

## Sec. 70k. Application of other laws

The provisions of this subchapter shall be held to be in addition to, and not in substitution for or limitation of, the provisions of any other Act of the United States.

(Pub. L. 85-897, Sec. 14, Sept. 2, 1958, 72 Stat. 1724.)

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indirectly in labeling, invoicing or advertising such products. (For example, a fur product made by the skin-on-skin method should not be represented as having been made by the letout method.)

(b) Where a fur product is made by the method known in the trade as letting-out, or is made of fur which has been sheared or plucked, such facts may be set out in labels, invoices and advertising.

**§ 301.46 Reference to guaranty by Government prohibited.**

No representation nor suggestion that a fur or fur product is guaranteed under the act by the Government, or any branch thereof, shall be made in the labeling, invoicing or advertising in connection therewith.

**§ 301.47 Form of separate guaranty.**

The following is a suggested form of separate guaranty under section 10 of the Act which may be used by a guarantor residing in the United States, on and as part of an invoice in which the merchandise covered is listed and specified and which shows the date of such document, the date of shipment of the merchandise and the signature and address of the guarantor:

We guarantee that the fur products or furs specified herein are not misbranded nor falsely nor deceptively advertised or invoiced under the provisions of the Fur Products Labeling Act and rules and regulations thereunder.

**§ 301.48 Continuing guaranty filed with Federal Trade Commission.**

(a)(1) Under section 10 of the Act any person residing in the United States and handling fur or fur products may file a continuing guaranty with the Federal Trade Commission. When filed with the Commission a continuing guaranty shall be fully executed in duplicate. Forms for use in preparing continuing guaranties shall be supplied by the Commission upon request.

(2) Continuing guaranties filed with the Commission shall continue in effect until revoked. The guarantor shall promptly report any change in business status to the Commission.

(3) The prescribed form for a continuing guaranty is found in § 303.38(b)

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of this chapter. The form is available upon request from the Textile Section, Enforcement Division, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

(b) Any person who has a continuing guaranty on file with the Commission may, during the effective date of the guaranty, give notice of such fact by setting forth on the invoice or other paper covering the marketing or handling of the product guaranteed the following: "Continuing guaranty under the Fur Products Labeling Act filed with the Federal Trade Commission."

(c) Any person who falsely represents in writing that he has a continuing guaranty on file with the Federal Trade Commission when such is not a fact shall be deemed to have furnished a false guaranty under section 10(b) of the Act.

[26 FR 3188, Apr. 14, 1961, as amended at 48 FR 12517, Mar. 25, 1983; 63 FR 7517, Feb. 13, 1998; 63 FR 71563, Dec. 28, 1998]

**§ 301.48a Guaranties not received in good faith.**

A guaranty shall not be deemed to have been received in good faith within the meaning of section 10(a) of the Act:

(a) Unless the recipient of such guaranty shall have examined the required label, required invoice and advertisement relating to the fur product or fur so guaranteed;

(b) If the recipient of the guaranty has knowledge that the fur or fur product guaranteed is misbranded, falsely invoiced or falsely advertised.

[26 FR 3188, Apr. 14, 1961]

**§ 301.49 Deception in general.**

No furs nor fur products shall be labeled, invoiced, or advertised in any manner which is false, misleading or deceptive in any respect.

**PART 303—RULES AND REGULATIONS UNDER THE TEXTILE FIBER PRODUCTS IDENTIFICATION ACT****Sec.**

303.1 Terms defined.

303.2 General requirements.

303.3 Fibers present in amounts of less than 5 percent.

303.4 English language requirement.



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- 303.5 Abbreviations, ditto marks, and asterisks prohibited.
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- 303.7 Generic names and definitions for manufactured fibers.
- 303.8 Procedure for establishing generic names for manufactured fibers.
- 303.9 Use of fur-bearing animal names and symbols prohibited.
- 303.10 Fiber content of special types of products.
- 303.11 Floor coverings containing backings, fillings, and paddings.
- 303.12 Trimmings of household textile articles.
- 303.13 Sale of remnants and products made of remnants.
- 303.14 Products containing unknown fibers.
- 303.15 Required label and method of affixing.
- 303.16 Arrangement and disclosure of information on labels.
- 303.17 Use of fiber trademarks and generic names on labels.
- 303.18 Terms implying fibers not present.
- 303.19 Name or other identification required to appear on labels.
- 303.20 Registered identification numbers.
- 303.21 Marking of samples, swatches, or specimens and products sold therefrom.
- 303.22 Products containing linings, interlinings, fillings, and paddings.
- 303.23 Textile fiber products containing superimposed or added fibers.
- 303.24 Pile fabrics and products composed thereof.
- 303.25 Sectional disclosure of content.
- 303.26 Ornamentation.
- 303.27 Use of the term "All" or "100%."
- 303.28 Products contained in packages.
- 303.29 Labeling of pairs or products containing two or more units.
- 303.30 Textile fiber products in form for consumer.
- 303.31 Invoice in lieu of label.
- 303.32 Products containing reused stuffing.
- 303.33 Country where textile fiber products are processed or manufactured.
- 303.34 Country of origin in mail order advertising.
- 303.35 Use of terms "virgin" or "new."
- 303.36 Form of separate guaranty.
- 303.37 Form of continuing guaranty from seller to buyer.
- 303.38 Continuing guaranty filed with Federal Trade Commission.
- 303.39 Maintenance of records.
- 303.40 Use of terms in written advertisements that imply presence of a fiber.
- 303.41 Use of fiber trademarks and generic names in advertising.
- 303.42 Arrangement of information in advertising textile fiber products.
- 303.43 Fiber content tolerances.
- 303.44 Products not intended for use subject to the act.
- 303.45 Exclusions from the act.

AUTHORITY: 15 U.S.C. 70 et seq.

SOURCE: 24 FR 4680, June 2, 1959, unless otherwise noted.

## § 303.1 Terms defined.

As used in this part, unless the context otherwise specifically requires:

(a) The term *Act* means the *Textile Fiber Products Identification Act* (approved September 2, 1958, 85th Congress, 2d Sess.; 15 U.S.C. 70, 72 Stat. 1717).

(b) The terms *rule*, *rules*, *regulations*, and *rules and regulations* mean the rules and regulations prescribed by the Commission pursuant to section 7(c) of the Act.

(c) The definition of terms contained in section 2 of the Act shall be applicable also to such terms when used in rules promulgated under the Act.

(d) The term *United States* means the several States, the District of Columbia, and the Territories and possessions of the United States.

(e) The terms *required information* and *information required* mean such information as is required to be disclosed on labels or invoices and in advertising under the Act and regulations.

(f) The terms *label*, *labels*, *labeled*, and *labeling* mean the stamp, tag, label, or other means of identification, or authorized substitute therefor, required to be on or affixed to textile fiber products by the Act and regulations and on which the information required is to appear.

(g) The terms *marketing or handling* and *marketed or handled*, when applied to textile fiber products, mean any one or all of the transactions set forth in section 3 of the Act.

(h) The terms *invoice* and *invoice or other paper* mean an account, order, memorandum, list, or catalog, which is issued to a purchaser, consignee, bailee, correspondent, agent, or any other person, in writing or in some other form capable of being read and preserved in a tangible form, in connection with the marketing or handling of any textile fiber product transported or delivered to such person.

(i) The term *outer coverings of furniture, mattresses, and box springs* means those coverings as are permanently incorporated in such articles.

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(j) The term *wearing apparel* means any costume or article of clothing or covering for any part of the body worn or intended to be worn by individuals.

(k) The term *beddings* means sheets, covers, blankets, comforters, pillows, pillowcases, quilts, bedspreads, pads, and all other textile fiber products used or intended to be used on or about a bed or other place for reclining or sleeping but shall not include furniture, mattresses or box springs.

(l) The term *headwear* means any textile fiber product worn exclusively on or about the head or face by individuals.

(m) The term *backings*, when applied to floor coverings, means that part of a floor covering to which the pile, face, or outer surface is woven, tufted, hooked, knitted, or otherwise attached, and which provides the structural base of the floor covering. The term *backing* shall also include fabrics attached to the structural base of the floor covering in such a way as to form a part of such structural base, but shall not include the pile, face, or outer surface of the floor covering or any part thereof.

(n) The term *elastic material* means a fabric composed of yarn consisting of an elastomer or a covered elastomer.

(o) The term *coated fabric* means any fabric which is coated, filled, impregnated, or laminated with a continuous-film-forming polymeric composition in such a manner that the weight added to the base fabric is at least 35 percent of the weight of the fabric before coating, filling, impregnation, or lamination.

(p) The term *upholstered product* means articles of furniture containing stuffing and shall include mattresses and box springs.

(q) The term *ornamentation* means any fibers or yarns imparting a visibly discernible pattern or design to a yarn or fabric.

(r) The term *fiber trademark* means a word or words used by a person to identify a particular fiber produced or sold by him and to distinguish it from fibers of the same generic class produced or sold by others. Such term shall not include any trade mark, product mark, house mark, trade name or other name which does not identify a particular fiber.

(s) The term *wool* means the fiber from the fleece of the sheep or lamb or hair of the Angora or Cashmere goat (and may include the so-called specialty fibers from the hair of the camel, alpaca, llama, and vicuna) which has never been reclaimed from any woven or felted wool product.

(t) The term *recycled wool* means (1) the resulting fiber when wool has been woven or felted into a wool product which, without ever having been utilized in any way by the ultimate consumer, subsequently has been made into a fibrous state, or (2) the resulting fiber when wool or reprocessed wool has been spun, woven, knitted, or felted into a wool product which, after having been used in any way by the ultimate consumer, subsequently has been made into a fibrous state.

(u) The terms *mail order catalog* and *mail order promotional material* mean any materials, used in the direct sale or direct offering for sale of textile products, that are disseminated to ultimate consumers in print or by electronic means, other than by broadcast, and that solicit ultimate consumers to purchase such textile products by mail, telephone, electronic mail, or some other method without examining the actual product purchased.

[24 FR 4493, June 2, 1959, as amended at 45 FR 44263, July 1, 1980; 50 FR 15106, Apr. 17, 1985; 53 FR 7517, Feb. 12, 1988]

## § 303.2 General requirements.

(a) Each textile fiber product, except those exempted or excluded under section 12 of the Act, shall be labeled or invoiced in conformity with the requirements of the Act and regulations.

(b) Any advertising of textile fiber products subject to the Act shall be in conformity with the requirements of the Act and regulations.

(c) The requirements of the Act and regulations shall not be applicable to products required to be labeled under the Wool Products Labeling Act of 1939 (Pub. L. 76-850, 15 U.S.C. 68, 54 Stat. 1128).

(d) Any person marketing or handling textile fiber products who shall cause or direct a processor or finisher to label, invoice, or otherwise identify any textile fiber product with required information shall be responsible under

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the Act and regulations for any failure of compliance with the Act and regulations by reason of any statement or omission in such label, invoice, or other means of identification utilized in accordance with his direction: *Provided*, That nothing herein shall relieve the processor or finisher of any duty or liability to which he may be subject under the Act and regulations.

**§ 303.3 Fibers present in amounts of less than 5 percent.**

(a) Except as permitted in sections 4(b)(1) and 4(b)(2) of the Act, as amended, no fiber present in the amount of less than 5 percent of the total fiber weight shall be designated by its generic name or fiber trademark in disclosing the constituent fibers in required information, but shall be designated as "other fiber." When more than one of such fibers are present in a product, they shall be designated in the aggregate as "other fibers." *Provided*, however, that nothing in this section shall be construed as prohibiting the disclosure of any fiber present in a textile fiber product which has a clearly established and definite functional significance when present in the amount contained in such product, as for example:

96 percent Acetate  
4 percent Spandex.

(b) In making such disclosure, all of the provisions of the Act and regulations in this part setting forth the manner and form of disclosure of fiber content information, including the provisions of §§ 303.17 and 303.41 of this part relating to the use of generic names and fiber trademarks, shall be applicable.

(63 FR 7518, Feb. 13, 1998)

**§ 303.4 English language requirement.**

All required information shall be set out in the English language. If the required information appears in a language other than English, it also shall appear in the English language. The provisions of this section shall not apply to advertisements in foreign language newspapers or periodicals, but such advertising shall in all other respects comply with the Act and regulations.

**§ 303.5 Abbreviations, ditto marks, and asterisks prohibited.**

(a) In disclosing required information, words or terms shall not be designated by ditto marks or appear in footnotes referred to by asterisks or other symbols in required information, and shall not be abbreviated except as permitted in § 303.33(e) of this part.

(b) Where the generic name of a textile fiber is required to appear in immediate conjunction with a fiber trademark in advertising, labeling, or invoicing, a disclosure of the generic name by means of a footnote, to which reference is made by use of an asterisk or other symbol placed next to the fiber trademark, shall not be sufficient in itself to constitute compliance with the Act and regulations.

(24 FR 4480, June 2, 1959, as amended at 65 FR 75196, Dec. 1, 2000)

**§ 303.6 Generic names of fibers to be used.**

(a) Except where another name is permitted under the Act and regulations, the respective generic names of all fibers present in the amount of 5 percentum or more of the total fiber weight of the textile fiber product shall be used when naming fibers in the required information; as for example: "cotton," "rayon," "silk," "linen," "nylon," etc.

(b) Where a textile fiber product contains the hair or fiber of a fur-bearing animal present in the amount 5 percentum or more of the total fiber weight of the product, the name of the animal producing such fiber may be used in setting forth the required information, provided the name of such animal is used in conjunction with the words "fiber," "hair," or "blend," as for example:

80 percent Rabbit hair.  
20 percent Nylon.  
or  
80 percent Silk.  
20 percent Mink fiber.

(c) The term *fur fiber* may be used to describe the hair or fur fiber or mixtures thereof of any animal or animals other than the sheep, lamb, Angora goat, Cashmere goat, camel, alpaca, llama or vicuna where such hair or fur fiber or mixture is present in the

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amount of 5 per centum or more of the total fiber weight of the textile fiber product and no direct or indirect representations are made as to the animal or animals from which the fiber so designated was obtained; as for example:

60 percent Cotton.  
40 percent Fur fiber.  
or  
50 percent Nylon.  
30 percent Mink hair.  
20 percent Fur fiber.

(d) Where textile fiber products subject to the Act contain (1) wool or (2) recycled wool in amounts of five per centum or more of the total fiber weight, such fibers shall be designated and disclosed as wool or recycled wool as the case may be.

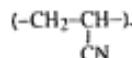
[24 FR 4402, June 2, 1953, as amended at 45 FR 44283, July 1, 1980]

**§ 303.7 Generic names and definitions for manufactured fibers.**

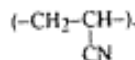
Pursuant to the provisions of section 7(c) of the Act, the Commission hereby establishes the generic names for manufactured fibers, together with their respective definitions, set forth in this section, and the generic names for manufactured fibers, together with their respective definitions, set forth in International Organization for Standardization ISO 2076: 1990(E), "Textiles—Man-made fibres—Generic names." This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from the American National Standards Institute, 11 West 42nd St., 13th floor, New York, NY 10036. Copies may be inspected at the Federal Trade Commission, Room 130, 600 Pennsylvania Avenue, NW., Washington, DC 20580, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: [http://www.archives.gov/federal\\_register/code\\_of\\_federal\\_regulations/ibr\\_locations.html](http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html).

(a) *Acrylic*. A manufactured fiber in which the fiber-forming substance is any long chain synthetic polymer composed of at least 85 percent by weight of acrylonitrile units

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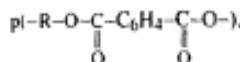


(b) *Modacrylic*. A manufactured fiber in which the fiber-forming substance is any long chain synthetic polymer composed of less than 85 percent but at least 35 percent by weight of acrylonitrile units

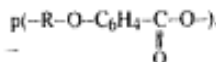


except fibers qualifying under paragraph (j)(2) of this section and fibers qualifying under paragraph (q) of this section. (Sec. 7, 72 Stat. 1717; 15 U.S.C. section 70e)

(c) *Polyester*. A manufactured fiber in which the fiber-forming substance is any long chain synthetic polymer composed of at least 85% by weight of an ester of a substituted aromatic carboxylic acid, including but not restricted to substituted terephthalate units,



and para substituted hydroxy-benzoate units,



Where the fiber is formed by the interaction of two or more chemically distinct polymers (of which none exceeds 85% by weight), and contains ester groups as the dominant functional unit (at least 85% by weight of the total polymer content of the fiber), and which, if stretched at least 100%, durably and rapidly reverts substantially to its unstretched length when the tension is removed, the term *elastereil-p* may be used as a generic description of the fiber.

(d) *Rayon*—A manufactured fiber composed of regenerated cellulose, as well as manufactured fibers composed

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of regenerated cellulose in which substituents have replaced not more than 15% of the hydrogens of the hydroxyl groups. Where the fiber is composed of cellulose precipitated from an organic solution in which no substitution of the hydroxyl groups takes place and no chemical intermediates are formed, the term *lyocell* may be used as a generic description of the fiber.

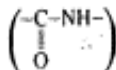
(e) *Acetate*. A manufactured fiber in which the fiber-forming substance is cellulose acetate. Where not less than 92 percent of the hydroxyl groups are acetylated, the term *triacetate* may be used as a generic description of the fiber.

(f) *Saran*. A manufactured fiber in which the fiber-forming substance is any long chain synthetic polymer composed of at least 80 percent by weight of vinylidene chloride units ( $-\text{CH}_2-\text{CCl}_2-$ ).

(g) *Azlon*. A manufactured fiber in which the fiber-forming substance is composed of any regenerated naturally occurring proteins.

(h) *Nytril*. A manufactured fiber containing at least 85 percent of a long chain polymer of vinylidene dinitrile ( $-\text{CH}_2-\text{C}(\text{CN})_2-$ ) where the vinylidene dinitrile content is no less than every other unit in the polymer chain.

(i) *Nylon*. A manufactured fiber in which the fiber-forming substance is a long-chain synthetic polyamide in which less than 85 percent of the amide



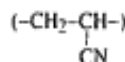
linkages are attached directly to two aromatic rings.

(j) *Rubber*. A manufactured fiber in which the fiber-forming substance is comprised of natural or synthetic rubber, including the following categories:

(1) A manufactured fiber in which the fiber-forming substance is a hydrocarbon such as natural rubber, polyisoprene, polybutadiene, copolymers of dienes and hydrocarbons, or amorphous (noncrystalline) polyolefins.

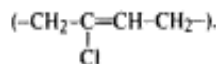
(2) A manufactured fiber in which the fiber-forming substance is a copolymer

of acrylonitrile and a diene (such as butadiene) composed of not more than 50 percent but at least 10 percent by weight of acrylonitrile units



The term *lastrite* may be used as a generic description for fibers falling within this category.

(3) A manufactured fiber in which the fiber-forming substance is a polychloroprene or a copolymer of chloroprene in which at least 35 percent by weight of the fiber-forming substance is composed of chloroprene units



(k) *Spandex*. A manufactured fiber in which the fiber-forming substance is a long chain synthetic polymer comprised of at least 85 percent of a segmented polyurethane.

(l) *Vinal*. A manufactured fiber in which the fiber-forming substance is any long chain synthetic polymer composed of at least 50 percent by weight of vinyl alcohol units ( $-\text{CH}_2-\text{CHOH}-$ ), and in which the total of the vinyl alcohol units and any one or more of the various acetal units is at least 85 percent by weight of the fiber.

(m) *Olefin*. A manufactured fiber in which the fiber-forming substance is any long chain synthetic polymer composed of at least 85 percent by weight of ethylene, propylene, or other olefin units, except amorphous (noncrystalline) polyolefins qualifying under paragraph (j)(1) of this section [Rule 7]. Where the fiber-forming substance is a cross-linked synthetic polymer, with low but significant crystallinity, composed of at least 95 percent by weight of ethylene and at least one other olefin unit, and the fiber is substantially elastic and heat resistant, the term *lastol* may be used as a generic description of the fiber.

(n) *Vinyon*. A manufactured fiber in which the fiber-forming substance is

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any long chain synthetic polymer composed of at least 85 percent by weight of vinyl chloride units ( $-\text{CH}_2-\text{CHCl}-$ ).

(o) *Metallic*. A manufactured fiber composed of metal, plastic-coated metal, metal-coated plastic, or a core completely covered by metal.

(p) *Glass*. A manufactured fiber in which the fiber-forming substance is glass.

(q) *Acrylex*. A manufactured fiber in which the fiber-forming substance is any long chain synthetic polymer composed of at least 50 percent by weight of one or more esters of a monohydric alcohol and acrylic acid,  $\text{CH}_2=\text{CH}-\text{COOH}$ .

(r) *Novoloid*. A manufactured fiber containing at least 85 percent by weight of a cross-linked novolac.

(s) *Aramid*. A manufactured fiber in which the fiber-forming substance is a long-chain synthetic polyamide in which at least 85 percent of the amide



linkages are attached directly to two aromatic rings.

(t) *Sulfar*. A manufactured fiber in which the fiber-forming substance is a long chain synthetic polysulfide in which at least 85% of the sulfide ( $-\text{S}-$ ) linkages are attached directly to two (2) aromatic rings.

(u) *PBI*. A manufactured fiber in which the fiber-forming substance is a long chain aromatic polymer having reoccurring imidazole groups as an integral part of the polymer chain.

(v) *Elastoester*. A manufactured fiber in which the fiber-forming substance is a long-chain synthetic polymer composed of at least 50% by weight of aliphatic polyether and at least 35% by weight of polyester, as defined in 16 CFR 303.7(c).

(w) *Melamine*. A manufactured fiber in which the fiber-forming substance is a synthetic polymer composed of at least 50% by weight of a cross-linked melamine polymer.

(x) *Fluoropolymer*. A manufactured fiber containing at least 95% of a long-chain polymer synthesized from aliphatic fluorocarbon monomers.

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(y) *PLA*. A manufactured fiber in which the fiber-forming substance is composed of at least 85% by weight of lactic acid ester units derived from naturally occurring sugars.

(Sec. 6, 72 Stat. 1717; 15 U.S.C. 70e)

[24 FR 4480, June 2, 1959; 24 FR 5737, July 17, 1959, as amended at 31 FR 2652, Feb. 11, 1966; 31 FR 3002, Feb. 22, 1966; 34 FR 14595, Sept. 19, 1969; 38 FR 21782, Aug. 13, 1973; 38 FR 34115, Dec. 11, 1973; 39 FR 1834, Jan. 15, 1974; 51 FR 20807, 20809, June 9, 1986; 61 FR 16307, Apr. 15, 1996; 62 FR 20344, May 23, 1997; 63 FR 7518, Feb. 13, 1998; 63 FR 38174, July 2, 1998; 63 FR 71583, Dec. 28, 1998; 65 FR 75156, Dec. 1, 2000; 67 FR 4963, Feb. 1, 2002; 67 FR 70839, Nov. 27, 2002; 68 FR 3816, Jan. 27, 2003; 69 FR 18803, Apr. 9, 2004]

**§ 303.8 Procedure for establishing generic names for manufactured fibers.**

(a) Prior to the marketing or handling of a manufactured fiber for which no generic name has been established or otherwise recognized by the Commission, the manufacturer or producer thereof shall file a written application with the Commission, requesting the establishment of a generic name for such fiber, stating therein:

(1) The reasons why the applicant's fiber should not be identified by one of the generic names established by the Commission in § 303.7 of this part;

(2) The chemical composition of the fiber, including the fiber-forming substances and respective percentages thereof, together with samples of the fiber;

(3) Suggested names for consideration as generic, together with a proposed definition for the fiber;

(4) Any other information deemed by the applicant to be pertinent to the application, including technical data in the form of test methods;

(5) The earliest date on which the application proposes to market or handle the fiber in commerce for other than developmental or testing purposes.

(b) Upon receipt of the application, the Commission will, within sixty (60) days, either deny the application or assign to the fiber a numerical or alphabetical symbol for temporary use during further consideration of such application.

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(c) After taking the necessary procedure in consideration of the application, the Commission in due course shall establish a generic name or advise the applicant of its refusal to grant the application and designate the proper existing generic name for the fiber.

[24 FR 4460, June 2, 1959, as amended at 63 FR 7518, Feb. 13, 1998]

**§ 303.9 Use of fur-bearing animal names and symbols prohibited.**

(a) The advertising or the labeling of a textile fiber product shall not contain any names, words, depictions, descriptive matter, or other symbols which connote or signify a fur-bearing animal, unless such product or the part thereof in connection with which the names, words, depictions, descriptive matter, or other symbols are used is a fur product within the meaning of the Fur Products Labeling Act.

(b) Subject to the provisions of paragraph (a) of this section and § 303.6 of this part, a textile fiber product shall not be described or referred to in any manner in an advertisement or label with:

(1) The name or part of the name of a fur-bearing animal, whether as a single word or a combination word, or any coined word which is phonetically similar to a fur-bearing animal name, or which is only a slight variation in spelling of a fur-bearing animal name or part of the name. As for example, such terms as "Ermine," "Mink," "Persian," "Broadtail," "Beaverton," "Marmink," "Sableton," "Lam," "Pershian," "Minx," or similar terms shall not be used.

(2) Any word or name symbolic of a fur-bearing animal by reason of conventional usage or by reason of its close relationship with fur-bearing animals. As for example, such terms as "guardhair," "underfur," and "mutation," or similar terms, shall not be used.

(c) Nothing contained herein shall prevent:

(1) The nondeceptive use of animal names or symbols in referring to a textile fiber product where the fur of such animal is not commonly or commercially used in fur products, as that term is defined in the Fur Products La-

beling Act, as for example "kitten soft", "Bear Brand", etc.

(2) The nondeceptive use of a trademark or trade name containing the name, symbol, or depiction of a fur-bearing animal unless:

(i) The textile fiber product in connection with which such trademark or trade name is used simulates a fur or fur product; or

(ii) Such trademark or trade name is used in any advertisement of a textile fiber product together with any depiction which has the appearance of a fur or fur product; or

(iii) The use of such trademark or trade name is prohibited by the Fur Products Labeling Act.

[24 FR 4460, June 2, 1959, as amended at 28 FR 722, Jan. 16, 1963]

**§ 303.10 Fiber content of special types of products.**

(a) Where a textile product is made wholly of elastic yarn or material, with minor parts of non-elastic material for structural purposes, it shall be identified as to the percentage of the elastomer, together with the percentage of all textile coverings of the elastomer and all other yarns or materials used therein.

Where a textile fiber product is made in part of elastic material and in part of other fabric, the fiber content of such fabric shall be set forth sectionally by percentages as in the case of other fabrics. In such cases the elastic material may be disclosed by describing the material as elastic followed by a listing in order of predominance by weight of the fibers used in such elastic, including the elastomer, where such fibers are present by 5 per centum or more with the designation "other fiber" or "other fibers" appearing last when fibers required to be so designated are present. An example of labeling under this paragraph is:

Front and back non-elastic sections:

50 percent Acetate.

50 percent Cotton.

Elastic: Rayon, cotton, nylon, rubber.

(b) Where drapery or upholstery fabrics are manufactured on hand-operated looms for a particular customer after the sale of such fabric has been consummated, and the amount of the

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order does not exceed 100 yards (91.44 m) of fabric, the required fiber content disclosure may be made by listing the fibers present in order of predominance by weight with any fiber or fibers required to be designated as "other fiber" or "other fibers" appearing last, as for example:

Rayon  
Wool  
Acetate  
Metallic  
Other fibers

(c)(1) Where a manufactured textile fiber is essentially a physical combination or mixture of two or more chemically distinct constituents or components combined at or prior to the time of extrusion, which components if separately extruded would each fall within different existing definitions of textile fibers as set forth in § 303.7 of this part (Rule 7), the fiber content disclosure as to such fiber, shall for all purposes under the regulations in this part (1) disclose such fact in the required fiber content information by appropriate nondeceptive descriptive terminology, such as "biconstituent fiber" or "multiconstituent fiber," (ii) set out the components contained in the fiber by the appropriate generic name specified in § 303.7 of this part (Rule 7) in the order of their predominance by weight, and (iii) set out the respective percentages of such components by weight.

(2) If the components of such fibers are of a matrix-fibril configuration, the term *matrix-fibril fiber* or *matrix fiber* may be used in setting forth the information required by this paragraph.

(3) Examples of proper fiber content designations under this paragraph are:

100% Biconstituent Fiber  
(65% Nylon, 35% Polyester)  
80% Matrix Fiber (60% Nylon, 40% Polyester)  
15% Polyester  
5% Rayon

(4) All of the provisions as to fiber content disclosures contained in the Act and regulations, including the provisions relative to fiber content tolerances and disclosures of fibers present in amounts of less than 5 percentum of the total fiber weight, shall also be ap-

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plicable to the designations and disclosures prescribed by this paragraph.

[35 FR 7044, July 26, 1960, as amended at 30 FR 14253, Nov. 13, 1965; 34 FR 12134 July 19, 1969; 61 FR 11544, Mar. 21, 1996]

## § 303.11 Floor coverings containing backings, fillings, and paddings.

In disclosing the required fiber content information as to floor coverings containing exempted backings, fillings, or paddings, the disclosure shall be made in such manner as to indicate that it relates only to the face, pile, or outer surface of the floor covering and not to the backing, filling, or padding. Examples of the form of marking these types of floor coverings as to fiber content are as follows:

100% Cotton Pile  
Face—60% Rayon, 40% Cotton  
Outer Surface—100% Wool

## § 303.12 Trimmings of household textile articles.

(a) Trimmings incorporated in articles of wearing apparel and other household textile articles may, among other forms of trim, include: (1) Rickrack, tape, belting, binding, braid, labels (either required or non-required), collars, cuffs, wrist bands, leg bands, waist bands, gussets, gores, welts, and findings, including superimposed garters in hosiery, and elastic materials and threads inserted in or added to the basic product or garment in minor proportion for holding, reinforcing or similar structural purposes; (2) decorative trim, whether applied by embroidery, overlay, applique, or attachment; and (3) decorative patterns or designs which are an integral part of the fabric out of which the household textile article is made: *Provided*, That such decorative trim or decorative pattern or design, as specified in paragraphs (a) (2) and (3) of this section, does not exceed 15 percent of the surface area of the household textile article. If no representation is made as to the fiber content of the decorative trim or decoration, as provided for in paragraphs (a) (2) and (3) of this section, the fiber content designation of the basic fabric shall be followed by the statement "exclusive of decoration."



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(b) The term *findings* may also include elastic material which constitutes a part of the basic fabric or material out of which the household textile article is made, where such elastic material does not exceed 20 percent of the surface area of the household textile article: *Provided*, That the required information as to fiber content of products subject to this paragraph is followed by the statement "exclusive of elastic."

**§ 303.13 Sale of remnants and products made of remnants.**

(a) In disclosing the required fiber content information as to remnants of fabric which are for practical purposes of unknown or undeterminable fiber content:

(1) The fiber content disclosure of such remnants of fabrics may be designated in the required information as "remnants of undetermined fiber content."

(2) Where such remnants of fabrics are displayed for sale at retail, a conspicuous sign may, in lieu of individual labeling, be used in immediate conjunction with such display, stating with respect to required fiber content disclosure that the goods are "remnants of undetermined fiber content."

(3) Where textile fiber products are made of such remnants, the required fiber content information of the products may be disclosed as "made of remnants of undetermined fiber content." If any representations as to fiber content are made with respect to such remnants, the provisions of this paragraph shall not apply.

(b) Where remnants of fabrics are marketed or handled in bales, bundles, or packages and are all of the same fiber content or are designated in the manner permitted by paragraph (a) of this section, the individual remnants need not be labeled if the bales, bundles, or packages containing such remnants are labeled with the required information including fiber content percentages or the designation permitted by paragraph (a) of this section.

(c) Where remnants of fabrics of the same fiber content are displayed for sale at retail, a conspicuous sign may, in lieu of individual labeling, be used in immediate conjunction with such display,

stating the fiber content information with respect to such remnants; as for example: "remnants, 100 percent cotton," "remnants, 50 percent rayon, 50 percent acetate," etc.

**§ 303.14 Products containing unknown fibers.**

(a) Where a textile fiber product is made from miscellaneous scraps, rags, odd lots, secondhand materials, textile by-products, or waste materials of unknown, and for practical purposes, undeterminable fiber content, the required fiber content disclosure may, when truthfully applicable, in lieu of the fiber content disclosure otherwise required by the Act and regulations, indicate that such product is composed of miscellaneous scraps, rags, odd lots, textile by-products, secondhand materials (in case of secondhand materials, words of like import may be used) or waste materials, as the case may be, of unknown or undetermined fiber content, as for example:

Made of miscellaneous scraps of undetermined fiber content  
100% unknown fibers—rags  
All undetermined fibers—textile by-products  
100% miscellaneous odd lots of undetermined fiber content  
Secondhand materials—fiber content unknown  
Made of unknown fibers—waste materials

(b) Where a textile fiber product is made in part from miscellaneous scraps, rags, odd lots, textile by-products, secondhand materials or waste materials of unknown and, for practical purposes, undeterminable fiber content together with a percentage of known or determinable fibers, the required fiber content disclosure may, when truthfully applicable, in lieu of the fiber content disclosure otherwise required by the Act and regulations, indicate the percentage of miscellaneous scraps, rags, odd lots, secondhand materials (in case of secondhand materials, words of like import may be used), textile by-products, or waste materials of unknown or undetermined fiber content and the percentage of known fibers, as for example:

45% Rayon  
30% Acetate  
25% Miscellaneous scraps of undetermined fiber content.

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60% Cotton  
 40% Unknown fibers—waste materials.  
 40% Acrylic  
 20% Modacrylic  
 40% Undetermined fibers—odd lots.  
 50% Polyester  
 30% Cotton  
 20% Textile by-products of undetermined fiber content.  
 50% Rayon  
 50% Secondhand materials—fiber content unknown.  
 45% Acetate  
 30% Cotton  
 25% Miscellaneous rags—undetermined fiber content.

(c) No representation as to fiber content shall be made as to any textile product or any portion of a textile fiber product designated as composed of unknown or undetermined fibers. If any such representation is made, a full and complete fiber content disclosure shall be required.

(d) Nothing contained in this section shall excuse a full disclosure as to fiber content if the same is known or practically ascertainable.

[25 FR 4317, May 14, 1960]

**§ 303.15 Required label and method of affixing.**

(a) A label is required to be affixed to each textile product and, where required, to its package or container in a secure manner. Such label shall be conspicuous and shall be of such durability as to remain attached to the product and its package throughout any distribution, sale, resale and until sold and delivered to the ultimate consumer.

(b) Each textile fiber product with a neck must have a label disclosing the country of origin affixed to the inside center of the neck midway between the shoulder seams or in close proximity to another label affixed to the inside center of the neck. The fiber content and RN or name of the company may be disclosed on the same label as the country of origin or on another conspicuous and readily accessible label or labels on the inside or outside of the garment. On all other textile products, the required information shall be disclosed on a conspicuous and readily accessible label or labels on the inside or outside of the product. The country of

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origin disclosure must always appear on the front side of the label. Other required information may appear either on the front side or the reverse side of a label, provided that the information is conspicuous and readily accessible.

(c) In the case of hosiery products, this section shall not be construed as requiring the affixing of a label to each hosiery product contained in a package if, (1) such hosiery products are intended for sale to the ultimate consumer in such package, (2) such package has affixed to it a label bearing the required information for the hosiery products contained in the package, and (3) the information on the label affixed to the package is equally applicable to each textile fiber product contained therein.

(d) Socks provided for in subheading 6115.92.90, 6115.93.90, 6115.99.18, 6111.20.60, 6111.30.50, or 6111.90.50 of the Harmonized Tariff Schedule of the United States, as in effect on September 1, 2003, shall be marked, as legibly, indelibly, and permanently as the nature of the article or package will permit, to disclose the English name of the country of origin. This disclosure shall appear on the front of the package, adjacent to the size designation of the product, and shall be set forth in such a manner as to be clearly legible, conspicuous, and readily accessible to the ultimate consumer. *Provided, however,* any package that contains several different types of goods and includes socks classified under subheading 6115.92.90, 6115.93.90, 6115.99.18, 6111.20.60, 6111.30.50, or 6111.90.50 of the Harmonized Tariff Schedule of the United States, as in effect on September 1, 2003, shall not be subject to the requirements of this subsection.

[50 FR 15106, Apr. 17, 1985, as amended at 63 FR 7518, Feb. 13, 1998; 70 FR 73369, Dec. 12, 2005]

**§ 303.16 Arrangement and disclosure of information on labels.**

(a) Subject to the provisions of § 303.15(b), information required by the Act and regulations in this part may appear on any label or labels attached to the textile fiber product, including the care label required by 16 CFR part 423, provided all the pertinent requirements of the Act and regulations in

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this part are met and so long as the combination of required information and non-required information is not misleading. The required information shall include the following:

(1) The generic names and percentages by weight of the constituent fibers present in the textile fiber product, excluding permissive ornamentation, in amounts of 5 percent or more and any fibers disclosed in accordance with § 303.3(a) shall appear in order of predominance by weight with any percentage of fiber or fibers required to be designated as "other fiber" or "other fibers" appearing last.

(2) The name, provided for in § 303.19, or registered identification number issued by the Commission, of the manufacturer or of one or more persons marketing or handling the textile fiber product.

(3) The name of the country where such product was processed or manufactured, as provided for in § 303.33.

(b) All parts of the required information shall be set forth in such a manner as to be clearly legible, conspicuous, and readily accessible to the prospective purchaser. All parts of the fiber content information shall appear in type or lettering of equal size and conspicuousness.

(c) Subject to the provisions of § 303.17, any non-required information or representations placed on the product shall not minimize, detract from, or conflict with required information and shall not be false, deceptive, or misleading.

(d) Non-deceptive terms which are properly and truthfully descriptive of a fiber may be used in conjunction with the generic name of such fiber; as for example: "100 percent cross-linked rayon," "100 percent solution dyed acetate," "100 percent combed cotton," "100 percent nylon 66," etc.

[24 FR 4480, June 2, 1959, as amended at 25 FR 4317, May 14, 1960; 30 FR 14254, Nov. 13, 1965; 30 FR 15313, Dec. 11, 1965; 50 FR 15107, Apr. 17, 1985; 53 FR 31315, Aug. 18, 1988; 63 FR 7519, Feb. 13, 1998]

**§ 303.17 Use of fiber trademarks and generic names on labels.**

(a) A non-deceptive fiber trademark may be used on a label in conjunction with the generic name of the fiber to

which it relates. Where such a trademark is placed on a label in conjunction with the required information, the generic name of the fiber must appear in immediate conjunction therewith, and such trademark and generic name must appear in type or lettering of equal size and conspicuousness.

(b) Where a generic name or a fiber trademark is used on any label, whether required or non-required, a full and complete fiber content disclosure shall be made in accordance with the Act and regulations the first time the generic name or fiber trademark appears on the label.

(c) If a fiber trademark is not used in the required information, but is used elsewhere on the label as non-required information, the generic name of the fiber shall accompany the fiber trademark in legible and conspicuous type or lettering the first time the trademark is used.

(d) No fiber trademark or generic name shall be used in non-required information on a label in such a manner as to be false, deceptive, or misleading as to fiber content, or to indicate directly or indirectly that a textile fiber product is composed wholly or in part of a particular fiber, when such is not the case.

**§ 303.18 Terms implying fibers not present.**

Words, coined words, symbols or depictions, (a) which constitute or imply the name or designation of a fiber which is not present in the product, (b) which are phonetically similar to the name or designation of such a fiber, or (c) which are only a slight variation of spelling from the name or designation of such a fiber shall not be used in such a manner as to represent or imply that such fiber is present in the product.

[30 FR 13693, Oct. 28, 1965]

**§ 303.19 Name or other identification required to appear on labels.**

(a) The name required by the Act to be used on labels shall be the name under which the person is doing business. Where a person has a word trademark, used as a house mark, registered in the United States Patent Office, such word trademark may be used on

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labels in lieu of the name otherwise required: *Provided*, The owner of such word trademark furnishes the Commission a copy of the registration prior to its use. No trademark, trade names, or other names except those provided for above shall be used for required identification purposes.

(b) Registered identification numbers, as provided for in §303.20 of this part, may be used for identification purposes in lieu of the required name.

**§ 303.20 Registered identification numbers.**

(a) Registered numbers for use as the required identification in lieu of the name on textile fiber product labels, as provided in section 4(b)(3) of the Act, will be issued by the Commission to qualified persons residing in the United States upon receipt of an application duly executed in the form set out in paragraph (d) of this section.

(b)(1) Registered identification numbers shall be used only by the person or concern to whom they are issued, and such numbers are not transferable or assignable.

(2) Registered identification numbers shall be subject to cancellation whenever any such number was procured or has been used improperly or contrary to the requirements of the Acts administered by the Federal Trade Commission, and regulations promulgated thereunder, or when otherwise deemed necessary in the public interest.

(3) Registered identification numbers shall be subject to cancellation if the Commission fails to receive prompt notification of any change in name, business address, or legal business status of a person or firm to whom a registered identification number has been assigned, by application duly executed in the form set out in paragraph (d) of this section, reflecting the current name, business address, and legal business status of the person or firm.

(c) Registered identification numbers assigned under this section may be used on labels required in labeling products subject to the provisions of the Wool Products Labeling Act and Fur Products Labeling Act, and numbers previously assigned by the Commission under such Acts may be used as and for the required name in labeling under this Act. When so used by the person or firm to whom assigned, the use of the numbers shall be construed as identifying and binding the applicant as fully and in all respects as though assigned under the specific Act for which it is used.

(d) Form to apply for a registered identification number or to update information pertaining to an existing number (the form is available upon request from: Enforcement Division, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580, or on the Internet at <http://www.ftc.gov>; application may also be made directly on the Internet):

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APPLICATION FOR A REGISTERED IDENTIFICATION NUMBER ("RN")		
DO NOT WRITE IN THIS SPACE		
DATE ISSUED: _____	DATE UPDATED: _____	RN: _____ BY: _____
1. PURPOSE OF APPLICATION (Both new applicants and update applicants must complete all entries on this form) <input type="checkbox"/> APPLY FOR A NEW RN <input type="checkbox"/> UPDATE INFORMATION ON AN EXISTING RN OR WPL NUMBER. ENTER EXISTING RN OR WPL NUMBER _____		
2. LEGAL NAME OF APPLICANT FIRM (Note: Proprietorships, please provide full legal name of the person who is the proprietor)		
3. NAME UNDER WHICH APPLICANT DOES BUSINESS (Only if different from legal name)		
4. TYPE OF COMPANY (If "OTHER" is checked, please state the type of company) <input type="checkbox"/> PROPRIETORSHIP <input type="checkbox"/> PARTNERSHIP <input type="checkbox"/> CORPORATION <input type="checkbox"/> S/C / LLP <input type="checkbox"/> OTHER _____		
5. ADDRESS OF PRINCIPAL OFFICE OR PLACE OF BUSINESS (Include zip code. Address must be actual location where business is conducted in the U.S. An additional mailing address or PO Box address may also be listed, if desired)  STREET ADDRESS (Required)	OPTIONAL ADDITIONAL MAILING ADDRESS	CONTACT INFORMATION TELEPHONE NUMBER _____ FAX NUMBER _____ E-MAIL ADDRESS _____ INTERNET URL ADDRESS _____
6. TYPE OF BUSINESS (Mark all that apply) <input type="checkbox"/> MANUFACTURING <input type="checkbox"/> IMPORTING <input type="checkbox"/> WHOLESALE <input type="checkbox"/> RETAILING <input type="checkbox"/> MAIL-ORDER <input type="checkbox"/> INTERNET <input type="checkbox"/> OTHER _____		
7. LIST PRODUCTS (To qualify for an RN, a company must be engaged in the importation, manufacturing, selling or other marketing of at least one (1) product line subject to the Textile, Wool or Fur Act)		
8. CERTIFICATION  By filing this form with the Federal Trade Commission, the company named above, applies for a registered number to use on labels required by one or more of the following acts: the Textile Fiber Product Identification Act (15 U.S.C. §§70-70a), the Wool Products Labeling Act (15 U.S.C. §§49-49c), or the Fur Products Labeling Act (15 U.S.C. §§69-69c). The company official (Signature, position, or corporate officer) listed below certifies that the information supplied on this form is true and correct.		
9. NAME OF COMPANY OFFICIAL (Type or print legibly)	10. TITLE OF COMPANY OFFICIAL	11. DATE SUBMITTED
INSTRUCTIONS Regulators under the Textile Fiber Product Identification Act, the Wool Products Labeling Act, and the Fur Products Labeling Act provide that any U.S.A. company that is a manufacturer or marketer of fiber or the products may, in lieu of the name under which it does business, be identified by its RN as labels required by these statutes.  In completing this form, please observe the following: (a) All numbered boxes must be filled in except for optional information. (b) PLEASE, Type or Print Legibly.  FTC Form 11 (rev. 6/2000)	(1) Submit one (1) completed application:  By Mail to: Federal Trade Commission Division of Enforcement 605 Pennsylvania Avenue NW Washington, DC 20580  Or By Fax to: (202) 314-3191  Or On-Line at: www.ftc.gov	CANCELLATION POLICY  RNs are subject to cancellation if the holder fails to promptly submit an updated FTC Form 11 upon any change(s) in its legal name (Line #2), type of company information (Line #4), or business address (Line #5).

[24 FR 4480, June 2, 1938, as amended at 48 FR 13516, Mar. 25, 1983; 63 FR 7518, Feb. 13, 1998; 63 FR 71583, Dec. 28, 1998; 65 FR 75156, Dec. 1, 2000]

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**§ 303.21 Marking of samples, swatches, or specimens and products sold therefrom.**

(a) Where samples, swatches, or specimens of textile fiber products subject to the Act are used to promote or effect sales of such textile fiber products, the samples, swatches, or specimens, as well as the products themselves, shall be labeled to show their respective fiber contents and other required information: *Provided*, That such samples, swatches or specimens need not be labeled:

(1) If the samples, swatches, or specimens are less than two square inches (12.9 cm<sup>2</sup>) in area and the information otherwise required to appear on the label is clearly, conspicuously, and non-deceptively disclosed on accompanying promotional matter in accordance with the Act and regulations.

(2) If the samples, swatches, or specimens are keyed to a catalogue to which reference is necessary in order to complete the sale of the textile fiber products, and which catalogue at the necessary point of reference clearly, conspicuously, and non-deceptively discloses the information otherwise required to appear on the label in accordance with the Act and regulations; or

(3) If such samples, swatches, or specimens are not used to effect sales to ultimate consumers and are not in the form intended for sale or delivery to, or for use by, the ultimate consumer, and are accompanied by an invoice or other paper showing the required information.

(b) Where properly labeled samples, swatches, or specimens are used to effect the sale of articles of wearing apparel or other household textile articles which are manufactured specifically for a particular customer after the sale is consummated, the articles of wearing apparel or other household textile articles need not be labeled if they are of the same fiber content as the samples, swatches, or specimens from which the sale was effected and an invoice or other paper accompanies them showing the information otherwise required to appear on the label.

[24 FR 4486, June 2, 1959, as amended at 51 FR 11544, Mar. 21, 1986]

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**§ 303.22 Products containing linings, interlinings, fillings, and paddings.**

In disclosing the required information as to textile fiber products, the fiber content of any linings, interlinings, fillings, or paddings shall be set forth separately and distinctly if such linings, interlinings, fillings, or paddings are incorporated in the product for warmth rather than for structural purposes, or if any express or implied representations are made as to their fiber content. Examples are as follows:

100% Nylon  
Interlining: 100% Rayon  
Covering: 100% Rayon  
Filling: 100% Cotton.

**§ 303.23 Textile fiber products containing superimposed or added fibers.**

Where a textile fiber product is made wholly of one fiber or a blend of fibers with the exception of an additional fiber in minor proportion superimposed or added in certain separate and distinct areas or sections for reinforcing or other useful purposes, the product may be designated according to the fiber content of the principal fiber or blend of fibers, with an exception naming the superimposed or added fiber, giving the percentage thereof in relation to the total fiber weight of the principal fiber or blend of fibers, and indicating the area or section which contains the superimposed or added fiber. Examples of this type of fiber content disclosure, as applied to products having reinforcing fibers added to a particular area or section, are as follows:

55% Cotton  
45% Rayon  
Except 5% Nylon added to toe and heel.  
All Cotton except 1% Nylon added to neckband.

**§ 303.24 Pile fabrics and products composed thereof.**

The fiber content of pile fabrics or products composed thereof may be stated on the label in such segregated form as will show the fiber content of the face or pile and of the back or base, with percentages of the respective fibers as they exist in the face or pile and in the back or base: *Provided*, That

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in such disclosure the respective percentages of the face and back be given in such manner as will show the ratio between the face and the back. Examples of the form of marking pile fabric as to fiber content provided for in this section are as follows:

100% Nylon Pile  
100% Cotton Back  
(Back constitutes 60% of fabric and pile 40%).  
Face—60% Rayon, 40% Nylon  
Back—70% Cotton, 30% Rayon  
(Face constitutes 60% of fabric and back 40%).

**§ 303.25 Sectional disclosure of content.**

(a) *Permissive.* Where a textile fiber product is composed of two or more sections which are of different fiber composition, the required information as to fiber content may be separated in the same label in such manner as to show the fiber composition of each section.

(b) *Mandatory.* The disclosure as above provided shall be made in all instances where such form of marking is necessary to avoid deception.

**§ 303.26 Ornamentation.**

(a)(1) Where the textile fiber product contains fiber ornamentation not exceeding five per centum of the total fiber weight of the product and the stated percentages of the fiber content are exclusive of such ornamentation, the label or any invoice used in lieu thereof shall contain a phrase or statement showing such fact; as for example:

60% Cotton  
40% Rayon  
Exclusive of Ornamentation;  
or  
All Cotton  
Exclusive of Ornamentation.

(2) The fiber content of such ornamentation may be disclosed where the percentage of the ornamentation in relation to the total fiber weight of the principal fiber or blend of fibers is shown; as for example:

70% Nylon  
30% Acetate  
Exclusive of 4% Metallic Ornamentation;  
or

100% Rayon  
Exclusive of 3% Silk Ornamentation.

(b) Where the fiber ornamentation exceeds five per centum, it shall be included in the statement of required percentages of fiber content.

(c) Where the ornamentation constitutes a distinct section of the product, sectional disclosure may be made in accordance with § 303.25 of this part.

**§ 303.27 Use of the term "All" or "100%."**

Where a textile fiber product or part thereof is comprised wholly of one fiber, other than any fiber ornamentation, decoration, elastic, or trimming as to which fiber content disclosure is not required, either the word *All* or the term *100%* may be used in labeling, together with the correct generic name of the fiber and any qualifying phrase, when required; as for example: "100% Cotton," "All Rayon, Exclusive of Ornamentation," "100% Acetate, Exclusive of Decoration," "All Nylon, Exclusive of Elastic," etc.

**§ 303.28 Products contained in packages.**

When textile products are marketed and delivered in a package which is intended to remain unbroken and intact until after delivery to the ultimate consumer, each textile product in the package, except hosiery, and the package shall be labeled with the required information. If the package is transparent to the extent it allows for a clear reading of the required information on the textile product, the package is not required to be labeled.

[50 FR 15107, Apr. 17, 1985]

**§ 303.29 Labeling of pairs or products containing two or more units.**

(a) Where a textile fiber product consists of two or more parts, units, or items of different fiber content, a separate label containing the required information shall be affixed to each of such parts, units or items showing the required information as to such part, unit, or item: *Provided*, That where such parts, units, or items are marketed or handled as a single product or ensemble and are sold and delivered to the ultimate consumer as a single

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product or ensemble, the required information may be set out on a single label in such a manner as to separately show the fiber composition of each part, unit, or item.

(b) Where garments, wearing apparel, or other textile fiber products are marketed or handled in pairs or ensembles of the same fiber content, only one unit of the pair or ensemble need be labeled with the required information when sold and delivered to the ultimate consumer.

[24 FR 4480, June 2, 1959, as amended at 25 FR 4318, May 14, 1960]

**§ 303.30 Textile fiber products in form for consumer.**

A textile fiber product shall be considered to be in the form intended for sale or delivery to, or for use by, the ultimate consumer when the manufacturing or processing of the textile fiber product is substantially complete. The fact that minor or insignificant details of the manufacturing or processing have not been completed shall not excuse the labeling of such products as to the required information. For example, a garment must be labeled even though such matters as the finishing of a hem or cuff or the affixing of buttons thereto remain to be completed.

**§ 303.31 Invoice in lieu of label.**

Where a textile fiber product is not in the form intended for sale, delivery to, or for use by the ultimate consumer, an invoice or other paper may be used in lieu of a label, and such invoice or other paper shall show, in addition to the name and address of the person issuing the invoice or other paper, the fiber content of such product as provided in the Act and regulations as well as any other required information.

**§ 303.32 Products containing reused stuffing.**

Any upholstered product, mattress, or cushion which contains stuffing which has been previously used as stuffing in any other upholstered product, mattress, or cushion shall have securely attached thereto a substantial tag or label, at least 2 inches (5.08 cm) by 3 inches (7.62 cm) in size, and statements thereon conspicuously stamped

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or printed in the English language and in plain type not less than 1/8 inch (8.38 mm) high, indicating that the stuffing therein is composed in whole or in part of "reused stuffing," "secondhand stuffing," "previously used stuffing," or "used stuffing."

[51 FR 11544, Mar. 21, 1996]

**§ 303.33 Country where textile fiber products are processed or manufactured.**

(a) In addition to the other information required by the Act and Regulations:

(1) Each imported textile fiber product shall be labeled with the name of the country where such imported product was processed or manufactured;

(2) Each textile fiber product completely made in the United States of materials that were made in the United States shall be labeled using the term *Made in U.S.A.* or some other clear and equivalent term.

(3) Each textile fiber product made in the United States, either in whole or in part of imported materials, shall contain a label disclosing these facts; for example:

Made in USA of imported fabric  
or  
Knitted in USA of imported yarn

and

(4) Each textile fiber product partially manufactured in a foreign country and partially manufactured in the United States shall contain on a label the following information:

(i) The manufacturing process in the foreign country and in the USA; for example:

"Imported cloth, finished in USA"

or

"Sewn in USA of imported components"

or

"Made in [foreign country], finished in USA"

or

"Scarf made in USA of fabric made in China"

or

"Comforter Filled, Sewn and Finished in the U.S. With Shell Made in China"

or

"Made in [Foreign Country]/fabric made in USA"

or



## Decision and Order

## Federal Trade Commission

## § 303.36

"Knit in USA, assembled in (Foreign Country)".

(i) When the U.S. Customs Service requires an origin label on the unfinished product, the manufacturing processes as required in paragraph (a)(4)(i) of this section or the name of the foreign country required by Customs, for example:

"Made in (foreign country)"

(b) For the purpose of determining whether a product should be marked under paragraphs (a) (2), (3), or (4) of this section, a manufacturer needs to consider the origin of only those materials that are covered under the Act and that are one step removed from that manufacturing process. For example, a yarn manufacturer must identify fiber if it is imported, a cloth manufacturer must identify imported yarn and a household product manufacturer must identify imported cloth or imported yarn for household products made directly from yarn, or imported fiber used as filling for warmth.

(c) The term *country* means the political entity known as a nation. Except for the United States, colonies, possessions or protectorates outside the boundaries of the mother country shall be considered separate countries, and the name thereof shall be deemed acceptable in designating the country where the textile fiber product was processed or manufactured unless the Commission shall otherwise direct.

(d) The country where the imported textile fiber product was principally made shall be considered to be the country where such textile fiber product was processed or manufactured. Further work or material added to the textile fiber product in another country must effect a basic change in form in order to render such other country the place where such textile fiber product was processed or manufactured.

(e) The English name of the country where the imported textile fiber product was processed or manufactured shall be used. The adjectival form of the name of the country will be accepted as the name of the country where the textile fiber product was processed or manufactured, provided the adjectival form of the name does not appear with such other words so as to refer to

a kind or species of product. Variant spellings which clearly indicate the English name of the country, such as *Brasil* for Brazil and *Italie* for Italy, are acceptable. Abbreviations which unmistakably indicate the name of a country, such as "Gt. Britain" for "Great Britain," are acceptable.

(f) Nothing in this rule shall be construed as limiting in any way the information required to be disclosed on labels under the provisions of any Tariff Act of the United States or regulations prescribed by the Secretary of the Treasury.

[24 FR 4480, June 3, 1959, as amended at 50 FR 15107, Apr. 17, 1985; 63 FR 7521, Feb. 13, 1998; 65 FR 73158, Dec. 1, 2000]

#### §303.34 Country of origin in mail order advertising.

When a textile fiber product is advertised in any mail order catalog or mail order promotional material, the description of such product shall contain a clear and conspicuous statement that the product was either made in U.S.A., imported, or both. Other words or phrases with the same meaning may be used. The statement of origin required by this section shall not be inconsistent with the origin labeling of the product being advertised.

[50 FR 15107, Apr. 17, 1985]

#### §303.35 Use of terms "virgin" or "new."

The terms *virgin* or *new* as descriptive of a textile fiber product, or any fiber or part thereof, shall not be used when the product or part so described is not composed wholly of new or virgin fiber which has never been reclaimed from any spun, woven, knitted, felted, bonded, or similarly manufactured product.

#### §303.36 Form of separate guaranty.

(a) The following are suggested forms of separate guaranties under section 10 of the Act which may be used by a guarantor residing in the United States on or as part of an invoice or other paper relating to the marketing or handling of any textile fiber products listed and designated therein, and showing the date of such invoice or other paper and the signature and address of the guarantor.

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(1) *General form.* We guarantee that the textile fiber products specified herein are not misbranded nor falsely nor deceptively advertised or invoiced under the provisions of the Textile Fiber Products Identification Act and rules and regulations thereunder.

(2) *Guaranty based on guaranty.* Based upon a guaranty received, we guarantee that the textile fiber products specified herein are not misbranded nor falsely nor deceptively advertised or invoiced under the provisions of the Textile Fiber Products Identification Act and rules and regulations thereunder.

NOTE: The printed name and address on the invoice or other paper will suffice to meet the signature and address requirements.

(b) The mere disclosure of required information including the fiber content of a textile fiber product on a label or on an invoice or other paper relating to its marketing or handling shall not be considered a form of separate guaranty.

**§ 303.37 Form of continuing guaranty from seller to buyer.**

Under section 10 of the Act, a seller residing in the United States may give a buyer a continuing guaranty to be applicable to all textile fiber products sold or to be sold. The following is the prescribed form of continuing guaranty from seller to buyer.

We, the undersigned, guaranty that all textile fiber products now being sold or which

may hereafter be sold or delivered to \_\_\_\_\_ are not, and will not be misbranded nor falsely nor deceptively advertised or invoiced under the provisions of the Textile Fiber Products Identification Act and rules and regulations thereunder. This guaranty effective until \_\_\_\_\_.

Dated, signed, and certified this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_ (City), \_\_\_\_\_ (State or Territory) \_\_\_\_\_ (name under which business is conducted.)

Under penalty of perjury, I certify that the information supplied in this form is true and correct.

\_\_\_\_\_  
Signature of Proprietor, Principal Partner, or Corporate Official

\_\_\_\_\_  
Name (Print or Type) Title

(48 FR 12518, Mar. 25, 1983)

**§ 303.38 Continuing guaranty filed with Federal Trade Commission.**

(a)(1) Under section 10 of the act any person residing in the United States and marketing or handling textile fiber products may file a continuing guaranty with the Federal Trade Commission. When filed with the Commission a continuing guaranty shall be fully executed in duplicate. Forms for use in preparing continuing guaranties will be supplied by the Commission upon request.

(2) Continuing guaranties filed with the Commission shall continue in effect until revoked. The guarantor shall promptly report any change in business status to the Commission.

(b) Prescribed form for a continuing guaranty:

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§ 303.38

<b>CONTINUING GUARANTY</b>	
1. LEGAL NAME OF GUARANTOR FIRM	
2. NAME UNDER WHICH GUARANTOR FIRM DOES BUSINESS, IF DIFFERENT FROM LEGAL NAME	
3. TYPE OF COMPANY <input type="checkbox"/> PROPRIETORSHIP <input type="checkbox"/> PARTNERSHIP <input type="checkbox"/> CORPORATION	
4. ADDRESS OF PRINCIPAL OFFICE OR PLACE OF BUSINESS (include Zip Code)	OPTIONAL INFORMATION TELEPHONE NUMBER: FAX NUMBER: INTERNET ADDRESS:
5. LAW UNDER WHICH THE CONTINUING GUARANTY IS TO BE FILED (Put an "X" in the appropriate boxes)	
<input type="checkbox"/> Under the Textile Fiber Products Identification Act (15 U.S.C. §§ 75-75a). The company named above, which manufactures, markets, or handles textile fiber products, guarantees that when it ships or delivers any textile fiber product, the product will not be misbranded, falsely or deceptively invoiced, or falsely or deceptively advertised, within the meaning of the Textile Fiber Products Identification Act and the rules and regulations under that Act.	
<input type="checkbox"/> Under the Wool Products Labeling Act (15 U.S.C. §§ 68-68d). The company named above, which manufactures, markets, or handles wool products, guarantees that when it ships or delivers any wool product, the product will not be misbranded within the meaning of the Wool Products Labeling Act and the rules and regulations under that Act.	
<input type="checkbox"/> Under the Fur Products Labeling Act (15 U.S.C. §§ 68-68f). The company named above, which manufactures, markets, or handles fur products, guarantees that when it ships or delivers any fur product, the product will not be misbranded, falsely or deceptively invoiced, or falsely or deceptively advertised, within the meaning of the Fur Products Labeling Act and the rules and regulations under that Act.	
6. CERTIFICATION	
Under penalty of perjury, I certify that the information supplied on this form is true and correct.	
SIGNATURE OF PROPRIETOR, PRINCIPAL PARTNER, OR CORPORATE OFFICIAL	
7. NAME (Please print or type)	8. TITLE
9. CITY AND STATE WHERE SIGNED	10. DATE
<b>INSTRUCTIONS</b> The Textile Fiber Products Identification Act, the Wool Products Labeling Act, and the Fur Products Labeling Act provide that any marketer or manufacturer of fiber or fur products covered by those Acts may file a continuing guaranty with the Federal Trade Commission. A continuing guaranty in file assures customer firms that the guarantor's products are in conformance with the ADEA under which the guarantor has filed. Customer firms rely on the continuing guaranty for protection from liability if violations occur.	
In completing this form, please observe the following: (a) All appropriate blanks on the form should be filled in. Include your Zip Code in item 4. (b) In item 8, signature of proprietor, partner, or corporate official of guarantor firm.	
(c) Send two completed, signed original copies to: Federal Trade Commission Division of Enforcement 500 Pennsylvania Ave., NW Washington, DC 20580 (d) Do not file application - mail signed originals only.	
Continuing guaranties filed with the Commission continue in effect until revoked. The guarantor must immediately notify the Commission in writing of any change in business status. Any change in the address of the guarantor's principal office and place of business must also be promptly reported.	
DO NOT USE THIS SPACE Filed _____ 19 ____ FEDERAL TRADE COMMISSION	

FTC Form 31-A (Rev. 11/98)

(c) Any person who has a continuing guaranty on file with the Commission may, during the effective dates of the guaranty, give notice of such fact by setting forth on the invoice or other

paper covering the marketing or handling of the product guaranteed the following:

## Decision and Order

**§ 303.39**

Continuing guaranty under the Textile Fiber Products Identification Act filed with the Federal Trade Commission.

(d) Any person who falsely represents in writing that he has a continuing guaranty on file with the Federal Trade Commission when such is not a fact shall be deemed to have furnished a false guaranty under section 10(b) of the Act.

[24 FR 4486, June 2, 1959, as amended at 48 FR 12517, Mar. 25, 1983; 63 FR 7521, Feb. 18, 1998; 63 FR 71585, Dec. 28, 1998]

**§ 303.39 Maintenance of records.**

(a) Pursuant to the provisions of section 6 of the Act, every manufacturer of a textile fiber product subject to the Act, irrespective of whether any guaranty has been given or received, shall maintain records showing the information required by the Act and Regulations with respect to all such textile fiber products made by such manufacturer. Such records shall show:

(1) The generic names and percentages by weight of the constituent fibers present in the textile fiber product, exclusive of permissive ornamentation, in amounts of five per centum or more.

(2) The name, provided for in § 303.19, or registered identification number issued by the Commission, of the manufacturer or of one or more persons marketing or handling the textile fiber product.

(3) The name of the country where such product was processed or manufactured as provided for in § 303.33.

The purpose of the records is to permit a determination that the requirements of the Act and Regulations have been met and to establish a traceable line of continuity from raw material through processing to finished product.

(b) Any person substituting a stamp, tag, label, or other identification pursuant to section 5(b) of the Act shall keep such records as will show the information set forth on the stamp, tag, label, or other identification that he removed and the name or names of the person or persons from whom such textile fiber product was received.

(c) The records required to be maintained pursuant to the provisions of

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this rule shall be preserved for at least three years.

[24 FR 4486, June 2, 1959, as amended at 53 FR 31315, Aug. 18, 1988]

**§ 303.40 Use of terms in written advertisements that imply presence of a fiber.**

The use of terms in written advertisements, including advertisements disseminated through the Internet and similar electronic media, that are descriptive of a method of manufacture, construction, or weave, and that by custom and usage are also indicative of a textile fiber or fibers, or the use of terms in such advertisements that constitute or connote the name or presence of a fiber or fibers, shall be deemed to be an implication of fiber content under section 4(c) of the Act, except that the provisions of this section shall not be applicable to non-deceptive shelf or display signs in retail stores indicating the location of textile fiber products and not intended as advertisements.

[63 FR 7523, Feb. 13, 1998]

**§ 303.41 Use of fiber trademarks and generic names in advertising.**

(a) In advertising textile fiber products, the use of a fiber trademark shall require a full disclosure of the fiber content information required by the Act and regulations in at least one instance in the advertisement.

(b) Where a fiber trademark is used in advertising textile fiber products containing more than one fiber, other than permissible ornamentation, such fiber trademark and the generic name of the fiber must appear in the required fiber content information in immediate proximity and conjunction with each other in plainly legible type or lettering of equal size and conspicuousness.

(c) Where a fiber trademark is used in advertising textile fiber products containing only one fiber, other than permissible ornamentation, such fiber trademark and the generic name of the fiber must appear in immediate proximity and conjunction with each other in plainly legible and conspicuous type or lettering at least once in the advertisement.

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## Federal Trade Commission

## § 303.44

(d) Where a fiber trademark or generic name is used in non-required information in advertising, such fiber trademark or generic name, shall not be used in such a manner as to be false, deceptive, or misleading as to fiber content, or to indicate, directly or indirectly, that a textile fiber product is composed wholly or in part of a particular fiber, when such is not the case.

**§ 303.42 Arrangement of information in advertising textile fiber products.**

(a) Where a textile fiber product is advertised in such manner as to require disclosure of the information required by the Act and regulations, all parts of the required information shall be stated in immediate conjunction with each other in legible and conspicuous type or lettering of equal size and prominence. In making the required disclosure of the fiber content of the product, the generic names of fibers present in an amount 5 percent or more of the total fiber weight of the product, together with any fibers disclosed in accordance with § 303.3(a), shall appear in order of predominance by weight, to be followed by the designation "other fiber" or "other fibers" if a fiber or fibers required to be so designated are present.

(b) Non-required information or representations shall in no way be false, deceptive, or misleading as to fiber content and shall not include any names, terms, or representations prohibited by the Act and regulations. Such non-required information or representations shall not be set forth or so used as to interfere with, minimize, or detract from the required information.

(c) Non-deceptive terms which are properly and truthfully descriptive of a fiber may be used in conjunction with the generic name of such fiber; as for example: "cross-linked rayon," "solution dyed acetate," "combed cotton," "nylon 66," etc.

[24 FR 4400, June 2, 1959, as amended at 39 FR 14254, Nov. 13, 1965; 39 FR 15313, Dec. 11, 1965; 63 FR 7523, Feb. 13, 1998]

**§ 303.43 Fiber content tolerances.**

(a) A textile fiber product which contains more than one fiber shall not be deemed to be misbranded as to fiber

content percentages if the percentages by weight of any fibers present in the total fiber content of the product, exclusive of permissive ornamentation, do not deviate or vary from the percentages stated on the label in excess of 3 percent of the total fiber weight of the product. For example, where the label indicates that a particular fiber is present in the amount of 40 percent, the amount of such fiber present may vary from a minimum of 37 percent of the total fiber weight of such product to a maximum of 43 percent of the total fiber weight of such product.

(b) Where the percentage of any fiber or fibers contained in a textile fiber product deviates or varies from the percentage stated on the label by more than the tolerance or variation provided in paragraph (a) of this section, such product shall be misbranded unless the person charged proves that the entire deviation or variation from the fiber content percentages stated on the label resulted from unavoidable variations in manufacture and despite the exercise of due care.

(c) Where representations are made to the effect that a textile fiber product is composed wholly of one fiber, the tolerance provided in section 4(b)(2) of the Act and paragraph (a) of this section shall not apply, except as to permissive ornamentation where the textile fiber product is represented to be composed of one fiber "exclusive of ornamentation."

**§ 303.44 Products not intended for uses subject to the act.**

Textile fiber products intended for uses not within the scope of the Act and regulations or intended for uses in other textile fiber products which are exempted or excluded from the Act shall not be subject to the labeling and invoicing requirements of the Act and regulations. *Provided*, An invoice or other paper covering the marketing or handling of such products is given, which indicates that the products are not intended for uses subject to the Textile Fiber Products Identification Act.

## Decision and Order

## § 303.45

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## § 303.45 Exclusions from the act.

(a) Pursuant to section 12(b) of the Act, the Commission hereby excludes from the operation of the Act:

- (1) All textile fiber products except:
  - (i) Articles of wearing apparel:
    - (ii) Handkerchiefs;
    - (iii) Scarfs;
    - (iv) Beddings;
    - (v) Curtains and casements;
    - (vi) Draperies;
    - (vii) Tablecloths, napkins, and doilies;
    - (viii) Floor coverings;
    - (ix) Towels;
    - (x) Wash cloths and dish cloths;
    - (xi) Ironing board covers and pads;
    - (xii) Umbrellas and parasols;
    - (xiii) Batts;
    - (xiv) Products subject to section 4(h) of the Act;
  - (xv) Flags with heading or more than 216 square inches (13.9 dm<sup>2</sup>) in size;
  - (xvi) Cushions;
  - (xvii) All fibers, yarns and fabrics (including narrow fabrics except packaging ribbons);
  - (xviii) Furniture slip covers and other covers or coverlets for furniture;
  - (xix) Afghans and throws;
  - (xx) Sleeping bags;
  - (xxi) Antimacassars and tidies;
  - (xxii) Hammocks;
  - (xxiii) Dresser and other furniture scarfs.
- (2) Belts, suspenders, arm bands, permanently knotted neckties, garters, sanitary belts, diaper liners, labels (either required or non-required) individually and in rolls, looper clips intended for handicraft purposes, book cloth, artists' canvases, tapestry cloth, and shoe laces.
- (3) All textile fiber products manufactured by the operators of company stores and offered for sale and sold exclusively to their own employees as ultimate consumers.
- (4) Coated fabrics and those portions of textile fiber products made of coated fabrics.
- (5) Secondhand household textile articles which are discernibly secondhand or which are marked to indicate their secondhand character.
- (6) Non-woven products of a disposable nature intended for one-time use only.

(7) All curtains, casements, draperies, and table place mats, or any portions thereof otherwise subject to the Act, made principally of slats, rods, or strips, composed of wood, metal, plastic, or leather.

(8) All textile fiber products in a form ready for the ultimate consumer procured by the military services of the United States which are bought according to specifications, but shall not include those textile fiber products sold and distributed through post exchanges, sales commissaries, or ship stores; provided, however, that if the military services sell textile fiber products for nongovernmental purposes the information with respect to the fiber content of such products shall be furnished to the purchaser thereof who shall label such products in conformity with the Act and regulations before such products are distributed for civilian use.

(9) All hand woven rugs made by Navajo Indians which have attached thereto the "Certificate of Genuineness" supplied by the Indian Arts and Crafts Board of the United States Department of Interior. The term *Navajo Indian* means any Indian who is listed on the register of the Navajo Indian Tribe or is eligible for listing thereon.

(b) The exclusions provided for in paragraph (a) of this section shall not be applicable (1) if any representations as to the fiber content of such products are made on any label or in any advertisement without making a full and complete fiber content disclosure on such label or in such advertisement in accordance with the Act and regulations with the exception of those products excluded by paragraph (a)(6) of this section, or (2) if any false, deceptive, or misleading representations are made as to the fiber content of such products.

(c) The exclusions from the Act provided in paragraph (a) of this section are in addition to the exemptions from the Act provided in section 12(a) of the Act and shall not affect or limit such exemptions.

(Sec. 12, 72 Stat. 1723; 15 U.S.C. 70j)

[24 FR 4880, June 2, 1959, as amended at 25 FR 4318, May 14, 1960; 25 FR 7044, July 25, 1960; 29 FR 48, Jan. 3, 1964; 61 FR 11544, Mar. 21, 1996]

## Analysis to Aid Public Comment

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

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from CSE, Inc. d/b/a Mad Mod, a corporation, and Chris and Cyndi Saetveit, individually and as owners of the corporation (together, “respondents”).

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 involves respondents’ marketing and sale of textile fiber products purportedly made of bamboo fiber. The FTC complaint alleges that respondents violated Section 5(a) of the FTC Act by making false claims that their textile fiber products are bamboo fiber; retain the anti-microbial properties of the bamboo plant; and are manufactured using an environmentally-friendly process. The complaint alleges that respondents’ textile fiber products are made of rayon and do not retain the anti-microbial properties of the bamboo plant, and that their manufacturing process involves the use of toxic chemicals and results in the emission of hazardous air pollutants. The complaint further alleges that the respondents failed to have substantiation for the foregoing claims.

The complaint also alleges that the proposed respondents have violated the Textile Fiber Products Identification Act (“Textile Act”) and the Rules and Regulations promulgated thereunder (“Textile Rules”) by falsely and deceptively labeling and advertising their textile fiber products as bamboo; by advertising their products without including in the description of each product a statement that the product was made in the U.S.A., imported, or both; and by failing to properly label their textile fiber products with the name of the country where each such product was processed or manufactured.

## Analysis to Aid Public Comment

The proposed consent order contains provisions designed to prevent respondents from engaging in similar acts and practices in the future. Part I.A of the proposed order prohibits respondents from representing that any textile fiber product (1) is made of bamboo or bamboo fiber; (2) is manufactured using an environmentally friendly process; or (3) is anti-microbial or retains the anti-microbial properties of any material from which it is made, unless such representations are true, not misleading, and substantiated by competent and reliable scientific evidence. Part I.B prohibits respondents from making claims about the benefits, performance, or efficacy of any textile fiber product, unless at the time the representation is made, it is truthful and not misleading, and is substantiated by competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence. Part II makes clear that, although Part I prohibits respondents from making false and unsubstantiated representations that their textile fiber products are made of bamboo or bamboo fiber as opposed to rayon, the respondents nonetheless may describe such products using the generic name of any manufactured fiber and identifying bamboo as the cellulose source for such fiber (*e.g.*, rayon made from bamboo), so long as such representation is true and substantiated. Part III of the proposed order prohibits respondents from failing to comply with the Textile Act or the Textile Rules.

Parts IV through VIII require respondents to keep copies of relevant advertisements and materials substantiating claims made in the advertisements; to provide copies of the order to certain of their personnel; to notify the Commission of changes in corporate structure that might affect compliance obligations under the order; to notify the Commission of changes in individual respondents' current business or employment; and to file compliance reports with the Commission and respond to other requests from FTC staff. Part IX provides that the order will terminate after twenty (20) years under certain circumstances.

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

**PURE BAMBOO, LLC  
AND  
BRUCE DEAR**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND THE  
TEXTILE FIBER PRODUCTS IDENTIFICATION ACT*Docket No. C-4278; File No. 082 3193  
Complaint December 15, 2009 - Decision, December 15, 2009*

This consent order addresses allegations that Pure Bamboo, LLC., seller and distributor of a textile fiber product throughout the United States, made deceptive advertising claims about its product in violation of Section 5 of the FTC Act. Respondents sold textile fiber products that were misbranded or falsely or deceptively advertised as bamboo fiber. The respondent did not comply with the Textile Act or the Textile Rules and Regulations. The order prohibits the respondents from expressing or implying a product is made of bamboo, or bamboo fiber, or manufactured using an environmentally friendly process, or is anti-microbial, unless the representation is true, non-misleading, and, at the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

*Participants**For the Commission: Melinda Claybaugh and Korin Ewing**For the Respondents: Dominick F. Mills; Mills Law Group,  
LLC***COMPLAINT**

The Federal Trade Commission, having reason to believe that Pure Bamboo, LLC (“Pure Bamboo”), a limited liability company, and Bruce Dear, individually and as the managing member of the limited liability company (“Respondents”), have violated the provisions of the Federal Trade Commission Act, 15 U.S.C. § 41, *et seq.*, the Textile Fiber Products Identification Act, 15 U.S.C. § 70, *et seq.*, and the Rules and Regulations promulgated thereunder, 16 C.F.R. Part 303, and it appearing to the Commission that this proceeding is in the public interest, alleges:

## Complaint

1. Respondent Pure Bamboo is a Nevada limited liability company, registered to do business in California. Its principal office or place of business is 12449 Gilmore Avenue, Los Angeles, California 90066.

2. Respondent Bruce Dear is the managing member of Pure Bamboo, LLC. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the limited liability company, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Pure Bamboo.

3. 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, 15 U.S.C. § 44.

4. Respondents manufacture, advertise, market, promote, offer to sell, sell, and distribute textile fiber products, including clothing and other items, throughout the United States, using both Pure Bamboo’s own website, [www.purebamboo.com](http://www.purebamboo.com), and other retailers.

5. Respondents price the textile fiber products that they manufacture, market, promote, distribute, and sell at a premium compared to other, similar products in the marketplace.

6. In advertisements to induce consumers to purchase their textile fiber products, Respondents make or have made various claims, on their website and elsewhere, concerning the fiber content, biodegradability, and anti-microbial characteristics of their textile fiber products, as well as the environmentally friendly manufacturing processes used to make their products, including, but not limited to, the following:

A. **Pure Bamboo Website ([www.purebamboo.com](http://www.purebamboo.com))**

1. **Pure Bamboo**

**Pure Quality, Pure Ingenuity, Pure Clothing**

## Complaint

We are dedicated to providing high performance wear that brings together comfort, simplicity and our own unique Pure Style to create an eco-friendly bamboo clothing line committed to fitting your one of a kind environmentally conscious life style.

(Homepage, Exhibit A at 1).

**2. About Pure Bamboo**

We started Pure Bamboo to create a company that could both support sustainable environmental business practices and serve a fun and freedom loving lifestyle.

\* \* \* \*

We've found bamboo to be a superior fabric for its comfort, breathability, and natural anti-microbial properties.

\* \* \* \*

We believe that it's possible to purchase products you love without having a negative impact on the environment. Together with a growing number of companies, we seek to create alternative choices in the market place for you to purchase unique, stylish clothing that is gentle on the environment and utilize[s] sustainable business practices.

\* \* \* \*

At Pure Bamboo, our goal is to honor the earth, her citizens and have fun while doing it.

("About" page, Exhibit A at 2).

## Complaint

3. **Do you Bamboo?****High-end, High-performance and Low Impact**

PURE Bamboo is eco-luxurious! Finally, a fabric that fulfills all our needs for comfort, beauty and sustainability. . . . [Bamboo is] 100% naturally grown without pesticides or fertilizers so PURE Bamboo clothing is better for your skin than most cottons and it's biodegradable.

\* \* \* \*

The unique properties of the fabric make it soft and durable – **smooth and free-moving** much like a fine silk and cashmere combined. This is why bamboo linen, even at average thread counts, is considered in the luxury category. But it's also why – for people who care about taking care of their bodies, and taking care of the environment, bamboo is the perfect choice.

**100% Natural**

PURE Bamboo clothing protects the wearer. Bamboo has naturally occurring anti-bacterial and anti-fungal properties, called **Bamboo Kin**, that inhibit bacteria from cultivating on it. So when this bamboo fiber is made into fabric, it's (sic) retains its anti-microbial properties!

\* \* \* \*

**Naturally Renewable and Durable**

As one of the world's most versatile and environmentally-friendly materials, bamboo has been used as the perfect natural resource for thousands of years. And because bamboo requires no fertilizers, pesticides or insecticides to grow, bamboo clothing has NO harmful chemical

## Complaint

residues to irritate your skin – unlike most cotton clothing, which leaves behind damaging chemicals in the fabric.

(“Do you Bamboo?” page, Exhibit A at 3).

**4. The Pure Bamboo Robe**

This amazingly soft and scrumptious robe is like a soft furry teddy bear hug to greet you after a relaxing shower or massage. The 70% bamboo & 30% hypoallergenic organic cotton blend make it the perfect robe to wear after a spa or massage when skin pores are open and most susceptible to toxins in the fabrics. Don with full confidence that what you are wearing is the best nature has to offer. In addition bamboo is naturally anti-microbial and anti-fungal providing you a superior option over traditional terrycloth bathrobes.

(“The Pure Bamboo Robe” product page, Exhibit A at 4).

**5. Pure Bamboo Spa Wrap**

Wrap yourself in luxury with our 100% bamboo spa wraps . . . Hypoallergenic and bacteria fighting properties, to keep you clean at all times.

(“Pure Bamboo Spa Wrap” product page, Exhibit A at 5-6).

**6. Bamboo Spa Tee**

70% bamboo fiber and 30% organic cotton

(“Bamboo Spa Tee” product page, Exhibit A at 7).

Complaint

**B. Product Labels**

Pure Bamboo  
[www.purebamboo.com](http://www.purebamboo.com)  
Bamboo  
Fiber  
Products

\* \* \* \*

70% Bamboo/Bambou  
30% Organic Cotton/Organique Coton

\* \* \* \*

Bamboo Fiber Products  
100% bamboo

(Exhibit B at 1-2).

**C. Product Card**

**Do you Bamboo?**

\* \* \* \*

We are dedicated to creating a business environment where sustainability, fair trade and a sincere responsibility and respect for the natural world go hand in hand with convenience, comfort, and elegance.

At Pure Bamboo, our goal is to honor the earth, her citizens and have fun while doing it.

(Exhibit C at 1).

7. The textile fiber products manufactured, marketed, promoted, distributed, and sold by Respondents consist of rayon and not actual bamboo fibers woven into fabric.

## Complaint

8. Rayon is the generic name for a type of regenerated, or manufactured, fiber made from cellulose. Rayon is manufactured by taking purified cellulose from a plant source, also called a cellulose precursor, and converting it to a viscous solution by dissolving it in one or more chemicals, such as sodium hydroxide. The chemical solution is then forced through spinnerets and into an acidic bath where it solidifies into fibers.

9. The process used to manufacture rayon from cellulose involves hazardous chemicals. *See* 40 C.F.R. Part 63 (“National Emissions Standards for Hazardous Air Pollutants: Cellulose Products Manufacturing”).

10. “[H]azardous air pollutants (HAP) emitted from cellulose products manufacturing operations” include carbon disulfide, carbonyl sulfide, ethylene oxide, methanol, methyl chloride, propylene oxide, and toluene. 40 C.F.R. § 63.5480.

11. Many plant sources may be used as cellulose precursors for rayon fabric, including cotton linters (short cotton fibers), wood pulp, and bamboo. Regardless of the source of the cellulose used, however, the manufacturing process involves the use of hazardous chemicals and the resulting fiber is rayon and not cotton, wood, or bamboo fiber.

12. Respondents do not state that their textile fiber products are rayon, nor, assuming that bamboo is the source of the cellulose used in their textile fiber products, do Respondents state that their textile fiber products are rayon made from bamboo. Moreover, on the pages of their website stating the claims set forth in Paragraph 6, Respondents do not provide any description of the chemical process used to manufacture their textile fiber products.

13. Respondents do not define, describe, or qualify their claim that their textile fiber products are biodegradable.

14. Approximately 91 percent of total municipal solid waste in the United States is disposed of in either landfills, incinerators, or recycling facilities. These disposal methods do not present conditions that would allow for Respondents’ textile fiber

## Complaint

products to completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time.

15. Respondents advertise or have advertised their textile fiber products for sale on the [www.purebamboo.com](http://www.purebamboo.com) website without including in the description of the product a clear and conspicuous statement that the product was either made in U.S.A., imported, or both.

16. Respondents sell or have sold hosiery textile fiber products without affixing labels to the products or to the packaging for those products that detail the fiber content, country of origin, and the name or registered identification number issued by the Commission of the manufacturer or of one or more persons marketing or handling the product.

**VIOLATIONS OF SECTION 5 OF THE FTC ACT****FALSE OR MISLEADING REPRESENTATIONS**

17. Through the means described in Paragraph 6, Respondents represent or have represented, expressly or by implication, that:

- a. Their textile fiber products are bamboo fiber;
- b. Their textile fiber products are manufactured using an environmentally friendly process;
- c. Their textile fiber products retain anti-microbial properties of the bamboo plant; and
- d. Their textile fiber products will completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time after customary disposal.



## Complaint

## 18. In truth and in fact:

- a. Respondents' textile fiber products are not bamboo fiber, but instead are rayon, a regenerated cellulose fiber;
- b. Respondents' textile fiber products are not manufactured using an environmentally friendly process but rather a process that involves the use of toxic chemicals and results in the emission of hazardous air pollutants;
- c. Respondents' textile fiber products do not retain anti-microbial properties of the bamboo plant; and
- d. Respondents' textile fiber products will not completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time after customary disposal because a substantial majority of total household waste is disposed of by methods that do not present conditions that would allow for Respondents' textile fiber products to completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time.

19. Therefore, the representations set forth in Paragraph 17 were, and are, false or misleading, and the making of such representations constitutes a deceptive act or practice, in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act.

UNSUBSTANTIATED REPRESENTATIONS

20. Through the means described in Paragraph 6, Respondents represent or have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 17, at the time the representations were made.

## Complaint

21. In truth and in fact, Respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 17, at the time the representations were made.

22. Therefore, the representation set forth in Paragraph 20 was, and is, false or misleading, and the making of such representation constitutes a deceptive act or practice, in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act.

**TEXTILE FIBER PRODUCTS IDENTIFICATION ACT  
and RULES AND REGULATIONS**

23. The Textile Fiber Products Identification Act, 15 U.S.C. § 70, *et seq.* (“Textile Act”), governs, *inter alia*, the labeling and advertising of textile fiber products introduced, manufactured for introduction, delivered for introduction, sold, advertised, or offered for sale in commerce. *See* 15 U.S.C. § 70a.

24. Under the Textile Act, a textile fiber product is “misbranded if it is falsely or deceptively stamped, tagged, labeled, invoiced, advertised, or otherwise identified as to the name or amount of constituent fibers contained therein.” 15 U.S.C. § 70b(a).

25. Pursuant to the Textile Act, 15 U.S.C. § 70e(c), the Federal Trade Commission has promulgated Rules and Regulations for its administration and enforcement (“Textile Rules and Regulations”). *See* 16 C.F.R. Part 303. The Textile Rules and Regulations state:

- a. All textile fiber products must carry permanent, affixed labels stating the recognized generic names of the constituent fibers, as well as indicating, among other things, the “percentages by weight of the constituent fibers present in the textile fiber product, excluding permissive ornamentation, in amounts of 5 percent or more,” as well as the “name of the country where such product was processed or manufactured.” 16 C.F.R. § 303.16(a)(1), (a)(3); *see also* 16 C.F.R. §§ 303.6, 303.15 and 303.33;

## Complaint

- b. In advertising textile fiber products in promotional materials disseminated to ultimate consumers in print or by electronic means, other than by broadcast, where the consumer is solicited to purchase such textile products without examining the actual product purchased, the description of the product must contain a clear and conspicuous statement that the product was either made in U.S.A., imported, or both. 16 C.F.R. § 303.34;
- c. In advertising and labeling textile fiber products, no generic name for a manufactured fiber may be used until such generic name has been “established or otherwise recognized by the Commission,” 16 C.F.R. § 303.8, and such generic names must be used when identifying the fiber content in the information required in such labels and advertisements, 16 C.F.R. § 303.6;
- d. The only generic terms for fibers manufactured from regenerated cellulose that have been established or otherwise recognized by the FTC are rayon, viscose, modal, cupro, and lyocell. *See* 16 C.F.R. § 303.7(d);
- e. “Words, coined words, symbols or depictions, (a) which constitute or imply the name or designation of a fiber which is not present in the product, (b) which are phonetically similar to the name or designation of such a fiber, or (c) which are only a slight variation of spelling from the name or designation of such a fiber shall not be used in such a manner as to represent or imply that such fiber is present in the product.” 16 C.F.R. § 303.18. Any term used in advertising, including internet advertising, that constitutes or connotes the name or presence of a textile fiber is deemed to be an implication of fiber content. 16 C.F.R. § 303.40; and
- f. Any information or representations included in advertising or labeling of a textile fiber product that is not required under the Textile Act or the Textile Rules

## Complaint

and Regulations “shall in no way be false, deceptive, or misleading as to fiber content and shall not include any names, terms, or representations prohibited by the [Textile] Act and regulations. Such non-required information or representations shall not be set forth or so used as to interfere with, minimize, or detract from the required information.” 16 C.F.R. § 303.42(b); 16 C.F.R. § 303.41(d); *see also* 16 C.F.R. § 303.17.

26. A violation either of the Textile Act or of the Textile Rules and Regulations constitutes an unfair and deceptive act or practice in violation of the Federal Trade Commission Act. *See* 15 U.S.C. §§ 70a and 70e.

**VIOLATIONS OF THE TEXTILE ACT AND  
THE TEXTILE RULES AND REGULATIONS**

27. As set forth in Paragraph 6, Respondents have:

- a. labeled their textile fiber products as consisting of bamboo; and
- b. advertised the fiber content of their textile fiber products using the terms “bamboo” and “bamboo fiber.”

28. In truth and in fact, Respondents’ textile fiber products are not bamboo fiber but are rayon, a regenerated cellulose fiber.

29. As set forth in Paragraph 15, Respondents have advertised and sold their textile fiber products on the [www.purebamboo.com](http://www.purebamboo.com) website without including in the description of each product a clear and conspicuous statement that the product was either made in U.S.A., imported, or both.

30. As set forth in Paragraph 16, Respondents sell or have sold hosiery textile fiber products without affixing to the packaging for those products, or to the products themselves, labels detailing fiber content information and other information required by the Textile Act and Textile Rules and Regulations.

## Complaint

31. Through the means described in Paragraphs 6, 15, and 16, Respondents have manufactured for introduction, introduced, advertised, offered for sale, or sold textile fiber products that are misbranded or falsely or deceptively advertised, as prohibited by Sections 70a and 70b of the Textile Act, 15 U.S.C. § 70, *et seq.*, and in violation of Sections 303.6, 303.8, 303.16, 303.17, 303.18, 303.34, 303.40, 303.41, and 303.42 of the Textile Rules and Regulations, 16 C.F.R. Part 303.

32. Respondents' violations of the Textile Act and of the Textile Rules and Regulations 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 fifteenth day of December, 2009, has issued this complaint against Respondents.

By the Commission.

Complaint

Exhibit A

Page 1 of 1

PureBamboo.com - Eco-friendly bamboo fiber clothing

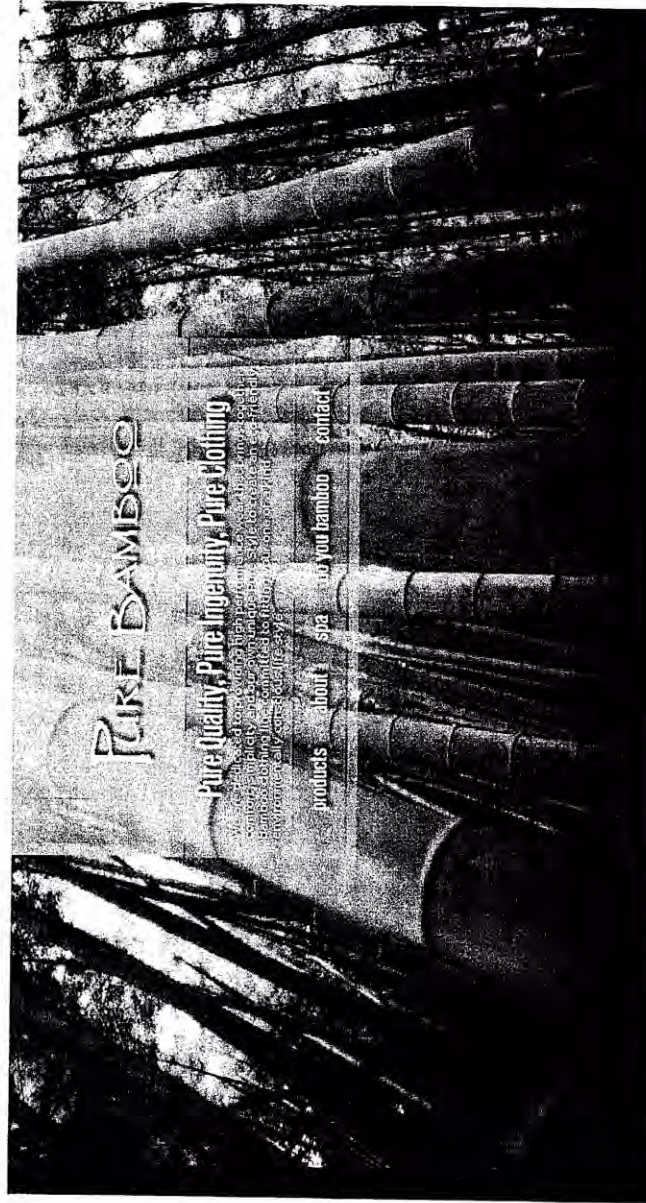


Exhibit A, page 1

Complaint

PureBamboo.com - Eco-friendly bamboo clothing

http://www.purebamboo.com/about.php



Product Catalog

Catalog Home

- Pure Spa Wear
- Pure Yoga Wear
- Pure Active Wear

Search  go

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Pure Bamboo



We started Pure Bamboo to create a company that could both support sustainable environmental business practices and serve a fun and freedom loving lifestyle. Can we have both? We believe we can! As avid outdoor enthusiasts, spa lovers and yogis we know first hand the importance of quality clothing and the fabric that makes up that garment. We've found bamboo to be a superior fabric for its comfort, breathability, and natural anti-microbial properties.

Can your purchasing choices actually help the environment rather than hurt it? Absolutely! How? We work closely with a non profit organization called Carbonfund.org. When you shop at Pure Bamboo, a portion of every purchase is donated to Carbonfund. This donation offsets carbon emissions released during the manufacturing of your product. These emissions are offset by investing in renewable energy resources as well as reforestation projects. [Click here to learn more about Carbonfund.org, carbon offsets and how this process works.](#)

Pure Bamboo is a company dedicated to investing in our future generations. We invest by committing to reducing our carbon footprint and working with other companies and manufacturers that utilize fair trade business practices. These practices include paying workers and craftspeople a living wage. We believe that paying people a living wage is an important ethical business practice and ultimately contributes to improving working conditions and helping foster better working environments for all.

We believe that it's possible to purchase products you love without having a negative impact on the environment. Together with a growing number of companies, we seek to create alternative choices in the market place for you to purchase unique, stylish clothing that is gentle on the environment and utilize sustainable business practices.

All of our products are carefully selected to ensure quality, function and fashion. Additionally we are dedicated to creating a business environment where sustainability, fair trade and Zero Carbon emissions go hand in hand with convenience, comfort and elegance.

At Pure Bamboo, our goal is to honor the earth, her citizens and have fun while doing it.

Are you Pure?

Complaint

PureBamboo.com - Eco-friendly bamboo clothing

http://www.purebamboo.com/why\_bamboo.php



Product Catalog

- Catalog Home
- Pure Spa Wear
- Pure Yoga Wear
- Pure Active Wear

Search  go

Advanced Search

Account Options

Username:

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Get an Account

Do you Bamboo?

Bamboo is fast becoming the most-popular alternative fabric and most talked about trends in fashion, why?

High-end, High-performance and Low Impact

PURE Bamboo is eco-heratious! Finally, a fabric that fulfills all our needs for comfort, beauty and sustainability. Bamboo itself is one of the fastest growing, most readily renewable natural resources on the planet. It's 100% naturally grown without pesticides or fertilizers so PURE Bamboo clothing is better for your skin than most cottons and it's biodegradable. The unique properties of the fabric make it soft and durable—smooth and free-moving much like a fine silk and cashmere combined. This is why bamboo linen, even at average thread counts, is considered in the luxury category. But it's also why—for people who care about taking care of their bodies, and taking care of the environment, bamboo is the perfect choice.



100% Natural

PURE Bamboo clothing protects the wearer. Bamboo has naturally occurring anti-bacterial and anti-fungal properties, called Bamboo Kin, that inhibit bacteria from colonizing on it. So when this bamboo fiber is made into fabric, it retains its anti-microbial properties! Because of this amazing quality, you can wash PURE Bamboo at lower temperatures, which means less energy and detergent are consumed. Twice as absorbent as cotton fabric, PURE Bamboo wicks away moisture from the skin and keeps the wearer dry, cool and comfortable. The fabric absorbs and evaporates perspiration quickly keeping the wearers odor-free, making it ideal for bathrobes, towels, active wear and baby wear.

Naturally Renewable and Durable

As one of the world's most versatile and environmentally-friendly materials, bamboo has been used as the perfect natural resource for thousands of years. And because bamboo requires no fertilizers, pesticides or insecticides to grow, bamboo clothing has NO harmful chemical residues to irritate your skin—unlike most cotton clothing, which leaves behind damaging chemicals in the fabric. (Cotton requires the use of fertilizers and insecticides, 7 out of 15 are rated among the most toxic chemicals on earth!) The non-sustainable cotton industry not only exacts an enormous toll on the earth's air, water and soil, it poorly impacts the health of people working in those fields as well as those living in cotton growing areas.

Bamboo is one of the most prolific plants (it's actually considered a grass) on the planet. Some varieties can grow up to 4 feet a day! Once cut a bamboo plant is fully mature in 3 to 4 years and ready to be harvested. Compared to a similar strand of trees bamboo absorbs 45% more carbon dioxide from the air. Bamboo can even improve soil quality in places where erosion and degradation of the natural minerals has occurred. It needs very little water to grow, which means it can thrive in a variety of climates without depleting water supplies.

In fact, PURE Bamboo is so committed to a sustainable and GREEN business, if you are a spa or hotel supplying your clients with these ultra-soft, long-lasting bathrobes, towels or sheets, you can get a little R & R—ask about our Rebate and Recycle program.

"There is never waste in nature."

And...Panda Safe!

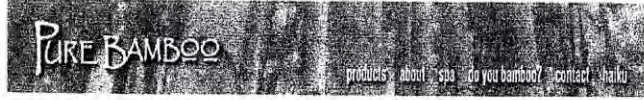
There are over 1000 different species of bamboo. All PURE Bamboo products come from a type of bamboo called Moso or if you're botanically inclined Phyllostachys pubescens, a variety of bamboo that Pandas do not eat. So yeah, it's Panda safe too!



Complaint

Pure Bamboo - Pure Bamboo Robe

http://www.purebamboo.com/store.php?cm=205&rm=377&action=s...



Product Catalog

Catalog Home ; Pure Spa Wear ; The Pure Bamboo Robe

- Catalog Home
- Pure Spa Wear**
- Pure Yoga Wear
- Pure Active Wear

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Category Preview



Bamboo Pillow Cases



Pure Bamboo Spa Wrap



Pure Organic Bamboo Towel Set



### The Pure Bamboo Robe

This amazingly soft and scrumptious robe is like a soft furry teddy bear hug to greet you after a relaxing shower or massage. The 70% bamboo & 30% hypoallergenic organic cotton blend make it the perfect robe to wear after a spa or massage when skin pores are open and most susceptible to toxins in the fabrics. Don with full confidence that what you are wearing is the best nature has to offer. In addition bamboo is naturally anti-microbial and anti-fungal providing you a superior option over traditional terrycloth bathrobes. Once you put on a Pure Bamboo Bathrobe you'll never want to take it off and with our Lifetime Guarantee on all our robes your satisfaction is insured. Go ahead try it! This is the last bathrobe you'll ever have to buy!!

**Our Price: \$150.00**

\* Color:

\* Choose Size:

Donation:  Donate to offset your carbon emissions: + \$0.50

\* indicates a required field.

Quantity:  [add to cart](#)

Complaint

Pure Bamboo Spa Wrap

http://www.purebamboo.com/store.php?cm=205&m=395&action=s...



Product Catalog Catalog Home : Pure Spa Wear : Pure Bamboo Spa Wrap

Catalog Home
Pure Spa Wear
Pure Yoga Wear
Pure Active Wear

Search go
Advanced Search

Account Options

Username:
Password:
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Login
Forgot Password?
Get an Account

Category Preview



Spa Socks



Bamboo Spa Tee



Pure Bamboo Spa Wrap

Wrap yourself up in luxury with our 100% bamboo spa wraps. Bamboo's moisture wicking properties will keep you dry without the wrap being dripping wet. A convenient pocket is available for all accessories to beautify yourself after your treatment. Hypoallergenic and bacteria fighting properties, to keep you clean at all times.

Available sizes: One size fits all
Available colors: Purely Natural (dye free)

Our Price: \$50.00

\* Color:

Donation: Donate to offset your carbon emissions: + \$0.50

\* indicates a required field.

Quantity: add to cart

Complaint

Pure Bamboo Spa Wrap

<http://www.purebamboo.com/store.php?cm=205&m=395&action=s...>



Pure Bamboo Long  
Sleeve Tee

Complaint

Bamboo Spa Tee

http://www.purebamboo.com/store.php?cm=205&m=396&action=s...



Product Catalog

Catalog Home : Pure Spa Wear : Bamboo Spa Tee

Catalog Home  
Pure Spa Wear  
Pure Yoga Wear  
Pure Active Wear

Search  go  
Advanced Search

Account Options

Username:

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### Bamboo Spa Tee

Who says Spa uniforms have to be boring? We put the Form in Uniform! Check out these two options sure to put a smile on all your employees faces!

These bamboo fiber Tees are one of the world's most comfortable garments! These Tees stand the test of time. Can be used as part of a Spa uniform for employees or just worn for casual everyday wear. Either way once you try a bamboo Tee it will soon become one of your favorites! Soft on the eyes and the skin, you'll never want to wear regular old cotton again.

Garment Dyed for beautiful colors, softness and minimal shrinkage. Ask about our specialty silk screening and embroidery options. 70% bamboo fiber and 30% organic cotton.

Available sizes: S/m/l/xl

Colors: Red, White, Blue, Black, Green, and Purely Natural

**Our Price: \$28.00**

\* Color:

\* Choose Size:

Donation:  Donate to offset your carbon emissions: + \$0.50

\* indicates a required field.

Quantity:  [add to cart](#)

Category Preview



Pure Bamboo Spa Wrap



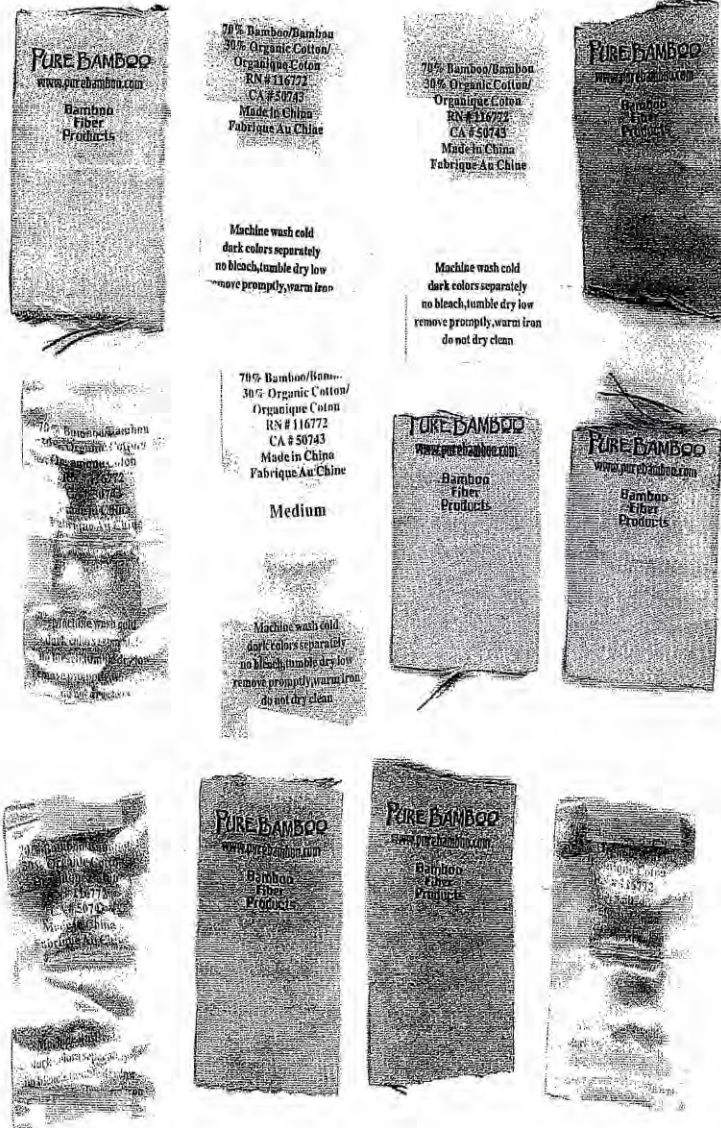
Pure Organic Bamboo Towel Set



Pure Bamboo Massage Table Sheets

Complaint

Exhibit B



Complaint

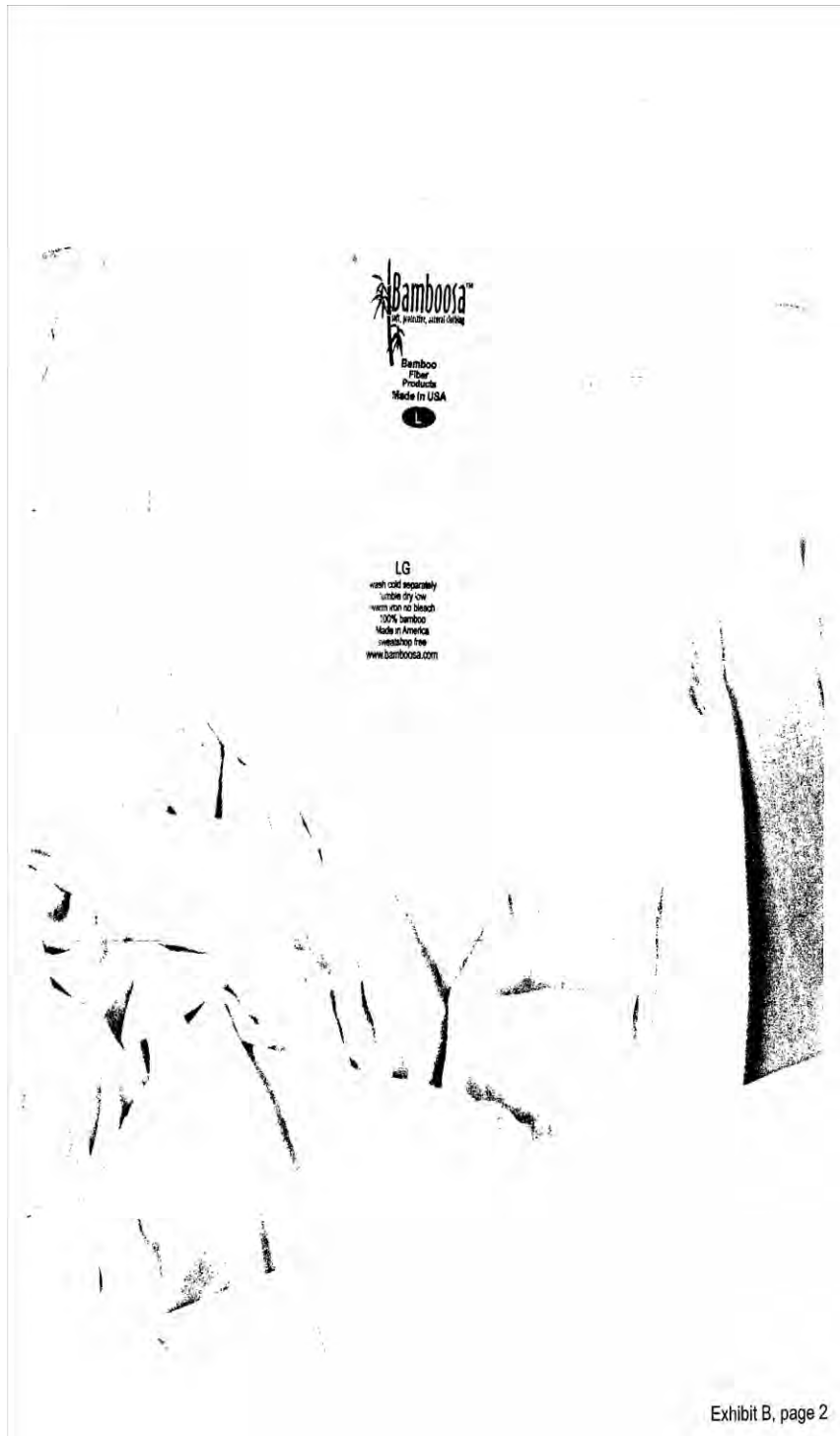


Exhibit B, page 2

Complaint

Exhibit C



Pure Bamboo

[www.purebamboo.com](http://www.purebamboo.com)

**Do you Bamboo?**

All of our products are carefully selected to ensure quality, function and fashion.

We are dedicated to creating a business environment where sustainability, fair trade and a sincere responsibility and respect for the natural world go hand in hand with convenience, comfort and elegance.

At Pure Bamboo, our goal is to honor the earth, her citizens and have fun while doing it.

Pure Bamboo is proud to introduce our *Rebate and Recycle Program* to our Spa and Resort customers. As part of our commitment to reducing waste, Pure Bamboo offers a rebate on all worn out bathrobes, towels, wraps and sheets purchased from Pure Bamboo. Pure Bamboo will use the returned merchandise to recycle the product into new products or use it for composting to create healthy soil. So don't throw those old towels and bathrobes away, recycle them with us and get paid to do it!

We bamboo.

Do you?

877-707-PURE

Made in 100% recycled paper, 100% post-consumer waste, recycled wherever you go. © GreenPrint.com

## Decision and Order

**DECISION AND ORDER**

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondents with violations of the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq.*, the Textile Fiber Products Identification Act, 15 U.S.C. § 70, *et seq.*, and the Rules and Regulations promulgated thereunder, 16 C.F.R. Part 303; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order (“consent agreement”), an admission by the 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 the respondents that the law has been violated as alleged in the 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 has reason to believe that the respondents have violated said Acts and Rules, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such consent agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons pursuant to section 2.34 of its Rules, now in 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 Pure Bamboo, LLC, is a Nevada limited liability company, registered to do business in California. Its principal office or place of business is



## Decision and Order

12449 Gilmore Avenue, Los Angeles, California  
90066.

2. Respondent Bruce Dear is the managing member of Pure Bamboo, LLC. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the limited liability company, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Pure Bamboo.
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:

- A. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
- B. "Competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.
- C. "Covered product" shall mean any or all of the following: (1) any article of wearing apparel, costume or accessory, drapery, floor covering, furnishing, bedding, or other textile good of a type customarily used in a household, regardless of where used in fact, that is made, in whole or in part, of yarn or fabric; or (2) any fiber, yarn or fabric, whether in the finished or

## Decision and Order

unfinished state, used or intended for use in any such textile good.

- D. “Fiber trademark” shall mean a word or words used to identify a particular fiber sold by a person and to distinguish it from fibers of the same generic class sold by others, as defined in 16 C.F.R. § 303.1(r).
- E. “Generic name of any manufactured fiber” shall mean any name for a textile fiber established and defined by the Commission pursuant to Section 70e(c) of the Textile Fiber Products Identification Act, as set forth in 16 C.F.R. § 303.7.
- F. “Is degradable, biodegradable, or photodegradable” shall mean that the entire product will completely decompose into elements found in nature within a reasonably short period of time after customary disposal.
- G. “Manufactured fiber” shall mean any fiber derived by a process of manufacture from any substance which, at any point in the manufacturing process, is not a fiber, as defined in 15 U.S.C. § 70(d).
- H. “Required information” shall mean such information as is required to be disclosed on labels or invoices and in advertising under the Textile Fiber Products Identification Act, 15 U.S.C. § 70 *et seq.*, and under the Rules and Regulations promulgated thereunder, 16 C.F.R. Part 303, as defined in 16 C.F.R. § 303.1(e).
- I. Unless otherwise specified, “respondents” shall mean Pure Bamboo, LLC, a limited liability company, its successors and assigns and its managing members; Bruce Dear, individually and as the managing member of the limited liability company; and each of the above’s agents, representatives, and employees.

## Decision and Order

**I.**

**IT IS 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 covered product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication:

- A. That such covered product
1. is made of bamboo or bamboo fiber, including, but not limited to, through the use of a fiber trademark or other descriptive term or name for a product or product line, *e.g.*, Pure Bamboo;
  2. is manufactured using an environmentally friendly process;
  3. is anti-microbial or retains the anti-microbial properties of any material from which it is made; or
  4. is degradable, biodegradable, or photodegradable,

unless the representation is true, non-misleading, and, at the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; or

- B. About the benefits, performance, or efficacy of such covered product, unless the representation is true, non-misleading, and, at the time it is made, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

**II.**

*Provided, however,* that nothing in this order shall prohibit respondents from describing a covered product using the generic

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name of any manufactured fiber and identifying bamboo as the cellulose source for such fiber, *e.g.*, rayon made from bamboo, so long as such representation is true, non-misleading, complies with the Textile Fiber Products Identification Act, 15 U.S.C. § 70, *et seq.* (“Textile Act”) and with the Rules and Regulations promulgated thereunder, 16 C.F.R. Part 303 (“Textile Rules”), and, at the time such 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 covered product in or affecting commerce, shall not fail to comply with any provision of the Textile Fiber Products Identification Act, 15 U.S.C. § 70, *et seq.* (“Textile Act”), or of the Rules and Regulations promulgated thereunder, 16 C.F.R. Part 303 (“Textile Rules”), copies of which are attached hereto as “Appendix A,” or of the Textile Act or Textile Rules as they may hereafter be amended, including but not limited to:

- A. Selling, offering for sale, or advertising in commerce any covered product that is falsely or deceptively stamped, tagged, labeled, invoiced, advertised, or otherwise identified as to the name or amount of constituent fibers contained therein, 15 U.S.C. §§ 70a, 70b;
- B. Selling, offering for sale, or advertising in commerce any covered product that does not have a stamp, tag, label, or other means of identification on or affixed to the inside center of the neck midway between the shoulder seams or, if such product does not contain a neck, in the most conspicuous place on the inner side of such product, unless it is on or affixed on the outer side of such product, or in the case of hosiery items on the outer side of such product or package, 15 U.S.C. § 70b(j);

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- C. Failing to use the recognized generic name of any manufactured fiber in the required information in any labels, invoices, or advertising of any covered product, 16 C.F.R. §§ 303.6 and 303.7;
- D. Failing to include all required information on labels for any covered product and in any written advertisement disseminated for a covered product that is used to aid, promote, or assist, directly or indirectly, in the sale or offering for sale of such covered product, including identifying:
1. the generic names and percentages by weight of the constituent fibers present in the covered product, in amounts of 5 percent or more and in the order of predominance set forth in 16 C.F.R. § 303.16(a)(1);
  2. the name or registered identification number issued by the Commission of the manufacturer or of one or more persons marketing or handling the covered product; and
  3. the name of the country where such covered product was processed or manufactured, as provided for in § 303.33,
- 15 U.S.C. § 70b(b); 16 C.F.R. §§ 303.16 and 303.42(a);
- E. Failing to ensure that any fiber trademark or generic name used on the label of or in any advertising for any covered product:
1. is not false, deceptive, or misleading as to fiber content; and
  2. does not indicate, directly or indirectly, that the covered product is composed wholly or in part of a particular fiber, when such is not the case,

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16 C.F.R. §§ 303.17(d) and 303.41(d);

- F. Failing to ensure that any non-required information or representations used on the label of or in the advertising for any covered product:
1. do not interfere with, minimize, detract from, or conflict with required information;
  2. do not include any names, terms, or representations prohibited by the Textile Act or Rules; and
  3. are not false, deceptive, or misleading.

16 C.F.R. §§ 303.16(c) and 303.42(b);

- G. Where a covered product is advertised in such manner as to require disclosure of the information required by the Textile Act and Textile Rules, failing to include all parts of the required information in immediate conjunction with each other in legible and conspicuous type or lettering of equal size and prominence, 16 C.F.R. § 303.42(a);
- H. Failing to ensure that, where a covered product is advertised in print or by electronic means, other than by broadcast, using materials that solicit consumers to purchase such products by mail, telephone, electronic mail, or some other method without examining the actual product purchased, the description of the product includes a clear and conspicuous statement that the product was either made in U.S.A., imported, or both. 16 C.F.R. §§ 303.1(u) and 303.34;
- I. Where a fiber trademark is used in advertising a covered product, failing:
1. to include the generic name of the fiber contained in such covered product in immediate proximity to and in conjunction with such fiber trademark; and

## Decision and Order

2. to include a full disclosure of the fiber content information required by the Textile Act and Textile Rules in at least one instance in any such advertisement,

16 C.F.R. § 303.41;

- J. Failing to ensure that any words, coined words, symbols or depictions used in the labeling or advertising of a covered product which:
  1. constitute or imply the name or designation of a fiber;
  2. are phonetically similar to the name or designation of a fiber; or
  3. are only a slight variation of spelling from the name or designation of a fiber

are not used in such a manner as to represent or imply that such fiber is present in the covered product, unless such fiber is actually present in that product, 16 C.F.R. § 303.18; and

- K. Failing to maintain for at least three years proper records for any covered products manufactured by respondents, including records showing the fiber content, 15 U.S.C. § 70d(b); 16 C.F.R. § 303.39.

#### IV.

**IT IS FURTHER ORDERED** that respondent Pure Bamboo, LLC, and its successors and assigns, and respondent Bruce Dear 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, labeling, packaging and promotional materials containing the representation;

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- B. All materials that were relied upon in disseminating the representation;
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in its 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; and
- D. All acknowledgments of receipt of this order obtained pursuant to Part V.

**V.**

**IT IS FURTHER ORDERED** that respondent Pure Bamboo, LLC, and its successors and assigns, and respondent Bruce Dear shall deliver a copy of this order to all current and future principals, members, 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.

**VI.**

**IT IS FURTHER ORDERED** that respondent Pure Bamboo, LLC, and its successors and assigns, and respondent Bruce Dear shall notify the Commission at least thirty (30) days prior to any change with regard to Pure Bamboo, LLC, or any business entity that any respondent directly or indirectly controls, or has an ownership interest in, that may affect compliance obligations arising under this order, including but not limited to formation of a new business entity; a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor entity; the creation or dissolution of a subsidiary, parent, or



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affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the business or corporate name or address. *Provided, however,* that, with respect to any proposed change about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

**VII.**

**IT IS FURTHER ORDERED** that respondent Bruce Dear, for a period of five (5) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include the respondent's new business address and telephone number, and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

**VIII.**

**IT IS FURTHER ORDERED** that respondent Pure Bamboo, LLC, and its successors and assigns, and respondent Bruce Dear shall, within sixty (60) days after the date of service of this order, file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which they have complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondents each shall submit additional true and accurate written reports.

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**IX.**

This order will terminate on December 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 respondent 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.

By the Commission.

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## Appendix A

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[Laws in effect as of January 3, 2006]  
[CITE: 15USC70]

## TITLE 15--COMMERCE AND TRADE

CHAPTER 2--FEDERAL TRADE COMMISSION; PROMOTION OF EXPORT TRADE AND  
PREVENTION OF UNFAIR METHODS OF COMPETITION

## SUBCHAPTER V--TEXTILE FIBER PRODUCTS IDENTIFICATION

## Sec. 70. Definitions

As used in this subchapter--

- (a) The term "person" means an individual, partnership, corporation, association or any other form of business enterprise.
- (b) The term "fiber" or "textile fiber" means a unit of matter which is capable of being spun into a yarn or made into a fabric by bonding or by interlacing in a variety of methods including weaving, knitting, braiding, felting, twisting, or webbing, and which is the basic structural element of textile products.
- (c) The term "natural fiber" means any fiber that exists as such in the natural state.
- (d) The term "manufactured fiber" means any fiber derived by a process of manufacture from any substance which, at any point in the manufacturing process, is not a fiber.
- (e) The term "yarn" means a strand of textile fiber in a form suitable for weaving, knitting, braiding, felting, webbing, or otherwise fabricating into a fabric.
- (f) The term "fabric" means any material woven, knitted, felted, or otherwise produced from, or in combination with, any natural or manufactured fiber, yarn, or substitute therefor.
- (g) The term "household textile articles" means articles of wearing apparel, costumes and accessories, draperies, floor coverings, furnishings, beddings, and other textile goods of a type customarily used in a household regardless of where used in fact.
- (h) The term "textile fiber product" means--
  - (1) any fiber, whether in the finished or unfinished state, used or intended for use in household textile articles;
  - (2) any yarn or fabric, whether in the finished or unfinished state, used or intended for use in household textile articles; and
  - (3) any household textile article made in whole or in part of yarn or fabric;

except that such term does not include a product required to be labeled under the Wool Products Labeling Act of 1939 [15 U.S.C. 68 et seq.].

- (i) The term "affixed" means attached to the textile fiber product in any manner.
- (j) The term "Commission" means the Federal Trade Commission.
- (k) The term "commerce" means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation or between the District of Columbia and any State or Territory or foreign nation.
- (l) The term "Territory" includes the insular possessions of the United States, and also any Territory of the United States.
- (m) The term "ultimate consumer" means a person who obtains a textile fiber product by purchase or exchange with no intent to sell or exchange such textile fiber product in any form.

(Pub. L. 85-897, Sec. 2, Sept. 2, 1958, 72 Stat. 1717.)

## References in Text

The Wool Products Labeling Act of 1939, referred to in subsec.

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(h) (3), is act Oct. 14, 1940, ch. 871, 54 Stat. 1128, as amended, which is classified generally to subchapter III (Sec. 68 et seq.) of this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 68 of this title and Tables.

## Effective Date

Section 15 of Pub. L. 85-897 provided that: "This Act [this subchapter] shall take effect eighteen months after enactment [Sept. 2, 1958], except for the promulgation of rules and regulations by the Commission, which shall be promulgated within nine months after the enactment of this Act. The Commission shall provide for the exception of any textile fiber product acquired prior to the effective date of this Act."

## Short Title

Section 1 of Pub. L. 85-897 provided: "That this Act [this subchapter] may be cited as the 'Textile Fiber Products Identification Act'."

## Separability

Section 13 of Pub. L. 85-897 provided that: "If any provision of this Act [this subchapter], or the application thereof to any person, as that term is herein defined, is held invalid, the remainder of the Act and the application of the remaining provisions to any person shall not be affected thereby."

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## TITLE 15--COMMERCE AND TRADE

CHAPTER 2--FEDERAL TRADE COMMISSION; PROMOTION OF EXPORT TRADE AND  
PREVENTION OF UNFAIR METHODS OF COMPETITION

## SUBCHAPTER V--TEXTILE FIBER PRODUCTS IDENTIFICATION

## Sec. 70a. Violations of Federal Trade Commission Act

- (a) Introduction or manufacture for introduction into commerce, sale, advertising or offering for sale in commerce

The introduction, delivery for introduction, manufacture for introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States, of any textile fiber product which is misbranded or falsely or deceptively advertised within the meaning of this subchapter or the rules and regulations promulgated thereunder, is unlawful, and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act [15 U.S.C. 41 et seq.].

- (b) Sale, offering for sale, advertising, delivery, transportation of products advertised for sale in commerce

The sale, offering for sale, advertising, delivery, transportation, or causing to be transported, of any textile fiber product which has been advertised or offered for sale in commerce, and which is misbranded or falsely or deceptively advertised, within the meaning of this subchapter or the rules and regulations promulgated thereunder, is unlawful, and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act [15 U.S.C. 41 et seq.].

- (c) Sale, offering for sale, advertising, delivery, transportation of products after shipment in commerce

The sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, which is misbranded or falsely or deceptively advertised, within the meaning of this subchapter or the rules and regulations promulgated thereunder, is unlawful, and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act [15 U.S.C. 41 et seq.].

- (d) Application of section to common carrier, freight forwarder, etc.

This section shall not apply--

(1) to any common carrier or contract carrier or freight forwarder with respect to a textile fiber product received, shipped, delivered, or handled by it for shipment in the ordinary course of its business;

(2) to any processor or finisher in performing a contract for the account of a person subject to the provisions of this subchapter if the processor or finisher does not change the textile fiber content of the textile fiber product contrary to the terms of such contract;

(3) with respect to the manufacture, delivery for transportation, transportation, sale, or offering for sale of a

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textile fiber product for exportation from the United States to any foreign country;

(4) to any publisher or other advertising agency or medium for the dissemination of advertising or promotional material, except the manufacturer, distributor, or seller of the textile fiber product to which the false or deceptive advertisement relates, if such publisher or other advertising agency or medium furnishes to the Commission, upon request, the name and post office address of the manufacturer, distributor, seller, or other person residing in the United States, who caused the dissemination of the advertising material; or

(5) to any textile fiber product until such product has been produced by the manufacturer or processor in the form intended for sale or delivery to, or for use by, the ultimate consumer: Provided, That this exemption shall apply only if such textile fiber product is covered by an invoice or other paper relating to the marketing or handling of the textile fiber product and such invoice or paper correctly discloses the information with respect to the textile fiber product which would otherwise be required under section 70b of this title to be on the stamp, tag, label, or other identification and the name and address of the person issuing the invoice or paper.

(Pub. L. 85-897, Sec. 3, Sept. 2, 1958, 72 Stat. 1718.)

## References in Text

The Federal Trade Commission Act, referred to in subsecs. (a) to (c), is act Sept. 26, 1914, ch. 311, 38 Stat. 717, as amended, which is classified generally to subchapter I (Sec. 41 et seq.) of this chapter. For complete classification of this Act to the Code, see section 58 of this title and Tables.

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 [Document affected by Public Law 9 Section ](2)]  
 [CITE: 15USC70b]

## TITLE 15--COMMERCE AND TRADE

CHAPTER 2--FEDERAL TRADE COMMISSION; PROMOTION OF EXPORT TRADE AND  
PREVENTION OF UNFAIR METHODS OF COMPETITION

## SUBCHAPTER V--TEXTILE FIBER PRODUCTS IDENTIFICATION

Sec. 70b. Misbranded and falsely advertised textile fiber  
products

## (a) False or deceptive identification

Except as otherwise provided in this subchapter, a textile fiber product shall be misbranded if it is falsely or deceptively stamped, tagged, labeled, invoiced, advertised, or otherwise identified as to the name or amount of constituent fibers contained therein.

## (b) Stamp, tag, label or other means of identification; contents

Except as otherwise provided in this subchapter, a textile fiber product shall be misbranded if a stamp, tag, label, or other means of identification, or substitute therefor authorized by section 70c of this title, is not on or affixed to the product showing in words and figures plainly legible, the following:

(1) The constituent fiber or combination of fibers in the textile fiber product, designating with equal prominence each natural or manufactured fiber in the textile fiber product by its generic name in the order of predominance by the weight thereof if the weight of such fiber is 5 per centum or more of the total fiber weight of the product, but nothing in this section shall be construed as prohibiting the use of a nondeceptive trademark in conjunction with a designated generic name: Provided, That exclusive of permissible ornamentation, any fiber or group of fibers present in an amount of 5 per centum or less by weight of the total fiber content shall not be designated by the generic name or the trademark of such fiber or fibers, but shall be designated only as "other fiber" or "other fibers" as the case may be, but nothing in this section shall be construed as prohibiting the disclosure of any fiber present in a textile fiber product which has a clearly established and definite functional significance where present in the amount contained in such product.

(2) The percentage of each fiber present, by weight, in the total fiber content of the textile fiber product, exclusive of ornamentation not exceeding 5 per centum by weight of the total fiber content: Provided, That, exclusive of permissible ornamentation, any fiber or group of fibers present in an amount of 5 per centum or less by weight of the total fiber content shall not be designated by the generic name or trademark of such fiber or fibers, but shall be designated only as "other fiber" or "other fibers" as the case may be but nothing in this section shall be construed as prohibiting the disclosure of any fiber present in a textile fiber product which has a clearly established and definite functional significance where present in the amount stated: Provided further, That in the case of a textile fiber product which contains more than one kind of fiber, deviation in the fiber content of any fiber in such product, from the amount stated on the stamp, tag, label, or other identification shall not be a misbranding under this section unless such deviation is in excess of reasonable tolerances

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which shall be established by the Commission: And provided further, That any such deviation which exceeds said tolerances shall not be a misbranding if the person charged proves that the deviation resulted from unavoidable variations in manufacture and despite due care to make accurate the statements on the tag, stamp, label, or other identification.

(3) The name, or other identification issued and registered by the Commission, of the manufacturer of the product or one or more persons subject to section 70a of this title with respect to such product.

(4) If it is an imported textile fiber product the name of the country where processed or manufactured.

(5) If it is a textile fiber product processed or manufactured in the United States, it be so identified.

## (c) False or deceptive advertisement

For the purposes of this subchapter, a textile fiber product shall be considered to be falsely or deceptively advertised if any disclosure or implication of fiber content is made in any written advertisement which is used to aid, promote, or assist directly or indirectly in the sale or offering for sale of such textile fiber product, unless the same information as that required to be shown on the stamp, tag, label, or other identification under subsection (b)(1) and (2) of this section is contained in the heading, body, or other part of such written advertisement, except that the percentages of the fiber present in the textile fiber product need not be stated.

## (d) Additional information allowed

In addition to the information required in this section, the stamp, tag, label, or other means of identification, or advertisement may contain other information not violating the provisions of this subchapter.

## (e) Labelling of packages

For purposes of this subchapter, in addition to the textile fiber products contained therein, a package of textile fiber products intended for sale to the ultimate consumer shall be misbranded unless such package has affixed to it a stamp, tag, label, or other means of identification bearing the information required by subsection (b) of this section, with respect to such contained textile fiber products, or is transparent to the extent it allows for the clear reading of the stamp, tag, label, or other means of identification on the textile fiber product, or in the case of hosiery items, this section shall not be construed as requiring the affixing of a stamp, tag, label, or other means of identification to each hosiery product contained in a package if (1) such hosiery products are intended for sale to the ultimate consumer in such package, (2) such package has affixed to it a stamp, tag, label, or other means of identification bearing, with respect to the hosiery products contained therein, the information required by subsection (b) of this section, and (3) the information on the stamp, tag, label, or other means of identification affixed to such package is equally applicable with respect to each textile fiber product contained therein.

## (f) Fabric severed from bolts, pieces or rolls of fabric

This section shall not be construed as requiring designation of the fiber content of any portion of fabric, when sold at retail, which is severed from bolts, pieces, or rolls of fabric labeled in accordance with the provisions of this section at the time of such sale: Provided, That if any portion of fabric severed from a bolt, piece, or roll of fabric is in any manner represented as containing percentages of natural or manufactured fibers, other than that which is set forth on the labeled bolt, piece, or roll, this section shall be applicable thereto.



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and the information required shall be separately set forth and segregated as required by this section.

(g) Advertisement of textile product by use of name or symbol of fur-bearing animal

For the purposes of this subchapter, a textile fiber product shall be considered to be falsely or deceptively advertised if the name or symbol of any fur-bearing animal is used in the advertisement of such product unless such product, or the part thereof in connection with which the name or symbol of a fur-bearing animal is used, is a fur or fur product within the meaning of the Fur Products Labeling Act (15 U.S.C. 69 et seq.): Provided, however, That where a textile fiber product contains the hair or fiber of a fur-bearing animal, the name of such animal, in conjunction with the word "fiber", "hair", or "blend", may be used.

(h) Reused stuffing

For the purposes of this subchapter, a textile fiber product shall be misbranded if it is used as stuffing in any upholstered product, mattress, or cushion after having been previously used as stuffing in any other upholstered product, mattress, or cushion, unless the upholstered product, mattress, or cushion containing such textile fiber product bears a stamp, tag, or label approved by the Commission indicating in words plainly legible that it contains reused stuffing.

(i) Mail order catalog or promotional material

For the purposes of this subchapter, a textile fiber product shall be considered to be falsely or deceptively advertised in any mail order catalog or mail order promotional material which is used in the direct sale or direct offering for sale of such textile fiber product, unless such textile fiber product description states in a clear and conspicuous manner that such textile fiber product is processed or manufactured in the United States of America, or imported, or both.

(j) Location of stamp, tag, label, or other identification

For purposes of this subchapter, any textile fiber product shall be misbranded if a stamp, tag, label, or other identification conforming to the requirements of this section is not on or affixed to the inside center of the neck midway between the shoulder seams or, if such product does not contain a neck, in the most conspicuous place on the inner side of such product, unless it is on or affixed on the outer side of such product, or in the case of hosiery items on the outer side of such product or package.

(k) Marking of certain sock products

(1) Notwithstanding any other provision of law, socks provided for in subheading 6115.92.90, 6115.93.90, 6115.99.18, 6111.20.60, 6111.30.50, or 6111.90.50 of the Harmonized Tariff Schedule of the United States, as in effect on September 1, 2003, shall be marked as legibly, indelibly, and permanently as the nature of the article or package will permit in such a manner as to indicate to the ultimate consumer in the United States the English name of the country of origin of the article. The marking required by this subsection shall be on the front of the package, adjacent to the size designation of the product, and shall be set forth in such a manner as to be clearly legible, conspicuous, and readily accessible to the ultimate consumer.

(2) Exceptions.--Any package that contains several different types of goods and includes socks classified under subheading 6115.92.90, 6115.93.90, 6115.99.18, 6111.20.60, 6111.30.50, or 6111.90.50 of the Harmonized Tariff Schedule of the United States, as in effect on September 1, 2003, shall not be subject to the requirements of paragraph (1).

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(Pub. L. 85-897, Sec. 4, Sept. 2, 1958, 72 Stat. 1719; Pub. L. 89-35, Secs. 1, 2, June 5, 1965, 79 Stat. 124; Pub. L. 98-417, title III, Secs. 301-303, Sept. 24, 1984, 98 Stat. 1603, 1604; Pub. L. 108-429, title II, Sec. 2004(h)(1), Dec. 3, 2004, 118 Stat. 2594.)

## References in Text

The Harmonized Tariff Schedule of the United States, referred to in subsec. (k), is not set out in the Code. See Publication of Harmonized Tariff Schedule note set out under section 1202 of Title 19, Customs Duties.

The Fur Products Labeling Act, referred to in subsec. (g), is act Aug. 8, 1951, ch. 298, 65 Stat. 175, as amended, which is classified generally to subchapter IV (Sec. 69 et seq.) of this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 69 of this title and Tables.

## Amendments

2004--Subsec. (k). Pub. L. 108-429 added subsec. (k).

1984--Subsec. (b)(5). Pub. L. 98-417, Sec. 301, added par. (5).

Subsec. (e). Pub. L. 98-417, Sec. 302, amended subsec. (e) generally. Prior to amendment, subsec. (e) read as follows: "This section shall not be construed as requiring the affixing of a stamp, tag, label, or other means of identification to each textile fiber product contained in a package if (1) such textile fiber products are intended for sale to the ultimate consumer in such package, (2) such package has affixed to it a stamp, tag, label, or other means of identification bearing, with respect to the textile fiber products contained therein, the information required by subsection (b) of this section, and (3) the information on the stamp, tag, label, or other means of identification affixed to such package is equally applicable with respect to each textile fiber product contained therein."

Subsecs. (i), (j). Pub. L. 98-417, Sec. 303, added subsecs. (i) and (j).

1965--Subsec. (b)(1). Pub. L. 89-35, Sec. 1, inserted "", but nothing in this section shall be construed as prohibiting the disclosure of any fiber present in a textile fiber product which has a clearly established and definite functional significance where present in the amount contained in such product".

Subsec. (b)(2). Pub. L. 89-35, Sec. 2, inserted "", but nothing in this section shall be construed as prohibiting the disclosure of any fiber present in a textile fiber product which has a clearly established and definite functional significance where present in the amount stated".

## Effective Date of 2004 Amendment

Pub. L. 108-429, title II, Sec. 2004(h)(2), Dec. 3, 2004, 118 Stat. 2594, provided that: "The amendment made by paragraph (1) [amending this section] shall take effect on the date that is 15 months after the date of enactment of this Act [Dec. 3, 2004], and on and after the date that is 15 months after such date of enactment, any provision of part 303 of title 16, Code of Federal Regulations, that is inconsistent with such amendment shall not apply."

## Effective Date of 1984 Amendment

Amendment by Pub. L. 98-417 effective 90 days after Sept. 24, 1984, see section 307 of Pub. L. 98-417, set out as a note under section 68b of this title.

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[CITE: 15USC70e]

## TITLE 15--COMMERCE AND TRADE

CHAPTER 2--FEDERAL TRADE COMMISSION; PROMOTION OF EXPORT TRADE AND  
PREVENTION OF UNFAIR METHODS OF COMPETITION

## SUBCHAPTER V--TEXTILE FIBER PRODUCTS IDENTIFICATION

## Sec. 70c. Removal of stamp, tag, label, or other identification

## (a) Removal or mutilation after shipment in commerce

After shipment of a textile fiber product in commerce it shall be unlawful, except as provided in this subchapter, to remove or mutilate, or cause or participate in the removal or mutilation of, prior to the time any textile fiber product is sold and delivered to the ultimate consumer, any stamp, tag, label, or other identification required by this subchapter to be affixed to such textile fiber product, and any person violating this section shall be guilty of an unfair method of competition, and an unfair or deceptive act or practice, under the Federal Trade Commission Act [15 U.S.C. 41 et seq.].

## (b) Substitution of stamp, tag, etc.

Any person--

(1) introducing, selling, advertising, or offering for sale, in commerce, or importing into the United States, a textile fiber product subject to the provisions of this subchapter, or

(2) selling, advertising, or offering for sale a textile fiber product whether in its original state or contained in other textile fiber products, which has been shipped, advertised, or offered for sale, in commerce,

may substitute for the stamp, tag, label, or other means of identification required to be affixed to such textile product pursuant to section 70b(b) of this title, a stamp, tag, label, or other means of identification conforming to the requirements of section 70b(b) of this title, and such substituted stamp, tag, label, or other means of identification shall show the name or other identification issued and registered by the Commission of the person making the substitution.

## (c) Affixing of stamp, tag, etc. to individual unit of broken package

If any person other than the ultimate consumer breaks a package which bears a stamp, tag, label, or other means of identification conforming to the requirements of section 70b of this title, and if such package contains one or more units of a textile fiber product to which a stamp, tag, label, or other identification conforming to the requirements of section 70b of this title is not affixed, such person shall affix a stamp, tag, label, or other identification bearing the information on the stamp, tag, label, or other means of identification attached to such broken package to each unit of textile fiber product taken from such broken package.

(Pub. L. 85-897, Sec. 5, Sept. 2, 1958, 72 Stat. 1720.)

## References in Text

The Federal Trade Commission Act, referred to in subsec. (a), is act Sept. 26, 1914, ch. 311, 38 Stat. 717, as amended, which is classified generally to subchapter I (Sec. 41 et seq.) of this chapter. For

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complete classification of this Act to the Code, see section 58 of this title and Tables.

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## SUBCHAPTER V--TEXTILE FIBER PRODUCTS IDENTIFICATION

## Sec. 70d. Records

## (a) Maintenance and preservation by manufacturer

Every manufacturer of textile fiber products subject to this subchapter shall maintain proper records showing the fiber content as required by this subchapter of all such products made by him, and shall preserve such records for at least three years.

## (b) Maintenance and preservation by person substituting stamp, tag, etc.

Any person substituting a stamp, tag, label, or other identification pursuant to section 70c(b) of this title shall keep such records as will show the information set forth on the stamp, tag, label, or other identification that he removed and the name or names of the person or persons from whom such textile fiber product was received, and shall preserve such records for at least three years.

## (c) Neglect or refusal to maintain or preserve records

The neglect or refusal to maintain or preserve the records required by this section is unlawful, and any person neglecting or refusing to maintain such records shall be guilty of an unfair method of competition, and an unfair or deceptive act or practice, in commerce, under the Federal Trade Commission Act [15 U.S.C. 41 et seq.].

(Pub. L. 85-897, Sec. 6, Sept. 2, 1958, 72 Stat. 1721.)

## References in Text

The Federal Trade Commission Act, referred to in subsec. (c), is act Sept. 26, 1914, ch. 311, 38 Stat. 717, as amended, which is classified generally to subchapter I (Sec. 41 et seq.) of this chapter. For complete classification of this Act to the Code, see section 58 of this title and Tables.

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## SUBCHAPTER V--TEXTILE FIBER PRODUCTS IDENTIFICATION

## Sec. 70e. Enforcement

## (a) Enforcement by Federal Trade Commission

Except as otherwise specifically provided herein, this subchapter shall be enforced by the Federal Trade Commission under rules, regulations, and procedure provided for in the Federal Trade Commission Act [15 U.S.C. 41 et seq.].

## (b) Terms of Federal Trade Commission Act incorporated into this subchapter

The Commission is authorized and directed to prevent any person from violating the provisions of this subchapter in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act [15 U.S.C. 41 et seq.] were incorporated into and made a part of this subchapter; and any such person violating the provisions of this subchapter shall be subject to the penalties and entitled to the privileges and immunities provided in said Federal Trade Commission Act, in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though the applicable terms and provisions of the said Federal Trade Commission Act were incorporated into and made a part of this subchapter.

## (c) Rules and regulations by Federal Trade Commission

The Commission is authorized and directed to make such rules and regulations, including the establishment of generic names of manufactured fibers, under and in pursuance of the terms of this subchapter as may be necessary and proper for administration and enforcement.

## (d) Inspection, analyses, tests, etc.

The Commission is authorized to cause inspections, analyses, tests, and examinations to be made of any product subject to this subchapter.

[Pub. L. 85-897, Sec. 7, Sept. 2, 1958, 72 Stat. 1721.]

## References in Text

The Federal Trade Commission Act, referred to in subsecs. (a) and (b), is act Sept. 26, 1914, ch. 311, 38 Stat. 717, as amended, which is classified generally to subchapter I (Sec. 41 et seq.) of this chapter. For complete classification of this Act to the Code, see section 58 of this title and Tables.

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## Sec. 70f. Injunction proceedings

Whenever the Commission has reason to believe--

(a) that any person is doing, or is about to do, an act which by section 70a, 70c, 70d, 70g, or 70h(b) of this title is declared to be unlawful; and

(b) that it would be to the public interest to enjoin the doing of such act until complaint is issued by the Commission under the Federal Trade Commission Act [15 U.S.C. 41 et seq.] and such complaint is dismissed by the Commission or set aside by the court on review or until an order to cease and desist made thereon by the Commission has become final within the meaning of the Federal Trade Commission Act,

the Commission may bring suit in the district court of the United States or in the United States court of any Territory, for the district or Territory in which such person resides or transacts business, to enjoin the doing of such act and upon proper showing a temporary injunction or restraining order shall be granted without bond.

(Pub. L. 85-897, Sec. 8, Sept. 2, 1958, 72 Stat. 1721.)

## References in Text

The Federal Trade Commission Act, referred to in text, is act Sept. 26, 1914, ch. 311, 38 Stat. 717, as amended, which is classified generally to subchapter I (Sec. 41 et seq.) of this chapter. For complete classification of this Act to the Code, see section 59 of this title and Tables.

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## Sec. 70g. Exclusion of misbranded textile fiber products

All textile fiber products imported into the United States shall be stamped, tagged, labeled, or otherwise identified in accordance with the provisions of section 70b of this title, and all invoices of such products required pursuant to section 1484 of title 19, shall set forth, in addition to the matter therein specified, the information with respect to said products required under the provisions of section 70b(b) of this title, which information shall be in the invoices prior to their certification, if such certification is required pursuant to section 1484 of title 19. The falsification of, or failure to set forth the required information in such invoices, or the falsification or perjury of the consignee's declaration provided for in section 1485 of title 19, insofar as it relates to such information, is unlawful, and shall be an unfair method of competition, and an unfair and deceptive act or practice, in commerce under the Federal Trade Commission Act [15 U.S.C. 41 et seq.]; and any person who falsifies, or perjures the consignee's declaration insofar as it relates to such information, may thenceforth be prohibited by the Commission from importing, or participating in the importation of, any textile fiber product into the United States except upon filing bond with the Secretary of the Treasury in a sum double the value of said products and any duty thereon, conditioned upon compliance with the provisions of this subchapter. A verified statement from the manufacturer or producer of such products showing their fiber content as required under the provisions of this subchapter may be required under regulation prescribed by the Secretary of the Treasury.

(Pub. L. 85-897, Sec. 9, Sept. 2, 1958, 72 Stat. 1722.)

## References in Text

The Federal Trade Commission Act, referred to in text, is act Sept. 26, 1914, ch. 311, 38 Stat. 717, as amended, which is classified generally to subchapter I (Sec. 41 et seq.) of this chapter. For complete classification of this Act to the Code, see section 58 of this title and Tables.



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## SUBCHAPTER V--TEXTILE FIBER PRODUCTS IDENTIFICATION

## Sec. 70h. Guaranty

## (a) Avoidance of liability; requirements

No person shall be guilty of an unlawful act under section 70a of this title if he establishes a guaranty received in good faith, signed by and containing the name and address of the person residing in the United States by whom the textile fiber product guaranteed was manufactured or from whom it was received, that said product is not misbranded or falsely invoiced under the provisions of this subchapter. Said guaranty shall be (1) a separate guaranty specifically designating the textile fiber product guaranteed, in which case it may be on the invoice or other paper relating to said product; or (2) a continuing guaranty given by seller to the buyer applicable to all textile fiber products sold to or to be sold to buyer by seller in a form as the Commission, by rules and regulations, may prescribe; or (3) a continuing guaranty filed with the Commission applicable to all textile fiber products handled by a guarantor in such form as the Commission by rules and regulations may prescribe.

## (b) Furnishing false guaranty

The furnishing of a false guaranty, except where the person furnishing such false guaranty relies on a guaranty to the same effect received in good faith signed by and containing the name and address of the person residing in the United States by whom the product guaranteed was manufactured or from whom it was received, is unlawful, and shall be an unfair method of competition, and an unfair and deceptive act or practice, in commerce, within the meaning of the Federal Trade Commission Act [15 U.S.C. 41 et seq.].

{Pub. L. 85-897, Sec. 10, Sept. 2, 1958, 72 Stat. 1722.}

## References in Text

The Federal Trade Commission Act, referred to in subsec. (b), is act Sept. 26, 1914, ch. 311, 38 Stat. 717, as amended, which is classified generally to subchapter I (Sec. 41 et seq.) of this chapter. For complete classification of this Act to the Code, see section 58 of this title and Tables.

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## SUBCHAPTER V--TEXTILE FIBER PRODUCTS IDENTIFICATION

## Sec. 70i. Criminal penalty

(a) Any person who willfully does an act which by section 70a, 70c, 70d, 70g, or 70h(b) of this title is declared to be unlawful shall be guilty of a misdemeanor and upon conviction shall be fined not more than \$5,000 or be imprisoned not more than one year, or both, in the discretion of the court: Provided, That nothing in this section shall limit any other provision of this subchapter.

(b) Whenever the Commission has reason to believe that any person is guilty of a misdemeanor under this section, it may certify all pertinent facts to the Attorney General. If, on the basis of the facts certified, the Attorney General concurs in such belief, it shall be his duty to cause appropriate proceedings to be brought for the enforcement of the provisions of this section against such person.

(Pub. L. 85-897, Sec. 11, Sept. 2, 1958, 72 Stat. 1723.)

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## SUBCHAPTER V--TEXTILE FIBER PRODUCTS IDENTIFICATION

## Sec. 70j. Exemptions

(a) None of the provisions of this subchapter shall be construed to apply to--

- (1) upholstery stuffing, except as provided in section 70b(h) of this title;
- (2) outer coverings of furniture, mattresses, and box springs;
- (3) linings or interlinings incorporated primarily for structural purposes and not for warmth;
- (4) filling or padding incorporated primarily for structural purposes and not for warmth;
- (5) stiffenings, trimmings, facings, or interfacings;
- (6) backings of, and paddings or cushions to be used under, floor coverings;
- (7) sewing and handicraft threads;
- (8) bandages, surgical dressings, and other textile fiber products, the labeling of which is subject to the requirements of the Federal Food, Drug and Cosmetic Act of 1938, as amended (21 U.S.C. 301 et seq.);
- (9) waste materials not intended for use in a textile fiber product;
- (10) textile fiber products incorporated in shoes or overshoes or similar outer footwear;
- (11) textile fiber products incorporated in headwear, handbags, luggage, brushes, lampshades, or toys, catamenial devices, adhesive tapes and adhesive sheets, cleaning cloths impregnated with chemicals, or diapers.

The exemption provided for any article by paragraph (3) or (4) of this subsection shall not be applicable if any representation as to fiber content of such article is made in any advertisement, label, or other means of identification covered by section 70b of this title.

(b) The Commission may exclude from the provisions of this subchapter other textile fiber products (1) which have an insignificant or inconsequential textile fiber content, or (2) with respect to which the disclosure of textile fiber content is not necessary for the protection of the ultimate consumer.

(Pub. L. 85-897, Sec. 12, Sept. 2, 1958, 72 Stat. 1723.)

## References in Text

The Federal Food, Drug and Cosmetic Act of 1938, referred to in subsec. (a)(8), is act June 25, 1938, ch. 675, 52 Stat. 1040, as amended, which is classified generally to chapter 9 (Sec. 301 et seq.) of Title 21, Food and Drugs. For complete classification of this Act to the Code, see section 301 of Title 21 and Tables.

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Sec. 70k. Application of other laws

The provisions of this subchapter shall be held to be in addition --  
to, and not in substitution for or limitation of, the provisions of any  
other Act of the United States.

(Pub. L. 85-897, Sec. 14, Sept. 2, 1958, 72 Stat. 1724.)

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indirectly in labeling, invoicing or advertising such products. (For example, a fur product made by the skin-on-skin method should not be represented as having been made by the letout method.)

(b) Where a fur product is made by the method known in the trade as letting-out, or is made of fur which has been sheared or plucked, such facts may be set out in labels, invoices and advertising.

**§ 301.46 Reference to guaranty by Government prohibited.**

No representation nor suggestion that a fur or fur product is guaranteed under the act by the Government, or any branch thereof, shall be made in the labeling, invoicing or advertising in connection therewith.

**§ 301.47 Form of separate guaranty.**

The following is a suggested form of separate guaranty under section 10 of the Act which may be used by a guarantor residing in the United States, on and as part of an invoice in which the merchandise covered is listed and specified and which shows the date of such document, the date of shipment of the merchandise and the signature and address of the guarantor:

We guarantee that the fur products or furs specified herein are not misbranded nor falsely nor deceptively advertised or invoiced under the provisions of the Fur Products Labeling Act and rules and regulations thereunder.

**§ 301.48 Continuing guaranty filed with Federal Trade Commission.**

(a)(1) Under section 10 of the Act any person residing in the United States and handling fur or fur products may file a continuing guaranty with the Federal Trade Commission. When filed with the Commission a continuing guaranty shall be fully executed in duplicate. Forms for use in preparing continuing guaranties shall be supplied by the Commission upon request.

(2) Continuing guaranties filed with the Commission shall continue in effect until revoked. The guarantor shall promptly report any change in business status to the Commission.

(3) The prescribed form for a continuing guaranty is found in § 303.38(b)

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of this chapter. The form is available upon request from the Textile Section, Enforcement Division, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

(b) Any person who has a continuing guaranty on file with the Commission may, during the effective date of the guaranty, give notice of such fact by setting forth on the invoice or other paper covering the marketing or handling of the product guaranteed the following: "Continuing guaranty under the Fur Products Labeling Act filed with the Federal Trade Commission."

(c) Any person who falsely represents in writing that he has a continuing guaranty on file with the Federal Trade Commission when such is not a fact shall be deemed to have furnished a false guaranty under section 10(b) of the Act.

[26 FR 3188, Apr. 14, 1961, as amended at 48 FR 12517, Mar. 25, 1983; 63 FR 7517, Feb. 13, 1998; 63 FR 71583, Dec. 28, 1998]

**§ 301.48a Guaranties not received in good faith.**

A guaranty shall not be deemed to have been received in good faith within the meaning of section 10(a) of the Act:

(a) Unless the recipient of such guaranty shall have examined the required label, required invoice and advertisement relating to the fur product or fur so guaranteed;

(b) If the recipient of the guaranty has knowledge that the fur or fur product guaranteed is misbranded, falsely invoiced or falsely advertised.

[26 FR 3188, Apr. 14, 1961]

**§ 301.49 Deception in general.**

No furs nor fur products shall be labeled, invoiced, or advertised in any manner which is false, misleading or deceptive in any respect.

**PART 303—RULES AND REGULATIONS UNDER THE TEXTILE FIBER PRODUCTS IDENTIFICATION ACT**

Sec.	
303.1	Terms defined.
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303.3	Fibers present in amounts of less than 5 percent.
303.4	English language requirement.

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- 303.5 Abbreviations, ditto marks, and asterisks prohibited.
- 303.6 Generic names of fibers to be used.
- 303.7 Generic names and definitions for manufactured fibers.
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- 303.9 Use of fur-bearing animal names and symbols prohibited.
- 303.10 Fiber content of special types of products.
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- 303.12 Trimmings of household textile articles.
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- 303.14 Products containing unknown fibers.
- 303.15 Required label and method of affixing.
- 303.16 Arrangement and disclosure of information on labels.
- 303.17 Use of fiber trademarks and generic names on labels.
- 303.18 Terms implying fibers not present.
- 303.19 Name or other identification required to appear on labels.
- 303.20 Registered identification numbers.
- 303.21 Marking of samples, swatches, or specimens and products sold therefrom.
- 303.22 Products containing linings, interlinings, fillings, and padding.
- 303.23 Textile fiber products containing superimposed or added fibers.
- 303.24 Pile fabrics and products composed thereof.
- 303.25 Sectional disclosure of content.
- 303.26 Ornamentation.
- 303.27 Use of the term "All" or "100%."
- 303.28 Products contained in packages.
- 303.29 Labeling of pairs or products containing two or more units.
- 303.30 Textile fiber products in form for consumer.
- 303.31 Invoice in lieu of label.
- 303.32 Products containing reused stuffing.
- 303.33 Country where textile fiber products are processed or manufactured.
- 303.34 Country of origin in mail order advertising.
- 303.35 Use of terms "virgin" or "new."
- 303.36 Form of separate guaranty.
- 303.37 Form of continuing guaranty from seller to buyer.
- 303.38 Continuing guaranty filed with Federal Trade Commission.
- 303.39 Maintenance of records.
- 303.40 Use of terms in written advertisements that imply presence of a fiber.
- 303.41 Use of fiber trademarks and generic names in advertising.
- 303.42 Arrangement of information in advertising textile fiber products.
- 303.43 Fiber content tolerances.
- 303.44 Products not intended for uses subject to the act.
- 303.45 Exclusions from the act.

AUTHORITY: 15 U.S.C. 70 *et seq.*

SOURCE: 24 FR 4480, June 2, 1959, unless otherwise noted.

## § 303.1 Terms defined.

As used in this part, unless the context otherwise specifically requires:

(a) The term *Act* means the *Textile Fiber Products Identification Act* (approved September 2, 1958, 85th Congress, 2d Sess.; 15 U.S.C. 70, 72 Stat. 1717).

(b) The terms *rule*, *rules*, *regulations*, and *rules and regulations* mean the rules and regulations prescribed by the Commission pursuant to section 7(c) of the Act.

(c) The definition of terms contained in section 2 of the Act shall be applicable also to such terms when used in rules promulgated under the Act.

(d) The term *United States* means the several States, the District of Columbia, and the Territories and possessions of the United States.

(e) The terms *required information* and *information required* mean such information as is required to be disclosed on labels or invoices and in advertising under the Act and regulations.

(f) The terms *label*, *labels*, *labeled*, and *labeling* mean the stamp, tag, label, or other means of identification, or authorized substitute therefor, required to be on or affixed to textile fiber products by the Act and regulations and on which the information required is to appear.

(g) The terms *marketing or handling* and *marketed or handled*, when applied to textile fiber products, mean any one or all of the transactions set forth in section 3 of the Act.

(h) The terms *invoice* and *invoice or other paper* mean an account, order, memorandum, list, or catalog, which is issued to a purchaser, consignee, bailee, correspondent, agent, or any other person, in writing or in some other form capable of being read and preserved in a tangible form, in connection with the marketing or handling of any textile fiber product transported or delivered to such person.

(i) The term *outer coverings of furniture, mattresses, and box springs* means those coverings as are permanently incorporated in such articles.

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(j) The term *wearing apparel* means any costume or article of clothing or covering for any part of the body worn or intended to be worn by individuals.

(k) The term *beddings* means sheets, covers, blankets, comforters, pillows, pillowcases, quilts, bedspreads, pads, and all other textile fiber products used or intended to be used on or about a bed or other place for reclining or sleeping but shall not include furniture, mattresses or box springs.

(l) The term *headwear* means any textile fiber product worn exclusively on or about the head or face by individuals.

(m) The term *backings*, when applied to floor coverings, means that part of a floor covering to which the pile, face, or outer surface is woven, tufted, hooked, knitted, or otherwise attached, and which provides the structural base of the floor covering. The term *backing* shall also include fabrics attached to the structural base of the floor covering in such a way as to form a part of such structural base, but shall not include the pile, face, or outer surface of the floor covering or any part thereof.

(n) The term *elastic material* means a fabric composed of yarn consisting of an elastomer or a covered elastomer.

(o) The term *coated fabric* means any fabric which is coated, filled, impregnated, or laminated with a continuous-film-forming polymeric composition in such a manner that the weight added to the base fabric is at least 35 percent of the weight of the fabric before coating, filling, impregnation, or lamination.

(p) The term *upholstered product* means articles of furniture containing stuffing and shall include mattresses and box springs.

(q) The term *ornamentation* means any fibers or yarns imparting a visibly discernible pattern or design to a yarn or fabric.

(r) The term *fiber trademark* means a word or words used by a person to identify a particular fiber produced or sold by him and to distinguish it from fibers of the same generic class produced or sold by others. Such term shall not include any trade mark, product mark, house mark, trade name or other name which does not identify a particular fiber.

(s) The term *wool* means the fiber from the fleece of the sheep or lamb or hair of the Angora or Cashmere goat (and may include the so-called specialty fibers from the hair of the camel, alpaca, llama, and vicuna) which has never been reclaimed from any woven or felted wool product.

(t) The term *recycled wool* means (1) the resulting fiber when wool has been woven or felted into a wool product which, without ever having been utilized in any way by the ultimate consumer, subsequently has been made into a fibrous state, or (2) the resulting fiber when wool or reprocessed wool has been spun, woven, knitted, or felted into a wool product which, after having been used in any way by the ultimate consumer, subsequently has been made into a fibrous state.

(u) The terms *mail order catalog* and *mail order promotional material* mean any materials, used in the direct sale or direct offering for sale of textile products, that are disseminated to ultimate consumers in print or by electronic means, other than by broadcast, and that solicit ultimate consumers to purchase such textile products by mail, telephone, electronic mail, or some other method without examining the actual product purchased.

[24 FR 4480, June 2, 1959, as amended at 45 FR 44263, July 1, 1980; 50 FR 15106, Apr. 17, 1985; 63 FR 7517, Feb. 12, 1998]

## § 303.2 General requirements.

(a) Each textile fiber product, except those exempted or excluded under section 12 of the Act, shall be labeled or invoiced in conformity with the requirements of the Act and regulations.

(b) Any advertising of textile fiber products subject to the Act shall be in conformity with the requirements of the Act and regulations.

(c) The requirements of the Act and regulations shall not be applicable to products required to be labeled under the Wool Products Labeling Act of 1939 (Pub. L. 76-850, 15 U.S.C. 68, 54 Stat. 1128).

(d) Any person marketing or handling textile fiber products who shall cause or direct a processor or finisher to label, invoice, or otherwise identify any textile fiber product with required information shall be responsible under

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the Act and regulations for any failure of compliance with the Act and regulations by reason of any statement or omission in such label, invoice, or other means of identification utilized in accordance with his direction: *Provided*, That nothing herein shall relieve the processor or finisher of any duty or liability to which he may be subject under the Act and regulations.

**§ 303.3 Fibers present in amounts of less than 5 percent.**

(a) Except as permitted in sections 4(b)(1) and 4(b)(2) of the Act, as amended, no fiber present in the amount of less than 5 percent of the total fiber weight shall be designated by its generic name or fiber trademark in disclosing the constituent fibers in required information, but shall be designated as "other fiber." When more than one of such fibers are present in a product, they shall be designated in the aggregate as "other fibers." *Provided*, however, that nothing in this section shall be construed as prohibiting the disclosure of any fiber present in a textile fiber product which has a clearly established and definite functional significance when present in the amount contained in such product, as for example:

96 percent Acetate  
4 percent Spandex.

(b) In making such disclosure, all of the provisions of the Act and regulations in this part setting forth the manner and form of disclosure of fiber content information, including the provisions of §§ 303.17 and 303.41 of this part relating to the use of generic names and fiber trademarks, shall be applicable.

[63 FR 7518, Feb. 13, 1998]

**§ 303.4 English language requirement.**

All required information shall be set out in the English language. If the required information appears in a language other than English, it also shall appear in the English language. The provisions of this section shall not apply to advertisements in foreign language newspapers or periodicals, but such advertising shall in all other respects comply with the Act and regulations.

**§ 303.5 Abbreviations, ditto marks, and asterisks prohibited.**

(a) In disclosing required information, words or terms shall not be designated by ditto marks or appear in footnotes referred to by asterisks or other symbols in required information, and shall not be abbreviated except as permitted in § 303.33(e) of this part.

(b) Where the generic name of a textile fiber is required to appear in immediate conjunction with a fiber trademark in advertising, labeling, or invoicing, a disclosure of the generic name by means of a footnote, to which reference is made by use of an asterisk or other symbol placed next to the fiber trademark, shall not be sufficient in itself to constitute compliance with the Act and regulations.

[24 FR 4480, June 2, 1959, as amended at 65 FR 75156, Dec. 1, 2000]

**§ 303.6 Generic names of fibers to be used.**

(a) Except where another name is permitted under the Act and regulations, the respective generic names of all fibers present in the amount of 5 percent or more of the total fiber weight of the textile fiber product shall be used when naming fibers in the required information; as for example: "cotton," "rayon," "silk," "linen," "nylon," etc.

(b) Where a textile fiber product contains the hair or fiber of a fur-bearing animal present in the amount 5 percent or more of the total fiber weight of the product, the name of the animal producing such fiber may be used in setting forth the required information, provided the name of such animal is used in conjunction with the words "fiber," "hair," or "blend;" as for example:

80 percent Rabbit hair.  
20 percent Nylon.  
or  
80 percent Silk.  
20 percent Mink fiber.

(c) The term *fur fiber* may be used to describe the hair or fur fiber or mixtures thereof of any animal or animals other than the sheep, lamb, Angora goat, Cashmere goat, camel, alpaca, llama or vicuna where such hair or fur fiber or mixture is present in the



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amount of 5 per centum or more of the total fiber weight of the textile fiber product and no direct or indirect representations are made as to the animal or animals from which the fiber so designated was obtained; as for example:

60 percent Cotton.  
40 percent Fur fiber.  
or  
50 percent Nylon.  
30 percent Mink hair.  
20 percent Fur fiber.

(d) Where textile fiber products subject to the Act contain (1) wool or (2) recycled wool in amounts of five per centum or more of the total fiber weight, such fibers shall be designated and disclosed as wool or recycled wool as the case may be.

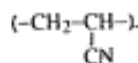
[24 FR 4490, June 2, 1959, as amended at 45 FR 44283, July 1, 1980]

**§ 303.7 Generic names and definitions for manufactured fibers.**

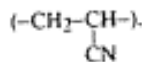
Pursuant to the provisions of section 7(c) of the Act, the Commission hereby establishes the generic names for manufactured fibers, together with their respective definitions, set forth in this section, and the generic names for manufactured fibers, together with their respective definitions, set forth in International Organization for Standardization ISO 2076: 1999(E), "Textiles—Man-made fibres—Generic names." This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from the American National Standards Institute, 11 West 42nd St., 13th floor, New York, NY 10036. Copies may be inspected at the Federal Trade Commission, Room 130, 600 Pennsylvania Avenue, NW., Washington, DC 20580, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: [http://www.archives.gov/federal\\_register/code\\_of\\_federal\\_regulations/ibr\\_locations.html](http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html).

(a) *Acrylic*. A manufactured fiber in which the fiber-forming substance is any long chain synthetic polymer composed of at least 85 percent by weight of acrylonitrile units

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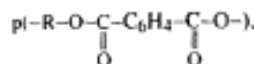


(b) *Modacrylic*. A manufactured fiber in which the fiber-forming substance is any long chain synthetic polymer composed of less than 85 percent but at least 35 percent by weight of acrylonitrile units

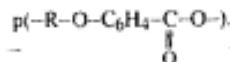


except fibers qualifying under paragraph (j)(2) of this section and fibers qualifying under paragraph (q) of this section. (Sec. 7, 72 Stat. 1717; 15 U.S.C. section 70e)

(c) *Polyester*. A manufactured fiber in which the fiber-forming substance is any long chain synthetic polymer composed of at least 85% by weight of an ester of a substituted aromatic carboxylic acid, including but not restricted to substituted terephthalate units,



and para substituted hydroxy-benzoate units,



Where the fiber is formed by the interaction of two or more chemically distinct polymers (of which none exceeds 85% by weight), and contains ester groups as the dominant functional unit (at least 85% by weight of the total polymer content of the fiber), and which, if stretched at least 100%, durably and rapidly reverts substantially to its unstretched length when the tension is removed, the term *elastereil-p* may be used as a generic description of the fiber.

(d) *Rayon*—A manufactured fiber composed of regenerated cellulose, as well as manufactured fibers composed

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of regenerated cellulose in which substituents have replaced not more than 15% of the hydrogens of the hydroxyl groups. Where the fiber is composed of cellulose precipitated from an organic solution in which no substitution of the hydroxyl groups takes place and no chemical intermediates are formed, the term *lyocell* may be used as a generic description of the fiber.

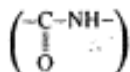
(e) *Acetate*. A manufactured fiber in which the fiber-forming substance is cellulose acetate. Where not less than 92 percent of the hydroxyl groups are acetylated, the term *triacetate* may be used as a generic description of the fiber.

(f) *Saran*. A manufactured fiber in which the fiber-forming substance is any long chain synthetic polymer composed of at least 80 percent by weight of vinylidene chloride units ( $-\text{CH}_2-\text{CCl}_2-$ ).

(g) *Aslon*. A manufactured fiber in which the fiber-forming substance is composed of any regenerated naturally occurring proteins.

(h) *Nytril*. A manufactured fiber containing at least 85 percent of a long chain polymer of vinylidene dinitrile ( $-\text{CH}_2-\text{C}(\text{CN})_2-$ ) where the vinylidene dinitrile content is no less than every other unit in the polymer chain.

(i) *Nylon*. A manufactured fiber in which the fiber-forming substance is a long-chain synthetic polyamide in which less than 85 percent of the amide



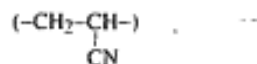
linkages are attached directly to two aromatic rings.

(j) *Rubber*. A manufactured fiber in which the fiber-forming substance is comprised of natural or synthetic rubber, including the following categories:

(1) A manufactured fiber in which the fiber-forming substance is a hydrocarbon such as natural rubber, polyisoprene, polybutadiene, copolymers of dienes and hydrocarbons, or amorphous (noncrystalline) polyolefins.

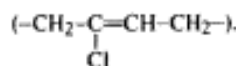
(2) A manufactured fiber in which the fiber-forming substance is a copolymer

of acrylonitrile and a diene (such as butadiene) composed of not more than 50 percent but at least 10 percent by weight of acrylonitrile units



The term *lastrile* may be used as a generic description for fibers falling within this category.

(3) A manufactured fiber in which the fiber-forming substance is a polychloroprene or a copolymer of chloroprene in which at least 35 percent by weight of the fiber-forming substance is composed of chloroprene units



(k) *Spandex*. A manufactured fiber in which the fiber-forming substance is a long chain synthetic polymer comprised of at least 85 percent of a segmented polyurethane.

(l) *Vinal*. A manufactured fiber in which the fiber-forming substance is any long chain synthetic polymer composed of at least 50 percent by weight of vinyl alcohol units ( $-\text{CH}_2-\text{CHOH}-$ ), and in which the total of the vinyl alcohol units and any one or more of the various acetal units is at least 85 percent by weight of the fiber.

(m) *Olefin*. A manufactured fiber in which the fiber-forming substance is any long chain synthetic polymer composed of at least 85 percent by weight of ethylene, propylene, or other olefin units, except amorphous (noncrystalline) polyolefins qualifying under paragraph (j)(1) of this section [Rule 7]. Where the fiber-forming substance is a cross-linked synthetic polymer, with low but significant crystallinity, composed of at least 95 percent by weight of ethylene and at least one other olefin unit, and the fiber is substantially elastic and heat resistant, the term *lastol* may be used as a generic description of the fiber.

(n) *Vinyon*. A manufactured fiber in which the fiber-forming substance is

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any long chain synthetic polymer composed of at least 85 percent by weight of vinyl chloride units ( $-\text{CH}_2-\text{CHCl}-$ ).

(o) *Metallic*. A manufactured fiber composed of metal, plastic-coated metal, metal-coated plastic, or a core completely covered by metal.

(p) *Glass*. A manufactured fiber in which the fiber-forming substance is glass.

(q) *Aridex*. A manufactured fiber in which the fiber-forming substance is any long chain synthetic polymer composed of at least 50 percent by weight of one or more esters of a monohydric alcohol and acrylic acid,  $\text{CH}_2=\text{CH}-\text{COOH}$ .

(r) *Novoloid*. A manufactured fiber containing at least 85 percent by weight of a cross-linked novolac.

(s) *Aramid*. A manufactured fiber in which the fiber-forming substance is a long-chain synthetic polyamide in which at least 85 percent of the amide



linkages are attached directly to two aromatic rings.

(t) *Sulfar*. A manufactured fiber in which the fiber-forming substance is a long chain synthetic polysulfide in which at least 85% of the sulfide ( $-\text{S}-$ ) linkages are attached directly to two (2) aromatic rings.

(u) *PBI*. A manufactured fiber in which the fiber-forming substance is a long chain aromatic polymer having reoccurring imidazole groups as an integral part of the polymer chain.

(v) *Elastoester*. A manufactured fiber in which the fiber-forming substance is a long-chain synthetic polymer composed of at least 50% by weight of aliphatic polyether and at least 35% by weight of polyester, as defined in 16 CFR 303.7(c).

(w) *Melamine*. A manufactured fiber in which the fiber-forming substance is a synthetic polymer composed of at least 50% by weight of a cross-linked melamine polymer.

(x) *Fluoropolymer*. A manufactured fiber containing at least 95% of a long-chain polymer synthesized from aliphatic fluorocarbon monomers.

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(y) *PLA*. A manufactured fiber in which the fiber-forming substance is composed of at least 85% by weight of lactic acid ester units derived from naturally occurring sugars.

(Sec. 6, 72 Stat. 1717; 15 U.S.C. 70e)

[24 FR 4460, June 2, 1959; 24 FR 5737, July 17, 1959, as amended at 31 FR 2652, Feb. 11, 1966; 31 FR 3002, Feb. 22, 1966; 34 FR 14595, Sept. 19, 1969; 38 FR 21782, Aug. 13, 1973; 38 FR 34115, Dec. 11, 1973; 39 FR 1834, Jan. 15, 1974; 51 FR 30807, 20909, June 9, 1986; 61 FR 16307, Apr. 15, 1996; 62 FR 30344, May 23, 1997; 63 FR 7518, Feb. 13, 1998; 63 FR 36174, July 2, 1998; 63 FR 71583, Dec. 28, 1998; 65 FR 75156, Dec. 1, 2000; 67 FR 4903, Feb. 1, 2002; 67 FR 70839, Nov. 27, 2002; 68 FR 3816, Jan. 27, 2003; 69 FR 18863, Apr. 9, 2004]

### § 303.8 Procedure for establishing generic names for manufactured fibers.

(a) Prior to the marketing or handling of a manufactured fiber for which no generic name has been established or otherwise recognized by the Commission, the manufacturer or producer thereof shall file a written application with the Commission, requesting the establishment of a generic name for such fiber, stating therein:

(1) The reasons why the applicant's fiber should not be identified by one of the generic names established by the Commission in § 303.7 of this part;

(2) The chemical composition of the fiber, including the fiber-forming substances and respective percentages thereof, together with samples of the fiber;

(3) Suggested names for consideration as generic, together with a proposed definition for the fiber;

(4) Any other information deemed by the applicant to be pertinent to the application, including technical data in the form of test methods;

(5) The earliest date on which the application proposes to market or handle the fiber in commerce for other than developmental or testing purposes.

(b) Upon receipt of the application, the Commission will, within sixty (60) days, either deny the application or assign to the fiber a numerical or alphabetical symbol for temporary use during further consideration of such application.

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(c) After taking the necessary procedure in consideration of the application, the Commission in due course shall establish a generic name or advise the applicant of its refusal to grant the application and designate the proper existing generic name for the fiber.

[24 FR 4460, June 2, 1959, as amended at 63 FR 7518, Feb. 13, 1998]

**§ 303.9 Use of fur-bearing animal names and symbols prohibited.**

(a) The advertising or the labeling of a textile fiber product shall not contain any names, words, depictions, descriptive matter, or other symbols which connote or signify a fur-bearing animal, unless such product or the part thereof in connection with which the names, words, depictions, descriptive matter, or other symbols are used is a fur product within the meaning of the Fur Products Labeling Act.

(b) Subject to the provisions of paragraph (a) of this section and § 303.6 of this part, a textile fiber product shall not be described or referred to in any manner in an advertisement or label with:

(1) The name or part of the name of a fur-bearing animal, whether as a single word or a combination word, or any coined word which is phonetically similar to a fur-bearing animal name, or which is only a slight variation in spelling of a fur-bearing animal name or part of the name. As for example, such terms as "Ermine," "Mink," "Persian," "Broadtail," "Beaverton," "Marmink," "Sableton," "Lam," "Pershian," "Minx," or similar terms shall not be used.

(2) Any word or name symbolic of a fur-bearing animal by reason of conventional usage or by reason of its close relationship with fur-bearing animals. As for example, such terms as "guardhair," "underfur," and "mutation," or similar terms, shall not be used.

(c) Nothing contained herein shall prevent:

(1) The nondeceptive use of animal names or symbols in referring to a textile fiber product where the fur of such animal is not commonly or commercially used in fur products, as that term is defined in the Fur Products La-

beling Act, as for example "kitten soft", "Bear Brand", etc.

(2) The nondeceptive use of a trademark or trade name containing the name, symbol, or depiction of a fur-bearing animal unless:

(i) The textile fiber product in connection with which such trademark or trade name is used simulates a fur or fur product; or

(ii) Such trademark or trade name is used in any advertisement of a textile fiber product together with any depiction which has the appearance of a fur or fur product; or

(iii) The use of such trademark or trade name is prohibited by the Fur Products Labeling Act.

[24 FR 4460, June 2, 1959, as amended at 28 FR 722, Jan. 16, 1963]

**§ 303.10 Fiber content of special types of products.**

(a) Where a textile product is made wholly of elastic yarn or material, with minor parts of non-elastic material for structural purposes, it shall be identified as to the percentage of the elastomer, together with the percentage of all textile coverings of the elastomer and all other yarns or materials used therein.

Where a textile fiber product is made in part of elastic material and in part of other fabric, the fiber content of such fabric shall be set forth sectionally by percentages as in the case of other fabrics. In such cases the elastic material may be disclosed by describing the material as elastic followed by a listing in order of predominance by weight of the fibers used in such elastic, including the elastomer, where such fibers are present by 5 per centum or more with the designation "other fiber" or "other fibers" appearing last when fibers required to be so designated are present. An example of labeling under this paragraph is:

Front and back non-elastic sections:

50 percent Acetate.

50 percent Cotton.

Elastic: Rayon, cotton, nylon, rubber.

(b) Where drapery or upholstery fabrics are manufactured on hand-operated looms for a particular customer after the sale of such fabric has been consummated, and the amount of the

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order does not exceed 100 yards (91.44 m) of fabric, the required fiber content disclosure may be made by listing the fibers present in order of predominance by weight with any fiber or fibers required to be designated as "other fiber" or "other fibers" appearing last, as for example:

Rayon  
Wool  
Acetate  
Metallic  
Other fibers

(c)(1) Where a manufactured textile fiber is essentially a physical combination or mixture of two or more chemically distinct constituents or components combined at or prior to the time of extrusion, which components if separately extruded would each fall within different existing definitions of textile fibers as set forth in §303.7 of this part (Rule 7), the fiber content disclosure as to such fiber, shall for all purposes under the regulations in this part (1) disclose such fact in the required fiber content information by appropriate nondeceptive descriptive terminology, such as "biconstituent fiber" or "multiconstituent fiber," (ii) set out the components contained in the fiber by the appropriate generic name specified in §303.7 of this part (Rule 7) in the order of their predominance by weight, and (iii) set out the respective percentages of such components by weight.

(2) If the components of such fibers are of a matrix-fibril configuration, the term *matrix-fibril fiber* or *matrix fiber* may be used in setting forth the information required by this paragraph.

(3) Examples of proper fiber content designations under this paragraph are:

100% Biconstituent Fiber  
(65% Nylon, 35% Polyester)  
80% Matrix Fiber (60% Nylon, 40% Polyester)  
15% Polyester  
5% Rayon

(4) All of the provisions as to fiber content disclosures contained in the Act and regulations, including the provisions relative to fiber content tolerances and disclosures of fibers present in amounts of less than 5 percentum of the total fiber weight, shall also be ap-

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plicable to the designations and disclosures prescribed by this paragraph.

[25 FR 7044, July 25, 1960, as amended at 30 FR 14253, Nov. 13, 1965; 34 FR 12134 July 19, 1969; 61 FR 11544, Mar. 21, 1996]

## §303.11 Floor coverings containing backings, fillings, and paddings.

In disclosing the required fiber content information as to floor coverings containing exempted backings, fillings, or paddings, the disclosure shall be made in such manner as to indicate that it relates only to the face, pile, or outer surface of the floor covering and not to the backing, filling, or padding. Examples of the form of marking these types of floor coverings as to fiber content are as follows:

100% Cotton Pile  
Face—60% Rayon, 40% Cotton  
Outer Surface—100% Wool

## §303.12 Trimmings of household textile articles.

(a) Trimmings incorporated in articles of wearing apparel and other household textile articles may, among other forms of trim, include: (1) Rickrack, tape, belting, binding, braid, labels (either required or non-required), collars, cuffs, wrist bands, leg bands, waist bands, gussets, gores, welts, and findings, including superimposed garters in hosiery, and elastic materials and threads inserted in or added to the basic product or garment in minor proportion for holding, reinforcing or similar structural purposes; (2) decorative trim, whether applied by embroidery, overlay, applique, or attachment; and (3) decorative patterns or designs which are an integral part of the fabric out of which the household textile article is made: *Provided*, That such decorative trim or decorative pattern or design, as specified in paragraphs (a) (2) and (3) of this section, does not exceed 15 percent of the surface area of the household textile article. If no representation is made as to the fiber content of the decorative trim or decoration, as provided for in paragraphs (a) (2) and (3) of this section, the fiber content designation of the basic fabric shall be followed by the statement "exclusive of decoration."

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(b) The term *findings* may also include elastic material which constitutes a part of the basic fabric or material out of which the household textile article is made, where such elastic material does not exceed 20 percent of the surface area of the household textile article: *Provided*, That the required information as to fiber content of products subject to this paragraph is followed by the statement "exclusive of elastic."

**§ 303.13 Sale of remnants and products made of remnants.**

(a) In disclosing the required fiber content information as to remnants of fabric which are for practical purposes of unknown or undeterminable fiber content:

(1) The fiber content disclosure of such remnants of fabrics may be designated in the required information as "remnants of undetermined fiber content."

(2) Where such remnants of fabrics are displayed for sale at retail, a conspicuous sign may, in lieu of individual labeling, be used in immediate conjunction with such display, stating with respect to required fiber content disclosure that the goods are "remnants of undetermined fiber content."

(3) Where textile fiber products are made of such remnants, the required fiber content information of the products may be disclosed as "made of remnants of undetermined fiber content." If any representations as to fiber content are made with respect to such remnants, the provisions of this paragraph shall not apply.

(b) Where remnants of fabrics are marketed or handled in bales, bundles, or packages and are all of the same fiber content or are designated in the manner permitted by paragraph (a) of this section, the individual remnants need not be labeled if the bales, bundles, or packages containing such remnants are labeled with the required information including fiber content percentages or the designation permitted by paragraph (a) of this section.

(c) Where remnants of fabrics of the same fiber content are displayed for sale at retail, a conspicuous sign may, in lieu of individual labeling, be used in immediate conjunction with such dis-

play, stating the fiber content information with respect to such remnants; as for example: "remnants, 100 percent cotton," "remnants, 50 percent rayon, 50 percent acetate," etc.

**§ 303.14 Products containing unknown fibers.**

(a) Where a textile fiber product is made from miscellaneous scraps, rags, odd lots, secondhand materials, textile by-products, or waste materials of unknown, and for practical purposes, undeterminable fiber content, the required fiber content disclosure may, when truthfully applicable, in lieu of the fiber content disclosure otherwise required by the Act and regulations, indicate that such product is composed of miscellaneous scraps, rags, odd lots, textile by-products, secondhand materials (in case of secondhand materials, words of like import may be used) or waste materials, as the case may be, of unknown or undetermined fiber content, as for example:

Made of miscellaneous scraps of undetermined fiber content

100% unknown fibers—rags

All undetermined fibers—textile by-products

100% miscellaneous odd lots of undetermined fiber content

Secondhand materials—fiber content unknown

Made of unknown fibers—waste materials

(b) Where a textile fiber product is made in part from miscellaneous scraps, rags, odd lots, textile by-products, second-hand materials or waste materials of unknown and, for practical purposes, undeterminable fiber content together with a percentage of known or determinable fibers, the required fiber content disclosure may, when truthfully applicable, in lieu of the fiber content disclosure otherwise required by the Act and regulations, indicate the percentage of miscellaneous scraps, rags, odd lots, second-hand materials (in case of secondhand materials, words of like import may be used), textile by-products, or waste materials of unknown or undetermined fiber content and the percentage of known fibers, as for example:

45% Rayon

30% Acetate

25% Miscellaneous scraps of undetermined fiber content.

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60% Cotton  
40% Unknown fibers—waste materials.  
40% Acrylic  
20% Modacrylic  
40% Undetermined fibers—odd lots.  
50% Polyester  
30% Cotton  
20% Textile by-products of undetermined fiber content.  
50% Rayon  
50% Secondhand materials—fiber content unknown.  
45% Acetate  
30% Cotton  
25% Miscellaneous rags—undetermined fiber content.

(c) No representation as to fiber content shall be made as to any textile product or any portion of a textile fiber product designated as composed of unknown or undetermined fibers. If any such representation is made, a full and complete fiber content disclosure shall be required.

(d) Nothing contained in this section shall excuse a full disclosure as to fiber content if the same is known or practically ascertainable.

[25 FR 4317, May 14, 1960]

**§ 303.15 Required label and method of affixing.**

(a) A label is required to be affixed to each textile product and, where required, to its package or container in a secure manner. Such label shall be conspicuous and shall be of such durability as to remain attached to the product and its package throughout any distribution, sale, resale and until sold and delivered to the ultimate consumer.

(b) Each textile fiber product with a neck must have a label disclosing the country of origin affixed to the inside center of the neck midway between the shoulder seams or in close proximity to another label affixed to the inside center of the neck. The fiber content and RN or name of the company may be disclosed on the same label as the country of origin or on another conspicuous and readily accessible label or labels on the inside or outside of the garment. On all other textile products, the required information shall be disclosed on a conspicuous and readily accessible label or labels on the inside or outside of the product. The country of

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origin disclosure must always appear on the front side of the label. Other required information may appear either on the front side or the reverse side of a label, provided that the information is conspicuous and readily accessible.

(c) In the case of hosiery products, this section shall not be construed as requiring the affixing of a label to each hosiery product contained in a package if, (1) such hosiery products are intended for sale to the ultimate consumer in such package, (2) such package has affixed to it a label bearing the required information for the hosiery products contained in the package, and (3) the information on the label affixed to the package is equally applicable to each textile fiber product contained therein.

(d) Socks provided for in subheading 6115.92.90, 6115.93.90, 6115.99.18, 6111.20.60, 6111.30.50, or 6111.90.50 of the Harmonized Tariff Schedule of the United States, as in effect on September 1, 2003, shall be marked, as legibly, indelibly, and permanently as the nature of the article or package will permit, to disclose the English name of the country of origin. This disclosure shall appear on the front of the package, adjacent to the size designation of the product, and shall be set forth in such a manner as to be clearly legible, conspicuous, and readily accessible to the ultimate consumer. *Provided, however,* any package that contains several different types of goods and includes socks classified under subheading 6115.92.90, 6115.93.90, 6115.99.18, 6111.20.60, 6111.30.50, or 6111.90.50 of the Harmonized Tariff Schedule of the United States, as in effect on September 1, 2003, shall not be subject to the requirements of this subsection.

[50 FR 15106, Apr. 17, 1985, as amended at 63 FR 7518, Feb. 13, 1998; 70 FR 73369, Dec. 12, 2005]

**§ 303.16 Arrangement and disclosure of information on labels.**

(a) Subject to the provisions of § 303.15(b), information required by the Act and regulations in this part may appear on any label or labels attached to the textile fiber product, including the care label required by 16 CFR part 423, provided all the pertinent requirements of the Act and regulations in

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this part are met and so long as the combination of required information and non-required information is not misleading. The required information shall include the following:

(1) The generic names and percentages by weight of the constituent fibers present in the textile fiber product, excluding permissive ornamentation, in amounts of 5 percent or more and any fibers disclosed in accordance with § 303.3(a) shall appear in order of predominance by weight with any percentage of fiber or fibers required to be designated as "other fiber" or "other fibers" appearing last.

(2) The name, provided for in § 303.19, or registered identification number issued by the Commission, of the manufacturer or of one or more persons marketing or handling the textile fiber product.

(3) The name of the country where such product was processed or manufactured, as provided for in § 303.33.

(b) All parts of the required information shall be set forth in such a manner as to be clearly legible, conspicuous, and readily accessible to the prospective purchaser. All parts of the fiber content information shall appear in type or lettering of equal size and conspicuousness.

(c) Subject to the provisions of § 303.17, any non-required information or representations placed on the product shall not minimize, detract from, or conflict with required information and shall not be false, deceptive, or misleading.

(d) Non-deceptive terms which are properly and truthfully descriptive of a fiber may be used in conjunction with the generic name of such fiber; as for example: "100 percent cross-linked rayon," "100 percent solution dyed acetate," "100 percent combed cotton," "100 percent nylon 66," etc.

[24 FR 4480, June 2, 1959, as amended at 25 FR 4317, May 14, 1960; 30 FR 14254, Nov. 13, 1965; 30 FR 15813, Dec. 11, 1965; 30 FR 15107, Apr. 17, 1965; 53 FR 31315, Aug. 18, 1988; 63 FR 7518, Feb. 13, 1998]

**§ 303.17 Use of fiber trademarks and generic names on labels.**

(a) A non-deceptive fiber trademark may be used on a label in conjunction with the generic name of the fiber to

which it relates. Where such a trademark is placed on a label in conjunction with the required information, the generic name of the fiber must appear in immediate conjunction therewith, and such trademark and generic name must appear in type or lettering of equal size and conspicuousness.

(b) Where a generic name or a fiber trademark is used on any label, whether required or non-required, a full and complete fiber content disclosure shall be made in accordance with the Act and regulations the first time the generic name or fiber trademark appears on the label.

(c) If a fiber trademark is not used in the required information, but is used elsewhere on the label as non-required information, the generic name of the fiber shall accompany the fiber trademark in legible and conspicuous type or lettering the first time the trademark is used.

(d) No fiber trademark or generic name shall be used in non-required information on a label in such a manner as to be false, deceptive, or misleading as to fiber content, or to indicate directly or indirectly that a textile fiber product is composed wholly or in part of a particular fiber, when such is not the case.

**§ 303.18 Terms implying fibers not present.**

Words, coined words, symbols or depictions, (a) which constitute or imply the name or designation of a fiber which is not present in the product, (b) which are phonetically similar to the name or designation of such a fiber, or (c) which are only a slight variation of spelling from the name or designation of such a fiber shall not be used in such a manner as to represent or imply that such fiber is present in the product.

[30 FR 13693, Oct. 28, 1965]

**§ 303.19 Name or other identification required to appear on labels.**

(a) The name required by the Act to be used on labels shall be the name under which the person is doing business. Where a person has a word trademark, used as a house mark, registered in the United States Patent Office, such word trademark may be used on



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labels in lieu of the name otherwise required: *Provided*, The owner of such word trademark furnishes the Commission a copy of the registration prior to its use. No trademark, trade names, or other names except those provided for above shall be used for required identification purposes.

(b) Registered identification numbers, as provided for in § 303.20 of this part, may be used for identification purposes in lieu of the required name.

**§ 303.20 Registered identification numbers.**

(a) Registered numbers for use as the required identification in lieu of the name on textile fiber product labels, as provided in section 4(b)(3) of the Act, will be issued by the Commission to qualified persons residing in the United States upon receipt of an application duly executed in the form set out in paragraph (d) of this section.

(b)(1) Registered identification numbers shall be used only by the person or concern to whom they are issued, and such numbers are not transferable or assignable.

(2) Registered identification numbers shall be subject to cancellation whenever any such number was procured or has been used improperly or contrary to the requirements of the Acts administered by the Federal Trade Commission, and regulations promulgated thereunder, or when otherwise deemed necessary in the public interest.

(3) Registered identification numbers shall be subject to cancellation if the Commission fails to receive prompt notification of any change in name, business address, or legal business status of a person or firm to whom a registered identification number has been assigned, by application duly executed in the form set out in paragraph (d) of this section, reflecting the current name, business address, and legal business status of the person or firm.

(c) Registered identification numbers assigned under this section may be used on labels required in labeling products subject to the provisions of the Wool Products Labeling Act and Fur Products Labeling Act, and numbers previously assigned by the Commission under such Acts may be used as and for the required name in labeling under this Act. When so used by the person or firm to whom assigned, the use of the numbers shall be construed as identifying and binding the applicant as fully and in all respects as though assigned under the specific Act for which it is used.

(d) Form to apply for a registered identification number or to update information pertaining to an existing number (the form is available upon request from: Enforcement Division, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580, or on the Internet at <http://www.ftc.gov>; application may also be made directly on the Internet):

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APPLICATION FOR A REGISTERED IDENTIFICATION NUMBER ("RN")		
DO NOT WRITE IN THIS SPACE		
DATE ISSUED: _____	DATE UPDATED: _____	RN: _____ BY: _____
1. PURPOSE OF APPLICATION (Both new applicants and update applicants must complete all entries on this form) <input type="checkbox"/> APPLY FOR A NEW RN <input type="checkbox"/> UPDATE INFORMATION ON AN EXISTING RN OR WPL NUMBER. ENTER EXISTING RN OR WPL NUMBER _____		
2. LEGAL NAME OF APPLICANT FIRM (Note: Partnerships, please provide full legal name of the person who is the proprietor)		
3. NAME UNDER WHICH APPLICANT DOES BUSINESS (Note: If different from legal name)		
4. TYPE OF COMPANY (If "OTHER" is checked, please state the type of company) <input type="checkbox"/> PROPRIETORSHIP <input type="checkbox"/> PARTNERSHIP <input type="checkbox"/> CORPORATION <input type="checkbox"/> S/C / LLP <input type="checkbox"/> OTHER _____		
5. ADDRESS OF PRINCIPAL OFFICE OR PLACE OF BUSINESS (Include zip code. Address must be actual location where business is conducted in the U.S. An additional mailing address or PO Box address may also be listed, if desired)  STREET ADDRESS (Required)	OPTIONAL ADDITIONAL MAILING ADDRESS	CONTACT INFORMATION TELEPHONE NUMBER _____ FAX NUMBER _____ E-MAIL ADDRESS _____ INTERNET URL ADDRESS _____
6. TYPE OF BUSINESS (Mark all that apply) <input type="checkbox"/> MANUFACTURING <input type="checkbox"/> IMPORTING <input type="checkbox"/> WHOLESALE <input type="checkbox"/> RETAILING <input type="checkbox"/> MAIL-ORDER <input type="checkbox"/> INTERNET <input type="checkbox"/> OTHER _____		
7. LIST PRODUCTS (To qualify for an RN, a company must be engaged in the importation, manufacturing, selling or other marketing of at least one (1) product line subject to the Textile, Wool or Fur Act)		
8. CERTIFICATION  By filing this form with the Federal Trade Commission, the company named above applies for a registered number to use on labels required by law or rules of the following acts: the Textile Fiber Product Identification Act (15 U.S.C. §§70-70N), the Wool Products Labeling Act (15 U.S.C. §§60-65), or the Fur Products Labeling Act (15 U.S.C. §§60-65). The company official (signature, partner, or corporate officer) listed below certifies that the information supplied on this form is true and correct.		
9. NAME OF COMPANY OFFICIAL (Type or print name)	10. TITLE OF COMPANY OFFICIAL	11. DATE SUBMITTED
DIRECTIONS Regulations under the Textile Fiber Product Identification Act, the Wool Products Labeling Act, and the Fur Products Labeling Act provide that any USA company that is a manufacturer or marketer of fiber or fur products may, in case of the name under which it does business, be identified by its RN on labels required by these statutes.  In completing this form, please observe the following: (1) All numbered boxes must be filled in except for optional information. (2) PLEASE, Type or Print Signatures. FTC Form 11 (rev. 4/2007)		(1) Submit one (1) completed application: By Mail to: Federal Trade Commission Division of Enforcement 605 Pennsylvania Avenue NW Washington, DC 20580  Or By Fax to: (202) 316-1171  Or On-Line at: www.ftc.gov  RNs are subject to cancellation if the holder fails to promptly submit an updated FTC Form 11 upon any change(s) in its legal name (Line #2), type of company information (Line #4), or business address (Line #5).

(24 FR 4480, June 2, 1959, as amended at 48 FR 12516, Mar. 25, 1983; 63 FR 7518, Feb. 13, 1998; 63 FR 71583, Dec. 28, 1998; 65 FR 75156, Dec. 1, 2000)

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**§ 303.21 Marking of samples, swatches, or specimens and products sold therefrom.**

(a) Where samples, swatches, or specimens of textile fiber products subject to the Act are used to promote or effect sales of such textile fiber products, the samples, swatches, or specimens, as well as the products themselves, shall be labeled to show their respective fiber contents and other required information: *Provided*, That such samples, swatches or specimens need not be labeled:

(1) If the samples, swatches, or specimens are less than two square inches (12.9 cm<sup>2</sup>) in area and the information otherwise required to appear on the label is clearly, conspicuously, and non-deceptively disclosed on accompanying promotional matter in accordance with the Act and regulations.

(2) If the samples, swatches, or specimens are keyed to a catalogue to which reference is necessary in order to complete the sale of the textile fiber products, and which catalogue at the necessary point of reference clearly, conspicuously, and non-deceptively discloses the information otherwise required to appear on the label in accordance with the Act and regulations; or

(3) If such samples, swatches, or specimens are not used to effect sales to ultimate consumers and are not in the form intended for sale or delivery to, or for use by, the ultimate consumer, and are accompanied by an invoice or other paper showing the required information.

(b) Where properly labeled samples, swatches, or specimens are used to effect the sale of articles of wearing apparel or other household textile articles which are manufactured specifically for a particular customer after the sale is consummated, the articles of wearing apparel or other household textile articles need not be labeled if they are of the same fiber content as the samples, swatches, or specimens from which the sale was effected and an invoice or other paper accompanies them showing the information otherwise required to appear on the label.

[24 FR 4480, June 2, 1959, as amended at 61 FR 11544, Mar. 21, 1996]

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**§ 303.22 Products containing linings, interlinings, fillings, and paddings.**

In disclosing the required information as to textile fiber products, the fiber content of any linings, interlinings, fillings, or paddings shall be set forth separately and distinctly if such linings, interlinings, fillings, or paddings are incorporated in the product for warmth rather than for structural purposes, or if any express or implied representations are made as to their fiber content. Examples are as follows:

100% Nylon  
Interlining: 100% Rayon  
Covering: 100% Rayon  
Filling: 100% Cotton.

**§ 303.23 Textile fiber products containing superimposed or added fibers.**

Where a textile fiber product is made wholly of one fiber or a blend of fibers with the exception of an additional fiber in minor proportion superimposed or added in certain separate and distinct areas or sections for reinforcing or other useful purposes, the product may be designated according to the fiber content of the principal fiber or blend of fibers, with an exception naming the superimposed or added fiber, giving the percentage thereof in relation to the total fiber weight of the principal fiber or blend of fibers, and indicating the area or section which contains the superimposed or added fiber. Examples of this type of fiber content disclosure, as applied to products having reinforcing fibers added to a particular area or section, are as follows:

55% Cotton  
45% Rayon  
Except 5% Nylon added to toe and heel.  
All Cotton except 1% Nylon added to neckband.

**§ 303.24 Pile fabrics and products composed thereof.**

The fiber content of pile fabrics or products composed thereof may be stated on the label in such segregated form as will show the fiber content of the face or pile and of the back or base, with percentages of the respective fibers as they exist in the face or pile and in the back or base: *Provided*, That

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in such disclosure the respective percentages of the face and back be given in such manner as will show the ratio between the face and the back. Examples of the form of marking pile fabric as to fiber content provided for in this section are as follows:

100% Nylon Pile  
100% Cotton Back  
(Back constitutes 60% of fabric and pile 40%).  
Face—60% Rayon, 40% Nylon  
Back—70% Cotton, 30% Rayon  
(Face constitutes 60% of fabric and back 40%).

**§ 303.25 Sectional disclosure of content.**

(a) *Permissive.* Where a textile fiber product is composed of two or more sections which are of different fiber composition, the required information as to fiber content may be separated in the same label in such manner as to show the fiber composition of each section.

(b) *Mandatory.* The disclosure as above provided shall be made in all instances where such form of marking is necessary to avoid deception.

**§ 303.26 Ornamentation.**

(a)(1) Where the textile fiber product contains fiber ornamentation not exceeding five per centum of the total fiber weight of the product and the stated percentages of the fiber content are exclusive of such ornamentation, the label or any invoice used in lieu thereof shall contain a phrase or statement showing such fact; as for example:

60% Cotton  
40% Rayon  
Exclusive of Ornamentation;  
or  
All Cotton  
Exclusive of Ornamentation.

(2) The fiber content of such ornamentation may be disclosed where the percentage of the ornamentation in relation to the total fiber weight of the principal fiber or blend of fibers is shown; as for example:

70% Nylon  
30% Acetate  
Exclusive of 4% Metallic Ornamentation;  
or

100% Rayon  
Exclusive of 3% Silk Ornamentation.

(b) Where the fiber ornamentation exceeds five per centum, it shall be included in the statement of required percentages of fiber content.

(c) Where the ornamentation constitutes a distinct section of the product, sectional disclosure may be made in accordance with § 303.25 of this part.

**§ 303.27 Use of the term "All" or "100%."**

Where a textile fiber product or part thereof is comprised wholly of one fiber, other than any fiber ornamentation, decoration, elastic, or trimming as to which fiber content disclosure is not required, either the word *All* or the term *100%* may be used in labeling, together with the correct generic name of the fiber and any qualifying phrase, when required; as for example: "100% Cotton," "All Rayon, Exclusive of Ornamentation," "100% Acetate, Exclusive of Decoration," "All Nylon, Exclusive of Elastic," etc.

**§ 303.28 Products contained in packages.**

When textile products are marketed and delivered in a package which is intended to remain unbroken and intact until after delivery to the ultimate consumer, each textile product in the package, except hosiery, and the package shall be labeled with the required information. If the package is transparent to the extent it allows for a clear reading of the required information on the textile product, the package is not required to be labeled.

[50 FR 15107, Apr. 17, 1985]

**§ 303.29 Labeling of pairs or products containing two or more units.**

(a) Where a textile fiber product consists of two or more parts, units, or items of different fiber content, a separate label containing the required information shall be affixed to each of such parts, units or items showing the required information as to such part, unit, or item: *Provided*, That where such parts, units, or items are marketed or handled as a single product or ensemble and are sold and delivered to the ultimate consumer as a single

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product or ensemble, the required information may be set out on a single label in such a manner as to separately show the fiber composition of each part, unit, or item.

(b) Where garments, wearing apparel, or other textile fiber products are marketed or handled in pairs or ensembles of the same fiber content, only one unit of the pair or ensemble need be labeled with the required information when sold and delivered to the ultimate consumer.

[24 FR 4480, June 2, 1959, as amended at 25 FR 4318, May 14, 1960]

## § 303.30 Textile fiber products in form for consumer.

A textile fiber product shall be considered to be in the form intended for sale or delivery to, or for use by, the ultimate consumer when the manufacturing or processing of the textile fiber product is substantially complete. The fact that minor or insignificant details of the manufacturing or processing have not been completed shall not excuse the labeling of such products as to the required information. For example, a garment must be labeled even though such matters as the finishing of a hem or cuff or the affixing of buttons there-to remain to be completed.

## § 303.31 Invoice in lieu of label.

Where a textile fiber product is not in the form intended for sale, delivery to, or for use by the ultimate consumer, an invoice or other paper may be used in lieu of a label, and such invoice or other paper shall show, in addition to the name and address of the person issuing the invoice or other paper, the fiber content of such product as provided in the Act and regulations as well as any other required information.

## § 303.32 Products containing reused stuffing.

Any upholstered product, mattress, or cushion which contains stuffing which has been previously used as stuffing in any other upholstered product, mattress, or cushion shall have securely attached thereto a substantial tag or label, at least 2 inches (5.08 cm) by 3 inches (7.62 cm) in size, and statements thereon conspicuously stamped

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or printed in the English language and in plain type not less than 1/4 inch (6.35 mm) high, indicating that the stuffing therein is composed in whole or in part of "reused stuffing," "secondhand stuffing," "previously used stuffing," or "used stuffing."

[61 FR 11544, Mar. 21, 1996]

## § 303.33 Country where textile fiber products are processed or manufactured.

(a) In addition to the other information required by the Act and Regulations:

(1) Each imported textile fiber product shall be labeled with the name of the country where such imported product was processed or manufactured;

(2) Each textile fiber product completely made in the United States of materials that were made in the United States shall be labeled using the term *Made in U.S.A.* or some other clear and equivalent term.

(3) Each textile fiber product made in the United States, either in whole or in part of imported materials, shall contain a label disclosing these facts; for example:

Made in USA of imported fabric

or

Knitted in USA of imported yarn

and

(4) Each textile fiber product partially manufactured in a foreign country and partially manufactured in the United States shall contain on a label the following information:

(i) The manufacturing process in the foreign country and in the USA; for example:

"Imported cloth, finished in USA"

or

"Sewn in USA of imported components"

or

"Made in [foreign country], finished in USA"

or

"Scarf made in USA of fabric made in China"

or

"Comforter Filled, Sewn and Finished in the U.S. With Shell Made in China"

or

"Made in [Foreign Country] fabric made in USA"

or

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"Knit in USA, assembled in (Foreign Country)"]".

(j) When the U.S. Customs Service requires an origin label on the unfinished product, the manufacturing processes as required in paragraph (a)(4)(1) of this section or the name of the foreign country required by Customs, for example:

"Made in (foreign country)"

(b) For the purpose of determining whether a product should be marked under paragraphs (a) (2), (3), or (4) of this section, a manufacturer needs to consider the origin of only those materials that are covered under the Act and that are one step removed from that manufacturing process. For example, a yarn manufacturer must identify fiber if it is imported, a cloth manufacturer must identify imported yarn and a household product manufacturer must identify imported cloth or imported yarn for household products made directly from yarn, or imported fiber used as filling for warmth.

(c) The term *country* means the political entity known as a nation. Except for the United States, colonies, possessions or protectorates outside the boundaries of the mother country shall be considered separate countries, and the name thereof shall be deemed acceptable in designating the country where the textile fiber product was processed or manufactured unless the Commission shall otherwise direct.

(d) The country where the imported textile fiber product was principally made shall be considered to be the country where such textile fiber product was processed or manufactured. Further work or material added to the textile fiber product in another country must effect a basic change in form in order to render such other country the place where such textile fiber product was processed or manufactured.

(e) The English name of the country where the imported textile fiber product was processed or manufactured shall be used. The adjectival form of the name of the country will be accepted as the name of the country where the textile fiber product was processed or manufactured, provided the adjectival form of the name does not appear with such other words so as to refer to

a kind or species of product. Variant spellings which clearly indicate the English name of the country, such as *Brasil* for *Brazil* and *Italie* for *Italy*, are acceptable. Abbreviations which unmistakably indicate the name of a country, such as "Gt. Britain" for "Great Britain," are acceptable.

(f) Nothing in this rule shall be construed as limiting in any way the information required to be disclosed on labels under the provisions of any Tariff Act of the United States or regulations prescribed by the Secretary of the Treasury.

[24 FR 4480, June 2, 1959, as amended at 50 FR 15107, Apr. 17, 1985; 63 FR 7521, Feb. 13, 1998; 65 FR 73153, Dec. 1, 2000]

#### §303.34 Country of origin in mail order advertising.

When a textile fiber product is advertised in any mail order catalog or mail order promotional material, the description of such product shall contain a clear and conspicuous statement that the product was either made in U.S.A., imported, or both. Other words or phrases with the same meaning may be used. The statement of origin required by this section shall not be inconsistent with the origin labeling of the product being advertised.

[50 FR 15107, Apr. 17, 1985]

#### §303.35 Use of terms "virgin" or "new."

The terms *virgin* or *new* as descriptive of a textile fiber product, or any fiber or part thereof, shall not be used when the product or part so described is not composed wholly of new or virgin fiber which has never been reclaimed from any spun, woven, knitted, felted, bonded, or similarly manufactured product.

#### §303.36 Form of separate guaranty.

(a) The following are suggested forms of separate guaranties under section 10 of the Act which may be used by a guarantor residing in the United States on or as part of an invoice or other paper relating to the marketing or handling of any textile fiber products listed and designated therein, and showing the date of such invoice or other paper and the signature and address of the guarantor.

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(1) *General form.* We guarantee that the textile fiber products specified herein are not misbranded nor falsely nor deceptively advertised or invoiced under the provisions of the Textile Fiber Products Identification Act and rules and regulations thereunder.

(2) *Guaranty based on guaranty.* Based upon a guaranty received, we guarantee that the textile fiber products specified herein are not misbranded nor falsely nor deceptively advertised or invoiced under the provisions of the Textile Fiber Products Identification Act and rules and regulations thereunder.

NOTE: The printed name and address on the invoice or other paper will suffice to meet the signature and address requirements.

(b) The mere disclosure of required information including the fiber content of a textile fiber product on a label or on an invoice or other paper relating to its marketing or handling shall not be considered a form of separate guaranty.

**§ 303.37 Form of continuing guaranty from seller to buyer.**

Under section 10 of the Act, a seller residing in the United States may give a buyer a continuing guaranty to be applicable to all textile fiber products sold or to be sold. The following is the prescribed form of continuing guaranty from seller to buyer.

We, the undersigned, guaranty that all textile fiber products now being sold or which

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may hereafter be sold or delivered to \_\_\_\_\_ are not, and will not be misbranded nor falsely nor deceptively advertised or invoiced under the provisions of the Textile Fiber Products Identification Act and rules and regulations thereunder. This guaranty effective until \_\_\_\_\_.

Dated, signed, and certified this \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_ (City), \_\_\_\_\_ (State or Territory) \_\_\_\_\_ (name under which business is conducted.)

Under penalty of perjury, I certify that the information supplied in this form is true and correct.

\_\_\_\_\_  
Signature of Proprietor, Principal Partner,  
or Corporate Official

\_\_\_\_\_  
Name (Print or Type) Title

(98 FR 12518, Mar. 25, 1983)

**§ 303.38 Continuing guaranty filed with Federal Trade Commission.**

(a)(1) Under section 10 of the act any person residing in the United States and marketing or handling textile fiber products may file a continuing guaranty with the Federal Trade Commission. When filed with the Commission a continuing guaranty shall be fully executed in duplicate. Forms for use in preparing continuing guaranties will be supplied by the Commission upon request.

(2) Continuing guaranties filed with the Commission shall continue in effect until revoked. The guarantor shall promptly report any change in business status to the Commission.

(b) Prescribed form for a continuing guaranty:

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CONTINUING GUARANTY

1. LEGAL NAME OF GUARANTOR FIRM

2. NAME UNDER WHICH GUARANTOR FIRM DOES BUSINESS, IF DIFFERENT FROM LEGAL NAME

3. TYPE OF COMPANY  
 PROPRIETORSHIP  PARTNERSHIP  CORPORATION

4. ADDRESS OF PRINCIPAL OFFICE OR PLACE OF BUSINESS (include Zip Code)

OPTIONAL INFORMATION  
 TELEPHONE NUMBER:  
 FAX NUMBER:  
 INTERNET ADDRESS:

5. LAW UNDER WHICH THE CONTINUING GUARANTY IS TO BE FILED (Put an 'X' in the appropriate boxes)

Under the Textile Fiber Products Identification Act (15 U.S.C. §§ 70-70a): The company named above, which manufactures, markets, or handles textile fiber products, guarantees that when it ships or delivers any textile fiber product, the product will not be misbranded, falsely or deceptively invoiced, or falsely or deceptively advertised, within the meaning of the Textile Fiber Products Identification Act and the rules and regulations under that Act.

Under the Wool Products Labeling Act (15 U.S.C. §§ 66-68): The company named above, which manufactures, markets, or handles wool products, guarantees that when it ships or delivers any wool product, the product will not be misbranded within the meaning of the Wool Products Labeling Act and the rules and regulations under that Act.

Under the Fur Products Labeling Act (15 U.S.C. §§ 68-69b): The company named above, which manufactures, markets, or handles fur products, guarantees that when it ships or delivers any fur product, the product will not be misbranded, falsely or deceptively invoiced, or falsely or deceptively advertised, within the meaning of the Fur Products Labeling Act and the rules and regulations under that Act.

6. CERTIFICATION  
Under penalty of perjury, I certify that the information supplied on this form is true and correct.

SIGNATURE OF PROPRIETOR, PRINCIPAL PARTNER, OR CORPORATE OFFICIAL

7. NAME (Please print or type)

8. TITLE

9. CITY AND STATE WHERE SIGNED

10. DATE

**INSTRUCTIONS**

The Textile Fiber Products Identification Act, the Wool Products Labeling Act, and the Fur Products Labeling Act provide that any marketer or manufacturer of fiber or fur products covered by those Acts may file a continuing guaranty with the Federal Trade Commission. A continuing guaranty on file assures customer firms that the guarantor's products are in conformance with the Act(s) under which the guarantor has filed. Customer firms rely on the continuing guaranties for protection from liability if violations occur.

In completing this form, please observe the following:

(a) All appropriate blanks on the form should be filled in. Include your Zip Code in item 4.

(b) In item 8, signature of proprietor, partner, or corporate official of guarantor firm.

(c) Send two completed, signed original copies to:  
 Federal Trade Commission  
 Division of Enforcement  
 500 Pennsylvania Ave, NW  
 Washington, DC 20580

(d) Do not fee application - mail signed originals only.

Continuing guaranties filed with the Commission continue in effect until revoked. The guarantor must immediately notify the Commission in writing of any change in business status. Any change in the address of the guarantor's principal office and place of business must also be promptly reported.

DO NOT USE THIS SPACE

Filed \_\_\_\_\_ 18 \_\_\_\_

FEDERAL TRADE COMMISSION

(c) Any person who has a continuing guaranty on file with the Commission may, during the effective dates of the guaranty, give notice of such fact by setting forth on the invoice or other paper covering the marketing or handling of the product guaranteed the following:



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Continuing guaranty under the Textile Fiber Products Identification Act filed with the Federal Trade Commission.

(d) Any person who falsely represents in writing that he has a continuing guaranty on file with the Federal Trade Commission when such is not a fact shall be deemed to have furnished a false guaranty under section 10(b) of the Act.

[24 FR 4486, June 2, 1959, as amended at 48 FR 12517, Mar. 25, 1983; 63 FR 7521, Feb. 13, 1998; 63 FR 71585, Dec. 28, 1998]

**§ 303.39 Maintenance of records.**

(a) Pursuant to the provisions of section 6 of the Act, every manufacturer of a textile fiber product subject to the Act, irrespective of whether any guaranty has been given or received, shall maintain records showing the information required by the Act and Regulations with respect to all such textile fiber products made by such manufacturer. Such records shall show:

(1) The generic names and percentages by weight of the constituent fibers present in the textile fiber product, exclusive of permissive ornamentation, in amounts of five per centum or more.

(2) The name, provided for in § 303.19, or registered identification number issued by the Commission, of the manufacturer or of one or more persons marketing or handling the textile fiber product.

(3) The name of the country where such product was processed or manufactured as provided for in § 303.33.

The purpose of the records is to permit a determination that the requirements of the Act and Regulations have been met and to establish a traceable line of continuity from raw material through processing to finished product.

(b) Any person substituting a stamp, tag, label, or other identification pursuant to section 5(b) of the Act shall keep such records as will show the information set forth on the stamp, tag, label, or other identification that he removed and the name or names of the person or persons from whom such textile fiber product was received.

(c) The records required to be maintained pursuant to the provisions of

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this rule shall be preserved for at least three years.

[24 FR 4480, June 2, 1959, as amended at 53 FR 31315, Aug. 18, 1988]

**§ 303.40 Use of terms in written advertisements that imply presence of a fiber.**

The use of terms in written advertisements, including advertisements disseminated through the Internet and similar electronic media, that are descriptive of a method of manufacture, construction, or weave, and that by custom and usage are also indicative of a textile fiber or fibers, or the use of terms in such advertisements that constitute or connote the name or presence of a fiber or fibers, shall be deemed to be an implication of fiber content under section 4(c) of the Act, except that the provisions of this section shall not be applicable to non-deceptive shelf or display signs in retail stores indicating the location of textile fiber products and not intended as advertisements.

[63 FR 7523, Feb. 13, 1998]

**§ 303.41 Use of fiber trademarks and generic names in advertising.**

(a) In advertising textile fiber products, the use of a fiber trademark shall require a full disclosure of the fiber content information required by the Act and regulations in at least one instance in the advertisement.

(b) Where a fiber trademark is used in advertising textile fiber products containing more than one fiber, other than permissive ornamentation, such fiber trademark and the generic name of the fiber must appear in the required fiber content information in immediate proximity and conjunction with each other in plainly legible type or lettering of equal size and conspicuousness.

(c) Where a fiber trademark is used in advertising textile fiber products containing only one fiber, other than permissive ornamentation, such fiber trademark and the generic name of the fiber must appear in immediate proximity and conjunction with each other in plainly legible and conspicuous type or lettering at least once in the advertisement.

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(d) Where a fiber trademark or generic name is used in non-required information in advertising, such fiber trademark or generic name, shall not be used in such a manner as to be false, deceptive, or misleading as to fiber content, or to indicate, directly or indirectly, that a textile fiber product is composed wholly or in part of a particular fiber, when such is not the case.

**§ 303.42 Arrangement of information in advertising textile fiber products.**

(a) Where a textile fiber product is advertised in such manner as to require disclosure of the information required by the Act and regulations, all parts of the required information shall be stated in immediate conjunction with each other in legible and conspicuous type or lettering of equal size and prominence. In making the required disclosure of the fiber content of the product, the generic names of fibers present in an amount 5 percent or more of the total fiber weight of the product, together with any fibers disclosed in accordance with § 303.3(a), shall appear in order of predominance by weight, to be followed by the designation "other fiber" or "other fibers" if a fiber or fibers required to be so designated are present.

(b) Non-required information or representations shall in no way be false, deceptive, or misleading as to fiber content and shall not include any names, terms, or representations prohibited by the Act and regulations. Such non-required information or representations shall not be set forth or so used as to interfere with, minimize, or detract from the required information.

(c) Non-deceptive terms which are properly and truthfully descriptive of a fiber may be used in conjunction with the generic name of such fiber; as for example: "cross-linked rayon," "solution dyed acetate," "combed cotton," "nylon 66," etc.

[24 FR 4400, June 2, 1959, as amended at 30 FR 14254, Nov. 13, 1965; 30 FR 15313, Dec. 11, 1965; 63 FR 7523, Feb. 13, 1998]

**§ 303.43 Fiber content tolerances.**

(a) A textile fiber product which contains more than one fiber shall not be deemed to be misbranded as to fiber

content percentages if the percentages by weight of any fibers present in the total fiber content of the product, exclusive of permissive ornamentation, do not deviate or vary from the percentages stated on the label in excess of 3 percent of the total fiber weight of the product. For example, where the label indicates that a particular fiber is present in the amount of 40 percent, the amount of such fiber present may vary from a minimum of 37 percent of the total fiber weight of such product to a maximum of 43 percent of the total fiber weight of such product.

(b) Where the percentage of any fiber or fibers contained in a textile fiber product deviates or varies from the percentage stated on the label by more than the tolerance or variation provided in paragraph (a) of this section, such product shall be misbranded unless the person charged proves that the entire deviation or variation from the fiber content percentages stated on the label resulted from unavoidable variations in manufacture and despite the exercise of due care.

(c) Where representations are made to the effect that a textile fiber product is composed wholly of one fiber, the tolerance provided in section 4(b)(2) of the Act and paragraph (a) of this section shall not apply, except as to permissive ornamentation where the textile fiber product is represented to be composed of one fiber "exclusive of ornamentation."

**§ 303.44 Products not intended for uses subject to the act.**

Textile fiber products intended for uses not within the scope of the Act and regulations or intended for uses in other textile fiber products which are exempted or excluded from the Act shall not be subject to the labeling and invoicing requirements of the Act and regulations: *Provided*, An invoice or other paper covering the marketing or handling of such products is given, which indicates that the products are not intended for uses subject to the Textile Fiber Products Identification Act.

## Decision and Order

## § 303.45

16 CFR Ch. I (1-1-08 Edition)

**§ 303.45 Exclusions from the act.**

(a) Pursuant to section 12(b) of the Act, the Commission hereby excludes from the operation of the Act:

- (1) All textile fiber products except:
  - (i) Articles of wearing apparel:
    - (ii) Handkerchiefs;
    - (iii) Scarfs;
    - (iv) Beddings;
    - (v) Curtains and casements;
    - (vi) Draperies;
    - (vii) Tablecloths, napkins, and doilies;
    - (viii) Floor coverings;
    - (ix) Towels;
    - (x) Wash cloths and dish cloths;
    - (xi) Ironing board covers and pads;
    - (xii) Umbrellas and parasols;
    - (xiii) Batts;
    - (xiv) Products subject to section 4(h) of the Act;
    - (xv) Flags with heading or more than 216 square inches (13.9 dm<sup>2</sup>) in size;
    - (xvi) Cushions;
    - (xvii) All fibers, yarns and fabrics (including narrow fabrics except packaging ribbons);
    - (xviii) Furniture slip covers and other covers or coverlets for furniture;
    - (xix) Afghans and throws;
    - (xx) Sleeping bags;
    - (xxi) Antimacassars and tidies;
    - (xxii) Hammocks;
    - (xxiii) Dresser and other furniture scarfs.
- (2) Belts, suspenders, arm bands, permanently knotted neckties, garters, sanitary belts, diaper liners, labels (either required or non-required) individually and in rolls, looper clips intended for handicraft purposes, book cloth, artists' canvases, tapestry cloth, and shoe laces.
- (3) All textile fiber products manufactured by the operators of company stores and offered for sale and sold exclusively to their own employees as ultimate consumers.
- (4) Coated fabrics and those portions of textile fiber products made of coated fabrics.
- (5) Secondhand household textile articles which are discernibly secondhand or which are marked to indicate their secondhand character.
- (6) Non-woven products of a disposable nature intended for one-time use only.

(7) All curtains, casements, draperies, and table place mats, or any portions thereof otherwise subject to the Act, made principally of slats, rods, or strips, composed of wood, metal, plastic, or leather.

(8) All textile fiber products in a form ready for the ultimate consumer procured by the military services of the United States which are bought according to specifications, but shall not include those textile fiber products sold and distributed through post exchanges, sales commissaries, or ship stores; provided, however, that if the military services sell textile fiber products for nongovernmental purposes the information with respect to the fiber content of such products shall be furnished to the purchaser thereof who shall label such products in conformity with the Act and regulations before such products are distributed for civilian use.

(9) All hand woven rugs made by Navajo Indians which have attached thereto the "Certificate of Genuineness" supplied by the Indian Arts and Crafts Board of the United States Department of Interior. The term *Navajo Indian* means any Indian who is listed on the register of the Navajo Indian Tribe or is eligible for listing thereon.

(b) The exclusions provided for in paragraph (a) of this section shall not be applicable (1) if any representations as to the fiber content of such products are made on any label or in any advertisement without making a full and complete fiber content disclosure on such label or in such advertisement in accordance with the Act and regulations with the exception of those products excluded by paragraph (a)(6) of this section, or (2) if any false, deceptive, or misleading representations are made as to the fiber content of such products.

(c) The exclusions from the Act provided in paragraph (a) of this section are in addition to the exemptions from the Act provided in section 12(a) of the Act and shall not affect or limit such exemptions.

(Sec. 12, 72 Stat. 1723; 15 U.S.C. 70j)

[24 FR 4480, June 2, 1959, as amended at 25 FR 4318, May 14, 1960; 25 FR 7044, July 26, 1960; 29 FR 48, Jan. 3, 1964; 61 FR 11544, Mar. 21, 1996]

## Analysis to Aid Public Comment

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

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from Pure Bamboo, LLC, a limited liability company and Bruce Dear, individually and as the managing member of the limited liability company corporation (together, “respondents”).

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 involves respondents’ Pure Bamboo’s marketing and sale of textile fiber products purportedly made of bamboo fiber, including “Spa Wear,” “Active Wear,” and “Yoga Wear” lines of adult clothing. The FTC complaint alleges that respondents violated Section 5(a) of the FTC Act by making false claims that their textile fiber products are made of bamboo fiber; retain the anti-microbial properties of the bamboo plant; are manufactured using an environmentally-friendly processes; and will completely break down and return to the biodegrade into elements found in nature within a reasonably short period of time after customary disposal. The complaint alleges that respondents’ textile bamboo fiber products and naturally anti-microbial claims are false because the respondents’ products are actually made of rayon and do not retain the anti-microbial properties of the bamboo plant. The complaint alleges that respondents’ environmentally friendly manufacturing process claim is false because the rayon manufacturing process involves the use of toxic chemicals and results in the emission of hazardous air pollutants. Finally, the complaint alleges that respondents’ biodegradability claim is false because a substantial majority of household waste is disposed of by either in landfills, incinerators, or recycling facilities and these customary disposal methods that do not present conditions that would allow for respondents’ textile fiber

## Analysis to Aid Public Comment

products to decompose biodegrade into elements found in nature, within a reasonably short period of time. The complaint further alleges that the respondents failed to have substantiation for the foregoing claims.

The complaint also alleges that the proposed respondents have violated the Textile Fiber Products Identification Act (“Textile Act”) and the Rules and Regulations promulgated thereunder (“Textile Rules”) by falsely and deceptively labeling and advertising their textile fiber products as bamboo; by advertising their products without including in the description of each product a statement that the product was made in the U.S.A., imported, or both; stating the product’s country of origin and by selling hosiery textile fiber products without affixing the to the products or their packaging required labels detailing fiber content and other required information.

The proposed consent order contains provisions designed to prevent respondents from engaging in similar acts and practices in the future. Part I.A of the proposed order prohibits respondents from representing that any their textile fiber products (1) is made of bamboo or bamboo fiber; (2) is manufactured using an environmentally friendly process; (3) is anti-microbial or retains the anti-microbial properties of any material from which it is made; or (4) is degradable, biodegradable, or photodegradable, unless such representations are true, not misleading, and substantiated by competent and reliable scientific evidence. Part I.B prohibits respondents from making claims about the benefits, performance, or efficacy of any of their textile fiber products, unless at the time the representation is made, it is truthful and not misleading, and is substantiated by competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence. Part II makes clear that, although Part I prohibits respondents from making false and unsubstantiated representations that their textile fiber products are made of bamboo or bamboo fiber as opposed to rayon, the respondents nonetheless may describe such products using the generic name of any manufactured fiber and identifying bamboo as the cellulose source for such fiber (*e.g.*, rayon made from bamboo), so long as such representation is true and substantiated. Part III of the

*Analysis to Aid Public Comment*

proposed order prohibits respondents from failing to comply with the Textile Act and/or the Textile Rules.

Parts IV through VIII require respondents to keep copies of relevant advertisements and materials substantiating claims made in the advertisements; to provide copies of the order to certain of their personnel; to notify the Commission of changes in corporate structure that might affect compliance obligations under the order; to notify the Commission of changes in the individual respondent's current business or employment; and to file compliance reports with the Commission and respond to other requests from FTC staff. Part IX provides that the order will terminate after twenty (20) years under certain circumstances.

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

**SAMI DESIGNS, LLC. D/B/A JONÄNO  
AND  
BONNIE SIEFERS**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND THE  
TEXTILE FIBER PRODUCTS IDENTIFICATION ACT*Docket No. C-4279; File No. 082 3194  
Complaint, December 15, 2009 - Decision, December 15, 2009*

This consent order addresses allegations that Sami Designs, LLC, also doing business as Jonäno, LLC., a producer, seller and distributor of a textile fiber products throughout the United States, made deceptive advertising claims about its product in violation of Section 5 of the FTC Act. The Complaint alleges that Respondents sold textile fiber products that were misbranded or falsely or deceptively advertised as to its fiber content. The Complaint further alleges that the Respondents did not comply with the Textile Act or the Textile Rules and Regulations. The order prohibits the Respondents from expressing or implying a product is made of a particular content using an environmentally friendly process or is anti-microbial, unless the representation is true, non-misleading, and, at the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

*Participants*

For the *Commission*: Melinda Claybaugh and Korin Ewing

For the *Respondents*: Richard A. O'Halloran; Burns, White & Hickton.

**COMPLAINT**

The Federal Trade Commission, having reason to believe that Sami Designs, LLC, also doing business as Jonäno (“Jonäno”), a limited liability company, and Bonnie Siefers, individually and as owner of the limited liability company (“Respondents”), have violated the provisions of the Federal Trade Commission Act, 15 U.S.C. § 41, *et seq.*, the Textile Fiber Products Identification Act, 15 U.S.C. § 70, *et seq.*, and the Rules and Regulations promulgated thereunder, 16 C.F.R. Part 303, and it appearing to

## Complaint

the Commission that this proceeding is in the public interest, alleges:

23. Respondent Sami Designs, LLC, also d/b/a Jonäno (“Jonäno”), is a Pennsylvania limited liability company. Its principal office or place of business is 2582 Wexford Run Road, Wexford, Pennsylvania 15090.

24. Respondent Bonnie Siefers is an owner of Jonäno. Individually or in concert with others, she formulates, directs, or controls the policies, acts, or practices of the limited liability company, including the acts or practices alleged in this complaint. Her principal office or place of business is the same as that of Jonäno.

25. 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, 15 U.S.C. § 44.

26. Respondents manufacture, advertise, market, promote, offer to sell, sell, and distribute textile fiber products, including a line of “ecoKashmere” products, throughout the United States, using both Jonäno’s own website, [www.jonano.com](http://www.jonano.com), and other retailers.

27. Respondents price the textile fiber products that they manufacture, market, promote, distribute, and sell at a premium compared to other, similar products in the marketplace.

28. In advertisements to induce consumers to purchase their textile fiber products, Respondents make or have made various claims, on their website and elsewhere, concerning the fiber content and anti-microbial characteristics of their textile fiber products, as well as the environmentally friendly manufacturing processes used to make their products, including, but not limited to, the following:



## Complaint

A. **Jonäno Website ([www.jonano.com](http://www.jonano.com))**1. **Get Natural**

Nurture yourself in soft sustainable style with our bamboo ecoKashmere, eColorgrown organic cotton and crisp hemp linen.

\* \* \* \*

**Comfort with Benefit™ - Organic Cotton,  
Natural Fibers and Bamboo Apparel**

\* \* \* \*

**EcoKashmere: Soft, Knit Bamboo Fiber**

(Homepage, Exhibit A at 1-2).

2. **BAMBOO CLOTHING**

Bamboo is a natural, renewable resource that can be made into easy-care fabrics. Made from the cellulose extracted from the bamboo plant, this elegant eco-fiber is manufactured using a non-toxic process which spins buttery-soft machine washable fabrics.

\* \* \* \*

Jonäno natural bamboo clothing provides a high level of comfort, plus natural antimicrobial protection designed to inhibit the growth of the bacteria and fungi that cause odor. The natural antimicrobial qualities of bamboo clothing help to protect you from perspiration, staining, and helps keep your clothes looking great longer. Best of all, bamboo clothing keeps its natural antimicrobial benefits even after repeated washing.

(“Natural Fibers” page, Exhibit A at 4).

## Complaint

3. **Eco-fashion****ECO-CHIC**

The term eco-chic is exclusive to fashionable and stylish clothing created using environmentally friendly processes. Embracing the idea of making a positive impact on the future of the planet, Jonäno selects high quality organic and natural fabrics that utilize the earth's resources in an Eco-friendly sustainable manner. Natural and **organic clothing** is created using as few chemicals and harmful impact on the environment as possible, promoting ecological responsibility.

(“Luxurious Eco-Fashion” page, Exhibit A at 5).

4. **EcoKashmere®**

Known for its buttery soft cashmere feel without the cashmere cost, the ecoKashmere® Collection by Jonäno offers transitional basics in our signature soft bamboo blends.

**DETOX YOUR WARDROBE**

The natural antibacterial properties of bamboo fabric come from an inherent quality of bamboo commonly called ‘bamboo kun.’ Bamboo cultivation does not require the use of pesticides, making it a natural choice for organic farming techniques. It is rarely attacked by pests or infected by pathogen. The same natural substance that protects bamboo growing in the field functions in ecoKashmere, killing germs that cause odor.

\* \* \* \*

Healthier for you and the environment, pesticide-free and chemical-free, ecoKashmere® bamboo clothes are the new earth's cashmere.

(“EcoKashmere® Line” page, Exhibit A at 6).

## Complaint

**5. About Jonāno****Reduced Footprint**

When this much care has been taken to create a fiber that is truly natural, organic and sustainable, the manufacturing process must also be environmentally responsible. Jonāno® creates (sic) ecoKashmere® in Asia in accordance with ISO 1400 environmental standards. It is made from organically grown bamboo and harvested close to vertically integrated manufacturers to lessen the transportation costs between fabrication facilities.

The bamboo is spun, and then dyed using closed systems mild alkali bath processes which has been determined to be safest for the environment.

\* \* \* \*

It is absolutely essential that the chemicals used in the production of textiles must not have any negative effects on human health and the environment. For this reason, authorized laboratories and professional certification groups test our textile products; physical and chemical analyses are used to verify that textile products are safe to be used for the consumer and the environment. Our manufacturing systems have been certified that they have met the OKO-TEK STANDARD 100.

(“About Jonāno” page, Exhibit A at 7-9).

**6. Women**

Bamboo Pique Long Sleeved Vee Polo Red

Composition: 95% Bamboo 5% Lycra Pique

(“Product” page, Exhibit A at 10-11).

## Complaint

**7. February 25, 2006 Press Release:****Why You Should Buy Organic Clothing**

\* \* \* \*

1. . . . Jonäno manufactures only authentic spun bamboo of the highest quality and strength.

\* \* \* \*

- Natural and organic fiber fabrics are processed with as few chemicals and harmful impact on the environment as possible. By purchasing natural and organic fiber clothing you are supporting environmental causes. By purchasing sustainable clothing that reduces environmental impact, clothing that supports and nourishes the earth and the lives of all people involved in the process of growing, manufacturing and distributing the clothing, you also support the principals (sic) of Fair Trade working conditions, earth and animal welfare.

(“News and Events” page, Exhibit A at 12-13).

**8. March 8, 2006 Press Release:****Skin Care And Hypoallergenic Solutions For Diabetics**

Skin care problems are common in diabetics. Jonäno offers hypoallergenic, naturally antimicrobial baselayer protection against bacteria and fungus that cause odor.

\* \* \* \*

Keeping your diabetes under control is the most important factor in preventing skin complications .

## Complaint

. . Proper skin care will also reduce your risk of skin problems:

\* \* \* \*

Choose newly available hypoallergenic and naturally antimicrobial clothing options . . . Jonāno offers naturally antimicrobial, hypoallergenic clothing for Men, Women and babies.

(“News and Events” page, Exhibit A at 14-15).

9. **October 25, 2008 Press Release**

**Eco-minded Shoppers are Discovering Renewable Bamboo**

Designed for parents who seek only the best when it comes to their precious little ones, soft, ring-spun bamboo ecoKashmere is both luxurious and healthy not only for your little ones, but also for the environment.

\* \* \* \*

Safer for the environment and baby, look for organics that are not only chemical-free, but also produced without any harsh chemical bleaches or dyes. Organically grown ensures that the fabric and crop remain pure and free from harmful chemicals and dyes. As a result, organics are not only gentle on baby’s sensitive skin, but also safer for the people who make the clothes, for the farmers who grow the crops, and for the environment.

(“News and Events” page, Exhibit A at 16-17).

## Complaint

**B. Product Hangtag**

## 1. Discover the difference of ecoKashmere™

Made from the fastest growing woody plant on earth, bamboo requires no pesticides, making this exotic fiber 100% eco-friendly. Renowned for its antibacterial properties and breathability, bamboo provides *comfort with benefit.*™ Wear your values in luxurious style created using sustainable business practices and fair labor standards that honor Mother Earth.

(Exhibit B at 1).

2. **Organic Bamboo**

Nurture yourself as you Wear your Values™ in luxurious ecoKashmere® bamboo clothing – a sustainable choice that honors Mother Earth.

Bamboo is a natural, renewable resource that can be made into easy-care textiles. This luxurious eco fabric is derived using a low impact process, which spins machine washable buttery cashmere-like fabrics.

- Bamboo offers a high level of comfort, plus natural antimicrobial protection;
- Bamboo inhibits the growth of the bacteria and fungi that cause odor and perspiration staining;
- Best of all, bamboo clothing retains its natural antimicrobial benefits even after repeated washing.

(Exhibit B at 2).

## Complaint

**C. Product Labels**

## 1. 95% Bamboo 5% Spandex

(Exhibit C at 1).

29. The textile fiber products manufactured, marketed, promoted, distributed, and sold by Respondents consist of rayon and not actual bamboo fibers woven into fabric.

30. Rayon is the generic name for a type of regenerated, or manufactured, fiber made from cellulose. Rayon is manufactured by taking purified cellulose from a plant source, also called a cellulose precursor, and converting it to a viscous solution by dissolving it in one or more chemicals, such as sodium hydroxide. The chemical solution is then forced through spinnerets and into an acidic bath where it solidifies into fibers.

31. The process used to manufacture rayon from cellulose involves hazardous chemicals. *See* 40 C.F.R. Part 63 (“National Emissions Standards for Hazardous Air Pollutants: Cellulose Products Manufacturing”).

32. “[H]azardous air pollutants (HAP) emitted from cellulose products manufacturing operations” include carbon disulfide, carbonyl sulfide, ethylene oxide, methanol, methyl chloride, propylene oxide, and toluene. 40 C.F.R. § 63.5480.

33. Many plant sources may be used as cellulose precursors for rayon fabric, including cotton linters (short cotton fibers), wood pulp, and bamboo. Regardless of the source of the cellulose used, however, the manufacturing process involves the use of hazardous chemicals and the resulting fiber is rayon and not cotton, wood, or bamboo fiber.

34. Respondents do not state that their textile fiber products are rayon, nor, assuming that bamboo is the source of the cellulose used in their textile fiber products, do Respondents state that their textile fiber products are rayon made from bamboo. Moreover, on the pages of their website stating the claims set forth in Paragraph 6, Respondents do not provide any description

## Complaint

of the chemical process used to manufacture their textile fiber products.

35. At the end of 2008, Respondents modified their website to add a webpage entitled “The Naked Truth” within the category of “Wear Your Values” under the tab for “About Jonano.” On this webpage, Respondents acknowledge that “Bamboo fabric uses a chemical process to turn its Cellulosic fibers into fabric. And yes, it’s also true that the process is similar to Tencel®, viscose and rayon production and is, in fact, considered a sub-category of both Viscose and Rayon.” (“The Naked Truth” page, Exhibit D at 1).

36. The statements made in Paragraph 13 are not clear and conspicuous, nor are they in close proximity to the representations set forth in Paragraph 6, above.

15. Respondents advertise or have advertised their textile fiber products for sale on the www.jonano.com website without including in the description of the product a clear and conspicuous statement that the product was either made in U.S.A., imported, or both.

**VIOLATIONS OF SECTION 5 OF THE FTC ACT****FALSE OR MISLEADING REPRESENTATIONS**

16. Through the means described in Paragraph 6, Respondents represent or have represented, expressly or by implication, that:

- a. Their textile fiber products are bamboo fiber;
- b. Their textile fiber products are manufactured using an environmentally friendly process; and
- c. Their textile fiber products retain anti-microbial properties of the bamboo plant.



## Complaint

## 17. In truth and in fact:

- a. Respondents' textile fiber products are not bamboo fiber, but instead are rayon, a regenerated cellulose fiber;
- b. Respondents' textile fiber products are not manufactured using an environmentally friendly process but rather a process that involves the use of toxic chemicals and results in the emission of hazardous air pollutants; and
- c. Respondents' textile fiber products do not retain anti-microbial properties of the bamboo plant.

18. Therefore, the representations set forth in Paragraph 16 were, and are, false or misleading, and the making of such representations constitutes a deceptive act or practice, in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act.

UNSUBSTANTIATED REPRESENTATIONS

19. Through the means described in Paragraph 6, Respondents represent or have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 16, 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 16, at the time the representations were made.

21. Therefore, the representation set forth in Paragraph 19 was, and is, false or misleading, and the making of such representation constitutes a deceptive act or practice, in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act.

## Complaint

**TEXTILE FIBER PRODUCTS IDENTIFICATION ACT**  
**and RULES AND REGULATIONS**

22. The Textile Fiber Products Identification Act, 15 U.S.C. § 70, *et seq.* (“Textile Act”), governs, *inter alia*, the labeling and advertising of textile fiber products introduced, manufactured for introduction, delivered for introduction, sold, advertised, or offered for sale in commerce. *See* 15 U.S.C. § 70a.

23. Under the Textile Act, a textile fiber product is “misbranded if it is falsely or deceptively stamped, tagged, labeled, invoiced, advertised, or otherwise identified as to the name or amount of constituent fibers contained therein.” 15 U.S.C. § 70b(a).

24. Pursuant to the Textile Act, 15 U.S.C. § 70e(c), the Federal Trade Commission has promulgated Rules and Regulations for its administration and enforcement (“Textile Rules and Regulations”). *See* 16 C.F.R. Part 303. The Textile Rules and Regulations state:

- a. All textile fiber products must carry permanent, affixed labels stating the recognized generic names of the constituent fibers, as well as indicating, among other things, the “percentages by weight of the constituent fibers present in the textile fiber product, excluding permissive ornamentation, in amounts of 5 percent or more,” as well as the “name of the country where such product was processed or manufactured.” 16 C.F.R. § 303.16(a)(1), (a)(3); *see also* 16 C.F.R. §§ 303.6, 303.15 and 303.33;
- b. In advertising textile fiber products in promotional materials disseminated to ultimate consumers in print or by electronic means, other than by broadcast, where the consumer is solicited to purchase such textile products without examining the actual product purchased, the description of the product must contain a clear and conspicuous statement that the product was either made in U.S.A., imported, or both. 16 C.F.R. § 303.34;

## Complaint

- c. In advertising and labeling textile fiber products, no generic name for a manufactured fiber may be used until such generic name has been “established or otherwise recognized by the Commission,” 16 C.F.R. § 303.8, and such generic names must be used when identifying the fiber content in the information required in such labels and advertisements, 16 C.F.R. § 303.6;
- d. The only generic terms for fibers manufactured from regenerated cellulose that have been established or otherwise recognized by the FTC are rayon, viscose, modal, cupro, and lyocell. *See* 16 C.F.R. § 303.7(d);
- e. “Words, coined words, symbols or depictions, (a) which constitute or imply the name or designation of a fiber which is not present in the product, (b) which are phonetically similar to the name or designation of such a fiber, or (c) which are only a slight variation of spelling from the name or designation of such a fiber shall not be used in such a manner as to represent or imply that such fiber is present in the product.” 16 C.F.R. § 303.18. Any term used in advertising, including internet advertising, that constitutes or connotes the name or presence of a textile fiber is deemed to be an implication of fiber content. 16 C.F.R. § 303.40; and
- f. Any information or representations included in advertising or labeling of a textile fiber product that is not required under the Textile Act or the Textile Rules and Regulations “shall in no way be false, deceptive, or misleading as to fiber content and shall not include any names, terms, or representations prohibited by the [Textile] Act and regulations. Such non-required information or representations shall not be set forth or so used as to interfere with, minimize, or detract from the required information.” 16 C.F.R. § 303.42(b); 16 C.F.R. § 303.41(d); *see also* 16 C.F.R. § 303.17.

## Complaint

25. A violation either of the Textile Act or of the Textile Rules and Regulations constitutes an unfair and deceptive act or practice in violation of the Federal Trade Commission Act. *See* 15 U.S.C. §§ 70a and 70e.

**VIOLATIONS OF THE TEXTILE ACT AND  
THE TEXTILE RULES AND REGULATIONS**

26. As set forth in Paragraph 6, Respondents have:

- a. labeled their textile fiber products as consisting of bamboo; and
- b. advertised the fiber content of their textile fiber products using the terms “bamboo” and “bamboo fiber.”

27. In truth and in fact, Respondents’ textile fiber products are not bamboo fiber but are rayon, a regenerated cellulose fiber.

28. As set forth in Paragraph 15, Respondents have advertised and sold their textile fiber products on the [www.jonano.com](http://www.jonano.com) website without including in the description of each product a clear and conspicuous statement that the product was either made in U.S.A., imported, or both.

29. Through the means described in Paragraphs 6 and 15, Respondents have manufactured for introduction, introduced, advertised, offered for sale, or sold textile fiber products that are misbranded or falsely or deceptively advertised, as prohibited by Sections 70a and 70b of the Textile Act, 15 U.S.C. § 70, *et seq.*, and in violation of Sections 303.6, 303.8, 303.16, 303.17, 303.18, 303.34, 303.40, 303.41, and 303.42 of the Textile Rules and Regulations, 16 C.F.R. Part 303.

30. Respondents’ violations of the Textile Act and of the Textile Rules and Regulations constitute deceptive acts or practices, in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act.

## Complaint

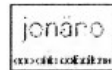
**THEREFORE**, the Federal Trade Commission, this fifteenth day of December, 2009, has issued this complaint against Respondents.

By the Commission.

**Exhibit A**

Designer Organic Clothing from Jonano for Women and Babies

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- e-catalog
- Change Currency: [ € ] [ £ ]
- Log in
- Register
- View cart
- Contact
  
- Eco-chic Collection
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- Wholesalers



**Comfort with Benefit™ - Organic Cotton, Natural Fibers and Bamboo Apparel**

<http://www.jonano.com/>

Exhibit A, page 1

## Complaint

Designer Organic Clothing from Jonano for Women and Babies

Page 2 of 4

Of all organic, natural fibers, organic cotton is one of the most popular. Organic cotton is grown using methods and materials that have a low impact on the environment.

Conventional cotton farming is one of agriculture's most environmentally destructive activities, taking an enormous toll on the air, water, and soil, as well as people living around pesticide laden cotton fields. Cotton uses approximately 25 percent of the world's insecticides and more than 10 percent of the pesticides (including herbicides, insecticides, and defoliants.). In the U.S. in 2000, 84 million pounds of pesticides were sprayed on the 14.4 million acres of conventional cotton grown in the country, ranking cotton second behind corn in total amount of pesticides sprayed. The Environmental Protection Agency (EPA) ruled in 2000 that seven of the top 15 pesticides used on cotton in the United States as "possible," "likely," "probable," or "known" human carcinogens.

Organically grown **bamboo clothing** is luxuriously soft with a texture akin to silken cashmere, and looks fantastic in nature inspired low impact fabric hues. Bamboo fiber's moisture absorbency is twice that of cotton, and has natural antimicrobial properties, commonly known as "bamboo kun." **Bamboo clothing** wicks moisture and odor away from your body at twice the rate of conventional cotton. Bamboo does not require the use of pesticides due to this natural antifungal and antibacterial agents. The same natural substance that protects bamboo growing in the field protects you as you wear **bamboo clothing**.

Bamboo is known to be the fastest growing plant on earth, making it naturally renewable. It grows to its maximum height in approximately 3 months and matures in 3-5 years. Bamboo's growth characteristics enable it to spread rapidly across large areas, and bamboo cultivation can improve soil quality in degraded and eroded areas.

Hemp is the original choice for **organic clothing**, with references to its use in **organic clothing** and textiles for over 12,000 years. Presidents Washington and Jefferson both grew hemp, and hemp was grown by the early American settlers. Ben Franklin owned a mill that made hemp paper. Jefferson drafted the Declaration of Independence on hemp paper.

Hemp denim was the chosen fabric for the first pair of Levi's jeans. More resilient than cotton denim, hemp is just as soft and versatile. And the hemp plant is one of the most amazing eco-friendly plants known on the planet. Industrial grade hemp produces three times more fabric per acre than non-organic cotton, and is a natural for organic farming techniques due to its natural antimicrobial qualities. The hemp plant actually replenishes the soil it is grown in, leaving it richer in essential nutrients than before it was planted. It also grows extremely fast, so it's an excellent crop in terms of productivity for the farmer. But it's hemp's wearability and texture that makes it a natural choice for the jonano Eco Scrub line in silken hemp linen.

Hemp natural fibers are longer, stronger, more absorbent and more mildew-resistant than cotton. **Organic clothing** made of at least 50% hemp block the sun's UV rays more effectively than other fabrics.

At Jonano™, we are passionate about the **organic clothing** that we offer you. Jonano™ is meticulous in removing the guess work out of what is good for your family, saving you both time and headaches. Whether shopping for yourself, your family, or choosing baby gift, we want you to know that the natural products you are choosing, are also items we are using in our home. Enjoy your shopping experience.

### ecoKashmere: Soft, Knit Bamboo Fiber

<http://www.jonano.com/>

Exhibit A, page 2

## Complaint

Designer Organic Clothing from Jonano for Women and Babies

Page 3 of 4

Known for its buttery soft feel without the cost.

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**Sami Baby: Natural clothing for your child**

Sami Baby Collections highlight your baby's playful nature.

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- [Buy Now](#)

**Eco Scrubs: For the environment and for you**

Functional and fresh Eco Scrubs transition in any environment.

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ecoKashmere® trademark registered.Sami Designs® trademark registered.  
Comfort with Benefit® trademark registered.  
Eco Scrubs™ trademark registered.  
eColorgrown™ trademark pending.  
Sami Baby™ trademark pendingSami Designs Inc specializes in trademark eco-friendly fabrics  
and sustainable business practices.<http://www.jonano.com/>

Exhibit A, page 3

Complaint

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CATEGORIES

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- ecologrow™ Line
- ecologrow™
- Jonano Eco...
- Sens Baby™
- Sami Signature™
- Environmental and...
- Natural Fibers
- Sens Eco Straps™
- Jonano Care
- Organic Trade
- Our Community
- eco Culture

About Us

Wholesale

Customer Service

Home > Wear Your Values > Natural Fibers

Natural Fibers

BAMBOO CLOTHING



Bamboo is a natural, renewable resource that can be made into easy-care fabrics. Made from the cellulose extracted from the bamboo plant, this elegant eco-fiber is manufactured using a non-toxic process which spins buttery-soft machine washable fabric. Bamboo grows very quickly and does not require pesticides or herbicides. Unlike even only synthetic spun bamboo of the highest quality and strength. It is comfortable, breathable and kills bacteria that cause odor. Jonano's bamboo "ecologrow™" Line feels like silk against next to the skin, and will lock moisture at least the rate of conventional cotton. Our organic baby clothing line of bamboo baby clothes and gifts introduce naturally soft and protective bamboo clothes to your smallest and most precious family members.

Jonano natural bamboo clothing provides a high level of comfort, plus natural antimicrobial protection designed to inhibit the growth of the bacteria and fungi that cause odor. The natural antimicrobial qualities of bamboo clothing help to protect you from perspiration, staining, and helps keep your clothing looking great longer. Best of all, bamboo clothing keeps its natural antimicrobial benefits even after repeated washing.

ORGANIC COTTON CLOTHING



Certified organic cotton is cotton grown without the use of harmful pesticides, herbicides or artificial fertilizers. It is also free of genetically modified organisms. Organic cotton clothing wears well and is extremely breathable, unlike synthetics that pill, emit static electricity, prematurely age and trap perspiration. Non-organic cotton clothing is commonly portrayed as natural, yet its cultivation and processing contaminates groundwater and ultimately drinking water, poisoning the food chain.

Jonano's Defold™ Line of designer tees are made of 100% certified organic cotton. Not only do they look great, but you can smile knowing that your designer tee has had less environmental impact than conventional cotton tees because its organic. Plus, the purchase of your designer tee is contributing to the noble efforts of finding a cure for cancer.

Sens Baby highlights our Scandinavian roots with organic baby clothing in styles reminiscent of the native dress worn by the women of the Scandinavian north. Each piece has been carefully selected to ensure that quality, durability and softness are sewn into every organic baby item in our collections.

HEMP CLOTHING



Hemp is an eco-fiber made from the inner bark of the hemp plant. Hemp clothing is durable, breathable, antimicrobial and strong in feel and weight to high quality linen but softer. It is also UV resistant and machine washable.

Jonano Eco Straps™ Line is the first of its kind, offering natural fiber options in Hemp Linen and 100% Certified Organic Cotton.

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SITE NEWS

08/26/2006

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Complaint

Wear Your Values :: Luxurious Eco Fashion - Designer Organic Clothing from Jonano Page 1 of 2

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- Same Baby™
- Same Signature...
- Environmental and...
- Natural Fibers
- Same Eco Scrubs™
- Jonano Care
- Organic Trade
- Our Community
- eco Culture

**About Us**

- Wholesale
- Customer Service

Home > **Wear Your Values** > Luxurious Eco Fashion

luxurious Eco Fashion

### Eco-fashion

Jonano™ presents a collection of luxurious organic clothing to uplift the senses and help preserve this unique planet we call home. The texture and colors of nature's own palette are a never ending source of inspiration. Heirloom colorgrown organic cottons, crisp structured hemp linens and cashmere soft bamboo come alive in earthy greens, deep salty blues and early morning taupes.

The nonprofit Sustainable Technology Education Project (STEP) defines eco-fashion as clothing "that takes into account the environment, the health of consumers and the working conditions of people in the fashion industry." Clothes and accessories that meet such criteria are often made using organic raw materials, such as cotton, bamboo and hemp grown without pesticides.

Jonano eco chic collections are manufactured from sustainable raw materials such as colorgrown organic cotton, organic bamboo and hemp. Jonano™ chooses to create garments that are sustainably-made with the quality craftsmanship you desire. We use non-toxic dyes and natural undyed fabric shades to create our eco-chic color palette. Organic baby clothing is hypoallergenic, safe and natural for babies sensitive skin.

Nurture yourself as you wear your values in luxurious organic clothing created using sustainable business practices and fair labor standards that honor Mother Earth.

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**ECO-CHIC**


The term eco-chic is exclusive to fashionable and stylish clothing created using environmentally-friendly processes. Embracing the idea of making a positive impact on the future of the planet, Jonano selects high quality organic and natural fabrics that utilize the earth's resources in an Eco-friendly sustainable manner. Natural and organic clothing is created using as few chemicals and harmful impact on the environment as possible, promoting ecological responsibility.

---

**CERTIFIED ORGANIC COTTON**

Certified Organic Cotton is cotton grown without any harmful pesticides, herbicides or artificial fertilizers using biologically based and sustainable growing methods such as crop rotation rather than with highly synthetic and destructive fertilizers. It is also free of formaldehyde finishes. Jonano™ is proud to be a member of the Organic Trade Association. Organic cotton clothing wears well and is extremely biodegradable, unlike synthetics that pill, emit static electricity, prematurely age, and trap perspiration.

Upon your request, we will be happy to forward a certificate of authenticity for every fabric labeled as certified organic. Hemp and bamboo are grown organically without the use of toxic chemicals but the industry has not yet drawn up standards for certification for these new eco-fibers. For more information about the Organic Trade Association, visit [www.ota.com](http://www.ota.com).




---

**FABRICS BEST FOR SKIN SENSITIVITIES**

Most people suffering from skin dermatological conditions can comfortably wear hypoallergenic clothing made from certified organic fibers such as cotton, bamboo and hemp. Bamboo and Hemp are bacteria resistant in their natural growing natural state. Customers with skin sensitivities to fabric dyes can choose our all natural dye-free organic clothing from the ecoKashmere® collection. Many of our chemically sensitive customers are able to wear most items in our store except those that have lycra in them. For shipping, each garment is protected for shipping in a reusable zip bag to protect them from residues that might rub off from shipping boxes and shipping envelopes. These spack style bags are great for travel and storage - please reuse.

---

**FAIR TRADE**

Fair Trade farming and production supports living wage and safe and healthy conditions for workers worldwide. Jonano partners with cooperatives as well as small independent manufacturers while Jonano™ is not yet a member of the Fair Trade Federation, we are careful to screen each manufacturer who participates in the creation our clothing. By adhering to Fair Trade and sustainable environmental principles, Fair Trade producers foster a more equitable and sustainable system of production and trade that benefits people and their communities.

We have solidified overseas relationships with manufacturing partners who share our social and environmental standards and operate according to the principles of fair labor working conditions.

We are very conscious about fair labor. Our manufacturing partners promise fair working

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-  Colorgrown Pizzini Dress

---

**free shipping**

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## Complaint

Designer Organic Clothing from Jonano for Women and Babies - Customer Service :: Ab... Page 1 of 4



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## About Jonano

### About Jonano®.

Check out the Fall 07 Collection [VIDEO](#)

### What is ecoKashmere®?

Jonano's bamboo ecoKashmere® Line feels like silken cashmere next to the skin, and will wick moisture at twice the rate of conventional cotton.

### Care Instructions

All items have been pre-washed.

Machine wash cold or warm, gentle cycle. Line dry or machine dry on low heat. Warm iron. No bleaching or drycleaning. [Sizes & Care Guidance](#)

### Bamboo Fiber Development

<http://www.jonano.com/our-community-1/about-jonano.html>

Exhibit A, page 7

## Complaint

Designer Organic Clothing from Jonano for Women and Babies - Customer Service :: Ab... Page 2 of 4

Although bamboo has long been known in Asia for its many unique applications, the idea of using bamboo to spin yarns is a much more recent technology. Interest in bamboo has steadily grown as more and more information becomes available concerning its inherent characteristics. Bamboo grows rapidly and can be harvested every two to three years with little or no environmental impact making it a remarkable, sustainable resource when compared to a tree forest that takes over 60 years to recover from deforestation. Bamboo is also inherently antimicrobial, so it is seldom infected by pathogens or eaten by pests. There is no need to use chemicals or pesticides to grow bamboo. Recent testing has proved that there is little or no growth in bacteria when it is brought into contact with bamboo for a period of 24 hours. It is noteworthy that for centuries, food in Japan was wrapped in bamboo leaves to keep it from spoiling. In addition, bamboo's molecular configuration gives it the ability to absorb and release moisture very rapidly.

The bamboo is grown on plantations and logged by hand. It is then finely shredded and bamboo cellulose is extracted. Impurities are then removed leaving only the finest quality fibers which are pulped into a cardboard-like sheet. The pulp is dissolved into viscose before being made into a spun or filament fiber using a low impact, closed loop system.

### Reduced Footprint

When this much care has been taken to create a fiber that is truly natural, organic and sustainable, the manufacturing process must also be environmentally responsible. Jonano® creates ecoKashmere® in Asia in accordance with ISO 1400 environmental standards. It is made from organically grown bamboo and harvested close to vertically integrated manufacturers to lessen the transportation costs between fabrication facilities.

The bamboo is spun, and then dyed using closed systems mild alkali bath processes which has been determined to be safest for the environment. Jonano chooses to use chlorine-free paper for mailings, recycled materials for labeling and packaging, and opts for shipping in preference to air transport - all conscious environmental choices.

### Environmental Policy

Within the objectives of establishing a third party certification system covering fair and safe working conditions as well as clean manufacturing from fiber to finished good, Jonano manufacturers have earned the right of being certified by ISO 9000: 1400 Environmental Management. The ISO 14000 environmental management standards exist to help organizations minimize how their operations negatively affect the environment (cause adverse changes to air, water, or land), comply with applicable laws, regulations, and other environmentally oriented requirements, and continually improve on the above.

ISO 14000 is similar to ISO 9000 quality management in that both pertain to the process (the comprehensive outcome of how a product is produced) rather than to the product itself. As with ISO 9000, certification is performed by third-party organizations rather than being awarded by ISO directly. The ISO 19011 audit standard applies when auditing for both 9000 and 14000 compliance at once.

The scope of the Environmental Management was established in accordance with environmental laws and regulations, some of the managing principles can be found listed below:

## Complaint

Designer Organic Clothing from Jonano for Women and Babies - Customer Service :: Ab... Page 3 of 4

- Minimization of wastes at source
- Reuse or treat with an appropriate method all possible wastes
- Reduce the use of natural resources to minimum levels by effective use of energy and raw materials
- Comply with occupational health and safety requirements
- Using latest environmentally friendly technologies in facilities
- Generating employee awareness and responsibility

**ÖKO-TEX 100 Certification**

It is absolutely essential that the chemicals used in the production of textiles must not have any negative effects on human health and the environment. For this reason, authorized laboratories and professional certification groups test our textile products; physical and chemical analyses are used to verify that textile products are safe to be used for the consumer and the environment. Our manufacturing systems have been certified that they have met the ÖKO-TEX STANDARD 100. This certificate is renewed every year. For detailed information, please visit [www.oeko-tex.com](http://www.oeko-tex.com) and [www.testex.com](http://www.testex.com).

**ecoKashmere**

Known for its buttery soft feel without the cost.

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**Sami Baby**

Sami Baby Collections highlight your baby's playful nature.

- [View More](#)
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**On Sale**

20% to 50% off

- [Buy Now](#)

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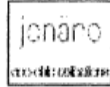
- All categories -

<http://www.jonano.com/our-community-1/about-jonano.html>

Exhibit A, page 9

## Complaint

Designer Organic Clothing from Jonano for Women and Babies - Women :: Bamboo Pique... Page 1 of 4



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- [Daffodil Line](#)
- [Eco Scrubs](#)
- [Sale](#)
  
- [Home |](#)
- [Women | Bamboo Pique Long Sleeved Vee Polo Red](#)

## Women



<http://www.jonano.com/bamboo-pique-long-sleeved-vee-polo-red.html>

Exhibit A, page 10

## Complaint

Designer Organic Clothing from Jonano for Women and Babies - Women :: Bamboo Pique... Page 2 of 4

[View larger image](#)**Bamboo Pique Long Sleeved Vee Polo Red**

Code W354R RED

Size: Small

Quantity 1

Price: \$38.00

- [Send to a friend](#)
- [Add to Wish List](#)
- [View Size chart](#)

**Buy Now****True Red Long Sleeve Bamboo Pique Polo**

Slip into sensually soft bamboo pique and experience eco luxury like you've never felt before. Made from bamboo ecoKashmere™ pique, in a light buttery knit that is too good for words. Great drape with a bit of stretch and remarkably flattering fit that falls to the hip. Featuring a deep vee polo neckline, long sleeves, and an embroidered tattoo style logo at the nape of the neck. Tapestry print detailing inside neck opening.

Color: True Red

Composition: 95% Bamboo 5% Lycra Pique

Available Colors: Cream Brule, Moroccan Blue, True Red

Care and Wash: Hand or machine wash cool, hang dry or tumble cool. Do not dryclean.

**Send Bamboo Pique Long Sleeved Vee Polo Red to a friend**

Name of your friend :

E-mail of your friend\*:

Your name :

Your e-mail :

Your message\*:

Bamboo Pique Long Sleeved Vee Polo Red

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<http://www.jonano.com/bamboo-pique-long-sleeved-vee-polo-red.html>

Exhibit A, page 11

## Complaint

Designer Organic Clothing from Jonano for Women and Babies - News... <http://www.jonano.com/news-events/february-25-2006-why-you-shou...>



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- February 25, 2006 - Why You Should Buy Organic Clothing

## February 25, 2006 - Why You Should Buy Organic Clothing

February 25, 2006

### Why You Should Buy Organic Clothing

Everyone needs clothes. They shelter us from the elements and define our personal style. Jonano offers information on organic clothing and new bamboo fabric alternatives that offer value-added benefits without the environmental cost.

#### DID YOU KNOW?

- A cotton t-shirt blended with polyester can release approximately one quarter of its weight in air pollutants and ten times its weight in carbon dioxide. Each organic fiber t-shirt you buy eliminates the use of 150 grams of agricultural chemicals. It takes approximately one pound of chemicals to grow three pounds of conventional cotton, while organic cotton is grown chemical free.
- Bamboo is a natural, renewable resource that can be made into easy-care fabrics. Made of the cellulose extracted from managed bamboo farms, this elegant eco-fiber is manufactured using a non-toxic process which spins buttery-soft machine washable fabrics. Bamboo grows very quickly and does not require fertilizers or pesticides. Jonano manufactures only authentic spun bamboo of the highest quality and strength. It is comfortable, breathable, and kills bacteria that causes odor. The jonano ecoKashmere™ line of base layer protective apparel feels like silken cashmere next to the skin, and will wick moisture at twice the rate of conventional cotton.
- Certified organic cotton is cotton grown without the use of harmful pesticides, herbicides or artificial fertilizers. It is also free of formaldehyde finishes. Organic cotton wears well and is extremely breathable, unlike synthetics that pill, emit static electricity, prematurely age and trap perspiration. Non-organic cotton is commonly portrayed as natural, yet it is highly cultivated and processed which contaminates groundwater and ultimately drinking water, poisoning the food chain.
- Most people suffering from skin dermatological conditions can comfortably wear garments made from organic fibers such as organic cotton or bamboo. Depending on your level of skin sensitivity, you may need to wear hypoallergenic, dye-free clothing. Bamboo fabric is naturally antimicrobial, and will not harm those with skin sensitivities. No chemicals have been





## Complaint

Designer Organic Clothing from Jonano for Women and Babies - News... <http://www.jonano.com/news-events/february-25-2006-why-you-shou...>

added to achieve this value added benefit. For shipping, jonano wraps unpackaged garments in unbleached tissue paper to protect them from residues that might rub off from shipping boxes and shipping envelopes.

- Natural and organic fiber fabrics are processed with as few chemicals and harmful impact on the environment as possible. By purchasing natural and organic fiber clothing you are supporting environmental causes. By purchasing sustainable clothing that reduces environmental impact, clothing that supports and nourishes the earth and the lives of all people involved in the process of growing, manufacturing and distributing the clothing, you also support the principals of Fair Trade working conditions, earth and animal welfare.
- The Fair Trade Federation, FTF, is an association of fair trade wholesalers, retailers and producers whose members are committed to providing fair wages and good employment opportunities to economically disadvantaged artisans and farmers worldwide. Jonano supports and follows the principals of the FTF. By adhering to social criteria and environmental principles, Fair Trade Organizations foster a more equitable and sustainable system of production and trade that benefits people and their communities

published February 25, 2006

written by Bonnie Sifers

Owner/Designer

[www.jonano.com](http://www.jonano.com)

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ecokacmare trademark application pending

Comfort with Benefit trademark application pending

sansico scoldis trademark application pending

Quote ID: 100000000016231 (Quote created: 02/23/06) (posted 03/25/06)

Headquartered in Pittsburgh, PA, Jonano™ is one of the few scrub companies on Earth specializing in eco-friendly fabrics and sustainable business practices.

- [Home](#)
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- February 25, 2006 - Why You Should Buy Organic Clothing

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Your rating: \* Excellent

Your message: \*

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## Complaint

Designer Organic Clothing from Jonano for Women and Babies - New... <http://www.jonano.com/news-events/march-8-2006-skin-care-and-hyp...>



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- March 8, 2006 - Skin Care And Hypoallergenic Solutions For Diabetics

## March 8, 2006 - Skin Care And Hypoallergenic Solutions For Diabetics

March 8, 2006

### Skin Care And Hypoallergenic Solutions For Diabetics

Skin care problems are common in diabetics. Jonano offers hypoallergenic, naturally antimicrobial baselayer protection against bacteria and fungus that cause odor.

Diabetes can affect every part of the body, including the skin, and as many as one third of diagnosed diabetics will develop a skin disorder during their lifetime.

High levels of blood glucose cause dry skin, particularly in the legs and feet. A unique condition known as diabetic neuropathy prohibits nerves from transmitting messages to the central nervous system which allow the skin to produce moisturizing sweat. When dry skin cracks and peels, germs gain access to the dermal inner layers, often leading to dangerous skin infections.



#### Bacterial Infections:

Several kinds of bacterial infections occur in people with diabetes causing inflamed skin tissue that is usually hot, swollen, red

## Complaint

Designer Organic Clothing from Jonano for Women and Babies - New... <http://www.jonano.com/news-events/march-8-2006-skin-care-and-hyp...>

and painful. Most infections are caused by Staphylococcus bacteria, commonly known as Staph. [WebMD](#) recommendations for taking care of minor skin irritations are:

- Gently wash the area with a mild hypoallergenic soap and warm water;
- Cover the irritated skin with a hypoallergenic or cloth bandage, or gauze pad secured in place with hypoallergenic or paper tape;
- Keep checking the area to make sure the irritation doesn't get worse;
- Change the bandage at least once a day.

Ask your doctor. Some infections may require treatment with antibiotics in the form of pills and/or creams.

### Fungal Infections:

Common fungal infection include athlete's foot, ringworm (a ring-shaped patch), jock itch and female yeast infection. Most infections are caused by the yeast-like fungus, *Candida albicans*, which causes itchy rashes in moist warm folds of the skin. This fungus causes bright red, itchy rashes, often surrounded by tiny blisters and scales.

If you think you have a fungal infection, visit your doctor, as you will require a prescription medicine to cure it.

Mucormycosis is seen in people with diabetes. This fungal infection starts in the nasal cavities and can spread to the eyes and brain. It can be fatal if left untreated.

### Protecting your Skin:

Keeping your diabetes under control is the most important factor in preventing skin complications. Follow your health care provider's advice in regard to nutrition, exercise and medication. Check your blood glucose levels as instructed and keep your levels within the range recommended by your doctor.

Proper skin care will also reduce your risk of skin problems:

- To prevent dry skin when the temperature drops, use a room humidifier
- When bathing use warm (not hot) water and a mild, hypoallergenic moisturizing soap;
- Avoid prolonged showers and baths and pat skin dry (do not rub);
- Avoid scratching irritated skin, apply mild hypoallergenic moisturizers instead;
- If you are prone to acne, see a dermatologist. Use only products labeled noncomedogenic or nonacnegenic;
- Take care of small cuts with antibacterial ointment and a hypoallergenic bandage. Change dressing daily;
- Protect your skin from the elements - use SPF of 15+ and protect your extremities. Use moisturizing lip balm.
- Choose newly available hypoallergenic and naturally antimicrobial clothing options.

See a doctor if you have any pain or discomfort that continues for more than two days or an elevated temperature. Go to the doctor immediately if you notice any pus developing on a sore or near it. Jonano offers naturally antimicrobial, hypoallergenic clothing for Men, Women and babies.

published March 7, 2006  
written by Bonnie Siefers  
Owner/Designer [www.jonano.com](http://www.jonano.com)  
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Sami Eco Scrubs trademark application pending.

Headquartered in Pittsburgh, PA, Jonano™ is one of the few scrub companies on Earth specializing in eco-friendly fabrics and sustainable business practices

## Complaint

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## October 25 2008 - Eco-minded Shoppers are Discovering Renewable Bamboo



<!--[if !vml]--><![endif]--> <!--[if !vml]--><![endif]-->(openPR) - Designed for parents who seek only the best when it comes to their precious little ones, soft, ringspun bamboo ecoKashmere is both luxurious and healthy not only for your little ones, but also for the environment. Organically grown bamboo fabrics are soft, naturally antimicrobial, and gentle on baby's delicate skin. The mom and baby range available from <http://www.jonano.com/>, is proving to be a runaway success.



Jonano presents Sami Baby, a collection of organic baby clothing to uplift the senses and help preserve this unique planet we call home. Designed for parents who seek only the best when it comes to their precious little ones, the collection is timeless, offering classic infant and baby items in eco-chic fabrics that you will feel good about. A pure, natural environment is vital to children of all ages. Organic fabrics are softer, more luxurious and healthier not only for your little ones, but also for the environment. Embracing the idea of making a positive impact on the future of the planet, Jonano selects high quality organic and natural fabrics that utilize the earth's resources in an eco-friendly manner, while at the same time providing the Comfort with Benefit unique to luxurious

<http://www.jonano.com/news-events/october-25-2008-eco-minded-shoppers-are-discoveri...>

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organic and natural fibers.

Organically grown bamboo fabrics are soft, naturally antimicrobial and more breathable on baby's delicate skin. Soft ringspun bamboo and organic cotton protect babies delicate skin and colorgrown options offer hypoallergenic alternatives. From the fibers we choose to the recycled tissue we wrap your finished product in for shipping, we are committed to providing you the best personal service, quality product and superior value that we can offer.

The Sami are the indigenous people of Scandinavia, with roots stretching back thousands of years, to the first people who settled along the Northern Arctic. For thousands of years the Sami People have been using the land in harmony with nature. Inspired by the Scandinavian Sami of the northern arctic, Sami Baby organic baby clothing separates and collections feature quality sustainable fabrics made from the finest bamboo and organic cotton. At Jonano™ we feel strongly that the Sami tradition of living a symbiotic relationship with the world is essential to maintaining a healthy lifestyle. That's why only sustainable and organic clothing, made according to fair trade standards meet our criteria. It's the content of the heart that defines the Sami philosophy of life.

The jonāno name is derived from the ancient Sami language and translates as "everybody healthy."  
juohkehas (everyone, everybody, everyperson)  
nā (in this way, like this way, this way)  
no (well, healthy)

Sami Baby highlights baby's playful nature. Look for bold stripes in bright color contrasts that evoke the native Sami dress. At Jonano, we are passionate about the organic clothing that we offer you. Jonano is meticulous in removing the guess work out of what is good for your family, saving you both time and headaches. Enjoy your shopping experience.

- § Crafted of the world's softest bamboo ecoKashmere, Sami Baby's exclusive, mix-and-match stripes and prints get a bunch of giggles from baby!
- § The essential Sami Sleeper keeps baby snug and cozy with easy pull on styling and an elastic open hem for easy changes in a lullaby 'Counting Sheep' pattern.
- § Everyone loves onsies! Panda bears adorn these colorful bamboo basics. This essential bodysuit has an easy-on lap collar and snaps at the bottom to make diaper changes snappy!
- § This super-cute lap tee with 'Tomte' stripe is a fabulous everyday piece for your child - Tomte is Swedish for little elf, and your little one will look perfectly elfish topped off with the tie top beanie. Produced in an environmentally friendly manner that's easy on the earth, your Sami baby will look sweet and feel great too!

Safer for the environment and baby, look for organics that are not only chemical-free, but also produced without any harsh chemical bleaches or dyes. Organically grown ensures that the fabric and crop remain pure and free from harmful chemicals and dyes. As a result, organics are not only gentle on baby's sensitive skin, but also safer for the people who make the clothes, for the farmers who grow the crops, and for the environment."

Created using sustainable business practices and fair labor standards that honor Mother Earth.

The Sami Baby Collection of apparel for newborns to nine months and retail from \$9.00 - \$32.00 U.S. Wholesale inquiries are welcome at [sales@jonano.com](mailto:sales@jonano.com)

Visit [www.samibaby.com](http://www.samibaby.com) for more information.  
Press Inquiries:  
Bonnie Siefers  
Owner/Designer  
Jonano eco chic collections, Sami Designs INC  
724.935.9753

<http://www.jonano.com/news-events/october-25-2008-eco-minded-shoppers-are-discoveri...>  
Exhibit A, page 17

Complaint

**Exhibit B**

Exhibit B, page 1

Discover the difference of  
ecoKashmere®

Made from the fastest growing woody plant on earth, bamboo requires no pesticides, making this exotic fiber 100% eco-friendly. Renowned for its antibacterial properties and breathability, bamboo provides comfort with benefit™. Wear your values in luxurious style created using sustainable business practices and fair labor standards that honor Mother Earth.



First Year  
ecoKashmere®  
56% Bamboo / Natural Fiber / 5% Nylon  
jonano.com

## Complaint



## Organic Bamboo



Nurture yourself  
as you Wear your  
Values™ in luxurious  
ecoKashmere®  
bamboo clothing - a  
sustainable choice that  
honors Mother Earth.

Bamboo is a natural,  
renewable resource  
that can be made into  
easy-care textiles. This  
luxurious eco fabric  
is derived using a low  
impact process, which  
spins machine washable,  
buttery cashmere-like  
fabrics.

- Bamboo offers a high level of comfort, plus natural antimicrobial protection;
- Bamboo inhibits the growth of the bacteria and fungi that cause odor and perspiration staining;
- Best of all, bamboo clothing retains its natural antimicrobial benefits even after repeated washing.

Bamboo is a prolific grass that does not require fertilizers or pesticides. What's more, bamboo is completely biodegradable, replenishing soils essential nutrients.

Bamboo comes from nature and completely returns to nature in the end.

Wear Your Values™

Jonano™ selects only farm grown bamboo of the highest quality and strength in creating ecoKashmere®.

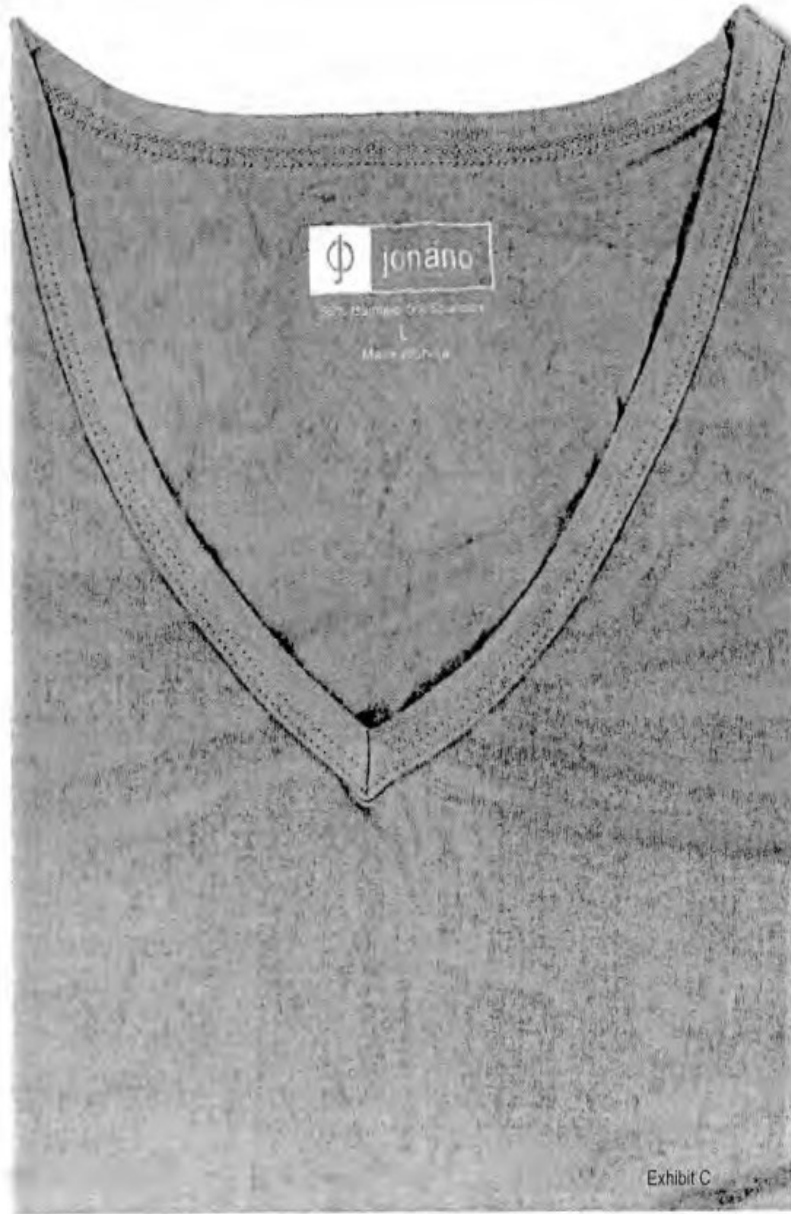
Jonano™  
877.ECO.9753  
[www.jonano.com](http://www.jonano.com)



JONANO-000249

Complaint

**Exhibit C**





## Complaint

**Exhibit D**

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- [Wear Your Values](#) | [The Naked Truth](#)

**The Naked Truth****Bamboo Fabric - The Naked Truth**

Yes, it's true. Bamboo fabric uses a chemical process to turn its Cellulosic fibers into fabric. And yes, it's also true that the process is similar to Tencel®, viscose and rayon production and is, in fact, considered a sub-category of both Viscose and Rayon. The production of rayon has been in existence since the mid 1800's and since then has undergone many iterations. More recently, new processes have been developed which enable plant-based fibers (such as bamboo) to be utilized in the production of fabric.

Some companies, such as ours, produce bamboo fiber via what's called an advanced "closed loop" solvent spinning process, which has minimal impact on the environment and an economical use of energy and water. The solvent is continually recycled during the production process. So, production plant emissions into the air from smokestacks and from waste water are significantly lower in comparison to many other man-made fiber operations. The solvent to digest the bamboo pulp can be

## Complaint

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toxic, but utilizing the closed loop process, this solvent is carefully reused and not thrown into local water systems. It's also important to note that products made from bamboo can be recycled, incinerated or digested in sewage. The fiber will usually degrade completely in just eight days in waste treatment plants.

So where does that leave us? Unfortunately, the truth is that 99% of all products we consume, ...even the eco friendly ones, have some negative environmental impact. Given this, it often comes down to a choice between the lesser of two evils when it comes to purchasing products. We all know how great bamboo is to grow, but do we all know how bad cotton is to grow?

Cotton uses approximately 25% of the world's insecticides; seven out of ten of these are among the most toxic chemicals on earth. It takes 1/3 of a pound of chemical fertilizers to produce just one pound of cotton (essentially one t-shirt). This exerts an enormous toll on the earth's air, water and soil and impacts the health of people working in this industry and in cotton growing regions. Even organic cotton has drawbacks. But that would take a whole new blog entry.

In comparison, bamboo requires NO fertilizer, pesticides or chemicals to grow, being that it is one of the fastest growing plants on the planet. In addition, it has no harmful residues left on it from the non-sustainable, chemically damaging cultivation that cotton requires. In terms of carbon dioxide, bamboo consumes 45% more carbon than a similar stand of trees. It is for these reasons many consider bamboo to be an environmentally viable alternative to cotton. So does bamboo fabric have some drawbacks? Of course!

**But just consider what product does not? The answer to that may just be donning your birthday suit and going "au natural" - and that's the naked truth.**

---

### ecoKashmere

Known for its buttery soft feel without the cost.

- [View More](#)
- [Buy Now](#)

### Sami Baby

Sami Baby Collections highlight your baby's playful nature.

<http://www.jonano.com/wear-your-values/the-naked-truth.html>

Exhibit D, page 2  
2/12/2009

## Complaint

Designer Organic Clothing from Jonano for Women and Babies - Wear Your Values :: Th... Page 3 of 4

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20% to 50% off

- [Buy Now](#)

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- All categories -

Advance Search

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ecoKashmere® trademark registered.

Sami Designs® trademark registered.  
Comfort with Benefit® trademark registered.  
Eco Scrubs™ trademark registered.  
eColorgrown™ trademark pending.  
Sami Baby™ trademark pending

Sami Designs Inc specializes in trademark eco-friendly fabrics  
and sustainable business practices.

Site Design by [Pod1](#)

Web Development by [Nezen Creation](#)

Fashion Photos by [Jeff Swensen Photography](#)

## Decision and Order

**DECISION AND ORDER**

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondents with violations of the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq.*, the Textile Fiber Products Identification Act, 15 U.S.C. § 70, *et seq.*, and the Rules and Regulations promulgated thereunder, 16 C.F.R. Part 303; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order (“consent agreement”), an admission by the 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 the respondents that the law has been violated as alleged in the 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 has reason to believe that the respondents have violated said Acts and Rules, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such consent agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons pursuant to section 2.34 of its Rules, now in 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 Sami Designs, LLC, also doing business as Jonāno (“Jonāno”), is a Pennsylvania limited liability company with its principal office or place of

## Decision and Order

business at 2582 Wexford Run Road, Wexford, Pennsylvania 15090.

2. Respondent Bonnie Siefers is the owner of Jonäno. Individually or in concert with others, she formulates, directs, or controls the policies, acts, or practices of the limited liability company. Her principal office or place of business is the same as that of Jonäno.
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:

- A. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
- B. “Competent and reliable scientific evidence” shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.
- C. “Covered product” shall mean any or all of the following: (1) any article of wearing apparel, costume or accessory, drapery, floor covering, furnishing, bedding, or other textile good of a type customarily used in a household, regardless of where used in fact, that is made, in whole or in part, of yarn or fabric; or (2) any fiber, yarn or fabric, whether in the finished or unfinished state, used or intended for use in any such textile good.

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- D. “Fiber trademark” shall mean a word or words used to identify a particular fiber sold by a person and to distinguish it from fibers of the same generic class sold by others, as defined in 16 C.F.R. § 303.1(r).
- E. “Generic name of any manufactured fiber” shall mean any name for a textile fiber established and defined by the Commission pursuant to Section 70e(c) of the Textile Fiber Products Identification Act, as set forth in 16 C.F.R. § 303.7.
- F. “Manufactured fiber” shall mean any fiber derived by a process of manufacture from any substance which, at any point in the manufacturing process, is not a fiber, as defined in 15 U.S.C. § 70(d).
- G. “Required information” shall mean such information as is required to be disclosed on labels or invoices and in advertising under the Textile Fiber Products Identification Act, 15 U.S.C. § 70 *et seq.*, and under the Rules and Regulations promulgated thereunder, 16 C.F.R. Part 303, as defined in 16 C.F.R. § 303.1(e).
- H. Unless otherwise specified, “respondents” shall mean Sami Designs, LLC, also doing business as Jonäno, a limited liability company, its successors and assigns and its officers or members; Bonnie Siefers, individually and as owner of the limited liability company; and each of the above’s agents, representatives, and employees.

**I.**

**IT IS 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 covered product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication:

## Decision and Order

- A. That such covered product
1. is made of bamboo or bamboo fiber, including, but not limited to, through the use of a fiber trademark or other descriptive term or name for a product or product line;
  2. is manufactured using an environmentally friendly process; or
  3. is anti-microbial or retains the anti-microbial properties of any material from which it is made, unless the representation is true, non-misleading, and, at the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; or
- B. About the benefits, performance, or efficacy of such covered product, unless the representation is true, non-misleading, and, at the time it is made, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

**II.**

*Provided, however,* that nothing in this order shall prohibit respondents from describing a covered product using the generic name of any manufactured fiber and identifying bamboo as the cellulose source for such fiber, *e.g.*, rayon made from bamboo, so long as such representation is true, non-misleading, complies with the Textile Fiber Products Identification Act, 15 U.S.C. § 70, *et seq.* (“Textile Act”) and with the Rules and Regulations promulgated thereunder, 16 C.F.R. Part 303 (“Textile Rules”), and, at the time such representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

## Decision and Order

**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 covered product in or affecting commerce, shall not fail to comply with any provision of the Textile Fiber Products Identification Act, 15 U.S.C. § 70, *et seq.* (“Textile Act”), or of the Rules and Regulations promulgated thereunder, 16 C.F.R. Part 303 (“Textile Rules”), copies of which are attached hereto as “Appendix A,” or of the Textile Act or Textile Rules as they may hereafter be amended, including but not limited to:

- A. Selling, offering for sale, or advertising in commerce any covered product that is falsely or deceptively stamped, tagged, labeled, invoiced, advertised, or otherwise identified as to the name or amount of constituent fibers contained therein, 15 U.S.C. §§ 70a, 70b;
- B. Selling, offering for sale, or advertising in commerce any covered product that does not have a stamp, tag, label, or other means of identification on or affixed to the inside center of the neck midway between the shoulder seams or, if such product does not contain a neck, in the most conspicuous place on the inner side of such product, unless it is on or affixed on the outer side of such product, or in the case of hosiery items on the outer side of such product or package, 15 U.S.C. § 70b(j);
- C. Failing to use the recognized generic name of any manufactured fiber in the required information in any labels, invoices, or advertising of any covered product, 16 C.F.R. §§ 303.6 and 303.7;
- D. Failing to include all required information on labels for any covered product and in any written advertisement disseminated for a covered product that is used to aid, promote, or assist, directly or indirectly, in the sale or



## Decision and Order

offering for sale of such covered product, including identifying:

1. the generic names and percentages by weight of the constituent fibers present in the covered product, in amounts of 5 percent or more and in the order of predominance set forth in 16 C.F.R. § 303.16(a)(1);
2. the name or registered identification number issued by the Commission of the manufacturer or of one or more persons marketing or handling the covered product; and
3. the name of the country where such covered product was processed or manufactured, as provided for in § 303.33,

15 U.S.C. § 70b(b); 16 C.F.R. §§ 303.16 and 303.42(a);

E. Failing to ensure that any fiber trademark or generic name used on the label of or in any advertising for any covered product:

1. is not false, deceptive, or misleading as to fiber content; and
2. does not indicate, directly or indirectly, that the covered product is composed wholly or in part of a particular fiber, when such is not the case,

16 C.F.R. §§ 303.17(d) and 303.41(d);

F. Failing to ensure that any non-required information or representations used on the label of or in the advertising for any covered product:

1. do not interfere with, minimize, detract from, or conflict with required information;

## Decision and Order

2. do not include any names, terms, or representations prohibited by the Textile Act or Rules; and
3. are not false, deceptive, or misleading,

16 C.F.R. §§ 303.16(c) and 303.42(b);

- G. Where a covered product is advertised in such manner as to require disclosure of the information required by the Textile Act and Textile Rules, failing to include all parts of the required information in immediate conjunction with each other in legible and conspicuous type or lettering of equal size and prominence, 16 C.F.R. § 303.42(a);
- H. Failing to ensure that, where a covered product is advertised in print or by electronic means, other than by broadcast, using materials that solicit consumers to purchase such products by mail, telephone, electronic mail, or some other method without examining the actual product purchased, the description of the product includes a clear and conspicuous statement that the product was either made in U.S.A., imported, or both. 16 C.F.R. §§ 303.1(u) and 303.34;
- I. Where a fiber trademark is used in advertising a covered product, failing:
1. to include the generic name of the fiber contained in such covered product in immediate proximity to and in conjunction with such fiber trademark; and
  2. to include a full disclosure of the fiber content information required by the Textile Act and Textile Rules in at least one instance in any such advertisement,

16 C.F.R. § 303.41;

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- J. Failing to ensure that any words, coined words, symbols or depictions used in the labeling or advertising of a covered product which:
1. constitute or imply the name or designation of a fiber;
  2. are phonetically similar to the name or designation of a fiber; or
  3. are only a slight variation of spelling from the name or designation of a fiber
- are not used in such a manner as to represent or imply that such fiber is present in the covered product, unless such fiber is actually present in that product, 16 C.F.R. § 303.18; and
- K. Failing to maintain for at least three years proper records for any covered products manufactured by respondents, including records showing the fiber content, 15 U.S.C. § 70d(b); 16 C.F.R. § 303.39.

**IV.**

**IT IS FURTHER ORDERED** that respondent Sami Designs, LLC, also doing business as Jonäno, and its successors and assigns, and respondent Bonnie Siefers 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, labeling, packaging and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation;
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the

## Decision and Order

representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations; and

- D. All acknowledgments of receipt of this order obtained pursuant to Part V.

**V.**

**IT IS FURTHER ORDERED** that respondent Sami Designs, LLC, also doing business as Jonäno, and its successors and assigns, and respondent Bonnie Siefers shall deliver a copy of this order to all current and future principals, members, 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.

**VI.**

**IT IS FURTHER ORDERED** that respondent Sami Designs, LLC, also doing business as Jonäno, and its successors and assigns, and respondent Bonnie Siefers shall notify the Commission at least thirty (30) days prior to any change with regard to Sami Designs, LLC, also doing business as Jonäno, or any business entity that any respondent directly or indirectly controls, or has an ownership interest in, that may affect compliance obligations arising under this order, including but not limited to formation of a new business entity; a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor entity; 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 business or corporate name or address. *Provided, however,* that, with respect to any proposed change about which respondents learn less than thirty (30) days prior to

## Decision and Order

the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

**VII.**

**IT IS FURTHER ORDERED** that respondent Bonnie Siefers, for a period of five (5) years after the date of issuance of this order, shall notify the Commission of the discontinuance of her current business or employment, or of her affiliation with any new business or employment. The notice shall include the respondent's new business address and telephone number and a description of the nature of the business or employment and her duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

**VIII.**

**IT IS FURTHER ORDERED** that respondent Sami Designs, LLC, also doing business as Jonäno, and its successors and assigns, and respondent Bonnie Siefers shall, within sixty (60) days after the date of service of this order, file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which they have complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondents each shall submit additional true and accurate written reports.

**IX.**

This order will terminate on December 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

## Decision and Order

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 respondent 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.

By the Commission.

## Decision and Order

## Appendix A

From the U.S. Code Online via GPO Access  
[wais.access.gpo.gov]  
[Laws in effect as of January 3, 2006]  
[CITE: 15USC70]

## TITLE 15--COMMERCE AND TRADE

CHAPTER 2--FEDERAL TRADE COMMISSION; PROMOTION OF EXPORT TRADE AND  
PREVENTION OF UNFAIR METHODS OF COMPETITION

## SUBCHAPTER V--TEXTILE FIBER PRODUCTS IDENTIFICATION

## Sec. 70. Definitions

As used in this subchapter--

- (a) The term "person" means an individual, partnership, corporation, association or any other form of business enterprise.
- (b) The term "fiber" or "textile fiber" means a unit of matter which is capable of being spun into a yarn or made into a fabric by bonding or by interlacing in a variety of methods including weaving, knitting, braiding, felting, twisting, or webbing, and which is the basic structural element of textile products.
- (c) The term "natural fiber" means any fiber that exists as such in the natural state.
- (d) The term "manufactured fiber" means any fiber derived by a process of manufacture from any substance which, at any point in the manufacturing process, is not a fiber.
- (e) The term "yarn" means a strand of textile fiber in a form suitable for weaving, knitting, braiding, felting, webbing, or otherwise fabricating into a fabric.
- (f) The term "fabric" means any material woven, knitted, felted, or otherwise produced from, or in combination with, any natural or manufactured fiber, yarn, or substitute therefor.
- (g) The term "household textile articles" means articles of wearing apparel, costumes and accessories, draperies, floor coverings, furnishings, beddings, and other textile goods of a type customarily used in a household regardless of where used in fact.
- (h) The term "textile fiber product" means--
- (1) any fiber, whether in the finished or unfinished state, used or intended for use in household textile articles;
  - (2) any yarn or fabric, whether in the finished or unfinished state, used or intended for use in household textile articles; and
  - (3) any household textile article made in whole or in part of yarn or fabric;

except that such term does not include a product required to be labeled under the Wool Products Labeling Act of 1939 [15 U.S.C. 68 et seq.].

- (i) The term "affixed" means attached to the textile fiber product in any manner.
- (j) The term "Commission" means the Federal Trade Commission.
- (k) The term "commerce" means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation or between the District of Columbia and any State or Territory or foreign nation.
- (l) The term "Territory" includes the insular possessions of the United States, and also any Territory of the United States.
- (m) The term "ultimate consumer" means a person who obtains a textile fiber product by purchase or exchange with no intent to sell or exchange such textile fiber product in any form.

(Pub. L. 85-897, Sec. 2, Sept. 2, 1958, 72 Stat. 1717.)

## References in Text

The Wool Products Labeling Act of 1939, referred to in subsec.

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(h) (3), is act Oct. 14, 1940, ch. 871, 54 Stat. 1128, as amended, which is classified generally to subchapter III (Sec. 68 et seq.) of this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 68 of this title and Tables.

## Effective Date

Section 15 of Pub. L. 85-897 provided that: "This Act [this subchapter] shall take effect eighteen months after enactment [Sept. 2, 1958], except for the promulgation of rules and regulations by the Commission, which shall be promulgated within nine months after the enactment of this Act. The Commission shall provide for the exception of any textile fiber product acquired prior to the effective date of this Act."

## Short Title

Section 1 of Pub. L. 85-897 provided: "That this Act [this subchapter] may be cited as the 'Textile Fiber Products Identification Act'."

## Separability

Section 13 of Pub. L. 85-897 provided that: "If any provision of this Act [this subchapter], or the application thereof to any person, as that term is herein defined, is held invalid, the remainder of the Act and the application of the remaining provisions to any person shall not be affected thereby."



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## TITLE 15--COMMERCE AND TRADE

CHAPTER 2--FEDERAL TRADE COMMISSION; PROMOTION OF EXPORT TRADE AND  
PREVENTION OF UNFAIR METHODS OF COMPETITION

## SUBCHAPTER V--TEXTILE FIBER PRODUCTS IDENTIFICATION

## Sec. 70a. Violations of Federal Trade Commission Act

- (a) Introduction or manufacture for introduction into commerce, sale, advertising or offering for sale in commerce

The introduction, delivery for introduction, manufacture for introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States, of any textile fiber product which is misbranded or falsely or deceptively advertised within the meaning of this subchapter or the rules and regulations promulgated thereunder, is unlawful, and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act [15 U.S.C. 41 et seq.].

- (b) Sale, offering for sale, advertising, delivery, transportation of products advertised for sale in commerce

The sale, offering for sale, advertising, delivery, transportation, or causing to be transported, of any textile fiber product which has been advertised or offered for sale in commerce, and which is misbranded or falsely or deceptively advertised, within the meaning of this subchapter or the rules and regulations promulgated thereunder, is unlawful, and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act [15 U.S.C. 41 et seq.].

- (c) Sale, offering for sale, advertising, delivery, transportation of products after shipment in commerce

The sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, which is misbranded or falsely or deceptively advertised, within the meaning of this subchapter or the rules and regulations promulgated thereunder, is unlawful, and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act [15 U.S.C. 41 et seq.].

- (d) Application of section to common carrier, freight forwarder, etc.

This section shall not apply--

(1) to any common carrier or contract carrier or freight forwarder with respect to a textile fiber product received, shipped, delivered, or handled by it for shipment in the ordinary course of its business;

(2) to any processor or finisher in performing a contract for the account of a person subject to the provisions of this subchapter if the processor or finisher does not change the textile fiber content of the textile fiber product contrary to the terms of such contract;

(3) with respect to the manufacture, delivery for transportation, transportation, sale, or offering for sale of a

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textile fiber product for exportation from the United States to any foreign country;

(4) to any publisher or other advertising agency or medium for the dissemination of advertising or promotional material, except the manufacturer, distributor, or seller of the textile fiber product to which the false or deceptive advertisement relates, if such publisher or other advertising agency or medium furnishes to the Commission, upon request, the name and post office address of the manufacturer, distributor, seller, or other person residing in the United States, who caused the dissemination of the advertising material; or

(5) to any textile fiber product until such product has been produced by the manufacturer or processor in the form intended for sale or delivery to, or for use by, the ultimate consumer: Provided, That this exemption shall apply only if such textile fiber product is covered by an invoice or other paper relating to the marketing or handling of the textile fiber product and such invoice or paper correctly discloses the information with respect to the textile fiber product which would otherwise be required under section 70b of this title to be on the stamp, tag, label, or other identification and the name and address of the person issuing the invoice or paper.

(Pub. L. 85-897, Sec. 3, Sept. 2, 1958, 72 Stat. 1718.)

## References in Text

The Federal Trade Commission Act, referred to in subsecs. (a) to (c), is act Sept. 26, 1914, ch. 311, 38 Stat. 717, as amended, which is classified generally to subchapter I (Sec. 41 et seq.) of this chapter. For complete classification of this Act to the Code, see section 58 of this title and Tables.

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[Document affected by Public Law 9 Section ](2)]  
[CITE: 15USC70b]

## TITLE 15--COMMERCE AND TRADE

CHAPTER 2--FEDERAL TRADE COMMISSION; PROMOTION OF EXPORT TRADE AND  
PREVENTION OF UNFAIR METHODS OF COMPETITION

## SUBCHAPTER V--TEXTILE FIBER PRODUCTS IDENTIFICATION

Sec. 70b. Misbranded and falsely advertised textile fiber  
products

## (a) False or deceptive identification

Except as otherwise provided in this subchapter, a textile fiber product shall be misbranded if it is falsely or deceptively stamped, tagged, labeled, invoiced, advertised, or otherwise identified as to the name or amount of constituent fibers contained therein.

## (b) Stamp, tag, label or other means of identification; contents

Except as otherwise provided in this subchapter, a textile fiber product shall be misbranded if a stamp, tag, label, or other means of identification, or substitute therefor authorized by section 70c of this title, is not on or affixed to the product showing in words and figures plainly legible, the following:

(1) The constituent fiber or combination of fibers in the textile fiber product, designating with equal prominence each natural or manufactured fiber in the textile fiber product by its generic name in the order of predominance by the weight thereof if the weight of such fiber is 5 per centum or more of the total fiber weight of the product, but nothing in this section shall be construed as prohibiting the use of a nondeceptive trademark in conjunction with a designated generic name: Provided, That exclusive of permissible ornamentation, any fiber or group of fibers present in an amount of 5 per centum or less by weight of the total fiber content shall not be designated by the generic name or the trademark of such fiber or fibers, but shall be designated only as "other fiber" or "other fibers" as the case may be, but nothing in this section shall be construed as prohibiting the disclosure of any fiber present in a textile fiber product which has a clearly established and definite functional significance where present in the amount contained in such product.

(2) The percentage of each fiber present, by weight, in the total fiber content of the textile fiber product, exclusive of ornamentation not exceeding 5 per centum by weight of the total fiber content: Provided, That, exclusive of permissible ornamentation, any fiber or group of fibers present in an amount of 5 per centum or less by weight of the total fiber content shall not be designated by the generic name or trademark of such fiber or fibers, but shall be designated only as "other fiber" or "other fibers" as the case may be but nothing in this section shall be construed as prohibiting the disclosure of any fiber present in a textile fiber product which has a clearly established and definite functional significance where present in the amount stated: Provided further, That in the case of a textile fiber product which contains more than one kind of fiber, deviation in the fiber content of any fiber in such product, from the amount stated on the stamp, tag, label, or other identification shall not be a misbranding under this section unless such deviation is in excess of reasonable tolerances

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which shall be established by the Commission: And provided further, That any such deviation which exceeds said tolerances shall not be a misbranding if the person charged proves that the deviation resulted from unavoidable variations in manufacture and despite due care to make accurate the statements on the tag, stamp, label, or other identification.

(3) The name, or other identification issued and registered by the Commission, of the manufacturer of the product or one or more persons subject to section 70a of this title with respect to such product.

(4) If it is an imported textile fiber product the name of the country where processed or manufactured.

(5) If it is a textile fiber product processed or manufactured in the United States, it be so identified.

## (c) False or deceptive advertisement

For the purposes of this subchapter, a textile fiber product shall be considered to be falsely or deceptively advertised if any disclosure or implication of fiber content is made in any written advertisement which is used to aid, promote, or assist directly or indirectly in the sale or offering for sale of such textile fiber product, unless the same information as that required to be shown on the stamp, tag, label, or other identification under subsection (b)(1) and (2) of this section is contained in the heading, body, or other part of such written advertisement, except that the percentages of the fiber present in the textile fiber product need not be stated.

## (d) Additional information allowed

In addition to the information required in this section, the stamp, tag, label, or other means of identification, or advertisement may contain other information not violating the provisions of this subchapter.

## (e) Labelling of packages

For purposes of this subchapter, in addition to the textile fiber products contained therein, a package of textile fiber products intended for sale to the ultimate consumer shall be misbranded unless such package has affixed to it a stamp, tag, label, or other means of identification bearing the information required by subsection (b) of this section, with respect to such contained textile fiber products, or is transparent to the extent it allows for the clear reading of the stamp, tag, label, or other means of identification on the textile fiber product, or in the case of hosiery items, this section shall not be construed as requiring the affixing of a stamp, tag, label, or other means of identification to each hosiery product contained in a package if (1) such hosiery products are intended for sale to the ultimate consumer in such package, (2) such package has affixed to it a stamp, tag, label, or other means of identification bearing, with respect to the hosiery products contained therein, the information required by subsection (b) of this section, and (3) the information on the stamp, tag, label, or other means of identification affixed to such package is equally applicable with respect to each textile fiber product contained therein.

## (f) Fabric severed from bolts, pieces or rolls of fabric

This section shall not be construed as requiring designation of the fiber content of any portion of fabric, when sold at retail, which is severed from bolts, pieces, or rolls of fabric labeled in accordance with the provisions of this section at the time of such sale: Provided, That if any portion of fabric severed from a bolt, piece, or roll of fabric is in any manner represented as containing percentages of natural or manufactured fibers, other than that which is set forth on the labeled bolt, piece, or roll, this section shall be applicable thereto.

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and the information required shall be separately set forth and segregated as required by this section.

(g) Advertisement of textile product by use of name or symbol of fur-bearing animal

For the purposes of this subchapter, a textile fiber product shall be considered to be falsely or deceptively advertised if the name or symbol of any fur-bearing animal is used in the advertisement of such product unless such product, or the part thereof in connection with which the name or symbol of a fur-bearing animal is used, is a fur or fur product within the meaning of the Fur Products Labeling Act (15 U.S.C. 69 et seq.): Provided, however, That where a textile fiber product contains the hair or fiber of a fur-bearing animal, the name of such animal, in conjunction with the word "fiber", "hair", or "blend", may be used.

(h) Reused stuffing

For the purposes of this subchapter, a textile fiber product shall be misbranded if it is used as stuffing in any upholstered product, mattress, or cushion after having been previously used as stuffing in any other upholstered product, mattress, or cushion, unless the upholstered product, mattress, or cushion containing such textile fiber product bears a stamp, tag, or label approved by the Commission indicating in words plainly legible that it contains reused stuffing.

(i) Mail order catalog or promotional material

For the purposes of this subchapter, a textile fiber product shall be considered to be falsely or deceptively advertised in any mail order catalog or mail order promotional material which is used in the direct sale or direct offering for sale of such textile fiber product, unless such textile fiber product description states in a clear and conspicuous manner that such textile fiber product is processed or manufactured in the United States of America, or imported, or both.

(j) Location of stamp, tag, label, or other identification

For purposes of this subchapter, any textile fiber product shall be misbranded if a stamp, tag, label, or other identification conforming to the requirements of this section is not on or affixed to the inside center of the neck midway between the shoulder seams or, if such product does not contain a neck, in the most conspicuous place on the inner side of such product, unless it is on or affixed on the outer side of such product, or in the case of hosiery items on the outer side of such product or package.

(k) Marking of certain sock products

(1) Notwithstanding any other provision of law, socks provided for in subheading 6115.92.90, 6115.93.90, 6115.99.18, 6111.20.60, 6111.30.50, or 6111.90.50 of the Harmonized Tariff Schedule of the United States, as in effect on September 1, 2003, shall be marked as legibly, indelibly, and permanently as the nature of the article or package will permit in such a manner as to indicate to the ultimate consumer in the United States the English name of the country of origin of the article. The marking required by this subsection shall be on the front of the package, adjacent to the size designation of the product, and shall be set forth in such a manner as to be clearly legible, conspicuous, and readily accessible to the ultimate consumer.

(2) Exceptions.--Any package that contains several different types of goods and includes socks classified under subheading 6115.92.90, 6115.93.90, 6115.99.18, 6111.20.60, 6111.30.50, or 6111.90.50 of the Harmonized Tariff Schedule of the United States, as in effect on September 1, 2003, shall not be subject to the requirements of paragraph (1).

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(Pub. L. 85-897, Sec. 4, Sept. 2, 1958, 72 Stat. 1719; Pub. L. 89-35, Secs. 1, 2, June 5, 1965, 79 Stat. 124; Pub. L. 98-417, title III, Secs. 301-303, Sept. 24, 1984, 98 Stat. 1603, 1604; Pub. L. 108-429, title II, Sec. 2004(h)(1), Dec. 3, 2004, 118 Stat. 2594.)

## References in Text

The Harmonized Tariff Schedule of the United States, referred to in subsec. (k), is not set out in the Code. See Publication of Harmonized Tariff Schedule note set out under section 1202 of Title 19, Customs Duties.

The Fur Products Labeling Act, referred to in subsec. (g), is act Aug. 8, 1951, ch. 298, 65 Stat. 175, as amended, which is classified generally to subchapter IV (Sec. 69 et seq.) of this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 69 of this title and Tables.

## Amendments

2004--Subsec. (k). Pub. L. 108-429 added subsec. (k).

1984--Subsec. (b)(5). Pub. L. 98-417, Sec. 301, added par. (5).

Subsec. (e). Pub. L. 98-417, Sec. 302, amended subsec. (e) generally. Prior to amendment, subsec. (e) read as follows: "This section shall not be construed as requiring the affixing of a stamp, tag, label, or other means of identification to each textile fiber product contained in a package if (1) such textile fiber products are intended for sale to the ultimate consumer in such package, (2) such package has affixed to it a stamp, tag, label, or other means of identification bearing, with respect to the textile fiber products contained therein, the information required by subsection (b) of this section, and (3) the information on the stamp, tag, label, or other means of identification affixed to such package is equally applicable with respect to each textile fiber product contained therein."

Subsecs. (i), (j). Pub. L. 98-417, Sec. 303, added subsecs. (i) and (j).

1965--Subsec. (b)(1). Pub. L. 89-35, Sec. 1, inserted "", but nothing in this section shall be construed as prohibiting the disclosure of any fiber present in a textile fiber product which has a clearly established and definite functional significance where present in the amount contained in such product''.

Subsec. (b)(2). Pub. L. 89-35, Sec. 2, inserted "", but nothing in this section shall be construed as prohibiting the disclosure of any fiber present in a textile fiber product which has a clearly established and definite functional significance where present in the amount stated''.

## Effective Date of 2004 Amendment

Pub. L. 108-429, title II, Sec. 2004(h)(2), Dec. 3, 2004, 118 Stat. 2594, provided that: "The amendment made by paragraph (1) [amending this section] shall take effect on the date that is 15 months after the date of enactment of this Act [Dec. 3, 2004], and on and after the date that is 15 months after such date of enactment, any provision of part 303 of title 16, Code of Federal Regulations, that is inconsistent with such amendment shall not apply."

## Effective Date of 1984 Amendment

Amendment by Pub. L. 98-417 effective 90 days after Sept. 24, 1984, see section 307 of Pub. L. 98-417, set out as a note under section 68b of this title.

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[Laws in effect as of January 3, 2006]  
[CITE: 15USC70e]

## TITLE 15--COMMERCE AND TRADE

CHAPTER 2--FEDERAL TRADE COMMISSION; PROMOTION OF EXPORT TRADE AND  
PREVENTION OF UNFAIR METHODS OF COMPETITION

## SUBCHAPTER V--TEXTILE FIBER PRODUCTS IDENTIFICATION

## Sec. 70c. Removal of stamp, tag, label, or other identification

## (a) Removal or mutilation after shipment in commerce

After shipment of a textile fiber product in commerce it shall be unlawful, except as provided in this subchapter, to remove or mutilate, or cause or participate in the removal or mutilation of, prior to the time any textile fiber product is sold and delivered to the ultimate consumer, any stamp, tag, label, or other identification required by this subchapter to be affixed to such textile fiber product, and any person violating this section shall be guilty of an unfair method of competition, and an unfair or deceptive act or practice, under the Federal Trade Commission Act [15 U.S.C. 41 et seq.].

## (b) Substitution of stamp, tag, etc.

## Any person--

(1) introducing, selling, advertising, or offering for sale, in commerce, or importing into the United States, a textile fiber product subject to the provisions of this subchapter, or

(2) selling, advertising, or offering for sale a textile fiber product whether in its original state or contained in other textile fiber products, which has been shipped, advertised, or offered for sale, in commerce,

may substitute for the stamp, tag, label, or other means of identification required to be affixed to such textile product pursuant to section 70b(b) of this title, a stamp, tag, label, or other means of identification conforming to the requirements of section 70b(b) of this title, and such substituted stamp, tag, label, or other means of identification shall show the name or other identification issued and registered by the Commission of the person making the substitution.

## (c) Affixing of stamp, tag, etc. to individual unit of broken package

If any person other than the ultimate consumer breaks a package which bears a stamp, tag, label, or other means of identification conforming to the requirements of section 70b of this title, and if such package contains one or more units of a textile fiber product to which a stamp, tag, label, or other identification conforming to the requirements of section 70b of this title is not affixed, such person shall affix a stamp, tag, label, or other identification bearing the information on the stamp, tag, label, or other means of identification attached to such broken package to each unit of textile fiber product taken from such broken package.

(Pub. L. 85-897, Sec. 5, Sept. 2, 1958, 72 Stat. 1720.)

## References in Text

The Federal Trade Commission Act, referred to in subsec. (a), is act Sept. 26, 1914, ch. 311, 38 Stat. 717, as amended, which is classified generally to subchapter I (Sec. 41 et seq.) of this chapter. For

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complete classification of this Act to the Code, see section 58 of this title and Tables.



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## TITLE 15--COMMERCE AND TRADE

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PREVENTION OF UNFAIR METHODS OF COMPETITION

## SUBCHAPTER V--TEXTILE FIBER PRODUCTS IDENTIFICATION

## Sec. 70d. Records

## (a) Maintenance and preservation by manufacturer

Every manufacturer of textile fiber products subject to this subchapter shall maintain proper records showing the fiber content as required by this subchapter of all such products made by him, and shall preserve such records for at least three years.

## (b) Maintenance and preservation by person substituting stamp, tag, etc.

Any person substituting a stamp, tag, label, or other identification pursuant to section 70c(b) of this title shall keep such records as will show the information set forth on the stamp, tag, label, or other identification that he removed and the name or names of the person or persons from whom such textile fiber product was received, and shall preserve such records for at least three years.

## (c) Neglect or refusal to maintain or preserve records

The neglect or refusal to maintain or preserve the records required by this section is unlawful, and any person neglecting or refusing to maintain such records shall be guilty of an unfair method of competition, and an unfair or deceptive act or practice, in commerce, under the Federal Trade Commission Act [15 U.S.C. 41 et seq.].

(Pub. L. 85-897, Sec. 6, Sept. 2, 1958, 72 Stat. 1721.)

## References in Text

The Federal Trade Commission Act, referred to in subsec. (c), is act Sept. 26, 1914, ch. 311, 38 Stat. 717, as amended, which is classified generally to subchapter I (Sec. 41 et seq.) of this chapter. For complete classification of this Act to the Code, see section 58 of this title and Tables.

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[CITE: 15USC70e]

## TITLE 15--COMMERCE AND TRADE

CHAPTER 2--FEDERAL TRADE COMMISSION; PROMOTION OF EXPORT TRADE AND  
PREVENTION OF UNFAIR METHODS OF COMPETITION

## SUBCHAPTER V--TEXTILE FIBER PRODUCTS IDENTIFICATION

## Sec. 70e. Enforcement

## (a) Enforcement by Federal Trade Commission

Except as otherwise specifically provided herein, this subchapter shall be enforced by the Federal Trade Commission under rules, regulations, and procedure provided for in the Federal Trade Commission Act [15 U.S.C. 41 et seq.].

## (b) Terms of Federal Trade Commission Act incorporated into this subchapter

The Commission is authorized and directed to prevent any person from violating the provisions of this subchapter in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act [15 U.S.C. 41 et seq.] were incorporated into and made a part of this subchapter; and any such person violating the provisions of this subchapter shall be subject to the penalties and entitled to the privileges and immunities provided in said Federal Trade Commission Act, in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though the applicable terms and provisions of the said Federal Trade Commission Act were incorporated into and made a part of this subchapter.

## (c) Rules and regulations by Federal Trade Commission

The Commission is authorized and directed to make such rules and regulations, including the establishment of generic names of manufactured fibers, under and in pursuance of the terms of this subchapter as may be necessary and proper for administration and enforcement.

## (d) Inspection, analyses, tests, etc.

The Commission is authorized to cause inspections, analyses, tests, and examinations to be made of any product subject to this subchapter.

[Pub. L. 85-897, Sec. 7, Sept. 2, 1958, 72 Stat. 1721.]

## References in Text

The Federal Trade Commission Act, referred to in subsecs. (a) and (b), is act Sept. 26, 1914, ch. 311, 38 Stat. 717, as amended, which is classified generally to subchapter I (Sec. 41 et seq.) of this chapter. For complete classification of this Act to the Code, see section 59 of this title and Tables.

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[Laws in effect as of January 3, 2006]  
[CITE: 15USC70f]

## TITLE 15--COMMERCE AND TRADE

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## SUBCHAPTER V--TEXTILE FIBER PRODUCTS IDENTIFICATION

## Sec. 70f. Injunction proceedings

Whenever the Commission has reason to believe--

(a) that any person is doing, or is about to do, an act which by section 70a, 70c, 70d, 70g, or 70h(b) of this title is declared to be unlawful; and

(b) that it would be to the public interest to enjoin the doing of such act until complaint is issued by the Commission under the Federal Trade Commission Act [15 U.S.C. 41 et seq.] and such complaint is dismissed by the Commission or set aside by the court on review or until an order to cease and desist made thereon by the Commission has become final within the meaning of the Federal Trade Commission Act,

the Commission may bring suit in the district court of the United States or in the United States court of any Territory, for the district or Territory in which such person resides or transacts business, to enjoin the doing of such act and upon proper showing a temporary injunction or restraining order shall be granted without bond.

(Pub. L. 85-897, Sec. 8, Sept. 2, 1958, 72 Stat. 1721.)

## References in Text

The Federal Trade Commission Act, referred to in text, is act Sept. 26, 1914, ch. 311, 38 Stat. 717, as amended, which is classified generally to subchapter I (Sec. 41 et seq.) of this chapter. For complete classification of this Act to the Code, see section 58 of this title and Tables.

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[Laws in effect as of January 3, 2006]  
[CITE: 15USC70g]

## TITLE 15--COMMERCE AND TRADE

CHAPTER 2--FEDERAL TRADE COMMISSION; PROMOTION OF EXPORT TRADE AND  
PREVENTION OF UNFAIR METHODS OF COMPETITION

## SUBCHAPTER V--TEXTILE FIBER PRODUCTS IDENTIFICATION

## Sec. 70g. Exclusion of misbranded textile fiber products

All textile fiber products imported into the United States shall be stamped, tagged, labeled, or otherwise identified in accordance with the provisions of section 70b of this title, and all invoices of such products required pursuant to section 1484 of title 19, shall set forth, in addition to the matter therein specified, the information with respect to said products required under the provisions of section 70b(b) of this title, which information shall be in the invoices prior to their certification, if such certification is required pursuant to section 1484 of title 19. The falsification of, or failure to set forth the required information in such invoices, or the falsification or perjury of the consignee's declaration provided for in section 1485 of title 19, insofar as it relates to such information, is unlawful, and shall be an unfair method of competition, and an unfair and deceptive act or practice, in commerce under the Federal Trade Commission Act [15 U.S.C. 41 et seq.]; and any person who falsifies, or perjures the consignee's declaration insofar as it relates to such information, may thenceforth be prohibited by the Commission from importing, or participating in the importation of, any textile fiber product into the United States except upon filing bond with the Secretary of the Treasury in a sum double the value of said products and any duty thereon, conditioned upon compliance with the provisions of this subchapter. A verified statement from the manufacturer or producer of such products showing their fiber content as required under the provisions of this subchapter may be required under regulation prescribed by the Secretary of the Treasury.

(Pub. L. 85-897, Sec. 9, Sept. 2, 1958, 72 Stat. 1722.)

## References in Text

The Federal Trade Commission Act, referred to in text, is act Sept. 26, 1914, ch. 311, 38 Stat. 717, as amended, which is classified generally to subchapter I (Sec. 41 et seq.) of this chapter. For complete classification of this Act to the Code, see section 58 of this title and Tables.

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{CITE: 15USC70h}

## TITLE 15--COMMERCE AND TRADE

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## SUBCHAPTER V--TEXTILE FIBER PRODUCTS IDENTIFICATION

## Sec. 70h. Guaranty

## (a) Avoidance of liability; requirements

No person shall be guilty of an unlawful act under section 70a of this title if he establishes a guaranty received in good faith, signed by and containing the name and address of the person residing in the United States by whom the textile fiber product guaranteed was manufactured or from whom it was received, that said product is not misbranded or falsely invoiced under the provisions of this subchapter. Said guaranty shall be (1) a separate guaranty specifically designating the textile fiber product guaranteed, in which case it may be on the invoice or other paper relating to said product; or (2) a continuing guaranty given by seller to the buyer applicable to all textile fiber products sold to or to be sold to buyer by seller in a form as the Commission, by rules and regulations, may prescribe; or (3) a continuing guaranty filed with the Commission applicable to all textile fiber products handled by a guarantor in such form as the Commission by rules and regulations may prescribe.

## (b) Furnishing false guaranty

The furnishing of a false guaranty, except where the person furnishing such false guaranty relies on a guaranty to the same effect received in good faith signed by and containing the name and address of the person residing in the United States by whom the product guaranteed was manufactured or from whom it was received, is unlawful, and shall be an unfair method of competition, and an unfair and deceptive act or practice, in commerce, within the meaning of the Federal Trade Commission Act [15 U.S.C. 41 et seq.].

(Pub. L. 85-897, Sec. 10, Sept. 2, 1958, 72 Stat. 1722.)

## References in Text

The Federal Trade Commission Act, referred to in subsec. (b), is act Sept. 26, 1914, ch. 311, 38 Stat. 717, as amended, which is classified generally to subchapter I (Sec. 41 et seq.) of this chapter. For complete classification of this Act to the Code, see section 58 of this title and Tables.

## Decision and Order

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[Laws in effect as of January 3, 2006]  
[CITE: 15USC70i]

## TITLE 15--COMMERCE AND TRADE

CHAPTER 2--FEDERAL TRADE COMMISSION; PROMOTION OF EXPORT TRADE AND  
PREVENTION OF UNFAIR METHODS OF COMPETITION

## SUBCHAPTER V--TEXTILE FIBER PRODUCTS IDENTIFICATION

## Sec. 70i. Criminal penalty

(a) Any person who willfully does an act which by section 70a, 70c, 70d, 70g, or 70h(b) of this title is declared to be unlawful shall be guilty of a misdemeanor and upon conviction shall be fined not more than \$5,000 or be imprisoned not more than one year, or both, in the discretion of the court: Provided, That nothing in this section shall limit any other provision of this subchapter.

(b) Whenever the Commission has reason to believe that any person is guilty of a misdemeanor under this section, it may certify all pertinent facts to the Attorney General. If, on the basis of the facts certified, the Attorney General concurs in such belief, it shall be his duty to cause appropriate proceedings to be brought for the enforcement of the provisions of this section against such person.

(Pub. L. 85-897, Sec. 11, Sept. 2, 1958, 72 Stat. 1723.)

## Decision and Order

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## TITLE 15--COMMERCE AND TRADE

CHAPTER 2--FEDERAL TRADE COMMISSION; PROMOTION OF EXPORT TRADE AND  
PREVENTION OF UNFAIR METHODS OF COMPETITION

## SUBCHAPTER V--TEXTILE FIBER PRODUCTS IDENTIFICATION

## Sec. 70j. Exemptions

(a) None of the provisions of this subchapter shall be construed to apply to--

- (1) upholstery stuffing, except as provided in section 70b(h) of this title;
- (2) outer coverings of furniture, mattresses, and box springs;
- (3) linings or interlinings incorporated primarily for structural purposes and not for warmth;
- (4) filling or padding incorporated primarily for structural purposes and not for warmth;
- (5) stiffenings, trimmings, facings, or interfacings;
- (6) backings of, and paddings or cushions to be used under, floor coverings;
- (7) sewing and handicraft threads;
- (8) bandages, surgical dressings, and other textile fiber products, the labeling of which is subject to the requirements of the Federal Food, Drug and Cosmetic Act of 1938, as amended [21 U.S.C. 301 et seq.];
- (9) waste materials not intended for use in a textile fiber product;
- (10) textile fiber products incorporated in shoes or overshoes or similar outer footwear;
- (11) textile fiber products incorporated in headwear, handbags, luggage, brushes, lampshades, or toys, catamenial devices, adhesive tapes and adhesive sheets, cleaning cloths impregnated with chemicals, or diapers.

The exemption provided for any article by paragraph (3) or (4) of this subsection shall not be applicable if any representation as to fiber content of such article is made in any advertisement, label, or other means of identification covered by section 70b of this title.

(b) The Commission may exclude from the provisions of this subchapter other textile fiber products (1) which have an insignificant or inconsequential textile fiber content, or (2) with respect to which the disclosure of textile fiber content is not necessary for the protection of the ultimate consumer.

(Pub. L. 85-897, Sec. 12, Sept. 2, 1958, 72 Stat. 1721.)

## References in Text

The Federal Food, Drug and Cosmetic Act of 1938, referred to in subsec. (a)(8), is act June 25, 1938, ch. 675, 52 Stat. 1040, as amended, which is classified generally to chapter 9 (Sec. 301 et seq.) of Title 21, Food and Drugs. For complete classification of this Act to the Code, see section 301 of Title 21 and Tables.

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[CITE: 15USC70k]

TITLE 15--COMMERCE AND TRADE

CHAPTER 2--FEDERAL TRADE COMMISSION; PROMOTION OF EXPORT TRADE AND  
PREVENTION OF UNFAIR METHODS OF COMPETITION

SUBCHAPTER V--TEXTILE FIBER PRODUCTS IDENTIFICATION

Sec. 70k. Application of other laws

The provisions of this subchapter shall be held to be in addition --  
to, and not in substitution for or limitation of, the provisions of any  
other Act of the United States.

(Pub. L. 85-897, Sec. 14, Sept. 2, 1958, 72 Stat. 1724.)



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indirectly in labeling, invoicing or advertising such products. (For example, a fur product made by the skin-on-skin method should not be represented as having been made by the letout method.)

(b) Where a fur product is made by the method known in the trade as letting-out, or is made of fur which has been sheared or plucked, such facts may be set out in labels, invoices and advertising.

**§ 301.46 Reference to guaranty by Government prohibited.**

No representation nor suggestion that a fur or fur product is guaranteed under the act by the Government, or any branch thereof, shall be made in the labeling, invoicing or advertising in connection therewith.

**§ 301.47 Form of separate guaranty.**

The following is a suggested form of separate guaranty under section 10 of the Act which may be used by a guarantor residing in the United States, on and as part of an invoice in which the merchandise covered is listed and specified and which shows the date of such document, the date of shipment of the merchandise and the signature and address of the guarantor:

We guarantee that the fur products or furs specified herein are not misbranded nor falsely nor deceptively advertised or invoiced under the provisions of the Fur Products Labeling Act and rules and regulations thereunder.

**§ 301.48 Continuing guaranty filed with Federal Trade Commission.**

(a)(1) Under section 10 of the Act any person residing in the United States and handling fur or fur products may file a continuing guaranty with the Federal Trade Commission. When filed with the Commission a continuing guaranty shall be fully executed in duplicate. Forms for use in preparing continuing guaranties shall be supplied by the Commission upon request.

(2) Continuing guaranties filed with the Commission shall continue in effect until revoked. The guarantor shall promptly report any change in business status to the Commission.

(3) The prescribed form for a continuing guaranty is found in § 303.38(b)

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of this chapter. The form is available upon request from the Textile Section, Enforcement Division, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

(b) Any person who has a continuing guaranty on file with the Commission may, during the effective date of the guaranty, give notice of such fact by setting forth on the invoice or other paper covering the marketing or handling of the product guaranteed the following: "Continuing guaranty under the Fur Products Labeling Act filed with the Federal Trade Commission."

(c) Any person who falsely represents in writing that he has a continuing guaranty on file with the Federal Trade Commission when such is not a fact shall be deemed to have furnished a false guaranty under section 10(b) of the Act.

[26 FR 3188, Apr. 14, 1961, as amended at 48 FR 12517, Mar. 25, 1983; 63 FR 7517, Feb. 13, 1998; 63 FR 71503, Dec. 28, 1998]

**§ 301.48a Guaranties not received in good faith.**

A guaranty shall not be deemed to have been received in good faith within the meaning of section 10(a) of the Act:

(a) Unless the recipient of such guaranty shall have examined the required label, required invoice and advertisement relating to the fur product or fur so guaranteed;

(b) If the recipient of the guaranty has knowledge that the fur or fur product guaranteed is misbranded, falsely invoiced or falsely advertised.

[26 FR 3188, Apr. 14, 1961]

**§ 301.49 Deception in general.**

No furs nor fur products shall be labeled, invoiced, or advertised in any manner which is false, misleading or deceptive in any respect.

**PART 303—RULES AND REGULATIONS UNDER THE TEXTILE FIBER PRODUCTS IDENTIFICATION ACT****Sec.**

303.1 Terms defined.

303.2 General requirements.

303.3 Fibers present in amounts of less than 5 percent.

303.4 English language requirement.

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- 303.5 Abbreviations, ditto marks, and asterisks prohibited.
- 303.6 Generic names of fibers to be used.
- 303.7 Generic names and definitions for manufactured fibers.
- 303.8 Procedure for establishing generic names for manufactured fibers.
- 303.9 Use of fur-bearing animal names and symbols prohibited.
- 303.10 Fiber content of special types of products.
- 303.11 Floor coverings containing backings, fillings, and paddings.
- 303.12 Trimmings of household textile articles.
- 303.13 Sale of remnants and products made of remnants.
- 303.14 Products containing unknown fibers.
- 303.15 Required label and method of affixing.
- 303.16 Arrangement and disclosure of information on labels.
- 303.17 Use of fiber trademarks and generic names on labels.
- 303.18 Terms implying fibers not present.
- 303.19 Name or other identification required to appear on labels.
- 303.20 Registered identification numbers.
- 303.21 Marking of samples, swatches, or specimens and products sold therefrom.
- 303.22 Products containing linings, interlinings, fillings, and paddings.
- 303.23 Textile fiber products containing superimposed or added fibers.
- 303.24 Pile fabrics and products composed thereof.
- 303.25 Sectional disclosure of content.
- 303.26 Ormentation.
- 303.27 Use of the term "All" or "100%."
- 303.28 Products contained in packages.
- 303.29 Labeling of pairs or products containing two or more units.
- 303.30 Textile fiber products in form for consumer.
- 303.31 Invoice in lieu of label.
- 303.32 Products containing reused stuffing.
- 303.33 Country where textile fiber products are processed or manufactured.
- 303.34 Country of origin in mail order advertising.
- 303.35 Use of terms "virgin" or "new."
- 303.36 Form of separate guaranty.
- 303.37 Form of continuing guaranty from seller to buyer.
- 303.38 Continuing guaranty filed with Federal Trade Commission.
- 303.39 Maintenance of records.
- 303.40 Use of terms in written advertisements that imply presence of a fiber.
- 303.41 Use of fiber trademarks and generic names in advertising.
- 303.42 Arrangement of information in advertising textile fiber products.
- 303.43 Fiber content tolerances.
- 303.44 Products not intended for uses subject to the act.
- 303.45 Exclusions from the act.

AUTHORITY: 15 U.S.C. 70 *et seq.*

SOURCE: 24 FR 4480, June 2, 1959, unless otherwise noted.

## § 303.1 Terms defined.

As used in this part, unless the context otherwise specifically requires:

(a) The term *Act* means the *Textile Fiber Products Identification Act* (approved September 2, 1958, 85th Congress, 2d Sess.; 15 U.S.C. 70, 72 Stat. 1717).

(b) The terms *rule*, *rules*, *regulations*, and *rules and regulations* mean the rules and regulations prescribed by the Commission pursuant to section 7(c) of the Act.

(c) The definition of terms contained in section 2 of the Act shall be applicable also to such terms when used in rules promulgated under the Act.

(d) The term *United States* means the several States, the District of Columbia, and the Territories and possessions of the United States.

(e) The terms *required information* and *information required* mean such information as is required to be disclosed on labels or invoices and in advertising under the Act and regulations.

(f) The terms *label*, *labels*, *labeled*, and *labeling* mean the stamp, tag, label, or other means of identification, or authorized substitute therefor, required to be on or affixed to textile fiber products by the Act and regulations and on which the information required is to appear.

(g) The terms *marketing or handling* and *marketed or handled*, when applied to textile-fiber products, mean any one or all of the transactions set forth in section 3 of the Act.

(h) The terms *invoice* and *invoice or other paper* mean an account, order, memorandum, list, or catalog, which is issued to a purchaser, consignee, bailee, correspondent, agent, or any other person, in writing or in some other form capable of being read and preserved in a tangible form, in connection with the marketing or handling of any textile fiber product transported or delivered to such person.

(i) The term *outer coverings of furniture, mattresses, and box springs* means those coverings as are permanently incorporated in such articles.

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(j) The term *wearing apparel* means any costume or article of clothing or covering for any part of the body worn or intended to be worn by individuals.

(k) The term *beddings* means sheets, covers, blankets, comforters, pillows, pillowcases, quilts, bedspreads, pads, and all other textile fiber products used or intended to be used on or about a bed or other place for reclining or sleeping but shall not include furniture, mattresses or box springs.

(l) The term *headwear* means any textile fiber product worn exclusively on or about the head or face by individuals.

(m) The term *backings*, when applied to floor coverings, means that part of a floor covering to which the pile, face, or outer surface is woven, tufted, hooked, knitted, or otherwise attached, and which provides the structural base of the floor covering. The term *backing* shall also include fabrics attached to the structural base of the floor covering in such a way as to form a part of such structural base, but shall not include the pile, face, or outer surface of the floor covering or any part thereof.

(n) The term *elastic material* means a fabric composed of yarn consisting of an elastomer or a covered elastomer.

(o) The term *coated fabric* means any fabric which is coated, filled, impregnated, or laminated with a continuous-film-forming polymeric composition in such a manner that the weight added to the base fabric is at least 35 percent of the weight of the fabric before coating, filling, impregnation, or lamination.

(p) The term *upholstered product* means articles of furniture containing stuffing and shall include mattresses and box springs.

(q) The term *ornamentation* means any fibers or yarns imparting a visibly discernible pattern or design to a yarn or fabric.

(r) The term *fiber trademark* means a word or words used by a person to identify a particular fiber produced or sold by him and to distinguish it from fibers of the same generic class produced or sold by others. Such term shall not include any trade mark, product mark, house mark, trade name or other name which does not identify a particular fiber.

(s) The term *wool* means the fiber from the fleece of the sheep or lamb or hair of the Angora or Cashmere goat (and may include the so-called specialty fibers from the hair of the camel, alpaca, llama, and vicuna) which has never been reclaimed from any woven or felted wool product.

(t) The term *recycled wool* means (1) the resulting fiber when wool has been woven or felted into a wool product which, without ever having been utilized in any way by the ultimate consumer, subsequently has been made into a fibrous state, or (2) the resulting fiber when wool or reprocessed wool has been spun, woven, knitted, or felted into a wool product which, after having been used in any way by the ultimate consumer, subsequently has been made into a fibrous state.

(u) The terms *mail order catalog* and *mail order promotional material* mean any materials, used in the direct sale or direct offering for sale of textile products, that are disseminated to ultimate consumers in print or by electronic means, other than by broadcast, and that solicit ultimate consumers to purchase such textile products by mail, telephone, electronic mail, or some other method without examining the actual product purchased.

[24 FR 4493, June 2, 1959, as amended at 45 FR 44263, July 1, 1980; 50 FR 15106, Apr. 17, 1985; 63 FR 7517, Feb. 13, 1998]

## § 303.2 General requirements.

(a) Each textile fiber product, except those exempted or excluded under section 12 of the Act, shall be labeled or invoiced in conformity with the requirements of the Act and regulations.

(b) Any advertising of textile fiber products subject to the Act shall be in conformity with the requirements of the Act and regulations.

(c) The requirements of the Act and regulations shall not be applicable to products required to be labeled under the Wool Products Labeling Act of 1939 (Pub. L. 76-850, 15 U.S.C. 69, 54 Stat. 1128).

(d) Any person marketing or handling textile fiber products who shall cause or direct a processor or finisher to label, invoice, or otherwise identify any textile fiber product with required information shall be responsible under

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the Act and regulations for any failure of compliance with the Act and regulations by reason of any statement or omission in such label, invoice, or other means of identification utilized in accordance with his direction: *Provided*, That nothing herein shall relieve the processor or finisher of any duty or liability to which he may be subject under the Act and regulations.

**§ 303.3 Fibers present in amounts of less than 5 percent.**

(a) Except as permitted in sections 4(b)(1) and 4(b)(2) of the Act, as amended, no fiber present in the amount of less than 5 percent of the total fiber weight shall be designated by its generic name or fiber trademark in disclosing the constituent fibers in required information, but shall be designated as "other fiber." When more than one of such fibers are present in a product, they shall be designated in the aggregate as "other fibers." *Provided*, however, that nothing in this section shall be construed as prohibiting the disclosure of any fiber present in a textile fiber product which has a clearly established and definite functional significance when present in the amount contained in such product, as for example:

96 percent Acetate  
4 percent Spandex.

(b) In making such disclosure, all of the provisions of the Act and regulations in this part setting forth the manner and form of disclosure of fiber content information, including the provisions of §§ 303.17 and 303.41 of this part relating to the use of generic names and fiber trademarks, shall be applicable.

[63 FR 7518, Feb. 13, 1998]

**§ 303.4 English language requirement.**

All required information shall be set out in the English language. If the required information appears in a language other than English, it also shall appear in the English language. The provisions of this section shall not apply to advertisements in foreign language newspapers or periodicals, but such advertising shall in all other respects comply with the Act and regulations.

**§ 303.5 Abbreviations, ditto marks, and asterisks prohibited.**

(a) In disclosing required information, words or terms shall not be designated by ditto marks or appear in footnotes referred to by asterisks or other symbols in required information, and shall not be abbreviated except as permitted in § 303.33(e) of this part.

(b) Where the generic name of a textile fiber is required to appear in immediate conjunction with a fiber trademark in advertising, labeling, or invoicing, a disclosure of the generic name by means of a footnote, to which reference is made by use of an asterisk or other symbol placed next to the fiber trademark, shall not be sufficient in itself to constitute compliance with the Act and regulations.

[24 FR 4480, June 2, 1959, as amended at 65 FR 75156, Dec. 1, 2000]

**§ 303.6 Generic names of fibers to be used.**

(a) Except where another name is permitted under the Act and regulations, the respective generic names of all fibers present in the amount of 5 percent or more of the total fiber weight of the textile fiber product shall be used when naming fibers in the required information; as for example: "cotton," "rayon," "silk," "linen," "nylon," etc.

(b) Where a textile fiber product contains the hair or fiber of a fur-bearing animal present in the amount 5 percent or more of the total fiber weight of the product, the name of the animal producing such fiber may be used in setting forth the required information, provided the name of such animal is used in conjunction with the words "fiber," "hair," or "blend," as for example:

80 percent Rabbit hair.  
20 percent Nylon.  
or  
80 percent Silk.  
20 percent Mink fiber.

(c) The term *fur fiber* may be used to describe the hair or fur fiber or mixtures thereof of any animal or animals other than the sheep, lamb, Angora goat, Cashmere goat, camel, alpaca, llama or vicuna where such hair or fur fiber or mixture is present in the

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amount of 5 per centum or more of the total fiber weight of the textile fiber product and no direct or indirect representations are made as to the animal or animals from which the fiber so designated was obtained; as for example:

60 percent Cotton.  
40 percent Fur fiber.  
or  
50 percent Nylon.  
30 percent Mink hair.  
20 percent Fur fiber.

(d) Where textile fiber products subject to the Act contain (1) wool or (2) recycled wool in amounts of five per centum or more of the total fiber weight, such fibers shall be designated and disclosed as wool or recycled wool as the case may be.

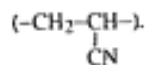
[24 FR 4402, June 2, 1959, as amended at 45 FR 44283, July 1, 1980]

**§ 303.7 Generic names and definitions for manufactured fibers.**

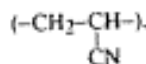
Pursuant to the provisions of section 7(c) of the Act, the Commission hereby establishes the generic names for manufactured fibers, together with their respective definitions, set forth in this section, and the generic names for manufactured fibers, together with their respective definitions, set forth in International Organization for Standardization ISO 2076: 1999(E), "Textiles—Man-made fibres—Generic names." This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from the American National Standards Institute, 11 West 42nd St., 13th floor, New York, NY 10036. Copies may be inspected at the Federal Trade Commission, Room 130, 600 Pennsylvania Avenue, NW., Washington, DC 20580, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: [http://www.archives.gov/federal\\_register/code\\_of\\_federal\\_regulations/ibr\\_locations.html](http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html).

(a) *Acrylic*. A manufactured fiber in which the fiber-forming substance is any long chain synthetic polymer composed of at least 85 percent by weight of acrylonitrile units

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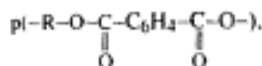


(b) *Modacrylic*. A manufactured fiber in which the fiber-forming substance is any long chain synthetic polymer composed of less than 85 percent but at least 35 percent by weight of acrylonitrile units

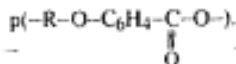


except fibers qualifying under paragraph (j)(2) of this section and fibers qualifying under paragraph (q) of this section. (Sec. 7, 72 Stat. 1717; 15 U.S.C. section 70e)

(c) *Polyester*. A manufactured fiber in which the fiber-forming substance is any long chain synthetic polymer composed of at least 85% by weight of an ester of a substituted aromatic carboxylic acid, including but not restricted to substituted terephthalate units,



and para substituted hydroxy-benzoate units,



Where the fiber is formed by the interaction of two or more chemically distinct polymers (of which none exceeds 85% by weight), and contains ester groups as the dominant functional unit (at least 85% by weight of the total polymer content of the fiber), and which, if stretched at least 100%, durably and rapidly reverts substantially to its unstretched length when the tension is removed, the term *elastereil-p* may be used as a generic description of the fiber.

(d) *Rayon*—A manufactured fiber composed of regenerated cellulose, as well as manufactured fibers composed

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of regenerated cellulose in which substituents have replaced not more than 15% of the hydrogens of the hydroxyl groups. Where the fiber is composed of cellulose precipitated from an organic solution in which no substitution of the hydroxyl groups takes place and no chemical intermediates are formed, the term *lyocell* may be used as a generic description of the fiber.

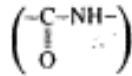
(e) *Acetate*. A manufactured fiber in which the fiber-forming substance is cellulose acetate. Where not less than 92 percent of the hydroxyl groups are acetylated, the term *triacetate* may be used as a generic description of the fiber.

(f) *Saran*. A manufactured fiber in which the fiber-forming substance is any long chain synthetic polymer composed of at least 80 percent by weight of vinylidene chloride units ( $-\text{CH}_2-\text{CCl}_2-$ ).

(g) *Azlon*. A manufactured fiber in which the fiber-forming substance is composed of any regenerated naturally occurring proteins.

(h) *Nitril*. A manufactured fiber containing at least 85 percent of a long chain polymer of vinylidene dinitrile ( $-\text{CH}_2-\text{C}(\text{CN})_2-$ ) where the vinylidene dinitrile content is no less than every other unit in the polymer chain.

(i) *Nylon*. A manufactured fiber in which the fiber-forming substance is a long-chain synthetic polyamide in which less than 85 percent of the amide



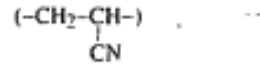
linkages are attached directly to two aromatic rings.

(j) *Rubber*. A manufactured fiber in which the fiber-forming substance is comprised of natural or synthetic rubber, including the following categories:

(1) A manufactured fiber in which the fiber-forming substance is a hydrocarbon such as natural rubber, polyisoprene, polybutadiene, copolymers of dienes and hydrocarbons, or amorphous (noncrystalline) polyolefins.

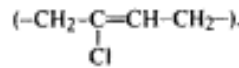
(2) A manufactured fiber in which the fiber-forming substance is a copolymer

of acrylonitrile and a diene (such as butadiene) composed of not more than 50 percent but at least 10 percent by weight of acrylonitrile units



The term *lastrile* may be used as a generic description for fibers falling within this category.

(3) A manufactured fiber in which the fiber-forming substance is a polychloroprene or a copolymer of chloroprene in which at least 35 percent by weight of the fiber-forming substance is composed of chloroprene units



(k) *Spandex*. A manufactured fiber in which the fiber-forming substance is a long chain synthetic polymer comprised of at least 85 percent of a segmented polyurethane.

(l) *Vinal*. A manufactured fiber in which the fiber-forming substance is any long chain synthetic polymer composed of at least 50 percent by weight of vinyl alcohol units ( $-\text{CH}_2-\text{CHOH}-$ ), and in which the total of the vinyl alcohol units and any one or more of the various acetal units is at least 85 percent by weight of the fiber.

(m) *Olefin*. A manufactured fiber in which the fiber-forming substance is any long chain synthetic polymer composed of at least 85 percent by weight of ethylene, propylene, or other olefin units, except amorphous (noncrystalline) polyolefins qualifying under paragraph (j)(1) of this section [Rule 7]. Where the fiber-forming substance is a cross-linked synthetic polymer, with low but significant crystallinity, composed of at least 95 percent by weight of ethylene and at least one other olefin unit, and the fiber is substantially elastic and heat resistant, the term *lastol* may be used as a generic description of the fiber.

(n) *Vinyon*. A manufactured fiber in which the fiber-forming substance is

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any long chain synthetic polymer composed of at least 85 percent by weight of vinyl chloride units ( $-\text{CH}_2-\text{CHCl}-$ ).

(o) *Metallized*. A manufactured fiber composed of metal, plastic-coated metal, metal-coated plastic, or a core completely covered by metal.

(p) *Glass*. A manufactured fiber in which the fiber-forming substance is glass.

(q) *Amidex*. A manufactured fiber in which the fiber-forming substance is any long chain synthetic polymer composed of at least 50 percent by weight of one or more esters of a monohydric alcohol and acrylic acid,  $\text{CH}_2=\text{CH}-\text{COOH}$ .

(r) *Novoloid*. A manufactured fiber containing at least 85 percent by weight of a cross-linked novolac.

(s) *Aramid*. A manufactured fiber in which the fiber-forming substance is a long-chain synthetic polyamide in which at least 85 percent of the amide



linkages are attached directly to two aromatic rings.

(t) *Sulfar*. A manufactured fiber in which the fiber-forming substance is a long chain synthetic polysulfide in which at least 85% of the sulfide ( $-\text{S}-$ ) linkages are attached directly to two (2) aromatic rings.

(u) *PBI*. A manufactured fiber in which the fiber-forming substance is a long chain aromatic polymer having reoccurring imidazole groups as an integral part of the polymer chain.

(v) *Elastoester*. A manufactured fiber in which the fiber-forming substance is a long-chain synthetic polymer composed of at least 50% by weight of aliphatic polyether and at least 35% by weight of polyester, as defined in 16 CFR 303.7(c).

(w) *Melamine*. A manufactured fiber in which the fiber-forming substance is a synthetic polymer composed of at least 50% by weight of a cross-linked melamine polymer.

(x) *Fluoropolymer*. A manufactured fiber containing at least 95% of a long-chain polymer synthesized from aliphatic fluorocarbon monomers.

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(y) *PLA*. A manufactured fiber in which the fiber-forming substance is composed of at least 85% by weight of lactic acid ester units derived from naturally occurring sugars.

(Sec. 6, 72 Stat. 1717; 15 U.S.C. 70e)

[24 FR 4480, June 2, 1959; 24 FR 5737, July 17, 1959, as amended at 31 FR 2652, Feb. 11, 1966; 31 FR 3302, Feb. 22, 1966; 34 FR 14595, Sept. 19, 1969; 38 FR 21782, Aug. 13, 1973; 38 FR 34115, Dec. 11, 1973; 39 FR 1834, Jan. 15, 1974; 51 FR 20807, 20909, June 9, 1986; 61 FR 16306, Apr. 15, 1996; 62 FR 30344, May 23, 1997; 63 FR 7510, Feb. 13, 1998; 63 FR 36174, July 2, 1998; 63 FR 71583, Dec. 28, 1998; 65 FR 75156, Dec. 1, 2000; 67 FR 4963, Feb. 1, 2002; 67 FR 70639, Nov. 27, 2002; 68 FR 3816, Jan. 27, 2003; 69 FR 18803, Apr. 9, 2004]

### § 303.8 Procedure for establishing generic names for manufactured fibers.

(a) Prior to the marketing or handling of a manufactured fiber for which no generic name has been established or otherwise recognized by the Commission, the manufacturer or producer thereof shall file a written application with the Commission, requesting the establishment of a generic name for such fiber, stating therein:

(1) The reasons why the applicant's fiber should not be identified by one of the generic names established by the Commission in § 303.7 of this part;

(2) The chemical composition of the fiber, including the fiber-forming substances and respective percentages thereof, together with samples of the fiber;

(3) Suggested names for consideration as generic, together with a proposed definition for the fiber;

(4) Any other information deemed by the applicant to be pertinent to the application, including technical data in the form of test methods;

(5) The earliest date on which the application proposes to market or handle the fiber in commerce for other than developmental or testing purposes.

(b) Upon receipt of the application, the Commission will, within sixty (60) days, either deny the application or assign to the fiber a numerical or alphabetical symbol for temporary use during further consideration of such application.

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(c) After taking the necessary procedure in consideration of the application, the Commission in due course shall establish a generic name or advise the applicant of its refusal to grant the application and designate the proper existing generic name for the fiber.

[24 FR 4460, June 2, 1959, as amended at 63 FR 7518, Feb. 13, 1998]

**§ 303.9 Use of fur-bearing animal names and symbols prohibited.**

(a) The advertising or the labeling of a textile fiber product shall not contain any names, words, depictions, descriptive matter, or other symbols which connote or signify a fur-bearing animal, unless such product or the part thereof in connection with which the names, words, depictions, descriptive matter, or other symbols are used is a fur product within the meaning of the Fur Products Labeling Act.

(b) Subject to the provisions of paragraph (a) of this section and § 303.6 of this part, a textile fiber product shall not be described or referred to in any manner in an advertisement or label with:

(1) The name or part of the name of a fur-bearing animal, whether as a single word or a combination word, or any coined word which is phonetically similar to a fur-bearing animal name, or which is only a slight variation in spelling of a fur-bearing animal name or part of the name. As for example, such terms as "Ermine," "Mink," "Persian," "Broadtail," "Beaverton," "Marmink," "Sableton," "Lam," "Pershian," "Minx," or similar terms shall not be used.

(2) Any word or name symbolic of a fur-bearing animal by reason of conventional usage or by reason of its close relationship with fur-bearing animals. As for example, such terms as "guardhair," "underfur," and "mutation," or similar terms, shall not be used.

(c) Nothing contained herein shall prevent:

(1) The nondeceptive use of animal names or symbols in referring to a textile fiber product where the fur of such animal is not commonly or commercially used in fur products, as that term is defined in the Fur Products La-

beling Act, as for example "kitten soft", "Bear Brand", etc.

(2) The nondeceptive use of a trademark or trade name containing the name, symbol, or depiction of a fur-bearing animal unless:

(i) The textile fiber product in connection with which such trademark or trade name is used simulates a fur or fur product; or

(ii) Such trademark or trade name is used in any advertisement of a textile fiber product together with any depiction which has the appearance of a fur or fur product; or

(iii) The use of such trademark or trade name is prohibited by the Fur Products Labeling Act.

[24 FR 4460, June 2, 1959, as amended at 28 FR 722, Jan. 16, 1963]

**§ 303.10 Fiber content of special types of products.**

(a) Where a textile product is made wholly of elastic yarn or material, with minor parts of non-elastic material for structural purposes, it shall be identified as to the percentage of the elastomer, together with the percentage of all textile coverings of the elastomer and all other yarns or materials used therein.

Where a textile fiber product is made in part of elastic material and in part of other fabric, the fiber content of such fabric shall be set forth sectionally by percentages as in the case of other fabrics. In such cases the elastic material may be disclosed by describing the material as elastic followed by a listing in order of predominance by weight of the fibers used in such elastic, including the elastomer, where such fibers are present by 5 per centum or more with the designation "other fiber" or "other fibers" appearing last when fibers required to be so designated are present. An example of labeling under this paragraph is:

Front and back non-elastic sections:

50 percent Acetate.

50 percent Cotton.

Elastic: Rayon, cotton, nylon, rubber.

(b) Where drapery or upholstery fabrics are manufactured on hand-operated looms for a particular customer after the sale of such fabric has been consummated, and the amount of the



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order does not exceed 100 yards (91.44 m) of fabric, the required fiber content disclosure may be made by listing the fibers present in order of predominance by weight with any fiber or fibers required to be designated as "other fiber" or "other fibers" appearing last, as for example:

Rayon  
Wool  
Acetate  
Metallic  
Other fibers

(c)(1) Where a manufactured textile fiber is essentially a physical combination or mixture of two or more chemically distinct constituents or components combined at or prior to the time of extrusion, which components if separately extruded would each fall within different existing definitions of textile fibers as set forth in § 303.7 of this part (Rule 7), the fiber content disclosure as to such fiber, shall for all purposes under the regulations in this part (i) disclose such fact in the required fiber content information by appropriate nondeceptive descriptive terminology, such as "biconstituent fiber" or "multiconstituent fiber," (ii) set out the components contained in the fiber by the appropriate generic name specified in § 303.7 of this part (Rule 7) in the order of their predominance by weight, and (iii) set out the respective percentages of such components by weight.

(2) If the components of such fibers are of a matrix-fibril configuration, the term *matrix-fibril fiber* or *matrix fiber* may be used in setting forth the information required by this paragraph.

(3) Examples of proper fiber content designations under this paragraph are:

100% Biconstituent Fiber  
(65% Nylon, 35% Polyester)  
80% Matrix Fiber (60% Nylon, 40% Polyester)  
15% Polyester  
5% Rayon

(4) All of the provisions as to fiber content disclosures contained in the Act and regulations, including the provisions relative to fiber content tolerances and disclosures of fibers present in amounts of less than 5 percentum of the total fiber weight, shall also be ap-

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plicable to the designations and disclosures prescribed by this paragraph.

[25 FR 7044, July 26, 1960, as amended at 30 FR 14253, Nov. 13, 1965; 34 FR 12134 July 19, 1969; 61 FR 11544, Mar. 21, 1996]

## § 303.11 Floor coverings containing backings, fillings, and paddings.

In disclosing the required fiber content information as to floor coverings containing exempted backings, fillings, or paddings, the disclosure shall be made in such manner as to indicate that it relates only to the face, pile, or outer surface of the floor covering and not to the backing, filling, or padding. Examples of the form of marking these types of floor coverings as to fiber content are as follows:

100% Cotton Pile  
Face—60% Rayon, 40% Cotton  
Outer Surface—100% Wool

## § 303.12 Trimmings of household textile articles.

(a) Trimmings incorporated in articles of wearing apparel and other household textile articles may, among other forms of trim, include: (1) Rickrack, tape, belting, binding, braid, labels (either required or non-required), collars, cuffs, wrist bands, leg bands, waist bands, gussets, gores, welts, and findings, including superimposed garters in hosiery, and elastic materials and threads inserted in or added to the basic product or garment in minor proportion for holding, reinforcing or similar structural purposes; (2) decorative trim, whether applied by embroidery, overlay, applique, or attachment; and (3) decorative patterns or designs which are an integral part of the fabric out of which the household textile article is made: *Provided*, That such decorative trim or decorative pattern or design, as specified in paragraphs (a) (2) and (3) of this section, does not exceed 15 percent of the surface area of the household textile article. If no representation is made as to the fiber content of the decorative trim or decoration, as provided for in paragraphs (a) (2) and (3) of this section, the fiber content designation of the basic fabric shall be followed by the statement "exclusive of decoration."

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(b) The term *findings* may also include elastic material which constitutes a part of the basic fabric or material out of which the household textile article is made, where such elastic material does not exceed 20 percent of the surface area of the household textile article: *Provided*, That the required information as to fiber content of products subject to this paragraph is followed by the statement "exclusive of elastic."

**§ 303.13 Sale of remnants and products made of remnants.**

(a) In disclosing the required fiber content information as to remnants of fabric which are for practical purposes of unknown or undeterminable fiber content:

(1) The fiber content disclosure of such remnants of fabrics may be designated in the required information as "remnants of undetermined fiber content."

(2) Where such remnants of fabrics are displayed for sale at retail, a conspicuous sign may, in lieu of individual labeling, be used in immediate conjunction with such display, stating with respect to required fiber content disclosure that the goods are "remnants of undetermined fiber content."

(3) Where textile fiber products are made of such remnants, the required fiber content information of the products may be disclosed as "made of remnants of undetermined fiber content." If any representations as to fiber content are made with respect to such remnants, the provisions of this paragraph shall not apply.

(b) Where remnants of fabrics are marketed or handled in bales, bundles, or packages and are all of the same fiber content or are designated in the manner permitted by paragraph (a) of this section, the individual remnants need not be labeled if the bales, bundles, or packages containing such remnants are labeled with the required information including fiber content percentages or the designation permitted by paragraph (a) of this section.

(c) Where remnants of fabrics of the same fiber content are displayed for sale at retail, a conspicuous sign may, in lieu of individual labeling, be used in immediate conjunction with such display,

stating the fiber content information with respect to such remnants; as for example: "remnants, 100 percent cotton," "remnants, 50 percent rayon, 50 percent acetate," etc.

**§ 303.14 Products containing unknown fibers.**

(a) Where a textile fiber product is made from miscellaneous scraps, rags, odd lots, secondhand materials, textile by-products, or waste materials of unknown, and for practical purposes, undeterminable fiber content, the required fiber content disclosure may, when truthfully applicable, in lieu of the fiber content disclosure otherwise required by the Act and regulations, indicate that such product is composed of miscellaneous scraps, rags, odd lots, textile by-products, secondhand materials (in case of secondhand materials, words of like import may be used) or waste materials, as the case may be, of unknown or undetermined fiber content, as for example:

Made of miscellaneous scraps of undetermined fiber content

100% unknown fibers—rags

All undetermined fibers—textile by-products

100% miscellaneous odd lots of undetermined fiber content

Secondhand materials—fiber content unknown

Made of unknown fibers—waste materials

(b) Where a textile fiber product is made in part from miscellaneous scraps, rags, odd lots, textile by-products, second-hand materials or waste materials of unknown and, for practical purposes, undeterminable fiber content together with a percentage of known or determinable fibers, the required fiber content disclosure may, when truthfully applicable, in lieu of the fiber content disclosure otherwise required by the Act and regulations, indicate the percentage of miscellaneous scraps, rags, odd lots, second-hand materials (in case of secondhand materials, words of like import may be used), textile by-products, or waste materials of unknown or undetermined fiber content and the percentage of known fibers, as for example:

45% Rayon

30% Acetate

25% Miscellaneous scraps of undetermined fiber content.

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60% Cotton  
 40% Unknown fibers—waste materials.  
 40% Acrylic  
 20% Modacrylic  
 40% Undetermined fibers—odd lots.  
 50% Polyester  
 30% Cotton  
 20% Textile by-products of undetermined fiber content.  
 50% Rayon  
 50% Secondhand materials—fiber content unknown.  
 45% Acetate  
 30% Cotton  
 25% Miscellaneous rags—undetermined fiber content.

(c) No representation as to fiber content shall be made as to any textile product or any portion of a textile fiber product designated as composed of unknown or undetermined fibers. If any such representation is made, a full and complete fiber content disclosure shall be required.

(d) Nothing contained in this section shall excuse a full disclosure as to fiber content if the same is known or practically ascertainable.

[25 FR 4317, May 14, 1960]

**§ 303.15 Required label and method of affixing.**

(a) A label is required to be affixed to each textile product and, where required, to its package or container in a secure manner. Such label shall be conspicuous and shall be of such durability as to remain attached to the product and its package throughout any distribution, sale, resale and until sold and delivered to the ultimate consumer.

(b) Each textile fiber product with a neck must have a label disclosing the country of origin affixed to the inside center of the neck midway between the shoulder seams or in close proximity to another label affixed to the inside center of the neck. The fiber content and RN or name of the company may be disclosed on the same label as the country of origin or on another conspicuous and readily accessible label or labels on the inside or outside of the garment. On all other textile products, the required information shall be disclosed on a conspicuous and readily accessible label or labels on the inside or outside of the product. The country of

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origin disclosure must always appear on the front side of the label. Other required information may appear either on the front side or the reverse side of a label, provided that the information is conspicuous and readily accessible.

(c) In the case of hosiery products, this section shall not be construed as requiring the affixing of a label to each hosiery product contained in a package if, (1) such hosiery products are intended for sale to the ultimate consumer in such package, (2) such package has affixed to it a label bearing the required information for the hosiery products contained in the package, and (3) the information on the label affixed to the package is equally applicable to each textile fiber product contained therein.

(d) Socks provided for in subheading 6115.92.90, 6115.93.90, 6115.99.18, 6111.20.60, 6111.30.50, or 6111.90.50 of the Harmonized Tariff Schedule of the United States, as in effect on September 1, 2003, shall be marked, as legibly, indelibly, and permanently as the nature of the article or package will permit, to disclose the English name of the country of origin. This disclosure shall appear on the front of the package, adjacent to the size designation of the product, and shall be set forth in such a manner as to be clearly legible, conspicuous, and readily accessible to the ultimate consumer. *Provided, however,* any package that contains several different types of goods and includes socks classified under subheading 6115.92.90, 6115.93.90, 6115.99.18, 6111.20.60, 6111.30.50, or 6111.90.50 of the Harmonized Tariff Schedule of the United States, as in effect on September 1, 2003, shall not be subject to the requirements of this subsection.

[50 FR 15106, Apr. 17, 1985, as amended at 63 FR 7518, Feb. 13, 1998; 70 FR 73369, Dec. 12, 2005]

**§ 303.16 Arrangement and disclosure of information on labels.**

(a) Subject to the provisions of § 303.15(b), information required by the Act and regulations in this part may appear on any label or labels attached to the textile fiber product, including the care label required by 16 CFR part 423, provided all the pertinent requirements of the Act and regulations in

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this part are met and so long as the combination of required information and non-required information is not misleading. The required information shall include the following:

(1) The generic names and percentages by weight of the constituent fibers present in the textile fiber product, excluding permissive ornamentation, in amounts of 5 percent or more and any fibers disclosed in accordance with §303.3(a) shall appear in order of predominance by weight with any percentage of fiber or fibers required to be designated as "other fiber" or "other fibers" appearing last.

(2) The name, provided for in §303.19, or registered identification number issued by the Commission, of the manufacturer or of one or more persons marketing or handling the textile fiber product.

(3) The name of the country where such product was processed or manufactured, as provided for in §303.33.

(b) All parts of the required information shall be set forth in such a manner as to be clearly legible, conspicuous, and readily accessible to the prospective purchaser. All parts of the fiber content information shall appear in type or lettering of equal size and conspicuousness.

(c) Subject to the provisions of §303.17, any non-required information or representations placed on the product shall not minimize, detract from, or conflict with required information and shall not be false, deceptive, or misleading.

(d) Non-deceptive terms which are properly and truthfully descriptive of a fiber may be used in conjunction with the generic name of such fiber; as for example: "100 percent cross-linked rayon," "100 percent solution dyed acetate," "100 percent combed cotton," "100 percent nylon 66," etc.

[24 FR 4480, June 2, 1959, as amended at 25 FR 4317, May 14, 1960; 30 FR 14254, Nov. 13, 1965; 30 FR 15313, Dec. 11, 1965; 30 FR 15107, Apr. 17, 1965; 33 FR 31315, Aug. 18, 1968; 63 FR 7518, Feb. 23, 1998]

**§ 303.17 Use of fiber trademarks and generic names on labels.**

(a) A non-deceptive fiber trademark may be used on a label in conjunction with the generic name of the fiber to

which it relates. Where such a trademark is placed on a label in conjunction with the required information, the generic name of the fiber must appear in immediate conjunction therewith, and such trademark and generic name must appear in type or lettering of equal size and conspicuousness.

(b) Where a generic name or a fiber trademark is used on any label, whether required or non-required, a full and complete fiber content disclosure shall be made in accordance with the Act and regulations the first time the generic name or fiber trademark appears on the label.

(c) If a fiber trademark is not used in the required information, but is used elsewhere on the label as non-required information, the generic name of the fiber shall accompany the fiber trademark in legible and conspicuous type or lettering the first time the trademark is used.

(d) No fiber trademark or generic name shall be used in non-required information on a label in such a manner as to be false, deceptive, or misleading as to fiber content, or to indicate directly or indirectly that a textile fiber product is composed wholly or in part of a particular fiber, when such is not the case.

**§ 303.18 Terms implying fibers not present.**

Words, coined words, symbols or depictions, (a) which constitute or imply the name or designation of a fiber which is not present in the product, (b) which are phonetically similar to the name or designation of such a fiber, or (c) which are only a slight variation of spelling from the name or designation of such a fiber shall not be used in such a manner as to represent or imply that such fiber is present in the product.

[30 FR 13693, Oct. 28, 1965]

**§ 303.19 Name or other identification required to appear on labels.**

(a) The name required by the Act to be used on labels shall be the name under which the person is doing business. Where a person has a word trademark, used as a house mark, registered in the United States Patent Office, such word trademark may be used on

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labels in lieu of the name otherwise required: *Provided*, The owner of such word trademark furnishes the Commission a copy of the registration prior to its use. No trademark, trade names, or other names except those provided for above shall be used for required identification purposes.

(b) Registered identification numbers, as provided for in §303.20 of this part, may be used for identification purposes in lieu of the required name.

**§303.20 Registered identification numbers.**

(a) Registered numbers for use as the required identification in lieu of the name on textile fiber product labels, as provided in section 4(b)(3) of the Act, will be issued by the Commission to qualified persons residing in the United States upon receipt of an application duly executed in the form set out in paragraph (d) of this section.

(b)(1) Registered identification numbers shall be used only by the person or concern to whom they are issued, and such numbers are not transferable or assignable.

(2) Registered identification numbers shall be subject to cancellation whenever any such number was procured or has been used improperly or contrary to the requirements of the Acts administered by the Federal Trade Commission, and regulations promulgated thereunder, or when otherwise deemed necessary in the public interest.

(3) Registered identification numbers shall be subject to cancellation if the Commission fails to receive prompt notification of any change in name, business address, or legal business status of a person or firm to whom a registered identification number has been assigned, by application duly executed in the form set out in paragraph (d) of this section, reflecting the current name, business address, and legal business status of the person or firm.

(c) Registered identification numbers assigned under this section may be used on labels required in labeling products subject to the provisions of the Wool Products Labeling Act and Fur Products Labeling Act, and numbers previously assigned by the Commission under such Acts may be used as and for the required name in labeling under this Act. When so used by the person or firm to whom assigned, the use of the numbers shall be construed as identifying and binding the applicant as fully and in all respects as though assigned under the specific Act for which it is used.

(d) Form to apply for a registered identification number or to update information pertaining to an existing number (the form is available upon request from: Enforcement Division, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580, or on the Internet at <http://www.ftc.gov>; application may also be made directly on the Internet):

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APPLICATION FOR A REGISTERED IDENTIFICATION NUMBER ("RN")		
DO NOT WRITE IN THIS SPACE		
DATE ISSUED: _____	DATE UPDATED: _____	RN: _____ BY: _____
1. PURPOSE OF APPLICATION (Check new applicants and update applicants must complete all entries on this form) <input type="checkbox"/> APPLY FOR A NEW RN <input type="checkbox"/> UPDATE INFORMATION ON AN EXISTING RN OR WPL NUMBER. ENTER EXISTING RN OR WPL NUMBER _____		
2. LEGAL NAME OF APPLICANT FIRM (Note: Partnerships, please provide full legal name of the person who is the proprietor)		
3. NAME UNDER WHICH APPLICANT DOES BUSINESS (Only if different from legal name)		
4. TYPE OF COMPANY (If "OTHER" is checked, please state the type of company) <input type="checkbox"/> PROPRIETORSHIP <input type="checkbox"/> PARTNERSHIP <input type="checkbox"/> CORPORATION <input type="checkbox"/> S-CORP <input type="checkbox"/> OTHER _____		
5. ADDRESS OF PRINCIPAL OFFICE OR PLACE OF BUSINESS (Include zip code. Address must be actual location where business is conducted in the US. An additional mailing address or PO Box address may also be listed, if desired)  STREET ADDRESS (Required)	OPTIONAL ADDITIONAL MAILING ADDRESS	CONTACT INFORMATION TELEPHONE NUMBER _____ FAX NUMBER _____ E-MAIL ADDRESS _____ INTERNET URL ADDRESS _____
6. TYPE OF BUSINESS (Mark all that apply) <input type="checkbox"/> MANUFACTURING <input type="checkbox"/> IMPORTING <input type="checkbox"/> WHOLESALE <input type="checkbox"/> RETAILING <input type="checkbox"/> MAIL-ORDER <input type="checkbox"/> INTERNET <input type="checkbox"/> OTHER _____		
7. LIST PRODUCTS (To qualify for an RN, a company must be engaged in the importation, manufacturing, selling or other marketing of at least one (1) product line subject to the Textile, Wool or Fur Act)		
8. CERTIFICATION  By filing this form with the Federal Trade Commission, the company named above, applies for a registered number to use on labels required by one or more of the following acts: the Textile Fiber Products Identification Act (15 U.S.C. §§70-76), the Wool Products Labeling Act (15 U.S.C. §§40-46), or the Fur Products Labeling Act (15 U.S.C. §§68-69). The company official (proprietor, partner, or corporate officer) listed below certifies that the information supplied on this form is true and correct.		
9. NAME OF COMPANY OFFICIAL (Type or print legibly)	10. TITLE OF COMPANY OFFICIAL	11. DATE SUBMITTED
INSTRUCTIONS Regulations under the Textile Fiber Products Identification Act, the Wool Products Labeling Act, and the Fur Products Labeling Act provide that any USA company that is a manufacturer or marketer of fiber or fur products may, in lieu of the name under which it does business, be identified by its RN as labels required by these statutes. In completing this form, please observe the following: (a) All numbered boxes must be filled in except for optional information. (b) PLEASE, Type or Print legibly. FTC Form 11 (rev. 4/2000)	(c) Submit one (1) completed application: By Mail to: Federal Trade Commission Division of Enforcement 400 Pennsylvania Avenue, NW Washington, DC 20580 Or By Fax to: (301) 376-3187 Or On-Line at: www.ftc.gov	CANCELLATION POLICY RNs are subject to cancellation if the holder fails to promptly submit an updated FTC Form 11 upon any change(s) in its legal name (Line #2), type of company information (Line #4), or business address (Line #5).

[24 FR 4460, June 2, 1959, as amended at 48 FR 13516, Mar. 25, 1983; 63 FR 7518, Feb. 13, 1998; 63 FR 71583, Dec. 28, 1998; 65 FR 75156, Dec. 1, 2000]

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**§ 303.21 Marking of samples, swatches, or specimens and products sold therefrom.**

(a) Where samples, swatches, or specimens of textile fiber products subject to the Act are used to promote or effect sales of such textile fiber products, the samples, swatches, or specimens, as well as the products themselves, shall be labeled to show their respective fiber contents and other required information: *Provided*, That such samples, swatches or specimens need not be labeled:

(1) If the samples, swatches, or specimens are less than two square inches (12.9 cm<sup>2</sup>) in area and the information otherwise required to appear on the label is clearly, conspicuously, and non-deceptively disclosed on accompanying promotional matter in accordance with the Act and regulations.

(2) If the samples, swatches, or specimens are keyed to a catalogue to which reference is necessary in order to complete the sale of the textile fiber products, and which catalogue at the necessary point of reference clearly, conspicuously, and non-deceptively discloses the information otherwise required to appear on the label in accordance with the Act and regulations; or

(3) If such samples, swatches, or specimens are not used to effect sales to ultimate consumers and are not in the form intended for sale or delivery to, or for use by, the ultimate consumer, and are accompanied by an invoice or other paper showing the required information.

(b) Where properly labeled samples, swatches, or specimens are used to effect the sale of articles of wearing apparel or other household textile articles which are manufactured specifically for a particular customer after the sale is consummated, the articles of wearing apparel or other household textile articles need not be labeled if they are of the same fiber content as the samples, swatches, or specimens from which the sale was effected and an invoice or other paper accompanies them showing the information otherwise required to appear on the label.

[24 FR 4480, June 2, 1959, as amended at 51 FR 11594, Mar. 31, 1996]

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**§ 303.22 Products containing linings, interlinings, fillings, and paddings.**

In disclosing the required information as to textile fiber products, the fiber content of any linings, interlinings, fillings, or paddings shall be set forth separately and distinctly if such linings, interlinings, fillings, or paddings are incorporated in the product for warmth rather than for structural purposes, or if any express or implied representations are made as to their fiber content. Examples are as follows:

100% Nylon  
Interlining: 100% Rayon  
Covering: 100% Rayon  
Filling: 100% Cotton.

**§ 303.23 Textile fiber products containing superimposed or added fibers.**

Where a textile fiber product is made wholly of one fiber or a blend of fibers with the exception of an additional fiber in minor proportion superimposed or added in certain separate and distinct areas or sections for reinforcing or other useful purposes, the product may be designated according to the fiber content of the principal fiber or blend of fibers, with an exception naming the superimposed or added fiber, giving the percentage thereof in relation to the total fiber weight of the principal fiber or blend of fibers, and indicating the area or section which contains the superimposed or added fiber. Examples of this type of fiber content disclosure, as applied to products having reinforcing fibers added to a particular area or section, are as follows:

55% Cotton  
45% Rayon  
Except 5% Nylon added to toe and heel.  
All Cotton except 1% Nylon added to neckband.

**§ 303.24 Pile fabrics and products composed thereof.**

The fiber content of pile fabrics or products composed thereof may be stated on the label in such segregated form as will show the fiber content of the face or pile and of the back or base, with percentages of the respective fibers as they exist in the face or pile and in the back or base: *Provided*, That

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in such disclosure the respective percentages of the face and back be given in such manner as will show the ratio between the face and the back. Examples of the form of marking pile fabric as to fiber content provided for in this section are as follows:

100% Nylon Pile  
100% Cotton Back  
(Back constitutes 60% of fabric and pile 40%).  
Face—60% Rayon, 40% Nylon  
Back—70% Cotton, 30% Rayon  
(Face constitutes 60% of fabric and back 40%).

**§303.25 Sectional disclosure of content.**

(a) *Permissive.* Where a textile fiber product is composed of two or more sections which are of different fiber composition, the required information as to fiber content may be separated in the same label in such manner as to show the fiber composition of each section.

(b) *Mandatory.* The disclosure as above provided shall be made in all instances where such form of marking is necessary to avoid deception.

**§303.26 Ornamentation.**

(a)(1) Where the textile fiber product contains fiber ornamentation not exceeding five per centum of the total fiber weight of the product and the stated percentages of the fiber content are exclusive of such ornamentation, the label or any invoice used in lieu thereof shall contain a phrase or statement showing such fact; as for example:

60% Cotton  
40% Rayon  
Exclusive of Ornamentation;  
or  
All Cotton  
Exclusive of Ornamentation.

(2) The fiber content of such ornamentation may be disclosed where the percentage of the ornamentation in relation to the total fiber weight of the principal fiber or blend of fibers is shown; as for example:

70% Nylon  
30% Acetate  
Exclusive of 4% Metallic Ornamentation;  
or

100% Rayon  
Exclusive of 3% Silk Ornamentation.

(b) Where the fiber ornamentation exceeds five per centum, it shall be included in the statement of required percentages of fiber content.

(c) Where the ornamentation constitutes a distinct section of the product, sectional disclosure may be made in accordance with §303.25 of this part.

**§303.27 Use of the term "All" or "100%."**

Where a textile fiber product or part thereof is comprised wholly of one fiber, other than any fiber ornamentation, decoration, elastic, or trimming as to which fiber content disclosure is not required, either the word *All* or the term *100%* may be used in labeling, together with the correct generic name of the fiber and any qualifying phrase, when required; as for example: "100% Cotton," "All Rayon, Exclusive of Ornamentation," "100% Acetate, Exclusive of Decoration," "All Nylon, Exclusive of Elastic," etc.

**§303.28 Products contained in packages.**

When textile products are marketed and delivered in a package which is intended to remain unbroken and intact until after delivery to the ultimate consumer, each textile product in the package, except hosiery, and the package shall be labeled with the required information. If the package is transparent to the extent it allows for a clear reading of the required information on the textile product, the package is not required to be labeled.

[50 FR 15107, Apr. 17, 1985]

**§303.29 Labeling of pairs or products containing two or more units.**

(a) Where a textile fiber product consists of two or more parts, units, or items of different fiber content, a separate label containing the required information shall be affixed to each of such parts, units or items showing the required information as to such part, unit, or item: *Provided*, That where such parts, units, or items are marketed or handled as a single product or ensemble and are sold and delivered to the ultimate consumer as a single



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**§ 303.30**

product or ensemble, the required information may be set out on a single label in such a manner as to separately show the fiber composition of each part, unit, or item.

(b) Where garments, wearing apparel, or other textile fiber products are marketed or handled in pairs or ensembles of the same fiber content, only one unit of the pair or ensemble need be labeled with the required information when sold and delivered to the ultimate consumer.

[24 FR 4480, June 2, 1959, as amended at 25 FR 4318, May 14, 1960]

**§ 303.30 Textile fiber products in form for consumer.**

A textile fiber product shall be considered to be in the form intended for sale or delivery to, or for use by, the ultimate consumer when the manufacturing or processing of the textile fiber product is substantially complete. The fact that minor or insignificant details of the manufacturing or processing have not been completed shall not excuse the labeling of such products as to the required information. For example, a garment must be labeled even though such matters as the finishing of a hem or cuff or the affixing of buttons there-to remain to be completed.

**§ 303.31 Invoice in lieu of label.**

Where a textile fiber product is not in the form intended for sale, delivery to, or for use by the ultimate consumer, an invoice or other paper may be used in lieu of a label, and such invoice or other paper shall show, in addition to the name and address of the person issuing the invoice or other paper, the fiber content of such product as provided in the Act and regulations as well as any other required information.

**§ 303.32 Products containing reused stuffing.**

Any upholstered product, mattress, or cushion which contains stuffing which has been previously used as stuffing in any other upholstered product, mattress, or cushion shall have securely attached thereto a substantial tag or label, at least 2 inches (5.08 cm) by 3 inches (7.62 cm) in size, and statements thereon conspicuously stamped

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or printed in the English language and in plain type not less than 1/8 inch (8.38 mm) high, indicating that the stuffing therein is composed in whole or in part of "reused stuffing," "secondhand stuffing," "previously used stuffing," or "used stuffing."

[61 FR 11544, Mar. 21, 1996]

**§ 303.33 Country where textile fiber products are processed or manufactured.**

(a) In addition to the other information required by the Act and Regulations:

(1) Each imported textile fiber product shall be labeled with the name of the country where such imported product was processed or manufactured;

(2) Each textile fiber product completely made in the United States of materials that were made in the United States shall be labeled using the term *Made in U.S.A.* or some other clear and equivalent term.

(3) Each textile fiber product made in the United States, either in whole or in part of imported materials, shall contain a label disclosing these facts; for example:

Made in USA of imported fabric

or

Knitted in USA of imported yarn

and

(4) Each textile fiber product partially manufactured in a foreign country and partially manufactured in the United States shall contain on a label the following information:

(i) The manufacturing process in the foreign country and in the USA; for example:

"Imported cloth, finished in USA"

or

"Sewn in USA of imported components"

or

"Made in [foreign country], finished in USA"

or

"Scarf made in USA of fabric made in China"

or

"Comforter Filled, Sewn and Finished in the U.S. With Shell Made in China"

or

"Made in [Foreign Country] fabric made in USA"

or

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**Federal Trade Commission****§ 303.36**

"Knit in USA, assembled in (Foreign Country)".

(i) When the U.S. Customs Service requires an origin label on the unfinished product, the manufacturing processes as required in paragraph (a)(4)(i) of this section or the name of the foreign country required by Customs, for example:

"Made in (foreign country)"

(b) For the purpose of determining whether a product should be marked under paragraphs (a) (2), (3), or (4) of this section, a manufacturer needs to consider the origin of only those materials that are covered under the Act and that are one step removed from that manufacturing process. For example, a yarn manufacturer must identify fiber if it is imported, a cloth manufacturer must identify imported yarn and a household product manufacturer must identify imported cloth or imported yarn for household products made directly from yarn, or imported fiber used as filling for warmth.

(c) The term *country* means the political entity known as a nation. Except for the United States, colonies, possessions or protectorates outside the boundaries of the mother country shall be considered separate countries, and the name thereof shall be deemed acceptable in designating the country where the textile fiber product was processed or manufactured unless the Commission shall otherwise direct.

(d) The country where the imported textile fiber product was principally made shall be considered to be the country where such textile fiber product was processed or manufactured. Further work or material added to the textile fiber product in another country must effect a basic change in form in order to render such other country the place where such textile fiber product was processed or manufactured.

(e) The English name of the country where the imported textile fiber product was processed or manufactured shall be used. The adjectival form of the name of the country will be accepted as the name of the country where the textile fiber product was processed or manufactured, provided the adjectival form of the name does not appear with such other words so as to refer to

a kind or species of product. Variant spellings which clearly indicate the English name of the country, such as *Brasil* for Brazil and *Italie* for Italy, are acceptable. Abbreviations which unmistakably indicate the name of a country, such as "Gt. Britain" for "Great Britain," are acceptable.

(f) Nothing in this rule shall be construed as limiting in any way the information required to be disclosed on labels under the provisions of any Tariff Act of the United States or regulations prescribed by the Secretary of the Treasury.

[24 FR 4480, June 2, 1959, as amended at 50 FR 15107, Apr. 17, 1985; 63 FR 7521, Feb. 13, 1998; 65 FR 73158, Dec. 1, 2000]

**§ 303.34 Country of origin in mail order advertising.**

When a textile fiber product is advertised in any mail order catalog or mail order promotional material, the description of such product shall contain a clear and conspicuous statement that the product was either made in U.S.A., imported, or both. Other words or phrases with the same meaning may be used. The statement of origin required by this section shall not be inconsistent with the origin labeling of the product being advertised.

[50 FR 15107, Apr. 17, 1985]

**§ 303.35 Use of terms "virgin" or "new."**

The terms *virgin* or *new* as descriptive of a textile fiber product, or any fiber or part thereof, shall not be used when the product or part so described is not composed wholly of new or virgin fiber which has never been reclaimed from any spun, woven, knitted, felted, bonded, or similarly manufactured product.

**§ 303.36 Form of separate guaranty.**

(a) The following are suggested forms of separate guaranties under section 10 of the Act which may be used by a guarantor residing in the United States on or as part of an invoice or other paper relating to the marketing or handling of any textile fiber products listed and designated therein, and showing the date of such invoice or other paper and the signature and address of the guarantor.

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(1) *General form.* We guarantee that the textile fiber products specified herein are not misbranded nor falsely nor deceptively advertised or invoiced under the provisions of the Textile Fiber Products Identification Act and rules and regulations thereunder.

(2) *Guaranty based on guaranty.* Based upon a guaranty received, we guarantee that the textile fiber products specified herein are not misbranded nor falsely nor deceptively advertised or invoiced under the provisions of the Textile Fiber Products Identification Act and rules and regulations thereunder.

NOTE: The printed name and address on the invoice or other paper will suffice to meet the signature and address requirements.

(b) The mere disclosure of required information including the fiber content of a textile fiber product on a label or on an invoice or other paper relating to its marketing or handling shall not be considered a form of separate guaranty.

**§303.37 Form of continuing guaranty from seller to buyer.**

Under section 10 of the Act, a seller residing in the United States may give a buyer a continuing guaranty to be applicable to all textile fiber products sold or to be sold. The following is the prescribed form of continuing guaranty from seller to buyer.

We, the undersigned, guaranty that all textile fiber products now being sold or which

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may hereafter be sold or delivered to \_\_\_\_\_ are not, and will not be misbranded nor falsely nor deceptively advertised or invoiced under the provisions of the Textile Fiber Products Identification Act and rules and regulations thereunder. This guaranty effective until \_\_\_\_\_.

Dated, signed, and certified this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_ (City), \_\_\_\_\_ (State or Territory) \_\_\_\_\_ (name under which business is conducted.)

Under penalty of perjury, I certify that the information supplied in this form is true and correct.

\_\_\_\_\_  
Signature of Proprietor, Principal Partner,  
or Corporate Official

\_\_\_\_\_  
Name (Print or Type) Title

[49 FR 12518, Mar. 25, 1984]

**§303.38 Continuing guaranty filed with Federal Trade Commission.**

(a)(1) Under section 10 of the act any person residing in the United States and marketing or handling textile fiber products may file a continuing guaranty with the Federal Trade Commission. When filed with the Commission a continuing guaranty shall be fully executed in duplicate. Forms for use in preparing continuing guaranties will be supplied by the Commission upon request.

(2) Continuing guaranties filed with the Commission shall continue in effect until revoked. The guarantor shall promptly report any change in business status to the Commission.

(b) Prescribed form for a continuing guaranty:

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<b>CONTINUING GUARANTY</b>	
1. LEGAL NAME OF GUARANTOR FIRM	
2. NAME UNDER WHICH GUARANTOR FIRM DOES BUSINESS, IF DIFFERENT FROM LEGAL NAME	
3. TYPE OF COMPANY <input type="checkbox"/> PROPRIETORSHIP <input type="checkbox"/> PARTNERSHIP <input type="checkbox"/> CORPORATION	
4. ADDRESS OF PRINCIPAL OFFICE OR PLACE OF BUSINESS (include Zip Code)	OPTIONAL INFORMATION TELEPHONE NUMBER: FAX NUMBER: INTERNET ADDRESS:
5. LAW UNDER WHICH THE CONTINUING GUARANTY IS TO BE FILED (Put an "X" in the appropriate boxes) <input type="checkbox"/> Under the Textile Fiber Products Identification Act (15 U.S.C. §§ 70-72b): The company named above, which manufactures, markets, or handles textile fiber products, guarantees that when it ships or delivers any textile fiber product, the product will not be misbranded, falsely or deceptively invoiced, or falsely or deceptively advertised, within the meaning of the Textile Fiber Products Identification Act and the rules and regulations under that Act. <input type="checkbox"/> Under the Wool Products Labeling Act (15 U.S.C. §§ 68-69): The company named above, which manufactures, markets, or handles wool products, guarantees that when it ships or delivers any wool product, the product will not be misbranded within the meaning of the Wool Products Labeling Act and the rules and regulations under that Act. <input type="checkbox"/> Under the Fur Products Labeling Act (15 U.S.C. §§ 68-69b): The company named above, which manufactures, markets, or handles fur products, guarantees that when it ships or delivers any fur product, the product will not be misbranded, falsely or deceptively invoiced, or falsely or deceptively advertised, within the meaning of the Fur Products Labeling Act and the rules and regulations under that Act.	
6. CERTIFICATION Under penalty of perjury, I certify that the information supplied on this form is true and correct.	
SIGNATURE OF PROPRIETOR, PRINCIPAL, PARTNER, OR CORPORATE OFFICIAL	
7. NAME (Please print or type)	8. TITLE
9. CITY AND STATE WHERE SIGNED	10. DATE
<b>INSTRUCTIONS</b> The Textile Fiber Products Identification Act, the Wool Products Labeling Act, and the Fur Products Labeling Act provide that any marketer or manufacturer of fiber or fur products covered by those Acts may file a continuing guaranty with the Federal Trade Commission. A continuing guaranty on file assures customer firms that the guarantor's products are in compliance with the Acts under which the guarantor has filed. Customer firms rely on the continuing guaranty for protection from liability if violations occur.  In completing this form, please observe the following: (a) All appropriate blanks on the form should be filled in. Include your Zip Code in item 4. (b) In item 8, signature of proprietor, partner, or corporate official of guarantor firm.  (c) Send two completed, signed original copies to: Federal Trade Commission Division of Enforcement 600 Pennsylvania Ave., NW Washington, DC 20580  (d) Do not fee application - mail signed originals only.  Continuing guaranties filed with the Commission continue in effect until revoked. The guarantor must immediately notify the Commission in writing of any change in business status. Any change in the address of the guarantor's principal office and place of business must also be promptly reported.	
DO NOT USE THIS SPACE Filed _____ 18 ____ FEDERAL TRADE COMMISSION	

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(c) Any person who has a continuing guaranty on file with the Commission may, during the effective dates of the guaranty, give notice of such fact by setting forth on the invoice or other paper covering the marketing or handling of the product guaranteed the following:

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**§ 303.39**

Continuing guaranty under the Textile Fiber Products Identification Act filed with the Federal Trade Commission.

(d) Any person who falsely represents in writing that he has a continuing guaranty on file with the Federal Trade Commission when such is not a fact shall be deemed to have furnished a false guaranty under section 10(b) of the Act.

[24 FR 4486, June 2, 1959, as amended at 48 FR 12517, Mar. 25, 1983; 63 FR 7521, Feb. 18, 1998; 63 FR 71585, Dec. 28, 1998]

**§ 303.39 Maintenance of records.**

(a) Pursuant to the provisions of section 6 of the Act, every manufacturer of a textile fiber product subject to the Act, irrespective of whether any guaranty has been given or received, shall maintain records showing the information required by the Act and Regulations with respect to all such textile fiber products made by such manufacturer. Such records shall show:

(1) The generic names and percentages by weight of the constituent fibers present in the textile fiber product, exclusive of permissive ornamentation, in amounts of five per centum or more.

(2) The name, provided for in § 303.19, or registered identification number issued by the Commission, of the manufacturer or of one or more persons marketing or handling the textile fiber product.

(3) The name of the country where such product was processed or manufactured as provided for in § 303.33.

The purpose of the records is to permit a determination that the requirements of the Act and Regulations have been met and to establish a traceable line of continuity from raw material through processing to finished product.

(b) Any person substituting a stamp, tag, label, or other identification pursuant to section 5(b) of the Act shall keep such records as will show the information set forth on the stamp, tag, label, or other identification that he removed and the name or names of the person or persons from whom such textile fiber product was received.

(c) The records required to be maintained pursuant to the provisions of

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this rule shall be preserved for at least three years.

[24 FR 4480, June 2, 1959, as amended at 53 FR 31315, Aug. 18, 1988]

**§ 303.40 Use of terms in written advertisements that imply presence of a fiber.**

The use of terms in written advertisements, including advertisements disseminated through the Internet and similar electronic media, that are descriptive of a method of manufacture, construction, or weave, and that by custom and usage are also indicative of a textile fiber or fibers, or the use of terms in such advertisements that constitute or connote the name or presence of a fiber or fibers, shall be deemed to be an implication of fiber content under section 4(c) of the Act, except that the provisions of this section shall not be applicable to non-deceptive shelf or display signs in retail stores indicating the location of textile fiber products and not intended as advertisements.

[63 FR 7523, Feb. 13, 1998]

**§ 303.41 Use of fiber trademarks and generic names in advertising.**

(a) In advertising textile fiber products, the use of a fiber trademark shall require a full disclosure of the fiber content information required by the Act and regulations in at least one instance in the advertisement.

(b) Where a fiber trademark is used in advertising textile fiber products containing more than one fiber, other than permissible ornamentation, such fiber trademark and the generic name of the fiber must appear in the required fiber content information in immediate proximity and conjunction with each other in plainly legible type or lettering of equal size and conspicuousness.

(c) Where a fiber trademark is used in advertising textile fiber products containing only one fiber, other than permissible ornamentation, such fiber trademark and the generic name of the fiber must appear in immediate proximity and conjunction with each other in plainly legible and conspicuous type or lettering at least once in the advertisement.

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## Federal Trade Commission

## § 303.44

(d) Where a fiber trademark or generic name is used in non-required information in advertising, such fiber trademark or generic name, shall not be used in such a manner as to be false, deceptive, or misleading as to fiber content, or to indicate, directly or indirectly, that a textile fiber product is composed wholly or in part of a particular fiber, when such is not the case.

**§ 303.42 Arrangement of information in advertising textile fiber products.**

(a) Where a textile fiber product is advertised in such manner as to require disclosure of the information required by the Act and regulations, all parts of the required information shall be stated in immediate conjunction with each other in legible and conspicuous type or lettering of equal size and prominence. In making the required disclosure of the fiber content of the product, the generic names of fibers present in an amount 5 percent or more of the total fiber weight of the product, together with any fibers disclosed in accordance with § 303.3(a), shall appear in order of predominance by weight, to be followed by the designation "other fiber" or "other fibers" if a fiber or fibers required to be so designated are present.

(b) Non-required information or representations shall in no way be false, deceptive, or misleading as to fiber content and shall not include any names, terms, or representations prohibited by the Act and regulations. Such non-required information or representations shall not be set forth or so used as to interfere with, minimize, or detract from the required information.

(c) Non-deceptive terms which are properly and truthfully descriptive of a fiber may be used in conjunction with the generic name of such fiber; as for example: "cross-linked rayon," "solution dyed acetate," "combed cotton," "nylon 66," etc.

[24 FR 4486, June 2, 1959, as amended at 30 FR 14254, Nov. 13, 1965; 30 FR 15313, Dec. 11, 1965; 63 FR 7523, Feb. 13, 1998]

**§ 303.43 Fiber content tolerances.**

(a) A textile fiber product which contains more than one fiber shall not be deemed to be misbranded as to fiber

content percentages if the percentages by weight of any fibers present in the total fiber content of the product, exclusive of permissive ornamentation, do not deviate or vary from the percentages stated on the label in excess of 3 percent of the total fiber weight of the product. For example, where the label indicates that a particular fiber is present in the amount of 40 percent, the amount of such fiber present may vary from a minimum of 37 percent of the total fiber weight of such product to a maximum of 43 percent of the total fiber weight of such product.

(b) Where the percentage of any fiber or fibers contained in a textile fiber product deviates or varies from the percentage stated on the label by more than the tolerance or variation provided in paragraph (a) of this section, such product shall be misbranded unless the person charged proves that the entire deviation or variation from the fiber content percentages stated on the label resulted from unavoidable variations in manufacture and despite the exercise of due care.

(c) Where representations are made to the effect that a textile fiber product is composed wholly of one fiber, the tolerance provided in section 4(b)(2) of the Act and paragraph (a) of this section shall not apply, except as to permissive ornamentation where the textile fiber product is represented to be composed of one fiber "exclusive of ornamentation."

**§ 303.44 Products not intended for uses subject to the act.**

Textile fiber products intended for uses not within the scope of the Act and regulations or intended for uses in other textile fiber products which are exempted or excluded from the Act shall not be subject to the labeling and invoicing requirements of the Act and regulations: *Provided*, An invoice or other paper covering the marketing or handling of such products is given, which indicates that the products are not intended for uses subject to the Textile Fiber Products Identification Act.

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**§ 303.45 Exclusions from the act.**

(a) Pursuant to section 12(b) of the Act, the Commission hereby excludes from the operation of the Act:

- (1) All textile fiber products except:
  - (i) Articles of wearing apparel;
  - (ii) Handkerchiefs;
  - (iii) Scarfs;
  - (iv) Beddings;
  - (v) Curtains and casements;
  - (vi) Draperies;
  - (vii) Tablecloths, napkins, and doilies;
  - (viii) Floor coverings;
  - (ix) Towels;
  - (x) Wash cloths and dish cloths;
  - (xi) Ironing board covers and pads;
  - (xii) Umbrellas and parasols;
  - (xiii) Batts;
  - (xiv) Products subject to section 4(h) of the Act;
  - (xv) Flags with heading or more than 216 square inches (13.9 dm<sup>2</sup>) in size;
  - (xvi) Cushions;
  - (xvii) All fibers, yarns and fabrics (including narrow fabrics except packaging ribbons);
  - (xviii) Furniture slip covers and other covers or coverlets for furniture;
  - (xix) Afghans and throws;
  - (xx) Sleeping bags;
  - (xxi) Antimacassars and tidies;
  - (xxii) Hammocks;
  - (xxiii) Dresser and other furniture scarfs.

(2) Belts, suspenders, arm bands, permanently knotted neckties, garters, sanitary belts, diaper liners, labels (either required or non-required) individually and in rolls, looper clips intended for handicraft purposes, book cloth, artists' canvases, tapestry cloth, and shoe laces.

(3) All textile fiber products manufactured by the operators of company stores and offered for sale and sold exclusively to their own employees as ultimate consumers.

(4) Coated fabrics and those portions of textile fiber products made of coated fabrics.

(5) Secondhand household textile articles which are discernibly secondhand or which are marked to indicate their secondhand character.

(6) Non-woven products of a disposable nature intended for one-time use only.

(7) All curtains, casements, draperies, and table place mats, or any portions thereof otherwise subject to the Act, made principally of slats, rods, or strips, composed of wood, metal, plastic, or leather.

(8) All textile fiber products in a form ready for the ultimate consumer procured by the military services of the United States which are bought according to specifications, but shall not include those textile fiber products sold and distributed through post exchanges, sales commissaries, or ship stores; provided, however, that if the military services sell textile fiber products for nongovernmental purposes the information with respect to the fiber content of such products shall be furnished to the purchaser thereof who shall label such products in conformity with the Act and regulations before such products are distributed for civilian use.

(9) All hand woven rugs made by Navajo Indians which have attached thereto the "Certificate of Genuineness" supplied by the Indian Arts and Crafts Board of the United States Department of Interior. The term *Navajo Indian* means any Indian who is listed on the register of the Navajo Indian Tribe or is eligible for listing thereon.

(b) The exclusions provided for in paragraph (a) of this section shall not be applicable (1) if any representations as to the fiber content of such products are made on any label or in any advertisement without making a full and complete fiber content disclosure on such label or in such advertisement in accordance with the Act and regulations with the exception of those products excluded by paragraph (a)(6) of this section, or (2) if any false, deceptive, or misleading representations are made as to the fiber content of such products.

(c) The exclusions from the Act provided in paragraph (a) of this section are in addition to the exemptions from the Act provided in section 12(a) of the Act and shall not affect or limit such exemptions.

(Sec. 12, 72 Stat. 1723; 15 U.S.C. 70j)

[24 FR 4480, June 2, 1959, as amended at 25 FR 4318, May 14, 1960; 25 FR 7044, July 26, 1960; 29 FR 48, Jan. 3, 1964; 61 FR 11544, Mar. 21, 1996]

## Analysis to Aid Public Comment

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

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from Sami Designs, LLC, d/b/a Jonäno, a limited liability company, and Bonnie Siefers, individually and as the owner of the limited liability company (together, “respondents”).

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 again will review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement’s proposed order.

This matter involves respondents’ marketing and sale of textile fiber products purportedly made of bamboo fiber. The FTC complaint alleges that respondents violated Section 5(a) of the FTC Act by making false claims that their textile fiber products are bamboo fiber; retain the anti-microbial properties of the bamboo plant; and are manufactured using an environmentally-friendly process. The complaint alleges that respondents’ textile fiber products are made of rayon and do not retain the anti-microbial properties of the bamboo plant, and that their manufacturing process involves the use of toxic chemicals and results in the emission of hazardous air pollutants. The complaint further alleges that the respondents failed to have substantiation for the foregoing claims.

The complaint also alleges that the proposed respondents have violated the Textile Fiber Products Identification Act (“Textile Act”) and the Rules and Regulations promulgated thereunder (“Textile Rules”) by falsely and deceptively labeling and advertising their textile fiber products as bamboo and by advertising their products without including in the description of each product a statement that the product was made in the U.S.A., imported, or both.



## Analysis to Aid Public Comment

The proposed consent order contains provisions designed to prevent respondents from engaging in similar acts and practices in the future. Part I.A of the proposed order prohibits respondents from representing that any textile fiber product (1) is made of bamboo or bamboo fiber; (2) is manufactured using an environmentally friendly process; or (3) is anti-microbial or retains the anti-microbial properties of any material from which it is made, unless such representations are true, not misleading, and substantiated by competent and reliable scientific evidence. Part I.B prohibits respondents from making claims about the benefits, performance, or efficacy of any textile fiber product, unless at the time the representation is made, it is truthful and not misleading, and is substantiated by competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence. Part II makes clear that, although Part I prohibits respondents from making false and unsubstantiated representations that their textile fiber products are made of bamboo or bamboo fiber as opposed to rayon, the respondents nonetheless may describe such products using the generic name of any manufactured fiber and identifying bamboo as the cellulose source for such fiber (*e.g.*, rayon made from bamboo), so long as such representation is true and substantiated. Part III of the proposed order prohibits respondents from failing to comply with the Textile Act or the Textile Rules.

Parts IV through VIII require respondents to keep copies of relevant advertisements and materials substantiating claims made in the advertisements; to provide copies of the order to certain of their personnel; to notify the Commission of changes in corporate structure that might affect compliance obligations under the order; to notify the Commission of changes in the individual respondent's current business or employment; and to file compliance reports with the Commission and respond to other requests from FTC staff. Part IX provides that the order will terminate after twenty (20) years under certain circumstances.

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

**DYNA-E INTERNATIONAL, INC.**  
**AND**  
**GEORGE WHEELER**

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

*Docket No. D-9336; File No. 082 3187*  
*Complaint, May 20, 2009 - Decision, December 15, 2009*

This consent order addresses Dyna-E International, Inc.'s marketing and sale of Lightload Towels. The complaint alleges that respondent violated Section 5 of the FTC Act by making false and misleading representations that its products and packaging were "biodegradable," when in fact, customary disposal methods do not allow for respondent's products or packaging to break down completely and return to nature. The complaint further alleges that respondent failed to substantiate its "biodegradable" claim. The consent order prohibits respondent from engaging in similar acts and practices by prohibiting respondent from making representations its products are biodegradable or environmentally beneficial unless substantiated by competent and reliable scientific evidence. Additionally, the order requires respondent to specify whether its biodegradability claim applies to the product, package, or components and to keep copies of relevant advertisements and their materials substantiating the claim.

*Participants*

For the *Commission: Michael J. Davis and Laura Schneider,*

For the *Respondents: Richard J. Leighton and Richard F. Mann, Keller and Heckman, LLP*

**COMPLAINT**

The Federal Trade Commission, having reason to believe that Dyna-E International, Inc., and George Wheeler, individually and as an officer of Dyna-E International, Inc. ("respondents"), have violated provisions of the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*, and it appearing to the Commission that this proceeding is in the public interest, alleges:

## Complaint

1. Respondent Dyna-E International, Inc. is a Nevada corporation with its principal office or place of business at 115-11 227th Street, Cambria Heights, New York 11411.

2. Respondent George Wheeler is president and director of Dyna-E International, Inc. Individually, or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of Dyna-E International, Inc., including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of Dyna-E International, Inc.

3. 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.

4. Respondents advertise, label, offer for sale, sell, and/or distribute goods under the brand name Lightload to the public throughout the United States, including Lightload Towels. Respondents advertise and offer these goods for sale through the Internet sites [www.lightloadtowels.com](http://www.lightloadtowels.com) and [www.ultralighttowels.com](http://www.ultralighttowels.com). Respondents also advertise, offer for sale, sell, or distribute these goods to retailers throughout the United States.

5. To induce consumers to purchase Lightload Towels, respondents disseminate, have disseminated, or have caused to be disseminated advertisements, including product labeling and other promotional materials, including but not limited to the attached Exhibit A. In these advertisements, respondents prominently state or have stated that Lightload Towels are “biodegradable.” Respondents do not define, describe, or qualify such biodegradability.

6. Approximately 91 percent of total municipal solid waste in the United States is disposed of in either landfills, incinerators, or recycling facilities. These disposal methods do not present conditions that would allow for Lightload Towels to completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time.

## Complaint

**VIOLATIONS OF SECTION 5 OF THE FTC ACT****FALSE OR MISLEADING REPRESENTATIONS**

7. Through the means described in Paragraph 5, respondents have represented, expressly or by implication, that Lightload Towels will completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time after customary disposal.

8. In truth and in fact, Lightload Towels will not completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time after customary disposal because a substantial majority of total municipal solid waste is disposed of by methods that do not present conditions that would allow for Lightload Towels to completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time.

9. Therefore, the representation set forth in Paragraph 7 was, and is, false or misleading.

**UNSUBSTANTIATED REPRESENTATIONS**

10 Through the means described in Paragraph 5, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representation set forth in Paragraph 7 at the time the representation was made.

11. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representation set forth in Paragraph 7 at the time the representation was made.

12. Therefore, the representation set forth in Paragraph 10 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

## Complaint

commerce, in violation of Section 5(a) of the Federal Trade Commission Act.

**NOTICE**

Proceedings on the charges asserted against the respondents named in this complaint will be held before an Administrative Law Judge of the Federal Trade Commission, under Part 3 of the Commission's Rules of Practice, 16 C.F.R. Part 3, as amended by the Commission's Interim Final Rules, 74 Fed. Reg. 1804 (Jan. 13, 2009) and Final Rule, 74 Fed. Reg. 20205 (May 1, 2009). A copy of Part 3 of the Commission Rules is enclosed with this complaint, and the Rules are also accessible on the Commission Website.

Notice is hereby given that the twentieth day of January, 2010, at 10:00 a.m., is hereby fixed as the time, and the Federal Trade Commission offices, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the 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.

You are notified that the opportunity is afforded you to file with the Federal Trade Commission an answer to this complaint on or before the 14th 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

## Complaint

basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings of fact and conclusions of law under § 3.46 of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings.

Failure to file an 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 to authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding.

The Administrative Law Judge will schedule an initial prehearing scheduling conference to be held not later than 10 days after the answer is filed by the last answering respondent in the complaint. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, but in any event no later than five days after the answer is filed by the last answering respondent. Rule 3.31(b) obligates counsel for each party, within five days of receiving a respondent's answer, to make certain initial disclosures without awaiting a discovery request.

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

## Complaint

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 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:

- A. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
- B. “Competent and reliable scientific evidence” shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.
- C. “Is degradable, biodegradable, or photodegradable” shall mean that the entire product or package will completely decompose into elements found in nature within a reasonably short period of time after customary disposal.
- D. Unless otherwise specified, “respondents” shall mean Dyna-E International, Inc., a corporation, and its successors and assigns, and its officers, agents, representatives, and employees; and George Wheeler, individually and as an officer of Dyna-E International, Inc.

## Complaint

**I.**

**IT IS ORDERED** that respondents, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or package, in or affecting commerce, shall not represent, in any manner, expressly or by implication:

- A. That any such product or package is degradable, biodegradable, or photodegradable, unless the representation is true, not misleading, and, at the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; or
- B. That any such product or package offers any other environmental benefit, unless the representation is true, not misleading, and, at the time it is made, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

**II.**

**IT IS FURTHER ORDERED** that respondent Dyna-E International, Inc., and its successors and assigns, and respondent George Wheeler 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 Commission for inspection and copying:

- A. All advertisements, labeling, packaging, and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation;
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that



## Complaint

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; and

- D. All acknowledgments of receipt of this order, obtained pursuant to Part III.

**III.**

**IT IS FURTHER ORDERED** that respondent Dyna-E International, Inc., and its successors and assigns, and respondent George Wheeler 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.

**IV.**

**IT IS FURTHER ORDERED** that respondent Dyna-E International, Inc., and its successors and assigns, and respondent George Wheeler shall notify the Commission at least thirty (30) days prior to any change with regard to Dyna-E International, Inc. or any business entity that any respondent directly or indirectly controls, or has an ownership interest in, that may affect compliance obligations arising under this order, including but not limited to formation of a new business entity; a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor entity; 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 business or corporate name or address. *Provided, however,* that, with respect to any proposed change about which respondents learn less than thirty (30) days prior to

## Complaint

the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

**V.**

**IT IS FURTHER ORDERED** that respondent George Wheeler, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of any change in his residence, of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include, as appropriate, respondent's new residential address and telephone number, new business address and telephone number, and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

**VI.**

**IT IS FURTHER ORDERED** that respondent Dyna-E International, Inc., and its successors and assigns, and respondent George Wheeler shall, within sixty (60) days after the date of service of this order file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which they have complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, each respondent shall submit additional true and accurate written reports.

**VII.**

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 Commission files a complaint (with or without an accompanying consent decree) in federal court

## Complaint

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.

**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 twentieth day of May, 2009.

By the Commission.

Complaint

**Exhibit A**



Complaint



Complaint



Complaint

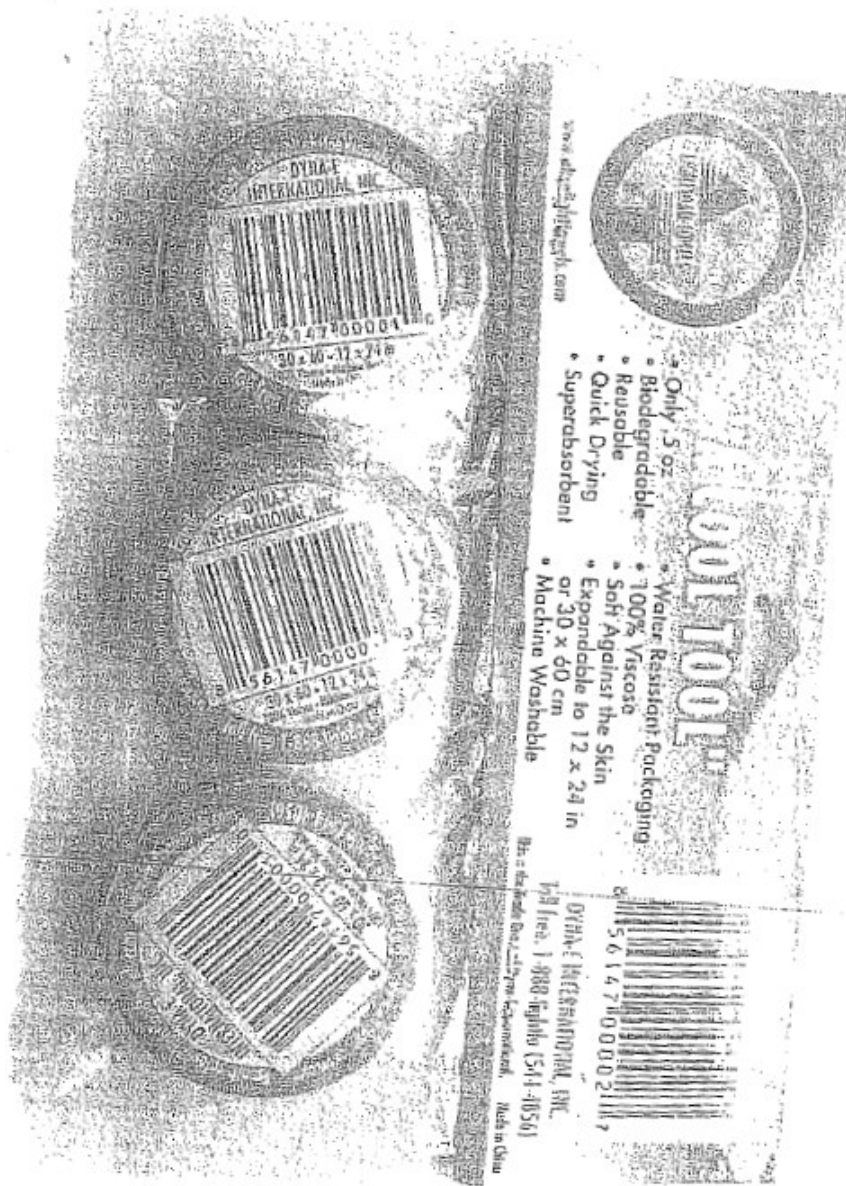


Complaint





Complaint



Complaint

# LIGHTLOAD TOWELS



The Lightest  
Most Versatile  
Towels Around

LIGHTLOAD TOWELS  
TM

**SUPERABSORBENT. MULTIPURPOSE.  
COMPACT. MACHINE WASHABLE.**

Great for Campers, Hikers, Bikers, Kayaker, Athletes, Swimmers, Fishermen, Hunters, Mechanics and much more! Not Just a towel, a tool.

**Use as a**

- Towel
- Dry Cloth
- Washcloth
- Neck, Headband
- First Aid Supplement
- Backpack/Seat Padding
- Water, Coffee Filter
- Pot Holder
- Fire Starter
- Handbar Grips
- Golf Club Cleaners

**Features**

- Only .5 oz
- Unfolds to 12" x 24"
- Reusable
- Superabsorbent
- Quick Drying
- Biodegradable
- Water-Resistant Packaging
- 100% Viscose

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[www.ultralighttowels.com](http://www.ultralighttowels.com)



Complaint

**LIGHTEST MOST VERSATILE TOWELS AROUND**

Use for:

- Beach towel • Seat cover • Ground cloth • Basket • Grilling
- Great for travelers, RVs, motorcycles, campers, sports
- Bikes, joggers and much more.

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**A USEFUL TOOL™**

Beach towel • Seat cover • Towel rack

Directions:  
Dip your towel in water (may make it easier to open)

- Only 5 oz
- Biodegradable
- Reusable
- Quick Drying
- Super absorbent
- Expandable to 90" x 150 cm (3 x 5 feet)
- Water-Resistant Packaging
- 100% Viscose
- Machine Washable

Phone: 1-800-4-A-TOOL  
Call us at 1-800-428-6863

## Complaint



Dyna-E International, Inc.  
115-11 227th Street • Jamaica, NY 11411

### LIGHTLOAD TOWELS

*Superabsorbent • Biodegradable • Quick Drying*

#### BEACH TOWEL

World's only full size beach towel that fits in a pocket!

- Compact & Easy to carry
- More absorbent than cotton beach towels
- Size: 36 by 60 inches
- Use as a bug repellent, sun block, wind scarf and much more.

#### THREE PACKS

World's only hand towels that are also survival tools!

- Size: 12 by 24 inches
- Use as a fire starter, coffee filter, wind scarf, water filter or first aid supplement.

Both beach and three packs are covered in water proof packaging and are the most energy efficient towels.

#### DISPLAY BOX

Each box contains 50 pieces of the 12 by 24 inch towels.  
This is great for the store counter.

Lightload Towels are available to purchase online at  
[www.ultralighttowels.com](http://www.ultralighttowels.com)  
Distributors please contact us at 917.922.0154 or  
toll free 888.544.4856

## Decision and Order

**DECISION AND ORDER**

The Federal Trade Commission (“Commission”) having heretofore issued its complaint charging respondents, Dyna-E International, Inc. and George Wheeler, with violations of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a), as amended, and respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

Respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the aforesaid 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, 16 C.F.R. § 3.25(c) (2009); 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, and having duly considered the comment filed thereafter by an interested person pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in § 3.25(f) of its Rules, 16 C.F.R. § 3.25(f) (2009), the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Dyna-E International, Inc. is a Nevada corporation with its principal office or place of business at 115-11 227th Street, Cambria Heights, New York 11411.
2. Respondent George Wheeler is an officer of Dyna-E International, Inc. Individually or in concert with

## Decision and Order

others, he formulates, directs, controls, or participates in the policies, acts, or practices alleged in the complaint. His principal office or place of business is the same as that of Dyna-E International, Inc.

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

**ORDER****DEFINITIONS**

For purposes of this order, the following definitions shall apply:

- A. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
- B. “Competent and reliable scientific evidence” shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.
- C. “Is degradable, biodegradable, or photodegradable” shall mean that the entire product or package will completely decompose into elements found in nature within a reasonably short period of time after customary disposal.
- D. Unless otherwise specified, “respondents” shall mean Dyna-E International, Inc., a corporation, and its successors and assigns, and its officers, agents, representatives, and employees; and George Wheeler, individually and as an officer of Dyna-E International, Inc.

## Decision and Order

**I.**

**IT IS ORDERED** that respondents, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or package, in or affecting commerce, shall not represent, in any manner, expressly or by implication:

- A. That any such product or package is degradable, biodegradable, or photodegradable, unless the representation is true, not misleading, and, at the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; or
- B. That any such product or package offers any other environmental benefit, unless the representation is true, not misleading, and, at the time it is made, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

**II.**

**IT IS FURTHER ORDERED** that respondent Dyna-E International, Inc., and its successors and assigns, and respondent George Wheeler 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 Commission for inspection and copying:

- A. All advertisements, labeling, packaging and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation;

## Decision and Order

- 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; and
- D. All acknowledgments of receipt of this order, obtained pursuant to Part III.

**III.**

**IT IS FURTHER ORDERED** that respondent Dyna-E International, Inc., and its successors and assigns, and respondent George Wheeler 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.

**IV.**

**IT IS FURTHER ORDERED** that respondent Dyna-E International, Inc., and its successors and assigns, and respondent George Wheeler shall notify the Commission at least thirty (30) days prior to any change with regard to Dyna-E International, Inc. or any business entity that any respondent directly or indirectly controls, or has an ownership interest in, that may affect compliance obligations arising under this order, including but not limited to formation of a new business entity; a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor entity; 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 business or corporate name or address.



## Decision and Order

*Provided, however,* that, with respect to any proposed change about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

**V.**

**IT IS FURTHER ORDERED** that respondent George Wheeler, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of any change in his residence, of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include, as appropriate, respondent's new residential address and telephone number, new business address and telephone number, and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

**VI.**

**IT IS FURTHER ORDERED** that respondent Dyna-E International, Inc., and its successors and assigns, and respondent George Wheeler shall, within sixty (60) days after the date of service of this order file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which they have complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, each respondent shall submit additional true and accurate written reports.

**VII.**

This order will terminate on December 15, 2029, or twenty (20) years from the most recent date that the United States or the

## Analysis to Aid Public Comment

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 OF CONSENT ORDER TO AID PUBLIC COMMENT**

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, an agreement containing a consent order from Dyna-E International, Inc., a corporation, and its president and director, George Wheeler ("respondents").

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

## Analysis to Aid Public Comment

of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

This matter involves respondents' marketing and sale of Lightload Towels with packaging and other marketing materials that prominently state "biodegradable" without qualification. According to the FTC complaint, respondents represented that Lightload Towels will completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time after customary disposal. The complaint alleges respondents' biodegradable claim is false because a substantial majority of total household waste is disposed of either in landfills, incinerators, or recycling facilities and these customary disposal methods do not present conditions that would allow for Lightload Towels to completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time. The complaint further alleges that respondents failed to have substantiation for their biodegradable claim. The proposed consent order contains provisions designed to prevent respondents from engaging in similar acts and practices in the future.

Part I.A of the proposed order prohibits respondents from making a representation that any product is degradable unless the representation is true, not misleading, and substantiated by competent and reliable scientific evidence. Part I.B prohibits respondents from making any other environmental benefit claim about any product, unless at the time the representation is made, it is truthful and not misleading, and substantiated by competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence.

Parts II through VI require respondents to keep copies of relevant advertisements and materials substantiating claims made in the advertisements; to provide copies of the order to certain of their personnel; to notify the Commission of changes in corporate structure that might affect compliance obligations under the order; to notify the Commission of changes in residence, employment, or business affiliation; to file compliance reports with the

Analysis to Aid Public Comment

Commission; and to respond to other requests from FTC staff. Part VII provides that the order will terminate after twenty (20) years under certain circumstances.

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

**DANIEL CHAPTER ONE  
AND  
JAMES FEIJO**

COMPLAINT IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF  
THE FEDERAL TRADE COMMISSION ACT; INITIAL DECISION; AND  
OPINION OF THE COMMISSION AND ORDER AFFIRMING THE  
INITIAL DECISION.

*Docket No. 9329; File No. 082 3085  
Complaint, September 16, 2008 - Initial Decision, August 5, 2009  
Opinion and Order, December 18, 2009*

The Commission issued an administrative complaint, alleging that Daniel Chapter One violated Sections 5, 12 and 15 of the Federal Trade Commission Act in connection with the advertising, promotion, offering for sale, sale, and distribution of products to the public, including Bio\*Shark, 7 Herb Formula, GDU, and BioMixx, which purport to prevent, treat, or cure cancer or tumors, and other serious medical illnesses. In his Initial Decision, Chief Administrative Law Judge D. Michael Chappell remedy issued an order requiring Respondents to cease and desist from making the types of misrepresentations challenged in the Complaint after determining that Respondents lacked a reasonable basis for their claims, and that Complaint Counsel demonstrated that Respondents' statements are deceptive or misleading. Respondent appealed the Initial Decision. On appeal, the Commission unanimously affirmed the Initial Decision of the Administrative Law Judge both as a matter of fact and as a matter of law. The Commission found the order entered to be proper, but modified the language in Attachment A of the Order, the prescribed notice that the Respondents are required to send to consumers who purchased the products at issue.

*Participants*

For the *Commission*: David W. Dulabon, William H. Efron, Leonard L. Gordon, Elizabeth K. Nach, Carole A. Paynter, and Theodore Zang, Jr.

For the *Respondents*: Betsy E. Lehrfeld, Christopher B. Turner, and James S. Turner, Swankin & Turner, and Michael McCormack, Solo Practitioner.

## Complaint

**COMPLAINT**

The Federal Trade Commission (“FTC”), having reason to believe that Daniel Chapter One, a corporation, and James Feijo, individually, and as an officer of Daniel Chapter One, (collectively, “Respondents”) have violated the FTC Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Daniel Chapter One (“DCO”) is a Washington corporation with its principal office or place of business at 1028 East Main Road, Portsmouth, Rhode Island 02871.

2. Respondent James Feijo (“Feijo”) owns DCO and does business as the President of DCO. His principal office or place of business is the same as that of DCO. He is responsible for managing the marketing and intellectual property of the DCO Products. At all times relevant to this complaint, acting alone or in concert with others, Feijo has formulated, directed, controlled, or participated in the various acts and practices set forth herein.

3. Respondents have advertised, promoted, offered for sale, sold, and distributed products to the public, including Bio\*Shark, 7 Herb Formula, GDU, and BioMixx (collectively, the “DCO Products”). The DCO Products are “foods” or “drugs” within the meaning of Sections 12 and 15 of the FTC Act.

4. The acts and practices of Respondents, as alleged herein, have been in or affecting commerce, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

5. Since 2005, Respondents have engaged in deceptive acts or practices in connection with the advertising, promotion, offering for sale, sale, and distribution of the DCO Products which purport to prevent, treat, or cure cancer or tumors, and other serious medical illnesses. Respondents operate linked web pages on the website, [www.danielchapterone.com](http://www.danielchapterone.com), through which they advertise and sell the products at issue in this complaint.

## Complaint

**Bio\*Shark**

6. Respondents describe Bio\*Shark as a dietary supplement that contains, among other ingredients, Shark Cartilage. Respondents offer one bottle of Bio\*Shark for \$65.95 (300 of the 800 mg capsules) and \$30.95 (100 of the 800 mg capsules). Each product label directs users to take 2-3 capsules three times a day or as directed by a physician or by a BioMolecular Nutrition health care professional.

**Respondents' Advertisements for Bio\*Shark**

7. To induce consumers to purchase Bio\*Shark, Respondents have created, prepared, disseminated, or caused to be disseminated advertisements, promotional web sites (including [www.danielchapterone.com](http://www.danielchapterone.com)), and catalogues. Exhibit A hereto is a printout of portions of Respondents' web site, which contains representations concerning Bio\*Shark including:

**PRODUCTS****Bio\*Shark: Tumors & Cysts**

Pure skeletal tissue of sharks which provides a protein that inhibits angiogenesis - the formation of new blood vessels. This can stop tumor growth, and halt the progression of eye diseases such as diabetic retinopathy and macular degeneration.

..

**7 Herb Formula**

8. Respondents describe 7 Herb Formula as a liquid tea concentrate dietary supplement that contains, among other ingredients, distilled water, Cat's Claw, Burdock Root, Siberian Ginseng, Sheep Sorrel, Slippery Elm, Watercress, and Turkey Rhubarb Root. Respondents offer one 32-ounce bottle of 7 Herb Formula for \$70.95. Respondents' product label directs users to take 1-2 ounces of 7 Herb Formula with 2-4 ounces of hot or cold filtered or distilled water. The label further directs users to take 7 Herb Formula twice daily or as directed by a BioMolecular Nutrition health care professional.

## Complaint

**Respondents' Advertisements for 7 Herb Formula**

9. To induce consumers to purchase 7 Herb Formula, Respondents have created, prepared, disseminated, or caused to be disseminated advertisements, promotional web sites (including [www.danielchapterone.com](http://www.danielchapterone.com)), and catalogues. Exhibit B hereto is a printout of a portion of Respondents' web site, which contains representations concerning 7 Herb Formula including:

## A. INFO CENTER

**Cancer News.**

7 Herb Formula

- purifies the blood
- promotes cell repair
- **fights tumor formation** [emphasis in original]
- fights pathogenic bacteria

...

If you suffer from any type of cancer, Daniel Chapter One suggests taking this products [sic], to fight it:

7\*Herb Formula <sup>TM</sup>... Bio\*Shark <sup>TM</sup>...BioMixx <sup>TM</sup>... GDU Caps <sup>TM</sup>...

[depiction of bottles of BioMixx, 7 Herb Formula, Bio\*Shark, and GDU] Daniel Chapter One's Cancer solutions

To Buy the products click here

How to fight cancer is your choice!...

B. **7 Herb Formula battles cancer.**

Tracey was given no hope!

The doctors had pretty much given up on Tracey. She had leukemia and tumors on the brain, behind the heart and on her liver. . .

This is Tracey's story in her own words as told in 1997: 'I had contracted leukemia and had three inoperable tumors. When I decided not to do chemotherapy or radiation, my father sent me Bio\*Mixx and 7 Herb Formula. Each day as I took it and got it into my system more and more, the better I



## Complaint

felt. Then I added Garlic Pur, Siberian Ginseng and BioShark.” “I am now in complete remission. . .’

**GDU**

10. Respondents describe GDU as a dietary supplement that contains, among other ingredients, Bromelain, Turmeric, Quercetin, Feverfew, and Boron. Respondents offer GDU for \$45.95 (300 capsules) and \$29.95 (120 capsules). Respondents’ product labels direct users to take 3-6 capsules 2 to 4 times per day or as directed by a physician or by a BioMolecular Nutrition health care professional.

**Respondents’ Advertisements for GDU**

11. To induce consumers to purchase GDU, Respondents have created, prepared, disseminated, or caused to be disseminated advertisements, promotional web sites (including [www.danielchapterone.com](http://www.danielchapterone.com)), and catalogues. Exhibit C hereto is a printout of a portion of Respondents’ web site, which contains representations concerning GDU including:

**PRODUCTS**

. . .

Contains natural proteolytic enzymes (from pineapple source bromelain) to help digest protein - even that of unwanted tumors and cysts. This formula also helps to relieve pain and heal inflammation. . . .and as an adjunct to cancer therapy.

**BioMixx**

12. Respondents describe BioMixx as a dietary supplement that contains, among other ingredients, Goldenseal, Echinacea, and Ginseng. Respondents offer BioMixx for \$40.95 (3 lb. powder) and \$22.95 (1 lb. powder). Respondents’ product label directs users to take five scoops daily.

## Complaint

**Respondents' Advertisements for BioMixx**

13. To induce consumers to purchase BioMixx, Respondents created, prepared, disseminated, or caused to be disseminated advertisements, promotional web sites (including [www.danielchapterone.com](http://www.danielchapterone.com)), and catalogues. Exhibit D hereto is a printout of a portion of Respondents' web site, which contains representations concerning BioMixx including:

Bio\*Mixx boosts the immune system, cleanses the blood and feeds the endocrine system to allow for natural healing. It is used to assist the body in fighting cancer and in healing the destructive effects of radiation and chemotherapy treatments.

**Respondents' Unsubstantiated Representations**

14. Through the means described in Paragraphs 6 through 13, including, but not limited to, the statements contained in the advertisements attached as Exhibits A through D, Respondents have represented, expressly or by implication, that:

- a. Bio\*Shark inhibits tumor growth;
- b. Bio\*Shark is effective in the treatment of cancer;
- c. 7 Herb Formula is effective in the treatment or cure of cancer;
- d. 7 Herb Formula inhibits tumor formation;
- e. GDU eliminates tumors;
- f. GDU is effective in the treatment of cancer;
- g. BioMixx is effective in the treatment of cancer; and
- h. BioMixx heals the destructive effects of radiation and chemotherapy.

## Complaint

15. Through the means described in Paragraphs 6 through 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, unsubstantiated.

17. The acts and practices of Respondents as alleged in this complaint constitute unfair or deceptive acts or practices, in or affecting commerce in violation of Sections 5(a) and 12 of the FTC Act.

**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

## Complaint

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.

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., in Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580, or such other place as determined by the ALJ. 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 the 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

## Complaint

proceedings in this matter that the proposed 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 proceedings in this matter and such other factors as are relevant to consider the necessity and appropriateness of such action.

**ORDER**

For purposes of this order the following definitions apply:

- A. “Competent and reliable scientific evidence” shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.
- B. “Covered Product or Service” shall mean any dietary supplement, food, drug, or other health-related product, service, or program, including, but not limited to, Bio\*Shark, 7 Herb Formula, GDU, and BioMixx.
- C. “Food” and “drug” shall mean “food” and “drug” as defined in Section 15 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 55.
- D. “Advertisement” means any written or verbal statement, illustration, or depiction that is designed to effect a sale or to create interest in the purchasing of goods or services, whether it appears in a book,

## Complaint

brochure, newspaper, magazine, pamphlet, leaflet, circular, mailer, book insert, letter, catalogue, poster, chart, billboard, public transit card, point of purchase display, packaging, package insert, label, film, slide, radio, television or cable television, video news release, audio program transmitted over a telephone system, infomercial, the Internet, e-mail, or in any other medium.

- E. Unless otherwise specified, “Respondents” shall mean Daniel Chapter One and its successors and assigns, affiliates, or subsidiaries, and its officer, James Feijo, individually and as an officer of the corporation; and each of the above’s agents, representatives, and employees.
- F. “Commerce” shall mean as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.
- G. “Endorsement” shall mean “endorsement” as defined in 16 C.F.R. § 255.0(b).

**I.**

**IT IS HEREBY ORDERED** that Respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of BioShark, 7 Herb Formula, GDU, and BioMixx, or any substantially similar health-related program, service, or product, or any other 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 product or program names or endorsements, that such health-related program, service, product, or Covered Product or Service prevents, treats, or cures or assists in the prevention, treatment, or cure of any type of tumor or cancer, including but not limited to representations that:

- A. Bio\*Shark inhibits tumor growth;

## Complaint

- B. Bio\*Shark is effective in the treatment of cancer;
- C. 7 Herb Formula is effective in the treatment or cure of cancer;
- D. 7 Herb Formula inhibits tumor formation;
- E. GDU eliminates tumors;
- F. GDU is effective in the treatment of cancer;
- G. BioMixx is effective in the treatment of cancer; or
- H. BioMixx heals the destructive effects of radiation or chemotherapy;

unless the representation is true, non-misleading, and, at the time it is made, Respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

**II.**

**IT IS FURTHER ORDERED** that Respondents, directly or through any person, corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, 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, directly 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 it is made, Respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

## Complaint

**III.****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.

**IV.****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 Bio\*Shark, 7 Herb Formula, GDU, and/or BioMixx, 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 IV.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



## Complaint

- 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 the issuance of this order, in connection with the purchase of Bio\*Shark, 7 Herb Formula, GDU, and/or BioMixx. *Provided, however,* that respondents may disclose such identifying information to the FTC pursuant to Part IV.A., above, or any law enforcement agency, or as required by any law, regulation, or court order.

**V.**

**IT IS FURTHER ORDERED** that for a period of five (5) years after the last date of dissemination of any representation covered by this order, Respondents shall 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; and
- C. All tests, reports, studies, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

**VI.**

**IT IS FURTHER ORDERED** that Respondents shall deliver a copy of this order to all current and future principals, officers,

## Complaint

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 days after the person assumes such position or responsibilities.

**VII.**

**IT IS FURTHER ORDERED** that Respondent Feijo, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include the Respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Paragraph shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

**VIII.**

**IT IS FURTHER ORDERED** that Respondent DCO and its successors and assigns 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 about which Respondent learns less than thirty (30) days prior to the date such action is to take place, Respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Paragraph shall be sent by certified mail to the Associate Director,

## Complaint

Division of Enforcement, Bureau of Consumer Protection,  
Federal Trade Commission, 600 Pennsylvania Avenue, N.W.,  
Washington, D.C. 20580.

**IX.**

**IT IS FURTHER ORDERED** that Respondents 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.

**X.**

**IT IS FURTHER ORDERED** that 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 paragraph in this order that terminates in less than twenty (20) years;
- B. This order's application to any Respondent that is not named as a Respondent in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

*Provided further*, that if such complaint is dismissed or a federal court rules that the Respondents did not violate any provision of this order, and the dismissal is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never 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.

Complaint

**ATTACHMENT A****LETTER TO BE SENT BY FIRST CLASS MAIL**

[To be printed on letterhead of Daniel Chapter One]

[Name and address of recipient] [Date]

Dear [Recipient]:

Our records show that you bought **[name of products]** from our website **[name of website]**. 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 Shark Cartilage, Cat’s Claw, Burdock Root, Siberian Ginseng, Sheep Sorrel, Slippery Elm, Watercress, Turkey Rhubarb Root, Bromelain, Turmeric, Quercetin, Feverfew, Boron, Goldenseal, Echinacea, and Ginseng as a means of prevention, treatment, or cure for cancer in humans. The scientific studies that have been done do not demonstrate that any of these ingredients, which are included in Bio\*Shark, 7 Herb Formula, GDU, and BioMixx, are effective when used for prevention or treatment for cancer in humans.

It is very important that you talk to your doctor or health care provider before using **any** alternative or herbal product, including Shark Cartilage, Cat’s Claw, Burdock Root, Siberian Ginseng, Sheep Sorrel, Slippery Elm, Watercress, Turkey Rhubarb Root, Bromelain, Turmeric,

Quercetin, Feverfew, Boron, Goldenseal, Echinacea, and Ginseng. 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

## Complaint

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 Shark Cartilage, Cat's Claw, Burdock Root, Siberian Ginseng, Sheep Sorrel, Slippery Elm, Watercress, Turkey Rhubarb Root, Bromelain, Turmeric, Quercetin, Feverfew, Boron, Goldenseal, Echinacea, and Ginseng, 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/cancer\\_topics/pdq](http://www.cancer.gov/cancer_topics/pdq); or
2. The National Center for Complementary and Alternative Medicines: [www.nccam.nih.gov](http://www.nccam.nih.gov).

You may also contact the National Cancer Institute's Cancer Information Service at 1-800-4- CANCER or 1-800-422-6237.

Sincerely,

Complaint

**ATTACHMENT B**

Daniel Chapter One 1028 East Main Road  
Portsmouth, Rhode Island, 02871

[name and address of purchaser]

**GOVERNMENT ORDERED NOTICE**

Complaint

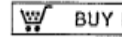
Exhibit A

ors cysts cancer help cancerous tumor research bio-shark tissue file:///E:/danielchapterone%20Teleport%20Pro%20Project/products\_...



- Herbs
- Immune Boosters
- 7 Herb Formula
- Bio\*Shark
- BioMixx
- GDU
- Biozymes
- Body Care
- Vitamins
- Biomolecular Nutrients
- Electrolytes
- Ergo & Thermogenics
- Minerals & Amino Acids
- Specialty & Essential Fats
- Aminoglycans
- CoEnzymes
- Homeopathy/Biotropins
- Hormonal & Fiber
- Muscle Mass/Performance

Immune Boosters



Read our clients test Bio Shark & Tumors

Canerous Tur

Bio\*Shark: Tumors & Cysts

Pure skeletal tissue of sharks which provides a protein that inhibits angiogenesis - the formation of new blood vessels. This can stop tumor growth, and halt the progression of eye diseases such as diabetic retinopathy and macular degeneration. Should not be used by pregnant women, or immediately after heart surgery. Shark cartilage may also reduce the pain, inflammation, and joint stiffness of arthritis, alleviate inflammatory bowel disease, and reverse psoriasis. Shark cartilage is an excellent source of Calcium, Phosphorus, amino acids, and a family of carbohydrates called mucopolysaccharides (sulfated Oligosaccharides and Chondroitin Sulfates A and C).

In summary, Bio\*Shark works to reduce inflammation and swelling, affects the formation of new blood vessels and provides essential nutrients for healing.

Warning: If you are pregnant, nursing a baby, recovering from recent surgery, or have a heart or circulatory condition, consult a health professional before using shark cartilage!

[Stop Tumor Growth & Cysts Top](#)



Complaint

ions cysts cancer help cancerous tumor research bio-shark tissue

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All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, photocopying, recording, or otherwise, without the prior written permission of the copyright owner. The information on this website is intended to provide record, and testimony about God and His Creation. It is not intended to diagnose a disease. The information provided on this site is designed to support relationship that exists between a patient/site visitor and his/her health care provider. Caution: some herbs or shark cartilage supplements should not be taken with certain medications.

Complaint

Exhibit B

nielChapterOne - Cancer News

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ABOUT US PRODUCTS INFO CENTER ON-LINE STORE TALK RADIO Links

- FAQ - Health Questions
- Articles / publications
- Testimonials
- Biomolecular Nutrition
- Cancer Newsletter
- Crohn's disease
- Colitis
- Arthritis
- RICH Homeopathy
- Diabetes - your choice
- Ezakiel Oil Rinse
- Genesis 1:29
- Events

Cancer News.

7 Herb Formula

- purifies the blood
- promotes cell repair
- fights tumor formation
- fights pathogenic bacteria



to learn more click here  
to buy click here

If you suffer from any type of cancer, Daniel Chapter One suggests taking this products, to fight it:

7\*Herb Formula™ 2 ounces in juice or water (minimum intake) 2 times daily

Blo\*Shark™ ( \*\*\*DO NOT TAKE IF PREGNANT,OR IMMEDIATELY AFTER HEARTSURGERY )

(for tumors only) 2 - 4 capsules 3 times daily with meals

BioMix™ (Boosts immune system) 4 - 5 scoops in soy milk 2 times daily

GDU Caps™ 3 - 6 capsules 3 times daily; 1/2 hr. BEFORE meals

The above Information is taken from **The Most Simple Guide to the most difficult diseases , the doctors' how-to quick reference guide.**

For more information call Jim and Trish during the Radio Show

Cancer Newsletter  
exe. form

Cancer Newslette

Read about 7 He  
Formula in exe form

Page shortcuts to t  
about cancer

Lump is gone without  
surgery!

7 Herb Formula battl  
cancer.

7 Herb eliminates pr  
growth

Pre Post™

Ancient cancer reme  
Improved upon

Victory over Gulf Wa

Doctors gave up on t

Pre-Cancerous Growl  
& Acid and Heartbur

Blo Shark™

Breast Mass



Listen to our  
testimonials about c

- Fred - Breast ca
- Marie-Dad's thrc

## Complaint

nielChapterOne - Cancer News

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To Buy the products click here

How to fight cancer is your choice!

"No type of cancer is to be taken lightly. If it is not treated properly and completely removed, it will continue to spread and eventually prove fatal. The first step is to cleanse the bloodstream by thoroughly relieving constipation and making all the organs of elimination active ... I have been asked many times what my cure for cancer is. Here it is in a nutshell: correct food, herbs, water, fresh air, massage, sunshine, and exercise, rest. If cancer is suspected, clean out the system, and get a new supply of pure blood. There are nonpoisonous herbs that will purify the blood and kill malignant growths internally or externally, leaving no bad after-effects. Cancer will not live in a system when the bloodstream is pure."

Jethro Kloss, "Back to

Eden"

#### Lump is gone without dangerous surgery!

Joe Rocha, a custodian at Roger Williams University in Rhode Island, was outside washing windows a few years ago when a stiff breeze blew in from Mount Hope Bay. Shortly after, the career Navy veteran complained of severe pain on the right side of his face. He suspected neuralgia and then thought the pain was from a tooth. He went to his dentist and the problem was not his tooth. It was serious. Joe Rocha then went to a family friend, a physician, who thought the problem was something worse than neuralgia and he was right. There was a swelling of the neck and a lump was detected. He underwent a series of tests and a tumor was found. The prognosis sent fear through the Rocha family. Because of the location of the tumor, Joe Rocha was told that surgery could result in serious consequences. Joe's wife, Maria, said she was terrified of the prospects of the operation. Her husband's doctor was preparing his team of surgeons and nurses to perform the tricky operation in a Fall River, MA, hospital. There was little comfort from the doctor who admitted to the Rochas that the tumor was in such a difficult place the operation itself could result in a heart attack, a stroke and possible paralysis on one side. Mrs. Rocha insisted her husband see their former neighbors and longtime friends, Jim and Tricia Feljo before undergoing surgery. It was the second time

cured-7Herb and m  
 • Marie - Dad's th  
 cured-7Herb and m  
 • Maureen - Canc  
 Arm -7HERB  
 • Mel - Breast Ma  
 and GDU  
 • Nancy - Cured E  
 Cancer in 3months-  
 GDU  
 • Robert-Prostate  
 cured from DC1 Prc  
 • Sharon-Mom's E  
 Healed  
 • Sylvia - Questio  
 Sugar and Cancer

## Complaint

the Rochas turned to the Feijos for lifesaving advice. "Jim and Tricia saved my life when doctors said I would die from candidiasis. Thanks to the Feijos I'm here and well. I thought they could help Joe." Joe began taking herbs and shark cartilage. Mrs. Rocha, a lay minister, put her faith in God. The Rochas and their two daughters prayed that the operation could be avoided. Mrs. Rocha thought she detected the tumor getting smaller over a six-week period. It was just a few days before Joe was about to undergo surgery that the couple met with the physician at a clinic in Fall River, MA. The doctor examined his patient and Maria couldn't restrain herself. "Don't you think the lump is shrinking?" she asked the doctor. The physician said the type of tumor Joe had only grows bigger and never shrinks. Joe's wife insisted that it was her opinion that the tumor was smaller. The doctor wasn't convinced and set into motion all of the details for the surgery to take place in four days. A couple of days later, the phone rang at the Rocha home in Portsmouth, RI. It was the doctor and he asked that the Rochas meet with him in his office the day before the scheduled surgery.

"We were amazed," Mrs. Rocha said. According to Maria, "He (the doctor) told us that my words kept ringing in his ears and that a closer examination revealed the tumor had shrunk, something he had not seen before."

The family went to a restaurant to celebrate and while they were driving home Mrs. Rocha said she broke down and cried, overcome by the joy that her husband of many years had been spared. Joe faithfully took his herbs and shark cartilage and the prayers of the Rocha family were answered.

The Rocha story hit home for Tricia Feijo.

She watched as her own mother had a similar growth years ago.

Tricia's mother opted to go the route prescribed by her physician and underwent surgery, radiation then chemotherapy. Initially, immediately after the diagnosis, she started on some herbs that Tricia recommended. The tumor stopped growing but the doctor insisted that Tricia's mom was wasting time and talked her into undergoing surgery.

"I'll never forget it," Tricia said. "My mother told me that when the doctor came in to her room after the operation, he sort of smiled and said the tumor he removed was shriveled and he never saw anything like it." Tricia believes it was the herbs that had stopped the growth of the tumor. She still wished the doctor had not talked her mom into accepting surgery.

Tricia says she also wishes 7 Herb Formula was available at the time her mother was diagnosed with cancer.

After a lengthy, painful ordeal of radiation - to kill "stray cancer cells" -

## Complaint

netlchapterOne - Cancer News

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and chemotherapy after the cancer returned, Tricia's mom ended up on oxygen.




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**7 Herb Formula battles cancer.**

*Tracey was given no hope!*

The doctors had pretty much given up on Tracey. She had leukemia and tumors on the brain, behind the heart and on her liver. The allopathic methods of dealing with the advanced cancer would be more chemotherapy.



She had gone the chemo and radiation route just months before and knew her weakened body could not endure another round of chemo. The doctor tried to pressure Tracey into taking chemo and she refused, angering the doctor. Her rejection of his chemo protocol led to a heated argument in his office and Tracey decided to take control of her own recovery. A woman that Tracey had befriended while in the hospital accepted the chemo treatment and the unfortunate result was that her friend died. This is Tracey's story in her own words as told in 1997: "I had contracted leukemia and had three inoperable tumors. When I decided not to do chemotherapy or radiation, my father sent me BioMix and 7 Herb Formula. Each day as I took it and got it into my system more and more, the better I felt. Then I added Garlic Pur, Siberian Ginseng and BioShark." "I am now in complete remission. The cancer cell count has dropped, the doctors tell me. I had a tumor just above the brain stem in my brain that has completely disappeared. The tumor on my liver is shrinking and the tumor behind my heart has shrunk over 50%. My weight, which dropped to 103 pounds, is on an uphill. There are other alternatives besides chemo and radiation". Tracey's father recently called the radio show. He said Tracey had a problem. Tricia Fejo said her heart skipped a beat when she heard Tracey's father. That concern soon evaporated. "Yeah, Tracey can't keep her feet on the ground these days," he said, then revealed that the young woman's new doctor had declared her free of cancer. Below you will find the reports of Tracey's progress and what she did as an alternative to the chemotherapy.

## Complaint

uelChapterOne - Cancer News

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## The Medical Report Cancer Count:

July 8	700
July 15	1100 +
Aug. 11	1040
Aug. 20	950
Sept. 2	790
Sept. 20	642 ~ free of leukemia
June 1998	Free of all cancer

## Tumors

July	Significant tumor	Size of quarter	5x7 cm
Sept.	Smaller lump	Size of dime	2x2 cm
Oct.	Gone	50% smaller	smaller
June 98	Gone	Gone	Gone
June 98	On Brain	Behind Heart	On Liver
	Gone	Gone	Gone

## Weight and Energy

July 8	103 lbs, no energy, feels bad, starts on natural products
Sept. 2	118 lbs, more energy, rode a bike
Sept. 20	121 lbs, rides bike, swims
Sept. 26	Also taking GDU 4000 ~ "feels terrific"
June 1998	125 lbs and continues to be free of cancer



## 7 Herb eliminates pre-cancerous growth

*Kathy Carlton tells her story of how 7 Herb Formula helped her.*

I'm 42 and I lived in Florida most of my life ... So, I've lived in the sun all my life. I had a pre-cancerous "wart" on the back of my leg and drinking 7 Herb Formula made it go away. I get these pre-cancerous things; the doctor checks me every several months. He says they are pre-cancerous. I had one on my hand once that was turning into a melanoma. The doctor burned it off. He usually burns them off. When they're small, he waits until they get bigger, then he burns them off. He gave me a cream when they were small but that irritated my skin. Anyway, I had one on the back of my leg that was getting big but the 7 Herb Formula made it go away. Maybe it took four or five weeks, but it just fell off: it got looser and looser and then it just fell off. I have the scar to prove it: I was taking the 7-Herb Formula and at first noticed no difference. But I took it about twice a day for five weeks. After five weeks I noticed better energy levels. I started taking it in August (1997) ~ so in the past four months I've gone through four bottles ~ because back in June I started getting stomach pains. In the morning I was waking up with bad pains. In June I went to the doctor because I was afraid I was having a heart attack or something. I was given an appointment for September to be tested. The doctor thought it was my

## Complaint

uelChapterOne - Cancer News

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esophagus ~ a lot of acid and heartburn. So I went to the GI specialist in September and had an upper GI, but by then the pain had gone away. The 7 Herb Formula had cured it! It got rid of the acid problem but I keep taking it (7 Herb Formula). I would take a shot glass full in the mornings ~ usually straight ~ and then drink a lot of water afterward. Then I would take a shot before bed. Now I only take it once a day or, some days, not at all. If I feel I'm getting a cold or something, I take extra. I haven't gotten sick once since I've taken it ~ not the flu or anything. And usually I would have (become sick) by now. And I used to feel tired around 2:00 p.m. but not anymore. The 7 Herb really gives me energy and it keeps me from getting hungry. I do use Lean Body sometimes instead of skipping meals but I do not do Lean Body all the time. The 7 Herb helps me maintain my weight. I don't lose but I don't gain. At first I lost 10 pounds. Maybe because I have more energy, I do more. I used to get low blood sugar a lot and now I'm okay. And I don't have high blood pressure anymore (I also take dandelion root for a diuretic). I think 7 Herb Formula balances out the immune system. My sister has lupus ~ I wish she would try it out ~ I want to send her a bottle to Virginia. Mentally, I even feel better. I recently ran out before leaving for Las Vegas. We were there for seven days and I felt so tired without the 7 Herb. It makes a big difference. And the most amazing thing was when I had the upper GI in September, and the x-ray showed nothing there. Before, I had bad pain constantly ~ by then, nothing. It's so amazing. It would ease the pain ~ right away ~ in a few minutes. Before that, I tried Tagamet and it would do nothing. It actually made my stomach hurt worse. Really, it's amazing!

★

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**Pre Post™**

Daniel Chapter One has been using its PrePost formula, a BioMolecular athletic food source for almost 15 years. PrePost is the world's first Soy based multi-nutritional high calorie sports supplement. Athletes and cancer patients all over the world have used PrePost for over a decade. By increasing an individual's caloric intake and adding Soy to their diet Daniel Chapter One has been able to see astounding results. Years of study and research helped Jim Feijo discover the benefits of using Soy as a protein base for overall better health. Recent studies have shown the importance of Soy protein in everyone's diet. Since Jim developed PrePost, many other Daniel Chapter One products have been developed with a Soy protein base. These products are now starting to get the recognition they have deserved. Attached below is an article from Vitamin Retailer

## Complaint

ielChapterOne - Cancer News

http://t/danielchapterone%201cleport%20Pro%20Project/mto\_come...

Magazine1. This article explains the benefits of the Soy Isoflavones, genistein and daidzein, found in Daniel Chapter One's BioMolecular formulas. "Soy Isoflavones (genistein and daidzein) confer protection against the so-called hormone-dependent cancers, such as breast cancer, and prostate cancer. For instance, when breast cancer cells are grown in the laboratory, genistein arrests their growth.2 Isoflavones are hypothesized to protect against cancer through at least four mechanisms. First, the weak estrogen activity of Isoflavones reduces the risk of hormonedependent cancers. Second, the antioxidant effects of Isoflavones protect against cancer causing free radicals. Third, Isoflavones beneficially affect enzymes. Finally, Isoflavones inhibit angiogenesis, a process which would otherwise nourish growing cancer cells. A growing problem faced by cancer therapy is the occurrence of very hardy tumors. A so-called "multidrug resistance gene" acts as a pump within some cancer cells, actually expelling anti-cancer drugs before they can eradicate the cancer. In effect, the Isoflavones, in some difficult to treat cancer cases, may be one of the few treatments that the tumor is not able to resist."3 (Footnotes) 1 Dolby, V., Nutritional Weapons are Powerful in the War Against Cancer. Vitamin Retailer. 1997;4(8):42-46. 2 Wei H., et al. Antioxidant and antipromotional effects of the soybean isoflavone genistein. Proc. Soc. Exp. Bio. Med. 1995;208:124-129 3 Peterson G. and Barnes S. Genistein inhibition of the growth of human breast cancer cells: Independence from estrogen receptors and the multidrug resistance gene. Biochem. Bioph. Res. 1991;179(1):661-667



#### Ancient cancer remedy is improved upon

##### *Herbal formula taken to maximum potency by Daniel Chapter One*

Jim and Tricia Feijo are the founders of Daniel Chapter One and co-hosts of a nationally syndicated talk show. Jim is the founder of BioMolecular nutrition. He holds bachelor and master degrees from Springfield College in Massachusetts. He has trained athletes ranging from Pop Warner Football to professional. Tricia is a classical homeopath who graduated from the New England School of Homeopathy. She is also a trained writer whose column appeared in publications in New England. She has studied nutrition and whole food science for nearly two decades. Jim Feijo is the ever-active researcher who looks to God-given nutrients to deal with health issues. Over the years, he has developed a number of high quality products. His unique ability to develop all-natural nutritional products that could build body mass in athletes caught the attention of Chinese doctors and



## Complaint

ielChapterOne - Cancer News

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scientists. Several years ago, He was invited to lead research at the Beijing Research Institute of Sports Science working with world-class Chinese athletes. He directed the athletes on the use of Daniel Chapter One products and monitored them through his unique computer program. The results were so impressive it caught the attention of Russian scientists and he was invited to Moscow to conduct similar studies. Besides helping world-class athletes, his computer program and products were found to be effective in helping people with chronic illness. In addition to his sports nutrition line, Jim has developed a line of health supplements and natural remedies. One of the products Jim Feijo is especially proud of is his 7 Herb Formula. The reason he is so delighted with 7 Herb is the effects he has seen on those who have used the product and the results that have been documented. The testimonials keep on coming in to Daniel Chapter One. Jim improved upon the ancient Ojibway Indian Tribe remedy known as Essiac and used by the late Dr. Charles Brusch ~ personal physician to President John F. Kennedy ~ to enhance the healing properties. Dr. Brusch said of the Essiac herbal formula: "It will greatly improve any condition afflicting the body!" As a result of his research, Jim found that by adding Siberian Ginseng and Cat's Claw to the Essiac formula, he could attain remarkable healing results. The two herbs were added to Burdock Root, Turkey Rhubarb, Slippery Elm, Sheep Sorrel and Watercress. It was determined that in order to achieve maximum effectiveness of this formula, the individual herbs must be cooked to a precise temperature for that specific herb and thus ensure 100% maximum phytochemical potencies. In similar products all of the herbs are cooked together, diminishing the potency and effectiveness of the herbs. So 7 Herb was formulated to the specific requirements of Daniel Chapter One. The rigid, precise individual preparation of the ingredients was a vast improvement over the original formula. It has been called "revolutionary." "We feel blessed that God has revealed this formula to us and that we have been able to provide those in need of help an alternative to chemotherapy and radiation," Jim Feijo said. Daniel Chapter One HealthWatch, which airs coast-to-coast five days a week, continues to hear the testimony of people who are using 7 Herb Formula. Among those who spoke of dramatic results using 7 Herb Formula ~ during the live talk show ~ are Joe and Maria Rocha and Jim Givens. Their stories are contained in this newsletter. Jim Feijo concluded: "There was a time in the not-so-distant past that we were voices in the wilderness, but today the American public is crying out for alternatives to harmful drugs. Our message has a vast audience today."



Victory over Gulf War Syndrome

## Complaint

nclChapterOne - Cancer News

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*The following is a letter Wayne L. Hams sent to the Gulf War Veterans Association, reprinted with his permission. Wayne went to the Persian Gulf in 1994 to lend his services as a minister for our troops overseas. He tells us how he victoriously overcame his personal war on cancer and Gulf War Syndrome with the help of Daniel Chapter One.*

In January 1998, after years of declining health, my wife and I both tested positive for Mycoplasma Fermentans Incognitus (MFI), better known as Gulf War illness. In October 1998, we both tested negative. In June 1998, a skin cancer clinic identified seven spots of Squamous Cell Carcinoma Cancer on my arms and legs. The largest spot was about the size of a quarter and the smallest was about the size of a pencil eraser. In October 1998, there is no trace of the cancer with the exception of a very small spot of light colored scar tissue where the largest spot had been. The standard treatment for MFI is 2 or more years of antibiotics in cycles of 6 weeks with a 8-week rest period in between each cycle of medication. We veered from the standard treatment for reasons I will explain below. Immediately prior to deployment to the Gulf and while in the Gulf, I was given shots which were never entered into my shot records. They were entered into medical records, but those pages conveniently disappeared when I returned to the states. Without knowing it, I passed the MFI on to my wife. The following are problems (see My Symptoms below) which I did not have before Desert Storm but developed after returning home. We were unable to find a doctor to treat us or even talk about GWI until April 1998. At that time we both began a six-week cycle of Doxycycline. The symptoms became worse for about two weeks, then seemed to clear up very well. About 3 weeks after the end of the first cycle, the symptoms returned but not as severe as they had been before treatment began. It was at this time the cancer was discovered. I had been directly exposed to insecticides in the Gulf and it lay wet on my bare skin for up to an hour before I could get to a place to wash it off. The doctor believes this may have been the cause of the cancer and that it lay dormant until I began the antibiotic treatment. She said that one of the side effects of antibiotics is a suppression of the natural immune system, which would allow the cancer to grow more rapidly. I decided to stop the antibiotic treatment and try anatural herbal and vitamin remedy I had been told about. Within about 4 weeks, all my symptoms had cleared up and have never returned. I continued on the natural remedy until today, October 18, 1998, when I was notified my tests showed I was completely cured of MFI. My wife decided to continue on the antibiotic six-week cycles, but on the six weeks in between, she also used the natural remedies. None of her symptoms



Complaint

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masses stayed constant. I started taking the 7 Herb and that tumor was shrinking. At the last treatment, I was told the tumors had liquid centers and were on the verge of drying up. Then I had a CAT scan and it was found that there has been massive tumor shrinkage." Jim Feijo called the Richard Nelson story a great example of how people can come to the rescue of others.



Pre-Cancerous Growths & Acid and Heartburn

"And the most amazing thing was when I had my upper G.I. in September, and the X-ray showed nothing there. Before, I had had pain constantly...by then, nothing." -Kathy Colton After using 7 HERB and other DC1 products for precancerous growths and for acid & heartburn.



Bio Shark™

In 1963, two researchers at the Massachusetts Institute of Technology published a study showing that shark cartilage contains a substance that significantly inhibits the development of blood vessels that nourish solid tumors, thereby limiting tumor growth. This effect is called anti-angiogenesis. Scientists recognize the benefits of starving a tumor to limit its growth. They have been looking for a drug to patent that can do the same thing as shark cartilage. They say the answer to curing cancer lies in preventing angiogenesis - the formation of blood vessels which feed the tumor. These scientists are trying to replicate what God has already presented to us so that they can claim rights to it, patent it and make a lot of money. But man can never lab synthesize a product and make it exactly the same - and all drugs have harmful side effects. Researchers have also demonstrated that shark cartilage can reduce the inflammation and pain associated with arthritis, alleviate psoriasis and have a positive effect on other degenerative diseases.



## Complaint

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**Breast Mass**

Deloris Winter  
Age 52, Lakeland, FL

"I went in for a breast examination by mammography. On 10/8/01 they said they found a mass that they believed was not cancerous, but benign.



I began taking GDU six times a day: 2 before breakfast, 2 before lunch, and 2 before dinner, and in a month I went to my doctors for the breast examination, and he found nothing on either breast.

Around that time I got another bottle of GDU and the Superior Herbal Fat Burners, which I took twice a day. In April I had my 6-month examination and the letter read: 'We are pleased to inform you that the results of your recent breast evaluation are normal.'

Praise GOD!"

Deloris Winter  
Age 52, Lakeland, FL

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Complaint

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ABOUT US PRODUCTS INFO CENTER ON LINE STORE TALK RADIO

- Herbs
- 7 Herb Formula
- Astragalus
- Bilberry Complex
- Black Cohosh
- Cascara Sagrada
- Cats Claw
- Cayenne
- Cranberry Concentrate
- Dandelion Root
- Digest 400
- Dong Qual
- Echina Plus
- Echinacea Root Tincture
- Echinacea Goldenseal Tincture
- Ezekiel First Aid Oil
- Fenugreek Plus
- FGC
- Feverfew
- Garlic Pur
- Genesis First Aid Oil
- Ginger Root
- Ginkgo Pur
- Goldenseal
- Gotu Kola



Herbs

Supplemental Facts

**7 Herb Formula: Detoxify, Acid Reflux & Cancer Help**

7 Herb Formula with Cat's Claw & Siberian Ginseng: Herbs to purify the blood and promote cell repair. The ingredients in this tea concentrate work to clear skin, cleanse the liver, decrease cell mutation, and fight pathogenic bacteria and tumor formation. Also helps regulate blood sugar, heal ulcers, and stop indigestion and heartburn.

The herbs in 7 Herb Formula allow the body to heal by nourishing and cleansing the blood organs. In addition, the formula detoxifies blood and lymph, a key to vibrant health and fighting illness. Below is a list of these 7 herbal ingredients, which have been scrupulously and separately prepared, then combined to form a tea concentrate, and poured, boiling, into quart-size amber glass bottles to ensure freshness and potency. Many pounds of herbs go into the making of one 32 ounce bottle of 7 Herb Formula, making it 3 times the potency of any other product of its kind!

- Hawthorn Plus C
- Herbaretic Diuretic
- HPLC (Hi Potency Liver Complex)
- Juniper Berries
- Kava Kava
- Licorice Root

1. Burdock Root, used in Ayurvedic and Chinese medicine to treat cancer. It is a potent blood purifier, and is known to decrease cell mutation and inhibit tumors. It restores liver and gallbladder function. Burdock contains the nutrients zinc, iron, manganese, and vitamins B1, B6, B12. It also provides vitamin E and selenium, which combat free radicals. Burdock Root contains natural inulin, which is beneficial

Complaint

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- Nettles
- Pau D'Arco
- Ruscus
- Saw Palmetto
- Slippery Elm Bark
- St. John's Wort
- Total Prostate Complex
- Valerian Root
- Yucca Leaves
- Immune Boosters
- Body Care
- Vitamins
- Biomolecular Nutrients
- Electrolytes
- Ergo & Thermogenics
- Minerals & Amino Acids
- Specialty & Essential Fats
- Aminoglycans
- CoEnzymes
- Homeopathy/Blotropins
- Hormonal & Fiber
- Muscle Mass/Performance

in diabetes as the body can use this to produce natural insulin.

2. Sheep Sorrel, also rich in vitamins, minerals and trace elements, high in life-giving properties. It nourishes the glandular system, and is known to relieve internal ulcers. Sheep Sorrel is a traditional folk remedy for cancer.

3. Siberian Ginseng, an herbal "tonic" which has restorative power due to its glycoside content. Glycosides are natural phytochemicals that initiate the body's stress response: so while this ingredient tones the body it also supports the immune system, while working in synergy with the other 6 ingredients to allow for an inflamed stomach to be healed. Siberian Ginseng also produces saponins, steroids found in plants, which have tumor inhibiting effects.

4. Cat's Claw, an herb from Peruvian rain forest. The inner bark, which is what is in 7 Herb Formula, is one of the most powerful cleansers of the intestinal tract. It also is an anti-oxidant and anti-inflammatory in action. Cat's Claw stimulates the immune system, enhancing white blood cells, which fight infection. Cat's Claw is used by native Peruvians to treat many diseases, including cancer.

5. Slippery Elm, according to herbalist Jethro Kloss, should be used in all stomach troubles because of its ability to heal, strengthen, and nourish the stomach. He states that it can stay in an ulcerated or even cancerous stomach when nothing else will. It nourishes the organs and tissues due to its nutrient content: bioflavonoids, calcium, phosphorous, polysaccharides, and vitamins A, B, C, and K. Slippery Elm also helps to neutralize acids from indigestion.

6. Watercress, the same plant used for salad greens and garnishes, is an excellent cleanser in the body, and it can heal mucus membranes including the stomach lining. Protects kidneys and joints from oxalic acid buildup.

7. Turkey Rhubarb Root purges the body of wastes and toxic matter. Also called Indian Rhubarb, this herb counteracts acids due to indigestion and acts as a gentle laxative. The malic acid inherent in this herb carries oxygen to all parts of the body. A substance called rhein in the herb fights both bacteria and fungus. Studies done in the 1960s show Turkey Rhubarb has anti-tumor properties. It also reduces inflammation.



Read more about  
7 Herb Formula - click

Read our clients' testimonials  
on using this product

- Special Forces Overcomes Prostate Cancer
- Doctor Alexander's Cancer
- HIV / AIDS
- Tumor Free!
- Prednisone W/ Masked My Kit Lump is Gone
- Dangerous SU Energy Boost
- 7 Herb Formula cancer
- Not Too Late!
- RENAL CELL C
- Prostate Cancer

## Complaint

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## Complaint

## Exhibit C

Arthritis pain relief anti inflammatory natural pain killer arthritis reduc... file:///E:/danielchapterone%20Teleport%20Pro%20Project/products\_...



Herbs

Immune Boosters

7 Herb Formula

Bio\*Shark

BioMixx

GDU

Biozymes

Body Care

Vitamins

Biomolecular Nutrients

Electrolytes

Ergo &amp; Thermogenics

Minerals &amp; Amino Acids

Specialty &amp; Essential Fats

Aminoglycans

CoEnzymes

Homeopathy/Biotropins

Hormonal &amp; Fiber

Muscle Mass/Performance

## Immune Boosters



## GDU - Arthritis Pain Anti inflammatory

Contains natural proteolytic enzymes (from pineapple source bromelain) to help digest protein - even that of unwanted tumors and cysts. This formula also helps to relieve pain and heal inflammation.

GDU caps also contain 300 mg Turmeric that protects the liver against toxins, 100 mg Quercetin, a natural bioflavonoid, which enhances the absorption of bromelain (the key ingredient) and relieves pain, bumps, and bruises, and 100 mg Feverfew, a natural pain killer. GDU caps with bromelain is a well-known herbal for digestive problems, helping users to digest proteins and aiding in pancreatic insufficiency.

GDU is also used for acute postoperative swelling, to heal surgical inflammation and bruises, to heal injuries, as a smooth muscle relaxant, for respiratory congestion and infections, sinusitis, pneumonia, bronchitis, angina, as a natural antibiotic, for painful menstruation, arthritis, thrombophlebitis, varicose veins, and as an adjunct to cancer therapy.

GDU caps possess a wide range of actions including anti-inflammatory and antispasmodic activity that make it suited to a wide range of uses. Safety: Even at very high dosages no toxic reactions have been found. Care should be taken when using GDU if on any medication that thins the blood. The nutrients in GDU: Bromelain, Turmeric, Quercetin, Feverfew, Boron

Complaint

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TURMERIC (CURCUMIN)

Turmeric: a spice and a potent anti-inflammatory. Herbalists have recommended turmeric for the pain and swelling of arthritis for many years. It also has a beneficial effect on the liver and gallbladder.

This product is available in two forms: 120 Caps (buy here) and 300 Caps (buy here)

1. Curcuma longa, turmeric, with its active ingredient curcumin, is a potent anti-inflammatory. Jean Carper reports in Food - Your Miracle Medicine (HarperCollins, 1993)

2. Curcumin, "is an anti-inflammatory agent on a par with cortisone"

3. Has reduced inflammation in animals.

Read our clients testimonials on using this anti-inflammatory

4. Reduced symptoms of rheumatoid arthritis in humans.

5. A rigorous double-blind, placebo-controlled study was conducted at the Seth 1G.S. Medical College in Bombay, India, to determine the herb's anti-inflammatory effect compared to that of powerful drugs, such as phenylbutazone, for post-surgical patients. The researchers concluded that curcumin was shown to possess significant anti-inflammatory activity following surgery.

- Juvenile Arthritis
- Arthritis
- Prostate Cancer
- Spinal Stenosis
- Breast Mass
- Arthritis Relief
- Prostate Cancer

Bromelain: Natural proteolytic enzymes, which can break down proteins that are involved in the inflammatory process. They also enhance the breakdown and removal of damaged tissue and aid the lymph to cleanse and drain the inflamed area of fluid and debris. Studies have shown that the potency of the enzymes used is critical in relation to their effectiveness.

Quercetin: A bioflavonoid, a compound widely distributed in plants. Bioflavonoids like quercetin are used in the treatment of athletic injuries because they relieve pain, bumps, and bruises. They also reduce pain located in the legs or across the back. Bromelain and quercetin are synergists, and should be taken together to enhance absorption.

Feverfew: Legend has it that this herb saved the life of someone who once fell off the Parthenon, the famous temple in ancient Greece! In 1985, the British medical journal Lancet reported that feverfew inhibited the release of two different inflammatory substances- one from platelets, the other from white blood cells - thought to contribute to the onset of migraine attacks and that may play a role in rheumatoid arthritis.

Boron: Essential nutrient included in GDU because of its many functions. Regulating appropriate body levels of hormones needed for bone health and maintaining minerals needed for healthy bones are two major functions of boron in GDU.

## Complaint

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**Arthritis Pain Relief & Anti Inflammatory Top** †

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Complaint

**Exhibit D**



**how to  
fight  
cancer is  
your  
choice!!!**



*Cancer Newsletter,  
Millenium Edition, 2002*



## Complaint

## Texas businessman has true friends for life

### Florida family shares its discovery of Daniel Chapter One success

#### What are friends for?

The answer to that question is personified in the Dellinger family of Milton, FL. Drew, 37, and his parents, Dean and Dorothy, have been using Daniel Chapter One products for about a year and are enthusiastic about the results. The Dellingers heard Jim and Tricia's Daniel Chapter One HealthWatch radio show in Milton and ordered products that they say had remarkable results.

The Dellingers wanted to share their discovery with family friend, Dick N. of Garland, Texas, who has been suffering from emphysema, 18% capacity in one lung and 27% in another, and bladder cancer.

They employed the persuasive powers of a mutual friend, Ed Kulikowski, whose daughter Tracey (See related story on opposite page) is cancer-free as a result of using the Daniel Chapter One products.

Mr. Kulikowski contacted the Texas Oil company executive and said that the Dellingers were willing to provide him with Daniel Chapter One products for his breathing problems and problems associated with his cancer.

Drew Dellinger said the family friend received the package of products and hesitated to use them.

The package included 7 Herb Formula, AM\*PM, Herbal Blast, Bio Shark and Bio\*Mixx.

The Texas oil executive reportedly downed six ounces of 7 Herb Formula right away and as soon as he did, Drew said, Dick N. felt as though an "electrical wave" went through his system. Drew said his friend told him that he began shaking.

Dick didn't know what was going on, Drew Dellinger said. He reportedly asked his wife, Carmen, "You reckon this stuff will kill me?"

Every 15 minutes, she would bring AM\*PM, 7 Herb, or Herbal Blast for Dick to drink, Drew reported.

What were the results for a man with partial use of his lungs and someone who had undergone several operations for cancer? He quickly began breathing better and is now off oxygen during the day but stays on it while sleeping. The excruciating pain that accompanied urination is gone.

According to Drew, the Texas businessman is back to work and telling people he never felt better.

He said that Dick told him the employees think he has been drinking because he seems like his jovial, energetic self.

The Dellingers are pleased they could come to the rescue of their friend. They said they have so much faith in Daniel Chapter One that it simply seemed the right thing to do to help their friend in a struggle to regain his health.

## Bio Mixx-



### How does Bio\*Mixx work?

Boosts the immune system, cleanses the blood and feeds the endocrine system

Bio\*Mixx is a combination of numerous herbs, vitamins, minerals, enzymes, amino acids and essential biomolecular nutrients. The purpose of this formula is to provide man natural immune-boosting properties in one tasty product. These include IGF-One, a natural gamma globulin complex essential for overall immunity with natural anti-fungal, antibacterial and anti-viral properties. Bio\*Mixx is a foundational nutritional product.

Some other important herbs in Bio\*Mixx include: Goldenseal, an antibacterial, Echinacea, an anti-viral, and Ginseng, an adaptogen that brings all body properties in to balance for overall wellness. Bio\*Mixx boosts the immune system, cleanses the blood and feeds the endocrine system to allow for natural healing. It is used to assist the body in fighting cancer and in healing the destructive effects of radiation and chemotherapy treatments.



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## Initial Decision

**I. INTRODUCTION****A. Summary of Complaint and Answer**

The Federal Trade Commission (“FTC”) issued the Complaint in this matter on September 16, 2008 against Daniel Chapter One (“DCO”) and James Feijo (“Respondents”). The Complaint alleges that Respondents have engaged in deceptive acts or practices in connection with the advertising, promotion, offering for sale, sale, and distribution of four products: BioShark, 7 Herb Formula, GDU, and BioMixx (collectively, the “Challenged Products”). Complaint ¶ 3. The Complaint also alleges that Respondents operate linked web pages on the website, www.danielchapterone.com, through which they advertise and sell the Challenged Products. Complaint ¶ 5.

The Complaint alleges that the Challenged Products are advertised to prevent, treat, or cure cancer or tumors, Complaint ¶ 5, and specifically charges that the advertisements represent, expressly or impliedly, that:

- Bio\*Shark inhibits tumor growth;
- Bio\*Shark is effective in the treatment of cancer;
- 7 Herb Formula is effective in the treatment or cure of cancer;
- 7 Herb Formula inhibits tumor formation;
- GDU eliminates tumors;
- GDU is effective in the treatment of cancer;
- BioMixx is effective in the treatment of cancer; and
- BioMixx heals the destructive effects of radiation and chemotherapy.

Complaint ¶ 14. The Complaint further alleges that Respondents represented, either expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the claims made, but that Respondents did not, in fact, possess and rely upon such reasonable basis. Complaint ¶¶ 15, 16. The Complaint charges Respondents with unfair or deceptive acts or practices, in or affecting commerce, in violation of Sections 5(a) and 12 of the Federal Trade Commission Act (“FTC Act”). Complaint ¶ 17.

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In their Answer, filed on October 11, 2008, Respondents admit that they operate a website that provides information on the Challenged Products in a religious and educational context, but otherwise deny allegations that they engaged in deceptive acts or practices in connection with the advertising or sale of the Challenged Products. Answer ¶ 5. Respondents averred that they did possess and rely upon a reasonable basis that substantiated the representations made about the Challenged Products at the time the representations were made. Answer ¶ 16.

Respondents' Answer also asserted six affirmative defenses. By stipulation of the parties, in an Order entered by the Administrative Law Judge ("ALJ") on January 8, 2009, the six affirmative defenses raised by Respondents in their Answer were stricken. On February 11, 2009, Respondents filed a motion to amend the Answer through which they sought to amend paragraphs 3, 5, and 14 of their Answer. The motion was opposed by Complaint Counsel. By Order dated March 4, 2009, Respondents' motion to amend was denied on the grounds that the proposed amendments would not facilitate a determination of a controversy, were not necessary to avoid prejudicing Respondents, did not conform to the evidence, and, coming after the close of discovery and approximately two months before trial, would have been unduly prejudicial to Complaint Counsel.

On February 25, 2009, Respondents filed a second motion to amend their answer, this time to add an affirmative defense that the Commission, in filing the Complaint and seeking the Cease and Desist Order included with the Complaint, was substantially burdening Respondents' free exercise of religion in violation of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(a) and (c). Complaint Counsel opposed the motion. By Order dated March 9, 2009, Respondents' motion to amend was denied on the grounds that the proposed amendment would not facilitate a determination of a controversy, and, coming after the close of discovery and approximately two months before trial, would have been unduly prejudicial to Complaint Counsel.

## Initial Decision

**B. Procedural History**

Respondents filed their first motion to dismiss on January 13, 2009, in which they contended, among other things, that the FTC has no jurisdiction over Respondents because DCO is a nonprofit religious ministry, not a commercial enterprise. Complaint Counsel opposed the motion. By Order dated February 2, 2009, the first motion to dismiss was denied on the grounds that Respondents had made a facial attack on the Complaint and that an evaluation of the allegations of the Complaint, which must be and were taken as true on such a motion to dismiss, sufficiently provided a basis for jurisdiction.

On February 13, 2009, Respondents filed a motion to reconsider the Order Denying Respondents' Motion to Dismiss Complaint. The motion was opposed by Complaint Counsel. By Order dated February 23, 2009, Respondents' motion was denied on the ground that Respondents failed to meet their burden for reconsideration.

Respondents filed a second motion to dismiss on February 25, 2009, in which Respondents again challenged the FTC's jurisdiction, arguing, among other things, that DCO is a nonprofit religious ministry. The second motion to dismiss referenced evidence outside the Complaint and thus was not a facial attack that could be decided only on the allegations of the Complaint. Complaint Counsel opposed the motion. On February 25, 2009, Respondents also filed a motion for summary decision. Complaint Counsel, too, filed a motion for summary decision on February 25, 2009. Both motions were opposed. By Order dated March 20, 2009, it was held that Respondents' second motion to dismiss and both parties' motions for summary decision could not properly be resolved prior to a determination of whether the FTC has jurisdiction over Respondents. Accordingly, those motions were held in abeyance until after the conclusion of a hearing on jurisdiction.

On March 20, 2009, an order was issued setting an evidentiary hearing and oral argument to determine jurisdiction under Sections 4 and 5 of the FTC Act. 15 U.S.C. §§ 44, 45. The FTC Act gives the Commission authority over "persons, partnerships,



## Initial Decision

or corporations,” 15 U.S.C. § 45(a)(2), and defines “corporation” to include “any company . . . or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members.” 15 U.S.C. § 44.

The hearing on jurisdiction was held on April 21, 2009. Following the conclusion of that hearing, a ruling was issued from the bench that Complaint Counsel had demonstrated, by a preponderance of the evidence, that jurisdiction does exist in this case. Respondents’ second motion to dismiss and both parties’ motions for summary decision were denied, as stated on the record in open court. Transcript of April 22, 2009 Final Pre-Hearing Conference, 4-6.

Respondents, on April 23, 2009, filed a motion for a Rule 3.23(b) determination authorizing Respondents to immediately appeal the denial of Respondents’ motion to dismiss for lack of jurisdiction. Complaint Counsel opposed this motion. By Order dated May 5, 2009, that motion was denied on the ground that Respondents failed to satisfy any of the three prongs of the stringent three-prong test for interlocutory appeal.

Following the hearing on jurisdiction, the final pre-hearing conference was held on April 22, 2009, with trial commencing immediately thereafter. Over seventy exhibits were admitted and eleven witnesses testified at the hearing on jurisdiction and at trial. The testimonial portion of the trial concluded on April 27, 2009. On May 28, 2009, the parties filed concurrent post-trial briefs, proposed findings of fact, and proposed conclusions of law. The parties filed concurrent replies to each other’s briefs and proposed findings on June 11, 2009. Closing arguments were heard on July 9, 2009.

The hearing record was closed, pursuant to Commission Rule 3.44(c), by Order dated May 7, 2009. Rule 3.51(a) of the Commission’s Rules of Practice states that an Initial Decision shall be filed “within ninety (90) days after closing the hearing record pursuant to § 3.44(c) . . . or within such further time as the Commission may by order allow upon written request from the

## Initial Decision

Administrative Law Judge.” 16 C.F.R. § 3.51(a). Ninety days from the close of the record is August 5, 2009.

Commission Rule 3.51(a) also states that an Initial Decision shall be filed within one year “after the issuance of the administrative complaint, except that the Administrative Law Judge may, upon a finding of extraordinary circumstances, extend the one-year deadline for a period of up to sixty (60) days.” 16 C.F.R. § 3.51(a). The Complaint in this matter was issued on September 16, 2008. One year from the issuance of the Complaint is September 16, 2009.

### C. Evidence

This Initial Decision is based on the exhibits properly admitted into evidence, the transcripts of testimony at the hearing on jurisdiction and at trial, and the briefs and proposed findings of fact and conclusions of law, and the replies thereto, submitted by the parties. Citations to specific numbered findings of fact in this Initial Decision are designated by “F.”<sup>1</sup>

Under Commission Rule 3.51(c)(1), “[a]n initial decision shall be based on a consideration of the whole record relevant to the issues decided, and shall be supported by reliable and probative

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<sup>1</sup> References to the record are abbreviated as follows:

CX – Complaint Counsel’s Exhibit  
R – Respondents’ Exhibit  
JX – Joint Exhibit  
HOJ Tr. – Transcript of Testimony from the Hearing on Jurisdiction  
Tr. – Transcript of Testimony before the ALJ  
Dep. – Transcript of Deposition  
CC Juris. Br. – Complaint Counsel’s Pre-Hearing Brief on Jurisdiction, April 13, 2009  
R Juris. Br. – Respondents’ Pre-Hearing Memorandum on Jurisdiction, attached to Respondents’ April 14, 2009 Errata  
CCB – Complaint Counsel’s Post-Hearing Brief  
RB – Respondents’ Post-Hearing Brief  
RCOL – Respondents’ Conclusions of Law  
RFF – Respondents’ Proposed Findings of Fact  
RRFF – Respondents’ Response to Complaint Counsel’s Proposed Findings of Fact

All testimony and exhibits from the hearing on jurisdiction are part of the record for the hearing on the merits. HOJ Tr. 13.

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evidence.” 16 C.F.R. § 3.51(c)(1); *see In re Chicago Bridge & Iron Co.*, No. 9300, 138 F.T.C. 1024, 1027 n.4, 2005 FTC LEXIS 215, at \*3 n.4 (Jan. 6, 2005). Under the Administrative Procedure Act (“APA”), an ALJ may not issue an order “except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.” APA, 5 U.S.C. § 556(d). All findings of fact in this Initial Decision are supported by reliable, probative, and substantial evidence.

This Initial Decision is based on a consideration of the whole record relevant to the issues and addresses the material issues of fact and law. Ruling upon a decision of another Commission, and interpreting almost identical language to that in Commission Rule 3.51(c)(1) in the APA, the U.S. Supreme Court held that “[b]y the express terms of [that Act], the Commission is not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are material.” *Minneapolis & St. Louis Ry. Co. v. United States*, 361 U.S. 173, 193-94 (1959). *Accord Stauffer Labs., Inc. v. FTC*, 343 F.2d 75, 89 (9th Cir. 1965). *See also Borek Motor Sales, Inc. v. National Labor Relations Bd.*, 425 F.2d 677, 681 (7th Cir. 1970) (holding that it is adequate for the Board to indicate that it had considered each of the company’s exceptions, even if only some of the exceptions were discussed, and stating that “[m]ore than that is not demanded by the [APA] and would place a severe burden upon the agency”); *In re Amrep Corp.*, No. 9018, 102 F.T.C. 1362, 1670, 1983 FTC LEXIS 17, \*566-67 (Nov. 2, 1983) (the Administrative Law Judge is not required to discuss the testimony of each witness or each exhibit presented during the administrative adjudication).

Accordingly, proposed findings of fact that are not included in this Initial Decision were rejected, either because they were not supported by the evidence, or because they were not dispositive or material to the determination of the allegations of the Complaint or the defenses thereto. Similarly, legal contentions and arguments not addressed in this Initial Decision were rejected, because they lacked support in fact or law, were not material, or were otherwise lacking in merit. All contentions and arguments

## Initial Decision

in the parties' post trial-briefs and reply briefs were reviewed and considered.

**D. Summary of the Initial Decision**

As set forth in this Initial Decision, the record indicates that DCO, described by Respondents as a house ministry, led by Respondent James Feijo, with his wife Patricia Feijo, engaged in business for profit for itself or for its member, James Feijo. DCO's activities include spiritual and nutritional counseling to individuals, and advertising and selling dietary supplements to the public. Respondents sell four products at issue in the Complaint: BioShark, 7 Herb Formula, GDU, and BioMixx.

The evidence shows that Respondents disseminated advertisements for the purpose of inducing, and which did induce, the purchase of a food or drug, in or having an effect on commerce, and that these advertisements claim that the Challenged Products, individually or collectively, prevent, treat, or cure cancer, inhibit tumors, or ameliorate the adverse effects of radiation and chemotherapy. The evidence further shows that Respondents did not have a reasonable basis to substantiate these claims and that the claims made are material to consumers.

Complaint Counsel has carried its burden of proving that Respondents are liable under Sections 5(a) and 12 of the FTC Act. The defenses raised by Respondents have been considered and are determined to be without merit. The remedy imposed is an appropriate cease and desist Order.

**II. FINDINGS OF FACT****A. Respondents****1. Daniel Chapter One and James Feijo**

1. Respondent Daniel Chapter One ("DCO") is a corporation sole organized in 2002 under the laws of the State of Washington. (Respondents' Answer to FTC's Complaint, Oct. 14, 2008 (hereinafter referred to as Answer) ¶ 1; Complaint Counsel's Trial Exhibit

## Initial Decision

(hereinafter referred to as CX \_\_) 31; J. Feijo, Hearing on Jurisdiction Transcript, Apr. 21, 2009, (hereinafter referred to as HOJ Tr. \_\_) 84).

2. DCO's Articles of Incorporation list the registered agent and incorporator for DCO as Rita Johnson and list her mailing location as P.O. Box 110788, Tacoma, Washington, 98411, non-domestic. (CX 31).
3. DCO's Articles of Incorporation list DCO's mailing address and principal location as James Jesse Feijo, c/o 21916 Southeast 392<sup>nd</sup> Street, Enumclaw, Washington, 98022, non-domestic. Neither Respondent DCO nor Respondent James Feijo maintains a building at that address. (CX 31; J. Feijo, HOJ Tr. 93-95).
4. DCO's principal office and place of business are located at 1028 East Main Road, Portsmouth, Rhode Island 02871. (Answer ¶ 1; Deposition of James Feijo, Jan. 13, 2009 (hereinafter referred to as R 15 (J. Feijo, Dep. at \_\_)) at 99).
5. Respondent James Feijo is the overseer of DCO and, in this capacity, is responsible for all of the activities of Respondent DCO. (Answer ¶ 2; R 15 (J. Feijo, Dep. at 9-10, 17); J. Feijo, HOJ Tr. 70, 217; J. Feijo, Trial Transcript (hereinafter referred to as Tr. \_\_) at 416).
6. James Feijo is the trustee for DCO's assets and for all of the funds held by DCO. He is responsible for paying all of DCO's bills and directing DCO's funds. (J. Feijo, HOJ Tr. 72-73; R 15 (J. Feijo, Dep. at 9-10, 193, 198)).
7. Patricia Feijo is Respondent James Feijo's wife and is the secretary for DCO. James and Patricia Feijo are the only officers of DCO. (Answer ¶ 2; CX 39 (Respondents' Answer to Interrogatory No. 1); J. Feijo, HOJ Tr. 209; P. Feijo, HOJ Tr. 259, 276).

## Initial Decision

**2. Overview of Respondents' activities**

8. Respondents currently sell 150 to 200 products (“DCO products”), including the four products challenged in the Complaint: BioShark, 7 Herb Formula, GDU, and BioMixx (collectively, the “Challenged Products”). (R 15 (J. Feijo, Dep. at 37); P. Feijo, Tr. 392; Marino, HOJ Tr. 53-54; J. Feijo, HOJ Tr. 314-15).
9. Respondents have generated approximately \$2 million in annual gross sales for the years 2006, 2007, and 2008 for all of DCO’s nearly 200 products. (CX 44; R 15 (J. Feijo, Dep. at 206-07, 212); J. Feijo, HOJ Tr. 109, 223-24).
10. At present, 100% of DCO’s product sales or distribution is dietary supplements. (J. Feijo, Tr. 419-20).
11. In 1983, DCO began as what James Feijo described as a house church – a church operating not in the typical sense that people think of, with a building, sign, and established doctrines, but as a church that meets in houses to worship and break bread, with no set times for religious meetings. (J. Feijo, HOJ Tr. 180-82, 263-64).
12. In 1986, DCO opened a health food store and began selling food sources. DCO began selling dietary supplements within the first year. (J. Feijo, Tr. 417-19).
13. In the mid-1990s, DCO began to develop its own dietary supplements and created BioMixx, before creating BioShark, 7 Herb Formula, and GDU, which Respondents created after 1993. (J. Feijo, Tr. 421, 423-24).
14. In 1998, Respondents created the website “danielchapterone.com” (hereinafter the “DCO Website”). (R 15 (J. Feijo, Dep. at 202)).

## Initial Decision

15. Around 1999, Respondents created the “BioGuide” and the “Cancer Newsletter” (*see infra* F. 86, 94). (R 15 (J. Feijo, Dep. at 200)).
16. According to James and Patricia Feijo, DCO was created for the purpose of healing based on the scripture of Daniel Chapter One and other biblical verses including Genesis 1:29, where, according to James and Patricia Feijo, God said he created food for healing. (J. Feijo, Tr. 417-23; Deposition of Patricia Feijo, Jan. 14, 2009 (hereinafter referred to as R 16 (P. Feijo, Dep. at \_\_)) at 39-40).
17. According to Patricia Feijo, the name Daniel Chapter One comes from the Book of Daniel in the Old Testament of the Bible, in which, Daniel and his men were in captivity and were expected to eat the king’s very rich diet of meats and wine, but instead ate and drank only pulse and water; after 10 days, their eyes were said to be brighter and they were said to be stronger than the king’s men. (R 16 (P. Feijo, Dep. at 40-41)).
18. According to James and Patricia Feijo, DCO’s ministry activities include helping house churches in other countries, holding religious meetings, performing baptisms, delivering babies, performing marriage ceremonies, performing healings, and reaching out to interested persons to inform them about Respondents’ perspectives on the integration of spiritual and physical well-being. (R 16 (P. Feijo, Dep. at 204-05); J. Feijo, HOJ Tr. 99, 180-83, 236-37; R 15 (J. Feijo, Dep. at 73); P. Feijo, Tr. 325-26).
19. Respondent James Feijo has provided nutritional counseling to some individuals and has let people in need stay in the house with the Feijos. (P. Feijo, HOJ Tr. 268-71).
20. Respondents have provided support to a junior men’s fast-pitch softball team. (P. Feijo, HOJ Tr. 263).

## Initial Decision

21. In some instances, Respondents have given away, or have provided at a reduced price, DCO products. (R 15 (J. Feijo, Dep. at 209-11); R 16 (P. Feijo, Dep. at 69); J. Feijo, HOJ Tr. 137, 184-88; P. Feijo, HOJ Tr. 263, 268, 274; Mink, HOJ Tr. 293-94; Hicks, HOJ Tr. 306-07).

**3. Incorporation of Daniel Chapter One**

22. Respondent DCO was previously incorporated as “Daniel Chapter One, Inc.,” a Rhode Island for-profit corporation, on October 10, 1990. (CX 50; J. Feijo, HOJ Tr. 101).
23. Respondent DCO’s Articles of Incorporation from 1990 state that the purposes for which Daniel Chapter One, Inc. was organized were: “[T]o engage in the sale, retail, wholesale and distribution of health products, including but not limited to health foods and supplements, namely those with special nutritive qualities and values.” (CX 50; J. Feijo, HOJ Tr. 101-02).
24. Respondent DCO filed annual reports from 1991 through 1997, during which time the stated character of the business remained substantially similar, namely, “to engage in the sale, retail, wholesale and distribution of health products, including health foods and supplements.” (CX 50; J. Feijo, HOJ Tr. 102-08).
25. Each of these for-profit corporation annual reports of DCO bears the signature of Respondent James Feijo. (J. Feijo, HOJ Tr. 102-08).
26. From 1991 to 1997, DCO’s corporate status was repeatedly revoked. (J. Feijo, HOJ Tr. 175-77, 194-97; CX 50).
27. Respondent James Feijo sold the Challenged Products while DCO was registered as a for-profit corporation. (J. Feijo, Tr. 417-18; R 15 (J. Feijo, Dep. at 224)).



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28. In 2002, Respondent Daniel Chapter One was organized as a corporation sole under the laws of the State of Washington. (Answer ¶ 1; CX 31; J. Feijo, HOJ Tr. at 84).
29. DCO's Articles of Incorporation as a corporation sole describe its purposes as follows:

[T]o do whatever will promote the Kingdom Of God, All Righteousness, and the principals [sic] of Liberty and Justice to provide for the comfort, happiness and improvement of an indefinite number of natural men and women, with special forerunner emphases upon the firm practice and lawful operation of the law, providing lawful advice, educating people in the fundamental principles of liberty and the common law, researching, developing and implementing remedies at law for any problem while holding accountable those individuals responsible for the breach of, or wrongful interference with contractual obligations, whether written, verbal, or implied; as well as other worthwhile projects for the common good of Daniel Chapter One and its close associates, along with other acts and programs beneficial to Daniel Chapter One at large.

(CX 31).

30. DCO's Articles of Incorporation do not specifically declare that DCO was organized exclusively for charitable or other clearly nonprofit purposes. DCO's Articles of Incorporation do not provide for distribution of its assets upon dissolution solely to other nonprofit entities or prohibit distribution of its earnings to the benefit of any individual or for-profit corporation. (CX 31).

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31. DCO is not registered with the Internal Revenue Service as a charity. (R 15 (J. Feijo, Dep. at 45); J. Feijo, HOJ Tr. 209).
32. DCO's advertising and promotional materials (*see infra* Section II D, E) do not specifically refer to DCO as a nonprofit entity. For example, the "About Us" section on the DCO Website, [www.danielchapterone.com](http://www.danielchapterone.com), describes DCO as a "health food store" or "health food supplement store." (CX 1).
33. DCO uses, but does not own, two buildings in Rhode Island – one is the telephone order center (*see infra* F. 99) and the other is the warehouse. (J. Feijo, HOJ Tr. 110; R 15 (J. Feijo, Dep. 72-73)).
34. Messiah Y'Shua Shalom, a State of Washington corporation sole, owns one of the two buildings that Respondents use in Rhode Island. (R 15 (J. Feijo, Dep. at 72-73); CX 35). The other building is rented from an owner unrelated to Respondents. (R 15 (J. Feijo, Dep. at 174)).
35. Respondent James Feijo is also the overseer for Messiah Y'Shua Shalom. (R 15 (J. Feijo, Dep. at 72-73); CX 35).
36. Respondents founded Accent Radio Network in 2000. (CX 32 at FTC-DCO 2954; J. Feijo, HOJ Tr. 110-12).

**B. Respondents' Finances****1. Control by James Feijo**

37. Respondent James Feijo is responsible for the development, creation, production, and pricing of the Challenged Products. (CX 39 (Respondents' Answer to Interrogatory No. 2); R 15 (J. Feijo, Dep. at 116); R 16 (P. Feijo, Dep. at 77)).

## Initial Decision

38. Respondent James Feijo and his wife, Patricia Feijo, have been solely responsible for creating, drafting, and approving the directions for usage of the Challenged Products. (CX 39 (Respondents' Answer to Interrogatory No. 16)).
39. Respondent James Feijo and Patricia Feijo developed the recommended dosages of the Challenged Products. (R 16 (P. Feijo, Dep. at, 166-67, 175, 192); CX 39 (Respondents' Answer to Interrogatory No. 16)).
40. Respondent James Feijo is the trustee for all of DCO's assets, including all funds, which are to be held in trust. (CX 39 (Respondents' Answer to Interrogatory Nos. 3, 9); J. Feijo, HOJ Tr. 73).
41. Respondent James Feijo is ultimately in charge of DCO. (J. Feijo, HOJ Tr. 112).

**2. Bank accounts**

42. Respondent DCO has bank accounts with Citizens Bank, including: Daniel Chapter One Business Partners Checking, Daniel Chapter One Business Partners Money Market Fund, Daniel Chapter One DBA Creation Science Funding, and Daniel Chapter One DBA Radio Leasing International. Revenue earned by Respondent DCO is deposited into the Daniel Chapter One Business Partners Checking account and from there is distributed, at Respondent James Feijo's discretion, to the other DCO bank accounts. (CX 49; J. Feijo, HOJ Tr. 206-08, 227, 230).
43. Records of the Daniel Chapter One Business Partners Checking account show frequent ATM cash withdrawals in the amount of \$803, including multiple such withdrawals in the same month. (CX 49, *see, e.g.*, FTC-DCO 3661, 3666, 3671, 3677, 3683, 3689).

## Initial Decision

44. The Daniel Chapter One Business Partners Money Market Fund held unused funds that Respondents put aside. (J. Feijo, HOJ Tr. 230).
45. Records from the Daniel Chapter One Business Partners Money Market Fund show that from December 19, 2006 until February 20, 2008, the money market fund had a balance in excess of \$1,000,000, and grew to as high as \$1,303,283. On February 21, 2008, a debit was posted in the amount of \$802,000. (CX 49 at FTC-DCO 3624-97).
46. According to James Feijo, DCO does not keep a ledger of the amounts it pays out. (J. Feijo, HOJ Tr. 166).
47. According to James Feijo, the trustee of DCO's funds, Feijo does not keep track of the money DCO distributes; Feijo is not aware of what bank accounts DCO has; and Feijo has no idea how much DCO pays out on a monthly basis for its credit cards. (J. Feijo, HOJ Tr. 165, 168-69, 227-28).
48. Patricia Feijo is a signatory to DCO's bank accounts and writes checks from the DCO accounts. (R 16 (P. Feijo, Dep. at 54); P. Feijo, HOJ Tr. 276).
49. Jill Feijo, James Feijo's daughter, pays DCO's bills. (J. Feijo, HOJ Tr. 204).

**3. Records**

50. DCO has a policy of not maintaining records. (J. Feijo, HOJ Tr. 73, 83).
51. Respondent James Feijo did not change DCO's document retention policies after learning that the FTC had brought a proceeding against him and DCO. (J. Feijo, HOJ Tr. 80). DCO did not change its document retention policies after receiving the Court's first and second orders to produce certain documents to Complaint Counsel. (J. Feijo, HOJ Tr. 81-83).

## Initial Decision

52. Respondent James Feijo had the authority to change DCO's document retention policies after receiving the orders in this proceeding to produce responsive documents to Complaint Counsel. (J. Feijo, HOJ Tr. 83).
53. DCO continued to discard documents, including Marino's purchase order form (*see infra* F. 154-55), even after receiving orders in this proceeding to produce certain documents to Complaint Counsel. (J. Feijo, HOJ Tr. 83).
54. DCO has no records indicating how much of its products it has given away or how much financial support DCO has dedicated to charitable activities. (P. Feijo, HOJ Tr. 274-75).

**4. Distribution of funds**

55. James and Patricia Feijo live at the Portsmouth, Rhode Island property, owned by Messiah Y'Shua Shalom, as well as in a three-bedroom house owned by DCO, with a pool on country club land, in Deerfield Beach, Florida. (R 15 (J. Feijo, Dep. at 70-71, 78-79); J. Feijo, HOJ Tr. 160, 204).
56. Respondent DCO owns two cars, a 2003 Cadillac and a 2004 Cadillac. DCO purchased one Cadillac new and the other Cadillac used. (R 15 (J. Feijo, Dep. at 71); J. Feijo, HOJ Tr. 160).
57. Respondent James Feijo uses the two Cadillacs owned by DCO. (R 15 (J. Feijo, Dep. at 96-97); J. Feijo, HOJ Tr. 160).
58. Respondent DCO pays for all of the Feijos' living expenses. (CX 39 (Respondents' Answer to Interrogatory No. 3); J. Feijo, HOJ Tr. 206; P. Feijo, HOJ Tr. 276).

## Initial Decision

59. Respondents do not maintain any records of how much DCO money is spent on the Feijos' living expenses. (P. Feijo, HOJ Tr. 277).
60. The Feijos do not file tax returns with regard to the money they receive from Respondent DCO. (P. Feijo, HOJ Tr. 278).
61. Respondent DCO pays for pool and gardening services rendered on the "Feijo house" in Florida. (CX 49 at FTC-DCO 3443, 3457).
62. Respondent DCO pays for Patricia Feijo's tennis club membership. (P. Feijo, HOJ Tr. 278).
63. Respondent DCO pays for Respondent James Feijo's membership at the Green Valley Country Club in Rhode Island. (J. Feijo, HOJ Tr. 154-55).
64. Respondent DCO pays for Respondent James Feijo to play golf at the Deer Creek Golf Course located behind the Deerfield Beach, Florida home. (CX 49; J. Feijo, HOJ Tr. 155).
65. Respondent DCO has an American Express Business Gold Card, in the names of Daniel Chapter One and of Patricia Feijo, to which Respondent James Feijo is also a signatory. (CX 48; P. Feijo, HOJ Tr. 276).
66. Respondent James Feijo has frequently used the American Express Business Gold Card to eat at restaurants, play golf, and buy cigars and other retail items. Patricia Feijo also frequently used the card at grocery stores, drug stores, book stores, gas stations, clothing and shoe stores, and home furnishing stores, such as Bed, Bath & Beyond, and Linens & Things. (CX 48; J. Feijo, HOJ Tr. 151-60; P. Feijo, HOJ Tr. 276).
67. Approximately \$9,936 was charged for golf expenses on DCO's American Express Business Gold Card

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during the period from December 2005 through March 2009. (CX 48 at FTC-DCO 2985, 2995, 3003, 3004, 3011, 3039, 3049, 3081, 3082, 3091, 3092, 3103, 3104, 3111, 3113, 3119, 3129, 3171, 3174, 3181, 3182, 3189, 3208B, 3208C, 3208M, 3210, 3237, 3264, 3297).

68. Approximately \$14,024 was charged for restaurant expenses on DCO's American Express Business Gold Card during the period from December 2005 through March 2009. (CX 48 at FTC-DCO 2966, 2975, 2985, 2995, 2996, 3003, 3011, 3012, 3019, 3027, 3028, 3039, 3040, 3049, 3057, 3058, 3059, 3067, 3068, 3081, 3091, 3103, 3113, 3129, 3137, 3181, 3182, 3197, 3208A, 3208B, 3208K, 3208M, 3209, 3210, 3217, 3218, 3225, 3235, 3238, 3245, 3251, 3255, 3264, 3265, 3274, 3275, 3284).
69. Approximately \$28,582 was charged for automobile expenses on DCO's American Express Business Gold Card during the period from December 2005 through March 2009. (CX 48 at FTC-DCO 2966, 2975, 3003, 3011, 3019, 3027, 3039, 3049, 3050, 3057, 3065, 3068, 3082, 3103, 3105, 3113, 3127, 3129, 3165, 3173, 3181, 3189, 3208B, 3231, 3238, 3245, 3264, 3265, 3271, 3273, 3284).
70. Approximately \$1,077 was charged for cigar expenses on DCO's American Express Business Gold Card during the period from December 2005 through March 2009. (CX 48 at FTC-DCO 3113, 3121, 3181, 3197, 3208M, 3245, 3264, 3273).
71. Respondent DCO also has credit cards with Bank of America and Chase Bank. (J. Feijo, HOJ Tr. 161).
72. Approximately \$51,087 was electronically transferred from Citizens Bank checking accounts of DCO and related entities to Bank of America during the period from February 2007 through March 2009. (CX 49 at

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FTC-DCO 3352, 3359, 3363, 3367, 3674, 3680, 3685, 3701, 3706, 3726, 3733, 3741, 3750).

73. Approximately \$30,277 was paid by check from DCO's Creation Science Funding account with Citizens Bank to Bank of America during the period from January 2007 through April 2007. (CX 49 at FTC-DCO 3448, 3456, 3470, 3472, 3498).
74. Approximately \$25,837 was paid by check from DCO's Creation Science Funding account with Citizens Bank to Chase Card Services during the period from January 2007 through April 2007. (CX 49 at FTC-DCO 3441, 3464, 3470, 3493, 3497).
75. Respondent James Feijo does not retain receipts for his credit card purchases and credit card payments are automatically debited. (J. Feijo, HOJ Tr. 163-64).
76. Respondent James Feijo does not have his own individual bank account. (J. Feijo, HOJ Tr. 208).
77. Respondent James Feijo pays his daughter Jill Feijo \$700 per week for her work at DCO. (J. Feijo, HOJ Tr. 204-05).
78. Although he paid individual income taxes prior to DCO's incorporation as a corporation sole, Respondent James Feijo has since stopped paying individual income taxes. (J. Feijo, HOJ Tr. 86).
79. DCO does not pay any state sales tax based on the sale of DCO products through the DCO Website. (J. Feijo, HOJ Tr. 210).

### **C. Respondents' Sales in Commerce**

#### **1. Respondents' sales of the Challenged Products**

80. Respondents' sales of the Challenged Products constitute 20 or 30 percent of the approximately \$2



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million in annual sales of DCO products for the years 2006, 2007, and 2008. (CX 44; R 15 (J. Feijo, Dep. at 206-07, 212); J. Feijo, HOJ Tr. 109, 223-24, 315).

81. Over a thousand people have purchased the Challenged Products. (R 16 (P. Feijo, Dep. at 57)).
82. Anyone can buy and use the Challenged Products, including people who do not belong to the DCO religious community and people who do not believe in God. (Marino, HOJ Tr. 55; P. Feijo, Tr. 410-11).
83. Respondents' acquisition costs for the products they sell is 30 percent of the price Respondents charge for products such as 7 Herb Formula. (R 15 (J. Feijo, Dep. at 232); F. 127-29, 140-42, 144-46).
84. Respondents sell the Challenged Products through publications, a call center, over the Internet, and through stores and distributors. (F. 86, 89-92, 94, 97, 99, 104, 116-17, 163, 174).

**a. DCO's publications**

85. James and Patricia Feijo claim to have created a combined spiritual and scientific approach that maintains the balance of bodily systems which James Feijo named BioMolecular Nutrition. (CX 21).
86. Respondents created a publication entitled "BioGuide: The BioMolecular Nutrition Guide to Natural Health 3" ("BioGuide" or "BioGuide 3"). BioGuide 3 is the third printing and the current version that DCO uses. (CX 21; R 16 (P. Feijo, Dep. at 117); R 15 (J. Feijo, Dep. at 243); J. Feijo, Tr. 452-53; P. Feijo, Tr. 388).
87. According to the BioGuide, "[t]here are two aspects of BioMolecular Nutrition, the spiritual and the physical." (CX 21 at FTC-DCO 0307). "The principles of BioMolecular Nutrition were those missing principles needed to bind together those of the

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nutritionists and the biochemists.” (CX 21 at FTC-DCO 0309).

88. The BioGuide states that “[b]ecause of BioMolecular nutritional products developed . . . [the Feijos have] been able to support other naturopathic disciplines – chiropractic, acupuncture, herbology, and homeopathy – and using the principles of BioMolecular Nutrition has allowed many natural health practitioners to be complete.” (CX 21 at FTC-DCO 0308).
89. The BioGuide contains descriptions of DCO products, testimonies from people who have used DCO products and doctors who recommend the products, as well as Biblical passages. (CX 21; R 16 (P. Feijo, Dep. at 117); J. Feijo, Tr. 452-53).
90. The BioGuide prominently displays the toll-free number for DCO’s call center and the danielchapterone.com web address. (CX 21).
91. Respondents also created the BioMolecular Nutrition Product Catalog, which lists and describes DCO products and states, “Call Toll FREE 1-800-504-5511 or shop online at www.danielchapterone.com.” (CX 17).
92. There is no indication in the BioMolecular Nutrition Product Catalog that the price listed beside the products displayed is for a donation. (R 15 (J. Feijo, Dep. at 158); R 16 (P. Feijo, Dep. at 76-77); J. Feijo, HOJ Tr. 140).
93. There is no mention of a DCO ministry in the BioMolecular Nutrition Product Catalog. (R 15 (J. Feijo, Dep. at 161)).
94. Respondents produced a newsletter, “How to Fight Cancer is Your Choice!!!” (hereinafter “Cancer Newsletter”). In the Cancer Newsletter, Respondents

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instruct consumers to call their toll-free number to order their products. (CX 23; CX 24).

95. The Cancer Newsletter, a one-time brochure reprinted once with minor updates, provides testimonials from users of DCO products. (J. Feijo, Tr. 452).
96. The Cancer Newsletter is available online on DCO's Website. (CX 13 at FTC-DCO 0013; CX 13A at FTC-DCO 2828A).
97. Respondents produced a publication, "The Most Simple Guide to the Most Difficult Diseases: The Doctors' How-To Quick Reference Guide" (hereinafter "The Most Simple Guide"). (CX 20).
98. "The Most Simple Guide" can be accessed by anyone, not only doctors, on DCO's Website. (P. Feijo, Tr. 395; J. Feijo, Tr. 453-55).

**b. Call center sales**

99. Respondent DCO has a toll-free number and a call center for consumers to purchase DCO products. (R 16 (P. Feijo, Dep. at 67); J. Feijo, HOJ Tr. 212; P. Feijo, HOJ Tr. 273-74; J. Feijo, HOJ Tr. 168, 204, 211-12).
100. Respondent James Feijo created, managed, and maintained the toll-free telephone number, designed so that consumers can order DCO products and discuss their physical and spiritual well-being. (CX 39 (Respondents' Answer to Interrogatory No. 33); P. Feijo, Tr. 357-58).
101. Respondent James Feijo's daughter, Jill Feijo, has supervised Respondent DCO's order center for the past nine years and has taken telephone orders. (CX 39 (Respondents' Answer to Interrogatory No. 33); J. Feijo, HOJ Tr. 204).

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102. Consumers learn of DCO's toll-free number from the BioGuide, DCO Website, and Respondents' radio program, "Daniel Chapter One HealthWatch." (P. Feijo, HOJ Tr. 273-74; CX 21; CX 29 at FTC-DCO 0451).

**c. Internet sales**

103. Respondents operate the DCO Website (www.danielchapterone.com). (Answer ¶ 5; R 15 (J. Feijo, Dep. at 62)). DCO also operates the websites www.dc1pages.com, www.dc1store.com, www.7herbformula.com, and www.gdu2000.com (collectively, the "Websites"). (CX 39 (Respondents' Answer to Interrogatory No. 11); R 15 (J. Feijo, Dep. at 62, 232-33); J. Feijo, Tr. 459).
104. DCO accepts consumers' orders over the Internet through the Websites. (P. Feijo, Tr. 397; Marino, HOJ Tr. 54).
105. DCO's Website contains a tab inviting consumers to shop at DCO's "On-Line Store." (CX 12-14).
106. DCO's Website contains an icon inviting consumers to "Buy Now." (CX 12-14; J. Feijo, HOJ Tr. 144).
107. On their website www.dc1store.com, Respondents state: "For Information on Special offers for *purchasing* multiple bottles of 7-Herb call 1-800-504-5511 between 9-6 EST Mon.-Fri." (CX 17 at FTC-DCO 0084 (emphasis added)).

**d. Radio broadcasts**

108. The "Daniel Chapter One HealthWatch" radio program is broadcast on the "Accent Radio Network" and is carried by what was characterized as an eclectic group of AM radio stations. (CX 32; R 15 (J. Feijo, Dep. at 235); Harrison, Tr. 309-10).

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109. Respondent James Feijo and his wife, Patricia Feijo, co-host the Daniel Chapter One radio program for two hours a day, Monday through Friday. (CX 39 (Respondents' Answer to Interrogatory No. 5); R 15 (J. Feijo, Dep. at 16-17); Harrison, Tr. 303; P. Feijo, Tr. 324; J. Feijo, Tr. 450-51).
110. James and Patricia Feijo have counseled individuals who have called into the Daniel Chapter One radio program and who have identified themselves as cancer patients about taking the Challenged Products. (R 16 (P. Feijo, Dep. at 92-97); P. Feijo, Tr. 360-64).
111. On their radio show, Respondents provide listeners with the toll-free number that people can call to purchase the Challenged Products. (P. Feijo, HOJ Tr. 272-74).

**e. Fees and promotions**

112. DCO's shipping and handling fees for its products are \$20.95. (R 15 (J. Feijo, Dep. at 152-53)).
113. DCO offers coupons to consumers for their next online store order. (R 15 (J. Feijo, Dep. at 154); Marino, HOJ Tr. 59; J. Feijo, HOJ Tr. 149-50).
114. Respondents run sales promotions from time to time to give people an opportunity to purchase products at a lower rate. (R 15 (J. Feijo, Dep. at 154)). For example, consumers can buy multiple bottles and get a bottle free. (R 15 (J. Feijo, Dep. at 232)).
115. Consumers can join DCO's Bucket-A-Month Club to obtain volume discounts on DCO products. (CX 29 at FTC-DCO 0430; J. Feijo, HOJ Tr. 140-41).

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**f. Stores and distributors**

116. A number of stores sell DCO products, including stores in Georgia and a store in Pennsylvania. (R 16 (P. Feijo, Dep. at 72)).
117. Respondents use distributors in various states for DCO products. (J. Feijo, HOJ Tr. 132-35). Respondents' distributors have included stores such as Nature's Pharmacy in Altoona, Florida; Herbs Shop Unlimited in Adel, Georgia; The Poppyseed in Peculiar, Missouri; Herbal Connection in Lake Park, Georgia; Beehive Natural Foods in Poplar Bluff, Missouri; Discount Nutrition in Monroeville, Pennsylvania; and Organic Pride in Plant City, Florida. (J. Feijo, HOJ Tr. 131-32).
118. Respondents call some distributors of DCO products "silver-line carriers" or "gold-line carriers." (J. Feijo, HOJ Tr. 125). "Gold-line carriers" carry a broader range of products than "silver-line carriers." (J. Feijo, HOJ Tr. 126).
119. Respondents' distributors have also included chiropractic centers. (J. Feijo, HOJ Tr. 134-35).
120. Doctors and stores that carry DCO's product line get the products at prices below their listed prices because they are going to resell the products. (R 16 (P. Feijo, Dep. at 71)).
121. One doctor who is a distributor of DCO products places about a 40 percent markup on the DCO products he sells. (Mink, HOJ Tr. 287-88; J. Feijo, HOJ Tr. 311).
122. Respondents have created a brochure entitled "The Truth Will Set You Free!" for the stores and doctors' offices that carry DCO products. (CX 22; J. Feijo, HOJ Tr. 135). Among the benefits listed in the brochure are financial rewards such as "boost[ed]"

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sales” and “earnings potential.” (CX 22; J. Feijo, HOJ Tr. 136-37). The brochure also states that Respondent DCO “is the ONLY nutrition company where the owners personally tell thousands of people to visit your office or store.” (CX 22).

123. On their webpage [www.dc1store.com](http://www.dc1store.com), Respondents promote an affiliate program, stating:

**Welcome to the DC1 Affiliate Program!** Our program is free to join, it’s easy to sign-up and requires no technical knowledge. Affiliate programs are common throughout the Internet and offer website owners a means of *profiting* from their websites. Affiliates *generate sales* for commercial websites and in return receive a percentage of the value of those sales. **How Does It Work?** When you join the DC1 Affiliate Program, you will be supplied with a range of banners and textual links that you place within your site. When a user clicks on one of your links to the DC1 Affiliate Program, their activity will be tracked by our affiliate software. You will earn a commission based on your commission type. **Real-Time Statistics and Reporting!** Login 24 hours a day to check your sales, traffic, account balance and see how your banners are performing. You can even test conversion performance by creating your own custom links! **Affiliate Program Details.** Pay-Per-Sale: 10% of all sales you deliver. \$100.00 USD - Minimum balance required . . . . Payments are made on the 1<sup>st</sup> of each month, for the previous month.”

(CX 29 at FTC-DCO 0461-0462 (emphasis in bold in original; emphasis in italics added)).

124. An entity does not have to be a religious ministry to participate in the DC1 Affiliate Program. (J. Feijo, HOJ Tr. 114).

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**2. Sales information for each of the Challenged Products**

125. There has been only one version of each of the Challenged Products and the information relating to the identity of each ingredient and the amount of each ingredient contained on the labels of the Challenged Products. (CX 39 Respondents' Answer to Interrogatory No. 17).
- a. BioShark**
126. BioShark is a product that contains, among other ingredients, shark cartilage. (Answer ¶ 6). Each BioShark product label directs users to take two to three capsules three times a day or as directed by a physician or by a BioMolecular Nutrition health care professional. (Answer ¶ 6; CX 17 at FTC-DCO 0065).
127. Respondents offer one bottle of BioShark for \$30.95 (for 100 of the 800 mg capsules) and another bottle of BioShark for \$65.95 (for 300 of the 800 mg capsules). (Answer ¶ 6).
128. Respondents pay Universal Nutrition \$3.15 per unit for the 100 capsule bottle of BioShark and \$8.75 per unit for the 300 capsule bottle of BioShark. (Deposition of Claudia Petra Bauhoffer-Kinney, Jan. 15, 2009 (hereinafter referred to as R 17 (Bauhoffer-Kinney, Dep. at 44)).
129. During 2008, Respondents paid Universal Nutrition approximately \$1,437 to manufacture 479 units of the 100 capsule bottle of BioShark and approximately \$6,256 to manufacture 782 units of the 300 capsule bottle of BioShark. (R 17 (Bauhoffer-Kinney, Dep. at 44-45)).
130. Universal Nutrition has its own brand of products and is also a private-label manufacturer. (R 17 (Bauhoffer-Kinney, Dep. at 17)).



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131. DCO falls under the private-label side of Universal Nutrition. (R 17 (Bauhoffer-Kinney, Dep. at 17)).
132. Universal Nutrition makes approximately thirty-five to forty products for DCO, including BioShark, GDU, and BioMixx. (R 17 (Bauhoffer-Kinney, Dep. at 20-21)).
133. Universal Nutrition started manufacturing BioShark for Respondents approximately eight to ten years ago. (R 17 (Bauhoffer-Kinney, Dep. at 42-43)).

**b. 7 Herb Formula**

134. 7 Herb Formula is a liquid tea concentrate product that contains, among other ingredients, distilled water, cat's claw, burdock root, Siberian ginseng, sheep sorrel, slippery elm, watercress, and Turkey rhubarb root. The 7 Herb Formula is an essiac formula to which Respondents added cat's claw and Siberian ginseng. (Answer ¶ 8; J. Feijo, HOJ Tr. 146-48; J. Feijo, Tr. 439).
135. Respondents' product label directs users to take one to two ounces of 7 Herb Formula with two to four ounces of hot or cold, filtered or distilled water. The label further directs users to take 7 Herb Formula twice daily or as directed by a BioMolecular Nutrition health care professional. (Answer ¶ 8; CX 17 at FTC-DCO 0064).
136. Respondents offer one thirty-two ounce bottle of 7 Herb Formula for \$70.95. (Answer ¶ 8).
137. On their websites [www.danielchapterone.com](http://www.danielchapterone.com) and [www.dclpages.com](http://www.dclpages.com), Respondents state regarding 7 Herb Formula: "I think it costs too much: Essiac formulas normally retail for \$45 to \$69 per bottle. If you compare that to the cost of a hospital stay and drug treatment, this is cheap! Daniel Chapter One's 7 Herb Formula is equally priced with most other brands

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but with ours you get a great deal more. Remember you are not only getting 32 ounces per bottle, when some of the other brands are only 16 ounces; you are also getting 2 more expensive herbs (Cat's Claw and Siberian Ginseng). We use 3 times the herbs and prepare each individually using a double water filtering process. If that is the case you must at least double the price they are asking to get equal price comparison." (CX 18 at FTC-DCO 0159-60).

138. On the DCO Website, Respondents state: "Daniel Chapter One is the first and only company to add Siberian Ginseng to the formula." (CX 30).

**c. GDU**

139. GDU is a product that contains, among other ingredients, bromelain, turmeric, quercetin, feverfew, and boron. (Answer ¶ 10). "GDU" stands for "gelatin digesting units." (J. Feijo, Tr. 442). Respondents' GDU product label directs users to take three to six capsules two to four times per day or as directed by a physician or by a BioMolecular Nutrition health care professional. (Answer ¶ 10; CX 17 at FTC-DCO 0068).
140. Respondents offer GDU for \$29.95 (for 120 capsules) and \$45.95 (for 300 capsules). (Answer ¶ 10).
141. Respondents pay Universal Nutrition \$3.28 per unit for the 120 tablet bottle of GDU and \$7.07 per unit for the 300 tablet bottle of GDU. (R 17 (Bauhoffer-Kinney, Dep. at 34-35)).
142. During 2008, Respondents paid Universal Nutrition approximately \$5,127 to manufacture 1,709 units of the 120 tablet bottle of GDU and approximately \$52,661 to manufacture 7,523 units of the 300 tablet bottle of GDU. (R 17 (Bauhoffer-Kinney, Dep. at 34-35)).

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**d. BioMixx**

143. BioMixx is a product that contains, among other ingredients, goldenseal, echinacea, and ginseng. (Answer ¶ 12). Respondents' product label for BioMixx directs users to take five scoops daily. (Answer ¶ 12; CX 18 at FTC-DCO 0127).
144. Respondents offer BioMixx for \$40.95 (for 3 pounds of powder) and \$22.95 (for one pound of powder). (Answer ¶ 12).
145. Respondents pay Universal Nutrition \$11.50 per unit for the three pound bottle of BioMixx. (R 17 (Bauhoffer-Kinney, Dep. at 46)).
146. During 2008, Respondents paid Universal Nutrition approximately \$8,778 to manufacture 798 units of the three pound bottle of BioMixx. (R 17 (Bauhoffer-Kinney, Dep. at 46)).

**3. Purchase of the Challenged Products by the FTC investigator**

147. On January 3, 2008, FTC investigator Michael Marino ("Marino") purchased the Challenged Products from the DCO Website. (CX 10; Marino, HOJ Tr. 53-55, 62-67).
148. At the time of Marino's purchase, each of the Challenged Products was displayed on the DCO Website with a picture of the product, a short description of the product, and a corresponding price. (Marino, HOJ Tr. 54).
149. Nothing on the DCO Website indicated to Marino that the Challenged Products could be obtained in exchange for a donation, could be purchased at a reduced price, or could be received for free. (Marino, HOJ Tr. 54-55).

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150. Nothing on the DCO Website indicated to Marino that a consumer would have to be part of any religious community in order to purchase the Challenged Products. (Marino, HOJ Tr. 55).
151. Prior to making the purchase of the Challenged Products, Marino created an undercover e-mail account to confirm and monitor the progress of the purchase. Marino received four e-mails from DCO relating to the purchase of the Challenged Products. (CX 33; Marino, HOJ Tr. 56-59).
152. One of the e-mails Marino received from DCO, which was sent the day after he purchased the Challenged Products, stated: "Thank you for your purchase on our online store. . . . We appreciate your business with us," and offered a ten percent discount on a subsequent purchase. (CX 33; Marino, HOJ Tr. 59).
153. On or about January 3, 2008, Marino purchased the Challenged Products, and received all four of the Challenged Products thereafter. (CX 33, 34; Marino, HOJ Tr. 55-60).
154. Included in the shipment of the DCO Products ordered by Marino were the following: "BioGuide 3: The BioMolecular Nutrition Guide to Natural Health 3," "BioMolecular Nutrition Product Catalog," a blank purchase-order form, and an invoice form. (CX 34; Marino, HOJ Tr. 55-56, 61).
155. According to the purchase-order form and invoice, the shipment to Marino originated from Daniel Chapter One, 1028 E. Main Road, PO Box 223, Portsmouth, RI 02871, and was sent to an FTC undercover address in a state in the United States other than Rhode Island. (CX 34; Marino, HOJ Tr. 60).
156. The shipment of the Challenged Products did not contain any documents indicating that the purchase was a donation or thanking the purchaser for making a

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donation to Daniel Chapter One. (CX 34; Marino, HOJ Tr. 60).

157. According to Commission records, the amount charged to the undercover credit card used for the purchase of the Challenged Products was \$175.75. The Commission records indicate that this charge was made by "DANIEL CHAPTER ONE." (CX 34; Marino, HOJ Tr. 58, 60).

**D. DCO's Advertisements**

158. Information about the Challenged Products is disseminated to the public through a variety of media, the Internet, written publications, and a radio show. (F. 161, 163-64, 169-70, 172, 175-77).
159. DCO has spent money to have its websites and written publications created. (J. Feijo, HOJ Tr. 139).
160. DCO has spent money for cable advertising services. (CX 48 at FTC-DCO 3058).
161. The Challenged Products are advertised on the websites [www.danielchapterone.com](http://www.danielchapterone.com), [www.dc1pages.com](http://www.dc1pages.com), [www.dc1store.com](http://www.dc1store.com), [www.7herbformula.com](http://www.7herbformula.com), and [www.gdu2000.com](http://www.gdu2000.com). (CX 39 (Respondents' Answer to Interrogatory No. 11); R 15 (J. Feijo, Dep. at 62, 232-33); J. Feijo, Tr. 459).
162. Any consumer can be directed to the DCO Website by entering the term "cancer" in a Google search. (R 15 (J. Feijo, Dep. at 136)).
163. The DCO publication, "The Most Simple Guide," promotes particular DCO products for particular medical conditions, and each alternating page of this publication sets forth the DCO Website and DCO's toll-free number for telephone orders. (CX 20; J. Feijo, Tr. 453-54). This guide is available to the public to order. (CX 23 at FTC-DCO 0404; CX 24 at

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- FTC-DCO 0420). The guide remains available on the DCO Website where anyone can download it. (CX 29 at FTC-DCO 0430; P. Feijo, Tr. 395). There has never been a charge to obtain the guide. (P. Feijo, Tr. 382-83).
164. DCO also promotes the Challenged Products through its publication BioGuide 3 (“BioGuide”). (CX 21; CX 39 (Respondents’ Answer to Interrogatory No. 11); F. 86, 89- 90).
  165. James Feijo was responsible for putting together the BioGuide. (R 15 (J. Feijo, Dep. at 243)).
  166. Patricia Feijo wrote the content of the BioGuide. (R 16 (P. Feijo, Dep. at 20)).
  167. The BioGuide frequently and prominently refers readers to the DCO Website and DCO’s toll-free ordering number. (*E.g.*, CX 21 at FTC-DCO 0309-11, 0313).
  168. The BioGuide is prominently promoted in the Cancer Newsletter. (CX 23 at FTC-DCO 0397; CX 24 at FTC-DCO 0413 (noting the BioGuide’s “Updated Products, Prices, Testimonies! . . . Only \$9.95.”).
  169. The BioGuide is available as a download from the DCO Website. (CX 29 at FTC-DCO 0430). There has never been a charge to obtain the BioGuide. (P. Feijo, Tr. 389).
  170. DCO promotes the Challenged Products through its publication, the Cancer Newsletter. (CX 23; CX 24).
  171. Although there is a price displayed for the Cancer Newsletter, the Cancer Newsletter was given away without charge. (P. Feijo, Tr. 387).

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172. The Cancer Newsletter is available on-line through the DCO Website. (CX 13 at FTC-DCO 0013; CX 13A at FTC-DCO 2828A).
173. The Cancer Newsletter was written primarily by Patricia Feijo. (CX 39 (Respondents' Answer to Interrogatory No. 8); P. Feijo, Tr. 395-96).
174. In the Cancer Newsletter, the toll-free order number and the DCO Website address appear on every other page and on the final page. (CX 23 at FTC-DCO 0392, 0394, 0396, 0398, 0400, 0402, 0404, 0405; CX 24 at FTC-DCO 0407, 0409, 0411, 0413, 0415, 0417, 0419, 0421).
175. The Cancer Newsletter promotes obtaining "The Most Simple Guide" and listening to DCO's radio program. (CX 23 at FTC-DCO 0403-05; CX 24 at FTC-DCO 0419-21).
176. Information about the Challenged Products is disseminated through the radio program, "Daniel Chapter One HealthWatch." (CX 39 (Respondents' Answer to Interrogatory No. 11); P. Feijo, Tr. 325; F. 108-09, 111).
177. "The Most Simple Guide," the BioGuide, and the Cancer Newsletter all promote DCO's radio show. (CX 20 at FTC-DCO 2824; CX 21 at FTC-DCO 0379, CX 23 at FTC-DCO 0405; CX 24 at FTC-DCO 0421). The DCO Website has a link to a webpage for "Talk Radio." (CX 12; CX 13, CX 14).
178. James and Patricia Feijo are responsible for the information provided in the BioGuide, the DCO Website, the Cancer Newsletter, the "Most Simple Guide," and the radio program, "Daniel Chapter One HealthWatch." (R 15 (J. Feijo, Dep. at 62); J. Feijo, Tr. 452-53; P. Feijo, Tr. 380, 395-96; CX 39 (Respondents' Answer to Interrogatory No. 11-12).

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**E. DCO's Advertising Claims****1. The Challenged Products collectively****a. Website advertising**

179. CX 13 is a printout from a webpage from the DCO Website, entitled "Cancer News." This printout is Exhibit B to the Complaint. CX 13A is another depiction of the same product webpage as that depicted in CX 13, but captured so as to view the entire width of the page. (CX 13; CX 13A).
180. The DCO webpage, Cancer News, contains a picture and text advertising 7 Herb Formula. Directly below the 7 Herb Formula advertisement, the webpage states the following regarding the Challenged Products as a group:

If you suffer from any type of cancer, Daniel Chapter One suggests taking this products [sic]:  
7\*Herb Formula <sup>TM</sup> 2 ounces in juice or water  
(minimum intake) 2 times daily  
Bio\*Shark <sup>TM</sup> . . .  
BioMixx <sup>TM</sup> . . .  
GDU Caps <sup>TM</sup> . . .

**The above information is taken from The Most Simple Guide to the most difficult diseases, the doctors' how-to quick reference guide.**

For more information call Jim and Trish during the Radio Show.

Immediately following this text is a prominent picture of bottles of BioMixx, 7 Herb Formula, Bio\*Shark, and GDU, and adjacent to that, is a statement in bold: "**Daniel Chapter One's Cancer solutions.**" Under the picture, the text states:



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**To Buy the products click here****How to fight cancer is your choice!**

(CX 13 at FTC-DCO 0013-14; CX 13A) (emphasis in original).

181. Immediately beneath “How to fight cancer is your choice!” is a quote from a book entitled “Back to Eden,” which includes the book author’s statement that his “cure for cancer” includes herbs. (CX 13 at FTC-DCO 0014; CX 13A at FTC-DCO 2828B).
182. The “Back to Eden” quote referred to in F.181 is followed by a series of testimonials in bold headlines including: “**Lump is gone without dangerous surgery!**,” “**7 Herb Formula battles cancer,**” “**7 Herb eliminates pre-cancerous growth,**” “**Ancient cancer remedy is improved upon,**” “**Doctors gave up on Michigan man,**” “**Pre-Cancerous Growths & Acid and Heartburn,**” and “**Breast Mass.**” (CX 13 at FTC-DCO 0014-24) (emphasis in original).
183. The testimonials on the Cancer News webpage claim that the Challenged Products, individually or in combination with each other and/or other DCO products, are effective in the prevention, treatment, or cure of cancer. (CX 13; CX 13A; F. 184-85).
184. The Cancer News webpage includes the following testimonial, accompanied by a picture of a smiling woman:

**7 Herb Formula battles cancer**

*Tracey was given no hope!*

The doctors had pretty much given up on Tracey. She had leukemia and tumors on the brain, behind the heart and on her liver.

...

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I had contracted leukemia and had three inoperable tumors. When I decided not to do chemotherapy or radiation, my father sent me Bio\*Mixx and 7 Herb Formula. Each day as I took it and got it into my system more and more, the better I felt. Then I added Garlic Pur, Siberian Ginseng, and Bio\*Shark. I am now in complete remission. The cancer cell count has dropped, the doctors tell me. I had a tumor just above the brain stem in my brain that has completely disappeared. The tumor on my liver is shrinking and the tumor behind my heart has shrunk over 50%. . . .

(CX 13 at FTC-DCO 0016) (emphasis in original).

185. Another testimonial on the Cancer News webpage states:

**Pre-Cancerous Growths & Acid and Heartburn**

And the most amazing thing was when I had my upper G.I. in September, and the X-ray showed nothing there. . . . [a]fter using 7 Herb and other DC1 products for precancerous growths and for acid & heartburn.

(CX 13 at FTC-DCO 0023) (emphasis in original).

186. The testimonials referred to in F. 184 and 185, as well as other testimonials, are hyperlinked to Cancer News webpage, below the bold-type message: **“Page shortcuts to testimonials about cancer.”** (CX 13 at FTC-DCO 0013) (emphasis in original).
187. At the side of the Cancer News webpage is the bold-type message: **“Listen to our audio testimonials about cancer,”** with bulleted headlines, including “Fred - Breast cancer,” “Marie - Dad’s throat tumor cured - 7 Herb and more,” “Nancy - Cured Breast Cancer in 3 months - 7 Herb and GDU,” “Robert - Prostate cured from DC1 products,” and “Sharon -

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Mom's breast tumor Healed." (CX 13 (emphasis in original); CX 13A).

188. On the side of the Cancer News webpage, there is a link to the Cancer Newsletter. (CX 13; CX 13A).
189. The overall net impression from the www.danielchapterone.com website advertising described in F. 179-88 is that the Challenged Products, individually and/or collectively, prevent, treat, or cure cancer. Viewing the Cancer News webpage as a whole, and the interaction of the words, pictures, and testimonials, the claim that the Challenged Products prevent, treat, or cure cancer is so strongly implied as to be virtually express.
190. The Challenged Products are promoted as a group on the website www.dc1pages.com, where the following text appears:

**Supporting Products**

To enhance 7 Herb Formula's healing qualities Daniel Chapter One advises to get familiar with the supporting products below . . . .

Immediately below the text is a photograph of bottles of each of the Challenged Products. Adjacent to the picture, in bold print, the following text appears:

**CANCER  
TREATMENT:**

**7 Herb Formula  
Bio\*Shark  
BioMixx  
GDU Caps**

**also**

**Ezekiel Oil**

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**topically**

(CX 18 at FTC-DCO 0190) (emphasis in original).

191. The overall net impression from the www.dc1pages.com content described in F. 190 is that the Challenged Products, individually and/or collectively, are effective in the treatment of cancer.

**b. “The Most Simple Guide to the Most Difficult Diseases”**

192. The Challenged Products are promoted collectively for cancer in the DCO publication “The Most Simple Guide to the Most Difficult Diseases: The Doctors’ How-To Quick Reference Guide.” (CX 20). The advertisements in this publication are organized by disease types. (CX 20 at FTC-DCO 2724). On the page for cancer, the following appears:

**CANCER**

*All types of Cancer*

**7\*Herb Formula™**

2 ounces in juice or water  
(minimum intake)  
2 times daily

**Bio\*Shark™\*\*\*\*(for tumors only)**

2 - 4 capsules  
3 times daily with meals

**BioMixx™ (Boosts immune system)**

4 - 5 scoops in soy milk  
2 times daily

**GDU Caps™**

3 - 6 capsules  
3 times daily; ½ hr.  
BEFORE meals

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Next to each product name is a “sun” symbol. The page states: “This sun [symbol] placed before a product indicates the most essential products for the above condition.” The only “condition” referred to on that page is cancer. (CX 20 at FTC-DCO 2739) (emphasis in original).

193. The overall net impression from the “cancer” page in the “The Most Simple Guide” described in F. 192 is that the Challenged Products, individually and/or collectively, treat or cure cancer. Viewing the Guide as a whole, and the interaction of the words, pictures, and testimonials, the claim that the Challenged Products prevent, treat, or cure cancer is so strongly implied as to be virtually express

**c. Cancer Newsletter**

194. The 2002 edition of the DCO Cancer Newsletter is entitled “How to fight cancer is your choice!!!” (CX 23). A two-page excerpt from this newsletter constitutes Exhibit D to the Complaint. (CX 15). There is also a 2004 version of the Cancer Newsletter. (CX 24). Both the 2002 and the 2004 editions are referred to collectively herein as the “Cancer Newsletter.” (CX 23; CX 24).
195. The Cancer Newsletter is “strictly all about the products for cancer.” (R 15 (J. Feijo, Dep. at 143)). The Cancer Newsletter contains descriptions of various DCO products that “a person can choose to use to help them fight cancer.” (P. Feijo, Tr. 399). These products include BioShark, GDU, BioMixx, and 7 Herb Formula. (P. Feijo, Tr. 402-04).
196. The Cancer Newsletter opens with a quote from a book entitled “Back to Eden,” which also appears at the Cancer News webpage of the DCO Website and includes the book author’s statement that his “cure for cancer” includes herbs. (F. 181; CX 23 at FTC-DCO 0391; CX 24 at FTC-DCO 0407).

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197. The Cancer Newsletter includes descriptions of eight DCO products, four of which are the Challenged Products, and one of which, Siberian ginseng, is an ingredient of one of the Challenged Products, 7 Herb Formula. Interspersed with the product descriptions are testimonials, including testimonials asserting the successful use of one or more of the Challenged Products, and/or other DCO products, for cancer. Other than product descriptions, this publication consists almost entirely of testimonials asserting the successful use of DCO products, including the Challenged Products, for cancer. (CX 23; CX 24).
198. Many of the testimonials in the Cancer Newsletter are the same as those appearing on the Cancer News webpage of [www.danielchapterone.com](http://www.danielchapterone.com), including, “Lump Is Gone Without Dangerous Surgery!,” “7 Herb Formula Battles Cancer,” “7 Herb Eliminates Pre-Cancerous Growth,” “Ancient Cancer Remedy Is Improved Upon,” “Doctors Gave Up On Michigan Man,” and “Pre-Cancerous Growths & Acid and Heartburn.” (CX 24 at FTC-DCO 0407; F. 182-85; *see also* CX 17 at FTC-DCO 0100-119 (testimonials)).
199. The testimonials in the Cancer Newsletter include such statements as:
- “I started taking the 7 Herb and that tumor was shrinking . . . there has been massive tumor shrinkage.” (“Doctors gave up on Michigan man,” CX 23 at FTC-DCO 0397; CX 24 at FTC-DCO 0413);
  - “Tricia convinced [them] that [the] best hope was to take natural remedies rather than go under the knife . . . . The growth is gone . . . .” (“Cancer Success a Lie!,” CX 23 at FTC-DCO 0399; CX 24 at FTC-DCO 0415);
  - “With stage 4 cancer and given only 6 months to live, Joe’s dad was not doing well. . . . With 4 ounces of 7\*Herb Formula per day, in just 2 days . . . the family watched dad’s color come back . . . .”

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GDU to the rescue! . . . PSA 3.3, no pain, alive . . .  
.” (“Not too late!,” CX 23 at FTC-DCO 0401; CX  
24 at FTC-DCO 0417).

200. The Cancer Newsletter includes testimonials such as: “Texas businessman has true friends for life,” which describes a bladder cancer sufferer who receives a package from friends that “included 7 Herb Formula, . . . BioShark and Bio\*Mixx,” (CX 23 at FTC-DCO 0400; CX 24 at FTC-DCO 0416); and “Tumor Free!,” which describes a brain cancer sufferer who takes “7 HERB, BIO MIXX, BIO SHARK, and GDU Caps,” and states, “the tumors were completely gone.” (CX 23 at FTC-DCO 0404; CX 24 at FTC-DCO 0420) (emphasis in original).
201. At the bottom of one page in the Cancer Newsletter which includes a description of BioMixx and a testimonial to 7 Herb Formula, BioShark and BioMixx, is the statement, “Visit [www.danielchapterone.com](http://www.danielchapterone.com) TODAY for access to your health questions!” (CX 23 at FTC-DCO 0400; CX 24 at FTC-DCO 0416).
202. The overall net impression from the Cancer Newsletter is that the Challenged Products, individually and/or in combination with one or more of the other Challenged Products, prevent, treat, or cure cancer. (F. 194-201; *see also* F. 182-85, 242 (testimonials)).

**d. BioGuide**

203. Another DCO publication is entitled “BioGuide: The BioMolecular Nutrition Guide to Natural Health 3” (“BioGuide”). Interspersed with the product descriptions in the BioGuide are testimonials, including testimonials asserting the successful use of one or more of the Challenged Products and/or other DCO products, for cancer. Other than product descriptions, this publication consists almost entirely of testimonials about DCO products. (CX 21).

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204. In the BioGuide, on the page immediately following an advertisement for 7 Herb Formula, there is a picture of a smiling woman and the heading, in large, colored, and bold type, “**Cancer Brain Tumor.**” Next to that entry is the colored, italicized text:

*The doctors had pretty much given up on Tracey. She had leukemia and tumors on the brain, behind the heart and on her liver.*

The testimonial continues in pertinent part:

I had contracted leukemia and had three inoperable tumors. When I decided not to do chemotherapy or radiation, my father sent me *BIOMIXX* and *7 HERB FORMULA*. Each day as I took it and got it into my system more and more, the better I felt. Then I added Garlic, Siberian Ginseng, and Bio\*Shark. I am now in complete remission. The cancer cell count has dropped, the doctors tell me. I had a tumor just above the brain stem in my brain that has completely disappeared. The tumor on my liver is shrinking and the tumor behind my heart has shrunk over 50% . . . .

(CX 21 at FTC-DCO 0353 (emphasis in original); *see also* F. 184, 198 (same testimonial appears on DCO Website and in Cancer Newsletter)).

205. In the BioGuide, next to the testimonial entitled “Cancer Brain Tumor,” is a testimonial with the heading, in large, colored, and bold type, “**Lowered PSA,**” which states in part, “My GOOD NEWS is that my PSA went from 6.9 to 6.0 after I finished using my first four bottles of 7 Herb formula, in combination with your Bio C 1000, GDU and other minerals and vitamins. I believe it was your products that did the trick. . . .” (CX 21 at FTC-DCO 0353) (emphasis in original).



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206. The BioGuide contains a testimonial with a heading, in large, colored, and bold type, “**Prostate Cancer**,” adjacent to a picture of a smiling man, which states in pertinent part: “I had beam radiation for prostate cancer. I also took 7 Herb Formula, 6 ounces a day, and BioMixx; I never had a bad day, never felt sick. When my PSA went from 7.6 to 0.5 in the month after I finished radiation, my doctor was surprised. Several months later, it was down to 0.16! 7 Herb Formula is extremely well done - fantastic. I still take 2 ounces of 7 Herb Formula every morning; I plan to stay on that forever! I figure 6 ounces (2 morning, 2 afternoon, 2 evening) did such a good job fighting cancer, 2 ounces is a good prophylaxis!” (CX 21 at FTC-DCO 0330) (emphasis in original).
207. The BioGuide contains a testimonial with a heading, in large, colored, and bold type, “**Renal Cell Cancer**,” next to a picture of a smiling man. The text states in pertinent part:

I had Renal Cell Cancer in my left kidney, with a tumor attached that was slightly larger than a baseball. I went on 7 Herb Formula and GDU . . . . They had found 3 spots in my lungs, although very small, that are being watched. I continue to drink the 7-Herb, and take Bio-Shark, and GDU. I drink ENDO24 everyday because of the spots in my lungs and ribs. To date, my oncologist is amazed that no further activity has occurred. . . .

Then immediately underneath, the following excerpt is repeated in large, bold, green type:

*To date, my oncologist is  
amazed that no further  
activity has occurred.*

(CX 21 at FTC-DCO 0317) (emphasis in original).

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208. The BioGuide contains a testimonial with a heading in large, colored, and bold type, “**Skin Cancer**,” next to a picture of a smiling couple. The text states in pertinent part that natural products “seemed to stabilize the cancer in that it quit spreading and getting larger but none of it decreased in size. After switching to DC1 products – 7-Herb Formula, BioShark, GDU, Garlic Pur, Siberian Ginseng, Ezekiel Oil and BioMixx – it cleared up quickly.” Below this text is a statement in large, bold, colored type:

*I had a thorough medical exam three weeks ago and was told I was completely clear of all types of cancer. The doctor didn't know how I got rid of it.*

(CX 21 at FTC-DCO 0357) (emphasis in original).

209. In the BioGuide, next to a large, bold print caption, “**DOCTORS**,” Dr. Jonas and Marla Marry are quoted as stating: “My son was diagnosed with a tumor on his left temple. The tumor was extremely aggressive. . . . [A] friend suggested we speak to Jim and Trish. They suggested 7-Herb, BioShark and GDU, which we bought and started him on. . . . [I]n the time it took us to find a specialist who eventually told us he could not help either, the tumor had already begun to shrink. . . . Four months later the whole family is using the products, as well as my patients, and you would never know my son had a tumor.” Next to the testimony are photographs of a happy-looking man and small children. (CX 21 at FTC-DCO 0313).
210. In the BioGuide, next to a large, bold print caption, “**NUTRITION CENTERS**,” Don and Janice Feagin, described as proprietors of a Daniel Chapter One center called the “Herbal Gallery,” are quoted as stating: “One lady, who had a history of cancer, used the 7 Herb Formula, GDU & BioShark and was

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blessed to get rid of a large breast tumor.” Next to these statements is a photograph of a smiling couple. (CX 21 at FTC-DCO 0315).

211. The overall net impression from the portions of BioGuide relating to the Challenged Products, described in F. 203-10, is that the Challenged Products, individually and/or in combination with one or more other Challenged Products, prevent, treat, or cure cancer.

**e. The radio show**

212. James and Patricia Feijo are not doctors. (R 16 (P. Feijo, Dep. at 114); P. Feijo, Tr. 404; J. Feijo, Tr. 416).
213. James and Patricia Feijo have given treatment advice to cancer patients who have called in to the radio program. (R 16 (P. Feijo, Dep. at 96-97); J. Feijo, HOJ Tr. 221-22; P. Feijo, Tr. 360-64). This treatment advice has involved advising individuals to obtain and take the Challenged Products. (F. 214, 216-17).
214. During the July 8, 2008 DCO HealthWatch radio program, James Feijo stated the following: “Here’s a testimony from Pastor Wayne Hamm, Henderson, Nevada. He had the Gulf War illness. He was told that he needed surgery and radiation treatment for his cancer, that he developed skin cancer because of the Gulf War, he was exposed out there. He didn’t take it. He decided to use Daniel Chapter One 7 Herb Formula, internally and topically. He also used Ezekiel Oil topically, BioShark and GDU. [His] skin cleared up after a few months in the late 1980s [sic], early ‘99, [he] was told there was no trace of cancer. The FDA does not want us to let you know about this.” (CX 5 at FTC-DCO 0603).
215. During the July 8, 2008 DCO HealthWatch radio program, James Feijo stated that “the FTC, the FDA, the Canadian Government don’t like the fact that

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we've told people about what to do about natural methods of health and healing, especially cancer.” (CX 5 at FTC-DCO 0506).

216. During the July 14, 2008 DCO HealthWatch radio program, Patricia Feijo stated the following: “And while the FTC does not want us saying that anything natural can be used to treat cancer and that nothing certainly can cure cancer, we know that the truth is different than what they want us to say. The truth is God has given us herbs in His creation and nutrients that can heal cancer, even cure cancer.” (CX 8 at FTC-DCO 0612).
217. During the July 14, 2008 DCO HealthWatch radio program, Patricia Feijo advised an individual whose father was diagnosed with colon cancer that she should get her father “on . . . GDU, BioShark and 7 Herb Formula. And if you can get him to, you know, go right now to the website, How To Fight Cancer Is Your Choice, or you can get him a hard copy from our order center, while we have them. It's what the FTC wants to shut us down over and they certainly want us to, you know, crash the website and they want to, you know, burn our material. They don't want us circulating How To Fight Cancer Is Your Choice.” (CX 8 at FTC-DCO 0693-0694).

**f. Summary**

218. The DCO publications and their content referred to in F. 161, 163, 164, 168, 170, 179-88, 190, 192, 194-201, 203-10 are for the purpose of inducing, are likely to induce, and did induce, directly or indirectly, the purchase of the Challenged Products in interstate commerce. (F. 8-9, 80-81, 106, 159-78, 180, 221, 266).
219. The DCO advertising for the Challenged Products collectively, referred to in F. 179-88, 190, 192, 194-

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201, and 203-10, makes claims that relate to consumer health. (F. 189, 191, 193, 202, 211).

**2. BioShark****a. DCO Website**

220. CX 12, a printout of the webpage for BioShark on the DCO Website, is Exhibit A to the Complaint. CX 12A is another depiction of the same product webpage as CX 12, but captured so as to show the entire width of the page. (CX 12; CX 12A).
221. The webpage content begins with a heading in bold type, “**Immune Boosters.**” Underneath that heading is a picture of bottles of BioShark, and under that a phrase in small print, “shark cartilage Supplemental Facts.” Immediately appearing under this small phrase is the following:

**Bio\*Shark: Tumors & Cysts**

Pure skeletal tissue of sharks which provides a protein that inhibits angiogenesis – the formation of new blood vessels. This can stop tumor growth, and halt the progression of eye diseases such as diabetic retinopathy and macular degeneration. Should not be used by pregnant women, or immediately after heart surgery. Shark cartilage may also reduce the pain, inflammation, and joint stiffness of arthritis, alleviate inflammatory bowel disease, and reverse psoriasis. Shark cartilage is an excellent source of Calcium, Phosphorus, amino acids, and a family of carbohydrates called mucopolysaccharides (sulfated Oligosaccharides and Chondroitin Sulfates A and C).

In summary, Bio\*Shark works to reduce inflammation and swelling, affects the formation of new blood vessels and provides essential nutrients for healing.

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Warning: If you are pregnant, nursing a baby, recovering from recent surgery, or have a heart or circulatory condition, consult a health professional before using shark cartilage!

Adjacent to that text is a shopping cart icon with the instruction, “**BUY NOW!**” Immediately below that is the message: “Read our clients [sic] testimonials on BioShark & Tumors,” and a link to a bulleted title “Cancerous Tumor.” At the bottom of the webpage is a link to “Stop Tumor Growth & Cysts Top.” (CX 12; CX 12A) (emphasis in original).

222. The words used to describe BioShark on the DCO Website product webpage, as set forth in F. 221 – “Pure skeletal tissue of sharks which provides a protein that inhibits angiogenesis - the formation of new blood vessels. This can stop tumor growth” – strongly imply that BioShark inhibits tumors.
223. An earlier version of the DCO Website stated “Bio\*Shark Shark Cartilage Stops tumor growth in its tracks.” (CX 18 at FTC-DCO 2032).
224. The overall net impression from the BioShark product webpage on the DCO Website is that BioShark inhibits the growth of tumors, including cancerous tumors. (F. 220-22).
225. The Cancer News webpage on the DCO Website includes the following statements under the heading, in bold type, **Bio\*Shark**<sup>TM</sup>:

In 1983, two researchers at the Massachusetts Institute of Technology published a study showing that shark cartilage contains a substance that significantly inhibits the development of blood vessels that nourish solid tumors, thereby limiting tumor growth. This effect is called anti-angiogenesis.

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Scientists recognize the benefits of starving a tumor to limit its growth. They have been looking for a drug to patent that can do the same thing as shark cartilage. They say the answer to curing cancer lies in preventing angiogenesis – the formation of blood vessels which feed the tumor. These scientists are trying to replicate what God has already presented to us so that they can claim rights to it, patent it and make a lot of money. But man can never lab synthesize a product and make it exactly the same – and all drugs have harmful side effects.

Researchers have also demonstrated that shark cartilage can reduce the inflammation and pain associated with arthritis, alleviate psoriasis and have a positive effect on other degenerative diseases.

(CX 13 at FTC-DCO 0023) (emphasis in original).

226. The DCO webpage, “Cancer News,” which makes representations regarding the Challenged Products as a group (F. 180-88) states: “If you suffer from any type of cancer, Daniel Chapter One suggests” taking several DCO products, including BioShark. Following the text is a prominent picture of a bottle of BioShark, adjacent to which, is a statement in bold type, “**Daniel Chapter One’s Cancer solutions.**” Under the picture, the text states:

**To Buy the products click here**

**How to fight cancer is your choice!**

(CX 13 at FTC-DCO 0013-0014; CX 13A) (emphasis in original).

227. The overall net impression from the information on the Cancer News webpage on the DCO Website set forth in F. 225-26 is that BioShark is effective in the

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treatment or cure of cancer, including cancerous tumors. *See also* F. 189.

**b. BioGuide**

228. The BioGuide includes the following product description for BioShark:

Pure skeletal tissue of sharks which provides a protein that inhibits angiogenesis – the formation of new blood vessels. This can stop tumor growth, and halt the progression of eye diseases such as diabetic retinopathy and macular degeneration. Should not be used by pregnant women, or immediately after heart surgery. Shark cartilage may also reduce the pain, inflammation, and joint stiffness of arthritis, alleviate inflammatory bowel disease, and reverse psoriasis. Shark cartilage is an excellent source of Calcium, Phosphorus, amino acids, and a family of carbohydrates called mucopolysaccharides (sulfated Oligosaccharides and Chondroitin Sulfates A and C).

*In summary, Bio\*Shark works to reduce inflammation and swelling, affects the formation of new blood vessels and provides essential nutrients for healing.*

*Warning: If you are pregnant, nursing a baby, recovering from recent surgery, or have a heart or circulatory condition, consult a health professional before using this product.*

(CX 21 at FTC-DCO 0322) (emphasis in original).

229. The words used to describe BioShark in the BioGuide, as set forth in F. 228 – “Pure skeletal tissue of sharks which provides a protein that inhibits angiogenesis – the formation of new blood vessels. This can stop tumor growth . . .” – strongly imply that BioShark inhibits tumors.



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230. The overall net impression of the portions of the BioGuide regarding BioShark is that BioShark inhibits tumor growth, and is effective in the prevention, treatment, or cure of cancer. (F. 204, 207-11. 228-29).

**c. Cancer Newsletter**

231. The Cancer Newsletter includes a page on BioShark. Adjacent to testimonials with headlines in large, bold, and highlighted type, “**Doctors gave up on Michigan Man,**” and “**Pre-Cancerous Growths & Acid and Heartburn,**” the following product information about BioShark appears:

In 1983, two researchers at the Massachusetts Institute of Technology published a study showing that shark cartilage contains a substance that significantly inhibits the development of blood vessels that nourish solid tumors, thereby limiting tumor growth. This effect is called anti-angiogenesis.

Scientists recognize the benefits of starving a tumor to limit its growth. They have been looking for a drug to patent that can do the same thing as shark cartilage. They say the answer to curing cancer lies in preventing angiogenesis – the formation of blood vessels which feed the tumor. These scientists are trying to replicate what God has already presented to us so that they can claim rights to it, patent it and make a lot of money. But man can never lab synthesize a product and make it exactly the same –and all drugs have harmful side effects.

Researchers have also demonstrated that shark cartilage can reduce the inflammation and pain associated with arthritis, alleviate psoriasis and have a positive effect on other degenerative diseases.

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(CX 23 at FTC-DCO 0397; CX 24 at FTC-DCO 0413)  
(emphasis in original).

232. The overall net impression from the Cancer Newsletter is that BioShark is effective in the treatment or cure of cancer. (F. 195, 197, 200-02, 231).

**d. BioMolecular Nutrition Product Catalog**

233. The BioMolecular Nutrition Product Catalog states the following regarding BioShark: “Shark Cartilage protein inhibits angiogenesis, stops tumor growth, and halts eye diseases. Reduces pain, inflammation, joint stiffness of arthritis, inflammatory bowel disease, and reverses psoriasis. Affects the formation of new blood vessels.” (CX 17 at FTC-DCO 0061).
234. The phrase, “stops tumor growth,” in the BioMolecular Nutrition Product Catalog description for BioShark, and set forth in F. 233, expressly claims that BioShark inhibits tumors. (F. 233).
235. The overall net impression from the portion of the BioMolecular Nutrition Product Catalog relating to BioShark, described in F. 233, is that BioShark inhibits tumor growth.
236. The DCO advertising regarding BioShark referred to in F. 221, 225-26, 228, 231, and 233 makes claims that relate to consumer health. (F. 222, 224, 227, 229-30, 232, 234-35).

**3. 7 Herb Formula**

**a. DCO Website**

237. The 7 Herb Formula webpage on the DCO Website shows a heading of “Herbs.” Underneath that heading, there is a picture of 7 Herb Formula bottles and a close-up of the front of the label. Under the picture is

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the small print phrase “Supplemental Facts” and a product description, which includes the following:

**7 Herb Formula: Detoxify, Acid Reflux & Cancer Help**

7 Herb Formula with Cat’s Claw & Siberian Ginseng: Herbs to purify the blood and promote cell repair. The ingredients in this tea concentrate work to clear skin, cleanse the liver, decrease cell mutation, and fight pathogenic bacteria and tumor formation. Also helps regulate blood sugar, heal ulcers, and stop indigestion and heartburn.

(CX 13 at FTC-DCO 0025; CX 13A at FTC-DCO 2840A) (emphasis in original).

238. The DCO product 7 Herb Formula is featured first on the webpage for Cancer News on the DCO Website. The webpage includes a large picture of bottles of 7 Herb Formula and the following statements:

**7 Herb Formula**

- purifies the blood
- promotes cell repair
- **fights tumor formation**
- fights pathogenic bacteria

to learn more click here

to buy click here

(CX 13 at FTC-DCO 0013; CX 13A at FTC-DCO 2828A) (emphasis in original).

239. Statements in the product description for 7 Herb Formula on the DCO Website Cancer News webpage that 7 Herb Formula “fights tumor formation” and “decrease[s] cell mutation,” as set forth in F. 237-38, clearly imply that 7 Herb Formula inhibits tumors and treats cancer.

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240. The DCO webpage, “Cancer News,” which makes representations regarding the Challenged Products as a group (F. 180-88) states: “If you suffer from any type of cancer, Daniel Chapter One suggests taking” several DCO products, including 7 Herb Formula <sup>TM</sup>. Following the text is a prominent picture of a bottle of 7 Herb Formula, adjacent to which is the statement in bold type, “**Daniel Chapter One’s Cancer solutions.**” Under the picture, the text states:

**To Buy the products click here**

**How to fight cancer is your choice!**

(CX 13 at FTC-DCO 0013-14; CX 13A) (emphasis in original).

241. Adjacent to the 7 Herb Formula picture and text on the Cancer News webpage on the DCO Website are links to the Cancer Newsletter and to “**Page shortcuts to testimonials about cancer,**” with titles such as “7 Herb Formula battles cancer” and “7 Herb eliminates pre-cancerous growth.” (CX 13 at FTC-DCO 0013; CX 13A at FTC-DCO 2828A) (emphasis in original).
242. Many of the testimonials on the Cancer News webpage are devoted to 7 Herb Formula. For example, a testimonial with the headline “**7 Herb eliminates pre-cancerous growth**” states in part, “I had a pre-cancerous ‘wart’ on the back of my leg and drinking 7 Herb Formula made it go away.” (CX 13 at FTC-DCO 0017) (emphasis in original). The testimonial section also includes a passage entitled “**Ancient cancer remedy is improved upon,**” which states in part: “In addition to his sports nutrition line, Jim has developed a line of health supplements and natural remedies. One of the products Jim Feijo is especially proud of is his 7 Herb Formula. . . . Jim improved upon the ancient Ojibway Indian Tribe remedy known as Essiac. . . . As a result of his research, Jim found that by adding Siberian Ginseng and Cat’s Claw to the

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Essiac formula, he could attain remarkable healing results. . . . ‘We feel blessed that God has revealed this formula to us and that we have been able to provide those in need of help an alternative to chemotherapy and radiation,’ Jim Feijo said.” (CX 13 at FTC-DCO 0019-20 (emphasis in original); *see also* F. 184, 185, 187 (7 Herb Formula testimonials)).

243. A testimonial on the Cancer News webpage with the headline “**Doctors gave up on Michigan man**” tells the story of a caller to the Daniel Chapter One HealthWatch radio program who reportedly suffered from cancer. It describes how the man’s brother-in-law heard “Jim and Tricia Feijo talk about the success of 7 Herb Formula in helping people with cancer” on the radio show. Thereafter, according to the testimonial, the man took 7 Herb Formula and experienced “massive tumor shrinkage.” (CX 13 at FTC-DCO 0022-23) (emphasis in original).
244. On the DCO Website, in the question and answer section regarding 7 Herb Formula, the response to the statement, “I want the ORIGINAL ESSIAC formula, not some knock off brand,” includes the statement: “With Jim Feijo’s addition to the [7 Herb] formula, we now have the most effective and potent formula available in the battle against tumors.” (CX 30 at FTC-DCO 0493) (emphasis in original).
245. The overall net impression from the DCO Website advertising for 7 Herb Formula is that 7 Herb Formula inhibits tumors and is effective in the prevention, treatment, or cure of cancer. (F. 180, 182, 184-85, 187, 189, 237-38, 240-44).

**b. dc1pages.com website**

246. On the website [www.dc1pages.com](http://www.dc1pages.com), in the question and answer section regarding 7 Herb Formula, the response to the statement, “I want the ORIGINAL ESSIAC formula, not some knock off brand,” includes

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the statement: “With Jim Feijo’s addition to the [7 Herb] formula, we now have the most effective and potent formula available in the battle against tumors.” (CX 18 at FTC-DCO 0140-42).

247. On the website [www.dclpages.com](http://www.dclpages.com), in the question and answer section regarding 7 Herb Formula, the response to the statement, “I use Brand X,” includes the statement: “The 7 Herb Formula has been used by patients involved in clinical studies in cancer clinics and sold in doctor’s offices around the country.” (CX 18 at FTC-DCO 0157).
248. The overall net impression from the [www.dclpages.com](http://www.dclpages.com) content relating to 7 Herb Formula is that 7 Herb Formula inhibits tumors and is effective in treatment of cancer. (F. 190-91, 246-47).

**c. BioGuide**

249. Three pages in the BioGuide are specifically devoted to promoting 7 Herb Formula. (CX 21 at FTC-DCO 0352-54). Two of those pages contain the following description: “7 Herb Formula with Cat’s Claw & Siberian Ginseng: Herbs to purify the blood and promote cell repair. The ingredients in this tea concentrate work to clear skin, cleanse the liver, decrease cell mutation, and fight pathogenic bacteria and tumor formation. Also helps regulate blood sugar, heal ulcers, and stop indigestion and heartburn.” (CX 21 at FTC-DCO 0352, 0354). In between these two pages is a page devoted to two testimonials, “**Cancer Brain Tumor**” and “**Lowered PSA.**” (CX 21 at FTC-DCO 0353).
250. The overall net impression from the portions of the BioGuide relating to 7 Herb Formula is that 7 Herb Formula inhibits tumors and is effective in the prevention, treatment, or cure of cancer. (F. 204-11, 249).

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**d. Cancer Newsletter**

251. The Cancer Newsletter includes a page specifically devoted to advertising 7 Herb Formula. That page prominently features the 7 Herb Formula name and logo. The text includes the statements: “**How does it work?** Daniel Chapter One’s 7 Herb Formula has been created to purify the blood and to promote cell repair. It fights pathogenic bacteria and tumor formation. The ingredients . . . cleanse the liver and decrease cell mutation.” (CX 23 at FTC-DCO 0402; CX 24 at FTC-DCO 0418).
252. The page immediately following the 7 Herb Formula product description set forth in F. 251 displays a heading in large, highlighted and bold type:

**Heartburn?**  
**Acid Reflux?**  
**Esophageal Cancer?**

Immediately below that heading is italicized text which includes the statement: “The herbs in 7\*Herb Formula . . . improve digestion, gall bladder, and bowel function, cleanse and detoxify the body, heal ulcers anywhere, and may prevent and even heal cancer. Be in control, don’t be a victim!” (CX 23 at FTC-DCO 0403; CX 24 at FTC-DCO 0419) (emphasis in original).

253. The Cancer Newsletter contains testimonials specifically referring to 7 Herb Formula. The headings for these testimonials are each in highlighted, large, bold type and include the following: “**7 Herb Formula battles cancer**” (CX 23 at FTC-DCO 0393; CX 24 at FTC-DCO 0409; *see* F. 184) (emphasis in original); “**7 Herb eliminates pre-cancerous growth**” (CX 23 at FTC-DCO 0394; CX 24 at FTC-DCO 0410) (emphasis in original); and “**7 Herb Formula helps battle cancer**” (CX 23 at FTC-DCO 0398; CX 24 at FTC-DCO 0414, describing a single father diagnosed

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with a prostate tumor who “began taking the 7 Herb and shark cartilage. . . . Within 60 days, . . . PSA level dropped from 256 to 5. . . . [Thereafter, n]o evidence of . . . tumor.”) (emphasis in original).

254. The logo for 7 Herb Formula is the only product logo featured in the Cancer Newsletter. In addition to appearing on the 7 Herb Formula product page, the logo appears on the last page of the Cancer Newsletter, under the reminder, “REMEMBER! How to fight cancer is your choice!” (CX 23 at FTC-DCO 0405; CX 24 at FTC-DCO 0421).
255. The overall net impression from the Cancer Newsletter is that 7 Herb Formula inhibits tumors and is effective in the prevention, treatment, or cure of cancer. (F. 195, 197-202, 251-54).

**e. BioMolecular Nutrition Product Catalog**

256. In DCO’s BioMolecular Nutrition Product Catalog, the text next to pictures of the 7 Herb Formula bottle states that the herbs in 7 Herb Formula “purify the blood and promote cell repair, clear skin, cleanse the liver, decrease cell mutation, [and] fight pathogenic bacteria and tumor formation.” (CX 17 at FTC-DCO 0061).
257. The phrase, “fight . . . tumor formation,” used in the product description for 7 Herb Formula in the BioMolecular Nutrition Product Catalog, as set forth in F. 256, strongly implies that the 7 Herb Formula inhibits tumor formation. Combined with the additional phrases in the description, “promote cell repair,” “decrease cell mutation,” and “fight pathogenic bacteria,” the words of the product description as a whole imply that 7 Herb Formula is effective in treating cancer.
258. The overall net impression from the portion of the BioMolecular Nutrition Product Catalog relating to 7 Herb Formula is that 7 Herb Formula inhibits tumors



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and is effective in the prevention, treatment, or cure of cancer. (F. 256-57).

259. The DCO advertising regarding 7 Herb Formula, referred to in F. 237-38, 240-44, 246-47, 249, 251-54, and 256, makes claims that relate to consumer health. (F. 239, 245, 248, 250, 255, 257-58).

**f. Radio Show**

260. During the July 8, 2008 DCO HealthWatch radio program, in response to a caller's concern about colon cancer and question about whether the caller should follow her doctor's recommendation of a colonoscopy, James Feijo stated, "Polyps are nothing. . . . Polyps should be left alone." In addition, in response to the caller's question about taking 7 Herb Formula, Patricia Feijo stated "It's a good idea for anyone to take a little bit every day, you know, as a preventive, sure." (CX 5 at FTC-DCO 0562-66).
261. During the July 14, 2008 DCO HealthWatch radio program, Patricia Feijo stated that 7 Herb Formula is "great for cancer." (CX 8 at FTC-DCO 0691).

**4. GDU****a. DCO Website**

262. CX 14, a printout of the webpage for GDU on the DCO Website, is Exhibit C to the Complaint. CX 14A is another depiction of the same product webpage as CX 14, but captured so as to show the entire width of the page. (CX 14; CX 14A).
263. The webpage content for GDU on the DCO Website begins with a heading, in bold type, "**Immune Boosters**." Underneath that heading is a picture of bottles of GDU, and under that, is a phrase, in small print, "Supplemental Facts." The product description that follows includes the heading in bold type, "**GDU -**

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**Arthritis Pain Anti Inflammatory**” and opens with the following paragraph:

Contains natural proteolytic enzymes (from pineapple source bromelain) to help digest protein - even that of unwanted tumors and cysts. This formula also helps to relieve pain and heal inflammation.

(CX 14 at FTC-DCO 0028; CX 14A at FTC-DCO 2844A). James and Patricia Feijo both took credit for writing this statement. (R 15 (J. Feijo, Dep. at 138-39); R 16 (P. Feijo, Dep. at 185-86)). Following this statement are several paragraphs describing the ingredients of GDU and its “wide range of actions . . . that make it suited to a wide range of uses.” Among these promoted uses is “as an adjunct to cancer therapy.” (CX 14 at FTC-DCO 0028).

264. The description of GDU on the product webpage on the DCO Website, as set forth in F. 263, implies that GDU inhibits tumors and is a cancer treatment.
265. At the side of the GDU product webpage is a link to “buy now.” Below that, is the instruction: “Read our clients [sic] testimonials on using this anti inflammatory,” and links to subjects including arthritis, injuries, and spinal stenosis. Also included are links to “Breast Mass” and “Prostate Cancer.” (CX 14A).
266. The DCO webpage “Cancer News,” which makes representations regarding the Challenged Products as a group (F. 180-88), states: “If you suffer from any type of cancer, Daniel Chapter One suggests taking” several DCO products, including GDU. A prominent picture of a bottle of GDU follows, adjacent to which is the statement in bold type, “**Daniel Chapter One’s Cancer solutions.**” Under the picture, the text states:

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**To Buy the products click here****How to fight cancer is your choice!**

(CX 13 at FTC-DCO 0013-14; CX 13A) (emphasis in original).

267. A testimonial entitled “Breast Mass,” linked to the Cancer News webpage on the DCO Website, states:

I went in for a breast examination by mammography. On 10/8/01 they said they found a mass that they believed was not cancerous, but benign. I began taking GDU six times a day: 2 before breakfast, 2 before lunch, and 2 before dinner, and in a month I went to my doctor for the breast examination, and he found nothing on either breast. Around that time I got another bottle of GDU and the Superior Herbal Fat Burners, which I took twice a day. In April I had my 6-month examination and the letter read: “We are pleased to inform you that the results of your recent breast evaluation are normal.”

(CX 13 at FTC-DCO 0024; *see also* CX 17 at FTC-DCO 0101 (same)).

268. There are testimonials linked to the Cancer News webpage that specifically refer to GDU, including: “Nancy – Cured Breast Cancer in 3 months - 7 Herb and GDU”; and “Mel – Breast Mass [illegible] and GDU.” (CX 13 at FTC-DCO 0014).
269. The overall net impression of the DCO Website content relating to GDU is that GDU inhibits tumors and is an effective treatment for cancer. (F. 180, 187, 189, 262-63, 265-68).

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**b. BioGuide**

270. The product pages devoted to GDU in DCO's BioGuide begin with the following statement: "**GDU:** Contains natural proteolytic enzymes (from pineapple source bromelain) to help digest protein - even that of unwanted tumors and cysts." (CX 21 at FTC-DCO 0329) (emphasis in original). This same statement is repeated on the following page. (CX 21 at FTC-DCO 0330).
271. On the first page devoted to GDU in the BioGuide is a paragraph describing a variety of uses for GDU, which include "as an adjunct to cancer therapy." Immediately below this section is text in large, colored type, "**to help digest protein even that of unwanted tumors and cysts. This formula also helps to relieve pain and heal inflammation.**" Immediately below this statement is a headline in large, bold, colored type, "**Prostate Cancer,**" along with a picture of a smiling man. (CX 21 at FTC-DCO 0330) (emphasis in original). On the following page is a headline in large, bold, colored type, "**Breast Mass,**" adjacent to a photograph of a smiling woman. (CX 21 at FTC-DCO 0331) (emphasis in original).
272. The description of GDU in the BioGuide implies that GDU inhibits tumors. (F. 270-71).
273. The testimonial in the BioGuide entitled "Breast Mass" includes the following text:

I went in for a breast examination by mammography. On 10/8/01 they said they found a mass that they believed was not cancerous, but benign. I began taking GDU six times a day: 2 before breakfast, 2 before lunch, and 2 before dinner, and in a month I went to my doctor for the breast examination, and he found nothing on either breast. Around that time I got another bottle of GDU and the Superior Herbal Fat Burners, which I

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took twice a day. In April I had my 6-month examination and the letter read: “We are pleased to inform you that the results of your recent breast evaluation are normal.”

At the conclusion of the testimonial, the following excerpt appears in large, bold, green type:

***‘We are pleased to inform you  
that the results of your recent  
breast evaluation are normal.’***

(CX 21 at FTC-DCO 0331) (emphasis in original).

274. In DCO’s BioGuide there is a testimonial under a headline in large, bold, bright green type, “**Lowered PSA.**” The testimonial states in pertinent part: “My GOOD NEWS is that my PSA went from 6.9 to 6.0 after I finished using my first four bottles of 7 Herb formula, in combination with your Bio C 1000, GDU and other minerals and vitamins. I believe it was your products that did the trick. . . .” (CX 21 at FTC-DCO 0353) (emphasis in original).
275. The overall net impression from the portions of the BioGuide relating to GDU is that GDU inhibits tumors and is an effective treatment for cancer. (F. 205, 207-11, 270-74).

**c. Cancer Newsletter**

276. The Cancer Newsletter includes a feature on GDU, with a picture of a GDU bottle next to a headline in large, bold type, “**Enzymes attack growths.**” The opening paragraph states:

Daniel Chapter One GDU Caps contains [sic] proteolytic enzymes that metabolize protein and can aid the body in breaking down a tumor. **The importance of oral enzymes in treating cancers has been the subject of scholarly papers and**

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**books for almost a century. . . . Enzymes, according to researchers, can change leukemia cells, returning those cells to a normal state. Enzymes have been shown to induce T cells and tumor necrosis factor.** The enzymes, while helping to destroy cancer cells, are not toxic, unlike other forms of treatment currently being imposed on cancer patients. . . . Daniel Chapter One GDU Caps contains [sic] proteolytic enzymes that God created to break up an excess protein mass and can aid the body in eliminating a tumor.”

(CX 23 at FTC-DCO 0399; CX 24 at FTC-DCO 0415) (emphasis in original).

Adjacent to the GDU headline, photograph, and text are two testimonials with headlines in large, highlighted and bold type, “**Lump is gone without dangerous surgery**” and “**Cancer Success a Lie!**” (CX 23 at FTC-DCO 0399; CX 24 at FTC-DCO 0415) (emphasis in original).

277. The phrases “treating cancer,” returning leukemia cells “to a normal state,” and “helping to destroy cancer cells,” in the product description for GDU in the Cancer Newsletter, as set forth in F. 276, imply that GDU treats cancer.
278. The overall net impression from the Cancer Newsletter is that GDU inhibits tumors and is an effective treatment for cancer. (F. 195, 197, 199-200, 202).

**d. BioMolecular Nutrition Product Catalog**

279. DCO’s BioMolecular Nutrition Product Catalog states, next to pictures of GDU bottles, that GDU “[c]ontains natural proteolytic enzymes (from pineapple source bromelain) to help digest protein, even that of unwanted tumors and cysts. Helps to relieve pain, inflammation, and as an adjunct to cancer therapy.” (CX 17 at FTC-DCO 0062).

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280. The language of the product description for GDU in the BioMolecular Nutrition Product Catalog, as set forth in F. 279 implies, that GDU inhibits tumors and is an effective treatment for cancer.
281. The overall net impression from the portion of the BioMolecular Nutrition Product Catalog relating to GDU is that GDU inhibits tumors and is an effective treatment for cancer. (F. 279).
282. The DCO advertising regarding GDU, referred to in F. 262-63, 265-68, 270-71, 273-74, 276, and 279, makes claims that relate to consumer health. (F. 264, 269, 272, 275, 277-78, 280-81).

**5. BioMixx****a. Website advertising**

283. The [www.danielchapterone.com](http://www.danielchapterone.com) webpage, “Cancer News,” which makes representations regarding the Challenged Products as a group (F. 180-88) states: “If you suffer from any type of cancer, Daniel Chapter One suggests taking” several DCO products, including BioMixx <sup>TM</sup>. A prominent picture of a bottle of BioMixx follows, adjacent to which is a statement in bold type, “**Daniel Chapter One’s Cancer solutions.**” Under the picture, the text states:

**To Buy the products click here**

**How to fight cancer is your choice!**

(CX 13 at FTC-DCO 0013-14; CX 13A) (emphasis in original).

284. The [www.danielchapterone.com](http://www.danielchapterone.com) Cancer News webpage includes the following testimonial, accompanied by a photograph of a smiling woman:

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*Tracey was given no hope!*

The doctors had pretty much given up on Tracey. She had leukemia and tumors on the brain, behind the heart and on her liver.

. . . .

I had contracted leukemia and had three inoperable tumors. When I decided not to do chemotherapy or radiation, my father sent me Bio\*Mixx and 7 Herb Formula. Each day as I took it and got it into my system more and more, the better I felt. Then I added Garlic Pur, Siberian Ginseng, and Bio\*Shark. I am now in complete remission. The cancer cell count has dropped, the doctors tell me. I had a tumor just above the brain stem in my brain that has completely disappeared. The tumor on my liver is shrinking and the tumor behind my heart has shrunk over 50%. . . .

(CX 13 at FTC-DCO 0016) (emphasis in original).

285. BioMixx is promoted along with the other Challenged Products on the DCO website [www.dc1pages.com](http://www.dc1pages.com), where the following text appears:

**Supporting Products**

To enhance 7 Herb Formula's healing quantities Daniel Chapter One advises to get familiar with the supporting products below:

Immediately below that text is a photograph of bottles of each of the Challenged Products. Adjacent to the photograph, in bold print, the following appears:

**CANCER  
TREATMENT:**

**7Herb Formula  
Bio\*Shark**



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**BioMixx**  
**GDU Caps**

(CX 18 at FTC-DCO 0190) (emphasis in original).

286. The overall net impression from the website content for BioMixx described in F. 283-85 is that BioMixx is effective in the prevention, treatment, or cure of cancer.

**b. BioGuide**

287. The product description for BioMixx in DCO's BioGuide includes the statements:

Helps detoxify the body, boosts immunity and energy. . . . What separates BioMixx is that it was developed specifically to maximize the immune system, particularly for those individuals whose immune systems were compromised through chemotherapy and radiation. BioMixx . . . is the most powerful, most advanced formula ever developed for strengthening and building the immune system. . . . This scientifically designed formula provides your body with . . . nutrients . . . for cell, organ, and tissue health necessary for a healthy immune system. Whether you're losing weight battling illness, or are weakened due to intense training, BioMixx is the best.

(CX 21 at FTC-DCO 0334).

288. The language of the product description for BioMixx in DCO's BioGuide, as set forth in F. 287, clearly implies that BioMixx is an effective treatment for the adverse effects of chemotherapy and radiation.
289. DCO's BioGuide refers to BioMixx in the testimonial entitled "**Cancer Brain Tumor.**" (F. 204; *see* CX 21 at FTC-DCO 0353 (emphasis in original)).

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290. DCO's BioGuide refers to BioMixx in the testimonial entitled "**Prostate Cancer.**" This headline, in large, bold type appears next to a picture of a smiling man. The testimonial states in pertinent part: "I had beam radiation for prostate cancer. I also took 7 Herb Formula, 6 ounces a day, and BioMixx; I never had a bad day, never felt sick. When my PSA went from 7.6 to 0.5 in the month after I finished radiation, my doctor was surprised. Several months later it was down to 0.16!" (CX 21 at FTC-DCO 0330) (emphasis in original).
291. The overall net impression from the portions of the BioGuide relating to BioMixx is that BioMixx is effective in the treatment of cancer and that BioMixx heals the adverse effects of radiation and chemotherapy. (F. 204, 208, 211, 297-90).

**c. Cancer Newsletter**

292. The Cancer Newsletter refers to BioMixx in the testimonial "7 Herb Formula Battles Cancer." This testimonial states in part: "I had contracted leukemia and had three inoperable tumors. When I decided not to do chemotherapy or radiation, my father sent me Bio\*Mixx and 7 Herb Formula. Then I added Garlic, Siberian Ginseng, and Bio\*Shark. I am now in complete remission." (CX 23 at FTC-DCO 0393; CX 24 at FTC-DCO 0409).
293. The Cancer Newsletter includes the following statements in the product description of BioMixx: "Bio\*Mixx boosts the immune system, cleanses the blood and feeds the endocrine system to allow for natural healing. It is used to assist the body in fighting cancer and in healing the destructive effects of radiation and chemotherapy treatments." (CX 23 at FTC-DCO 0400; CX 24 at FTC-DCO 0416).
294. The overall net impression from the Cancer Newsletter is that BioMixx is effective in the treatment of cancer

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and that BioMixx heals the adverse effects of radiation and chemotherapy. (F. 195, 197, 200, 202, 292-93).

295. The DCO advertising regarding BioMixx, referred to in F. 283-85, 287, 289-90, and 292-93, makes claims that relate to consumer health. (F. 286, 288, 291, 294).

## 6. Disclaimers

296. On the DCO Website, at the very end of the content, at the bottom of the webpage, a copyright notice appears. Within the notice, after the copyright language, the following language appears:

The information on this website is intended to provide information, record, and testimony about God and His Creation. It is not intended to diagnose a disease. The information provided on this site is designed to support, not replace, the relationship that exists between a patient/site visitor and his/her health care provider. Caution: some herbs or . . . supplements should not be mixed with certain medications.

The above quoted statement appears in type font that is significantly smaller than the type font used for other content on the DCO Website. (CX 12 at FTC-DCO 0012; CX 13 at FTC-DCO 0027; CX 14 at FTC-DCO 0030).

297. At the bottom of the “checkout” page, located at [www.dclstore.com](http://www.dclstore.com), to which individuals are directed for purchasing a DCO product, there appears a copyright notice. Within the notice, after the copyright language, the following language appears:

The information on this website is intended to provide information, record, and testimony about God and His Creation. It is not intended to diagnose a disease. The information provided on this site is designed to support, not replace, the

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relationship that exists between a patient/site visitor and his/her health care provider. Caution: some herbs or . . . supplements should not be mixed with certain medications.

The above quoted statement appears in type font that is approximately the same size as the type font used for most of the other content on the checkout page. (CX 11 at FTC-DCO 0712-0713).

298. At the end of the BioGuide, before the index, in the lower right hand corner is a bordered text box. Inside the box, after a notice of copyright paragraph, the next paragraph states:

This catalog is intended to provide information, record, and testimony about Y'shua and His Creation. It is not intended to diagnose or treat disease. Caution: some herbs should not be mixed with certain medications.

The above quoted statement appears in type font that is significantly smaller than the type font used for most other content in the BioGuide. (CX 21 at FTC-DCO 0377).

299. At the bottom of the last page of the Cancer Newsletter, in the lower right hand corner, there is a copyright notice paragraph, and thereafter, the following text:

The information on this website is intended to provide information, record, and testimony about God and His Creation. It is not intended to diagnose or treat disease. Caution: some herbs or supplements should not be mixed with certain medications.

The above quoted statement appears in type font that is tiny in relation to the type font used for other content

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in the Cancer Newsletter, and is nearly illegible. (CX 23 at FTC-DCO 0405; CX 24 at FTC-DCO 0421).

300. At the bottom of certain webpages from [www.dc1pages.com](http://www.dc1pages.com), at the very end of the web content, a copyright notice appears. Within the notice, after the copyright language, there is the following language:

The information on this website is intended to provide information, record, and testimony about Y'shua and His Creation. It is not intended to diagnose or treat disease. The information provided on this site is designed to support, not replace, the relationship that exists between a patient/site visitor and his/her health care provider. Caution: some herbs . . . should not be mixed with certain medications.

The above quoted statement appears in type font that is significantly smaller than the type font used for other content on [www.dc1pages.com](http://www.dc1pages.com). (CX 18 at FTC-DCO 0133, 0189; *see also* CX 30 at FTC-DCO 0496).

301. Some product ordering pages on the website [www.dc1store.com](http://www.dc1store.com) contain the following language in italicized type:

*\*These statements have not been evaluated by the FDA. This product is not intended to diagnose, treat, cure or prevent disease.*

The above quoted statement appears in type font that is approximately the same size as the type font used for other content on the product pages. (CX 17 at FTC-DCO 0073, 0076, 0080, 0084, 0089, 0095, 0098).

302. "The Most Simple Guide" contains no language disclaiming any intent to diagnose or treat disease. (CX 20).

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303. Where disclaimer language does appear in the websites, BioGuide, and Cancer Newsletter, it appears in a font size that is equal to or significantly smaller than that used for other written material. (F. 297-299, 301-02). In the Cancer Newsletter, “How to fight Cancer is Your Choice!!!” the quoted disclaimer language is infinitesimal in relation to the other written material. (F. 300).
304. In the pages from the website [www.dclpages.com](http://www.dclpages.com) (CX 18 at FTC-DCO 0133, 0189), the sentence purporting to disclaim any intent to “treat” disease was followed on the next page by a statement touting, in far larger type font:

**CANCER TREATMENT****7 Herb Formula****Bio\*Shark****BioMixx****GDU Caps**

(CX 18 at FTC-DCO 0190).

305. The purported disclaimers are ambiguous and inconspicuous in relation to other messages conveyed by the advertisements. (F. 296-301, 303-04).
306. The purported disclaimers do not alter the overall net impression from the advertisements that the Challenged Products prevent, treat, or cure cancer. (F. 296-301, 303-04).

**F. Substantiation for DCO’s Advertising Claims****1. Testing of the Challenged Products**

307. Respondents represented that they possessed and relied upon a reasonable basis that substantiated the DCO advertising claims at the time they were made. (Answer ¶ 15).

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308. Respondents did not conduct or direct others to conduct any scientific testing of the effects of the Challenged Products. Respondents are not aware of any such testing having been performed by others. (CX 39 (Respondents' Answer to Interrogatory 15); R 16 (P. Feijo, Dep. at 161); R 15 (J. Feijo, Dep. at 201-02); P. Feijo, Tr. 405).
309. Respondents conducted no scientific testing on BioShark. (P. Feijo, Tr. 405; R 16 (P. Feijo, Dep. at 161)).
310. Universal Nutrition, the manufacturer of BioShark, did not conduct any testing on BioShark. (R 17 (Bauhoffer-Kinney, Dep. at 45-46)).
311. Respondents never had an outside lab study the components of 7 Herb Formula to determine its effects. (R 16 (P. Feijo, Dep. at 132)).
312. GDU was never subjected to clinical trials and Respondents have not conducted any studies to see whether GDU would counteract with any conventional cancer medicine someone might also be taking. (R 16 (P. Feijo, Dep. at 190, 194)).
313. Respondents did not conduct any tests or clinical studies on BioMixx and did not engage anybody else to do any kind of clinical tests on BioMixx. (R 16 (P. Feijo, Dep. at 199)).
314. Universal Nutrition, the manufacturer of BioMixx, has not conducted any testing on BioMixx. (R 17 (Bauhoffer-Kinney, Dep. at 50)).
315. It was not Respondents' practice to obtain scientific studies about any of the components in their products. (R 16 (P. Feijo, Dep. at 120)).
316. Respondents' basis for making their claims about the Challenged Products includes personal observations

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and customer testimonials. (R 15 (J. Feijo, Dep. at 141); R 16 (P. Feijo, Dep. at 116, 132, 186-87, 199)).

317. Respondents' substantiation for their claims regarding BioShark includes an article by I. W. Lane entitled "Sharks Don't Get Cancer." (R 16 (P. Feijo, Dep. at 161-62)).
318. Respondents relied upon a variety of materials, books, magazines, and articles, which James and Patricia Feijo had read, which provided them with an understanding of how certain substances in the Challenged Products could be utilized to help healing. (R 15 (J. Feijo, Dep. at 176-86); P. Feijo, Tr. 605-08; R 10).
319. The reference materials relied upon by Respondents do not constitute adequate substantiation for a claim that any of the Challenged Products prevent, treat, or cure cancer. (F. 326, 328, 343-49, 362, 365-67, 368-69, 372, 376, 383).

## **2. Summary of proffered experts' testimony on substantiation**

### **a. Complaint Counsel's proffered expert**

#### **(1) Qualifications**

320. Dr. Denis Miller ("Miller"), who was called to testify as an expert for Complaint Counsel, is a board-certified pediatric hematologist/oncologist. (Miller, Tr. 29; Expert Report of Denis R. Miller, M.D., dated Jan. 28, 2009, (hereinafter referred to as CX 52 (Miller Report) at 1).
321. For over forty years, Miller has directed clinical care, education, laboratory and clinical research, and administration, heading divisions or departments at University of Rochester Medical Center, New York Hospital-Cornell Medical Center, Memorial Sloan-



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Kettering Cancer Center, and Northwestern University Medical School. (CX 52 (Miller Report) at 1).

322. Miller also has served as Associate Medical Director of Cancer Treatment Centers of America (“CTCA”) and as Scientific Director of CTCA’s Cancer Treatment Research Foundations. (CX 52 (Miller Report) at 1).
323. As Scientific Director, Miller supervised the clinical research program and was principal investigator for a number of Phase I/II clinical studies involving treatments for hematological malignancies and cancers of the head and neck, lung, breast, pancreas, and colon. (CX 52 (Miller Report) at 1-2).
324. Miller has authored or co-authored over 300 book chapters, peer-reviewed articles, and abstracts, and has served on the editorial boards of the British Journal of Hematology and the American Journal of Clinical Oncology. (CX 52 (Miller Report) at 3).
325. Miller currently is the Oncology/Hematology Therapeutic Area Leader at PAREXEL International, a leading contract research organization, where he manages clinical trials for the pharmaceutical industry. (CX 52 (Miller Report) at 2).
326. Based on his training, experience, and familiarity with this area of research, Miller is qualified to give expert opinions in the area of cancer, cancer research, and research methodology. (F. 320-25).

**(2) Scope of work and materials considered**

327. Miller was asked to determine whether there is competent and reliable scientific evidence to substantiate the following claims: BioShark inhibits tumor growth; BioShark is effective in the treatment of cancer; 7 Herb Formula is effective in the treatment or cure of cancer; 7 Herb Formula inhibits tumor

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formation; GDU eliminates tumors; GDU is effective in the treatment of cancer; BioMixx is effective in the treatment of cancer; and BioMixx heals the destructive effects of radiation and chemotherapy. (CX 52 (Miller Report) at 4).

328. To form his opinions, in addition to drawing upon his expertise in cancer care and treatment, Miller conducted literature searches, including searches in PubMed, Google, PDQ, NCI, MSKCC, MD Anderson Cancer Center, Dana Farber Cancer Institute, Search Medica, Stanford HighWire, Clinical Trials.gov, and many cancer and hematology journals such as the Journal of Clinical Oncology, Clinical Cancer Research, Blood, British Journal of Haematology, Supportive Care in Oncology, American Journal of Oncology, and the New England Journal of Medicine. Miller also reviewed materials provided by Complaint Counsel, including the Complaint and the DCO advertising attached to the Complaint as exhibits A through D, DCO advertising on [www.danielchapterone.com](http://www.danielchapterone.com), the BioGuide, the labels for the Challenged Products, and thirty testimonials regarding DCO products. Miller also reviewed the materials Respondents stated that they relied upon for substantiation. (CX 52 (Miller Report) at 5-7).

**b. Respondents' proffered experts****(1) Qualifications**

329. Respondents proffered five individuals as expert witnesses: James Duke, Ph.D.; Sally LaMont, N.D.; Rustum Roy; James Dews; and Jay Lehr, Ph.D.
330. Dr. Duke ("Duke") is a retired economic botanist. He has compiled and maintains a database, which includes the chemical composition ("phytochemicals") of approximately 3,000 species of herbs, and codes the nature and extent of published data indicating biological actions for those chemicals. The data

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ranges from folklore, to animal or in vitro evidence, to approval of the chemical for those biological actions by foreign bodies referred to as Commission E or the Tramil Commission. (Duke, Tr. 476-78; R 18 (Duke, Dep. at 59, 91, 93, 118-19)).

331. Dr. LaMont (“LaMont”) is a licensed naturopathic doctor and acupuncturist. Naturopathic doctors focus on primary prevention of illness and on stimulating the body’s innate healing capacities to treat the underlying causes of disease. Naturopathic doctors, including LaMont, commonly use herbs in their practice. (LaMont Tr. 539, 541-42). LaMont also works with mind-body therapies and regularly suggests meditation, qigong, yoga, and other biofeedback-type of therapies that would strengthen the connection between a person’s mind and immune system. (R 22 (LaMont, Dep. at 20)).
332. Rustum Roy (“Roy”) is a scientist and an educator in the physical sciences and in integrative medicine. (Expert Report of Rustum Roy, dated Feb. 4, 2009 (hereinafter referred to as R 5 (Roy Report) at 2)).
333. James Dews (“Dews”) is a manufacturer of pharmaceuticals and “nutraceuticals,” which Dews described as a merger of food supplements and pharmaceuticals. A nutraceutical can be created by extracting the chemical compounds from a food supplement. He helped create and manufacture the product that eventually became 7 Herb Formula. (R 19 (Dews, Dep. at 17-18, 34-36, 76)).
334. Jay Lehr (“Lehr”) is a Ph.D. environmental scientist and has written a book on health and fitness. (R 21 (Lehr, Dep. at 9-10)). Lehr has known James Feijo for approximately ten years and takes the Daniel Chapter One products PrePost, Endeurosine, and Mito/ATP to enhance his athletic performance. He has also recently begun taking GDU for his arthritic hip. (R 21 (Lehr, Dep. at 16-18)).

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335. None of Respondents' proffered experts is a medical doctor. (F. 329-34; *see also* R 18 (Duke, Dep. at 56); Duke, Tr. 521; R 20 (Roy, Dep. at 26); R 5 (Roy Report) at FTC-DCO 234-36; Expert Report of James Dews, dated Feb. 4, 2009 (hereinafter R 6 (Dews Report) at 1-3; Expert Report of Jay Lehr (undated) (hereinafter referred to as R 21 (Lehr Report) at 1-2)).
336. None of Respondents' proffered experts has specialized training or experience regarding cancer or cancer treatment. (R 18 (Duke, Dep. at 19, 56); Duke, Tr. 521; R 22 (LaMont, Dep. at 11-12); LaMont, Tr. 576-77; *see generally* R 5 (Roy Report) at FTC-DCO 0234-36; R 6 (Dews Report) at 1-3; R 21 (Lehr Report) at 1-2).
337. None of Respondents' proffered experts has conducted clinical studies regarding cancer treatments. (R 18 (Duke, Dep. at 55); R 22 (LaMont, Dep. at 184); LaMont, Tr. 577; R 20 (Roy, Dep. at 14); R 21 (Lehr, Dep. at 34); R 19 (Dews, Dep. at 61-63)).

**(2) Scope of work and materials considered**

338. None of Respondents' proffered experts reviewed the DCO advertising claims at issue in the case in preparing their opinions. (R 18 (Duke, Dep. at 36-37); Duke, Tr. 534; R 22 (LaMont, Dep. at 32-34, 56-58, 77-78); R 5 (Roy Report) at 1, FTC-DCO 0238-99; R 20 (Roy, Dep. at 7); R 6 (Dews Report) at 7-8; R 19 (Dews, Dep. at 36-38); R 21 (Lehr Report) at 2-4).
339. Respondents did not ask their proffered experts to render an opinion as to whether Respondents' purported substantiation materials constituted competent and reliable scientific evidence substantiating a claim that any of the Challenged Products prevent, treat, or cure cancer. (R 3 (Duke Report) at 1; R 4 (LaMont Report) at 3; R 5 (Roy Report) at 1; R 6 (Dews Report) at 2; R 21 (Lehr Report) at 2).

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340. Respondents did not ask their proffered experts to render an opinion as to whether there existed any competent and reliable scientific evidence substantiating a claim that any of the Challenged Products prevent, treat, or cure cancer. (R 3 (Duke Report) at 1; R 4 (LaMont Report) at 3; R 5 (Roy Report) at 1; R 6 (Dews Report) at 2; R 21 (Lehr Report) at 2).
341. Respondents' proffered experts did not opine as to whether there is competent or reliable scientific evidence substantiating a claim that any of the Challenged Products prevent, treat, or cure cancer. (R 3 (Duke Report) at 1, 3; R 4 (LaMont Report) at 3, 40; R 5 (Roy Report) at 1; R 6 (Dews Report) at 2, 14; R 21 (Lehr Report) at 2).
342. None of Respondents' proffered experts reviewed the DCO advertising claims at issue in the case in preparing their opinions. (R 18 (Duke, Dep. at 36-37); Duke, Tr. 534; R 22 (LaMont, Dep. at 32-34, 56-58, 77-78); R 5 (Roy Report) at 1, DCO 0238-99; R 20 (Roy, Dep. at 7); R 6 (Dews Report) at 7-8; R 19 (Dews, Dep. at 36-38); R 21 (Lehr Report) at 2-4).

**3. Level of substantiation required to support anti-cancer effects**

343. "Competent and reliable scientific evidence" is required to conclude that a cancer treatment is effective. (Miller, Tr. 66-68).
344. Competent and reliable scientific evidence means in part that a hypothesis has been established. To constitute competent and reliable scientific evidence that a product treats, cures, or prevents cancer, the product's efficacy and safety must be demonstrated through controlled clinical studies. (CX 52 (Miller Report) at 7; *see also* LaMont, Tr. 596 (stating that the definition of competent and reliable scientific evidence includes a "spectrum" of evidence, such as studies of

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animals and cell culture lines, but that investigation into a compound's safety and efficacy progresses "towards clinical outcome studies in an office-based practice or a university setting, and eventually moves towards human clinical trials").

345. Clinical studies are studies on humans. Non-clinical studies are performed in test tubes and in animals with the aim of demonstrating potential activity and acceptable safety. Once non-clinical studies have been performed, the study proceeds into progressive phases of clinical trials in humans. (CX 52 (Miller Report) at 9).
346. Only data from well-designed, controlled, clinical trials will substantiate a claim that a new therapy is safe and effective to treat, cure, or prevent cancer. (CX 52 (Miller Report) at 30).
347. The proper format for any clinical trial protocol includes the following: Details of the rationale for the study; clear elucidation of primary and secondary objectives; clear presentation of the investigation plan, including study design, selection of subjects, study treatments, documentation of prior and concomitant illnesses and treatments, and study procedures; description of specific methods of data collection, quality assurance, and quality control; description of statistical procedures; reporting of studies of pharmacokinetics, pharmacodynamics, quality of life, and health economics; discussion of overall conclusion regarding safety and efficacy; relevant references; tables and figures; selected subject listings of demographics, disease and treatment parameters, endpoints, safety factors, and deaths; and subject narratives for serious adverse events and deaths. (CX 52 (Miller Report) at 8-9; Miller Tr. 66-68).
348. Claims that a dietary supplement prevents cancer, aids in the treatment of cancer, or can be used as a primary treatment for cancer, as opposed to claims that a

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dietary supplement is good nutrition, require substantiation. (Miller, Tr. 152).

349. Anti-cancer agents may work by preventing cell proliferation (division), inducing programmed cell death (apoptosis), inhibiting growth factors or biochemical pathways that result in cell death, and inhibiting new blood vessel formation (angiogenesis). Anti-angiogenic agents have an important role in the treatment of some types of cancer. (CX 52 (Miller Report) at 10).
350. The process required to prove that a drug is safe and effective for the treatment of disease is very costly. Testing used to prove that a drug is a safe and effective treatment for disease is a particularly challenging and costly endeavor to undertake for testing herbal products, because it is difficult to extract and test a single chemical component from an herb, and because an herb may comprise thousands of chemical components. (Miller, Tr. 181; Duke, Tr. 499-502, 537-38; *see also* LaMont, Tr. 596-97).
351. Testimonials do not substitute for a well-designed clinical trial. (CX 52 (Miller Report) at 30).
352. Anecdotal reports are the weakest form of evidence to support the anti-cancer activity of a new agent. (CX 52 (Miller Report) at 11-12).
353. Testimonials have very little scientific validity. In the thirty testimonials reviewed by Miller, many of the patients were taking other modalities of anti-cancer therapy. There was insufficient documentation that the individuals had cancer. There was no valid instrument to measure their reported response to the Challenged Products. A patient's report that he or she "felt better," standing alone, does not scientifically measure the patient's response. (Miller, Tr. 141-42, 214-15).

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**4. Potential harm from alternative or ineffective remedies**

354. The need to substantiate a claim of anti-cancer activity with competent and scientific evidence is the same whether the purported agent is an herbal medicine or a conventional pharmaceutical agent. “There [are] not . . . two kinds of medicine. There’s not conventional medicine and alternative medicine. There’s one medicine, medicine that works. The other medicine may or may not work, but to show that it works you have to go through the process . . . . [T]here shouldn’t be a separate, different, less rigorous way of identifying the safety and the efficacy of so-called complementary medicine just because it’s complementary. It has to go through the same process because we want to help cancer patients and we want to make sure that what they’re getting is safe and effective.” (Miller, Tr. 144).
355. Effective complementary medicine adds to the efficacy of standard anti-cancer therapy, reducing some of cancer therapy’s adverse side effects (e.g., nausea and vomiting, severe neutropenia, anemia, fatigue), improving general well-being and quality of life, and permitting oncologists to administer effective doses of therapy on time. Many new targeted therapies work better when given with conventional anti-cancer therapy and rarely are as efficacious when given as single agents. Suggesting that complementary medicine can be an effective substitute for traditional medicine would be a disservice to cancer patients because delays in effective therapy may allow cancer cells to regrow, develop resistance to therapy, and metastasize. (CX 52 (Miller Report) at 11).
356. Taking the Challenged Products presents a potential harm. This is most acute if a cancer patient foregoes potentially beneficial and effective therapy and replaces that option with BioShark, 7 Herb Formula, GDU, or BioMixx, alone or in combination with other



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DCO products. Diagnosing cancer early and treating it appropriately and effectively still offers the best chance of curing it. The use of complementary or alternative therapies exclusively as front-line treatment will result in disease progression. (CX 52 (Miller Report) at 12).

357. The Challenged Products are not necessarily harmless simply because they are herbs as opposed to drugs. Everything has potential side effects. One example is cat's claw, an ingredient in 7 Herb Formula. Cat's claw may have an effect on a very important enzyme system in the liver that causes either the breakdown of other drugs or may activate other drugs. As a result of this interaction, cat's claw might increase the concentrations of some drugs in the patient's system, which can lead to toxicity, or can cause an increased breakdown of those drugs, thereby lessening their efficacy. Cat's claw increases the activity of many drugs given for high blood pressure, which can result in hypotension (low blood pressure). Cat's claw can cause diarrhea, which is particularly adverse for a cancer patient who already may be nutritionally challenged. Cat's claw may also cause bleeding by affecting the blood's clotting system, thereby potentially increasing the risk of bleeding in a cancer patient. Thus, if a cancer patient is already taking a medication that lowers his or her platelet count or increases his or her risk of bleeding, this could be an extremely dangerous interaction. (Miller, Tr. 111-13).
358. Side effects are also affected by the dosing. One example of the importance of proper dosing is with Turkish rhubarb root, a component of 7 Herb Formula. Turkish rhubarb root contains tannins, which, in high doses, cause diarrhea and, in lower doses, cause constipation. (Miller, Tr. 117).
359. Another example of the importance of proper dosing comes from a study of parthenolide, the active ingredient in feverfew, a component of GDU. The

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study was designed to determine through dose escalation what dose of parthenolide would show evidence of activity in cancer patients. Researchers were unable to measure any parthenolide in the bloodstream at the doses administered in the study. Even with very low doses, patients had side effects, including fever, chills, nausea, diarrhea, blurred vision, and fatigue. (Miller, Tr. 130-31).

360. An example of potentially harmful interactions was reported in a study of curcumin, the active ingredient in tumeric, a component of GDU. That study reported that curcumin can block or decrease the activity of a number of commonly used anti-cancer chemotherapy agents, including those used to treat breast cancer, colon cancer, and lymphoma. (Miller, Tr. 126).
361. Enhancing a deficient immune system is important. An over-enhanced immune system can be related to a number of autoimmune diseases, including malignancies like multiple myeloma. (Miller, Tr. 218-19).
- 5. No competent and reliable scientific evidence to substantiate claims about the Challenged Products, either alone or in combination with other DCO products**
362. The reference materials relied upon by Respondents do not constitute competent and reliable scientific evidence that any of the Challenged Products prevent, treat, or cure cancer. (CX 52 (Miller Report) at 31; Miller Tr. 143).
363. There is no competent and reliable scientific evidence that the Challenged Products are effective, either alone or in combination with other DCO products, in the prevention, treatment, or cure of cancer, in inhibiting tumor formation, or in ameliorating the adverse effects of radiation and chemotherapy. (CX 52 (Miller Report) at 31; Miller Tr. 143).

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364. Since BioShark, 7 Herb Formula, GDU, and BioMixx have not been tested, their effectiveness in the prevention, treatment, or cure of cancer is not known. (R 22 (LaMont, Dep. at 47-48); LaMont, Tr. 579-82).
365. The majority of the materials relied upon by Respondents as substantiation were not peer-reviewed papers. The materials did not include controlled clinical trials. The materials consisted of author opinions and reviews of literature on the use of herbal medicines for a number of different diseases, including cancer. (Miller, Tr. 81-82).
366. Many of the studies cited by Respondents as substantiation were non-clinical studies, i.e., in vitro or animal studies. (CX 52 (Miller Report) at 10).
367. Other studies relied upon by Respondents as substantiation evaluated isolated compounds that are present in some of the Challenged Products and showed nonspecific immunostimulatory activities or suggested cancer preventive effects. This does not substitute for an actual evaluation of each Challenged Product itself. It is not possible to extrapolate from results of a published non-clinical study of curcumin that GDU can eliminate tumors. GDU itself, or each active ingredient in GDU, must be subjected to the same experimental conditions as those to which the curcumin was subjected. (CX 52 (Miller Report) at 11).

**6. No competent and reliable scientific evidence to substantiate BioShark claims**

368. The reference materials relied upon by Respondents do not constitute competent and reliable scientific evidence that BioShark inhibits tumor growth in humans or that it is effective in the treatment of cancer in humans. (CX 52 (Miller Report) at 13).

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369. Respondents' reliance on Dr. I. William Lane's book, "Sharks Don't Get Cancer," was misplaced, as studies at Johns Hopkins University indicate that sharks do indeed get cancer. (CX 52 (Miller Report) at 16).
370. There have been no adequate and well-controlled studies demonstrating that BioShark is anti-angiogenic or is effective in the treatment of cancer, and even supporting non-clinical studies of crude or partially-purified shark cartilage products were extremely limited, particularly with regard to mechanisms of action, pharmacokinetics, pharmacodynamics, and dose response. (CX 52 (Miller Report) at 17).
371. There is no competent and reliable scientific evidence that any crude shark cartilage product is effective in treating human cancer. (CX 52 (Miller Report) at 17).

**7. No competent and reliable scientific evidence to substantiate 7 Herb Formula claims**

372. The reference materials relied upon by Respondents do not constitute competent and reliable scientific evidence that 7 Herb Formula is effective in the treatment or cure of cancer or that it inhibits tumor formation. (CX 52 (Miller Report) at 18).
373. There is no competent and reliable scientific evidence that 7 Herb Formula is effective in the treatment or cure of cancer or that it inhibits tumor formation. (CX 52 (Miller Report) at 18).
374. There are no clinical or non-clinical studies supporting claims that 7 Herb Formula, or any of its individual ingredients, is an effective anti-cancer agent or inhibits tumor formation. (CX 52 (Miller Report) at 19).
375. There have been animal and in vitro studies on the ingredients in 7 Herb Formula: Burdock root, cat's claw, sheep sorrel, slippery elm bark, Turkish rhubarb root, Siberian ginseng, and watercress. There have

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been no controlled clinical trials on humans with cancer. (CX 52 (Miller Report) at 18-22).

**8. No competent and reliable scientific evidence to substantiate GDU claims**

376. The reference materials relied upon by Respondents do not constitute competent and reliable scientific evidence that GDU eliminates tumors or is effective in the treatment of cancer. (CX 52 (Miller Report) at 22).
377. There is no competent and reliable scientific evidence that GDU eliminates tumors or is effective in the treatment of cancer. (CX 52 (Miller Report) at 22).
378. There have been no randomized, controlled clinical trials of any of the individual components of GDU or of GDU itself in patients with cancer. (CX 52 (Miller Report) at 27).
379. Curcumin (tumeric), one of GDU's ingredients, is currently being evaluated in controlled clinical trials to determine its potential as a chemoprotective and cancer preventive agent. (CX 52 (Miller Report) at 22).
380. Some animal studies have suggested that curcumin may have activity as a cancer preventive and therapeutic agent. (CX 52 (Miller Report) at 23).
381. Some animal studies have also suggested that curcumin may actually inhibit the anti-cancer activity of some approved anti-cancer agents, as well as exacerbate iron deficiency. (CX 52 (Miller Report) at 27).
382. Further research on curcumin is necessary to determine if curcumin has cancer preventive or chemotherapeutic effects. (CX 52 (Miller Report) at 27).

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**9. No competent and reliable scientific evidence to substantiate BioMixx claims**

383. The reference materials relied upon by Respondents do not constitute competent and reliable scientific evidence that BioMixx is effective in the treatment of cancer or heals the destructive effects of radiation and chemotherapy. (CX 52 (Miller Report) at 27).
384. There is no competent and reliable scientific evidence that BioMixx is effective in the treatment of cancer or heals the destructive effects of radiation and chemotherapy. (CX 52 (Miller Report) at 27).
385. There are no reported studies that either BioMixx, or any of its constituent ingredients, is effective in the treatment of cancer in humans. (CX 52 (Miller Report) at 27-29).
386. There are absolutely no scientific data to support a statement that BioMixx assists the body in fighting cancer or in healing the destructive effects of radiation and chemotherapy treatments. (CX 52 (Miller Report) at 29).

**10. Substantiation through competent and reliable scientific evidence for Respondents' claims about the efficacy of the Challenged Products was not addressed by Respondents' proffered experts****a. Duke**

387. Duke was provided statements made by Respondents to review and was asked if the data he reviewed supported the accuracy of those statements. (Duke, Tr. 519). The statements he was given mirror selected statements from the product descriptions for the Challenged Products. (F. 238, 263, 293). Duke concluded:

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There is a reasonable basis for the claims that the ingredients of 7 Herb Formula “fights [sic] tumor formation, and fights [sic] pathogenic bacteria.”

There is a reasonable basis for the claims that the ingredients of GDU “contains [sic] natural proteolytic enzymes (from pineapple source bromelain) to help digest protein – even that of unwanted tumors and cysts. This formula also helps to relieve pain and heal inflammation. . . . GDU is also used for . . . and as an adjunct to cancer therapy. GDU possesses a wide range of actions including anti-inflammatory and antispasmodic activity . . . .”

There is a reasonable basis for the claims that the ingredients of BioMixx “boosts [sic] the immune system . . . to allow for natural healing. It is used to assist the body in fighting cancer and in healing the destructive effects of radiation and chemotherapy treatments.”

(R 3 (Duke Report) at 3; Duke, Tr. 519-21, 536).

388. Duke’s opinions do not address whether competent and reliable scientific evidence is necessary to substantiate advertising claims that any of the Challenged Products prevent, treat, or cure cancer, inhibit tumors, and/or heal the destructive effects of radiation and chemotherapy. (R 3 (Duke Report)).
389. Duke’s opinions do not address whether there is competent and reliable scientific evidence to support advertising claims that any of the Challenged Products prevent, treat, or cure cancer, inhibit tumors, and/or heal the destructive effects of radiation and chemotherapy. (R 3 (Duke Report)).
390. Duke’s opinions do not address whether Respondents possessed and relied upon adequate substantiation to support their claims that any of the Challenged

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Products prevent, treat, or cure cancer, inhibit tumors, and/or heal the destructive effects of radiation and chemotherapy. (R 3 (Duke Report)).

391. Duke does not recall seeing any articles that James or Patricia Feijo believe to have substantiated the claims that Respondents made regarding the Challenged Products. (R 18 (Duke, Dep. at 185)).
392. Duke made no effort to determine whether there were any studies of any sort regarding the Challenged Products. (R 18 (Duke, Dep. at 190-91)).
393. Duke did not analyze any of the Challenged Products themselves, but instead analyzed only constituent ingredients of the Challenged Products. (Duke Tr. 524-27).
394. Duke did not know the concentrations of the ingredients contained in the Challenged Products. (Duke Tr. 533-34).

**b. LaMont**

395. LaMont was provided labels from the Challenged Products, and the substantiation evidence upon which Respondents relied to support statements reflected in the then-draft complaint, including claims that BioShark inhibits tumor growth, 7 Herb Formula is effective in treating and curing cancer, GDU eliminates tumors, and BioMixx is effective in treating cancer. (R 22 (LaMont, Dep. Exs. 1, 2)).
396. LaMont was asked to evaluate the labels and the substantiation evidence upon which Respondents relied, and to write a report that would describe the mechanism of action of some of the constituents of the Challenged Products. In addition to reviewing Respondents' substantiation evidence, LaMont reviewed published medical literature in MedLine, PubMed, the Memorial Sloan-Kettering cancer



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website, and the American Botanical website, among other sources. (R 4 (LaMont Report at 3); LaMont, Tr. 549-550).

397. Based on her review, LaMont concluded:

There is a reasonable basis to claim that the ingredients of GDU contain bromelain, a source of natural proteolytic enzymes from the pineapple, which helps digest unwanted proteins. GDU also contains tumeric, feverfew and quercitin, which help to reduce inflammation and relieve pain.

Next, it is reasonable to claim that these ingredients as a whole may be used as an adjunct to cancer therapy, and that the ingredients possess a wide range of actions as anti-inflammatory agents.

There is a reasonable basis to claim that the ingredients of 7 Herb Formula fight tumor formation, and fight pathogenic bacteria.

There is a reasonable basis to claim that the ingredients of BioMixx boost the immune system, build lean body mass and support healing. It is also reasonable to claim that these ingredients assist the body in fighting cancer, cachexia and in healing the destructive effects of radiation and chemotherapy treatments.

(R 4 (LaMont Report) at 40; LaMont, Tr. 572-74).

398. LaMont's opinions do not address whether competent and reliable scientific evidence is necessary to substantiate advertising claims that any of the Challenged Products prevent, treat, or cure cancer, inhibit tumors, and/or heal the destructive effects of radiation and chemotherapy. (R 4 (LaMont Report)).

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399. LaMont's opinions do not address whether there is competent and reliable scientific evidence to support advertising claims that any of the Challenged Products prevent, treat, or cure cancer, inhibit tumors, and/or heal the destructive effects of radiation and chemotherapy. (R 4 (LaMont Report)).
400. LaMont's opinions do not address whether Respondents possessed and relied upon competent and reliable scientific evidence when Respondents made claims that any of the Challenged Products prevent, treat, or cure cancer, inhibit tumors, and/or heal the destructive effects of radiation and chemotherapy. (R 4 (LaMont Report)).
401. LaMont did not analyze any of the Challenged Products themselves, but instead analyzed only the constituent ingredients of the Challenged Products. LaMont did not know the concentrations of the ingredients contained in any of the Challenged Products. (LaMont, Tr. 579, 582-83).
402. LaMont was unable to conclude that there was any evidence to support a claim that 7 Herb Formula is effective in treating or curing cancer. (R 22 (LaMont, Dep. at 205)).
403. LaMont was unable to conclude that BioMixx is itself effective in the treatment of cancer or that it heals the destructive effects of radiation and chemotherapy. (R 22 (LaMont, Dep. at 210-11)).

**c. Roy**

404. Roy was asked to provide his opinion on the scientific validity of randomly controlled trials to evaluate whole-person healing; the science of homeopathy; and the scientific validity of traditional testing of herbal medicines. (R 5 (Roy Report) at 1).

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405. Roy's conclusions included: Traditional randomly controlled double blind studies are inappropriate to evaluate whole-person healing approaches; whole-person healing approaches focus on the effect on the structure and function of the whole person, as opposed to the use of a drug to cure the symptoms of a disease; and cancer is a particular instance where whole-body healing approaches make more scientific sense than pharmaceutical approaches. (R 5 (Roy Report) at 1-2).
406. The bases for Roy's conclusions in F. 405 include his opinion that homeopathy was developed empirically, from observations of the effects of various different materials on the functioning of healthy subjects, as opposed to trying a specific biochemical drug to cure a symptom. (R 5 (Roy Report) at 1-2).
407. The bases for Roy's conclusions in F. 405 include his opinion that herbal medicines have been tested epidemiologically by nature over thousands of years and hundreds of human generations, while pharmaceutical drug testing relies on statistical projections from small controlled trials. (R 5 (Roy Report) at 3-4).
408. Roy's opinions do not address whether there is competent and reliable scientific evidence to support Respondents' claims that any of the Challenged Products prevent, treat, or cure cancer, inhibit tumors, and/or heal the destructive effects of radiation and chemotherapy. (R 5 (Roy Report)).
409. Roy's opinions do not address whether Respondents possessed and relied upon competent and reliable scientific evidence to support Respondents' claims that any of the Challenged Products prevent, treat, or cure cancer, inhibit tumors, and/or heal the destructive effects of radiation and chemotherapy. (R 5 (Roy Report)).

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410. Roy did not review the Complaint in this matter or any of the challenged advertisements. (R 20 (Roy, Dep. at 7)).
411. Roy is not an expert in homeopathy. (R 20 (Roy, Dep. at 12)).
412. Roy has no idea what ingredients the Challenged Products contain. (R 20 (Roy, Dep. at 24)).
413. Roy did not review or obtain any of the products or product labels for the Challenged Products. (R 20 (Roy, Dep. at 7-8)).
414. Roy does not have any formal training in medicine. (R 20 (Roy, Dep. at 26)).
415. Roy has never treated patients, or consulted with healers who were treating particular patients. (R 20 (Roy, Dep. at 28)).
416. Roy and his laboratory have not performed any clinical trials. (R 20 (Roy, Dep. at 13)).
417. Roy has never performed any experiments on humans to measure the efficacy of any medical treatments. (R 20 (Roy, Dep. at 14)).

**d. Dews**

418. Dews was asked to provide his opinion on 7 Herb Formula. He concluded that all seven herbs are listed in the Herbal Physicians' Desk Reference, that there are many references on what these herbs are used for, and that, in manufacturing the formula, he was careful to make sure it was safe. When formulating the product that eventually became 7 Herb Formula, Dews avoided using too much rhubarb, which has a laxative action, because he did not want the product to cause diarrhea. (R 6 (Dews Report) at 1, 8-9).

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419. Dews' opinions do not address whether competent and reliable scientific evidence is necessary to substantiate advertising claims that any of the Challenged Products prevent, treat, or cure cancer, inhibit tumors, and/or heal the destructive effects of radiation and chemotherapy. (R 6 (Dews Report)).
420. Dews' opinions do not address whether there is competent and reliable scientific evidence to support advertising claims that any of the Challenged Products prevent, treat, or cure cancer, inhibit tumors, and/or heal the destructive effects of radiation and chemotherapy. (R 6 (Dews Report)).
421. Dews' opinions do not address whether Respondents possessed and relied upon competent and reliable scientific evidence to support Respondents' claims that any of the Challenged Products prevent, treat, or cure cancer, inhibit tumors, and/or heal the destructive effects of radiation and chemotherapy. (R 6 (Dews Report)).

**e. Lehr**

422. Lehr was asked to opine on the efficacy of DCO products. His opinions are based on his own personal experience in taking the DCO product called PrePost. It was Lehr's opinion that since he started taking the DCO product PrePost, his "life is totally different. . . . It's just incredible. . . . And it's astounding, I mean." (R 21 (Lehr Report) at 6).
423. Lehr's opinions do not address whether competent and reliable scientific evidence is necessary to substantiate advertising claims that any of the Challenged Products prevent, treat, or cure cancer, inhibit tumors, and/or heal the destructive effects of radiation and chemotherapy. (R 21 (Lehr Report)).
424. Lehr's opinions do not address whether there is competent and reliable scientific evidence to support

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Respondents' advertising claims that any of the Challenged Products prevent, treat, or cure cancer, inhibit tumors, and/or heal the destructive effects of radiation and chemotherapy. (R 21 (Lehr Report)).

425. Lehr's opinions do not address whether Respondents possessed and relied upon competent and reliable scientific evidence to support claims that any of the Challenged Products prevent, treat, or cure cancer, inhibit tumors, and/or heal the destructive effects of radiation and chemotherapy. (R 21 (Lehr Report)).

### III. ANALYSIS AND CONCLUSIONS OF LAW

#### A. Burden of Proof

The parties' burdens of proof are governed by Federal Trade Commission Rule 3.43(a), Section 556(d) of the Administrative Procedure Act ("APA"), and case law. FTC Rules of Practice, Interim rules with request for comments, 66 Fed. Reg. 17,622, 17,626 (Apr. 3, 2001). Pursuant to Commission Rule 3.43(a), "[c]ounsel representing the Commission . . . shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto." 16 C.F.R. § 3.43(a). Under the APA, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d).

Respondents contend that, because of the constitutional issues raised by Respondents, Complaint Counsel should be required to prove the elements of the charges against Respondents by "clear, cogent and convincing evidence." RCOL 1; RB at 4 n.2 (citing *Addington v. Texas*, 441 U.S. 418 (1979)). Respondents' argument has no merit. *Addington* addressed the standard of proof required to commit an individual involuntarily to a state mental hospital – a serious deprivation of a well-recognized, constitutionally protected liberty interest. As shown in Section III E *infra*, Respondents' constitutional arguments are unsupported by fact or law. Accordingly, *Addington* does not alter the applicable standard of proof for this case.

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It is well established that the preponderance of the evidence standard governs FTC enforcement actions. *In re Telebrands Corp.*, No. 9313, 140 F.T.C. 278, 426, 2004 FTC LEXIS 154, at \*76 (Sept. 15, 2004), *aff'd*, 140 F.T.C. 278, 2005 FTC LEXIS 178 (Sept. 19, 2005), *aff'd*, 457 F.3d 354 (4th Cir. 2006); *In re Automotive Breakthrough Sciences, Inc.*, No. 9275, 1998 FTC LEXIS 112, at \*37 n.45 (Sept. 9, 1998) (holding that each finding must be “supported by a preponderance of the evidence in the record”); *In re Adventist Health System/West*, No. 9234, 117 F.T.C. 224, 1994 FTC LEXIS 54, at \*28 (Apr. 1, 1994) (“[e]ach element of the case must be established by a preponderance of the evidence”); *In re Bristol-Meyers Co.*, No. 8917, 102 F.T.C. 21, 1983 FTC LEXIS 64, at \*143 (July 5, 1983) (stating that complaint counsel has “the burden of proving by a preponderance of credible evidence that the challenged advertising claims have not been established or did not have a reasonable basis”), *aff'd*, 738 F.2d 554 (2d Cir. 1984). *See also Steadman v. SEC*, 450 U.S. 91, 102 (1981) (holding that APA establishes preponderance of the evidence standard of proof for formal administrative adjudicatory proceedings).

“[T]he Commission has only such jurisdiction as Congress has conferred upon it by the Federal Trade Commission Act.” *Community Blood Bank v. FTC*, 405 F.2d 1011, 1015 (8th Cir. 1969) (citations omitted). When the jurisdiction of the Commission is challenged, the Commission bears the burden of establishing its jurisdiction. *Id.* (citations omitted); *In re College Football Ass’n*, No. 9242, 1994 FTC LEXIS 350, at \*7 n.3 (July 21, 1991) (citing *Oliver v. Trunkline Gas Co.*, 789 F.2d 341, 343 (5th Cir. 1986)) (“Complaint [C]ounsel bear the burden of ‘affirmatively’ establishing that jurisdiction exists.”). Jurisdictional facts, like substantive liability, must be established by a preponderance of the evidence. *See McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *FTC v. Warner Chilcott Holdings Co. III*, No. 05-2179, 2007 U.S. Dist. LEXIS 4240, at \*17 (D.D.C. Jan. 22, 2007).

The Complaint in this case alleges that Respondents did not possess and rely upon a reasonable basis that substantiated the representations Respondents made in the challenged advertisements. Complaint ¶ 16. Complaint Counsel has the

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burden of proving by a preponderance of credible evidence that Respondents made the claims in the challenged advertising and did not have a reasonable basis for such claims. *In re Bristol-Myers Co.*, 1983 FTC LEXIS 64, at \*143. See *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 959 (N.D. Ill. 2006) (holding that to prevail on a reasonable basis theory, the FTC must prove that the advertiser lacked a reasonable basis for asserting the challenged claim, that the advertiser has the burden of establishing the substantiation it relied on for its claim, and that the FTC has the burden of proving that the advertiser's substantiation is inadequate), *aff'd*, 512 F.3d 858 (7th Cir. 2008).

**B. Jurisdiction over Respondents****1. Positions of the parties and procedural background**

Respondents assert that DCO is a not-for-profit religious organization and, as such, is not subject to the jurisdiction of the FTC. R Juris. Br. at 1-2. Specifically, Respondents assert that DCO is a religious ministry, incorporated as a corporation sole under the nonprofit corporation statutes of the State of Washington, and that James Feijo is the overseer of DCO, as defined under the corporation sole statute. R Juris. Br. at 1. Respondents further state that, as part of its missionary work, DCO addresses the health concerns of its followers, which led DCO to develop the Challenged Products. R Juris. Br. at 2. Maintaining that its religious ministry is not organized to carry on business for its own profit or that of its members, Respondents argue that DCO is not a corporation, as is required for jurisdiction under Sections 4 and 5 of the FTC Act. R Juris. Br. at 7-8.

Complaint Counsel argues that DCO is not a bona fide charitable institution, but is instead a for-profit commercial enterprise, completely controlled by James Feijo, from which he and his family derive substantial pecuniary benefits. CC Juris. Br. at 4. Complaint Counsel further contends that Feijo runs a multi-million dollar commercial operation that competes with for-profit entities in commerce. CC Juris. Br. at 5.

On April 21, 2009, a hearing was held for the limited purpose of determining whether DCO is a corporation within the meaning



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of Section 4 of the FTC Act, 15 U.S.C. § 44, and applicable case law. Apr. 21, 2009 Hearing on Jurisdiction (“HOJ”). After the conclusion of that hearing, a ruling was issued from the bench that Complaint Counsel had demonstrated, by a preponderance of the evidence, that there is jurisdiction over both Respondents, DCO and James Feijo, under Sections 4 and 5 of the FTC Act, 15 U.S.C. §§ 44 and 45, and that the conduct challenged in this case is in or affecting commerce within the meaning of those Sections. HOJ Tr. 347-48. *See also* Order Memorializing Bench Rulings on Jurisdiction, Respondents’ Motion to Dismiss, Motions for Summary Decision, and Respondents’ Motion for Stay Pending Interlocutory Appeal, Apr. 27, 2009. The analysis in support of that ruling follows.

## 2. Summary of background facts

Respondents maintain that DCO is a house church. According to James Feijo, a house church is a church operating not in the typical sense, with a building, sign, and established doctrines, but instead is a church meeting in houses to worship and break bread, with no set times for religious meetings. (J. Feijo, HOJ Tr. 180-82, 263-64). James and Patricia Feijo testified that DCO was created for the purpose of healing based on the scripture of Daniel Chapter One and other Biblical verses, including Genesis 1:29 where it is written that God said he created all things for our food for healing. (J. Feijo, Tr. 417-23; R 16 (P. Feijo, Dep. at 39-40)). According to Patricia Feijo, the name Daniel Chapter One comes from the Book of Daniel in the Old Testament of the Bible, in which Daniel and his men were in captivity and were expected to eat the king’s very rich diet of meats and wine, but instead ate and drank only pulse and water; after 10 days, their eyes were said to be brighter and they were said to be stronger than the king’s men. (R 16 (P. Feijo, Dep. at 40-41)).

James and Patricia Feijo testified that DCO’s ministry activities include helping house churches in other countries, holding religious meetings, performing baptisms, delivering babies, performing marriage ceremonies, performing healings, and reaching out to others to inform them about Respondents’ perspectives on the integration of spiritual and physical well-being. (R 16 (P. Feijo, Dep. at 204-05); J. Feijo, HOJ Tr. 99, 180-

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83, 236-37; R 15 (J. Feijo, Dep. at 73); P. Feijo, Tr. 325-26). Respondents claim that they have created a combined spiritual and scientific approach that maintains the balance of bodily systems. F. 85. James Feijo named this approach “BioMolecular Nutrition.” F. 85.

Respondents sell the four products challenged in the Complaint over the Internet through their websites and through the BioMolecular Nutrition Product Catalog, which lists and describes products sold by DCO. F. 84, 91. The BioMolecular Nutrition Product Catalog sets forth the DCO Website address, [www.danielchapterone.com](http://www.danielchapterone.com), for consumers to shop online, and lists the toll-free number that consumers can use to place orders. F. 91. In addition, Respondents operate a radio program, DCO HealthWatch, to which cancer patients have called in and received counseling about taking the Challenged Products. F. 108-10. Respondents contend that because their activities in promoting and selling the DCO Products are in furtherance of the Feijos’ spiritual and scientific beliefs, they are outside the FTC’s jurisdiction.

### 3. Analytical framework

In analyzing whether the FTC has jurisdiction over Respondents, the starting point is the language of the statute itself. *United States v. Turkette*, 452 U.S. 576, 580 (1981). Section 5(a)(1)-(2) of the FTC Act grants the FTC the authority to “prevent unfair or deceptive acts or practices in or affecting commerce” by “persons, partnerships, or corporations.” 15 U.S.C. § 45(a)(1)-(2). Section 4 of the FTC Act defines “corporation” in part as “any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, . . . without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members.” 15 U.S.C. § 44.

In interpreting the language of Section 4 of the FTC Act, courts and the Commission have consistently held that an entity organized as a nonprofit is within the jurisdiction of the FTC if the entity in fact engages in business for its own profit or that of

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its members. *California Dental Ass'n v. FTC*, 526 U.S. 756, 766-67 (1999); *Community Blood Bank*, 405 F.2d at 1017 (Commission's jurisdiction extends to any legal entity without shares of capital which engages in business for profit in the traditional meaning of that language). In *Community Blood Bank*, the Court of Appeals explained that "under § 4 the Commission lacks jurisdiction over nonprofit corporations without shares of capital, which are organized for and actually engaged in business for only charitable purposes, and do not derive any 'profit' for themselves or their members within the meaning of the word 'profit' as attributed to corporations having shares of capital." 405 F.2d at 1022. Commenting on *Community Blood Bank*, the Commission stated: "The court thus established a two-pronged test looking both to the source of the [entity's] income, i.e., to whether the corporation is 'organized for and actually engaged in business for only charitable purposes,' and to the destination of the income, i.e., to whether either the corporation or its members derive a profit." *In re College Football Ass'n*, 1994 FTC LEXIS 350, at \*51-52.

Thus, the analysis of jurisdiction in this case begins with an evaluation of the source of DCO's income and an inquiry into whether DCO is actually engaged in business only for charitable purposes. Then, the focus turns to whether DCO in fact engages in business for its own profit or that of its members. In addition, jurisdiction over James Feijo individually is assessed. Finally, the evidence that Respondents' activities are in or affecting commerce is evaluated to establish that the FTC has jurisdiction over Respondents with respect to the acts or practices challenged in the Complaint.

**4. DCO is not a business organized or engaged in only charitable purposes**

**a. DCO operates a commercial enterprise**

Profit, the "jurisdictional touchstone" of the FTC Act, *California Dental*, 526 U.S. at 767, is determined in accordance with the "traditional and generally accepted meaning of that word." *Community Blood Bank*, 405 F.2d at 1017. "According to a generally accepted definition 'profit' means gain from business

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or investment over and above expenditures, or gain made on business or investment when both receipts or payments are taken into account.” *Community Blood Bank*, 405 F.2d at 1017. The dictionary definition of profit includes “a valuable return: GAIN,” and “to be of service or advantage . . . to derive a benefit: GAIN,” as well as the traditional concept of profit in business as “the excess of returns over expenditure in a transaction or series of transactions; esp[ecially] the excess of the selling price of goods over their cost.” *Merriam-Webster’s Collegiate Dictionary* (10th ed. 1993).

Respondent DCO has a toll-free phone number and a call center and operates websites through which consumers may purchase DCO products. F. 84, 99, 103-04. In addition, DCO sells its products through stores in Georgia and Pennsylvania and through various distributors, including chiropractic centers. F. 116-19. The DCO Website contains a tab inviting consumers to shop at DCO’s “On-Line Store.” F. 105. The “About Us” section on the DCO Website describes the company as a “health food store” or “health food supplement store.” F. 32. In their websites and brochures, Respondents compare their products and their organization to “other brands” or “other companies.” *E.g.*, F. 137; F. 138 (DCO Website stating: “Daniel Chapter One is the first and only company to add Siberian ginseng to the formula”).

Over a thousand consumers have purchased DCO’s products. F. 81. Respondents have generated approximately \$2 million in annual sales for the years 2006, 2007, and 2008 for all of DCO’s nearly 200 products. F. 9. Its sales of the Challenged Products constitute twenty or thirty percent of its sales. F. 80. Respondents charge consumers three to ten times what it costs Respondents to purchase the Challenged Products from manufacturers. F. 83, 127-29, 140-42, 144-46.

Significantly, DCO was incorporated as a for-profit corporation from 1991 to 1997 and sold the Challenged Products since at least 1993 and throughout the 1990s. F. 12-13, 22-23, 27. DCO’s Articles of Incorporation during this period stated that the purpose for which DCO was organized as a for-profit corporation was: “To engage in the sale, retail, wholesale and distribution of health products, including but not limited to health foods and

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supplements, namely those with special nutritive qualities and values.” F. 23. DCO changed its corporate form to corporation sole in 2002 and continued to sell the Challenged Products. F. 8-9, 28.

It appears that DCO’s revenues exceed its expenses, since DCO was able to completely support two individuals and their homes (*see infra* Section III B 5) and to maintain surpluses in various accounts in the hundreds of thousands of dollars for extended periods of time.<sup>2</sup> F. 42-45. A showing that DCO was successful in running its business, however, is not required. *See California Dental*, 526 U.S. at 768 n.6 (“It should go without saying that the FTC Act does not require for Commission jurisdiction that members of an entity turn a profit on their membership, but only that the entity be organized to carry on business for members’ profit.”); *In re Ohio Christian College*, No. 8820, 80 F.T.C. 815, 849-50, 1972 FTC LEXIS 223, at \*72 (May 19, 1972) (stating that the fact that respondents “were apparently not very successful in their enterprise” was of “little consequence”).

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<sup>2</sup> The record on DCO’s revenues and expenditures is not clear. It is noted that Respondents failed to fully comply with discovery requests regarding their finances, even after being ordered to do so, but Complaint Counsel was able to obtain some limited financial records by subpoena. Complaint Counsel asked for an adverse inference that the information sought from Respondents in discovery would have defeated Respondents’ nonprofit argument. CC Juris. Br. at 22. James Feijo, DCO’s sole trustee, testified that he does not keep records or keep track of the money DCO distributes. F. 6, 40, 47; *see also* F. 50-54 (Respondents did not maintain documents even after being ordered to produce documents in this proceeding). Although an adverse inference in this case may have been appropriate, *see Hamilton v. Accu-Tex*, 32 F. Supp. 2d 47, 68 (E.D.N.Y. 1998) (drawing adverse inference on interstate revenue in order to determine interstate commerce, an element for long-arm jurisdiction, and finding “since the necessary information is in the exclusive control of defendants, where they have failed to provide the information, this Court finds that plaintiffs have satisfied their burden, and the case should proceed”), it is not necessary here, because the facts are sufficient to demonstrate that DCO operated as a business for its own profit or that of its members.

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**b. DCO is not organized only for charitable purposes**

Respondents' principal ground for arguing that the FTC lacks jurisdiction is that DCO is a ministry, organized as a corporation sole under the laws of the State of Washington as of October 30, 2002, and that James Feijo is the overseer of Daniel Chapter One, within the meaning of the Washington State statute authorizing the creation of a corporation sole. R Juris. Br. at 1 (citing R 1 (DCO's Articles of Incorporation) and Rev. Code Wash. (ARCW) § 24.12.030). However, courts and the Commission look to the substance, rather than the form, of incorporation in determining jurisdiction under the FTC Act. *Community Blood Bank*, 405 F.2d at 1019 ("mere form of incorporation does not put [an entity] outside the jurisdiction of the Commission"); *In re American Medical Ass'n*, No. 9064, 94 F.T.C. 701, 1979 FTC LEXIS 182, at \*239 (Oct. 12, 1979), *enforced as modified*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided court*, 455 U.S. 676 (1982). Regardless of DCO's form of incorporation, the evidence shows that DCO bears none of the substantive indicia of a corporation that is truly organized only for charitable purposes.

DCO is not registered with the Internal Revenue Service as a tax-exempt organization under Section 501(c)(3) or any other section of the IRS Code. F. 31. In evaluating the FTC's jurisdiction, "[t]he Commission has long recognized that while the terms employed in other statutes and the interpretation adopted by other agencies are not controlling, the treatment of exemptions for nonprofit corporations by other branches of the Federal Government is helpful." *In re College Football Ass'n*, 1994 FTC LEXIS 350, at \*52 (June 16, 1994) (citing *In re Ohio Christian College*, 80 F.T.C. at 848; *In re American Medical Ass'n*, 1979 FTC LEXIS 182, at \*254 (finding an entity's tax-exempt status certainly one factor to be considered and observing that a determination by another federal agency that a respondent is or is not organized and operated exclusively for eleemosynary purposes should not be disregarded)). In *Community Blood Bank*, the fact that respondents were exempt from federal income tax liability was among the factors weighed in finding that the FTC lacked jurisdiction. 405 F.2d at 1020.

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Respondents contend that it is immaterial for jurisdictional purposes that DCO does not have a Section 501(c)(3) tax exemption because, according to Respondents, churches do not need to obtain such exemption, pursuant to Section 508(c)(1)(A) of the IRS Code. Contrary to Respondents' argument, Section 508(c)(1)(A) exempts churches from certain notice requirements applicable to other entities seeking to obtain a Section 501(c)(3) tax exemption, and has no bearing on the issue of FTC jurisdiction.<sup>3</sup>

Moreover, as summarized below, in Section III B 5, DCO distributes funds for the use of both James and Patricia Feijo, private individuals and DCO's corporate officers. The Internal Revenue Code provides an exemption from income taxation for corporations where "no part of the net earnings of which inures to the benefit of any private . . . individual." 26 U.S.C. § 501(c)(3). The Nonprofit Corporation Act of the State of Washington defines a nonprofit corporation as a corporation no part of the income of which is distributable to its members, directors, or

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<sup>3</sup> Section 508 provides in pertinent part:

- (a) . . . Except as provided in subsection (c), an organization organized after October 9, 1969, shall not be treated as an organization described in section 501(c)(3) [26 USCS § 501(c)(3)] --
- (1) unless it has given notice to the Secretary, in such manner as the Secretary may by regulations prescribe, that it is applying for recognition of such status, or
- (2) for any period before the giving of such notice, if such notice is given after the time prescribed by the Secretary by regulations for giving notice under this subsection.
- (b) Presumption that organizations are private foundations. Except as provided in subsection (c), any organization (including an organization in existence on October 9, 1969) which is described in section 501(c)(3) [26 USCS § 501(c)(3)] and which does not notify the Secretary, at such time and in such manner as the Secretary may by regulations prescribe, that it is not a private foundation shall be presumed to be a private foundation.
- (c) Exceptions.
- (1) Mandatory exceptions. Subsections (a) and (b) shall not apply to
- (A) *churches*, their integrated auxiliaries, and conventions or associations of churches. . . .

(emphasis added).

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officers. Rev. Code Wash. (ARCW) § 24.03.005. With the distribution of funds for use by James and Patricia Feijo, DCO would not qualify as a tax-exempt nonprofit corporation under either the Internal Revenue Code or laws of the State of Washington.

In addition, DCO's Articles of Incorporation do not declare that DCO was organized exclusively for charitable or other clearly nonprofit purposes, but instead include provisions permitting "other worthwhile projects for the common good of Daniel Chapter One and its close associates, along with other acts and programs beneficial to Daniel Chapter One at large." F. 29-30. Further, DCO's Articles of Incorporation do not provide for distribution of its assets upon dissolution solely to other nonprofit entities or prohibit distribution of its earnings to the benefit of any individual or for-profit corporation. F. 30. By contrast, in *Community Blood Bank*, in which the Court found the FTC lacked jurisdiction, the articles of incorporation of the nonprofit entities: declared that they were organized exclusively for educational and charitable purposes; declared that no part of their earnings shall inure to the benefit of any member or any other individual or corporation; and, required that the corporation's assets, upon dissolution, be disposed of in accordance with the provisions of the state's nonprofit corporation law. 405 F.2d at 1020.

**c. DCO is not engaged in business only for charitable purposes**

It is not disputed that DCO has engaged in some charitable activities. In some instances, Respondents gave away DCO products and provided counsel to persons in need. F. 19, 21. Respondents have at times allowed people in need to stay in their house and provided support to a junior men's fast-pitch softball team. F. 19-20. However, Respondents did not provide documents to indicate how much of DCO's products they have given away or how much financial support they have dedicated to charitable activities, and the testimony on this point was inconclusive. F. 54. Furthermore, the evidence shows, as summarized in Section III B 5 *infra*, that in addition to its charitable activities, DCO distributes funds to support all of the living expenses of both James and Patricia Feijo. This



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contribution of funds to the Feijos defeats Respondents' claim that DCO is operated exclusively for charitable purposes. As noted in *Community Blood Bank*: "A religious association might sell cookies at a church bazaar, or receive income from securities it holds, but so long as its income is devoted exclusively to the purposes of the corporation, and not distributed to members or shareholders, it surely does not cease to be a nonprofit corporation merely because it has income. . . ." *Community Blood Bank*, 405 F.2d at 1019-20 (quoting with approval dissenting opinion in *In re Community Blood Bank*, 70 F.T.C. 728, 1966 FTC LEXIS 30, at \*455 (Sept. 28, 1968)). In *Community Blood Bank*, the uncontradicted evidence showed that no part of any funds received by respondents had ever been distributed to or inured to the benefit of any of their members, directors, or officers. *Community Blood Bank*, 405 F.2d at 1020. But here, as summarized below, where the evidence clearly shows that DCO distributes funds to the Feijos, DCO's income is not devoted exclusively to charitable or other nonprofit purposes.

**5. DCO engages in business for its own profit or that of its members**

Whether Respondent DCO is a ministry is not dispositive in determining the FTC's jurisdiction over Respondents' activities. Instead, the pivotal inquiry is whether Respondent DCO engaged in business for its own profit or that of its members. *California Dental*, 526 U.S. at 766-67; *Community Blood Bank*, 405 F.2d at 1017. In *Community Blood Bank*, the individual respondents "were 'public-spirited volunteers' and derived no personal profit, benefit or advantages in their individual occupations . . . from their participation in the activities of the community-wide blood bank program." 405 F.2d at 1021. "Their activities at all times were directed toward promoting a community-sponsored program in the public interest and at no time were infected with commercial intent." *Id.* at 1021-22. The Commission, in *Ohio Christian College*, noted that the court in *Community Blood Bank* found that the challenged boycotting activities were motivated by a sincere belief that commercial trafficking in blood was immoral and not in the public interest. *In re Ohio Christian College*, 1972 FTC LEXIS 223, at \*65. The Commission went on to state: "Whether one agrees with this belief or not, it is apparent the

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actions of the corporate respondents in *Community Blood Bank* were well-intentioned and did not inure to the financial benefit of anyone.” *Id.*

Thus, the Commission has made clear that, for finding jurisdiction, what matters is not what respondents’ subjective motivations are, but whether respondents’ actions inure to their own financial benefit. Applying that principle to this case, what matters, for finding jurisdiction, is not whether Respondents’ commercial activities are motivated by religious beliefs, but whether Respondents’ activities inured to their own financial benefit, which, as summarized below, they clearly did.

**a. DCO distributes funds to the Feijos**

“[T]he distribution of funds to private persons or for-profit companies as opposed to their use for ‘recognized public purposes’ is one basis for finding an entity to be ‘organized to carry on business for . . . profit.’” *In re College Football Ass’n*, 1994 FTC LEXIS 350, at \*49. *See also California Dental*, 526 U.S. at 766-67 (holding that jurisdiction arose from economic and pecuniary benefits conferred by nonprofit trade association on its for-profit members); *In re American Medical Ass’n*, 1979 FTC LEXIS 182, at \*240 (stating that Section 4 does not require a transfer or delivery of monetary profits to the members of a non-stock corporation, but only pecuniary benefits to its members from the corporation’s activities); *In re Ohio Christian College*, 1972 FTC LEXIS 223, at \*68 (“‘Profit does not necessarily mean a direct return by way of dividends, interest, capital account or salaries. A saving of expense which would otherwise necessarily be incurred is also a profit to the person benefitted.’”) (citation omitted).

It is undisputed that DCO pays all of the Feijos’ living expenses. F. 58. DCO or its affiliate owns two houses (one in Rhode Island and one in Florida, on country club land with a pool in the back), in which the Feijos stay without paying rent. F. 55. DCO also owns two cars (a 2003 Cadillac and a 2004 Cadillac) which the Feijos use. F. 56-57. Respondent James Feijo does not have his own individual bank account. F. 76. Both James and Patricia freely use DCO credit cards for personal expenses. F. 66.

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DCO pays all of the Feijos' expenses, including pool and gardening services for the Feijo house in Florida; Patricia Feijo's tennis club membership; James Feijo's membership at the Green Valley Country Club in Rhode Island; and, during the period from December 2005 to March 2009, golf expenses of \$9,936, restaurant expenses of \$14,024, automobile expenses of \$28,582, and cigar expenses of \$1,077. F. 58, 61-70. This distribution of funds, which amounts to a saving of expense which might otherwise be incurred by the Feijos, is a profit to the Feijos and provides a basis for finding that DCO is organized to carry on business for profit.

Respondents argue that jurisdiction should not be based upon the economic benefits conferred upon the Feijos because the Feijos do not take salaries from DCO for their work and because they live modestly. R Juris. Br. at 7. Neither of these things affects jurisdiction in this case. The Feijos have no need to take salaries, since James Feijo controls all of the assets of DCO and can direct whatever funds he chooses for the support of himself and his wife. F. 6, 40. Second, it is not necessary for the Feijos to live lavishly for jurisdiction to be proper under Section 4. The Supreme Court, in *California Dental*, specifically rejected the notion that the profit received must be substantial: "There is accordingly no apparent reason to let the statute's application turn on meeting some threshold percentage of activity for this purpose [of profit], or even satisfying a softer formulation calling for a substantial part of the nonprofit entity's total activities to be aimed at its members' pecuniary benefit. To be sure, proximate relation to lucre must appear . . . ." 526 U.S. at 766. It is sufficient for the purpose of finding jurisdiction that the economic benefits conferred are more than "*de minimis*" or "merely presumed." *Id.* at 767 and 767 n.6. In this case, the complete financial support of James and Patricia Feijo, including, among other things, two homes, two cars, tennis lessons, rounds of golf, cigars, restaurant meals, and club memberships, constitutes neither simply presumed nor *de minimis* economic benefits.

The Commission found jurisdiction under Section 4 on similar facts in *Ohio Christian College*, which involved deceptive trade practices by a nonprofit religious college. The Commission stated:

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[T]he question is not whether a corporation amassed profit, but how it disposed of such profit. From the facts available to the Commission, we find the relationship between [Ohio Christian College] and the individual respondents in dealing with the dissipation of profits strikingly similar to that existing between a closely-held commercial corporation and its officer-shareholders. The cavalier treatment of the corporate assets and finances leads us to conclude that respondents considered them their own. The individual respondent . . . has complete control over the purse strings, he sets all salaries (including his own), determines all allocation and expenditures, signs all checks and exercises plenary power over the affairs of the school. The record shows the corporation was organized and controlled so that the individual respondents could take what they wanted prior to any further disposition or comingling of funds.

1972 FTC LEXIS 223, at \*69-70.

In this case, as well, James Feijo treated the income and expenditures of DCO cavalierly. He claimed to keep no financial records, and to have no idea of how much money DCO had or how much money was spent on various aspects of its operations or for the support of the Feijos' living expenses. F. 47, 50, 59. Moreover, since James Feijo had no individual bank account, he used DCO's assets at will, thereby treating those assets as his own. As in *Ohio Christian College*, such circumstances support jurisdiction over DCO as an entity that is organized to carry on business for profit.

**b. DCO's profit inures to its sole member, James Feijo**

As a corporation sole, DCO has one member, James Feijo, the overseer of DCO. Pursuant to the State of Washington's Nonprofit Corporation Act, under which DCO is organized:

Any person, being the . . . overseer . . . of any church or religious denomination in this state, may, in conformity with the constitution, canons, rules, regulations or discipline of such

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church or denomination, become a corporation sole, in the manner prescribed in this chapter . . . ; and, thereupon, said . . . overseer . . . shall be held and deemed to be a body corporate, with all the rights and powers prescribed in the case of corporations aggregate; and with all the privileges provided by law for religious corporations.

Rev. Code Wash. (ARCW) § 24.12.010. *See also Barnett v. Hicks*, 792 P.2d 150, 155 (Wash. 1990) (Dore, J., dissenting on other grounds) (noting that under Washington law, a corporation sole vests full management power in one individual).

The evidence in this case shows that James Feijo controls the money made by DCO. F. 6, 40-41. The structure of the corporation sole enables James Feijo to set his and his wife's salaries and benefits without the check of a managing board of directors or other individuals. Further, DCO pays all of the Feijos' living expenses, including food, clothing, housing, transportation, travel, recreation, and more. F. 55-58, 61-70. These economic benefits constitute profit to James Feijo. Thus, DCO engages in business for the profit of its sole member, James Feijo.

#### **6. James Feijo is a person over whom the FTC has jurisdiction**

The FTC has jurisdiction under Section 5(a)(2) over persons, partnerships or corporations. 15 U.S.C. § 45(a)(2). If individuals direct and control the acts and practices of a corporation amenable to the FTC's jurisdiction, then they too may be made subject to the FTC's jurisdiction. *In re Ohio Christian College*, 1972 FTC LEXIS 223, at \*62-63; *see FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 573 (7th Cir. 1989) (holding that individual who either participated directly in or had the authority to control deceptive acts or practices may be held liable under the FTC Act for the violations of his corporation).

Respondent James Feijo both participated directly in and had the authority to control the acts or practices challenged in this case. Respondents admit that Respondent Feijo is responsible for the activities of Respondent DCO as its overseer. F. 5. The

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activities for which he is responsible include the development, creation, production, and distribution of the Challenged Products; the creation, management, and maintenance of DCO's toll-free telephone number through which consumers may order the Challenged Products; the setting of prices for the Challenged Products; and the creation, drafting, and approval of the directions for usage and the recommended dosages of the Challenged Products. F. 37-39, 100. Respondent James Feijo and his wife, Patricia Feijo, are also responsible for the information contained in DCO's advertising and promotional materials, including the BioGuide, the Cancer Newsletter, the Most Simple Guide, and the websites [www.danielchapterone.com](http://www.danielchapterone.com), [www.7herbformula.com](http://www.7herbformula.com), and [www.gdu2000.com](http://www.gdu2000.com). F. 165-66, 173, 178. In addition, Respondent Feijo and his wife co-host the DCO radio program, Daniel Chapter One HealthWatch, for two hours daily, Monday through Friday, on which they have counseled individuals who have called into the radio program about taking DCO's products. F. 108-10, 178. Finally, Respondent Feijo is the trustee for all of DCO's assets, including all funds which are held in trust. F. 6, 40. Thus, Respondent James Feijo had the authority to direct and control, in fact did direct and control, and participated directly in the challenged acts or practices of DCO, a corporation that is subject to the FTC's jurisdiction. Accordingly, Respondent James Feijo is a person over whom the Commission has jurisdiction, and he may be held individually liable under the FTC Act for the deceptive acts and practices found below.

### **7. Respondents engage in interstate commerce**

Section 5(a)(1) of the FTC Act declares unlawful "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). Section 12 of the FTC Act provides that the dissemination of any false advertisement, for the purpose of inducing the purchase in or having an effect upon commerce, of food or drugs, shall be an unfair or deceptive act or practice in or affecting commerce within the meaning of Section 5. 15 U.S.C. § 52.

In their Answer, Respondents admit that they distribute the Challenged Products in commerce. Answer ¶ 4. Respondent DCO operates a call center and websites through which

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consumers may purchase the Challenged Products. F. 99, 103-04. DCO has sold its products nationally through a number of stores, distributors, and chiropractic centers, including those in Florida, Georgia, Missouri, and Pennsylvania. F. 116-17, 119. These sales are in or affecting commerce. *See United States v. Robertson*, 514 U.S. 669, 672 (1995) (“[A] corporation is generally engaged in commerce when it is itself directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce.”) (per curiam) (citation omitted). In addition, Respondents’ advertisements of its products through the DCO websites (F. 158-61), which reach a national audience invoke the FTC’s jurisdiction. *See FTC v. Simeon Management Corp.*, 391 F. Supp. 697, 703 (N.D. Cal. 1975) (holding that advertisements placed in newspapers, magazines, and on television with out-of-state circulations and broadcasting ranges, were sufficiently involved in or affecting commerce to invoke the FTC’s jurisdiction).

To the extent that Respondents maintain that they do not sell the Challenged Products, but instead offer them for suggested donations, the evidence is to the contrary. For example, on their website [www.dclstore.com](http://www.dclstore.com), Respondents state: “For Information on Special offers for purchasing multiple bottles of 7-Herb call 1-800-504-5511 between 9-6 EST Mon-Fri.” F. 107. In the BioMolecular Nutrition Product Catalog, which lists and describes the Challenged Products and states “Call Toll free or shop online,” there is no indication that the listed prices are suggested donations. F. 91-92.

An FTC investigator purchased the Challenged Products from the DCO Website, [www.danielchapterone.com](http://www.danielchapterone.com), on January 3, 2008. F. 147. At the time of his purchase, each of the Challenged Products was displayed on the DCO Website with a picture of the product, a short description of the product, and a corresponding price. F. 148. The shipment to the investigator of the Challenged Products did not contain any documents indicating that the purchase was a donation or thanking the purchaser for making a donation to DCO. F. 156. An e-mail the FTC investigator received after his purchase of the Challenged Products stated: “Thank you for your purchase on our online store. . . . We

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appreciate your business with us,” and offered a ten percent discount on a subsequent purchase. F. 152.

The evidence clearly demonstrates that Respondents advertise and sell products, including the Challenged Products, throughout the United States, and that their sales are in or affecting commerce. Thus, the Commission has jurisdiction over Respondents, and the conduct challenged in the Complaint, pursuant to Sections 4 and 5 of the FTC Act, 15 U.S.C. §§ 44, 45.

### **8. Summary of jurisdiction**

The FTC has jurisdiction over DCO as a corporation, within the meaning of Section 4 of the FTC Act. Jurisdiction is also proper as to James Feijo, as a person directly participating in and controlling all activity of DCO, under Section 5 of the FTC Act. The conduct of Respondents is in or affecting commerce, pursuant to Sections 5 and 12 of the FTC Act. Accordingly, the FTC has jurisdiction in this matter.

### **C. Respondents’ Dissemination of Advertisements to Induce Purchases of Food or Drugs**

Section 12 of the FTC Act makes it unlawful “for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement . . . [b]y any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce of food, drugs, devices, services, or cosmetics.” 15 U.S.C. § 52. Prior to addressing whether the DCO materials are false, within the meaning of Section 12, it must be determined preliminarily whether the materials constitute: (1) the dissemination of advertisements; (2) for the purpose of inducing, or which are likely to induce, purchases in or affecting commerce; (3) of “food” or “drugs.”



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### **1. Materials disseminated about the Challenged Products constitute advertisements**

“Advertisement” is not defined in the FTC Act. The ordinary meaning of the word is: The act or process of calling something to the attention of the public; or a public notice, especially one published in the press or broadcast over the air. *Merriam-Webster’s Collegiate Dictionary* (10th ed. 1993). Black’s Law Dictionary defines “advertisement” as a “[n]otice given in a manner designed to attract public attention. Information communicated to the public, or to an individual concerned. . . .” *Black’s Law Dictionary* 54 (6th ed. 1990) (citation omitted). See also *B & B Coastal Enters., Inc. v. Demers*, 276 F. Supp. 2d 155, 159 n.3 (D. Me. 2003) (noting that local ordinance regulating advertising signs applied to any sign which “directs attention to the type of business or profession conducted, as well as to a commodity or service, sold, offered, or manufactured . . .”). As discussed below, the evidence amply demonstrates that the DCO materials at issue in this case constitute the dissemination of “advertisements” for purposes of Section 12.

First, information about the Challenged Products is disseminated to the public, over the Internet, through the websites [www.danielchapterone.com](http://www.danielchapterone.com), [www.7herbformula.com](http://www.7herbformula.com), [www.gdu2000.com](http://www.gdu2000.com), [www.dc1pages.com](http://www.dc1pages.com), and [www.dc1store.com](http://www.dc1store.com). F. 158, 161. Consumers can locate the DCO Website by entering the term “cancer” in a Google search. F. 162. In addition, information about the Challenged Products is disseminated to the public through printed materials, also available on the DCO Website, including the BioGuide, the Cancer Newsletter, and “The Most Simple Guide.” F. 163-64, 169-70, 172. Information about the Challenged Products is also disseminated to the public through BioMolecular Nutrition Product Catalog, F. 91, 154. Finally, information about the Challenged Products is disseminated to the public, via the Monday through Friday, two hour radio program, “Daniel Chapter One HealthWatch.” F. 175-77.

The information provided through these media promotes the Challenged Products. Respondent Feijo admits that DCO advertises on the DCO Website. F. 161. DCO’s printed materials

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also promote the attributes of the Challenged Products. For example, the “Most Simple Guide” describes the Challenged Products as “essential for cancer.” F. 192. The DCO websites, the BioGuide, and the Cancer Newsletter promote the products through product descriptions and testimonials. F. 179-80, 183-88, 190, 195, 197-201, 203-10. The BioMolecular Nutrition Product Catalog also describes and promotes the characteristics of the Challenged Products. F. 91, 233, 256, 279. Finally, the radio program uses “health advice” to promote the products. F. 213-17. Accordingly, the DCO materials constitute “advertisements” within the scope of Section 12 of the FTC Act, 15 U.S.C. § 52.

**2. The advertisements are for the purpose of inducing, and did induce, purchases of the Challenged Products in or affecting commerce**

As noted in Section III B 7 above, Respondents’ contention that their products are offered for suggested donations and not for purchase is contrary to the evidence. The DCO Website contains icons inviting consumers to “Buy Now.” For example, the DCO Website touts the purported benefits of BioShark immediately adjacent to a link urging the viewer to “BUY NOW!” F. 106, 221. The BioGuide, Cancer Newsletter, and “Most Simple Guide” all prominently feature DCO’s toll-free call center number. F. 90, 94, 163, 167, 174. Consumers are also given the toll-free call center number on the DCO radio program. F. 102, 111. In addition, DCO has spent money on advertising its products. F. 159-60. In these circumstances, it is clear that Respondents’ advertisements are “intended to” induce sales. Moreover, there is no question that DCO in fact made sales, F. 9, 80-81, and that its sales are “in or affecting commerce.” *See* F. 218; *supra* Section III B 7.

**3. The Challenged Products are food and/or drugs**

“Food” and “drug,” for the purposes of Section 12, are defined in the FTC Act as follows:

(b) Food. The term “food” means (1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article.

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(c) Drug. The term “drug” means (1) articles recognized in the official United States Pharmacopoeia, official Homoeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; and (2) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (3) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (4) articles intended for use as a component of any article specified in clause (1), (2), or (3); but does not include devices or their components, parts, or accessories.

15 U.S.C. § 55(b), (c).

Courts and the Commission have routinely treated dietary supplements as within the scope of Section 12. *See FTC v. National Urological Group, Inc.*, No. 1:04-CV-3294, 2008 U.S. Dist. LEXIS 44145 (N.D. Ga. June 4, 2008); *FTC v. Direct Marketing Concepts, Inc.*, 569 F. Supp. 2d 285, 297 (D. Mass. 2008); *FTC v. Garvey*, 383 F.3d 891 (9th Cir. 2004); *Shafe v. FTC*, 256 F.2d 661, 663 (6th Cir. 1958). There is no dispute that the Challenged Products are dietary supplements. RFF 11; Answer ¶¶ 6, 8, 10, 12. In accordance with the foregoing authorities, such articles constitute “food” and/or “drug[s]” within the scope of Section 12. *See In re General Nutrition, Inc.*, No. 9175, 113 F.T.C. 146, 1986 FTC LEXIS 74, at \*4 (Feb. 24, 1986) (finding that, as advertised, dietary supplement tablets, “Healthy Greens,” constituted a “food” and “drug” within the meaning of Section 12 of the FTC Act).

#### **D. Respondents’ Advertising Is Deceptive or Misleading**

An “advertisement is deceptive under the Act if it is likely to mislead consumers, acting reasonably under the circumstances, in a material respect.” *Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992) (citing *In re Thompson Medical Co.*, No. 9149, 104 F.T.C. 648, 788, 1984 FTC LEXIS 6, at \*311 (Nov. 23, 1984), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986); *In re Cliffdale Assocs.*, No. 9156, 103 F.T.C. 110, 164-66, 1984 FTC LEXIS 71, at \*104 (Mar. 23, 1984)). *See also* 15 U.S.C. § 55(a)(1) (defining “false

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advertisement” as an advertisement “which is misleading in a material respect”). Proof of intent to deceive is not required, and “the subjective good faith of the advertiser is not a valid defense.” *FTC v. Sabal*, 32 F. Supp. 2d 1004, 1007 (N.D. Ill. 1998); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988).

In determining whether advertising is deceptive, the Commission engages in a three-part inquiry to determine: (1) whether the advertisements convey the claims alleged; (2) whether the claims are false or misleading; and (3) whether the claims are material to prospective consumers. *Kraft v. FTC*, 970 F.2d at 314; *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994); *FTC v. Direct Marketing Concepts*, 569 F. Supp. 2d at 297. Applying that three-part inquiry to this case, it is clear that Respondents’ advertising is deceptive.

### **1. The DCO advertisements make the claims alleged in the Complaint**

The Complaint alleges that Respondents disseminated advertisements which claim that the Challenged Products prevent, treat, or cure cancer. Complaint ¶¶ 5, 7, 9, 11, 13. The Complaint further charges that Respondents’ advertisements represent that:

Bio\*Shark inhibits tumor growth;  
Bio\*Shark is effective in the treatment of cancer;  
7 Herb Formula is effective in the treatment or cure of cancer;  
7 Herb Formula inhibits tumor formation;  
GDU eliminates tumors;  
GDU is effective in the treatment of cancer;  
BioMixx is effective in the treatment of cancer; and  
BioMixx heals the destructive effects of radiation and chemotherapy.

Complaint ¶ 14.

Respondents contend that DCO’s advertising does not use the words “diagnose, mitigate, cure or prevent,” that their “express statements” about the Challenged Products describe the products’

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effects on the “structure or function” of the body, and that their “claims” consist of the language of the various product descriptions in their advertising. RPF No. 22-26; *see also* RRF No. 153 (replying that the “statement cited . . . specifically does not state that the products can cure, treat or prevent cancer”); RB at 9 (“Nowhere on the face of the actual statements by Respondents do Respondents state that their products diagnose, mitigate, treat, cure or prevent a specific disease or class of diseases. . .”). Respondents’ arguments disregard both the law and common sense, which recognize that claims may be either express or implied. *In re Kraft, Inc.*, No. 9208, 114 F.T.C. 40, 120, 1991 FTC LEXIS 38, at \*10 (Jan. 30, 1991), *aff’d*, 970 F.2d 311 (7th Cir. 1992); *In re Thompson Medical*, 104 F.T.C. at 788, 1984 FTC LEXIS 6, at \*311. While express claims directly state the representation at issue, implied claims do so in an oblique or indirect way. *Kraft v. FTC*, 970 F.2d at 318 n.4; *In re Thompson Medical*, 104 F.T.C. at 788, 1984 FTC LEXIS 6, at \*312 (“Implied claims are any claims that are not express.”).

The primary evidence of the claims an advertisement conveys to reasonable consumers is the advertisement itself. *In re Telebrands Corp.*, No. 9313, 140 F.T.C. 278, 290, 2005 FTC LEXIS 178 (Sept. 19, 2005), *aff’d*, 457 F.3d 354 (4th Cir. 2006); *In re Novartis Corp.*, No. 9279, 127 F.T.C. 580, 680, 1999 FTC LEXIS 90, at \*37-38 (May 13, 1999); *In re Kraft*, 1991 FTC LEXIS 38, at \*12. Moreover, the Commission looks to the overall net impression created by the advertisement as a whole, by examining the interaction of all of the different elements in the advertisement, rather than focusing on the individual elements in isolation. *American Home Prods. Corp. v. FTC*, 695 F.2d 681, 687 (3d Cir. 1982); *In re Kraft*, 1991 FTC LEXIS 38, at \*14; *In re Thompson Medical*, 104 F.T.C. at 323 n.17, 1984 FTC LEXIS 6, at \*324 n.17. “[T]he cardinal factor is the probable effect which the advertiser’s handiwork will have upon the eye and mind of the reader. It is therefore necessary in these cases to consider the advertisement in its entirety and not to engage in disputatious dissection. The entire mosaic should be viewed rather than each tile separately. ‘The buying public does not ordinarily carefully study or weigh each word in an advertisement. . . .’” *FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963) (quoting *Aronberg v. FTC*, 132 F.2d 165, 167 (7th Cir. 1942)).

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Assessing the overall net impression of an advertisement includes examining the interaction of such elements as language and visual images. *In re Telebrands*, 140 F.T.C. at 290; *In re Kraft*, 1991 FTC LEXIS 38, at \*13. Testimonials are also a key element in the overall net impression of an advertisement. *FTC v. Bronson Partners, LLC*, 564 F. Supp. 2d 119, 125 (D. Conn. 2008) (“[W]hen an advertisement contains a testimonial reflecting the experience of an individual with a product, there is an implicit representation that such experience reflects the typical or ordinary results anyone may anticipate from use of the product.”) (quoting *Porter & Dietsch, Inc.*, 90 F.T.C. 770, 1977 FTC LEXIS 11, at \*147 (1977)). Testimonials not only make representations about the advertised product, but also reinforce representations implied through other elements of the advertisement. *See FTC v. QT, Inc.*, 448 F. Supp. 2d at 920-21, 929-32.

In addition, an advertisement may convey numerous representations, and the same advertising elements may be amenable to more than one reasonable interpretation. *In re Kraft*, 1991 FTC LEXIS 38, at \*11 n.8; *In re Thompson Medical*, 104 F.T.C. at 789 n.7, 1984 FTC LEXIS 6, at \*312 n.7. Moreover, the representations alleged in the Complaint need not be the only reasonable interpretations of the challenged advertising. *In re Kraft*, 1991 FTC LEXIS 38, at \*11 n.8; *In re Thompson Medical*, 104 F.T.C. at 789 n.7, 1984 FTC LEXIS 6, at \*312 n.7; *In re Bristol-Myers Co.*, 102 F.T.C. at 320, 1983 FTC LEXIS 64, at \*249. In addition, “[s]tatements susceptible of both a misleading and a truthful interpretation will be construed against the advertiser.” *FTC v. Bronson Partners*, 564 F. Supp. 2d at 127 n.6 (quoting *Country Tweeds, Inc. v. FTC*, 326 F.2d 144, 148 (2d Cir. 1964)).

As more fully discussed below, based on the overall net impression of the DCO advertisements for the Challenged Products, taken as a whole, the advertisements make the claims alleged in the Complaint. If not expressly made, these claims are clearly implied through the interaction of the advertising’s words, visual images, and testimonials. In some cases, the representations are so strongly implied as to be virtually synonymous with express claims.

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**a. Claims regarding the Challenged Products collectively****(1) “Cancer News” webpage on www.danielchapterone.com**

DCO advertises the Challenged Products as a group on the DCO Website on a page entitled “Cancer News.” F. 179-88. Viewing the Cancer News webpage as a whole, the claim that the Challenged Products prevent, treat, or cure cancer is so strongly implied as to be virtually express. F. 189.

First, the title of the page, in bold type, is “Cancer News.” F. 179. Then, the opening paragraph recommends the Challenged Products “[i]f you suffer from any type of cancer.” F. 180. Next, the Challenged Products are prominently featured in a photograph adjacent to the bold type phrase “Daniel Chapter One Cancer Solutions.” F. 180. Next, adjacent to the text and visual image are bold type instructions to read or listen to testimonials “about cancer.” F. 182, 186-87. The audio testimonials include such titles as, “Marie - Dad’s throat tumor cured - 7 Herb and more,” “Nancy - Cured Breast Cancer in 3 months - 7 Herb and GDU,” and “Robert - Prostate cured from DC1 products.” F. 187. Written testimonials also appear on the webpage. F. 182-85. These include statements from “Tracey,” a purported cancer patient on whom “doctors had . . . given up,” that she took BioMixx, 7 Herb Formula, and BioShark, among other DCO products, and that she is “now in complete remission.” F. 184. Another testimonial states: “After using 7 Herb and other DC1 products for precancerous growths,” among other ailments, her X-ray “showed nothing there.” F. 185.

The overall net impression from the interaction of the words, pictures, and testimonials is unmistakable – that the Challenged Products prevent, treat, or cure cancer. *See FTC v. National Urological Group*, 2008 U.S. Dist. LEXIS 44145, at \*50-52 (holding that advertisement which included statements that herbal supplement was a “solution” for obesity and “Try Thermalean today and win the battle against obesity” clearly implied that the herbal supplement was an effective treatment for obesity).

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**(2) “Cancer Treatment” advertisement on  
www.dclpages.com**

The Challenged Products are advertised as a group on the DCO website [www.dclpages.com](http://www.dclpages.com). F. 190. The words “Cancer Treatment,” in bold and larger type, are featured prominently next to a picture of bottles of the Challenged Products and a listing of their product names. F. 190. The overall net impression of these words and visual images is that the Challenged Products are effective in the treatment of cancer. F. 191.

Respondents contend that use of the phrase “supporting products” at the top of the webpage “indicate[s] that these products are ‘supporting products’ that can be used in conjunction with cancer treatments, whatever those may be.” RRFF No. 137. This contention is belied by the words of the advertisement itself, which states: “To enhance *7 Herb Formula’s healing quantities* Daniel Chapter One advises to get familiar with *the supporting products below.*” F. 190 (emphasis added). It is clear from this language that the only “cancer treatment” that the Challenged Products are advertised to “support” is DCO’s 7 Herb Formula.

**(3) “The Most Simple Guide to the Most  
Difficult Diseases”**

The Challenged Products are promoted collectively in the DCO publication, “The Most Simple Guide to the Most Difficult Diseases: The Doctors’ How-To Quick Reference Guide.” F. 192. The page of the Guide that is dedicated to cancer, which word appears in large, bold type, lists the four Challenged Products in bold type, along with dosing instructions, such as: “7\*Herb Formula™ 2 ounces in juice or water (minimum intake) 2 times daily.” F. 192. Each product listing is preceded by a “sun” symbol which, according to the advertisement, means that this product is “essential” for cancer. F. 192. Through the interaction of these words and visual images, the message that the Challenged Products treat or cure cancer is so strongly implied as to be virtually express. F. 193.



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**(4) Cancer Newsletter**

The Cancer Newsletter, viewed as a whole, conveys the overall net impression that the Challenged Products prevent, treat, or cure cancer. First, the title of the publication, “How to fight cancer is your choice,” F. 194, sets the stage by strongly implying, if not expressly stating, that the products described in the newsletter will “fight” cancer. See *FTC v. National Urological Group*, 2008 U.S. Dist. LEXIS 44145, at \*50-52 (holding that advertisement which included statement regarding herbal supplement, “Try Thermalean today and win the battle against obesity” clearly implied that the herbal supplement was an effective treatment for obesity). In addition, the preface to the Cancer Newsletter quotes a book entitled “Back to Eden,” in which the writer states that his “cure for cancer” includes herbs. This in turn implies that the herbal supplements featured in the Cancer Newsletter can cure cancer. F. 196. Against this backdrop, featuring the Challenged Products, as four of only eight products featured in the Cancer Newsletter, implies that the Challenged Products treat or cure cancer. F. 195, 197, 202.

Further creating and reinforcing this overall net impression are the numerous testimonials to the successful use of the Challenged Products for cancer. F. 197-201. While there are only eight product descriptions, there are seventeen testimonials, which at times appear two to a page. The testimonial titles stand out in large, bold type: “Lump is gone without dangerous surgery!,” “7 Herb Formula battles cancer,” “7 Herb eliminates pre-cancerous growth,” “Ancient cancer remedy improved upon,” “Doctors gave up on Michigan man,” “Pre-Cancerous Growths & Acid and Heartburn,” “Tumor Free!,” and “Declared Free of Cancer.” F. 198. The testimonials include such statements as: “I started taking the 7 Herb and that tumor was shrinking . . . there has been massive tumor shrinkage.” F. 199 (“Doctors gave up on Michigan man”); “Tricia convinced [them] that [the] best hope was to take natural remedies rather than go under the knife. . . . The growth is gone. . . .” F. 199 (“Cancer Success a Lie!”); and, “With stage 4 cancer and given only 6 months to live, Joe’s dad was not doing well. . . . With 4 ounces of 7\*Herb a day, in just 2 days . . . the family watched dad’s color come back. . . . GDU to

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the rescue! . . . PSA 3.3, no pain, alive. . . .” F. 199 (“Not too late!”).

By including the Challenged Products prominently and referring to them in the testimonials, the Cancer Newsletter implies that the Challenged Products, individually or in combination with one another, prevent, treat, or cure cancer. F. 202.

**(5) BioGuide**

Like the Cancer Newsletter, the BioGuide makes prominent, overwhelming use of testimonials claiming the successful use of the Challenged Products for cancer. F. 203. The clear implication of the BioGuide, through the words, photographs, and testimonials in particular, is that the Challenged Products prevent, treat, or cure cancer. F. 211. For example, on the page immediately following an advertisement for 7 Herb Formula, there is a picture of a smiling woman and the heading in large, colored, and bold type, “Cancer Brain Tumor.” Next to that entry is the colored, italicized text:

*The doctors had pretty much given up on Tracey. She had leukemia and tumors on the brain, behind the heart and on her liver.*

The testimonial then claims that the speaker took “*BIOMIXX* and *7 HERB FORMULA*,” which resulted in “complete remission.” It further claims that a tumor above the brain stem “completely disappeared,” a “tumor on my liver is shrinking and the tumor behind my heart has shrunk over 50%. . . .” F. 204.

Similarly styled claims, complete with photographs of smiling people, are made in testimonials entitled: “Lowered PSA,” in which the speaker announces the “GOOD NEWS” of a lowered PSA, and states his belief that 7 Herb Formula and GDU “did the trick,” F. 205; “Prostate Cancer,” in which the author claims that he took 7 Herb Formula and BioMixx, has a lowered PSA, and plans to “stay on [7 Herb Formula] forever!” apparently to keep his cancer at bay, F. 206; and “Renal Cell Cancer,” in which the speaker claims to be taking 7 Herb Formula, GDU, and BioShark,

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and that “no further activity” in his kidney tumor has occurred. F. 207. The BioGuide also includes a testimonial from a doctor who claims to have given 7 Herb Formula, BioShark, and GDU to his own child and claims the child’s tumor has “begun to shrink. . . . Four months later the whole family is using the products, as well as my patients,” F. 209, with the clear implication that these products have the ability not only to cure cancer, but to prevent it as well. Read as a whole, through the interaction of the product descriptions, the visual images, such as highlighted text and photographs, and the testimonials, the BioGuide clearly implies, if not expressly states, that the Challenged Products prevent, treat, or cure cancer. F. 211.

**b. Claims regarding BioShark****(1) Website advertising**

The product description of BioShark on the DCO Website states in pertinent part:

Pure skeletal tissue of sharks which provides a protein that inhibits angiogenesis - the formation of new blood vessels. This can stop tumor growth, and halt the progression of eye diseases such as diabetic retinopathy and macular degeneration. . . .

F. 221. Respondents assert that the foregoing statements comprise their entire advertising “claim” for BioShark. *See* RPF No. 22. Even standing alone, the product description, through the use of such phrases as “inhibits angiogenesis” and “can stop tumor growth,” strongly implies that BioShark inhibits tumors. F. 222. The language does not stand alone, however, and must be interpreted in the context of the other elements of the advertisement to determine the overall net impression. *See American Home Prods. v. FTC*, 695 F.2d at 687 (stating that advertisement must be interpreted as a whole, without emphasizing isolated words or phrases apart from their context). In this advertisement, the product webpage specifically promotes BioShark, in bold letters, for “Tumors & Cysts.” F. 221. Adjacent to the product description is the message: “Read our clients [sic] testimonials on BioShark & Tumors,” and a link to a

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bulleted title, “Cancerous Tumor.” F. 221. At the bottom of the webpage is a link to “Stop Tumor Growth & Cysts Top.” F. 221. Considering these additional elements, the overall net impression of the product webpage for BioShark is that BioShark inhibits cancerous tumors and is an effective treatment for cancer. F. 224.

Adding to the overall net impression of the DCO Website that BioShark inhibits cancerous tumors and is an effective treatment for cancer, is that BioShark is featured as one of the “cancer solutions” for “any type of cancer” on the Cancer News webpage. F. 180. The website [www.dclpages.com](http://www.dclpages.com) also expressly advertises BioShark, along with the other Challenged Products, as a “Cancer Treatment.” F. 190.

Further adding to that overall net impression is the following statement, set forth under the BioShark heading, which implies that BioShark inhibits tumors: “In 1983, two researchers at the Massachusetts Institute of Technology published a study showing that shark cartilage contains a substance that significantly inhibits the development of blood vessels that nourish solid tumors, thereby limiting tumor growth. This effect is called anti-angiogenesis.” F. 225.

It is not a defense that the advertisements attempt to tie claims to the constituent ingredients of BioShark, i.e., “skeletal tissue of sharks” and “shark cartilage,” as opposed to BioShark itself because, despite this word parsing, the overall net impression is that Respondents’ claims pertain to the BioShark product itself. *See FTC v. National Urological Group*, 2008 U.S. Dist. LEXIS 44145, at \*53-55 (holding that even though express language of the advertising attempted to tie a claim to components of herbal supplement product and not to the product itself, the overall net impression was a claim as to the effectiveness of the product itself).

## (2) Cancer Newsletter

The overall net impression from the Cancer Newsletter is that BioShark inhibits tumors and is effective in the treatment of cancer. F. 232. BioShark is among the products that the Newsletter’s title represents will “fight” cancer. F. 195, 197.

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Moreover, BioShark is specifically included in numerous testimonials. E.g., F. 184 (“7 Herb Formula battles cancer” (“[M]y father sent me BIOMIXX and 7 HERB FORMULA. Each day as I took it and got it into my system more and more, the better I felt. Then I added Garlic Pur, Siberian Ginseng, and Bio\*Shark. I am now in complete remission.”)); F. 200 (“Texas businessman has true friends for life” (Friends send a bladder cancer sufferer a package that “included 7 Herb Formula . . . Bio\*Shark and Bio\*Mixx”), and “Tumor Free!” (claiming that brain cancer sufferer takes “7 HERB FORMULA . . . BIO MIXX, BIO SHARK, and GDU Caps. . . . [T]he tumors were completely gone.”)).

In addition, the Cancer Newsletter includes representations implying that BioShark has been scientifically proven to inhibit tumors, repeating the statement from the Cancer News webpage on the DCO Website: “In 1983, two researchers at the Massachusetts Institute of Technology published a study showing that shark cartilage contains a substance that significantly inhibits the development of blood vessels that nourish solid tumors, thereby limiting tumor growth. This effect is called anti-angiogenesis.” F. 231. Adding to and strengthening this impression is the placement of this paragraph in the midst of the large, bold, and highlighted type testimonial titles, “Doctors gave up on Michigan Man” and “Pre-Cancerous Growth & Acid and Heartburn.” F. 231.

### (3) BioGuide

The BioGuide contains the same product description for BioShark as that found on its product webpage on the DCO Website. F. 221, 228. For the same reasons as those stated above, that product description strongly implies that BioShark inhibits tumors. F. 229. Adding to and reinforcing that implied claim are the testimonials, complete with photographs of smiling people, claiming that BioShark effectively treated cancer. For example, the testimonial “Cancer Brain Tumor” includes the statement: “[M]y father sent me *BIOMIXX* and *7 HERB FORMULA*. Each day as I took it and got it into my system more and more, the better I felt. Then I added Garlic, Siberian Ginseng, and BioShark. I am now in complete remission.” F. 204.

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Similarly, the testimonial entitled “Renal Cell Cancer” includes the following: “I had Renal Cell Cancer in my left kidney, with a tumor attached that was slightly larger than a baseball. I went on 7 Herb Formula and GDU. . . . I continue to drink the 7-Herb and take Bio-Shark, and GDU. . . . [N]o further activity has occurred.” F. 207. Another testimonial claims: “After switching to DC1 products – 7-Herb Formula, BioShark, GDU, Garlic Pur, Siberian Ginseng, Ezekiel Oil and BioMixx – [the skin cancer] cleared up quickly. . . . [T]hree weeks ago [I] was told I was completely clear of all types of cancer.” F. 208. Accordingly, the BioGuide, taken as a whole, through the interaction of the product descriptions, the visual images such as highlighted text and photographs, and the testimonials, not only represents that BioShark inhibits tumor growth, but that BioShark prevents, treats, or cures cancer. F. 230.

**(4) BioMolecular Nutrition Product Catalog**

The BioMolecular Nutrition Product Catalog includes a similar product description for BioShark as that set forth on the DCO Website and in the BioGuide, stating: “Shark Cartilage protein inhibits angiogenesis, stops tumor growth, and halts eye diseases. Reduces pain, inflammation, joint stiffness of arthritis, inflammatory bowel disease, and reverses psoriasis. Affects the formation of new blood vessels.” F. 233; *see* F. 221, 228. The overall net impression of this description is that BioShark inhibits tumor growth. F. 235. Indeed, the phrase “stops tumor growth” expressly claims that BioShark inhibits tumor growth. F. 234.

**c. Claims regarding 7 Herb Formula****(1) Website advertising**

The product page for 7 Herb Formula includes in the description, “purify the blood and promote cell repair. The ingredients in this tea concentrate work to clear skin, cleanse the liver, decrease cell mutation, and fight pathogenic bacteria and tumor formation.” F. 237. The product is also featured on the Cancer News webpage of the DCO Website with a similar description, stating that 7 Herb Formula “purifies the blood, promotes cell repair, fights tumor formation [and] fights

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pathogenic bacteria.” F. 238. Respondents focus on these statements, asserting that the statements comprise their website “claim” regarding 7 Herb Formula. Relying on these statements alone, Respondents assert that they did not claim that 7 Herb Formula treats, cures, or prevents cancer. RPF No. 23. Contrary to Respondents’ position, such statements as “fights tumor formation” and “decrease[s] cell mutation,” by themselves clearly do imply that 7 Herb Formula inhibits tumors and treats cancer. F. 239.

Moreover, the words do not appear in isolation, but interact with other elements in the advertisement. First, the product description appears under a bold type heading including the words “Cancer Help.” F. 237. Next, a picture of the product with its description appears first on the Cancer News webpage, where the phrase “fights tumor formation” is highlighted in bold type. F. 238. Next, after the product description and a photograph of the product along with the other Challenged Products, is the admonition, “How to fight cancer is your choice!” F. 240. In addition, there are links to testimonials “about cancer,” with titles that include specific references to 7 Herb Formula, such as “7 Herb Formula battles cancer” and “7 Herb eliminates pre-cancerous growth.” F. 241. These elements interact to create a strong impression that 7 Herb Formula not only inhibits tumor growth, but is an effective treatment for cancer.

The text of testimonials strengthens this impression. For example, in the testimonial entitled “7 Herb Formula Battles Cancer,” the speaker claims taking 7 Herb Formula, among other DCO products, for cancer and experiencing a “complete remission,” thereby creating the impression that 7 Herb Formula cured her. F. 184; *see also* F. 243 (describing Michigan man’s claim of taking 7 Herb Formula and experiencing “massive tumor shrinkage”). In addition, the testimonial entitled “7 Herb Eliminates Pre-cancerous Growth” states in part, “I had a pre-cancerous ‘wart’ on the back of my leg and drinking 7 Herb Formula made it go away,” thereby creating the impression that 7 Herb Formula prevents cancer. F. 242.

Other material on the DCO Website further contributes to the overall net impression that 7 Herb Formula is an effective cancer

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treatment. The Cancer News webpage article, “Ancient Cancer Remedy is Improved Upon,” includes statements that “Jim improved upon the ancient Ojibway Indian Tribe remedy known as Essiac. . . . As a result of his research, Jim found that by adding Siberian Ginseng and Cat’s Claw to the Essiac formula, he could attain remarkable healing results. . . .” F. 242; *see also* F. 244 (“With Jim Feijo’s addition to the [7 Herb] formula, we now have the most effective and potent formula available in the battle against tumors.”). Such statements clearly imply, if not expressly represent, that 7 Herb is an effective cancer remedy. *See FTC v. National Urological Group*, 2008 U.S. Dist. LEXIS 44145, at \*51-52 (holding that advertisement which included statements that herbal supplement was the “most complete . . . nutraceutical ever developed for the diet industry” implied that the herbal supplement was an effective treatment for obesity).

The DCO website [www.dc1pages.com](http://www.dc1pages.com) expressly advertises 7 Herb Formula, along with the other Challenged Products, as a “Cancer Treatment” and specifically refers to its “healing qualities.” F. 190. In addition, the question and answer portion of this site, similar to that on the DCO Website, makes the claim that 7 Herb Formula is the “most effective and potent formula available in the battle against tumors,” F. 246, and therefore similarly represents that 7 Herb Formula is an effective cancer remedy. *See FTC v. National Urological Group*, 2008 U.S. Dist. LEXIS 44145, at \*51-52 (holding that advertisement which included statements that herbal supplement product was the “most complete . . . nutraceutical ever developed for diet industry” implied that the herbal supplement was an effective treatment for obesity). Finally, the website [www.dc1pages.com](http://www.dc1pages.com) states that 7 Herb Formula has been used in cancer clinics and provided in doctor’s offices, thereby creating the impression that 7 Herb Formula is a cancer treatment. F. 247. Viewed in its entirety, the overall net impression of the advertising for 7 Herb Formula on [www.dc1pages.com](http://www.dc1pages.com) is that the product inhibits tumors and is effective for the treatment of cancer. F. 248.

## (2) Cancer Newsletter

The product description for 7 Herb Formula in the Cancer Newsletter states that 7 Herb Formula “fights . . . tumor



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formation.” F. 251. Accordingly, the advertisement clearly implies that the product inhibits tumor formation. Combined with the statements that “7 Herb Formula has been created to . . . promote cell repair . . . fights pathogenic bacteria . . . [t]he ingredients . . . decrease cell mutation,” the product description also implies that 7 Herb Formula is effective in treating cancer. F. 251, 255. The advertisement also states, immediately below the product description under a heading, in large, bold type, “esophageal cancer?” that the ingredients of 7 Herb Formula “may prevent and even heal cancer.” F. 252. These statements strongly imply, if not expressly state, that 7 Herb Formula prevents or cures cancer. *See FTC v. National Urological Group*, 2008 U.S. Dist. LEXIS 44145, at \*53-55 (holding that even though the express language of advertising attempted to tie a claim to components of herbal supplement product and not to the product itself, overall net impression was a claim as to the effectiveness of the product itself).

Moreover, the above product descriptions must be interpreted with reference to other elements of the Cancer Newsletter. First, 7 Herb Formula is included among the eight products that the Cancer Newsletter’s title represents will “fight” cancer. F. 195, 197. In fact, the Cancer Newsletter particularly highlights 7 Herb Formula, devoting an entire page to the product and prominently featuring its logo. F. 251. In addition, several testimonial titles specifically refer to 7 Herb Formula. E.g., F. 184 (“7 Herb Formula battles cancer”); F. 198 (“7 Herb Formula Eliminates Pre-Cancerous Growth”); F. 253 (same); F. 204 (“My father sent me BIOMIXX and 7 HERB FORMULA. Each day as I took it and got it into my system more and more, the better I felt. . . . I am now in complete remission”); F. 242 (“I had a pre-cancerous ‘wart’ on the back of my leg and drinking 7 Herb Formula made it go away”); and F. 253 (“7 Herb Formula Helps Battle Cancer” (“Within 60 days [of being on 7 Herb Formula] . . . PSA level dropped from 256 to 5. . . . [Thereafter, n]o evidence of . . . tumor.”)).

The interaction of all of the elements of the Cancer Newsletter, including the title of the publication, the prominent featuring of 7 Herb Formula in text, visual imagery, and testimonials, and the content of the product descriptions and

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testimonials, creates an overall net impression that 7 Herb Formula inhibits tumors and is effective to prevent, treat, or cure cancer. F. 255.

**(3) BioGuide**

The product description for 7 Herb Formula in the BioGuide, mirroring that on the DCO Website, includes the statements: “Herbs to purify the blood and promote cell repair. The ingredients in this tea concentrate work to clear skin, cleanse the liver, decrease cell mutation, and fight pathogenic bacteria and tumor formation.” F. 237, 249. As on the DCO Website, these statements do not stand alone.

The product description is repeated twice in the three pages devoted to 7 Herb Formula. F. 249. Moreover, in between these pages is a page containing two testimonials to 7 Herb Formula. The first testimonial, “Cancer Brain Tumor,” shows a smiling woman next to text highlighting the use of 7 Herb Formula in sending her cancer into “complete remission” and shrinking other tumors. F. 249. The placement and title of the second testimonial, “Lowered PSA,” itself implies that 7 Herb Formula is related to the reported improvement in that cancer indicator. The testimonial features a photograph of a smiling man and text expressly stating the speaker’s belief that the DCO products he took, including 7 Herb Formula, “did the trick.” F. 205. Other testimonials in the BioGuide make similar claims as to the effectiveness of 7 Herb Formula to prevent, treat, or cure cancer. *See, e.g.*, F. 206 (testimonial entitled “Prostate Cancer,” stating that the speaker took 7 Herb Formula “every day . . . . [It] did such a good job fighting cancer, 2 ounces is a good prophylaxis!”); F. 207 (testimonial entitled “Renal Cell Cancer,” stating that the speaker with cancerous kidney tumor went on 7 Herb Formula and the oncologist is “amazed that no further activity has occurred”); F.208 (testimonial entitled “Skin Cancer,” in which the speaker switches to DCO products, including 7 Herb Formula, and is “completely clear of all types of cancer”).

The overall net impression from the BioGuide, through the interaction of the words of the product descriptions, the visual images such as highlighted text and photographs, and the

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testimonials, is that 7 Herb Formula inhibits tumors and is effective to prevent, treat, or cure cancer. F. 250.

**(4) BioMolecular Nutrition Product Catalog**

The BioMolecular Nutrition Product Catalog describes 7 Herb Formula in virtually the same manner as the DCO Website, the BioGuide, and the Cancer Newsletter, stating that the herbs in 7 Herb Formula “purify the blood and promote cell repair, clear skin, cleanse the liver, decrease cell mutation, [and] fight pathogenic bacteria and tumor formation.” F. 237, 249, 251, 256. As noted above, use of the phrase, “fights . . . tumor formation” strongly implies, if not expressly states, that the product inhibits tumor formation. Combined with the phrases “promote cell repair,” “decrease cell mutation,” and “fight pathogenic bacteria,” the product description as a whole implies that 7 Herb Formula is effective in treating cancer. *See FTC v. National Urological Group*, 2008 U.S. Dist. LEXIS 44145, at \*53-55 (holding that even though express language of advertising attempted to tie a claim to components of herbal supplement product and not to the product itself, overall net impression was a claim as to the effectiveness of the product itself).

**d. Claims regarding GDU****(1) Website advertising**

The product page for GDU on the DCO Website includes statements that the ingredients of GDU “digest protein – even that of unwanted tumors and cysts” and that GDU is used “as an adjunct to cancer therapy.” F. 262-63. These statements imply that GDU inhibits tumors and is a cancer treatment. F. 264. In addition, the product webpage has links to testimonials with various cancer-related titles, including, “Breast Mass” and “Prostate Cancer.” F. 265. The interaction of the product description and cancer-related testimonial titles gives this DCO Website advertisement a strong overall net impression that GDU not only inhibits tumors, but is an effective cancer treatment or cure. F. 269.

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Other features on the DCO Website strengthen this impression. GDU is featured as a “Cancer Solution” for “any type of cancer” on the Cancer News webpage on the DCO Website, further reinforcing the implication that GDU is an effective cancer treatment. F. 266. Testimonials on that webpage, or linked to the webpage, also claim that taking GDU, along with other DCO products, effectively treated cancer. F. 267; F. 268 (“Nancy – Cured Breast Cancer in 3 months – 7 Herb and GDU” and “Mel – Breast Mass [illegible] and GDU”). This website advertising also creates the impression that GDU is an effective cancer treatment. F. 269.

The DCO website [www.dco1pages.com](http://www.dco1pages.com) also claims that GDU is an effective treatment by expressly advertising GDU, among the other Challenged Products, as a “Cancer Treatment.” F. 190.

**(2) Cancer Newsletter**

The product description for GDU in the Cancer Newsletter appears under the headline in large, bold type: “Enzymes attack growths.” F. 276. The advertisement goes on to explain how the enzymes in GDU “can aid the body in breaking down a tumor.” F. 276. It emphasizes the importance of enzymes “in treating cancer,” stating that such enzymes can return leukemia cells “to a normal state,” and help “to destroy cancer cells.” F. 276. While these statements ostensibly refer only to the enzyme ingredient in GDU, they impliedly represent that GDU itself has these cancer treating qualities. F. 277. *See FTC v. National Urological Group*, 2008 U.S. Dist. LEXIS 44145, at \*53-55 (holding that overall net impression was a claim as to the effectiveness of the product itself, even though express language of advertising attempted to tie claims to components of herbal supplement product and not to the product itself).

Even though the language of the product description for GDU in the Cancer Newsletter attempts to relegate GDU’s claimed effectiveness to a supporting role in “helping” or “aiding” the body, “[t]he entire mosaic should be viewed rather than each tile separately.” *FTC v. Sterling Drug*, 317 F.2d at 674. In this case, the entire mosaic of the advertisement belies a merely “supporting” role for GDU. The overall net impression is that

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GDU itself inhibits tumors and is an effective cancer treatment. F. 278.

GDU is one of the eight products that the Cancer Newsletter's title represents will "fight" cancer. F. 195, 197. The product description appears under the heading in large, bold type: "Enzymes attack growths." F. 276. Adjacent to the GDU headline, photograph, and product description are two testimonials with large type, highlighted and bold headlines: "Lump is gone without dangerous surgery" and "Cancer Success a Lie!" F. 276. Other testimonials in the Cancer Newsletter claim that taking GDU, along with other DCO products, effectively treats cancer. F. 200 ("Tumor Free!" claims brain cancer sufferer takes "7 HERB FORMULA . . . , BIO MIXX, BIO SHARK, and GDU Caps . . . [and thereafter] the tumors were completely gone"); and F. 199 ("Not too late!" in which a stage-four cancer patient with six months to live announces, "GDU to the rescue!").

The interaction of all of the elements of the Cancer Newsletter, including the title of the publication, the featuring of GDU, the product description headline and text, and the titles and content of its testimonials, creates an overall net impression that GDU inhibits tumors and is an effective cancer treatment. F. 278.

### (3) BioGuide

The BioGuide features the product description for GDU on two pages. F. 270. The descriptions track those on the DCO Website and in the Cancer Newsletter, stating that GDU contains enzymes "to help digest protein - even that of unwanted tumors and cysts," and that GDU has a variety of uses, including "as an adjunct to cancer therapy." F. 263, 270-71. The former statement is repeated in large, bold type, thereby emphasizing the purported ability of GDU to "digest . . . tumors and cysts." F. 271. Taken as a whole, this product description implies that GDU inhibits tumors and implies that GDU is a cancer treatment. F. 272.

There are additional elements in the BioGuide that create the overall net impression that GDU inhibits tumors and is an effective treatment for cancer. The product name "GDU," in large, bold type, and the statement, also in large, bold type,

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regarding its effect on “tumors and cysts,” appear above a photograph of a smiling man, and the large, bold type testimonial title, “Prostate Cancer.” F. 271.

Moreover, testimonials in the BioGuide discuss the use of GDU in treating cancer. For example, on the page immediately following the GDU product description, the testimonial entitled “Breast Mass” claims that after discovering a breast mass, the speaker “began taking GDU six times a day . . . . I got another bottle of GDU and the Superior Herbal Fat Burners, which I took twice a day. In April I had my 6-month examination and the letter read: ‘We are pleased to inform you that the results of your recent breast evaluation are normal.’” F. 273. Similarly, the testimonial entitled “Renal Cell Cancer” describes the speaker’s use of GDU for a kidney tumor: “I went on 7 Herb Formula and GDU . . . . I continue to drink the 7-Herb and take Bio-Shark, and GDU. . . . To date, my oncologist is amazed that no further activity has occurred.” The latter statement is repeated in large, bold type. F. 207. In addition, the testimonial entitled “Lowered PSA” announces the speaker’s “GOOD NEWS” of a lowered PSA after taking “7 Herb formula, in combination with your Bio C 1000, GDU and other minerals and vitamins. I believe it was your products that did the trick.” F. 274; *see also* F. 208 (“Skin Cancer”: “After switching to DC1 products – 7-Herb Formula, BioShark, GDU, Garlic Pur, Siberian Ginseng, Ezekiel Oil and BioMixx – it cleared up quickly . . . completely clear of all types of cancer”); F. 209 (“My son was diagnosed with a tumor on his left temple. . . . Jim and Trish . . . suggested 7-Herb, BioShark and GDU, which we bought and started him on. . . . [T]he tumor had already begun to shrink. . . . Four months later the whole family is using the products, as well as my patients, and you would never know my son had a tumor”); F. 210 (“One lady, who had a history of cancer, used the 7 Herb Formula, GDU & BioShark and was blessed to get rid of a large breast tumor.”).

The interaction of all of the elements of the BioGuide regarding GDU, including the product descriptions, the visual images, such as highlighted text and photographs, and the testimonials, create the overall net impression that GDU inhibits tumors and is an effective cancer treatment. F. 275.

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**(4) BioMolecular Nutrition Product Catalog**

The product description for GDU in the BioMolecular Nutrition Product Catalog mirrors that in the other DCO publications, stating that GDU contains enzymes “to help digest protein, even that of unwanted tumors and cysts. Helps to relieve pain, inflammation, and as an adjunct to cancer therapy.” F. 263, 270, 276, 279. As stated above, taken as a whole, this product description implies that GDU inhibits tumors and is a cancer treatment. F. 280-81.

**e. Claims regarding BioMixx****(1) Website advertising**

Both the DCO Website and the website [www.dclpages.com](http://www.dclpages.com) imply that BioMixx is effective in treating or curing cancer. The Cancer News webpage on the DCO Website expressly advertises BioMixx, along with the other Challenged Products, as a “Cancer Solution” for “any type of cancer.” F. 283. The Cancer News webpage also includes a testimonial representing that BioMixx effectively treated cancer: “I had contracted leukemia and had three inoperable tumors. When I decided not to do chemotherapy or radiation, my father sent me Bio\*Mixx and 7 Herb Formula. Each day as I took it and got it into my system more and more, the better I felt. . . . I am now in complete remission.” F. 284. The website [www.dclpages.com](http://www.dclpages.com) also claims that BioMixx is an effective cancer treatment by expressly advertising BioMixx, among the other Challenged Products, as a “Cancer Treatment.” F. 285.

**(2) Cancer Newsletter**

The product description for BioMixx in the Cancer Newsletter claims that BioMixx “is used to assist the body in fighting cancer and in healing the destructive effects of radiation and chemotherapy treatments.” F. 293. As with the similar word parsing used for the product descriptions for GDU (*see* F. 276), Respondents’ attempt to relegate BioMixx’s effectiveness to a supporting role in assisting the body fails. It is necessary to consider the advertisement “in its entirety and not to engage in

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disputatious dissection.” *FTC v. Sterling Drug*, 317 F.2d at 674. In this case, the “entire mosaic” of the Cancer Newsletter creates the overall net impression that BioMixx is an effective cancer treatment and ameliorates the adverse effects of radiation and chemotherapy. F. 294.

BioMixx is one of the eight products that the Cancer Newsletter’s title represents will “fight” cancer. F. 195, 197. In addition, BioMixx is among the products referred to in the testimonial “7 Herb Formula Battles Cancer,” in which the speaker is quoted as saying: “I had contracted leukemia and had three inoperable tumors. When I decided not to do chemotherapy or radiation, my father sent me Bio\*Mixx and 7 Herb Formula. Each day as I took it and got it into my system more and more, the better I felt. . . . I am now in complete remission.” F. 292. Viewing the Cancer Newsletter as a whole, and considering the interaction of the publication’s title, the BioMixx product description, and the testimonial, the overall net impression is that BioMixx is an effective cancer treatment and heals the adverse effects of radiation and chemotherapy. F. 294.

**(3) BioGuide**

The lengthy product description for BioMixx in the BioGuide states in relevant part that BioMixx “[h]elps detoxify the body [and] boosts immunity and energy. . . . What separates BioMixx is that it was developed specifically to maximize the immune system, particularly for those individuals whose immune systems were compromised through chemotherapy and radiation. . . . This scientifically designed formula provides your body with [herbs and nutrients] . . . for cell, organ, and tissue health . . . . Whether you’re losing weight battling illness, or are weakened due to intense training, BioMixx is the best.” F. 287. This description conveys the clear message that BioMixx is an effective treatment for the adverse effects of chemotherapy and radiation. F. 288. By juxtaposing the promotion of BioMixx for this purpose with the promotion of BioMixx for “cell” health and to “battle illness,” the advertisement also conveys the impression that BioMixx is effective for cancer. F. 291.



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The impression that BioMixx is an effective cancer treatment, as well as an antidote to the adverse effects of chemotherapy and radiation, is strengthened by the message of testimonials. For example, the testimonial entitled “Cancer Brain Tumor” appears prominently, next to a photo of a smiling woman, and includes the statements: “I had contracted leukemia and had three inoperable tumors. When I decided not to do chemotherapy or radiation, my father sent me *BIOMIXX* and *7 HERB FORMULA*. Each day as I took it and got it into my system more and more, the better I felt. . . . I am now in complete remission. . . .” F. 204, 289. BioMixx is also featured in a prominent testimonial entitled “Prostate Cancer,” which states in part: “I had beam radiation for prostate cancer. I also took 7 Herb Formula . . . and BioMixx; I never had a bad day, never felt sick. When my PSA went from 7.6 to 0.5 in the month after I finished radiation, my doctor was surprised. Several months later it was down to 0.16!” F. 290.

Viewed as a whole, considering the product descriptions, the visual images, such as highlighted text and photographs, and the testimonials, the BioGuide conveys the overall net impression that BioMixx is effective in the treatment of cancer and in healing the adverse effects of radiation and chemotherapy. F. 291.

**f. Disclaimer language**

Respondents assert that their website advertising contains the following disclaimer: “These statements have not been evaluated by the FDA. This product is not intended to diagnose, treat, cure or prevent disease.” RFF 16 (citing CX 17 at FTC-DCO 0073, 0076, 0080, 0084, 0089, 0095, 0098). Respondents’ cited disclaimer appears on certain shopping cart webpages on the website [www.dc1store.com](http://www.dc1store.com). F. 301. Relatively similar disclaimers, but briefer and without the FDA reference, appear on the bottom of certain webpages from [www.dc1pages.com](http://www.dc1pages.com), at the bottom of webpages on [danielchapterone.com](http://danielchapterone.com), at the end of the BioGuide, and on the last page of the Cancer Newsletter. F. 296-300.

“Disclaimers or qualifications in any particular ad are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims

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and to leave an accurate impression. Anything less is only likely to cause confusion by creating contradictory double meanings.” *Removatron Int’l Corp. v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989) (citing *Giant Food, Inc. v. FTC*, 322 F.2d 977, 986 (D.C. Cir. 1963)); accord *FTC v. U.S. Sales Corp.*, 785 F. Supp. 2d 737, 751 (N.D. Ill. 1992). Applying these standards to evaluate the above disclaimer, as well as similar disclaimers in the DCO advertising materials, it is readily apparent that the disclaimers are ineffective to alter the overall net impression of the advertisements or to leave an accurate impression.

The purported disclaimers are not prominent in any advertisement. In each case, the disclaimer appears well after the conclusion of the advertising claims. F. 296-300. In each instance, the disclaimer appears in type that is the same size, or smaller, than the surrounding type. F. 296-301, 303. The disclaimer in the Cancer Newsletter is virtually infinitesimal. F. 299, 303. In each instance, except for the webpages cited by Respondents, the disclaimer is buried in copyright disclosures. F. 296-300. Such small-print disclaimers at the bottom of advertisements are insufficient. *See FTC v. Medlab, Inc.*, No. C 08-822 SI, 2009 U.S. Dist. LEXIS 33917, at \*15 (N.D. Cal. Apr. 21, 2009) (“Defendants cannot inoculate themselves from the representations that appear in the body of the text by including cautionary statements at the foot of the advertisements.”).

Moreover, the language disclaiming any intent to “treat” any disease only serves to confuse in this case by interjecting a message that is contradictory to the overall net impression that the Challenged Products do treat cancer. For example, the disclaimer language appearing on one of the pages of [www.dclpages.com](http://www.dclpages.com) is followed on the next page, in bold type font far larger than that used for the disclaimer, by language touting:

**CANCER TREATMENT****7 Herb Formula****Bio\*Shark****BioMixx****GDU Caps**

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## F. 304.

Because the purported disclaimers are not prominent or unambiguous, and create confusion with messages that contradict the advertisements' overall messages, the disclaimers are ineffective. See *In re Giant Food*, No. 7773, 61 F.T.C. 326, 1962 FTC LEXIS 85, at \*51-52 (July 31, 1962) (holding that small print disclaimers that were inconsistent and contradictory to the content of the advertisements were ineffective to cure deceptive advertising), *aff'd*, *Giant Food, Inc. v. FTC*, 322 F.2d 977, 986 (D.C. Cir. 1963); *FTC v. QT, Inc.*, 448 F. Supp. 2d at 924 n.15 (stating that inconspicuous, periodic, on-screen statement in infomercial that "this product is not intended to diagnose, treat, cure or prevent disease" [was] wholly inadequate to change the net impression of the pain relief claims made"). Accordingly, the disclaimers in Respondents' advertisements in this case are not adequate to avoid liability. See *FTC v. Phoenix Avatar, LLC*, No. 04 C 2897, 2004 U.S. Dist. LEXIS 14717 (N.D. Ill. July 29, 2004) (holding that disclaimer on the back of product packaging, that "[t]hese statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure or prevent any disease," did not foreclose liability for deceptive advertising of weight-loss product).

**g. Extrinsic evidence is not required**

Respondents contend that their advertisements cannot be interpreted through a facial analysis alone, and that extrinsic evidence of consumer perceptions is required in order to find implied claims. RB at 5, 7, 10. Both the Commission and the courts, however, have squarely rejected the notion that extrinsic evidence is always necessary in order to prove an implied claim. As the Commission explained in *Thompson Medical*:

[T]he Commission employs two different techniques in evaluating whether an advertisement contains implied claims. One is to look at evidence from the advertisement itself. We often conclude that an advertisement contains an implied claim by evaluating the conten[t] of the advertisement and the circumstances surrounding it. This technique is primarily useful in evaluating advertisements whose language or

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depictions are clear enough, though not express, for us to conclude with confidence after examining the interaction of all the different elements in them that they contain a particular implied claim. If our initial review of evidence from the advertisement itself does not allow us to conclude with confidence that it is reasonable to read an advertisement as containing a particular implied message, we will not find the ad to make the implied claim unless extrinsic evidence allows us to conclude that such a reading of the ad is reasonable.

104 F.T.C. at 789, 1984 FTC LEXIS 6, at \*312-13.

In *Kraft v. Federal Trade Commission*, the court affirmed the Commission's holding that Kraft's advertising, which stated that Kraft uses "five ounces of milk" per slice of cheese, implied that its cheese had the same calcium content as that portion of milk. 970 F.2d at 313. In finding that implied claim, the Commission relied on the advertising itself and did not rely on any extrinsic evidence of consumer perceptions of the advertising. On appeal, Kraft argued that the Commission should be required, as a matter of law, to support its findings with extrinsic evidence in all cases involving implied claims. The court, finding Kraft's argument "unavailing as a matter of law," observed:

Courts, including the Supreme Court, have uniformly rejected imposing such a requirement on the FTC, and we decline to do so as well. We hold that the Commission may rely on its own reasoned analysis to determine what claims, including implied ones, are conveyed in a challenged advertisement, so long as those claims are reasonably clear from the face of the advertisement. . . . The implied claims Kraft made are reasonably clear from the face of the advertisements. . . . Hence the Commission was not required to utilize consumer surveys in reaching its decision. 970 F.2d at 319-20 (citing *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965) (stating that the FTC is not required to conduct consumer surveys before determining that a commercial has a tendency to mislead) (other citations omitted)).

In this case, Respondents' advertising claims are even more clearly implied than those in *Kraft*. The interaction of product

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descriptions, advertisement headings, visual images, testimonial titles, and testimonial texts, among other elements, is more than sufficient to conclude with confidence that the advertisements at issue make the claims alleged in the Complaint. The implied claims in Respondents' advertising are beyond "reasonably clear." They are clear and conspicuous from the advertising itself. Accordingly, no extrinsic evidence is necessary to interpret the claims. See *FTC v. National Urological Group*, 2008 U.S. Dist. LEXIS 44145, at \*42 n.12 (entering summary judgment in false advertising case where facial analysis of dietary supplement advertisements showed clearly implied claims of effectiveness for treatment of erectile dysfunction, holding that extrinsic evidence of consumer perceptions was unnecessary as a matter of law). See also *FTC v. QT, Inc.*, 448 F. Supp. 2d at 958 (stating: "The courts and the FTC have consistently recognized that implied claims fall along a continuum from those which are so conspicuous as to be virtually synonymous with express claims to those which are barely discernible. It is only at the latter end of the continuum that extrinsic evidence is necessary.") (quoting *FTC v. Febre*, No. 94 C 3625, 1996 U.S. Dist. LEXIS 9487, at \*14 (N.D. Ill. July 3, 1996)).

Respondents contend that extrinsic evidence is particularly necessary in this case because the advertising was targeted at a particular group, defined by Respondents as individuals devoted to natural health in general and the constituents of Respondents' religious ministry in particular. RB at 6-7. While it is true that, if an advertisement is targeted at a particular group, the Commission analyzes the advertisements from the perspective of reasonable consumers within that group, *In re Telebrands*, 140 F.T.C. at 291, in this case there is insufficient evidence to conclude that Respondents' advertising was directed only at the target group Respondents allege. Rather, the evidence shows that anyone can access the advertisements. The DCO publication, "The Most Simple Guide," is available on the DCO Website and anyone can download it. F. 163. The BioGuide and the Cancer Newsletter are also available on-line through the DCO Website. F. 169, 172. Consumers can locate the DCO Website by entering the term "cancer" in a Google search. F. 162. Moreover, nothing on the DCO Website indicated to the FTC investigator who made the undercover purchase in this case that a consumer would have to

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be part of any religious community in order to purchase the Challenged Products. F. 149. Accordingly, it is not necessary to interpret Respondents' claims from the perspective of Respondents' purported target group and extrinsic evidence is not necessary for that purpose.

## 2. Respondents' claims are misleading

There are two theories to prove that an advertisement is deceptive or misleading: (1) the "falsity" theory<sup>4</sup> or (2) the "reasonable basis" theory. *FTC v. Pantron I*, 33 F.3d at 1096; *In re Thompson Medical*, 104 F.T.C. at 818-19, 1984 FTC LEXIS 6, at \*380-81. The Complaint in this case makes allegations only under the reasonable basis theory (Complaint ¶¶ 15, 16) and thus the analysis in this decision considers the reasonable basis theory only.

The reasonable basis theory holds that claims about a product's attributes, performance, or efficacy ("objective" product claims<sup>5</sup>) carry with them the express or implied representation that the advertiser had a reasonable basis substantiating the claims at the time the claims were made. *In re Thompson Medical*, 104 F.T.C. at 813, 1984 FTC LEXIS 6, at \*367; *FTC v. Direct Marketing Concepts*, 569 F. Supp. 2d at 298; *In re Kroger*, No. C-9102, 1978 FTC LEXIS 332, at \*15 (May 17, 1978). Respondents' advertising claims, including claims that the Challenged Products are "Cancer Treatments" and "Cancer Solutions," are objective product claims because the claims are stated in positive terms and are not qualified to be statements of opinion. *See Koch v. FTC*, 206 F.2d 311, 318 (6th Cir. 1953). In addition, Respondents' testimonials constitute objective claims that the products inhibit tumors or are otherwise effective in the treatment of cancer. *See id.* Accordingly, Respondents implied

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<sup>4</sup> Under the "falsity" theory, in order to prevail, the government must carry the burden of proving that the express or implied message conveyed by the ad is false. *Pantron I v. FTC*, 33 F.3d at 1096; *In re Thompson Medical*, 104 F.T.C. at 818-19, 1984 FTC LEXIS 6, at \*379-80.

<sup>5</sup> Claims regarding a product's attributes, performance, or efficacy are considered "objective" claims, as opposed to mere sales "puffery," because such claims can be objectively verified. *In re Thompson Medical*, 104 F.T.C. at 788-89 n.6, 1984 FTC LEXIS 6, at \*312 n.6.

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that they had a reasonable basis to substantiate these claims. *See In re Thompson*, 104 F.T.C. at 813, 1984 FTC LEXIS 6, at \*367. *See also* Answer ¶ 15 (admitting that Respondents relied upon a reasonable basis that substantiated the challenged representations).

In determining whether an advertiser has satisfied the reasonable basis requirement, it must be determined (1) what level of substantiation the advertiser is required to have for its advertising claims, and then (2) whether the advertiser possessed and relied on that level of substantiation. *FTC v. Pantron I*, 33 F.3d at 1096; *FTC v. QT, Inc.*, 448 F. Supp. 2d at 959. Respondents have the burden of establishing what substantiation they relied on for their product claims and Complaint Counsel has the burden of proving that Respondents' purported substantiation is inadequate. *FTC v. QT, Inc.*, 448 F. Supp. 2d at 959.

If an advertiser does not have a reasonable basis substantiating its claims, the representations are deceptive or misleading. *FTC v. Pantron I*, 33 F.3d at 1096; *FTC v. Sabal*, 32 F. Supp. 2d at 1007; *FTC v. QT, Inc.*, 448 F. Supp. 2d at 959-60. As further discussed below, the appropriate level of substantiation for health-related efficacy claims, such as those made by Respondents here, is "competent and reliable scientific evidence." Because Respondents did not possess or rely upon such evidence, Respondents' advertising claims are misleading.

**a. Competent and reliable scientific evidence is needed for health-related efficacy claims**

The level of substantiation required depends on whether the advertising claims at issue are (1) establishment claims or (2) non-establishment claims. *Thompson Medical Co. v. FTC*, 791 F.2d 189, 194 (D.C. Cir. 1986). Establishment claims are those that contain representations regarding the amount of support the advertiser has for its product claims. *Id.*; *FTC v. Direct Marketing Concepts*, 569 F. Supp. 2d at 298 (citing FTC Policy Statement on Advertising Substantiation, appended to *In re Thompson Medical*, 104 F.T.C. at 839, 1984 FTC LEXIS 6, at \*434 (hereinafter "Policy on Advertising Substantiation")). "They are in effect statements 'that scientific tests establish that a

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product works.”” *FTC v. Direct Marketing Concepts*, 569 F. Supp. 2d at 298 (citing *Removatron v. FTC*, 884 F.2d at 1492 n.3). Common examples of establishment claims include statements such as “tests prove,” “doctors recommend,” or “studies show.” *Id.* at 298-99 (citing Policy on Advertising Substantiation; *Thompson Medical Co. v. FTC*, 791 F.2d at 194) (other citations omitted). Where the challenged advertisements contain establishment claims, the Commission expects the advertiser to have at least the amount and type of substantiation it claimed to have had. *Thompson Medical Co. v. FTC*, 791 F.2d at 194. *See Removatron v. FTC*, 884 F.2d at 1498 (holding that advertiser lacked reasonable basis for establishment claim as to product’s hair removal effects, as a matter of law, because advertiser did not have any well-controlled scientific studies supporting the claim).

By contrast, a non-establishment claim is simply a claim about a product’s attributes, performance, or efficacy, without indicating any particular level of support for such claim. *In re Thompson Medical*, 104 F.T.C. at 815, 1984 FTC LEXIS 6, at \*370. For non-establishment claims, what constitutes sufficient substantiation may depend on multiple factors, such as the type of claim, the type of product, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation for the claim, and the amount of substantiation that experts in the field believe is reasonable. *FTC v. Direct Marketing Concepts*, 569 F. Supp. 2d at 299 (citing *Removatron v. FTC*, 884 F.2d at 1492 n.3); *accord FTC v. QT, Inc.*, 448 F. Supp. 2d at 959 (citing Policy on Advertising Substantiation). In *Thompson Medical*, the Commission stated that determining the appropriate level of substantiation for non-establishment claims requires weighing the following factors: (1) the product involved; (2) the type of claim; (3) the benefits of a truthful claim; (4) the ease of developing substantiation for the claim; (5) the consequences of a false claim; and (6) the amount of substantiation experts in the field would agree is reasonable. 104 F.T.C. at 821, 1984 FTC LEXIS 6, at \*387 (citing *In re Pfizer, Inc.* 81 F.T.C. 23 (1972), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986) (hereinafter the “Pfizer factors”).

The DCO advertising at issue represents that the Challenged Products, individually or collectively, prevent, treat, or cure



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cancer, inhibit tumors, or ameliorate the adverse effects of chemotherapy or radiation. F. 189, 191, 193, 202, 211, 222, 224, 227, 229, 230, 232, 234, 235, 239, 245, 248, 250, 255, 257, 258, 269, 272, 275, 277-78, 280-81, 286, 288, 291, 294. The advertisements do not represent that the claims have been proven by scientific testing, except in a very few cases. *E.g.*, F. 225, 231, 247. Complaint Counsel has not alleged or argued that Respondents' advertisements constitute establishment claims. Accordingly, the claims at issue are deemed non-establishment claims, and will be evaluated as such.

As discussed below, the challenged claims made by Respondents are health-related efficacy claims. It is well established that health-related efficacy claims, including those made about dietary supplements specifically, must be substantiated by "competent and reliable scientific evidence." *FTC v. Natural Solution, Inc.*, No. CV 06-6112-JFW, 2007 U.S. Dist. LEXIS 60783, at \*11-12 (C.D. Cal. Aug. 7, 2007) (requiring competent and reliable scientific evidence to substantiate claims that liquid botanical dietary supplement Knutric was a treatment to prevent and fight various forms of cancer); *FTC v. National Urological Group*, 2008 U.S. Dist. LEXIS 44145, at \*43-44 (requiring competent and reliable scientific evidence to substantiate claims that dietary supplements under the brand names Thermalean, Lipodrene, and/or Spontane-ES, were effective for weight loss and sexual enhancement); *FTC v. Direct Marketing Concepts*, 569 F. Supp. 2d at 300, 303 (requiring competent and reliable scientific evidence to substantiate claims that dietary supplements, Coral Calcium and Supreme Greens, were effective to prevent, treat, or cure cancer); *see also FTC v. QT, Inc.*, 448 F. Supp. 2d at 961 (requiring competent and reliable scientific evidence to substantiate claims that the Q-Ray bracelet provided immediate, significant, or complete relief from various types of pain).

The foregoing authorities concluded that competent and reliable scientific evidence was the appropriate level of substantiation for health-related efficacy claims without first considering each of the *Pfizer* factors. However, to the extent specific application of the *Pfizer* factors is necessary for health-related efficacy claims, such application yields the same result:

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Respondents must have possessed and relied upon competent and reliable scientific evidence to substantiate the health-related efficacy claims that they made. Each of the *Pfizer* factors is considered below.

**(1) The type of product**

Products related to consumer health require a high level of substantiation, such as scientific tests. *In re Removatron Int'l Corp.*, No. 9200, 111 F.T.C. 206, 1985 FTC LEXIS 21, at \*212 n.20 (Nov. 4, 1988), *aff'd*, 884 F.2d 1489; *In re Thompson Medical*, 104 F.T.C. at 822, 1984 FTC LEXIS 6, at \*388. Claims that the Challenged Products prevent, treat, or cure cancer, inhibit tumors, or ameliorate the adverse effects of radiation and chemotherapy relate to consumer health. F. 219, 236, 259, 282, 295. Accordingly, a high level of substantiation is required.

**(2) The type of claim**

Claims that are difficult or impossible for consumers to evaluate for themselves require a high level of substantiation, such as scientific tests. The “placebo” effect of consumer expectations when taking a purported remedy makes it difficult for consumers to verify product effectiveness for themselves. *In re Removatron*, 1985 FTC LEXIS 21, at \*212 n.20; *In re Thompson Medical*, 104 F.T.C. at 822-23, 1984 FTC LEXIS 6, at \*389; *FTC v. Pantron I*, 33 F.3d at 1090 n.1. In this case, for example, consumers cannot effectively determine for themselves the accuracy of the claim that BioShark inhibits tumors. Similarly, consumers reading “Tracey’s” testimonial cannot evaluate whether the claimed “complete remission” of Tracey’s cancer is due to her consumption of the Challenged Products or some other factor. Therefore, a high level of substantiation is required.

Respondents maintain that the challenged advertising does not state that the Challenged Products prevent, treat, or cure disease or tumors, and that Respondents’ “express statements” constitute “structure/function” claims. RPF No. 27, 36, 42, 43. Respondents state that the phrase “structure or function,” in the context of dietary supplements claims, refers to representations

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about a dietary supplement's effect on the structure or function of the body for maintenance of good health and nutrition. RB at 3-4 (citing the FTC's Guide, *Dietary Supplements: An Advertising Guide for Industry*, at 26 n.2). As discussed in Section III D 1, *supra*, the words used in an advertisement cannot be viewed in isolation, but must be viewed along with all the other elements of the advertisement to obtain the overall net impression. The evidence demonstrates that the overall net impression of Respondents' advertising is that the Challenged Products, individually or collectively, prevent, treat, or cure cancer, inhibit tumors, or ameliorate the adverse effects of chemotherapy or radiation. F. 189, 191, 193, 202, 211, 222, 224, 227, 229, 230, 232, 234, 235, 239, 245, 248, 250, 255, 257, 258, 269, 272, 275, 277-78, 280-81, 286, 288, 291, 294. These are health-related claims. F. 219, 236, 259, 282, 295. Therefore, Respondents' argument that they should be held to a lower standard of substantiation because they made "structure/function" claims is without merit. *See FTC v. QT, Inc.*, 448 F. Supp. 2d at 962 ("Defendants would not be required to have a gold-standard study to substantiate the Q-Ray bracelet if they did not make such a strong, medical claim. The choice belonged to Defendants.").

**(3) The benefits of a truthful claim and the ease of developing substantiation for the claim**

These two factors – the benefits of a truthful claim and the ease of developing substantiation for the claim – are typically considered together. The consideration of these factors seeks to ensure that the level of substantiation required is not likely to deter product development or prevent disclosure of potentially valuable information about product characteristics to consumers. *In re Removatron*, 1985 FTC LEXIS 21, at \*212 n.20; *In re Thompson Medical*, 104 F.T.C. at 823-24, 1984 FTC LEXIS 6, at \*391.

The fact that cancer patients could benefit from truthful claims of effective treatments is obvious. Respondents contend that developing "competent and reliable scientific evidence" is too costly for dietary supplements, and that such products should be held to a lower standard. RPF No. 27, 36, 42, 43. However, as noted above, courts have required competent and reliable

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scientific evidence for claims about dietary supplements when such products are advertised to treat diseases or medical conditions. *E.g.*, *FTC v. Natural Solution*, 2007 U.S. Dist. LEXIS 60783, at \*11-12; *FTC v. National Urological Group*, 2008 U.S. Dist. LEXIS 44145, at \*43-44; *FTC v. Direct Marketing Concepts*, 569 F. Supp. 2d at 300, 303. Although Respondents deny they “stated” that the Challenged Products prevent, treat, or cure cancer or tumors, the evidence shows that the advertising clearly conveyed these claims. F. 189, 191, 193, 202, 211, 222, 224, 227, 229, 230, 232, 234, 235, 239, 245, 248, 250, 255, 257, 258, 269, 272, 275, 277-78, 280-81, 286, 288, 291, 294.

**(4) The consequences of a false claim**

The consequences of a false claim weigh in favor of requiring a higher level of substantiation in this case. The evidence shows that foregoing a proven cancer treatment in favor of an ineffective treatment would be injurious to a patient’s health. F. 355-56. In addition, side effects and/or inappropriate dosing of a dietary supplement can cause harmful interactions that interfere with cancer treatment. F. 357-61. Furthermore, the Challenged Products are costly. F. 126-27, 135-37, 139-40, 143-44. Spending money on an ineffective remedy causes economic injury. *In re Schering Corp.*, No. 9232, 1991 FTC LEXIS 427, at \*134 (Sept. 16, 1991); *In re Removatron*, 1985 FTC LEXIS 21, at \*212 n.20.

**(5) The amount of substantiation experts in the field believe is reasonable**

Dr. Miller was the only witness in this case qualified as an expert in cancer research and cancer treatment. F. 326. His opinions, which were thorough and well-reasoned, were that competent and reliable scientific evidence is required to demonstrate that a cancer treatment is effective; that competent and reliable scientific evidence means controlled clinical studies; that animal and in vitro studies are insufficient; and that testimonials have no scientific validity. F. 343-53. Respondents contend that the relevant field is dietary supplements, and that in this regard, Drs. Duke and LaMont are more qualified than Dr. Miller. RB at 8-9. Where, as here, a dietary supplement is

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claimed to have medical effects, however, it is appropriate to rely on the opinion of an expert in the medical field. *See FTC v. National Urological Group*, 2008 U.S. Dist. LEXIS 44145, at \*78-79 (accepting opinion of an expert in the field of erectile dysfunction as to level of substantiation required for claims that a dietary supplement was an effective treatment).

In any event, while Drs. Duke and LaMont each opined that there was a “reasonable basis” for the statements submitted to them for evaluation, neither witness even offered an opinion as to the amount or type of substantiation that is reasonable to support a claim that the Challenged Products prevent, treat, or cure cancer. F. 338, 387-88, 395-98. Accordingly, neither witness disputed Miller’s opinion that competent and reliable scientific evidence is the appropriate standard for substantiating cancer claims. *See FTC v. National Urological Group*, 2008 U.S. Dist. LEXIS 44145, at \*78-79. Although LaMont would include studies of animals and cell culture lines in her definition of competent and reliable scientific evidence, she also included human clinical trials in her definition. F. 344. Accordingly, the expert testimony supports holding advertising claims, such as those made by Respondents, to the “competent and reliable scientific evidence” standard of substantiation.

**b. Respondents did not possess or rely upon competent and reliable scientific evidence to substantiate their advertising claims**

Respondents did not possess or rely upon competent and reliable scientific evidence to substantiate their claims that any of the Challenged Products is effective, either alone or in combination with other DCO products, in the prevention, treatment, or cure of cancer, in inhibiting tumor formation, or in ameliorating the adverse effects of radiation and chemotherapy, and in fact, no such evidence exists. F. 362-86. Claims that a dietary supplement treats a medical condition must be substantiated by clinical or scientific testing on the product itself; testing only component ingredients of the product is insufficient, unless the testing is on an exact duplicate of the product’s combination of active ingredients. F. 367; *see FTC v. National Urological Group*, 2008 U.S. Dist. LEXIS 44145, at \*79; *FTC v.*

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*Natural Solution*, 2007 U.S. Dist. LEXIS 60783, at \*14-15 n.6 (holding on summary judgment that reliance on articles on the Internet, including the Mayo Clinic, website did not constitute adequate substantiation of claims that dietary supplement prevented or treated cancer where articles only addressed potential effects of particular herbs and did not demonstrate that the formula actually prevents or treats cancer). In the instant case, the Challenged Products were not tested to determine if they had the claimed effects. F. 308-14. Studies upon which Respondents relied evaluated isolated compounds that are present in certain of the Challenged Products and showed nonspecific immunostimulatory activities or suggested cancer preventive effects. F. 367. As in *National Urological Group* and *Natural Solution*, however, and as stated by Dr. Miller, testing only certain components of a Challenged Product does not substitute for an actual evaluation of each of the Challenged Products itself. For example, one cannot extrapolate from results of a published non-clinical study of curcumin that GDU can eliminate tumors. GDU itself, or each active ingredient in GDU, must be subjected to the same experimental conditions as those to which the curcumin was subjected. F. 367.

In addition, the materials relied upon by Respondents as substantiation consisted of author opinions and reviews of literature on the use of herbal medicines for a number of different diseases, including cancer. F. 365. Mere compilations of citations, which do not contain independent analysis or support for claims made in advertising, do not constitute substantiation. *FTC v. Direct Marketing Concepts*, 569 F. Supp. 2d at 300-01. Most of the studies referenced by Respondents are not peer-reviewed papers. F. 365. Respondents' substantiation materials did not include any controlled clinical trials. F. 365. Respondents' substantiation included non-clinical in vitro or animal studies, which serve only to demonstrate potential activity and safety. F. 345, 366. Such potential activity is not sufficient substantiation for claimed anti-cancer effects. See *FTC v. Natural Solution*, 2007 U.S. Dist. LEXIS 60783, at \*14-15 (holding that reliance on Internet articles which addressed potential effects of herbs in Knutric and stated that further research was required did not substantiate anti-cancer claims). Instead, competent and

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reliable scientific evidence to substantiate Respondents' claims requires controlled, clinical studies. F. 343-48.

Finally, Respondents' testimonials do not constitute valid scientific evidence because, among other reasons, it cannot be confirmed that the speakers had cancer, or that the speakers' reported responses were not due to other treatment modalities. *See Koch v. FTC*, 206 F.2d 311, 315-16 (6th Cir. 1953) (giving case histories no weight in verifying treatment claims, where the clinical data were based upon insufficient diagnosis or indicated use of conventional treatment along with the product). An individual's report that he or she "felt better," standing alone, does not scientifically measure response to a particular product. F. 351-53. For these and other reasons, cases consistently hold that testimonials do not constitute adequate substantiation for health-related efficacy claims in advertising. As Judge Easterbrook explained in *Federal Trade Commission v. QT, Inc.*:

[A] person who promotes a product that contemporary technology does not understand must establish that this "magic" actually works. Proof is what separates an effect new to science from a swindle. . . . [D]efendants have no proof of the Q-Ray Ionized Bracelet's efficacy. The "tests" on which they relied were bunk. . . . What remain are testimonials, which are not a form of proof because most testimonials represent a logical fallacy: post hoc ergo propter hoc. (A person who experiences a reduction in pain after donning the bracelet may have enjoyed the same reduction without it. That's why the "testimonial" of someone who keeps elephants off the streets of a large city by snapping his fingers is the basis of a joke rather than proof of cause and effect.)

512 F.3d 858, 862 (7th Cir. 2008). *See also Simeon Mgmt. Corp. v. FTC*, 579 F.2d 1137, 1143-44 (9th Cir. 1978) (stating that anecdotal evidence, such as testimonials by satisfied customers, does not constitute adequate and well-controlled investigation, and therefore does not support claims that drug was effective for weight loss); *In re Warner-Lambert Co.*, No. 8891, 86 F.T.C. 1398, 1496, 1975 FTC LEXIS 12, at \*213 (Dec. 9, 1975) ("Since there may be a divergence between what the user thinks the product will do for him and what the product actually does (or

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does not do), evidence of consumer beliefs has little probative value for determining whether” a product works in the manner claimed), *aff'd*, 562 F.2d 749 (D.C. Cir. 1977).

Respondents argue that the literature upon which they relied constitutes “reasonable” support for their “express statements” which they contend are “structure/function” claims. RFF Nos. 26, 40; RCOL Nos. 18, 19. As discussed in Section III E 1-5 *supra*, the overall net impression of the DCO advertising is that each of the Challenged Products, either alone or in combination with other DCO products, is effective in the prevention, treatment, or cure of cancer, in inhibiting tumor formation, or in ameliorating the adverse effects of radiation and chemotherapy. F. 189, 191, 193, 202, 211, 222, 224, 227, 229, 230, 232, 234, 235, 239, 245, 248, 250, 255, 257, 258, 269, 272, 275, 277-78, 280-81, 286, 288, 291, 294. The fact that there may have been some basis to support the “express” words of product descriptions, taken out of context, is immaterial because Respondents had no competent and reliable scientific evidence to substantiate the overall net impression conveyed by their advertisements. *See FTC v. Bronson Partners*, 564 F. Supp. 2d at 133-34 (holding that expert report that included conclusions that Chinese Diet Tea “could lead to weight reduction,” “can be a useful part of a weight reduction program,” and “can help reduce fat absorption,” while supporting the generalized notion that the product could be a useful part of a weight reduction program, did not support advertising claims that the product will lead to rapid and substantial weight loss).

It bears mentioning that Respondents’ strategy throughout this case, despite clear and well-established law, has been to ignore each component of their advertising *except* the “express” words of their product descriptions, as though those statements stand alone. Following this strategy, Respondents did not seek, nor did any of their proffered experts offer, an opinion as to whether there was competent and reliable scientific evidence to support the claims that were alleged in the Complaint. F. 339-40, 387-89, 397, 399-400, 405, 408-09, 418, 420-21, 422, 424-25. Respondents’ proffered experts were not asked to review, and none of them did review, any of the DCO advertising at issue. F. 338, 387, 395-96, 404, 410, 418, 422. None of Respondents’ proffered experts, with the possible exception of Roy, opined as to what level of



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substantiation is necessary or appropriate for claims that a dietary supplement prevents, treats, or cures cancer. F. 387-88, 397-98, 405-07, 418-19, 422-23. None of Respondents' proffered experts had any expertise in treating cancer, or in testing the efficacy of proposed cancer treatments. F. 330-37, 414-17. The result of Respondents' strategy is that none of Respondents' proffered experts offered any opinions on any material, contested issue in the case, and the opinions that Respondents' proffered experts did offer are entitled to little, if any, weight.

**c. Respondents' claims are deceptive or misleading**

Complaint Counsel can show that a representation is deceptive or misleading by showing that the advertiser lacked a reasonable basis for asserting that the message was true. *FTC v. Pantron I*, 33 F.3d at 1096; *FTC v. Sabal*, 32 F. Supp. 2d at 1007; *FTC v. QT, Inc.*, 448 F. Supp. 2d at 959-60. Complaint Counsel has demonstrated that Respondents lacked a reasonable basis for their claims that the Challenged Products, individually or collectively, prevent, treat, or cure cancer or inhibit tumors, or ameliorate the adverse effects of chemotherapy and radiation. Accordingly, Complaint Counsel has demonstrated that Respondents' claims are deceptive or misleading.

**3. Respondents' advertising claims are material**

"A claim is considered material if it 'involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding a product.'" *Kraft v. FTC*, 970 F.2d at 322 (citations omitted). Health-related efficacy claims are consistently held to involve information that is important to consumers. *FTC v. Direct Marketing Concepts*, 569 F. Supp. 2d at 299-300; *FTC v. QT, Inc.*, 448 F. Supp. 2d at 966; *accord FTC v. National Urological Group*, 2008 U.S. Dist. LEXIS 44145, at \*45-46. Furthermore, the Commission is entitled to presume materiality for claims involving health concerns. *Kraft v. FTC*, 970 F.2d at 323. *Accord Novartis Corp. v. FTC*, 223 F.3d 783, 786 (D.C. Cir. 2000) (noting that information has been presumed material where it "concerns the purpose, safety, efficacy, or cost of the product or service") (quoting FTC Policy Statement on

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Deception, appended to *In re Cliffdale Assocs.*, 103 F.T.C. 110, 182, 1984 FTC LEXIS 71, at \*189 (Mar. 23, 1984)); *FTC v. QT, Inc.*, 448 F. Supp. 2d at 966. The presumption may be rebutted with extrinsic evidence indicating that the claims are not material. *FTC v. National Urological Group*, 2008 U.S. Dist. LEXIS 44145, at \*81.

Respondents' advertising claims that the Challenged Products, individually or collectively, prevent, treat, or cure cancer or inhibit tumors, or ameliorate the adverse effects of chemotherapy and radiation unquestionably relate to health concerns. F. 219, 236, 259, 282, 295. Claims that relate to health concerns are material. *FTC v. Direct Marketing Concepts*, 569 F. Supp. 2d at 299-300 (holding that claims that dietary supplements could prevent or treat cancer and other diseases were health-related efficacy claims which were "clearly material"); *FTC v. QT, Inc.*, 448 F. Supp. 2d at 966 (stating that claims that the Q-Ray bracelet provides immediate, significant, or complete relief from various types of pain were "[w]ithout question" medical, health-related claims that were material to consumers); *FTC v. National Urological Group*, 2008 U.S. Dist. LEXIS 44145, at \*46 (applying presumption of materiality to claims that dietary supplements were effective to treat weight loss and sexual dysfunction). Therefore, Respondents' claims are clearly material. In addition, Respondents did not make any argument, or attempt to introduce any evidence, that their claims are not material to consumers. Accordingly, Respondents' claims are deemed material.

### **E. Respondents' Defenses**

Respondents have raised numerous defenses. Some of these defenses have been addressed in other sections of this Initial Decision.<sup>6</sup> Only a few of Respondents' remaining defenses merit discussion, and these are addressed below. Regardless of whether a defense is specifically addressed in this Initial Decision, each of

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<sup>6</sup> See, e.g., Sections III B (jurisdiction); III D 1 (interpretation of advertisements); III D 1 f (disclaimers); III D 1 g (extrinsic evidence); III D 2 a (level of substantiation).

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Respondents' defenses has been fully considered, and rejected as being without sufficient basis in fact and/or law.

**1. Claims regarding insufficient proof****a. Proof of unfair trade practices under Section 5(n) of the Act**

Respondents argue that Complaint Counsel must prove that Respondents' acts or practices are not only deceptive, but also "unfair," as defined under Section 5(n) of the FTC Act. That Section provides:

(n) Definition of unfair acts or practices. The Commission shall have no authority under this section or section 18 [15 U.S.C. § 57a] to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

15 U.S.C. § 45(n).

Respondents' argument fails. Respondents cite no authority for their contention that the evidence must show that deceptive trade practices are also unfair because of substantial consumer injury. Moreover, the law is contrary to Respondents' position. It is well established that proof of deception does not require proof of actual consumer injury. *FTC v. Direct Marketing Concepts*, 569 F. Supp. 2d at 297; *In re Kraft*, 1991 FTC LEXIS 38, at \*38. This is because misrepresentations harm consumer choice, and in this regard, injure both consumers and competition. *In re Novartis Corp.*, 1999 FTC LEXIS 63, at \*26. Accordingly, the harm resulting from a deceptive practice renders such practice "unfair" as well. *In re Southwest Sunsites, Inc.*, No. 9134, 105 F.T.C. 7, 1980 FTC LEXIS 86, at \*338 n.81 (Jan. 15, 1985).

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Indeed, the provisions of Section 12(b) of the FTC Act recognize this principle, by providing that false advertising is, by definition, an “unfair or deceptive” act or practice within the meaning of Section 5 of the FTC Act. 15 U.S.C. § 52(b). Therefore, there is no legal or logical reason to require additional, independent proof of unfairness under Section 5(n), 15 U.S.C. § 45(n).

**b. Proof of inadequate substantiation****(1) Requirement of placebo-controlled, double-blind studies**

Respondents assert that placebo-controlled, double-blind studies are not required for adequate substantiation under the FTC Act. RB at 2-3 (citing *FTC v. QT, Inc.*, 512 F.3d 858). Respondents correctly note that the court in *Federal Trade Commission v. QT, Inc.* stated: “Nothing in the Federal Trade Commission Act . . . requires placebo-controlled, double-blind studies. . . . Placebo-controlled, double-blind testing is not a legal requirement for consumer products.” 512 F.3d at 861. However, Respondents ignore the fact that the appellate court affirmed the district court’s holdings that substantiation for health-related efficacy claims must be based on competent and reliable scientific evidence, and that the studies upon which defendants relied were inadequate under that standard. *Id.* at 862. Moreover, the appellate court held that its conclusion regarding double-blind, placebo-controlled studies was of no help to the defendants because, as the district court had found after exhaustive analysis of the defendants’ studies, “defendants ha[d] no proof” to support their advertising claims. *Id.*

In the instant case as well, the language in *Federal Trade Commission v. QT, Inc.* regarding placebo-controlled, double-blind studies does not help Respondents because, as discussed in Section III D 2 *supra*, Respondents did not possess or rely upon any adequate substantiation for their claims that the Challenged Products prevent, treat, or cure cancer. Respondents had no studies whatsoever of the effects of the Challenged Products themselves. F. 308-14. Respondents’ substantiation materials included studies on isolated compounds that are present in some of the Challenged Products, rather than studies of the exact

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combinations of constituent ingredients in the Challenged Products. F. 367. Respondents' own proffered expert, Dr. LaMont, admitted that because the products have not been tested, the effectiveness of BioShark, 7 Herb Formula, GDU, and BioMixx to prevent, treat, or cure cancer is not known. F. 364. Most of the substantiation materials upon which Respondents relied were not peer-reviewed papers. F. 365. Respondents' substantiation materials did not include controlled clinical human trials. F. 365. Respondents' substantiation materials included author opinions and reviews of literature on the use of herbal medicines. F. 365. Many of the studies cited in Respondents' reference materials were in vitro or animal studies. F. 366. Ultimately, like the defendants in *QT, Inc.*, Respondents here relied on testimonials (F. 316), "which are not a form of proof." 512 F.3d at 862.

**(2) Substantiation for "structure-function"  
claims under DSHEA**

Respondents further contend that a high level of substantiation, such as placebo-controlled, double-blind studies, is not required because, according to Respondents, Respondents made "structure-function" claims under the Dietary Supplement Health and Education Act, Pub. L. No. 103-417, 108 Stat. 4325 (DSHEA). RB at 3, 7-8. Respondents cite 21 U.S.C. § 343(r)(6)(A), which relaxes certain DSHEA misbranding rules for statements on labels that "describe . . . the role of a nutrient or dietary ingredient intended to affect the structure or function in humans." In this case, the evidence demonstrates that Respondents made health-related efficacy claims. *See supra* Section III D 1-2. Such claims would not be deemed "structure-function" claims under DSHEA, even according to the cases cited by Respondents. *See Pearson v. Shalala*, 164 F.3d 650, 652 (D.C. Cir. 1999) (stating that claims that consumption of antioxidant vitamins may reduce the risk of certain kinds of cancers, consumption of fiber may reduce the risk of colorectal cancer, consumption of omega-3 fatty acids may reduce the risk of coronary heart disease, and 8 mg of folic acid in a dietary supplement is more effective in reducing the risk of neural tube defects than a lower amount in foods in common form constitute "health claims" under FDA regulations); *United States v. Lane*

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*Labs-USA, Inc.*, 324 F. Supp. 2d 547, 568 (D.N.J. 2004) (holding that claims that shark cartilage products were an effective treatment for cancer and HIV/AIDS were not structure-function claims). In any event, this case does not present issues relating to labeling under DSHEA, but advertising and unfair acts or practices under the FTC Act. Complaint ¶¶ 7-14, 16; 15 U.S.C. §§ 45(a), 52.

### (3) FTC Guidelines for Dietary Supplement Advertising

Next, Respondents argue that Complaint Counsel ignored FTC guidelines regarding the advertising of dietary supplements. RB at 4, 8 (citing the FTC's Guide, *Dietary Supplements: An Advertising Guide for Industry*, available at <http://www.ftc.gov/bcp/edu/pubs/business/adv/bus09.shtm> (hereinafter, "Guidelines")). Respondents contend that the Guidelines state that: (1) the evaluation of substantiation for dietary supplement claims must be flexible to ensure consumers have access to information about emerging areas of science; (2) there is no requirement that dietary supplement claims be supported by a specific number of studies; and (3) research concerning the biological mechanism underlying the claimed action of a dietary supplement is acceptable substantiation for dietary supplement claims. RB at 4, 8.

Respondents misconstrue the Guidelines. The first statement from the Guidelines that Respondents contend was ignored introduces a discussion of the five factors relevant in evaluating substantiation, which are the same as the five *Pfizer* factors. See Guidelines at 8-9; *In re Thompson Medical*, 104 F.T.C. 648, 821, 1984 FTC LEXIS 6, at \*387. The *Pfizer* factors were considered and applied in this case. See *supra* Section III D 2 a. The second statement from the Guidelines, to which Respondents referred, is preceded by important qualifying statements, which Respondents ignore, including that "the [amount and type of] evidence needed depends on the nature of the claim," that "all competent and reliable scientific research" should be considered, and that "the quality of studies [is] more important than quantity." Guidelines at 10. The nature of Respondents' claims was thoroughly considered in determining the level of substantiation required.

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*See supra* Section III D 1-2 a. The quality of Respondents' substantiation was fully evaluated and determined to not constitute competent and reliable scientific evidence. *See supra* Section III D 2 b. Finally, regarding Respondents' third statement, the Guidelines simply do not state that "research concerning the biological mechanism underlying the claimed action of a dietary supplement is acceptable substantiation for dietary supplement claims." The Guidelines state: "When a clinical trial is not possible (e.g., in the case of a relationship between a nutrient and a condition that may take decades to develop), *epidemiologic evidence may be* an acceptable substitute for clinical data, especially when supported by other evidence, such as research explaining the biological mechanism underlying the claimed effect." Guidelines at 10 (emphasis added). To the extent Respondents' substantiation materials included any "research explaining the biological mechanism" of the Challenged Products, it was determined that such materials did not constitute adequate substantiation for the claim that the Challenged Products prevent, treat, or cure cancer. *See supra* Section III D 2 b.

## 2. Due process claim

Although Respondents' due process claim is difficult to discern, it appears to be based upon what Respondents contend is a lack of evidence. Respondents assert that: Under DSHEA, dietary supplements must be proved harmful; there is no evidence of unfairness or consumer injury; and extrinsic evidence is necessary to determine the overall net impression of their advertising. RB at 10-11. To find liability without such evidence, according to Respondents, violates their procedural due process rights, under *Mathews v. Eldridge*, 424 U.S. 319 (1976) and *Stanley v. Illinois*, 405 U.S. 645 (1972). Neither cited opinion has any bearing on this case legally or factually. Moreover, each alleged evidentiary deficiency has been proved erroneous. As noted in *supra* Sections III D 1 g and III E 1 a-b, DSHEA law does not govern this deceptive advertising case, consumer injury is not an element of proof in a deceptive advertising case, unfairness is not an element of proof in a deceptive advertising case, and extrinsic evidence is not necessary to determine the overall net impression of advertisements where, as here, the

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meaning is sufficiently clear on the face of the advertisements. Accordingly, Respondents' due process argument has no merit.

### 3. *United States v. Johnson*

Respondents rely on the near-century-old case of *United States v. Johnson*, 221 U.S. 488 (1911) to argue that unsubstantiated claims regarding product effectiveness are not unlawful because such claims are matters of opinion, not fact. *See, e.g.*, Respondents' Motion to Dismiss, Jan. 11, 2009, at 6-8. *Johnson* involved the question of whether medicine bottles, whose labels contained false and misleading representations that the medicine was effective in curing cancer, were "misbranded" within the meaning of Section 8 of the Food and Drug Act of 1906. 221 U.S. at 495-97. The Court held that the Act was not intended to cover all possible false or misleading statements regarding medicine, but only those related to the identity of the contents of the medicine. *Id.* On its face, *Johnson* has no application to this case. In addition, Congress implicitly overruled *Johnson* by amending the Food and Drug Act to expressly include claims regarding curative effectiveness. Act of June 30, 1906, as amended, 37 Stat. 416 (1912). Finally, as noted in Section III D 2 *supra*, Respondents' advertising claims, including claims that the Challenged Products are "Cancer Treatments" and "Cancer Solutions," are stated in positive terms, and not qualified by opinion. *See Koch v. FTC*, 206 F.2d at 318 (holding that representations concerning the therapeutic value of certain medicinal preparations were within jurisdiction of FTC). Respondents' claims are representations of fact because they are subject to objective verification. *See In re Thompson Medical*, 104 F.T.C. 648, 788-89 n.6, 1984 FTC LEXIS 6, at \*312 n.6 (stating that claims that can be objectively verified do not constitute mere "puffery"). Thus, *Johnson* does not support Respondents' position.

### 4. First Amendment defense

Respondents assert that their statements about the Challenged Products reflect both their religious view of life grounded in the Christian Bible and their political beliefs concerning allopathic drugs and pharmaceutical companies. RB at 12-13. Thus,



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Respondents maintain, their statements about the Challenged Products constitute religious and political speech protected by the First Amendment to the U.S. Constitution. RB at 12-13. Respondents further argue that even if their statements are found to be commercial speech, they are protected by the First Amendment. RB at 13. Respondents also assert that the FTC has the burden of showing that Respondents' statements are misleading and the burden of proving that suppression of those statements is necessary to achieve a substantial government interest. RB at 16. In addition, Respondents assert that the First Amendment doctrine of prior restraint would prohibit an FTC order enjoining Respondents' representations. RB at 14.

Complaint Counsel asserts that Respondents' representations constitute commercial speech. CCB at 32. Complaint Counsel further states that the evidence demonstrates that the challenged advertisements and promotional materials, which are broadly disseminated on the Internet to draw consumers, contain little or no religious commentary. CCB at 32-33. Complaint Counsel also contends that this commercial speech is deceptive and, therefore, not protected by the First Amendment. CCB at 34-35. In addition, Complaint Counsel maintains that the FTC's action does not constitute a prior restraint. CCB at 35.

Supreme Court decisions "have recognized 'the "common-sense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.'" *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 64 (1983) (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978)). Thus, the Supreme Court has held that the Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression. *Id.* at 64-65 (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 562-563 (1980); *Virginia Pharm. Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 n.24 (1976)).

"[A]s a general matter, 'the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Id.* at 65

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(quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). Thus, with respect to noncommercial speech, the Supreme Court has “sustained content-based restrictions only in the most extraordinary circumstances.” *Id.* “By contrast, regulation of commercial speech based on content is less problematic.” *Id.* “In light of the greater potential for deception or confusion in the context of certain advertising messages, content-based restrictions on commercial speech may be permissible.” *Id.* (citing *In re R. M. J.*, 455 U.S. 191, 200 (1982); *Friedman v. Rogers*, 440 U.S. 1 (1979)).

“Because the degree of protection afforded by the First Amendment depends on whether the activity sought to be regulated constitutes commercial or noncommercial speech,” *id.*, a determination must first be made as to whether Respondents’ challenged representations constitute commercial speech. Once it is determined that the language at issue is commercial speech, case law makes clear that misleading or deceptive commercial speech is not protected by the First Amendment.

**a. Respondents’ statements constitute commercial speech**

The determination of whether speech is commercial speech “rests heavily on ‘the common sense distinction between speech proposing a commercial transaction . . . and other varieties of speech.’” *Zauderer v. Office of Disciplinary Council*, 471 U.S. 626, 637-38 (1985) (citations omitted); *In re R.J. Reynolds Tobacco Co.*, No. 9206, 111 F.T.C. 539, 1988 FTC LEXIS 9, at \*9 (Mar. 4, 1988) (“The Supreme Court has referred to the ‘core notion’ of commercial speech as speech which proposes a commercial transaction.”) (citations omitted). As a result, the determining factor is whether the speech at issue “propose[s] a commercial transaction.” *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473-74 (1989).

Whether the speaker has an economic motivation for the speech is germane to the issue of whether the speech is commercial. *In re Primus*, 436 U.S. 412, 438 n.32 (1978) (stating that the line between commercial and noncommercial speech is “based in part on the motive of the speaker”); *Bolger*, 463 U.S. at

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66. Another consideration is whether the statements refer to specific products. *Bolger*, 463 U.S. at 66; *In re R.J. Reynolds*, 1988 FTC LEXIS 9, at \*14 (“[I]nformation about attributes of a product or service offered for sale, such as type, price, or quality, is also indicative of commercial speech.”) (citing *Friedman v. Rogers*, 440 U.S. 1, 11 (1979)). The Federal Trade Commission has specifically stated: “[I]nformation about health effects associated with the use of a product can properly be classified as commercial speech.” *In re R.J. Reynolds*, 1988 FTC LEXIS 9, at \*14 (citing *Bolger*, 463 U.S. at 66-67; *National Comm’n on Egg Nutrition v. FTC*, 570 F.2d 157, 163 (7th Cir. 1977)).

In this case, the evidence very clearly shows that Respondents’ speech is economically motivated and proposes a commercial transaction by urging consumers to purchase specific products. Respondent James Feijo conceded at trial that the DCO Website constitutes advertising. F. 161. Moreover, the content of Respondents’ advertising promotes specific products and their attributes, and urges consumers to purchase those products. For example, in the BioMolecular Nutrition Product Catalog, Respondents list and describe the Challenged Products and state, “Call Toll FREE 1-800-504-5511 or shop online at [www.danielchapterone.com](http://www.danielchapterone.com).” F. 91. There is no mention of a DCO ministry in the BioMolecular Nutrition Product Catalog. F. 93. In the exhibits attached to the Complaint, and admitted into evidence, Respondents clearly propose commercial transactions. F. 179-80 (webpage from the DCO Website, entitled “Cancer News,” which contains a picture of 7 Herb Formula and states regarding the Challenged Products as a group: “If you suffer from any type of cancer, Daniel Chapter One suggests taking 7\*Herb Formula™, Bio\*Shark™, BioMixx™, GDU Caps™.” Immediately following this text is a prominent picture of bottles of BioMixx, 7 Herb Formula, Bio\*Shark, and GDU, and adjacent to that is a statement in bold type, “Daniel Chapter One’s Cancer solutions,” and text that states: “To Buy the products click here. How to fight cancer is your choice!”) (emphasis omitted); F. 220-21 (printout of the webpage for BioShark on the DCO Website, with a heading in bold type, “Immune Boosters,” a picture of bottles of BioShark, and a shopping cart icon with the instruction, “BUY NOW!”) (emphasis omitted); F. 262-63 (webpage for GDU on the DCO Website, which begins with a heading in bold

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type, “Immune Boosters,” depicts bottles of GDU, with text that includes “[t]his formula also helps to relieve pain and heal inflammation,” and provides a link to “buy now.”). Further, Respondents’ representations convey information about the health effects that are purportedly associated with the use of their products. *See supra* Section III D 1-2. *E.g.*, F. 180 (DCO Website stating: “If you suffer from any type of cancer, Daniel Chapter One suggests taking [the Challenged Products]”).

In addition to evaluating the content of the speech, the Supreme Court has found that the means used to publish speech is relevant to how speech should be classified. *In re R.J. Reynolds*, 1988 FTC LEXIS 9, at \*15. For example, the Court has recognized that commercial speech frequently takes the form of paid-for advertising. *Id.* (citing *Bolger*, 463 U.S. at 66; *Bates v. State Bar of Ariz.*, 433 U.S. 350, 363-64 (1977); *Virginia State Board of Pharmacy*, 425 U.S. at 761). Respondents operate the DCO Website, [www.danielchapterone.com](http://www.danielchapterone.com), and the websites [www.dc1pages.com](http://www.dc1pages.com), [www.dc1store.com](http://www.dc1store.com), [www.7herbformula.com](http://www.7herbformula.com), and [www.gdu2000.com](http://www.gdu2000.com), through which they accept consumers’ orders. F. 103-04. Respondents have spent money to have the DCO websites and written publications created and for cable advertising services. F. 159-60.

Given the foregoing, the religious or political views, upon which Respondents’ advertising was assertedly based, do not convert Respondents’ commercial speech to constitutionally protected religious or political speech. In *Bolger*, the Supreme Court found that mailings constituted “commercial speech notwithstanding the fact that they contain discussions of important public issues such as venereal disease and family planning.” *Bolger*, 463 U.S. at 67-68. “We have made clear that advertising which ‘links a product to a current public debate’ is not thereby entitled to the constitutional protection afforded noncommercial speech.” *Id.* at 68 (quoting *Central Hudson*, 447 U.S. at 563 n.5). The Supreme Court further held: “A company has the full panoply of protections available to its direct comments on public issues, so there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions. Advertisers should not be permitted to immunize false or misleading product information from government

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regulation simply by including references to public issues.” *Id.* See also *Central Hudson*, 447 U.S. at 563 (stating that failing to honor distinction between commercial and noncommercial speech “could invite dilution, simply by a leveling process, of the force of the [First] Amendment’s guarantee with respect to the latter kind of speech”) (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. at 456). Thus, even though Respondents assert that their representations are based on their religious view of life grounded in the Christian Bible and positioned as a political argument against drugs and pharmaceutical companies, RB at 12-13, it is clear from the foregoing examples that Respondents’ speech seeks to promote sales of the Challenged Products. Accordingly, Respondents’ challenged representations constitute commercial speech.

**b. Misleading commercial speech may be prohibited**

For commercial speech to receive the protections of the First Amendment, “it at least must concern lawful activity and not be misleading.” *Central Hudson*, 447 U.S. at 566. As the Supreme Court has explained:

The First Amendment’s concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity.

*Id.* at 563-64. It is well settled that “[t]he States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading.” *Zauderer*, 471 U.S. at 638; *In re R. M. J.*, 455 U.S. at 203 (noting that the government may prohibit false or misleading commercial advertising entirely).

Restrictions on deceptive advertising of food and drugs have repeatedly been upheld against First Amendment challenges.

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*Association of Nat'l Advertisers v. Lungren*, 44 F.3d 726, 734 n.3 (9th Cir. 1994) (citing *Kraft v. FTC*, 970 F.2d at 324-26 (upholding FTC ban on deceptive claims about the calcium content of processed cheese products); *Bristol-Myers Co. v. FTC*, 738 F.2d 554, 562 (2d Cir. 1984) (upholding FTC prohibitions on certain types of advertising claims about analgesics)). See also *FTC v. National Urological Group*, 2008 U.S. Dist. LEXIS 44145, at \*29-30 (citing *Bristol-Myers v. FTC*, 738 F.2d at 562 (“deceptive advertising enjoys no constitutional protection”)). “Even in the absence of a finding of actual deception, agencies may properly regulate speech that is merely potentially deceptive.” *Bristol-Meyers v. FTC*, 738 F.2d at 562 (citing *Friedman v. Rogers*, 440 U.S. 1, 15 (1979)). Respondents’ representations have been found to lack adequate substantiation and therefore have been determined to be deceptive or misleading. See *supra* Section III D 2. Accordingly, the deceptive commercial speech at issue in this case is not protected by the First Amendment.

**c. *Central Hudson* does not apply**

Respondents argue that even if their statements are found to be commercial speech, they are protected by the First Amendment under *Central Hudson*. RB at 13, 16, 22. In *Central Hudson*, the Supreme Court set out the standards applicable to governmental restrictions on commercial speech: The State must assert a substantial interest to be achieved by restrictions on commercial speech; the regulatory technique must be in proportion to that interest; and the limitation on expression must be designed carefully to achieve the State’s goal. *Central Hudson*, 447 U.S. at 564. The *Central Hudson* test, however, is applied “if the communication is neither misleading nor related to unlawful activity.” *Id.*; *Grolier Inc. v. FTC*, 699 F.2d 983, 988 (9th Cir. 1983). Where, as here, Respondents’ practices are unlawful or misleading, First Amendment protections do not apply. *Grolier v. FTC*, 699 F.2d at 988; *National Urological Group*, 2008 U.S. Dist. LEXIS 44145, at \*30 (stating that *Central Hudson* test did not apply to the FTC deceptive advertising case before the court). Therefore, the *Central Hudson* test does not apply to this deceptive advertising case.

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**d. Other cases relied upon by Respondents do not apply**

Respondents cite numerous First Amendment commercial speech cases involving advertisements for accountants and attorneys to show how the Supreme Court “restated its *Central Hudson* test.” RB at 16-18. Respondents’ reliance upon these cases is misplaced. The accountant and attorney advertisement cases that Respondents cite all involve commercial speech that was not misleading or that did not involve unlawful activity. See *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 620-24 (1995) (holding that the Florida Bar Rules prohibiting personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for thirty days following an accident or disaster did not violate the First Amendment); *Ibanez v. Fla. Dep’t of Bus. and Prof’l Regulation Bd. of Accountancy*, 512 U.S. 136, 139, 142 (1994) (concluding that the Board’s decision censoring petitioner was incompatible with the First Amendment, but recognizing that “false, deceptive, or misleading commercial speech may be banned”); *Edenfield v. Fane*, 507 U.S. 761, 765-66 (1993) (holding that Florida’s rule prohibiting certified public accountants from engaging in “direct, in-person, uninvited solicitation” is inconsistent with the free speech guarantees of the First Amendment when the speech involved is truthful and nondeceptive); *Peel v. Attorney Registration and Disciplinary Comm’n of Ill.*, 496 U.S. 91, 100, 110-11 (1990) (stating that an attorney’s letterhead was not actually or inherently misleading, because a lawyer has a constitutional right, under the standards applicable to commercial speech, to advertise his or her certification, but stating that “[m]isleading advertising may be prohibited entirely”); *In re R. M. J.*, 455 U.S. at 206-07 (stating that there is “no finding that appellant’s speech was misleading” but noting that “the States retain the authority to regulate advertising that is inherently misleading or that has proved to be misleading in practice”). In the instant case, Respondents’ challenged speech is misleading and unlawful. Accordingly, the commercial speech cases upon which Respondents rely are inapposite.

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**e. The FTC's action does not constitute a prior restraint**

Respondents have asserted that this administrative proceeding and the issuance of a cease and desist order impose a prior restraint, in violation of their First Amendment rights, because there has been no proof that any consumer was actually misled or “physically harmed.” RRB at 13-15. Respondents misapply the concept of “prior restraint.” “The term ‘prior restraint’ is used ‘to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.’” *Alexander v. United States*, 509 U.S. 544, 550 (1993) (citations omitted). Courts have consistently held that a FTC cease and desist order prohibiting representations about performance of products without substantiation is not an unconstitutional “prior restraint,” but a reasonable sanction, imposed after a hearing establishes a violation of the FTC Act. *E.g.*, *Jay Norris, Inc. v. FTC*, 598 F.2d 1244, 1252 (2d Cir. 1979) (“[B]ecause the FTC here imposes the requirement of prior substantiation as a reasonable remedy for past violations of the Act, there is no unconstitutional prior restraint of petitioners’ protected speech.”); *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 399 (9th Cir. 1982) (“[T]he Commission may require prior reasonable substantiation of product performance claims after finding violations of the Act, without offending the [F]irst [A]mendment.”). Thus, the cease and desist order entered here, only after an administrative trial where the evidence conclusively showed that Respondents’ advertising was misleading, does not constitute a prior restraint.

The defenses advanced by Respondents are without merit. Accordingly, they do not provide a basis for holding that Respondents are not liable for the proven violations of the FTC Act.

**F. Summary of Liability**

The Complaint charges that the acts and practices of Respondents, as alleged in the Complaint, constitute deceptive advertising in violation of Sections 5(a) and 12 of the FTC Act. Complaint Counsel has presented reliable, probative, and



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substantial evidence in support of the Complaint's charges. The defenses raised by Respondents have been considered and rejected. Accordingly, Respondents DCO and James Feijo are hereby found liable for violating Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a), 52.

**G. Remedy**

On determination that a challenged act or practice is prohibited by Section 5 of the FTC Act, the appropriate remedy is an order requiring respondents to cease and desist from such act or practice. 15 U.S.C. § 45(b); *FTC v. National Lead Co.*, 352 U.S. 419, 428 (1957). Courts have long recognized that the Commission has considerable discretion in fashioning an appropriate remedial order, subject to the constraint that the order must bear a reasonable relationship to the unlawful acts or practices. *See, e.g., FTC v. Colgate-Palmolive Co.*, 380 U.S. at 394-95; *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1946).

As held above, DCO is liable for the violations of the FTC Act alleged in the Complaint. Further, as set forth below, James Feijo is individually liable and an Order against him, as well as DCO, is appropriate. The Order attached herewith is reasonably related to the proven violations.

**1. Individual liability**

When both a corporation and an individual are named in the complaint, to obtain a cease and desist order against the individual, Complaint Counsel must prove violations of the FTC Act by the corporation and that the individual either directly participated in the acts at issue or had authority to control them. *FTC v. Amy Travel Serv., Inc.*, 875 F.2d at 573; *see also FTC v. Standard Educ. Soc'y*, 302 U.S. 112, 119-20 (1937) (finding it proper for Commission to include individuals who were in charge and control of the affairs of respondent corporations in the Commission's cease and desist order). As summarized in Section III F, DCO violated the FTC Act. As summarized in Section III B 6, Respondent James Feijo both participated directly in and had the authority to control and, in fact, did direct and control the

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deceptive representations at issue. Accordingly, James Feijo is individually liable for acts or practices of Respondent DCO that violate Sections 5 and 12 of the FTC Act, and the entry of a cease and desist order against James Feijo is appropriate.

## **2. Specific provisions of the Order**

The Order attached to this Initial Decision is substantially the same as the proposed order that accompanied the Complaint in this matter. The only substantive change in this Order from the proposed order attached to the Complaint is to the language in the letter, appended as Attachment A to the Order, that Respondents are required by this Order to send to consumers of the Challenged Products. That change is discussed below.

As a result of the Findings and Conclusions in this case, the Order prohibits Respondents from making the types of misrepresentations challenged in the Complaint. The Order also provides fencing-in relief, requiring Respondents to possess competent and reliable scientific evidence supporting certain future claims about any dietary supplement, food, drug, or other health-related product, service, or program. These provisions are discussed below. In addition, the Order contains standard provisions regarding record-keeping, dissemination of the order to officers and employees, prior notification of corporate changes, filing compliance reports, and sunseting of the Order.

### **a. Competent and reliable scientific evidence requirement**

The Order prohibits Respondents from making representations that any health-related program, service, or product prevents, treats, or cures, or assists in the prevention, treatment, or cure of any type of tumor or cancer, unless the representation is true, non-misleading, and, at the time it is made, Respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation. “Competent and reliable scientific evidence” is defined in the Order to mean “tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons

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qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.”

Commission orders requiring respondents to have competent and reliable scientific evidence, as defined in this Order, that is based on the expertise of professionals in the area and that has been conducted and evaluated by persons qualified to do so, are typical and have been consistently upheld. *E.g.*, *In re Telebrands*, 140 F.T.C. at 347, *aff'd*, 457 F.3d 354; *In re Kraft*, 114 F.T.C. at 149, *aff'd*, 970 F.2d 311 (7th Cir. 1992). *See also In re Thompson Medical*, 104 F.T.C. at 844, *aff'd*, 791 F.2d at 192 (upholding order requiring respondents to possess and rely upon a reasonable basis consisting of competent and reliable scientific or medical evidence to substantiate certain representations, and defining “‘competent and reliable scientific evidence’ [to] include at least two adequate and well-controlled, double-blinded clinical studies . . . by persons . . . qualified by training and experience to conduct such studies”); *In re Removatron*, 1985 FTC LEXIS 21, at \*167, *aff'd*, 884 F.2d at 1498 (upholding order requiring respondents to possess and rely upon competent and reliable scientific evidence to substantiate representations and defining “‘competent and reliable scientific evidence’ . . . as adequate and well-controlled, double-blind clinical testing conforming to acceptable designs and protocols and conducted by a person or persons qualified by training and experience to conduct such testing”).

**b. Fencing-in provision**

The Order entered herewith prohibits Respondents from making certain representations not only as to the Challenged Products, but also as to any substantially similar health-related program, service, or product, or any other Covered Product or Service. “Covered Product or Service” is defined in the Order to mean any dietary supplement, food, drug, or other health-related product, service, or program, including, but not limited to, BioShark, 7 Herb Formula, GDU, and BioMixx. Thus, the Order, by prohibiting Respondents from engaging in deceptive practices concerning products in addition to the Challenged Products, provides “fencing-in” relief.

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“Fencing-in” relief refers to provisions in an FTC order that are broader than the conduct that is declared unlawful and may extend to multiple products. *Telebrands Corp. v. FTC*, 457 F.2d 354, 357 n.5 (4th Cir. 2006) (citing *In re Telebrands*, 140 F.T.C. at 281 n.3); *American Home Prods. v. FTC*, 695 F.2d at 705; *Kraft v. FTC*, 970 F.2d at 326 (citing *FTC v. Colgate-Palmolive*, 380 U.S. at 395; *Sears v. FTC*, 676 F.2d at 391-92). “Fencing-in remedies are designed to prevent future unlawful conduct.” *Telebrands*, 457 F.2d at 357 n.5 (citing *In re Telebrands*, 140 F.T.C. at 281 n.3).

“Such an order must be sufficiently clear that it is comprehensible to the violator, and must be ‘reasonably related’ to a violation of the Act.” *Kraft*, 970 F.2d at 326 (citation omitted). In determining whether a broad fencing-in order bears a “reasonable relationship” to a violation of the FTC Act, Courts and the Commission consider: (1) the deliberateness and seriousness of the violation; (2) the degree of transferability of the violation to other products; and, (3) any history of prior violations. *Telebrands*, 457 F.2d at 358; *Kraft*, 970 F.2d at 326. Applying these factors to the facts of this case, in order to provide adequate consumer protection, the fencing-in relief in this Order is appropriate.

**(1) Deliberateness and seriousness of the violation**

In weighing the deliberateness of the violation, the evidence shows that Respondents made numerous deceptive representations over the Internet, in their publications, and through the DCO radio program, over the course of several years. Respondents were aware that they were making representations that could be deemed unlawful by governing authorities. *See* F. 215 (DCO HealthWatch radio program, where James Feijo stated that “the FTC, the FDA, the Canadian Government don’t like the fact that we’ve told people about what to do about natural methods of health and healing, especially cancer”); F. 217 (DCO HealthWatch radio program, in which Patricia Feijo advised an individual whose father was diagnosed with colon cancer that she should get her father “on . . . GDU, BioShark and 7 Herb Formula. And if you can get him to, you know, go right now to

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the website, [to download] How To Fight Cancer Is Your Choice, or you can get him a hard copy from our order center, while we have them. It's what the FTC wants to shut us down over and they certainly want us to, you know, crash the website and they want to, you know, burn our material."").

In weighing the seriousness of the violation, the evidence shows that the representations are health-related claims, *see supra* III D 1-2, and in some instances suggested that individuals forego traditional cancer treatments in favor of purchasing and consuming the Challenged Products. *E.g.*, F. 260 (During the July 8, 2008 DCO HealthWatch radio program, in response to a caller's concern about colon cancer and whether the caller should follow her doctor's recommendation of a colonoscopy, James Feijo stated, "Polyps are nothing . . . Polyps should be left alone."); F. 214 (2008 DCO HealthWatch radio program, in which James Feijo stated, "Here's a testimony from Pastor Wayne Hamm, Henderson, Nevada. He had the Gulf War illness. He was told that he needed surgery and radiation treatment for his cancer, that he developed skin cancer because of the Gulf War, he was exposed out there. He didn't take it. He decided to use Daniel Chapter One 7 Herb Formula, internally and topically. He also used Ezekiel Oil topically, BioShark and GDU. [His] skin cleared up after a few months in the late 1980s [sic], early '99, [he] was told there was no trace of cancer."). There is a potential harm if a cancer patient foregoes potentially beneficial therapy and replaces it with one or more of the Challenged Products. F. 356. In addition, taking the Challenged Products could cause a dangerous interaction with drugs. F. 357. "When drug advertising is at issue, the potential health hazards may well justify a more sweeping order than would be proper were the Commission dealing with a less consequential area." *American Home Prods. v. FTC*, 695 F.2d at 706. Here, where Respondents intentionally represented that the Challenged Products could prevent, treat, or cure cancer, through numerous publications and websites, the deliberateness and seriousness of the violation weighs heavily in favor of the Order encompassing a broad range of products.

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**(2) Degree of transferability**

A violation is transferrable where other products could be sold utilizing similar techniques. *FTC v. Colgate-Palmolive*, 380 U.S. at 394-95; *Sears v. FTC*, 676 F.2d at 392. For example, “misrepresenting that doctors prefer a product, or that tests prove the product’s superiority, is a form of deception that could readily be employed for any non-prescription drug product.” *American Home Prods. Corp. v. FTC*, 695 F.2d at 708. In this case, the claims that the Challenged Products prevent, treat, or cure cancer, and the use of testimonials by doctors and consumers to make such claims, could readily be employed for any dietary supplement. Thus, transferability is a significant factor in favor of provisions in the Order encompassing a broad range of products.

**(3) History of violations**

No evidence was introduced or argument made to indicate that Respondents have a history of prior violations of the FTC Act. However, “the more egregious the facts with respect to a particular element, the less important it is that another negative factor be present. In the final analysis, [courts] look to the circumstances as a whole and not to the presence or absence of any single factor.” *Sears v. FTC*, 676 F.2d at 392; *see also Kraft v. FTC*, 970 F.2d at 327. In *Telebrands*, the Court of Appeals upheld the Commission’s conclusion that the strength of the evidence as to the first two factors sufficiently established that there was a reasonable relationship between the remedy and the violation, and it was not necessary to also consider any prior consent orders. *Telebrands*, 457 F.2d at 362. Thus, while here there is no history of violations which would weigh against the Order encompassing a broad range of products, that factor is less important, taking into account the circumstances as a whole. Accordingly, weighing all of the factors, the fencing-in relief in the attached Order bears a reasonable relationship to Respondents’ violations of the FTC Act.

**c. Requirement of a letter to consumers**

The proposed order requires Respondents to mail a letter to each consumer of the Challenged Products, to inform him or her

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that the FTC has found that Respondents' advertising claims for these products were false and unsubstantiated and that the FTC has issued an Order prohibiting Respondents from making those claims in the future. It is appropriate to require Respondents to mail a letter to consumers to inform them of those findings. *E.g.*, *FTC v. Natural Solution, Inc.*, No. CV 06-06112-JFW (C.D. Cal. Sept. 4, 2007). However, the proposed letter attached to the Complaint will be modified in two respects.

First, the proposed letter attached to the Complaint could be seen as requiring Respondents to adopt as their own statements and opinions that are contrary to the beliefs to which Respondents testified at trial. Therefore, the letter is modified to make it clear that the information contained in the letter is information that the FTC has required Respondents to transmit to consumers. Second, the letter is modified to reflect the fact that consumers purchased the Challenged Products not only through the DCO websites, but also through the toll-free number to DCO's call center.

**d. Summary of remedy**

The Order entered herewith is sufficiently clear and precise and is reasonably related to the unlawful acts or practices found to exist.

**IV. SUMMARY OF CONCLUSIONS OF LAW**

1. Complaint Counsel bears the burden of proving jurisdiction and liability by a preponderance of evidence.
2. Respondent Daniel Chapter One ("DCO") engages in business for its own profit or that of its sole member, Respondent James Feijo.
3. Respondent Daniel Chapter One ("DCO") is a corporation, as "corporation" within the meaning of "corporation" in Section 4 of the Federal Trade Commission Act.
4. Respondent James Feijo directed and controlled the acts and practices of DCO and may be held liable under the FTC Act for the violations of DCO.

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5. Respondents' sales of BioShark, 7 Herb Formula, GDU, and BioMixx, the "Challenged Products," are in or affect commerce, as required by the FTC Act, 15 U.S.C. § 45(a)(1).
6. The Commission has jurisdiction over Respondents, and the conduct challenged in the Complaint, under Sections 4 and 5 of the FTC Act. 15 U.S.C. § 44, 45.
7. The materials disseminated by Respondents over the Internet constitute advertisements under Section 12 of the FTC Act. 15 U.S.C. § 52.
8. The materials disseminated by Respondents over the Internet were for the purpose of inducing and did induce purchases of the Challenged Products in or affecting commerce, under Section 12 of the FTC Act. 15 U.S.C. §§ 52, 55.
9. The Challenged Products constitute "food" or "drugs," under Section 12 of the FTC Act. 15 U.S.C. § 55.
10. The overall, net impression created by the Respondents' advertisements is that the Challenged Products, either alone or in combination with each other or other DCO products, prevent, treat, or cure cancer, inhibit tumors, or ameliorate the adverse effects of radiation or chemotherapy.
11. The disclaimer language, which appears on some of the advertisements, is not prominent or unambiguous, creates confusion with contradictory messages, and thus is not adequate for Respondents to avoid liability.
12. Extrinsic evidence is not required to interpret Respondents' advertisements or to interpret the claims from the perspective of a particular targeted group.
13. Extrinsic evidence is not required to interpret Respondents' advertisements because the meaning of the advertisements is reasonably clear from a facial review.



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14. The claims made by Respondents are objective claims that relate to the attributes, performance, or efficacy of the Challenged Products.
15. Objective product claims carry with them the express or implied representation that Respondents had a reasonable basis substantiating the claims at the time the claims were made.
16. The claims made by Respondents are non-establishment claims and relate to health and safety.
17. Health-related efficacy claims, including claims made about dietary supplements must be substantiated by competent and reliable scientific evidence on the product itself. Testing only component ingredients is insufficient, unless the testing is on an exact duplicate of the product's combination of active ingredients.
18. Respondents did not possess or rely upon competent and reliable scientific evidence to substantiate their claims that the Challenged Products are effective, either alone or in combination with each other or other DCO products, in the prevention, treatment, or cure of cancer, tumors, or side effects of radiation or chemotherapy.
19. By showing that Respondents lacked a reasonable basis for their claims, Complaint Counsel has demonstrated that Respondents' statements are deceptive or misleading.
20. Respondents' claims relate to health concerns, involve information that is important to consumers and likely to affect their choice of or conduct regarding the Challenged Products, and are therefore material.
21. Respondents' representations constitute commercial speech that is false, deceptive, or misleading, and are therefore not protected by the First Amendment.
22. The FTC's action and the Order entered herewith do not constitute an unconstitutional prior restraint.

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23. All defenses raised by Respondents have been considered and rejected as lacking in merit, regardless of whether they are expressly addressed in this Initial Decision.
24. Respondents DCO and James Feijo are liable for violating Sections 5(a) and 12 of the FTC Act. 15 U.S.C. §§ 45(a), 52.
25. Individual Respondent James Feijo participated directly in and had the authority to control the deceptive representations at issue in this case. Accordingly, James Feijo is individually liable for practices of Respondent DCO found to be in violation of Sections 5 and 12 of the FTC Act.
26. The appropriate remedy is an order requiring Respondents to cease and desist from making the types of misrepresentations challenged in the Complaint.
27. Fencing-in relief is appropriate where, after examining circumstances of the case as a whole, it bears a reasonable relationship to a violation of the FTC Act.
28. The Order also provides fencing-in relief, requiring Respondents to possess competent and reliable scientific evidence supporting certain future claims about any dietary supplement, food, drug, or other health-related product, service, or program.
29. The Order attached herewith is clear and reasonably related to the proven violations.

**ORDER**

For purposes of this order the following definitions apply:

- A. “Competent and reliable scientific evidence” shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so,

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using procedures generally accepted in the profession to yield accurate and reliable results.

- B. “Covered Product or Service” shall mean any dietary supplement, food, drug, or other health-related product, service, or program, including, but not limited to, BioShark, 7 Herb Formula, GDU, and BioMixx.
- C. “Food” and “drug” shall mean “food” and “drug” as defined in Section 15 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 55.
- D. “Advertisement” means any written or verbal statement, illustration, or depiction that is designed to effect a sale or to create interest in the purchasing of goods or services, whether it appears in a book, brochure, newspaper, magazine, pamphlet, leaflet, circular, mailer, book insert, letter, catalogue, poster, chart, billboard, public transit card, point of purchase display, packaging, package insert, label, film, slide, radio, television or cable television, video news release, audio program transmitted over a telephone system, infomercial, the Internet, e-mail, or in any other medium.
- E. Unless otherwise specified, “Respondents” shall mean Daniel Chapter One and its successors and assigns, affiliates, or subsidiaries, and its officer, James Feijo, individually and as an officer of the corporation; and each of the above’s agents, representatives, and employees.
- F. “Commerce” shall mean “commerce” as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.
- G. “Endorsement” shall mean “endorsement” as defined in 16 C.F.R. § 255.0(b).

## Initial Decision

**I.**

**IT IS HEREBY ORDERED** that Respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of BioShark, 7 Herb Formula, GDU, and BioMixx, or any substantially similar health-related program, service, or product, or any other 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 product or program names or endorsements, that such health-related program, service, product, or Covered Product or Service prevents, treats, or cures or assists in the prevention, treatment, or cure of any type of tumor or cancer, including but not limited to representations that:

- A. BioShark inhibits tumor growth;
- B. BioShark is effective in the treatment of cancer;
- C. 7 Herb Formula is effective in the treatment or cure of cancer;
- D. 7 Herb Formula inhibits tumor formation;
- E. GDU eliminates tumors;
- F. GDU is effective in the treatment of cancer;
- G. BioMixx is effective in the treatment of cancer; or
- H. BioMixx heals the destructive effects of radiation or chemotherapy;

unless the representation is true, non-misleading, and, at the time it is made, Respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

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**II.**

**IT IS FURTHER ORDERED** that Respondents, directly or through any person, corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, 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, directly 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 it is made, Respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

**III.**

**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.

**IV.**

**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

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who purchased BioShark, 7 Herb Formula, GDU, and/or BioMixx, 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 IV.A. above. 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 the issuance of this order, in connection with the purchase of BioShark, 7 Herb Formula, GDU, and/or BioMixx. *Provided, however,* that Respondents may disclose such identifying information to the FTC pursuant to Part IV.A., above, or any law enforcement agency, or as required by any law, regulation, or court order.

## V.

**IT IS FURTHER ORDERED** that for a period of five (5) years after the last date of dissemination of any representation covered by this order, Respondents shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials containing the representation;

## Initial Decision

- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

**VI.**

**IT IS FURTHER ORDERED** that Respondents 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.

**VII.**

**IT IS FURTHER ORDERED** that Respondent Feijo, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include the individual Respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Paragraph 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.

## Initial Decision

**VIII.**

**IT IS FURTHER ORDERED** that Respondent DCO and its successors and assigns 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 about which Respondent DCO learns less than thirty (30) days prior to the date such action is to take place, Respondent DCO shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Paragraph shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

**IX.**

**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.

**X.**

**IT IS FURTHER ORDERED** that 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 paragraph in this order that terminates in less than twenty (20) years;



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- B. This order's application to any Respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

*Provided further*, that if such complaint is dismissed or a federal court rules that the Respondents did not violate any provision of this order, and the dismissal is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never 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.

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**ATTACHMENT A**

**LETTER TO BE SENT BY FIRST CLASS MAIL**

[To be printed on letterhead of Daniel Chapter One]

[Name and address of recipient] [Date]

Dear [Recipient]:

Our records show that you bought **[name of products]** from our website **[name of website]** or through our call center using our toll free number. 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 by the FTC also requires that we send you the following information about the scientific evidence on these products:

Very little scientific research has been done concerning shark cartilage, cat’s claw, burdock root, Siberian ginseng, sheep sorrel, slippery elm, watercress, Turkey rhubarb root, bromelain, turmeric, quercetin, feverfew, boron, goldenseal, echinacea, and ginseng as a means of prevention, treatment, or cure for cancer in humans. The scientific studies that have been done do not demonstrate that any of these ingredients, which are included in BioShark, 7 Herb Formula, GDU, and BioMixx, are effective when used for prevention or treatment for cancer in humans.

It is very important that you talk to your doctor or health care provider before using any alternative or herbal product, including shark cartilage, cat’s claw, burdock root, Siberian ginseng, sheep sorrel, slippery elm, watercress, Turkey rhubarb root, bromelain, turmeric, quercetin, feverfew, boron, goldenseal, echinacea, and ginseng. Speaking with your doctor is important to make sure that all aspects of your medical treatment work

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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 shark cartilage, cat's claw, burdock root, Siberian ginseng, sheep sorrel, slippery elm, watercress, Turkey rhubarb root, bromelain, turmeric, quercetin, feverfew, boron, goldenseal, echinacea, and ginseng, 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/cancer-topics/pdq](http://www.cancer.gov/cancer-topics/pdq); or
2. The National Center for Complementary and Alternative Medicines: [www.nccam.nih.gov](http://www.nccam.nih.gov).

You may also contact the National Cancer Institute's Cancer Information Service at 1-800-4-CANCER or 1-800-422-6237.

Sincerely,

Opinion of the Commission

**ATTACHMENT B**

Daniel Chapter One  
1028 East Main Road  
Portsmouth, Rhode Island, 02871

[name and address of purchaser]

**GOVERNMENT ORDERED NOTICE**

**OPINION OF THE COMMISSION**

By ROSCH, Commissioner, For A Unanimous Commission:

Upon consideration of the record and the arguments of counsel, the Commission denies the Respondents' appeal and affirms the Initial Decision of the Administrative Law Judge both as a matter of fact and as a matter of law. The Commission finds the order entered below to be proper, but modifies the language in Attachment A of the Order, the prescribed notice that the Respondents are required to send to consumers who purchased the products at issue.

**I. Background and Proceedings Below**

The Commission issued the Complaint in this matter on September 16, 2008 against Daniel Chapter One ("DCO") and

## Opinion of the Commission

James Feijo (collectively, “Respondents”). The Complaint alleged that Respondents engaged in deceptive acts or practices, in or affecting commerce, in violation of Sections 5(a) and 12 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 45(a) and 52. Compl. ¶ 17.

The Complaint alleged that these deceptive acts or practices occurred in connection with the Respondents’ advertising, promotion, offering for sale and distribution of four DCO products: BioShark, 7 Herb Formula, GDU and BioMixx (collectively, “the Challenged Products”), which purport to prevent, treat, or cure cancer or tumors and other serious medical illnesses. *Id.* ¶¶ 3-13.

More specifically, the Complaint alleged that advertisements for the Challenged Products represented, expressly or by implication, that:

- BioShark inhibits tumor growth and is effective in the treatment of cancer;
- 7 Herb Formula inhibits tumor growth and is effective in the treatment or cure of cancer;
- GDU eliminates tumors and is effective in the treatment of cancer; and
- BioMixx heals the destructive effects of radiation and chemotherapy and is effective in the treatment of cancer.

*Id.* ¶ 14. The Complaint alleged that those representations were deceptive in that Respondents represented, directly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations when in fact Respondents lacked a reasonable basis to substantiate them. *Id.* ¶¶ 15-17.

Respondents filed their Answer on October 11, 2008. The Answer admitted that Respondents made the representations alleged in the Complaint about the efficacy of the Challenged Products. Answer ¶ 14. The Answer also admitted that

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Respondents operated a website that provided information respecting the Challenged Products in a religious and educational context, but otherwise denied the allegations that they engaged in deceptive acts or practices in connection with the advertising or sale of the Challenged Products. *Id.* ¶¶ 5, 7, 9, 11, 13-15. The Answer affirmatively averred that Respondents possessed and relied upon a reasonable basis that substantiated the representations made about the Challenged Products at the time the representations were made. *Id.* ¶ 16.

Respondents filed two motions to amend their Answer. Chief Administrative Law Judge D. Michael Chappell (“ALJ”), who presided over all pretrial proceedings and the trial, denied those motions on the grounds, *inter alia*, that the proposed amendments, coming after the close of discovery and approximately two months before trial, would have been unduly prejudicial to Complaint Counsel. Respondents also filed two motions to dismiss, and cross-motions for summary judgment were filed by Respondents and Complaint Counsel. Those motions were denied.

An evidentiary hearing on jurisdiction was held on April 21, 2009. Thereafter, the ALJ issued a ruling that Complaint Counsel had demonstrated, by a preponderance of evidence, that jurisdiction existed in the case. Respondents’ motion for an interlocutory appeal from that ruling was denied.

The final pre-trial conference was held on April 22, 2009, with trial commencing immediately thereafter. Following trial, Respondents and Complaint Counsel filed concurrent post-trial briefs, proposed findings of fact and conclusions of law, and replies to each other’s post trial briefs and proposed findings. Closing argument was held on July 9, 2009. The ALJ issued his Initial Decision and Proposed Order on August 5, 2009.

As set forth in the Initial Decision, the ALJ found that the record showed that DCO, described by the Respondents as a house ministry, was led by Respondent James Feijo, with his wife Patricia Feijo, and that DCO engaged in business for profit for itself or for its member, James Feijo. The ALJ found that, although DCO’s activities included spiritual counseling to

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individuals, they also included advertising and selling the dietary supplements BioShark, 7 Herb Formula, GDU and BioMixx to the public.

The ALJ also found that Respondents disseminated advertisements for the purpose of inducing, and which did induce, the purchase of a food or drug, in or having an effect on commerce within the meaning of Sections 5(a) and 12 of the FTC Act, and that those advertisements claimed that the Challenged Products, individually or collectively, prevent, treat, or cure cancer, inhibit tumors, or ameliorate the adverse effects of radiation and chemotherapy. The ALJ also found that Respondents did not have a reasonable basis to substantiate these claims and that the claims made were material to consumers.

The ALJ held that Complaint Counsel had carried its burden of proving that Respondents are liable under Sections 5(a) and 12 of the FTC Act. The ALJ considered the defenses raised by the Respondents and concluded that they were not meritorious. The ALJ imposed a cease and desist order that, *inter alia*, enjoins Respondents from making any representation, expressly or by implication, that any dietary supplement, food, drug, or other health-related product, service, or program, including but not limited to the Challenged Products, prevents, treats, cures or assists in the prevention, treatment, or cure of any type of tumor or cancer, unless the representation is true, non-misleading, and, at the time it is made, Respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

The order also enjoins the Respondents from making any representation about the efficacy, performance, or health-related benefits of any dietary supplement, food, drug, or other health-related product, service, or program, including but not limited to the Challenged Products, unless the representation is true, non-misleading, and, at the time it is made, Respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

The order also requires the Respondents to send a prescribed notice to all consumers who purchased the Challenged Products

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that informs those consumers that the FTC has found that the advertising claims at issue were false and unsubstantiated, that the FTC has issued an order prohibiting those claims from being made in the future, and that informs those consumers about the scientific evidence on the Challenged Products.

Respondents filed a timely appeal and Complaint Counsel did not cross-appeal. The decision of the ALJ is subject to *de novo* review by the Commission. See 16 C.F.R. § 3.54. Accordingly, the Commission on appeal may consider the entire record and determine whether there is a sufficient evidentiary basis for the ALJ's findings of fact.

The Commission has reviewed the ALJ's findings of fact, as well as the record underlying them. The Commission has also reviewed the advertisements at issue to determine the overall net impressions conveyed by them. The Commission sees no reason to disturb the ALJ's findings of fact and adopts them as the Commission's own insofar as they are consistent with those set forth in this Opinion. Otherwise, the findings of fact in this Opinion are those of the Commission.

## II. Respondents' Claims on Appeal

Respondents make three fundamental claims in their appeal: (1) Respondents claim that the FTC did not have jurisdiction over them (RAB at 11, 29-40);<sup>1</sup> (2) Respondents claim that the ALJ misinterpreted various statutes, including, among others, Section 5 of the FTC Act, as well as the Due Process Clause and the First Amendment of the United States Constitution, by banning truthful statements about dietary supplements, improperly shifting the burden of proof to Respondents, applying an incorrect standard of

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<sup>1</sup> References to the record are abbreviated as follows:

IDF	Initial Decision Finding
ID	Initial Decision
RAB	Respondents' Appellate Brief
CAB	Complaint Counsel's Answering Brief
RRB	Respondents' Reply Brief
Tr.	Transcript of Trial Testimony
CX	Complaint Counsel's Exhibit
RX	Respondents' Exhibit



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proof, and permitting “evidence by presumption” (RAB at 11-29, 40-55); and (3) Respondents argue that the ALJ’s remedy not only prohibits truthful speech, but also illegally compels Respondents to engage in government-mandated speech. RAB at 12, 55-65.

The Commission considers the Respondents’ arguments in Part III in the following order: Section A considers the Respondents’ jurisdictional argument; Sections B through E consider Respondents’ statutory and constitutional arguments; and Section F considers the Respondents’ argument concerning the remedy.

### **III. Analysis**

#### **A. The FTC Has Jurisdiction.**

##### Findings of Fact.

Prior to 2002, DCO was a for-profit corporation organized in 1990 under the laws of Rhode Island. IDF 22. Its Articles of Incorporation stated that its purposes were “to engage in the sale, retail, wholesale and distribution of health products, including but not limited to health foods and supplements, namely those with special nutritive qualities and values.” IDF 23. Subsequent annual reports, which were signed by Respondent James Feijo, described the character of the business in substantially the same way. IDF 24, 25. James Feijo sold BioShark, 7 Herb Formula, GDU and BioMixx while DCO was registered as a for-profit corporation. IDF 27.

DCO is currently a “corporation sole” organized in 2002 under the laws of the State of Washington. IDF 1; RAB at 30, 32. DCO’s Articles of Incorporation do not specifically declare that DCO was organized exclusively for charitable or other clearly nonprofit purposes. IDF 30. The Articles do not provide for distribution of its assets upon dissolution solely to other nonprofit entities or prohibit distribution of its earnings to the benefit of any individual or for-profit corporation. *Id.* Nor do its advertising or promotional materials specifically refer to DCO as a nonprofit entity. IDF 32.

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Respondent James Feijo is the sole “overseer” and trustee of DCO’s assets and all of its funds, and he is DCO’s sole “member.” IDF 5, 6; RRB at 8. As such, he is responsible for all of its activities and for directing all of its funds. IDF 5, 6. James Feijo and his wife, Patricia, are the only officers of DCO. IDF 7.

DCO has a number of bank accounts, including accounts that are described as “Business Partner” accounts. IDF 42. DCO’s revenue is deposited into the Business Partners Checking accounts, and from there the revenue is distributed at James Feijo’s discretion to other DCO bank accounts. IDF 42. Patricia Feijo is a signatory to DCO’s bank accounts and writes checks from the DCO accounts. IDF 48. The Business Partners Money Market Fund showed a balance during the period from December 19, 2006 to February 20, 2008 in excess of \$1 million, but on February 21, 2008, a debit of over \$800,000 was posted. IDF 45.

DCO or its affiliate own the Rhode Island and Florida homes in which James and Patricia Feijo live, as well as two Cadillacs that James Feijo uses. ID at 75; IDF 55-57. DCO paid for all of the Feijos’ living expenses, including pool and gardening expenses, tennis and golf club expenses, as well as the Feijos’ expenditures on retail items and at restaurants. IDF 58, 61-70.

DCO currently sells 150 to 200 products, including BioShark, 7 Herb Formula, GDU and BioMixx. IDF 8. James Feijo has been solely responsible for the development, creation, production, and pricing of the Challenged Products. IDF 37. James and Patricia Feijo have been solely responsible for creating, drafting and approving directions for the usage, and developing recommended dosages, for the Challenged Products. IDF 38, 39.

Sales of the 150 to 200 products sold by DCO, all of which are dietary supplements, have generated approximately \$2 million in annual gross sales. IDF 9, 10. DCO’s sales of BioShark, 7 Herb Formula, GDU and BioMixx constituted 20 to 30 percent of DCO’s sales during the period from 2006 through 2008. IDF 80. The acquisition costs for those products is about 30 percent of the sale price. IDF 83.

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Over a thousand people have purchased the Challenged Products, including people who do not belong to any DCO religious community and people who do not believe in God. IDF 81, 82. Respondents sell the four Challenged Products through publications, a call center, a radio program, over the Internet, and through stores and other resellers. IDF 84, 158. Any consumer could be directed to the DCO website by entering the term “cancer” in a Google internet search. IDF 162.

DCO’s publications are fourfold. The first is entitled “Bioguide: The BioMolecular Nutrition Guide to Natural Health” (“BioGuide”), which was prepared by James Feijo, describes “two aspects of BioMolecular Nutrition, the spiritual and the physical” and promotes all four Challenged Products. IDF 203-211, 228, 229, 249, 270-274, 287-290. The second publication is the BioMolecular Nutrition Product Catalog (“Product Catalog”), which describes all of DCO’s products including the four Challenged Products, but does not mention the existence of a DCO ministry. IDF 91, 233, 234, 256, 257, 279, 280. The third publication is a newsletter entitled “How to Fight Cancer is Your Choice!!!” (“Newsletter”), which promotes all four of the Challenged Products. IDF 94-96, 194-201, 231, 251, 253, 254, 276, 277, 292, 293. The fourth publication is entitled “The Most Simple Guide to the Most Difficult Diseases: The Doctors’ How-To Quick Reference Guide” (“Most Simple Guide”). It also promotes the four Challenged Products. IDF 192. The Most Simple Guide, the BioGuide, and the Newsletter are all available to anyone by download from DCO’s website. IDF 163, 169, 172.

Each of these publications promotes DCO’s call center and the toll-free number to access it, as well as DCO’s principal website address. IDF 90, 91, 94, 167, 174. The Newsletter promotes the BioGuide and the Most Simple Guide. IDF 168, 175. All except the Product Catalog promote the radio program. IDF 177.

As previously mentioned, DCO has a toll-free number and a call center for consumers to buy their products. IDF 99. They were created, managed and maintained by James Feijo, who has supervised the call center and taken consumer orders. IDF 100, 101. DCO also has several websites at which it takes consumers’

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orders, the principal one of which invites consumers to shop at DCO's "On-Line Store" and to "Buy Now." IDF 103-107. These websites promote all four of the Challenged Products. IDF 179-190, 220-226, 237-244, 246, 247, 262-268, 283-286.

DCO also has a radio program, which is co-hosted by James and Patricia Feijo for two hours a day. IDF 108, 109. On that program, the Feijos have promoted the Challenged Products. IDF 213-217, 260, 261. They have also counseled individuals who have identified themselves as cancer patients, and they (and the website) have provided listeners with the toll-free number they can use to buy DCO's products. IDF 102, 110, 111.

A number of retail stores and chiropractic centers in various states sell DCO products. IDF 116-119. Respondents have prepared a brochure entitled "The Truth Will Set You Free" for retailers of DCO products. Among the benefits listed in that brochure are financial rewards, and the brochure makes the representation that DCO is "the ONLY nutrition company where the owners personally tell thousands of people to visit your office or store." IDF 122. Respondents also promote an "affiliate program" on their principal web page where they offer website owners "a means of profiting from their websites" by "generat[ing] sales for commercial websites" in order to "earn a commission." IDF 123.

To promote its products, DCO offers consumers coupons for their next online order, and discounts when products are purchased in volume. IDF 113-115. Moreover, in addition to the revenue derived from sale of its products, DCO charges shipping and handling fees totaling \$20.95. IDF 112.

Legal Analysis.

On appeal, Respondents argue that the ALJ was mistaken and incorrect in concluding that the FTC had jurisdiction over DCO. In support of this contention, Respondents rely on several alleged Due Process errors and misapplications of law by the ALJ. RAB at 31. Specifically, Respondents argue that the ALJ misapplied the applicable law regarding jurisdiction; disregarded DCO's status as a corporation sole, a legitimate entity outside the FTC's

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jurisdiction; failed to require Complaint Counsel to prove that DCO is a corporation “organized to carry on business for its own profit or that of its members;” and failed to prove that DCO or its members “derived a profit from DCO’s activities.” RAB 31-40. These arguments are each considered below.

As Respondents acknowledge in their appellate briefs, *California Dental Ass’n v. FTC*, 526 U.S. 756 (1999) and *Community Blood Bank v. FTC*, 405 F.2d 1011 (8th Cir. 1969), are controlling authorities respecting their challenge to the FTC’s jurisdiction. RAB at 31, 34; RRB at 17. Both cases, following the language of § 4 of the FTC Act, hold that the Commission’s jurisdiction extends to a corporation organized to carry on business for its own profit or that of its members. *See California Dental*, 526 U.S. at 766-67 (“The FTC Act is at pains to include not only an entity ‘organized to carry on business for its own profit,’ . . . but also one that carries on business for the profit ‘of its members’”); *Community Blood Bank*, 405 F.2d at 1022 (holding the Commission has jurisdiction over nonprofit corporations without shares of capital, which engage in business for their own profit or that of their members); *see also* 15 U.S.C. § 44.

Respondents try to distinguish these cases from the instant case by parsing the definition of “profit” and by arguing that, contrary to the teaching of *California Dental*, DCO did not make a profit and has no for-profit subsidiaries. RAB at 32. Specifically, Respondents quote *California Dental* for the proposition that “according to a generally accepted definition ‘profit’ means gain from business or investment over and above expenditures, or gain made on business or investment where both receipts or payments are taken into account.” RAB at 32 (*quoting California Dental*, 526 U.S. at 768 n.6 (*citing Community Blood Bank*, 405 F.2d at 1017)). However, the ALJ cited to the same *California Dental* language in evaluating the evidence and reaching his conclusion that by engaging in commercial activities, DCO operates a commercial enterprise and thereby is not a business organized or engaged in only charitable purposes. ID at 70-71. In addition, Respondents failed to include the conclusion of the quoted sentence where the Court noted that “the ‘term’s meaning must be derived from the context in which it is used.’”

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*California Dental*, 526 U.S. at 768 n.6 (citing *Community Blood Bank*, 405 F.2d at 1016).

Respondents contend that they are a religious ministry organized and operated for charitable purposes. RAB at 2, 31. Respondents argue that by acknowledging that DCO was a religious ministry, but still concluding that the FTC had jurisdiction over DCO, the ALJ's conclusions are "unprecedented, legally incorrect and unsupported by the facts." RAB at 4, 29-30. But *Community Blood Bank* specifically holds that such a finding does not foreclose the FTC from exercising jurisdiction over a respondent. 405 F.2d at 1017-18; *see also id.* at 1018 ("Congress took pains in drafting § 4 to authorize the Commission to regulate so-called nonprofit corporations, associations and all other entities if they are in fact profit-making enterprises."). Nonprofit status insulates an entity from FTC jurisdiction when the entity is engaged in business for "only charitable purposes." *Id.* at 1022. Whatever else may be said about DCO's religious status and activities, the findings of fact, supported by extensive evidence, establish that DCO conducted business for the purpose and with the effect of selling its products, including the four Challenged Products. IDF 80-84, 91, 94, 96, 98-101, 110-113, 116-119, 123, 158, 174-190, 192, 194-201, 203-211, 213-217, 220-229, 231, 233, 234, 237-244, 246, 247, 249, 253, 254, 256, 257, 260-268, 270-274, 276, 277, 279, 280, 283-290, 292, 293. Thus, the ALJ did nothing to impeach his conclusion that the FTC had jurisdiction over Respondents.

The Respondents also argue that the ALJ failed to require proof that DCO was organized and operated to carry on business for its own profit or that of its members. RAB at 30, 34-35. In support of this contention, Respondents insist that DCO was not a for-profit corporation because it did not "make a profit" and that "the evidence showed the DCO operates at a breakeven point or less." RAB at 30, 35. Whether or not that is true, it is beside the point. As the ALJ pointed out, it is not necessary to show that the entity was actually successful in running its business or turning a profit. *Id.* at 71 (citing *California Dental*, 526 U.S. at 768 n.6 ("the FTC Act does not require for Commission jurisdiction that members of an entity turn a profit on their membership, but only that the entity be organized to carry on business for members'

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profit”); *In re Ohio Christian College*, 80 F.T.C. 815, 849-50 (1972) (stating that the fact that respondents “were apparently not very successful in their enterprise” was of “little consequence”). As discussed above, Respondents’ activities, as described in the findings of fact, and supported by extensive evidence, establish that DCO conducted business for the purpose and with the effect of selling its products.

Moreover, in *In re College Football Ass’n*, 117 F.T.C. 971, 994 (1994), the Commission stated that *Community Blood Bank* thus established a two-part test looking to “the source of the entity’s income, *i.e.*, to whether the corporation is ‘organized for and actually engaged in business for only charitable purposes,’ and to the destination of the income, *i.e.*, to whether either the corporation or its members derive a profit.” Respondents contend that the FTC must also show the “destination” of DCO’s income, and argue that the ALJ improperly shifted the burden of proof from the FTC to the Respondents to show that the income did not profit either DCO or Mr. Feijo. RAB at 35-36. However, the ALJ’s findings of fact, supported by ample evidence, show that the “destination” of the profits of DCO’s for-profit activities was James Feijo. ID at 74-76. As DCO’s sole “member,” “overseer,” and “trustee,” James Feijo was responsible for all of DCO’s activities, including the distribution of its funds; he distributed those funds to himself and his wife for their benefit. The record also shows that DCO or its affiliate owned the Feijos’ Rhode Island and Florida homes and two Cadillacs, and was the source of all of their living expenses, including their tennis, golf and restaurant expenses. IDF 5, 6, 42, 48, 55-58, 61-70. Thus, it cannot be said that the ALJ’s conclusion that the FTC had jurisdiction over DCO was “unprecedented.” RAB at 11; RRB at 12, 14, 21-22. To the contrary, it was fully supported by *California Dental* and *Community Blood Bank*.

Finally, it cannot be said that the ALJ was “mistaken” in exercising jurisdiction over DCO and Mr. Feijo despite the existence of various statutes and regulations that allow churches to carry on “business activities” for purposes of exemption from federal income taxation or provide “religious workers’ special exemptions.” RAB at 38-40. Respondents argue that DCO’s status as a church and Mr. Feijo’s status as a minister entitle

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Respondents to special tax treatment. RAB at 39. Similarly, Respondents contend that DCO was organized as a “corporation sole” in 2002 under the laws of the State of Washington, and, as such, has been a nonprofit corporation since 2002. RAB at 29-31. As recognized by the ALJ, however, “courts and the Commission look to the substance, rather than the form, of incorporation in determining jurisdiction under the FTC Act.” ID at 71 (citations omitted). The Commission agrees with the ALJ’s determination, supported by ample evidence in the record, that “DCO bears none of the substantive indicia of a corporation that is truly organized only for charitable purposes.” *Id.*

**B. Respondents Made the Claims Alleged in the Complaint.**

Findings of Fact.

The text of the advertisements at issue here repeatedly links all four products collectively to the prevention, treatment or cure of cancer. IDF 179, 180, 183, 186, 190, 192, 195, 197, 200, 203, 204, 208, 213. Furthermore, the advertisements repeatedly link each product individually to the cure or treatment of cancer, the shrinkage of tumors, or, in the case of BioMixx, to the amelioration of the side effects of radiation and chemotherapy. IDF 182, 198, 199, 204, 206, 221, 222, 223, 225, 226, 228, 231, 233 (respecting BioShark); IDF 237-244, 246, 247, 249, 251- 254, 256, 257, 260 (respecting 7 Herb Formula); IDF 262, 264-268, 270-274, 276, 277, 279, 280 (respecting GDU); IDF 283-285, 287-290, 292, 293 (respecting BioMixx). Indeed, in some of these advertisements the linkage between these products and the treatment or cure of cancer is to a specific type of cancer such as breast cancer (IDF 182, 187, 265, 267, 268, 273); brain cancer (IDF 184, 200, 249, 289); prostate cancer (IDF 187, 206 253, 265, 271, 274, 290); skin cancer (IDF 208, 214); colon cancer (IDF 217, 260); leukemia (IDF 276, 284); bladder cancer (IDF 200); renal cancer (IDF 207); and esophageal cancer (IDF 252). Generally, these links were explicit, but even when they were implicit, the linkage was clear.

The linkage in these advertisements was frequently emphasized by testimonials, generally by consumers. IDF 180,



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181, 183, 184, 186, 197-200, 203-210, 231, 242-244, 247, 249, 253, 265, 267, 268, 273, 276, 284, 290, 292. Again, the linkage in the testimonials between the products and the treatment or cure of cancer, the shrinkage of tumors or, in the case of BioMixx, to the healing effects on radiation or chemotherapy was generally explicit, but even where it was implicit, the linkage was clear. That linkage was also frequently stressed either by the use of bold-faced type, the use of italics or the use of capital letters. IDF 180, 182, 186, 187, 190, 192, 204-209, 221, 226, 228, 231, 237, 238, 240-243, 249, 252-254, 266, 271, 274, 276, 283, 285, 289. Additionally, the products or consumers purporting to use them were depicted in the advertisements. IDF 180, 184, 190, 204, 206-208, 210, 221, 237, 238, 240, 241, 251 (logo), 254 (logo), 256, 262, 263, 266, 271, 276, 279, 283-285, 290.

These advertisements did not exist in isolation from each other. As previously described, DCO's publications prominently displayed the existence of DCO's call center and the toll-free number by which the call center could be accessed, as well as DCO's principal website address. IDF 90, 91, 98, 167-169, 174. Also, the Newsletter promoted the BioGuide and The Most Simple Guide, and the call center promoted the DCO email address. IDF 168, 175-177. Thus, the overall net impressions left by these advertisements were mutually reinforcing.

Those overall net impressions were that: (1) BioShark inhibits tumor growth and is effective in the prevention, treatment, or cure of cancer (IDF 224, 227, 230, 232, 235); (2) 7 Herb Formula inhibits tumor formation and is effective in the prevention, treatment, or cure of cancer (IDF 245, 248, 250, 255, 258); (3) GDU eliminates tumors and is an effective treatment for cancer (IDF 269, 275, 278, 281); and (4) BioMixx heals the adverse effects of radiation and chemotherapy and is effective in the prevention, treatment, or cure of cancer. IDF 286, 291, 294.

Respondents' advertisements and materials sometimes included "disclaimers" of these overall net impressions. DCO's websites asserted, *inter alia*, that "[t]he information provided in this site is not intended to diagnose a disease;" that the information "is designed to support, not replace, the relationship that exists between a patient site visitor and his/her health

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provider;” and that “this product is not intended to diagnose, treat, cure, or prevent disease.” IDF 296, 297, 300, 301. The BioGuide and Newsletter stated, *inter alia*, that they were “not intended to diagnose or treat disease.” IDF 298, 299. The Most Simple Guide contains no disclaimer language. IDF 302.

For the most part, these disclaimers were made in “mouse print” or type size significantly smaller than the type of the text contributing to those overall net impressions. IDF 296, 298-300, 303. They were often buried in copyright disclosures, and placed well after the conclusion of the advertising claims. IDF 296-300. Moreover, they disclaimed only Respondents’ “intentions,” not the representations themselves. They did not dispel the overall net impressions left by the advertisements and by the other contributing factors that the Challenged Products prevent, treat, or cure cancer. IDF 306.

Legal Analysis.

Respondents do not take issue with the ALJ’s conclusion that the “overall net impression” of the advertising promoting the four Challenged Products determines what impression is conveyed by an advertisement. RAB at 4, 5, 11; RRB at 38. That acknowledgment is not gratuitous. The courts have long held that to be the test applied in determining what impressions are conveyed to consumers. *See, e.g., American Home Prods. Corp. v. FTC*, 695 F.2d 681, 687 (3rd Cir. 1982); *FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963); *FTC v. Bronson Partners LLC*, 564 F. Supp. 2d 119, 125 (D. Conn. 2008); *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 920-21, 929, 932 (N.D. Ill. 2006), *aff’d*, 512 F.3d 858 (7th Cir. 2008). Moreover, Respondents admitted that they made the representations that the ALJ found were conveyed by the advertisements at issue (Answer ¶ 14), although now Respondents shrug off the admissions as “ministerial error” and stress that the ALJ did not consider them. RBB at 35.

However, Respondents repeatedly assert that in assessing those “overall net impressions,” the ALJ was obliged by the Due Process Clause and the First Amendment of the Constitution to consider “extrinsic” evidence. RAB at 2, 4, 13, 48-49; RRB at 12-13, 30-31. More specifically, Respondents claim that

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“Complaint Counsel should have been required to produce evidence that consumers were actually misled by Respondents’ promotional efforts and representations,” including testimony from the misled consumers themselves. RAB at 14, 23-24; RRB at 33, 34, 37-38, 57. Indeed, Respondents contend that the ALJ’s failure to require Complaint Counsel to do so amounted to resorting to “presumptions” instead of evidence or at least “shifting the burden of proof” to Respondents in violation of the Due Process Clause and the First Amendment. RAB at 3, 11, 14, 24.

That is not the law. Federal courts have long held that the Commission has the common sense and expertise to determine “what claims, including implied ones, are conveyed in a challenged advertisement, so long as those claims are reasonably clear.” *Kraft, Inc. v. FTC*, 970 F.2d 311, 319 (7th Cir. 1992); accord *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965); *Thompson Med. Co. v. FTC*, 791 F.2d 189, 197 (D.C. Cir. 1986); *Bronson Partners*, 564 F. Supp. 2d at 126; *FTC v. Nat’l Urological Group, Inc.*, No. 1:04-CV-3294-CAP, 2008 U.S. Dist. LEXIS 44145, at \*41-43 (N.D. Ga. June 4, 2008) (extrinsic evidence “is only necessary when the asserted claims fall on the ‘barely discernable’ side of the continuum”); *QT, Inc.*, 448 F. Supp. 2d at 958.

Moreover, in *Kraft*, the Seventh Circuit rejected Respondents’ First Amendment argument. Like Respondents, Kraft contended that *Peel v. Attorney Registration & Disciplinary Commission*, 496 U.S. 91 (1990), held that the First Amendment required “extrinsic” evidence and prevented the Commission from determining the overall net impression conveyed by advertisements challenged as deceptive under the FTC Act. The Court of Appeals held that the restriction challenged in *Peel* is “a completely different animal than the one challenged here.” *Kraft*, 970 F.2d at 317. It explained that in *Peel*, the issue was whether a “regulation applicable to all lawyers, completely prohibiting an entire category of potentially misleading speech, passed constitutional muster” in contrast to “whether an individualized FTC cease and desist order, prohibiting a particular set of deceptive ads, passes constitutional muster.” *Id.*

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In this case, the ALJ and the Commission itself have determined the “overall net impressions” of the representations made about the Challenged Products, based not only on the text of the advertisements itself, but also on the interaction of other factors that operate to create that impression, such as testimonials, bold type, visual images and mutually reinforcing language. ID at 82-83. Those are factors that the Commission and the courts have recognized are probative in determining what messages advertising is conveying. *In re Kraft*, 114 F.T.C. 40, 121 (1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992); *see also Bronson Partners*, 564 F. Supp. 2d at 125; *In re Telebrands Corp.*, 140 F.T.C. 278, 290 (2005), *aff'd*, 457 F.3d 354 (4th Cir. 2006). The Commission therefore does not agree with Respondents that “evidence” has been supplanted by “presumptions” or that the ALJ shifted the “burden of proof” to Respondents so as to violate Due Process or the First Amendment of the Constitution in the determination of those overall net impressions.

As discussed below, the alleged “disclaimers” do not dispel these overall net impressions.

**C. Respondents’ Representations Were Deceptive Unless Properly Substantiated.**

After reaching his findings on the overall net impressions of the Respondents’s advertising respecting the efficacy of the four Challenged Products, the ALJ next examined whether those representations were deceptive under Commission and federal case law. He concluded that under that case law, the representations would be deceptive under Sections 5 and 12 of the FTC Act if they were either shown to be false or shown to lack a reasonable basis substantiating the claims made in the advertisement. ID at 99 (*citing FTC v. Pantron I*, 33 F.3d 1088, 1096 (9th Cir. 1994); *In re Thompson Med. Co.*, 104 F.T.C. 648, 818-19 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986)).

The ALJ focused on whether the advertisements at issue were deceptive or misleading under the “reasonable basis” theory because the Complaint only made “reasonable basis” allegations. *Id.* Again, citing Commission and federal case law, the ALJ stated that the “reasonable basis theory holds that claims about a

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product's attributes, performance, or efficacy ('objective' product claims) carry with them the express or implied representation that the advertiser had a reasonable basis substantiating the claims at the time the claims were made." *Id.* (citing *In re Thompson Med. Co.*, 104 F.T.C. at 813; *FTC v. Direct Mktg. Concepts*, 569 F. Supp. 2d 285, 298 (D. Mass. 2008); *In re Kroger Co.*, No. C-9102, 1978 FTC LEXIS 332, at \*15 (May 17, 1978)).

Respondents do not (and cannot) dispute that this is a correct reading of the case law. However, Respondents contend that in applying these principles, the ALJ again engaged in "presumptions" and shifted the "burden of proof" in a way that violated the Due Process Clause and the First Amendment of the Constitution. RRB at 34, 51.

First, Respondents contend that the representations made about the efficacy of the four Challenged Products cannot be challenged as deceptive, consistent with the First Amendment. Specifically, Respondents liken those representations to mere "ideas, opinions, beliefs and theories" involved in *In re Rodale Press, Inc.*, 71 F.T.C. 1184 (1967), to a ban on the words "natural," "organic" and "health food" which an FTC Presiding Officer condemned in connection with the Commission's Proposed Trade Regulation Rule on Food Advertising ("Food Rulemaking") (Report of the Presiding Officer, Proposed Trade Regulation Rule: Food Advertising, Pub. Rec. No. 215-40, at 239, Feb. 21, 1978), and with the representations about "matters of opinion" involved in *United States v. Johnson*, 221 U.S. 488 (1911). RAB at 5-11.

Respondents' representations are not matters of opinion, but, as the ALJ put it, "objective product claims . . . stated in positive terms and . . . not qualified to be statements of opinion." ID at 99. Or, to put the matter more baldly, Respondents' representations were representations of fact, not simply representations about ideas, opinions, beliefs or theories; Respondents made assertions not just about what they believed those products might do, but represented that the four Challenged Products would in fact treat or cure cancer, prevent or shrink tumors, and ameliorate the side effects of radiation and chemotherapy. *See, e.g.*, IDF 179, 180, 183, 186, 190, 192, 195, 197, 200, 203, 204, 208, 213 (Challenged

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Products collectively); IDF 221-223, 225, 226, 228, 231, 233 (BioShark); IDF 182, 198, 199, 204, 206, 237-244, 246, 247, 249, 251-254, 256, 257, 260 (7 Herb Formula); IDF 262, 264-268, 270-274, 276, 277, 279, 280 (GDU); IDF 283-285, 287-290, 292, 293 (BioMixx). Therefore, as a matter of law, there was an implied claim that there was a reasonable basis substantiating those representations. *In re Thompson Med. Co.*, 104 F.T.C. at 813 n.37 (noting that “objective product claims carry with them an express or implied statement that the advertiser has some amount of support for the claim”).

Beyond that, *Rodale Press*, the Food Rulemaking, and the *Johnson* case were not decided on constitutional grounds. As Respondents acknowledge, the Commission simply voted to dismiss *Rodale Press*. RAB at 6. Similarly, the Commission abandoned its Proposed Trade Regulation Rule on Food Advertising on the ground that case-by-case scrutiny would be more appropriate. *See* Food Advertising, 45 Fed. Reg. 23705 (Apr. 8, 1980); Termination of Proposed Trade Regulation, 48 Fed. Reg. 23270 (May 24, 1983). In neither instance was the Commission’s action compelled by the First Amendment. *See, e.g.*, 45 Fed. Reg. at 23706 (stating that “it is not clear that the claims under scrutiny are readily susceptible to the across-the-board remedies that have been proposed or that this approach represents the ideal solution for remedying deception or unfairness”); *Rodale Press, Inc. v. FTC*, 407 F.2d 1252 (D.C. Cir. 1968) (vacating Commission’s order and remanding for further hearing and argument on new theory of violation); *In re Rodale Press, Inc.*, 74 F.T.C. 1429, 1430 (1968) (dismissing complaint because, “[f]urther continuation of these proceedings at this time appearing not to be in the public interest and the possibility appearing remote that the practices challenged in the complaint would be resumed in the future”). Respondents likewise acknowledge that “[t]he *Johnson* case did not reach the constitutional question because the majority disposed of it as a legislative interpretation case.” RAB at 11. Indeed, as the ALJ pointed out, Congress effectively overruled *Johnson* by amending the Food and Drug Act to expressly include claims regarding curative effectiveness. ID at 111 (*citing* Act of June 30, 1906, as amended, 37 Stat. 416 (1912)).

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Additionally, Respondents' representations are not protected by the First Amendment. It is well established under applicable Supreme Court precedent that commercial speech is accorded less protection than other constitutionally protected forms of speech. ID at 112 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562-63 (1980); *Va. Pharm. Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 n.24 (1976)). In determining whether speech is commercial, *Zauderer v. Office of Disciplinary Council*, 471 U.S. 626, 637-38 (1985), is instructive. *Zauderer* holds that the determination of whether speech is commercial speech "rests heavily on 'the common sense distinction between speech proposing a commercial transaction . . . and other varieties of speech.'" ID at 113 (citations omitted). Thus, as the ALJ pointed out in the Initial Decision, speech that "propose[s] a commercial transaction" necessarily constitutes commercial speech. *Id.* (citing *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473-74 (1989)).

As previously discussed in connection with Respondents' jurisdictional challenge, the primary purpose and effect of Respondents' representations concerning the four Challenged Products was to sell those products. Those representations constituted commercial speech, not simply practicing religion or engaging in "charitable solicitations." See RRB at 62. As a matter of law, including religious or political views in the commercial advertising at issue does not convert Respondents' commercial speech to constitutionally protected religious or political speech. ID at 114; *see also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67-68 (1983) (holding that mailings constituted "commercial speech notwithstanding the fact that they contain discussions of important public issues such as venereal disease and family planning"); *id.* at 68 (quoting *Central Hudson*, 447 U.S. at 563 n.5 ("[A]dvertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech.")).

Accordingly, the Supreme Court cases concerning *non-commercial* speech upon which Respondents rely – namely, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); and *West Virginia State Board of Education v. Barnette*,

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319 U.S. 624 (1943) – do not apply at all. *Cf. Church of Scientology v. Richardson*, 437 F. 2d 214, 218 (9th Cir. 1971) (holding there was no First Amendment violation so long as the FDA “could determine the E-meter’s [an instrument used in the practice of Scientology] intended use without evaluating the truth or falsity of any related ‘religious’ claims.”). RRB at 56.

The Supreme Court’s First Amendment cases involving commercial speech upon which Respondents rely – *Central Hudson*, 447 U.S. 557; *Edenfield v. Fane*, 507 U.S. 761 (1993); *Greater New Orleans Broadcasting Ass’n. v. United States*, 527 U.S. 173 (1999); *Ibanez v. Florida Department of Business & Professional Regulation, Board of Accountancy*, 512 U.S. 136 (1994); *In re R.M.J.*, 455 U.S. 191 (1982); *Peel v. Attorney Registration & Disciplinary Commission*, 496 U.S. 91 (1990); *Rubin v. Coors Brewery Co.*, 514 U.S. 476 (1995); *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); and *Illinois ex rel. Madigan v. Telemarketers Ass’n.*, 538 U.S. 600, 619-20 (2003) – have all affirmed that misleading or deceptive commercial speech is not protected by the First Amendment. Those declarations are often included in the passages cited by Respondents. RAB at 18, 20-21; RRB at 51-52.

Respondents argue that *Central Hudson*, *Peel*, *Ibanez* and *Thompson*, *Madigan* and *Greater New Orleans Broadcasting* teach that under the First Amendment, the government (here the FTC) must identify a “substantial interest” in order to justify restricting their advertising. RAB at 20-23; RRB at 51-52. Respondents further cite *Edenfield*, 507 U.S. at 770-71, for the proposition that the “substantial interest” cannot be established by mere “speculation and conjecture.” RAB at 22. But that gets things backward. In *Central Hudson*, the Supreme Court set forth the four-part analysis for determining whether regulation of commercial speech is constitutional. A first and threshold inquiry is whether the speech in question is false or misleading; for commercial speech to be afforded any First Amendment protection, “it at least must concern lawful activity and not be misleading.” 447 U.S. at 566. Non-misleading commercial speech remains subject to reasonable regulation, under the



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remaining three elements of the *Central Hudson* analysis: whether the regulation is based on a substantial governmental interest; “whether the regulation directly advances the governmental interest asserted;” and “whether it is not more extensive than necessary to serve that interest.” *Id.*

The cases cited by Respondents all recognize that the latter three prongs of the test are reached if, and only if, Respondent’s advertising is not misleading or deceptive. *See Edenfield*, 507 U.S. at 768 (“[O]ur cases make clear that the State may ban commercial expression that is fraudulent or deceptive without further justification.”). The ALJ found Respondents’ commercial speech deceptive. The record shows that the ALJ’s findings were based on the text of the advertisements at issue, as well as the Respondents’ use of testimonials, bold print, pictures and mutually reinforcing advertisements to create the “overall net impressions” conveyed by the advertisements. In reviewing the ALJ’s findings, the Commission has also brought its expertise and experience to bear. Once reaching that finding, no further analysis is necessary.

Respondents also emphasize that *Thompson v. Western States Medical Center* held that under the First Amendment, even if the government has an interest in preventing misleading advertisements, it could not enjoin the compounding of drugs if disclaimers would be a less restrictive alternative. RAB at 60. In their Reply Brief, Respondents argue that *Pearson v. Shalala*, 164 F.3d 650 (D.C. Cir. 1999), said the same thing about the use of disclaimers. RRB at 27-30. That case does not help Respondents either. Both in *Thompson* and in the portion of *Pearson* on which Respondents rely, the issue was not the condemnation of particular commercial speech found to have been actually misleading, but rather the regulation of broad categories of speech, subject to the latter three prongs of the *Central Hudson* analysis. *See Thompson*, 535 U.S. at 368; *Pearson*, 164 F.3d at 655-56. It was in the context of that analysis – assessing the “fit” between government regulation of non-misleading commercial speech and the interests sought to be served – that each court focused on the use of disclaimers as a substantially less restrictive alternative to outright bans. *See Central Hudson*, 535 U.S. at 376; *Pearson*, 164 F.3d at 657-58. Respondents offer no support for

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their assertion that the *Central Hudson* “fit” analysis should be imported into cases like the present one, in which an administrative agency is adjudicating the deceptive nature of particular advertisements.<sup>2</sup>

Even if we were to adopt Respondents’ unprecedented approach to this issue, their arguments fail on the record before us. Respondents’ “disclaimers” here were ineffective, given the multiple techniques Respondents used to reinforce their overall advertising messages, the comparatively small print in which most of their “disclaimers” were printed (IDF 296, 298, 299, 300, 303), their ambiguity and lack of conspicuousness (IDF 305), and the fact that even those “disclaimers” only disclaimed Respondents’ “intentions,” not the messages themselves. Any one of these factors would blunt the effectiveness of the disclaimers. *See, e.g., Removatron Int’l v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989) (holding that disclaimer that was not clear and conspicuous was ineffective). Considering these factors in combination, Respondents’ “disclaimers” did not dispel the overall net impressions that the four Challenged Products would treat or cure the diseases and conditions that Respondents’ representations conveyed.

Second, Respondents argue that none of this First Amendment jurisprudence applies to herbal supplements like the four Challenged Products because they are not “drugs” within the meaning of the Food and Drug Act. RAB at 8. As Respondents acknowledge, the Food and Drug Act “differs from” the FTC Act. RRB at 41 (*quoting FTC v. QT, Inc.*, 512 F.3d 858, 861 (7th Cir. 2008)). Respondents do not explain why or how the Food and Drug Act can be considered binding on the Commission in enforcing the Sections 5 and 12 of the FTC Act. Under the FTC Act, these products are embraced within Section 5, and, as the ALJ observed, the FTC Act defines the words “food” and “drug” broadly for purposes of Section 12. ID at 80. Accordingly, the courts have repeatedly held that that definition covers dietary

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<sup>2</sup> Respondents further attempt to bootstrap from *Pearson*’s holding by equating the “potentially misleading” speech subjected to prescriptive regulation there with the implied claims that have been specifically adjudicated in the present case to be actually misleading. RRB at 28. As explained above, however, the two are “completely different animal[s].” *Kraft*, 970 F.2d at 317.

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supplements. *See, e.g., FTC v. Natural Solution, Inc.*, No. CV 06-6112-JFW, 2007 U.S. Dist. LEXIS 60783, at \*11-12 (C.D. Cal. Aug. 7, 2007); *Nat'l Urological Group*, 2008 U.S. Dist. LEXIS 44145, at \*43-44; *Direct Mktg. Concepts*, 569 F. Supp. 2d at 300, 303; *see also* ID at 80-81, 103. Moreover, those same courts have specifically held that such products can be deceptive if they lack a reasonable basis substantiating the claims made for them. *Natural Solution*, 2007 U.S. Dist. LEXIS 60783, at \*9-10; *Nat'l Urological Group*, 2008 U.S. Dist. LEXIS 44145, at \*76-79; *Direct Mktg. Concepts*, 569 F. Supp. 2d at 298.

Third, Respondents repeatedly assert that the Commission cannot challenge their efficacy representations for the four Challenged Products because those representations were simply “structure/function” claims that are permitted under the Dietary Supplement Health and Education Act, Pub. L. No. 103-417, 108 Stat. 4325 (“DSHEA”), which amended the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-399a (“FDCA”). RAB at 3, 4, 12, 45, 46, 51, 52; RRB at 33, 40, 41, 45. Respondents’ representations, however, are not “structure/function” claims under the DSHEA. Under the FDCA, such a claim is defined simply as one that describes “the role of a nutrient or dietary ingredient intended to affect the structure or function in humans.” 21 C.F.R. § 101.93(f) (2009). The Respondents’ representations that the four Challenged Products would treat or cure cancer, prevent or shrink tumors, and ameliorate the side effects of radiation and chemotherapy do not simply describe the “role” that those four products will play in affecting the structure or function in humans. *See United States v. Lane Labs-USA, Inc.*, 324 F. Supp. 2d 547, 568 (D.N.J. 2004); *see also Pearson*, 164 F.3d at 652. Moreover, DSHEA expressly provides that even compliant “structure/function” claims are permitted only if they are “truthful and not misleading” and the manufacturer “has substantiation” that such claims are true. 21 U.S.C. § 343 (r)(6)(B) (2009). Thus, the DSHEA amendment to the FDCA is not inconsistent with the FTC case law as applied by the ALJ. Indeed, even if the FDCA departed from the FTC Act and its relevant case law, Respondents offer no authority that it would be binding on the Commission.

Fourth, Respondents argue that the ALJ failed to adopt a “flexible standard of substantiation” for their representations and

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ignored numerous studies supporting those representations, contrary to the FTC's guidelines entitled, *Dietary Supplements: An Advertising Guide for Industry* ("Guide"). RAB at 47-48. The Commission does not agree. The Guide advises the Commission's standard of substantiation for dietary supplements is "flexible," because the standard depends upon the claims made for those products. Guide at 8. The Guide warns that the "FTC typically requires claims about the efficacy or safety of dietary supplements to be supported with 'competent and reliable scientific evidence.'" Guide at 9. Thus, where, as here, Respondents represented that the four Challenged Products would treat or cure cancer, prevent or shrink tumors, and/or ameliorate the destructive side effects of radiation or chemotherapy, the competent and reliable scientific standard applies under the Guide.

Fifth, Respondents maintain that they only intended to convey the impression that their "Biblical approach to health care – including use of the Challenged Products – could reinforce the naturally healing capability of the body, including the immune system, and thereby provide adjunct support for whatever path – drugs, surgery or other – an individual freely chose to take for their cancer care regimen." RAB at 44. That stated intent is at odds with almost all of the advertisements themselves, which generally did not mention the "naturally healing ability of the body" or that the four Challenged Products could be only an "adjunct" to traditional cancer treatments. But in any event, the courts have long held that "the subjective good faith of the advertiser is not a valid defense." *FTC v. Sabal*, 32 F. Supp. 2d 1004, 1007 (N.D. Ill. 1998); *see also FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988).

Finally, Respondents contend that they cannot be held liable for deception because all of the elements of Section 5(n) of the FTC Act have not been proved. That is, Respondents argue Complaint Counsel failed to prove their acts were both unfair and deceptive. That argument is without merit. No case has ever held that deception claims are subject to Section 5(n).

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**D. Due Process Was Not Violated.**

Despite Respondents' claims to the contrary, it cannot be said that the ALJ violated Due Process in reaching his findings of fact under a "preponderance of evidence" standard instead of a "clear and convincing evidence" standard. RAB at 11, 27-29. As the ALJ states in his Initial Decision, under both the Administrative Procedure Act and the Commission's rules, the proper standard to be applied in FTC Act cases challenging deceptive practices is the "preponderance of evidence" standard. ID at 66-67. Federal court and Commission decisions respecting those challenges have repeatedly so held. *In re Telebrands Corp.*, 140 F.T.C. 278, 426 (2004), *aff'd*, 140 F.T.C. 278 (2005), *aff'd*, 457 F.3d 354 (4th Cir. 2006); *In re Auto. Breakthrough Sciences, Inc.*, No. 9275, 1998 FTC LEXIS 112, at \*37 n.45 (Sept. 9, 1998); *In re Adventist Health System/West*, 117 F.T.C. 224, 297 (1994); *In re Bristol-Myers Co. v. FTC*, 102 F.T.C. 21, 275 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984). Moreover, contrary to Respondents' assertion in their Reply Brief (RRB at 47), those decisions do not simply concern the standard applicable to litigating over whether the FTC has jurisdiction. *Telebrands*, for example, concerned whether certain representations were conveyed in the advertising, and whether they were deceptive. 140 F.T.C. at 427, 449.

Other cases upon which the Respondents rely, *Addington v. Texas*, 441 U.S. 418 (1979); *Stanley v. Illinois*, 405 U.S. 645 (1972); and *Mathews v. Eldridge*, 424 U.S. 319 (1976) (RAB at 26-28), do not hold otherwise. Those cases did not consider the standard of proof applicable under the FTC Act or the standard of proof applicable when the FTC challenges deceptive acts or practices. Indeed, they are entirely inapposite. *Stanley* simply held that a State may not deprive an unwed father of custody of his children, on the basis of a statutory presumption of unfitness, but must afford an individualized fitness hearing. In the present case, Respondents have been afforded an extensive hearing on the specific charges against them. *Mathews* set forth general standards for due process procedures, but emphasized the flexibility of the constitutional standard. 424 U.S. at 334-35. The Court there upheld an administrative scheme for the termination of disability benefits without any pre-termination evidentiary hearing – a holding that offers the present Respondents no

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support. *Id.* at 339-40. In *Addington* – the only case cited that addresses a constitutional requirement regarding the standard of proof – the Supreme Court held that due process requires “clear and convincing” evidence to support the indefinite, involuntary commitment of an individual to a mental institution. 441 U.S. at 431-32. The holding in *Addington*, respecting an extreme form of deprivation of personal liberty, has no bearing on the present case. Here, Respondents were afforded ample procedural protections, including adjudication under the established preponderance of evidence standard typical of civil litigation. Their assertions that due process required more than this are without merit.

**E. There is No Reasonable Basis Substantiating the Representations.**

Findings of Fact.

Respondents alleged in their Answer that they possessed and relied upon a reasonable basis that substantiated the representations they made for the four products at issue at the time those representations were made. Answer ¶ 16; RAB at 2. However, Respondents did not conduct or direct others to conduct any scientific testing of the effects of the four Challenged Products. IDF 308, 309, 311, 313, 315. The manufacturers of BioShark and BioMixx likewise did not conduct any testing on those products. IDF 310, 314. Respondents have not produced anything to show that they possessed and relied on any competent and reliable scientific evidence to support the overall net impressions conveyed by the advertisements at issue.

The ALJ considered the evidence presented by Complaint Counsel’s expert, Dennis Miller, M.D. and Respondents’ five experts, James Duke, Ph.D., Sally LaMont, N.D., Rustum Roy, James Dews and Jay Lehr, Ph.D. IDF 329-425. The only proffered expert who was a medical doctor, had specialized training or experience regarding cancer or cancer treatment, or had conducted clinical studies regarding cancer treatments was Dr. Miller. IDF 329-337. Dr. Miller is a board-certified pediatric hematologist/oncologist who, *inter alia*, has directed clinical care, education, laboratory and clinical research, and administration heading divisions or departments for over forty years at the

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University of Rochester Medical Center, New York Hospital-Cornell Medical Center, Memorial Sloan-Kettering Cancer Center and Northwestern University Medical School. IDF 320-326.

Dr. Miller testified that “competent and reliable scientific evidence” is required to conclude that a cancer treatment is effective. IDF 343. Dr. Miller explained that in order to constitute competent and reliable scientific evidence that a product treats, cures, or prevents cancer, the products’ efficacy and safety must be demonstrated through controlled clinical studies (tests on humans). IDF 344, 345. He further testified that studies performed in test tubes or in animals, testimonials and other anecdotal reports are not substitutes. IDF 345, 351-353. He testified that harm potentially may occur from remedies that are alternatives to those that have undergone clinical studies on humans. IDF 356-361. And, he testified that for these reasons, the need to substantiate a claim by clinical studies (*i.e.*, on humans) was the same whether the purported agent was a herbal medicine or a more conventional pharmaceutical agent. IDF 354.

Dr. Miller was asked to determine whether there was competent and reliable scientific evidence to substantiate each of the overall net impressions conveyed by the advertisements at issue about the Challenged Products, and he did so. IDF 327, 344, 345, 351-354. Dr. Miller concluded that the reference materials relied on by Respondents did not constitute competent and reliable scientific evidence that any of the Challenged Products prevent, treat or cure cancer; that most of those materials were not peer-reviewed papers but instead consisted of author opinions and literature reviews; that many of the studies involved *in vitro* or animal studies, not studies on humans; that others relied on the efficacy or safety of ingredients of the Challenged Products rather than the products themselves and that, absent, evidence that DCO’s four products at issue here contained exactly those ingredients in the proportion tested, those studies were not probative; and that there is no competent and reliable scientific evidence that the Challenged Products are effective, either alone or in combination with other DCO products, in the prevention, treatment or cure of cancer, in inhibiting tumor formation, or in ameliorating the adverse effects of radiation and chemotherapy.

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IDF 362-367. The reference materials on which Respondents relied were of the sort that Dr. Miller testified were not reliable. IDF 368-386.

Respondents did not ask any of their proffered experts to render an opinion as to whether Respondent's purported substantiation materials constituted competent and reliable scientific evidence substantiating any of the overall net impressions conveyed by the advertisements at issue about the Challenged Products. IDF 339. Neither did Respondents ask any of their proffered experts to render an opinion as to whether there existed any such substantiating evidence. IDF 340. Respondents' expert, Dr. Duke, made no effort to determine whether there were any studies of any sort regarding the Challenged Products; he did not analyze any of those products; and he did not know the ingredients of those products. IDF 392-394. Dr. LaMont likewise did not analyze any of the Challenged Products themselves, but only the ingredients in those products, and she did not know the concentration of those ingredients in those products. IDF 401-403. Mr. Roy did not review or obtain any of the Challenged Products or their labels, and he had no idea what ingredients those products contain. IDF 412, 413. None of the experts proffered by Respondents expressed any opinion about whether there was any competent and reliable scientific evidence to support the overall net impressions respecting the efficacy of the four products at issue created by the challenged advertisements. IDF 341, 389, 390, 398, 399, 408, 409, 419, 420, 423, 424.

Legal Analysis.

Respondents have repeatedly accused the ALJ of improperly engaging in "presumptions," "shifting the burden of proof" away from Complaint Counsel, as well as violating the Due Process Clause and the First Amendment of the Constitution. Thus, in reviewing the ALJ's conclusion that Respondents lacked a reasonable basis substantiating their representations concerning the efficacy of the Challenged Products, it is appropriate to analyze what the ALJ did not do, in addition to what he did do.



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First, the ALJ did not treat Respondents' advertising as making "establishment" claims – that is to say, advertising that represents the amount and type of evidence substantiating the product claims made. ID at 100-101. Although the ALJ pointed out that a few of the advertisements did represent that the claims had been proven by scientific testing (ID at 101 (citing IDF 225, 231, 247)), he concluded, "Complaint Counsel has not alleged or argued that Respondents' advertisements constitute establishment claims. Accordingly, the claims at issue are deemed non-establishment claims, and will be evaluated as such." ID at 101.

The result of that conclusion, however, is that in determining the level of substantiation required, the ALJ did not "presume" the truth of Respondents' representations that their claims were supported a study conducted by "two researchers at the Massachusetts Institute of Technology" or "used by patients involved in clinical studies in cancer clinics." IDF 225 (CX 13); IDF 231 (CX 23 & 24); IDF 247 (CX 18). Instead, the ALJ found the claims to be "health-related efficacy claims," and as a result, under well-established precedent, such claims must be substantiated by "competent and reliable scientific evidence." ID at 101. In addition, to the extent that further analysis for determining the substantiation standard was necessary, the ALJ also analyzed them under the *Pfizer* factors: the type of claim involved, the benefits of a truthful claim, the consequences of a false claim, and the amount of substantiation experts in the field consider reasonable. ID at 102-104; *In re Pfizer, Inc.*, 81 F.T.C. 23 (1972); *QT, Inc.*, 448 F. Supp. 2d at 959; *Nat'l Urological Group*, 2008 U.S. Dist. LEXIS 44145, at \*43-44, 77-79; *In re Removatron*, 111 F.T.C. 206, 306 n.20 (1988); *In re Thompson Med. Co.*, 104 F.T.C. at 821.

Based upon his findings respecting the "overall net impressions" conveyed by Respondents' representations, the ALJ concluded that: (1) the representations made about the four Challenged Products were "health-related efficacy claims" in that they represented that the products would "treat or cure" cancer, eliminate or shrink tumors, and/or ameliorate the adverse effects of radiation and chemotherapy (ID at 101-102); (2) the benefits of truthful claims were substantial because cancer patients would benefit from truthful representations about effective treatment of,

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or cure for, the disease (ID at 103); (3) the consequences of a deceptive claim were substantial not only because a patient might forego using products or therapies that were effective in treating or curing the relevant diseases, but also (as Respondents acknowledged in their “disclaimers”), because their products could be harmful if used with the other products or therapies (ID at 103); and (4) clinical studies respecting human beings were required because the representations Respondents made concerned the efficacy of the Challenged Products in treating or curing human beings, not animals, or their efficacy *in vitro*. ID at 103-104.

Taking those considerations into account, the ALJ concluded that Respondents’ representations needed to be substantiated by “competent and reliable scientific evidence,” including “controlled clinical studies” – *i.e.*, human studies. ID at 104. That conclusion is supported by numerous decisions describing the standard that should be applied when supplements like the Respondents’ four products are represented to be effective to treat diseases or medical conditions. *See, e.g., Natural Solution*, 2007 U.S. Dist. LEXIS 60783, at \*11-12; *Nat’l Urological Group*, 2008 U.S. Dist. LEXIS 44145, at \*43-44; *Direct Mktg. Concepts*, 569 F. Supp. 2d at 300, 303.

Second, the ALJ did not hold Respondents to the representation they made in their Answer that they had a reasonable basis substantiating their representations at the time the representations were made. The only explanation that the ALJ articulated for not requiring Respondents to tether their proof to “the time the representations were made” was that Complaint Counsel, rather than Respondents, had the burden of proof on all elements of their claim, including whether Respondents had a reasonable basis to substantiate their representations. ID at 67. The Commission considers that conclusion debatable. Respondents specifically averred that they had substantiation at the time their representations were made, and they were in the best position to support their averment. Again, the Commission is not prepared to second-guess the decision by the ALJ. The consequence of that conclusion, however, was that the ALJ considered abundant *ex post* expert testimony on the issue

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whether there was *ever* a reasonable basis substantiating the representations.

Respondents repeatedly assert that in assessing the expert testimony the ALJ did not just embrace the substantiation standard he had held was applicable – namely “competent and reliable scientific evidence,” including “controlled clinical studies” – but instead required that those studies be “double-blind” and “placebo controlled.” RAB at 4, 8, 11-12, 15, 25, 43, 45; RRB at 12, 40-41, 53-54, 57, 59, 65. According to Respondents, that substantiation requirement, combined with the lack of a requirement that “extrinsic evidence” be produced, had the effect of creating a “presumption” that their representations were not adequately substantiated and, indeed, of turning the proceeding into “rulemaking by adjudication” in violation of *Pearson v. Shalala*, 164 F.3d 650 (D.C. Cir. 1999), the Due Process Clause, and the First Amendment of the Constitution. RAB at 4, 11-12, 15-17, 25-26, 43-44, 54-55; RRB at 40, 54-55.

Respondents’ claims are without merit. As previously discussed, “extrinsic” evidence to interpret the advertising is not required, as a matter of law. Respondents’ reliance on *FTC v. QT, Inc.*, 512 F.3d 858, 861 (7th Cir. 2008), does not assist their argument either. As the ALJ explained in the Initial Decision, although the Seventh Circuit stated that nothing in the FTC Act required a placebo-controlled, double-blind study, it went on to affirm the district court’s holding that substantiation for health-related efficacy claims must be based on competent and reliable scientific evidence. ID at 109. Because the ALJ in this case found the Respondents had not possessed or relied upon *any* adequate substantiation for their claims, the ALJ found their argument that *QT* does not require a placebo-controlled, double-blind study to be irrelevant. ID at 109. The Commission agrees.

The same thing is true of Respondents’ assertion that this case involves “rulemaking by adjudication” of the sort condemned in the *Pearson* case. RAB at 15-16, 25-26; RRB at 27, 31-33, 44 n.24, 53-54. *Pearson* bears no resemblance to this case. Not only were the agency (the FDA) and the statute (the Food, Drug, and Cosmetic Act) different than the ones involved here, but the case involved formal rulemaking procedures by the FDA. In *Pearson*,

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the FDA proposed a rule that would ban all health claims by dietary supplements unless there was “significant scientific agreement” about those claims, regardless of whether or not the claims were deceptive. RAB at 14-16. This case does not involve rule-making or even “amending or bypassing a pending rulemaking proceeding.” RAB at 40. This case involves a purely adjudicatory challenge to specific deceptive representations made in advertisements that four specific products would “treat” or “cure” cancer, prevent or shrink tumors, and ameliorate the destructive side effects of radiation or chemotherapy. Most significantly, the substantiation standard used by the ALJ in this case, requiring competent and reliable scientific evidence, including studies on humans is neither “unconstitutionally vague” nor “impossibly high,” as Respondents describe the “significant scientific agreement” standard in the FDA’s proposed rule. RRB at 27, 31-32, 44 n.24. To borrow the language in *Kraft, Pearson* involved “a completely different animal” than the one involved here. *Kraft*, 970 F.2d at 317.

Nor did the ALJ otherwise use any “assumptions” or “shift the burden of proof” away from Complaint Counsel in his assessment of the expert testimony. RAB at 3, 11, 54-55. To the contrary, he found, *inter alia*, that Complaint Counsel’s witness, Dr. Miller, a board-certified oncologist who had practiced for over forty years at some of the country’s most eminent institutions, was the “only witness in this case qualified as an expert in cancer research and cancer treatment” (ID at 103), and that he was the only expert witness who offered an opinion as to whether there was competent and reliable scientific evidence to support Respondents’ representations. ID at 103-106. By contrast, the ALJ found that Respondents and their experts had relied, *inter alia*, on in vitro and animal (not human) clinical reports, searches of literature, testimonials without confirmation that the speakers’ treatments were not attributable to other clinical modalities or indeed that the speakers had cancer, and tests on the ingredients of the four Challenged Products without confirmation that the ingredients were present in those products in the same proportion to the ingredients tested. ID at 104-105.

Respondents do not contend that these findings lacked substantial supporting evidence in the record. As a result, as the

## Opinion of the Commission

ALJ put it, “none of Respondents’ experts offered any opinions on any material, contested issue in the case, and the opinions that Respondents’ proffered experts did offer are entitled to little, if any, weight.” ID at 106. Put differently, the ALJ simply weighed the evidence proffered by the experts. The way he weighed the evidence, moreover, was consistent with his earlier opinion that although Respondents might have the burden of production of some evidence to substantiate their representations, Complaint Counsel bore the burden of proving that the substantiation was inadequate. ID at 67. The ALJ concluded that Complaint Counsel had borne the burden of proving that Respondents’ representations were not substantiated. There was no violation of either the Due Process Clause or the First Amendment involved.

**F. The Remedy is Proper.**

Respondents advance several arguments that the remedy is illegal. RAB at 55-65. The Commission has considered each of these arguments, has reviewed the applicable case law and the language of the proposed Order, and has concluded that these claims are without merit. The Commission considers each of these arguments in turn.

Respondents first argue that the recent unpublished decision in *FTC v. Lane Labs-USA, Inc.*, No. 00-CV-3174 (DMC) (D.N.J. Aug. 10, 2009) (appeal pending),<sup>3</sup> “should be instructive and considered here,” (RAB at 56-57; *see also* RRB at 59-60), and that they are “identically situated” to the respondents in *Lane Labs*. RRB at 34. In doing so, Respondents focus on three statements made by the district court, which were based upon the specific facts and evidence presented in that case: 1) the district court considered the substantiation proffered by Lane Labs and noted, “[t]his is not a case of a company making claims out of thin air;” 2) the district court found that Lane Labs provided credible medical testimony that the products in question are good products and could have the results advertised; and 3) the district court noted that “there has been no physical harm to the public.”

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<sup>3</sup> The Commission is appealing this decision. *FTC v. Lane-Labs-USA, Inc.*, No. 00-CV-3174 (DMC) (D. N.J. Aug. 10, 2009), *appeal docketed*, No. 09-3909 (3rd Cir. Oct. 13, 2009).

## Opinion of the Commission

Contrary to Respondents' assertion, they are not "identically situated" to the respondents in *Lane Labs*. *Lane Labs* was a civil contempt proceeding in which the FTC sought a \$24 million compensatory contempt award from the defendants for violating a negotiated consent order. According to the district court, in order to establish contempt, the movant bears the burden of proving by clear and convincing evidence that the respondent violated a court order. *Lane Labs*, No. 00-CV-3174 (DMC), slip op. at 11. The district court declined to find contempt because he found that the FTC failed to show by clear and convincing evidence that the defendants had not substantially complied with the Orders. Accordingly, the standard of proof, as well as the proof required, differentiates the DCO Respondents from the Lane Lab respondents.

And, to the extent that *Lane Labs* – as an unpublished decision that is being appealed – can be considered "instructive," it does not help Respondents. As in the instant case, the *Lane Lab* Orders required defendants to possess "competent and reliable scientific evidence" (as defined in the DCO remedy) to substantiate any claims made about the health benefits of a product.<sup>4</sup> The *Lane Labs* court specifically found the Orders to be valid and controlling. *Id.* at 12. However, in contrast to the case before us, the medical experts proffered in *Lane Labs* were medical doctors that the district court qualified and found "credible and knowledgeable in their respective fields of expertise." *Id.* at 8-10. The DCO respondents' experts were not medical doctors and the ALJ found that none of these proffered experts had "specialized training or experience regarding cancer or cancer treatment." IDF 335, 336. Indeed, in contrast to *Lane Labs*, in preparing their opinions, none of Respondents' experts here had reviewed the advertising claims at issue. IDF at 338. Furthermore, Respondents did not ask their experts to render an opinion as to whether their purported substantiation materials constituted competent and reliable scientific evidence that would substantiate

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<sup>4</sup> "Competent and scientific evidence" was defined as "tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate results." *Lane Labs*, slip op. at 12. This is the same definition the ALJ uses in the proposed Order.

## Opinion of the Commission

a claim that any of the Challenged Products prevent, cure or treat, cancer (IDF 339), or whether any such evidence existed. IDF 340.

Second, Respondents argue that the remedy is an arbitrary, capricious and retaliatory attack on their constitutional rights. Respondents make many general allegations regarding this claim, but do not cite any case law or other precedent in support of it. Respondents assert that the ALJ used “Respondents’ political and religious speech as a weapon against them when he turned to issuing the Remedy.” RRB at 36; *see also* RAB at 57. Respondents also claim that the ALJ took the Respondents’ political and religious speech and activities into consideration when crafting the remedy, but not when “portraying Respondents as being engaged purely in commerce.” RAB at 57.

As a preliminary matter, the Commission notes that the ALJ did not “portray[] Respondents as being engaged purely in commerce.” As the Commission has stated already, this misstates the law and the legal conclusions of the Initial Decision; the ALJ found that Respondents were not a business organized for or engaged in “only” charitable purposes. These two conclusions are not the same. In addition, as discussed earlier in this Opinion, the Commission has already found that the ALJ performed the proper legal analysis in determining the FTC’s jurisdiction, *see* section III.A, and Respondents’ liability, *see* sections III.C and E. The Commission likewise finds that the ALJ applied the proper standard in drafting the proposed order.<sup>5</sup> Accordingly, the Commission declines to characterize the remedy as “arbitrary, capricious and retaliatory.”

Third, Respondents claim that the proposed remedy would violate the Religious Freedom Restoration Act of 1993 (P.L. 10-

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<sup>5</sup> Once the determination is made that Respondents violated Section 5 of the FTC Act, the Commission has the authority to issue an order requiring respondents to cease and desist from such acts and or practices. *FTC v. Nat’l Lead Co.*, 352 U.S. 419, 428 (1957). The Commission has considerable discretion in fashioning the remedial order, so long as the order bears a reasonable relationship to the unlawful acts or practices. *See, e.g., FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1946).

## Opinion of the Commission

141) (“RFRA”). RAB at 57-60. The Commission disagrees. As Respondents concede, the RFRA only applies to government statutes that “substantially burden a person’s exercise of religion.” RAB at 58; RRB at 15, 60-61. The Order imposes no burden on Respondents’ exercise of religion; it only applies to their commercial advertising. Although Respondents argue the remedy imposes an unconstitutional prior restraint on “truthful speech,” (RAB at 61; RRB at 60-63), the speech at issue here was found to be deceptive. As noted in *Central Hudson*, “there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.” 447 U.S. at 563.

Far from prohibiting truthful speech, Paragraphs II and III of the Order permit Respondents to make any efficacy claims for those products so long as the representations are “true, non-misleading, and, at the time [they are] made, Respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.” In other words, Respondents are only obliged to do that which the case law under Sections 5 and 12 of the FTC Act has defined as necessary to avoid deception. To be sure, that requirement embraces not just the four Challenged Products, but other dietary supplements, foods, drugs or other health and related programs, services or products. However, the case law holds that this is appropriate “fencing in,” given the kinds of representations Respondents made and the frequency with which they made those representations. *Telebrands Corp. v. FTC*, 457 F.3d 354, 358 (4th Cir. 2006); *Kraft*, 970 F.2d at 326.<sup>6</sup> The proposed order limits what Respondents may say without substantiation relating to the sale of certain products, but it does not otherwise reach into the Respondents’ religious speech or practices.

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<sup>6</sup> The Commission generally considers three factors in determining whether an order bears a reasonable relationship to a particular violation: (1) the seriousness and deliberateness of the violation; (2) the ease with which the violation may be transferred to other products; and (3) whether the respondent has a history of prior violations. See *In re Stouffer Foods Corp.*, 118 F.T.C. 746, 811 (1994). All three elements need not be present to warrant fencing-in. See *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 392 (9th Cir. 1982). The ALJ considered these factors and found the relief ordered was reasonably related to the Respondents’ violations of the FTC Act. Respondents do not seem to challenge the ALJ’s analysis of these elements. ID at 120-21.



## Opinion of the Commission

Finally, Respondents claim that the requirement that they send a letter to their customers – even as modified by the ALJ – would unconstitutionally encroach on their rights under the religious guarantees of the First Amendment and the RFRA. RAB at 61-65; RRB at 63. Specifically, Respondents claim that the proposed remedy “prohibits truthful speech,” is “contrary to Mr. Feijo’s right to refrain from speaking at all,” forces Respondents “to repudiate publicly their faith in God’s revealed truth and be forced to embrace and proclaim as their own the FTC’s faith in so-called ‘science,’” and “compels Respondents to conduct government-mandated speech as a condition precedent to continuing their religious ministry.” RAB at 12, 57-64; RRB at 58, 64.

Paragraph V of the Order requires Respondents to send to all consumers who have bought the four Challenged Products since the beginning of 2005 an exact copy of the letter appended to the Order as Attachment A. The ALJ modified the proposed letter attached to the Complaint “to make it clear that the information contained in the letter is information that the FTC has required Respondents to transmit to consumers.” ID at 121. Neither the letter nor anything else in the Order compels Respondents to do anything “as a condition precedent to continuing their religious ministry,” or forces Respondents to “repudiate publicly ‘their faith’ in God’s revealed truth and be forced to endorse and proclaim as their own the FTC’s faith in so-called ‘science.’” RRB at 58. Neither does the Commission see any evidence that the ALJ punished Respondents for their political or religious beliefs in his proposed order.

However, in the Order the Commission issues here today, in the interest of brevity, the Commission has further modified the first and second paragraphs of the letter required by Paragraph V (appended to the Order as Attachment A).

**IV. Conclusion**

The Commission, for the reasons stated in this opinion, has determined to deny the appeal of Respondents and to make final the attached Order, which is identical to the order entered by the

## Final Order

ALJ, except as to the modifications made to Attachment A, the letter required to be sent to consumers by Respondents.

**FINAL ORDER**

The Commission has heard this matter on the appeal of Respondents from the Initial Decision and on briefs and oral argument in support of and in opposition to the appeal. For the reasons stated in the accompanying Opinion of the Commission, the Commission has determined to enter the following order. Accordingly,

**I.**

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

- A. “Competent and reliable scientific evidence” shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.
- B. “Covered Product or Service” shall mean any dietary supplement, food, drug, or other health-related product, service, or program, including, but not limited to, BioShark, 7 Herb Formula, GDU, and BioMixx.
- C. “Food” and “drug” shall mean “food” and “drug” as defined in Section 15 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 55.
- D. “Advertisement” means any written or verbal statement, illustration, or depiction that is designed to

## Final Order

effect a sale or to create interest in the purchasing of goods or services, whether it appears in a book, brochure, newspaper, magazine, pamphlet, leaflet, circular, mailer, book insert, letter, catalogue, poster, chart, billboard, public transit card, point of purchase display, packaging, package insert, label, film, slide, radio, television or cable television, video news release, audio program transmitted over a telephone system, infomercial, the Internet, e-mail, or in any other medium.

- E. Unless otherwise specified, “Respondents” shall mean Daniel Chapter One and its successors and assigns, affiliates, or subsidiaries, and its officer, James Feijo, individually and as an officer of the corporation; and each of the above’s agents, representatives, and employees.
- F. “Commerce” shall mean “commerce” as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.
- G. “Endorsement” shall mean “endorsement” as defined in 16 C.F.R. § 255.0(b).

**II.**

**IT IS HEREBY ORDERED** that Respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of BioShark, 7 Herb Formula, GDU, and BioMixx, or any substantially similar health-related program, service, or product, or any other 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 product or program names or endorsements, that such health-related program, service, product, or Covered Product or Service prevents, treats, or cures or assists in the prevention, treatment, or cure of any type of tumor or cancer, including but not limited to representations that:

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- A. BioShark inhibits tumor growth;
- B. BioShark is effective in the treatment of cancer;
- C. 7 Herb Formula is effective in the treatment or cure of cancer;
- D. 7 Herb Formula inhibits tumor formation;
- E. GDU eliminates tumors;
- F. GDU is effective in the treatment of cancer;
- G. BioMixx is effective in the treatment of cancer; or
- H. BioMixx heals the destructive effects of radiation or chemotherapy;

unless the representation is true, non-misleading, and, at the time it is made, Respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

**III.**

**IT IS FURTHER ORDERED** that Respondents, directly or through any person, corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, 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, directly 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 it is made, Respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

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**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.****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 BioShark, 7 Herb Formula, GDU, and/or BioMixx, 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., above. 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

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- 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 the issuance of this order, in connection with the purchase of BioShark, 7 Herb Formula, GDU, and/or BioMixx. *Provided, however,* that Respondents may disclose 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 for a period of five (5) years after the last date of dissemination of any representation covered by this order, Respondents shall 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; and
- C. All tests, reports, studies, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question such 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 Respondents shall deliver a copy of this order to all current and future principals, officers,

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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.

**VIII.**

**IT IS FURTHER ORDERED** that Respondent Feijo, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include the individual Respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Paragraph shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

**IX.**

**IT IS FURTHER ORDERED** that Respondent DCO and its successors and assigns 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 about which Respondent DCO learns less than thirty (30) days prior to the date such action is to take place, Respondent DCO shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Paragraph shall be sent by certified mail to the Associate

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Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

**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.**

**IT IS FURTHER ORDERED** that this order will terminate on December 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 paragraph in this order that terminates in less than twenty (20) years;
- B. This order's application to any Respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

*Provided further*, that if such complaint is dismissed or a federal court rules that the Respondents did not violate any provision of this order, and the dismissal is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never 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.



Final Order

**ATTACHMENT A**  
**LETTER TO BE SENT BY FIRST CLASS MAIL**  
[To be printed on letterhead of Daniel Chapter One]

[Name and address of recipient] [Date]

Dear [Recipient]:

Our records show that you bought **[names of products]** from our website **[name of website]** or through a call center using our toll-free number. We are writing to tell you that the Federal Trade Commission (“FTC”) has found our advertising claims for these products to be deceptive because they were not substantiated by competent and reliable scientific evidence, and the FTC has issued an Order prohibiting us from making these claims in the future.

The Order entered against us by the FTC requires that we send you the following information from the FTC about the scientific evidence on these products:

Competent and reliable scientific evidence does not demonstrate that any of the ingredients in BioShark, 7 Herb Formula, GDU or BioMixx, are effective when used for prevention, treatment or cure of cancer.

It is important that you talk to your doctor or health care provider before using any herbal product in order to ensure that all aspects of your medical treatment work together. Some herbal products may interfere or affect your cancer or other medical treatment, 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 is also important that you talk to your doctor or health care provider before you decide to take any herbal product instead of taking cancer treatments that have been scientifically proven to be safe and effective in humans.

Sincerely,

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**ATTACHMENT B**

Daniel Chapter One  
1028 East Main Road  
Portsmouth, Rhode Island, 02871

[name and address of purchaser]

**GOVERNMENT ORDERED NOTICE**

INTERLOCUTORY, MODIFYING,  
VACATING, AND MISCELLANEOUS  
ORDERS

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**DYNA-E INTERNATIONAL, INC.**  
**AND**  
**GEORGE WHEELER**

*Docket No. 9336, Order, July 2, 2009*

Order withdrawing the Matter from adjudication.

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

**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.

## **WHOLE FOODS MARKET, INC.**

*Docket No. 9324, Order, July 9, 2009*

Order granting the Motion by Ahold U.S.A., Inc., New Seasons Market, Inc., Save Mart Supermarkets, Gelson's Markets, Safeway, Inc., Harris Teeter, Inc., and Apollo Management Holding L.P. and ordering Respondent to return any third-party documents that were subject to any outstanding discovery requests in *Kottaras v. Whole Foods Market, Inc.*

### **ORDER GRANTING THIRD PARTIES' MOTION TO ENFORCE PROTECTIVE ORDER**

Ahold U.S.A., Inc., New Seasons Market, Inc., Save Mart Supermarkets, Gelson's Markets, Safeway, Inc., Harris Teeter, Inc., and Apollo Management Holding L.P. ("Moving Third Parties") have filed a motion requesting that the Commission enforce the Protective Order Governing Confidential Information ("Protective Order") issued in this matter. On May 21, 2009, the Commission issued an Order relieving Respondent Whole Foods Market, Inc. ("Whole Foods") of its obligation under Paragraph 12 of the Protective Order to return any third-party documents that were subject to any outstanding discovery requests in related federal court litigation,<sup>1</sup> provided that Whole Foods complied with its obligations under Paragraph 11 of the Protective Order. The Commission did so reluctantly. The Commission's investigations and cases rely heavily on the good faith cooperation of Third Parties. Third Party cooperation in turn is based in no small part on the expectation that their documents and testimony will be used only in the Commission action at issue. The purpose of the Commission's May 21, 2009 Order was to allow the United States District Court to rule on the appropriateness of the discovery requests pending before it. Absent such an order from the Commission, the documents could have been returned immediately, thus mooting the issue and depriving the District Court of the opportunity to rule.

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<sup>1</sup> The discovery requests covered included but were not limited to outstanding discovery requests in *Kottaras v. Whole Foods Market, Inc.*, No. 1:08-cv-01832 (D.D.C.) (*Kottaras*).

## Interlocutory Orders, Etc.

The Commission issued its final Decision and Order in this matter on May 28, 2009. The Moving Third Parties filed the present motion on July 2, 2009. The Moving Third Parties request an order instructing Whole Foods to return immediately to the Moving Third Parties all documents upon entry of an order permitting as much by the District Court in *Kottaras*. That request reflects the intent of the Commission's May 21, 2009 Order. Moreover, Whole Foods has advised the Moving Third Parties that it does not oppose returning the documents, consistent with its obligations in the District Court. Accordingly,

**IT IS ORDERED THAT** Whole Foods shall return immediately to the Moving Third Parties all documents produced by the Moving Third Parties in this matter, when so directed by the United States District Court in *Kottaras v. Whole Foods Market, Inc.*, Case No. 1:08CV-01832 (D.D.C.).

By the Commission.

Interlocutory Orders, Etc.

**WHOLE FOODS MARKET, INC.**

*Docket No. 9324, Order, July 20, 2009*

Order granting Kroger's request for joinder with Ahold U.S.A., Inc., New Seasons Market, Inc., Save Mart Supermarkets, Gelson's Markets, Safeway, Inc., Harris Teeter, Inc., and Apollo Management Holding L.P.

ORDER GRANTING KROGER CO. REQUEST

The Kroger Co. ("Kroger") has effected a filing joining and incorporating by reference the Motion to Enforce Protective Order ("Third Parties' Motion") which Ahold U.S.A., Inc., New Seasons Market, Inc., Save Mart Supermarkets, Gelson's Markets, Safeway, Inc., Harris Teeter, Inc., and Apollo Management Holding L.P. filed on July 2, 2009. The Commission issued an Order granting that Motion on July 9, 2009 (copy attached) and Kroger filed its joinder on July 13, 2009. The Kroger filing therefore will be treated as a request for the same relief granted by the July 9 Order.

For the reasons detailed in the July 9 Order, the Commission has determined to grant the Kroger request. Accordingly,

**IT IS ORDERED THAT** Whole Foods shall return immediately to Kroger all documents produced by Kroger in this matter, when so directed by the United States District Court in *Kottaras v. Whole Foods Market, Inc.*, Case No. 1:08CV-01832 (D.D.C.).

By the Commission.

Interlocutory Orders, Etc.

## CARILION CLINIC

*Docket No. 9338, Order, August 11, 2009*

Order withdrawing the Matter from adjudication.

### ORDER

Complaint Counsel and Respondent Carilion Clinic, Inc., have jointly 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. 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 thirty (30) days. Absent another order by the Commission, this matter will revert to Part 3 adjudicative status at 12:01 a.m. on Friday, September 11th.

**IT IS ORDERED THAT** Complaint Counsel and Respondent's request to withdraw this matter from adjudication is **granted**. This matter is withdrawn from adjudication until 12:01 a.m. on Friday, September 11, 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.

**THORATEC CORPORATION  
AND  
HEARTWARE INTERNATIONAL, INC.**

*Docket No. 9339, Order, August 11, 2009*

Order dismissing the Complaint.

**ORDER DISMISSING COMPLAINT**

On July 28, 2009, the Federal Trade Commission issued the Administrative Complaint in this matter, having reason to believe that Respondents Thoratec Corporation (“Thoratec”) and HeartWare International, Inc. (“HeartWare”) 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 Thoratec has withdrawn its Hart-Scott-Rodino Notification and Report Form filed for the proposed transaction.<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 for further administrative litigation.<sup>2</sup> In particular, the Respondents have announced that

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<sup>1</sup> See Joint Motion to Dismiss Complaint (Aug. 5, 2009), *available at* <http://www.ftc.gov/os/adjpro/d9339/090805jointmodismisscmplt.pdf>.

<sup>2</sup> Cf. Order Dismissing Complaint, In the Matter of CSL Limited and Cerberus-Plasma Holdings, LLC (June 22, 2009), *available at* <http://www.ftc.gov/os/adjpro/d9337/090622commorderdismisscomplaint.pdf>; Order Dismissing Complaint, In the Matter of Inova Health System Foundation and Prince William Health System, Inc., Docket No. 9326 (June 17, 2008), *available at* <http://www.ftc.gov/os/adjpro/d9326/080617orderdismisscmplt.pdf>; Order Dismissing Complaint, In the Matter of Red Sky Holdings LP and Newpark Resources, Inc., Docket No. 9333 (Dec. 10, 2008), *available at* <http://www.ftc.gov/os/adjpro/d9333/081210redskycmplt.pdf>;



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they have decided not to proceed with the proposed acquisition, and Thoratec has withdrawn its Hart-Scott-Rodino Notification and Report Form filed for the proposed transaction. As a consequence, the Respondents would not be able to effect the proposed transaction without filing new Hart-Scott-Rodino Notification and Report Forms.

For the foregoing reasons, the Commission has determined that the public interest warrants dismissal of the Administrative Complaint in this matter. The Commission has determined to do so without prejudice, however, because it is not reaching a decision on the merits. Accordingly,

**IT IS ORDERED THAT** the Administrative Complaint in this matter be, and it hereby is, dismissed without prejudice.

By the Commission.

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## **ASPEN TECHNOLOGY, INC.**

*Docket No. 9310, Order, August 20, 2009*

Order modifying the Order issued on December 20, 2004 by adding provisions intended to remediate its inability to achieve fully its stated purpose as a result of actions by AspenTech.

### **ORDER TO SHOW CAUSE AND ORDER MODIFYING ORDER**

On December 20, 2004, the Federal Trade Commission (“Commission”) issued a Decision and Order (“Order”) in Docket No. 9310 resolving claims contained in the Commission’s Complaint issued on August 7, 2003. The Complaint alleged that the acquisition of Hyprotech Limited (“Hyprotech”) by Respondent Aspen Technology, Inc. (“AspenTech”), lessened competition in several relevant markets, including the licensing of process engineering simulation software, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. Respondent denied these allegations but agreed to settle the matter through entry of the Order, which became final on December 27, 2004, before the administrative trial had begun.

The Order requires AspenTech, among other things, to divest Hyprotech’s process engineering simulation software, known as HYSYS, and certain related products specified in the Order that were marketed together with HYSYS (collectively, “Hyprotech assets”). The Order requires AspenTech to divest the Hyprotech assets it owns and to sublicense rights to the Hyprotech assets it licenses from third parties if the relevant license agreements permit it to do so. The Order also requires that AspenTech divest or license the Hyprotech assets to an acquirer approved by the Commission and in a manner approved by the Commission and incorporates into the Order the terms of any Commission-approved divestiture agreement between AspenTech and a Commission-approved acquirer. On December 20, 2004, the Commission approved divestiture of the Hyprotech assets to Honeywell International Inc. (“Honeywell”) pursuant to a purchase and sale agreement previously submitted to the Commission. The Order requires AspenTech to have divested the Hyprotech assets to Honeywell on or before March 28, 2005. The

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purpose of the divestiture of these assets, as stated in the Order, is “to allow the Commission-approved Acquirer [Honeywell] to engage in the continued development and licensing of Hyprotech Process Engineering Simulation Software and to remedy the lessening of competition as alleged in the Commission’s complaint . . .” in the markets for process engineering simulation software. Order ¶ II.K.

Following entry of the Order in 2004, issues arose concerning the scope and timeliness of AspenTech’s delivery and licensing of some of the assets required to be divested and licensed. After a full investigation, the Commission found reason to believe that AspenTech did not transfer certain of the Hyprotech assets to Honeywell by the deadline contained in the Order and did not assist Honeywell in obtaining license rights to certain assets believed to be owned by a third party but licensed to AspenTech; the Commission notified the Department of Justice of its intention to file an enforcement action. Although AspenTech denies these allegations, it has agreed to settle the matter by consenting to the entry of the attached Order Modifying Order (“Modifying Order”).

The assets that the Commission believes AspenTech did not timely transfer to Honeywell consist of software contained in certain of the heat exchange simulation software products collectively referred to by AspenTech as the HTFS suite of products and identified in the Order as ACOL, APLE, FRAN, FIHR, MUSE, PIPE, TASC-Chemical and TASC-Mechanical (“HTFS products”). The Order requires AspenTech to divest all software that it owns in these products and to sublicense all third-party owned software embedded in these products for which it has the right to sublicense. The HTFS products contain software that AspenTech owns and software that AspenTech licenses from third parties. Certain of that third-party software was licensed under an agreement the Commission believes contains explicit language giving AspenTech the right to sublicense all its licensed rights in the software, including its rights to source code, to another party, and the Commission believes this language controls AspenTech’s rights to this software. At the time of the original asset transfer, AspenTech removed the third party source code from the HTFS products before delivering them to Honeywell. Without the

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relevant licensed source code, the HTFS products were unworkable.

Honeywell sought to obtain from AspenTech the source code that AspenTech had removed from the HTFS products, asserting that this source code was part of the Hyprotech assets the Order required AspenTech to divest or sublicense. AspenTech did not inform the Commission of this controversy or seek Commission guidance regarding its obligations under the Order, and instead directed Honeywell to the third party to obtain rights to the relevant source code. After Honeywell was unable to resolve the issue with AspenTech, it contacted the Commission staff. The Commission staff concluded that the third party agreement gave AspenTech the right to sublicense its rights to the source code, and that, in the opinion of the staff, AspenTech had improperly removed the third party source code from the HTFS products.

AspenTech states that it originally sublicensed to Honeywell the rights that it believes it was permitted to sublicense under the agreement with the third party, which AspenTech believes do not include rights to source code. AspenTech further states that, based on this understanding, it informed Honeywell that, pursuant to Honeywell's demand that AspenTech remove third party code for which it did not have sublicense rights from the Hyprotech assets before transferring them to Honeywell, AspenTech was removing the relevant third party source code from the HTFS products.

The Commission considered AspenTech's assertions, but nonetheless found reason to believe that AspenTech had violated its obligations under the Order.

The full HTFS software, including third-party software, was finally transferred to Honeywell in January 2006, some ten months after the Order's deadline of March 28, 2005. In the intervening period, AspenTech released new next-generation heat exchange products intended ultimately to replace ACOL and TASC, two of the most widely licensed HTFS products. These new products were known as ACOL+ and TASC+ and were not subject to divestiture under the Order. The Commission believes that AspenTech's delay in fully transferring the HTFS software prevented the Order from operating fully as intended and thereby

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frustrated its purpose. The Commission believes that, by delaying divestiture of the software, AspenTech impaired Honeywell's ability to compete for customers who use heat exchange products in connection with process engineering simulation software.

The Commission also believes that AspenTech's actions lessened the effect of the Order's requirement that AspenTech provide Honeywell with releases for all Hyprotech assets for a period of two years. Had AspenTech fully complied with the Order, this provision would have provided Honeywell with a two-year entry window during which Honeywell could provide customers the full complement of divested software at least equivalent to that offered by AspenTech, and could seamlessly migrate customers from the AspenTech products to the Honeywell products. Because AspenTech did not provide Honeywell with all of the divested assets in a timely manner, however, Honeywell was denied the full benefit of this Order requirement. Honeywell initially lacked some of the needed products and then lacked the ability to offer seamless migration, although the Commission notes that AspenTech continued to provide updates to the HTFS products to Honeywell for an additional twelve months. The Commission believes these additional updates were required by the Order but AspenTech disagrees.

In view of the foregoing, the Commission has determined in its discretion that it is in the public interest to reopen the proceeding in Docket No. 9310, pursuant to Section 3.72(b) of the Commission's Rules of Practice, 16 CFR §3.72(b), and to modify the Order by adding provisions intended to remediate the inability of the Order to achieve fully its stated purpose as a result of actions by AspenTech. These provisions, set forth as (new) Paragraph XIII, among other things, require AspenTech, to maintain the "Portable Format Export/Import Feature" defined in the Modifying Order to mean "a provision for the export into and import from Portable Format of the Input Variables." Aspen Tech is also required to provide Honeywell the information needed to permit Honeywell to develop the capability to provide customers

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with seamless transfer of data and files from AspenTech products to Honeywell's competing products for at least six years.<sup>1</sup>

Respondent AspenTech denies that it has violated the terms of the Order and does not agree with the facts and conclusions as stated herein. In settlement of the Commission's claims regarding violation of the terms of the Order as described, however, AspenTech has consented to the changes contained in this Modifying Order, and waives any further rights it may have under Section 3.72(b) of the Commission's Rules of Practice, 16 C.F.R. § 3.72(b).

Respondent, its attorney, and counsel for the Commission therefore executed an Agreement Containing Order To Show Cause and Order Modifying Order ("Agreement"); the Commission thereafter accepted the executed Agreement and placed it on the public record for a period of thirty (30) days for the receipt and consideration of public comments; and the Commission has now determined to accord final approval to the Order To Show Cause and Order Modifying Order. Accordingly,

**IT IS ORDERED** that this matter be, and it hereby is, reopened; and

**IT IS FURTHER ORDERED** that the Order in Docket No. 9310 be, and it hereby is, modified to add a new thirteenth (13th) paragraph, which shall read as follows:

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<sup>1</sup> Issues also arose with respect to the software product Flarenet. Hyprotech marketed Flarenet as a product that was part of the Hyprotech family of products, although Hyprotech licensed it from a third party. After acquiring Hyprotech, AspenTech obtained full rights to Flarenet from the third party. However, while the Order and purchase and sale agreement were being negotiated, AspenTech represented that Flarenet was still owned by the third party. Like other products owned by third parties, Flarenet was excluded from the divestiture under the Order. AspenTech asserts that Flarenet was excluded from divestiture for other reasons. Although AspenTech asserts that it has no obligation to provide Honeywell with access to Flarenet, in connection with the settlement of a private cause of action, it has agreed to license Flarenet to Honeywell under an agreement between the parties. Accordingly, there is no need for the Commission to pursue a modification of the Order with respect to Flarenet.

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### **XIII.**

**IT IS FURTHER ORDERED** that:

- A. As used in this Paragraph XIII., the following definitions shall apply:
1. “Commercial Version Release” means a new version of any HYSYS Product or Heat Exchange Simulation Software Product, in each case that contains new Input Variables or changes the Portable Format of the relevant software, that is made generally available to customers. For the avoidance of doubt, “Commercial Version Release” shall not include localized versions, patches to a release, or beta or other test versions of a software product.
  2. “Consent Agreement” means the Agreement Containing Show Cause Order and Order Modifying Order Pursuant to Rule 3.72, executed by Respondent.
  3. “Honeywell” means Honeywell International Inc., 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 101 Columbia Road, Morris Township, NJ 07962.
  4. “Heat Exchange Simulation Software Product” means Respondent’s software products known by and licensed by Respondent as of the date the Modifying Order became final as, or previously known and licensed as, ACOL, APLE, FIHR, FRAN, MUSE, PIPE, TASC, Aspen Air Cooled Exchanger (previously known as Acol+), Aspen Fired Heater, Aspen Plate Exchanger (previously known as Plate+), Aspen Plate Fin Exchanger and Aspen Shell & Tube Exchanger (previously known as Tasc+) (each a “Product”). “Heat Exchange

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Simulation Software Product” also includes any successor versions of these software programs, but, for the avoidance of doubt, shall not include (i) separate software programs usable in connection with such Product (such as through a “call” to the separate program), (ii) software code from separate software programs incorporated in whole or in part in such Product, except to the extent such code contains enhancements to the heat exchange design and rating capability of the Product or (iii) another software program into which all or a portion of the Product is incorporated, integrated, embedded or attached, provided that this exclusion shall not apply to the Product itself and future enhancements to the heat exchange design and rating capability of the Product as incorporated, integrated, embedded or attached to such other program.

5. “HTFS+ Portability Test Suite” means a suite of test cases that fully tests the validity of a data export from HTFS+ as demonstrated to the satisfaction of the Monitor.
6. “HTFS+ Technical Documentation” means the Technical Documentation of the HTFS+ Portable Format.
7. “HYSYS 2006.0 Update” means the versions of Aspen HYSYS and Aspen HYSYS Dynamics that contain the Portable Format Export/Import Feature as to all Input Variables in Aspen HYSYS version 2006.0 and Aspen HYSYS Dynamics version 2006.0, respectively.
8. “HYSYS Portability Test Suite” means a suite of test cases that, as verified by the Monitor, fully tests the validity of the Portable Format Export/Import Feature in HYSYS 2006.0 Update.
9. “HYSYS Product” means Respondent’s software products known by and licensed by Respondent as



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of the date this Modifying Order became final as Aspen HYSYS and Aspen HYSYS Dynamics. “HYSYS Product” also includes any successor versions of the Aspen HYSYS and Aspen HYSYS Dynamics software programs, but, for the avoidance of doubt, shall not include (i) separate software programs usable in connection with Aspen HYSYS or Aspen HYSYS Dynamics (such as through a “call” to the separate program), (ii) software code from separate software programs incorporated in whole or in part in Aspen HYSYS or Aspen HYSYS Dynamics, except to the extent such code contains enhancements to the steady-state process simulation or dynamic process simulation capabilities of Aspen HYSYS or Aspen HYSYS Dynamics, respectively, or (iii) another software program into which all or a portion of Aspen HYSYS or Aspen HYSYS Dynamics is incorporated, integrated, embedded or attached, provided that this exclusion shall not apply to Aspen HYSYS itself, Aspen HYSYS Dynamics itself, and future enhancements to the steady-state process simulation or dynamic process simulation capabilities of Aspen HYSYS or Aspen HYSYS Dynamics, respectively, as incorporated, integrated, embedded or attached to such other program.

10. “HYSYS 7.1 Technical Documentation” means Technical Documentation of the XML tags for new Input Variables or changes to the Portable Format in the commercial releases of Aspen HYSYS version 7.1 and Aspen HYSYS Dynamics version 7.1 current as of April 30, 2009 that are not included in Aspen HYSYS version 2006.0 and Aspen HYSYS Dynamics version 2006.0, respectively.
11. “Input Variable” means (i) input data provided as input by the user to define the calculations to be run in a case file in a HYSYS Product or a Heat

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Exchange Simulation Software Product, and (ii) input data provided as input by the user to define the flowsheet block and stream graphical layout of a case in a HYSYS Product, but only as to flowsheet block and stream graphical layout input data that can be exported into Portable Format in HYSYS 2006.0 Update.

12. “Modifying Order” means the Order Modifying Order issued by the Commission in this matter.
13. “Monitor” means the person appointed by the Commission to monitor Respondent’s compliance with its obligations under this Modifying Order and any related agreements, including the Monitor Agreement.
14. “Monitor Agreement” means the agreement executed by Respondent and the Monitor.
15. “Project Plan” means the plan submitted to and approved by the Monitor that contains a plan and schedule according to which Respondent plans to complete the HYSYS 2006.0 Update, HYSYS 7.1 Technical Documentation, HYSYS Portability Test Suite, HTFS+ Portability Test Suite, and HTFS+ Technical Documentation.
16. “Portable Format” shall mean a structured file format, such as XML or ASCII, that is both human-readable and machine-readable.
17. “Portable Format Export/Import Feature” means a provision for the export into and import from Portable Format of the Input Variables.
18. “Technical Documentation” means the tag itself, the data type of the tag (e.g., integer, real, Boolean, text, choice), valid choices for choice data types, and a definition of the meaning of the tag.

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19. "Validate" means:

- a. with respect to HYSYS 2006.0 Update, (i) the Monitor has verified that as to Input Variables common to Aspen HYSYS and Aspen HYSYS Dynamics versions 7.1 and HYSYS 2006.0 Update, the Monitor has verified that the native input report (.dmp) text files for each case in the HYSYS Portability Test Suite are shown to be substantially the same as the input report (.dmp) files that are produced when the Portable Format file is exported from Aspen HYSYS version 7.1 and Aspen HYSYS Dynamics version 7.1, and then imported as a new case in HYSYS 2006.0 Update, and (ii) the Monitor has verified, running HYSYS 2006.0 Update in calculation mode, that each case in the HYSYS Portability Test Suite demonstrates that the calculation results from the original case file and the calculation results from the exported/imported case file are substantially the same, using the same quality assurance criteria that Respondent uses for validating its commercial product release on these same test cases; and
- b. with respect to a Commercial Version Release of a HYSYS Product, (i) the Monitor has verified that the Commercial Version Release native input report (.dmp) text files are shown to be substantially the same as the input report (.dmp) files that are produced when the Portable Format file is exported and then imported as a new case in the Commercial Version Release, and (ii) as to Input Variables common to the Commercial Version Release and HYSYS 2006.0 Update, the Monitor has verified that the native input report (.dmp) text files for each case in the HYSYS Portability Test Suite are shown to be substantially the same as the input report (.dmp) files that are

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produced when the Portable Format file is exported from the Commercial Version Release and then imported as a new case in HYSYS 2006.0 Update, and (iii) the Monitor has verified that the Portable Format Export/Import Feature is used in a substantially similar manner as such feature is used in HYSYS 2006.0 Update.

- B. The Monitor's duties and responsibilities shall include, and Respondent shall facilitate, comply with, and take no action inconsistent with or that hinders, the following:
1. the Monitor shall act in a fiduciary capacity for the benefit of the Commission;
  2. the Monitor shall monitor Respondent's compliance with the requirements of subparagraphs XIII.F. – XIII.M. of this Modifying Order in consultation with the Commission staff;
  3. the Monitor shall, in the Monitor's sole discretion, consult with third parties in the exercise of the Monitor's duties under this Paragraph XIII and the Monitor Agreement;
  4. the Monitor shall Validate that the suite of test cases continues to operate properly with HYSYS 2006.0 Update using the same procedures and criteria provided hereunder in subparagraph XIII.G and XIII.L.4.; and
  5. the Monitor shall report on a regular basis to the Commission; accordingly, the Monitor Agreement shall require the Monitor to report in writing to the Commission concerning Respondent's compliance with its obligations under subparagraphs XIII.F. – XIII.M. of this Modifying Order:

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- a. thirty (30) days after the date this Modifying Order becomes final;
  - b. every sixty (60) days until the first anniversary of the date this Modifying Order becomes final;
  - c. every six (6) months thereafter through the end of the Monitor's term; and
  - d. more frequently, as requested by the Commission or its staff; and
6. the Monitor shall, in consultation with Commission staff, attempt to resolve disputes regarding Respondent's compliance with its obligations under subparagraphs XIII.F. – XIII.M.; *provided, however*, that nothing in this paragraph shall limit the Commission's ability to assert that actions by AspenTech constitute a violation of the Modifying Order.
- C. Respondent shall grant and transfer to the Monitor, and the Monitor shall have, all rights, powers, and authority necessary to carry out the Monitor's duties and responsibilities, including but not limited to the following:
1. subject to any demonstrated legally recognized privilege, the 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 information as the Monitor may request, related to Respondent's compliance with its obligations under subparagraphs XIII.F. – XIII.M. of this Modifying Order;
  2. the Monitor shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions to

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which the Monitor and Respondent agree and that the Commission approves;

3. the Monitor shall have authority to employ, at the expense of Respondent, such experts, consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties;
4. Respondent 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 from gross negligence, willful or wanton acts, or bad faith by the Monitor;
5. Respondent may require the Monitor and each of the Monitor's experts, consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Monitor from providing any information to the Commission, and a copy of such agreement shall be provided to the Commission staff; and
6. the Commission may, among other things, require the Monitor and each of the Monitor's experts, 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 Monitor's duties.

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- D. The Commission appoints Dr. Thomas L. Teague as Monitor and approves the Monitor Agreement executed by Respondent and Dr. Teague.
- E. The Monitor shall serve until Respondent has complied with its obligations under subparagraphs XIII.F. – XIII.M.; if the Commission determines that the Monitor can no longer act, has ceased to act, or has failed to act diligently as Monitor, or if Dr. Teague can no longer act as Monitor, the Commission may appoint a substitute Monitor:
1. the Commission shall select the substitute Monitor, subject to the consent of Respondent, which consent shall not be unreasonably withheld;
  2. if Respondent has not opposed, in writing, including the reasons for opposing, the selection of a proposed substitute Monitor within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed substitute Monitor, Respondent shall be deemed to have consented to the selection of the proposed substitute Monitor;
  3. Respondent shall enter into Monitor Agreement with the substitute Monitor within a reasonable time thereafter, which shall satisfy the requirements of subparagraphs XIII.B. – XIII.C. and which shall be subject to the approval of the Commission; and
- F. For each Commercial Version Release of HYSYS Products or Heat Exchange Simulation Software Products released by Respondent prior to December 31, 2014 (or December 31, 2016, if extended pursuant to subparagraph XIII.N), Respondent shall maintain the Portable Format Export/Import Feature.
- G. By no later than July 22, 2009, Respondent shall provide to the Monitor and to Honeywell:

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1. The HYSYS 2006.0 Update, including the object code and full source code for HYSYS 2006.0 Update to Honeywell and, unless otherwise requested by the Monitor, in object code form only to the Monitor, with a report of which source code files have been changed.
  - a. Upon receipt of the HYSYS 2006.0 Update, the Monitor shall review and Validate the HYSYS 2006.0 Update and determine whether any revisions are necessary.
  - b. If the Monitor determines that any revisions are necessary, Respondent shall furnish a final and complete update, incorporating such revisions, to the Monitor and Honeywell as soon as possible, but no later than four (4) weeks after the Monitor notifies Respondent of any requested revisions.
  - c. When the Monitor Validates the HYSYS 2006.0 Update, he will notify Respondent and the Commission staff.
2. The HYSYS Portability Test Suite, including the exported XML files from the commercial release of Aspen HYSYS version 7.1 and Aspen HYSYS Dynamics version 7.1 current as of April 30, 2009, and the native format Aspen HYSYS version 2006.0 and Aspen HYSYS Dynamics version 2006.0 input report (.dmp) files that were produced from the importation of these XML files generated from the commercial release of Aspen HYSYS version 7.1 and Aspen HYSYS Dynamics version 7.1 current as of April 30, 2009, respectively.
  - a. Upon receipt of the HYSYS Portability Test Suite, the Monitor shall review the HYSYS Portability Test Suite and determine whether the HYSYS Portability Test Suite allows the Monitor to test the Portable Format



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Export/Import Feature as to all Input Variables common to the commercial release of Aspen HYSYS version 7.1 and Aspen HYSYS Dynamics version 7.1 current as of April 30, 2009 and HYSYS 2006.0 Update.

- b. If the Monitor determines that any revisions to the HYSYS Portability Test Suite are necessary, Respondent shall furnish a final and complete update, incorporating such revisions, to the Monitor and Honeywell as soon as possible, but no later than four (4) weeks after the Monitor notifies Respondent of any requested revisions.
  - c. When the Monitor determines that the HYSYS Portability Test Suite is complete, he will notify Respondent and the Commission staff.
3. The HYSYS 7.1 Technical Documentation:
- a. Upon receipt of the HYSYS 7.1 Technical Documentation, the Monitor shall review the HYSYS 7.1 Technical Documentation to ensure that it is complete.
  - b. If the Monitor determines that any revisions to the HYSYS 7.1 Technical Documentation are necessary, Respondent shall furnish a final and complete update, incorporating such revisions, to the Monitor and to Honeywell as soon as possible, but no later than four (4) weeks after the Monitor notifies Respondent of any requested revisions.
  - c. When the Monitor determines that the HYSYS 7.1 Technical Documentation is complete, he will notify Respondent and the Commission staff.

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- H. By no later than July 22, 2009, Respondent shall complete and provide to the Monitor and to Honeywell the HTFS+ Technical Documentation:
1. Upon receipt of the HTFS+ Technical Documentation, the Monitor shall review the HTFS+ Technical Documentation to ensure its completeness.
  2. If the Monitor determines that any revisions are necessary, Respondent shall furnish a final and complete update, incorporating such revisions, to the Monitor and Honeywell as soon as possible, but no later than four (4) weeks after the Monitor notifies Respondent of any requested revisions.
  3. When the Monitor determines that the HTFS+ Technical Documentation is complete, he will notify Respondent and the Commission staff.
- I. Respondent shall generate and provide to the Monitor and to Honeywell the HTFS+ Portability Test Suite as follows:
1. As part of the HTFS+ Portability Test Suite, Respondent shall generate three (3) sets of test cases:
    - a. the standard example cases for ACOL, APLE, FIHR, MUSE, and TASC will be run through the import function of HTFS+ and saved in HTFS+ input files;
    - b. the supplemental set of test input files that are designed by Respondent to map Input Variables that are not already covered by the existing example input cases; and
    - c. any additional supplemental set of test input files to the extent that additional Input Variables for ACOL, APLE, FIHR, MUSE, or

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TASC not covered by the test cases above are identified by the Monitor prior to or on March 1, 2009, Respondent shall generate such additional supplemental test cases in the respective product and run those cases through the import function of HTFS+ and save as HTFS+ input files.

2. Respondent shall complete and provide to the Monitor and Honeywell the HTFS+ Portability Test Suite by no later than July 22, 2009. The HTFS+ Portability Test Suite shall include two (2) formats of the same test cases: the first format as inputs to ACOL, APLE, FIHR, MUSE or TASC, and the second format as run through the import function of HTFS+ and saved as HTFS+ input files.
  3. The Monitor shall review the HTFS+ Portability Test Suite.
  4. If the Monitor determines that any revisions are necessary, Respondent shall furnish final and complete updates, incorporating such revisions, to the Monitor and Honeywell as soon as possible, but no later than four (4) weeks after the Monitor notifies Respondent of any requested revisions.
  5. When the Monitor determines that the HTFS+ Portability Test Suite is complete, he will notify Respondent and the Commission staff.
- J. From the date Respondent executes the Consent Agreement until the last of the dates that the Monitor notifies Respondent and the Commission staff that Respondent has completed the HYSYS 2006.0 Update, the HYSYS 7.1 Technical Documentation, the HYSYS Portability Test Suite, the HTFS+ Portability Test Suite, and the HTFS+ Technical Documentation, Respondent shall report weekly to the Monitor on the

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status of the Project Plan, or more frequently and in such manner as the Monitor requests.

- K. If the Monitor determines that, despite Respondent's good faith efforts to satisfy the requirements of subparagraphs XIII.G. – XIII.J. and to comply with the Project Plan, Respondent is unable to satisfy specific time requirements, the Monitor may extend any of the deadlines in subparagraphs XIII.G. – XIII.J. by up to forty-five (45) days. If the Monitor determines that a longer extension is appropriate, Respondent may include that determination in any request for an extension of time under Rule 4.3(b) of the Commission's Rules of Practice, 16 C.F.R. § 4.3(b), and the Commission will give great weight to that determination in considering whether to grant the extension of time.
- L. With respect to any Commercial Version Release of a HYSYS Product or any Heat Exchange Simulation Software Product that (i) Respondent releases after the date Respondent executes the Consent Agreement and prior to December 31, 2014 (or December 31, 2016, if extended pursuant to subparagraph XIII.N.), and (ii) contains new Input Variables, or changes the Portable Format of the relevant software:
1. Respondent shall provide to the Monitor the Technical Documentation of the Portable Format tags for all new Input Variables and changes to the Portable Format in such Commercial Version Release.
  2. The Monitor shall review the Technical Documentation to ensure its completeness, and will report to Respondent any necessary revisions.
    - a. If the Monitor communicates such revisions to Respondent within two (2) weeks of the Monitor's receipt of the Technical Documentation, Respondent shall provide a

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final and complete update incorporating such revisions to the Monitor and to Honeywell no later than two (2) weeks prior to shipping the Commercial Version Release to customers.

- b. If the Monitor does not communicate revisions within two (2) weeks from the Monitor's receipt of the Technical Documentation, Respondent shall provide the Technical Documentation to Honeywell no later than two (2) weeks prior to shipping the Commercial Version Release to Customers.
  - c. For any revisions communicated to Respondent by the Monitor later than two (2) weeks from the Monitor's receipt of the Technical Documentation, Respondent shall provide a final and complete update of the Technical Documentation incorporating such revisions to the Monitor and to Honeywell within four (4) weeks of notification of such revisions from the Monitor.
3. Respondent shall provide to the Monitor a beta version of the Commercial Version Release software.
  4. The Monitor shall review and Validate the beta version of the Commercial Version Release, and will report to Respondent any necessary revisions.
    - a. If the Monitor communicates such revisions to Respondent within two (2) weeks of the Monitor's receipt of the beta version of the Commercial Version Release, Respondent shall provide a final and complete update of the Commercial Version Release incorporating such revisions to the Monitor no later than when the Commercial Version Release is shipped to customers.

## Interlocutory Orders, Etc.

- b. For any revisions communicated to Respondent by the Monitor later than two (2) weeks from the Monitor's receipt of the beta version of the Commercial Version Release, Respondent shall provide an update of the Commercial Version Release incorporating such revisions to the Monitor and to customers in the next patch shipped to customers for the Commercial Version Release.
5. If, in the Commercial Version Release, Respondent replaces XML with a different Portable Format, the Monitor shall determine an appropriate procedure for the Monitor to Validate such Commercial Version Release and for the provision of Technical Documentation to the Monitor and to Honeywell. Pursuant to such procedure, Respondent shall not ship the Commercial Version Release to customers until at least two (2) weeks after providing the Technical Documentation for such Commercial Version Release to Honeywell.
- M. With respect to any software patch for a HYSYS Product or Heat Exchange Simulation Software Product that (i) contains new Input Variable or changes the Portable Format, and (ii) is furnished to customers by Respondent at any time after the date Respondent executes the Consent Agreement and prior to December 31, 2014 (or December 31, 2016, if extended pursuant to subparagraph XIII.N.):
1. Respondent shall provide to the Monitor and to Honeywell the Technical Documentation of the Portable Format tags for the affected Input Variables no later than the date that Respondent makes the software patch generally available to customers.
  2. If, after review of the Technical Documentation, the Monitor reports to Respondent necessary revisions, Respondent shall provide an update to

## Interlocutory Orders, Etc.

the Technical Documentation incorporating such revisions to the Monitor and to Honeywell within four (4) weeks of notification of such revisions from the Monitor.

- N. The duration of Respondent's obligations under subparagraphs XIII.L. and XIII.M. may be extended to December 31, 2016, at the sole option of Honeywell, provided that Honeywell delivers written notice to the general counsel of Respondent, to the Commission staff, and to the Monitor, between April 1, 2014, and June 30, 2014.
- O. Respondent shall:
1. Within thirty (30) days after it executes the Consent Agreement, file a verified written report with the Commission setting forth in detail the manner and form in which it has complied, is complying, and will comply with this Paragraph XIII; and
  2. On January 1, 2010, and on January 1 for each of the next five (5) years (or seven (7) years if Honeywell chooses to extend the duration of Respondent's commitment under subparagraph XIII.N.), and at such other times as the Commission may require, file a verified written report with the Commission setting forth in detail the manner and form in which it has complied, is complying, and will comply with this Paragraph.
- P. The purpose of this Paragraph XIII is to remedy the possible effects of the alleged delays in Respondent's complying with its obligations in the Commission's Order as issued on December 20, 2004, and as discussed in the Commission's Order To Show Cause.

By the Commission, Commissioner Rosch recused.

## Concurring Statement

**Concurring Statement of  
Commissioner Pamela Jones Harbour***In the Matter of Aspen Technology, Inc., Docket No. 9310***Final Approval of Order To Show Cause  
and Order Modifying Order**

I concur in granting final approval to this Order to Show Cause and Order Modifying Order because I believe these changes to our Order of December 20, 2004 (“Original Order”) are likely to remedy the harm created in the marketplace by Aspen’s failure to divest assets in the manner required by the Original Order.

I believe, however, that civil penalties would have been the appropriate remedy for Aspen’s deliberate failure to comply with either the letter or spirit of the Original Order. Aspen’s conduct regarding the Original Order was part of an attempt to gain competitive advantage, which included both untruthful and disingenuous representations. Such threats to the integrity of the Commission’s procedures and remedies deserve their own independent sanctions – civil penalties.



Interlocutory Orders, Etc.

**POLYPORE INTERNATIONAL, INC.***Docket No. 9327, Order, September 8, 2009*

Order granting the Administrative Law Judge's request for a 60-day extension of time to file the Initial Decision.

## ORDER

Chief Administrative Law Judge Chappell has moved, pursuant to former Rule 3.51(a) of the Commission Rules of Practice, for a 60-day extension within which to file the Initial Decision in this case, which would give him until November 20, 2009, to file the Initial Decision.<sup>1</sup> Upon consideration of the motion, the Commission has determined that, in light of the other matters on the Administrative Law Judge's docket and the voluminous record in the above-captioned matter, his request should be granted. Accordingly,

**IT IS ORDERED THAT** the Administrative Law Judge's request for a 60-day extension of time be and it hereby is **granted**. The Administrative Law Judge shall have until November 20, 2009, to file the Initial Decision in this case.

By the Commission.

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<sup>1</sup> Until January 13, 2009, former Commission Rule 3.51(a) provided that an Initial Decision shall be filed "within ninety (90) days after closing the hearing record pursuant to § 3.44(c) . . . or within such further time as the Commission may by order allow upon written request from the Administrative Law Judge." The Complaint in this matter was issued last year, and former Commission Rule 3.51(a) consequently applies to this proceeding. Federal Trade Commission, *Interim Final Rules With Request for Comment*, 74 Fed. Reg. 1804 (January 13, 2009); *see also* Federal Trade Commission, *Final Rule*, 74 Fed. Reg. 20205 (May 1, 2009). Pursuant to former Commission Rule 3.44(c), the hearing record was closed on June 22, 2009, and the ninety-day period will consequently end on September 21, 2009. A sixty-day extension will therefore extend the Administrative Law Judge's time to file an Initial Decision until November 20, 2009.

Interlocutory Orders, Etc.

**CARILION CLINIC**

*Docket No. 9338, Order, September 9, 2009*

Order extending the withdrawal from adjudication.

ORDER

On August 11, 2009, the Commission withdrew this matter from adjudication until 12:01 a.m. on Friday, September 11, 2009, in response to a joint motion filed by Complaint Counsel and Respondent pursuant to Rule 3.25(b) of the Commission Rules of Practice. To facilitate further consideration of a proposed consent agreement, the Commission has determined to further extend the withdrawal of this matter from adjudication. Accordingly,

**IT IS ORDERED THAT** this matter will remain withdrawn from adjudication – and the deadline for Respondent to file its Answer to the Complaint is hereby extended – until 12:01 a.m. on Wednesday, October 14, 2009, at which time this matter will return to adjudicative status under Part 3 of the Commission Rules of Practice.

By the Commission.

Interlocutory Orders, Etc.

**THE M GROUP, INC., D/B/A BAMBOOSA**  
**AND**  
**MINDY JOHNSON, MICHAEL MOORE, AND**  
**MORRIS SAINTSING**

*Docket No. 9340, Order, September 17, 2009*

Order withdrawing the Matter from adjudication.

**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

**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.

**DANIEL CHAPTER ONE  
AND  
JAMES FEIJO**

*Docket No. 9329, Order September 21, 2009*

Order granting joint motion.

ORDER

On September 18, 2009, Complaint Counsel and Counsel for the Respondents filed a Joint Motion requesting that the Commission (1) accept the corrected version of Respondents' Appeal Brief attached to the Joint Motion, as a substitute for the Appeal Brief filed on September 14, 2009; and (2) begin the 30-day period within which Complaint Counsel must file their Answering Brief on September 21, 2009. The Commission has determined to grant the Joint Motion. Accordingly,

**IT IS ORDERED** that the corrected version of Respondents' Appeal Brief filed on September 18, 2009 be and it hereby is accepted as Respondents' Appeal Brief; and

**IT IS FURTHER ORDERED** that Complaint Counsel shall file their Answering Brief on or before October 20, 2009.

By the Commission.

Interlocutory Orders, Etc.

**DANIEL CHAPTER ONE  
AND  
JAMES FEIJO**

*Docket No. 9329, Order, October 2, 2009*

Order granting Respondents' motion for an extension of time to file their Answering Brief.

ORDER

On September 21, 2009, the Commission issued an Order accepting a corrected version of Respondents' Appeal Brief and granting Complaint Counsel a corollary extension until October 20, 2009 by which to file their Answering Brief in this proceeding. Under Commission Rule 3.52, if Respondents' counsel are served with Complaint Counsel's Answering Brief on October 20, 2009, Respondents' Reply Brief will be due on October 29, 2009. On October 1, 2009, Respondents filed a Motion for leave to file their Reply Brief no later than November 4, 2009, because two of their counsel, including their lead counsel, several months ago "committed to participating in out-of-town, professional meetings on October 26-29, 2009," and therefore "would effectively lose four of the seven business days provided by Rule 3.52 to reply to Complaint Counsel's Answering Brief."

Respondents state in their Motion that Complaint Counsel do not object to the proposed extension. The Commission has determined to grant the Motion. Accordingly,

**IT IS ORDERED** that Respondents shall file their Reply Brief on or before November 4, 2009.

By the Commission.

Interlocutory Orders, Etc.

## CARILION CLINIC

*Docket No. 9338, Order, October 14, 2009*

Order withdrawing the Matter from adjudication.

### ORDER

On August 11, 2009, the Commission issued an Order granting a joint motion filed by Complaint Counsel and the Respondent to withdraw this matter from adjudication for the purpose of considering a proposed consent agreement. On September 9, 2009, the Commission issued an Order extending both the withdrawal from adjudication and the deadline for Respondent to file its Answer to the Complaint until October 14, 2009. On October 6, 2009, the Commission accepted for public comment an Agreement Containing Consent Orders (“Consent Agreement”) and issued an Order To Maintain Assets. At that point, Commission Rule 3.25(f), 16 C.F.R. § 3.25(f), became applicable to this proceeding. Accordingly,

**IT IS ORDERED THAT** this matter will remain withdrawn from adjudication as provided by Commission Rule 3.25(f) – and Respondent’s obligation to file an Answer to the Complaint will remain stayed – pending a determination by the Commission with respect to the proposed Consent Agreement, pursuant to Commission Rule 3.25(f).

By the Commission.

Interlocutory Orders, Etc.

**DANIEL CHAPTER ONE**  
**AND**  
**JAMES FEIJO**

*Docket No. 9329, Order, October 16, 2009*

Order denying motion to reschedule the Oral Argument.

ORDER DENYING MOTION TO RESCHEDULE ORAL ARGUMENT

On October 13, 2009, the Commission issued a Notice scheduling the Oral Argument in this matter for Thursday, December 3, 2009, at 1 p.m. Complaint Counsel have now filed a Motion requesting that the Commission reschedule the Oral Argument to December 10, 2009 or a later date. Complaint Counsel advised in the Motion that Leonard L. Gordon, the Director of the Commission's Northeast Regional Office, and Lead Complaint Counsel in this proceeding, will be out of the country for the ten days immediately preceding December 3, 2009. Complaint Counsel further advise that Respondents do not object to the Motion.

The Commission understands and is sympathetic to the timing concerns that Complaint Counsel cite in their Motion. However, the Motion does not indicate that Director Gordon's absence from the United States for the ten days preceding December 3 will either prevent him from participating in the Oral Argument or prevent Complaint Counsel from adequately preparing for the Oral Argument. Moreover, Respondents' Reply Brief must be filed by November 4, 2009, and, as a consequence of January 2009 revisions to in a number of the Commission Rules governing adjudicative proceedings in January of this year, Commission Rule 3.52(b)(2) now provides that the Commission "will schedule oral argument within 15 days after the deadline for the filing of any reply briefs." 16 C.F.R. § 3.52(b)(2). While the revised Rules technically do not apply to this proceeding -- because the Administrative Complaint was issued last year<sup>1</sup> -- the

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<sup>1</sup> See generally Federal Trade Commission, *Interim Final Rules With Request for Comment*, 74 Fed. Reg. 1804 (January 13, 2009); see also Federal Trade Commission, *Final Rule*, 74 Fed. Reg. 20205 (May 1, 2009).

## Interlocutory Orders, Etc.

Commission has nevertheless determined to adhere as closely as possible to the post-briefing appellate timetables prescribed by the revised Rules. The Commission's determination to designate December 3rd as the date for the Oral Argument derives from that objective and related considerations. Accordingly,

**IT IS ORDERED** that Complaint Counsel's Unopposed Motion To Reschedule Oral Argument be, and it hereby is, denied.

By the Commission.



Interlocutory Orders, Etc.

**DANIEL CHAPTER ONE**  
**AND**  
**JAMES FEIJO**

*Docket No. 9329, Order, November 16, 2009*

Order giving Complaint Counsel and Respondent each 30 minutes to present their oral arguments.

**ORDER REGARDING ORAL ARGUMENT**

The Oral Argument on the Appeal which the Respondents have filed from the Initial Decision in this matter has been scheduled for Thursday, December 3, 2009, at 1:00 p.m., in Hearing Room 532-H of the Headquarters Building of the Federal Trade Commission, located at 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The Respondents and Complaint Counsel have now completed their briefing of the matter, and the Commission has determined that sixty minutes should be sufficient to satisfy the purpose of the Oral Argument; that is, “to emphasize and clarify the written argument appearing in the briefs and to answer questions.” Commission Rule 3.52(h), 16 C.F.R. § 3.52(h). Accordingly,

**IT IS ORDERED** that Respondents and Complaint Counsel will each be allotted thirty minutes to present their respective arguments. As the appellants in this matter, Respondents will have the opportunity to open the argument, and to reserve up to five minutes of their time for rebuttal.

By the Commission.

Interlocutory Orders, Etc.

**BASF SE**

*Docket No. C-4253, Order, December 4, 2009*

Order approving respondent's application for Commission approval of proposed divestiture of BASF's Ciba BV Business and the Ciba IB Business to Dominion Colour Corporation.

LETTER APPROVING APPLICATION FOR DIVESTITURE OF ASSETS

Dear Mr. Schlossberg:

This letter responds to the October 16, 2009, Petition of BASF For Approval of Proposed Divestiture ("Petition") requesting that the Commission approve BASF's divestiture of the Ciba BV Business and the Ciba IB Business to Dominion Colour Corporation ("DCC") pursuant to the order in this matter. The Petition was placed on the public record for comments for thirty days, until November 17, 2009, and no comments were received.

After consideration of the proposed transaction as set forth in the Petition and supplemental documents, as well as other available information, the Commission has determined to approve the divestiture of the Ciba BV Business and the Ciba IB Business to DCC. In according its approval, the Commission has relied upon the information submitted and representations made in connection with BASF's Petition, and has assumed them to be accurate and complete.

By direction of the Commission.

# RESPONSES TO PETITIONS TO QUASH OR LIMIT COMPULSORY PROCESS

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## THORATEC CORPORATION, AND HEARTWARE INTERNATIONAL, INC.

*FTC File No. 091-0064, Decision, July 21, 2009*

### RESPONSE TO HEARTWARE INTERNATIONAL, INC.'S PETITION TO LIMIT OR QUASH SUBPOENAS *AD TESTIFICANDUM*

Dear Mr. Buffier:

On June 26, 2009, HeartWare International, Inc. ("HW") filed its Petition to Limit or Quash Subpoenas *Ad Testificandum* Dated April, 24, 2009 ("Petition").<sup>1</sup> The challenged subpoenas were issued in the Commission's investigation to determine whether there is reason to believe that Thoratec Corp.'s acquisition of HW would violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, or Section 7 of the Clayton Act, 15 U.S.C. § 18. This letter advises you of the Commission's disposition of the Petition seeking to limit or quash subpoenas issued to Messrs. Douglas Godshall and James Schuermann for oral testimony at investigational hearings conducted (and to be continued) in accordance with the provisions of Commission Rules 2.8, 2.8A and 2.9, 16 C.F.R. §§ 2.8, 2.8A, 2.9.<sup>2</sup> The Petition was referred to

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<sup>1</sup> Commission Rule 2.7(d)(1), 16 C.F.R. § 2.7(d)(1), requires that a petition to limit or quash a subpoena be filed prior to the subpoena's return date or within twenty days after service, whichever first occurs. Even though this Petition may be untimely under a technical reading of the rule, the Commission will entertain it because the events giving rise to HW's claims for relief did not occur until after the expiration of the filing deadline, and HW's Petition was filed promptly after receipt of staff's June 24 letter announcing the reconvening of the investigational hearings.

<sup>2</sup> In ruling on the Petition, the Commission does not reach the issue of whether HW has standing to file the Petition without joining Messrs. Godshall and Schuermann as parties to the Petition. While the Commission understands that counsel for Petitioner also represents Messrs. Godshall and Schuermann, no statement to that effect appears in the Petition. The Commission assumes that the individuals subpoenaed are aware of the instant

## Responses to Petitions to Quash

the full Commission for determination by Commissioner Pamela Jones Harbour, acting in her sole discretion as the Commission's delegate pursuant to the provisions of Rule 2.7(d)(4), 16 C.F.R. § 2.7(d)(4).

**I. Background and Summary**

The Federal Trade Commission issued subpoenas *ad testificandum* on April 24, 2009 (“subpoenas”), to Douglas Godshall and James Schuermann for oral testimony at investigational hearings. Mr. Godshall is HW’s President and Chief Executive Officer. Mr. Schuermann is the Vice President for Sales and Marketing for HW. Investigational hearings were held on June 5<sup>th</sup> (Godshall) and June 11<sup>th</sup> (Schuermann). During the course of these investigational hearings, testimony was withheld by the witnesses upon advice of counsel because the admission of an exhibit, or the testimony being sought, would have elicited information that might be subject to claims of attorney-client privilege and/or the work-product doctrine. Counsel objected to the use of Godshall Exhibit No. 10 (two emails and an attached revenue model spreadsheet) on the ground that the documents had been inadvertently produced, and were subject to both attorney-client privilege and the work-product doctrine.<sup>3</sup> HW’s counsel requested the return of the inadvertently produced documents. Commission counsel briefly questioned the witness regarding the factual bases for the privilege claim, and obtained information indicating this exhibit was produced at the “explicit” request of Mr. Buffier,<sup>4</sup> and that it had been requested as part of the “joint defense” of the proposed merger.<sup>5</sup>

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Petition and have elected not to raise any additional objections particular to themselves regarding further compliance with the subpoenas.

<sup>3</sup> Godshall IH 245:12-249:20, Jun. 5, 2009. The exhibit was described by Commission counsel as consisting of two emails and a spreadsheet “entitled HeartWare revenue model.” *Id.* at 245:20. The top email was from Godshall to Schuermann dated April 15, 2009, “subject re e-mailing HVAD financials JFApril09.XLS.” *Id.* at 245:21-23. The transcript provides no further information regarding either the identity of the second email or the contents of either email or the attachment.

<sup>4</sup> *Id.* at 246:4

<sup>5</sup> *Id.* at 248:7-12.

## Responses to Petitions to Quash

Commission counsel then stated that the privilege and work-product issues would be submitted to the Commission's General Counsel for an evaluation of the protections claimed and instructions regarding the proper disposition of the documents. At the same time, staff reserved the right to recall Mr. Godshall for further testimony, depending on the determination of the General Counsel regarding the documents.<sup>6</sup> HW's counsel also reserved its right to object.<sup>7</sup>

Later during the Godshall investigational hearing, counsel instructed the witness not to respond to questions regarding the substance of his conversations with customers regarding their reaction to the proposed merger transaction on the grounds that communications at the request of counsel were protected by the work-product doctrine.<sup>8</sup> HW's counsel made a clear distinction between (1) the substance of the conversations between the witness and customers undertaken at the behest and under the supervision of counsel, and (2) the identity of the third parties with whom the conversations were held.<sup>9</sup> Mr. Godshall identified ten customers with whom he spoke on behalf of HW's counsel, and one further person with whom he might have had such a conversation. He was not, however, permitted to testify as to the

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<sup>6</sup> *Id.* at 249:10-18. Staff subsequently advised HW's counsel that the staff would delete these documents from their files, and advised that such deletion did not constitute the Commission's agreement as to the validity of the protections being asserted. Petition, Exhibit E at 1 (Letter from James Southworth to Beau Buffier, dated June 12, 2009). Staff also requested "a written description of the process used to review HeartWare's submission for privileged materials." *Id.* The Commission understands that HW has not provided either the requested information regarding HW's privilege review processes or an updated privilege log that includes the deleted documents.

<sup>7</sup> *Id.* at 249:19-20.

<sup>8</sup> *Id.* at 287:7-12, and 20-21.

<sup>9</sup> The conversation between the witness and third parties was subject to work-product protection, but the identities of the third parties were not subject to such protections, according to HW's counsel. *Compare id.* at 288:17-20 (Mr. Buffier: "I'm going to instruct Mr. Godshall not to answer if any of [the substance of] those communications were held at the direction of legal counsel.") *with id.* at 287:20-21 (Mr. Buffier: "You can answer if you remember which doctors [you spoke with].").

## Responses to Petitions to Quash

substance of those conversations, regarding either the questions asked or the answers given.

In similar manner, Mr. Schuermann was permitted to testify regarding conversations he had with customers regarding their reactions to the transaction when those conversations were not pursuant to counsel's request and direction.<sup>10</sup> The witness did provide some limited information regarding conversations with third parties about the transaction when those discussions had not been undertaken at the direction of counsel. Counsel for HW advised

Mr. Schuermann not to answer any questions about the substance of any conversations that he had with third parties at the direction of counsel.<sup>11</sup>

Subsequent conversations between Bureau of Competition staff and HW's counsel were not successful in resolving the dispute regarding the witnesses' right to withhold answers regarding the substance of conversations undertaken at the request of counsel, and the revenue model and associated documents. On June 24, staff sent a letter to HW's counsel directing the reappearance of the witnesses "to provide testimony regarding communications they had with customers about the proposed acquisition," stating staff's belief that HW had not "established the necessary factual predicate to show that this information is protected work product."<sup>12</sup> The letter further directed the witnesses to reappear to answer questions about "sales and market shares with respect to any relevant product being developed by HeartWare," citing HW's privilege claims respecting the revenue model as the reason for not having examined Mr. Schuermann

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<sup>10</sup> Schuermann IH 235:12-15, Jun. 11, 2009 (Ms. Delbaum: "At this point, Mr. Schuermann, I'll just caution you not to reveal any communications that you had at our request. If you have knowledge of customer reaction outside of that, feel free to answer.").

<sup>11</sup> *Id.* at 250:18-25.

<sup>12</sup> Petition, Exhibit C (Letter from James Southworth to Beau Buffier, dated Jun. 24, 2009) at 1.

## Responses to Petitions to Quash

about sales and market shares during his investigational hearing on June 11.<sup>13</sup>

The Petition, dated June 26, 2009, was filed on June 29. The Petition seeks to limit or quash the reappearance of the witnesses for further investigational hearing examination. Petition at 19. In addition to reiterating HW's claims of attorney-client privilege and work-product protections, the Petition claims that it would be unduly burdensome to require Mr. Schuermann "to return to Washington, D.C. for further hearings," Petition at 18, because staff already had an extended opportunity in which these issues could have been raised with Mr. Schuermann.

**II. Third-Party Interviews by HeartWare's Managers at the Direction of Counsel in Anticipation of Litigation Are Entitled to Protection as Trial Preparation Materials.**

Commission Rule 2.9(b)(2), 16 C.F.R. § 2.9(b)(2), permits a witness at an investigational hearing to refuse to answer questions the answers to which are privileged. That rule, however, does not provide any guidance regarding the perimeters of the privileges that may be asserted. The Commission will read Rule 2.9(b)(2) *in pari materia* with Rule 3.31(c)(3)(Hearing preparations: Materials.), 16 C.F.R. § 3.31(c)(3). The latter rule protects trial preparation materials from discovery if they were "prepared in anticipation of litigation or for hearing by or for another party or by or for that other party's representative (including the party's attorney, consultant, or agent)." *Id.* The protections afforded by this rule are not absolute; they may be overcome upon a showing that the party seeking discovery has substantial need of the materials in preparation of its case and that the party is unable without undue hardship to obtain substantially equivalent materials by other means. In ordering discovery of such materials when the required showing has been made, the Administrative Law Judge *shall* protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

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<sup>13</sup> *Id.* at 1-2.

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*Id.* (emphasis added). The protections afforded to trial preparation materials under Rule 3.31(c)(3) are substantially similar to the work-product doctrine. See 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE 2D §§ 2021 - 2028 at 313-415 (1994); *Hickman v. Taylor*, 329 U.S. 495 (1947). Our rule should be construed accordingly.

Commission staff do not appear to question that some third-party interviews undertaken by these two witnesses were done in anticipation of litigation for HW or its attorneys, and at the direction of counsel. Mr. Godshall's testimony on the latter point stands un rebutted in this record:

Q: Have you talked to any customers about this transaction?

A: I've spoken with many customers and have been advised by – have been requested by counsel to speak to customers, to help educate counsel as well as to collect customer opinion. So since the transaction, my customer discussions on the subject of this deal have been at the direction of counsel.

Godshall IH at 286:18-25. On the current record, HW has provided an adequate factual basis to support its assertion that customer interviews conducted by HW managers at the direction of counsel in anticipation of litigation are entitled to trial preparation materials protections within the meaning of Rules 2.9(b)(2) and 3.31(c)(3).

Commission staff could only overcome the qualified protections of Rule 3.31(c)(3) by showing that there was a “substantial need [for the customer interview materials] . . . and that [staff are] unable without undue hardship to obtain substantial equivalent materials by other means.” Customer reactions to prospective mergers are important to the merger review process; however, that importance, standing alone, is not sufficient to overcome the protections of our rule under the circumstances. The Commission understands that staff have had a reasonable opportunity to interview each of HW's customers identified in the investigational hearing testimony of Messrs. Godshall and Schuermann. The record does not support a finding that staff are



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“unable without undue hardship to obtain the substantial equivalent of the [customer interviews identified by the testimony of Messrs. Godshall and Schuermann] by other means.” *Id.* The Commission also believes that staff can obtain comparable information from other third-party interviewees, at least to the extent that the identity of those third parties has been provided by HW.<sup>14</sup> Accordingly, the Petition shall be granted in part.<sup>15</sup>

**III. Additional Investigative Hearing Time Is Not Unduly Burdensome.**

HW has not demonstrated that resumption of the investigational hearings is unwarranted. Directing the witnesses to reappear for further examination regarding sales and market shares does not necessarily raise any claim of privilege.<sup>16</sup> HW’s does not dispute staff’s right to question Mr. Schuermann regarding sales and market share information.<sup>17</sup> Rather, it objects to the resumption of Mr. Schuermann’s investigational hearing on the grounds that staff had, and failed to avail themselves of, the

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<sup>14</sup> HW does not contest its obligation to identify the customers whose interviews were conducted by its managers at the request of counsel in anticipation of litigation. Godshall IH at 287:20-21. *See also Upjohn Co. v. United States*, 449 U.S. 383, 396 (1981) (“Upjohn has provided the IRS with a list of such employees, and the IRS has already interviewed some 25 of them.”).

<sup>15</sup> Granting the Petition in part recognizes the validity of the privilege claim, but is not a limitation upon staff’s right to ask questions regarding customer interviews, including without limitation issues related to: (1) the unprivileged details of otherwise privileged conversations, (2) issues related to the scope of privilege being claimed with respect to otherwise privileged conversations, or (3) the further examination of the factual bases for such claims of privilege. In any subsequent questioning, HW may assert further privilege claims, and staff may seek resolution of such claims through a district court enforcement action commenced by the FTC’s General Counsel in accordance with the provisions of Rule 2.13, 16 C.F.R. § 2.13.

<sup>16</sup> Staff’s request to resume the investigational hearings of the witnesses may be based in part on HW’s assertion that Godshall Exhibit 10 is protected by claims of privilege and the work-product doctrine, but that does not provide a ground for prohibiting the resumed examination of these witnesses. It is not necessary to resolve whether that exhibit is privileged to dispose of the Petition.

<sup>17</sup> Petition at 17-18.

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opportunity to examine Mr. Schuermann regarding those subjects during the first 9½ hours (including breaks) of his investigational hearing on June 11. Petition at 18. HW claims that staff should not have a “second bite of the apple” because doing so would constitute an “abuse of process” and would be “presumptively unreasonable” in light of the 7-hour limitation on civil litigation depositions conducted pursuant to Fed. R. Civ. P. 30(d)(1). Petition at 18-19.

The mistake lies in HW’s assumption that Commission investigational hearings should be governed, by analogy, by the limitations included within the Federal Rules of Civil Procedure. To the extent that the scope of the Commission’s Rules of Practice regarding its conduct of investigations should be construed by analogy to some other legal activities, the Supreme Court has observed that the appropriate analogy is to the grand jury, not to civil litigation.<sup>18</sup> Commission rules applicable to the conduct of investigational hearings do not include time limitations comparable to those cited by HW’s Petition.<sup>19</sup> Rule 2.9(b)(6) vests the person conducting an investigational hearing with broad discretion to “take all necessary action[s] to regulate the course of the hearing;” that, of necessity, includes the discretion to adjourn and reconvene a hearing at a later date, especially when, as here, doing so will permit all parties to the hearing to become better informed regarding the scope and validity of any claimed rights to withhold particular evidence or testimony.

HW claims that the Commission should prohibit reconvening these adjourned investigational hearings because reconvening them will impose a “substantial burden and expense” for these

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<sup>18</sup> *Fed. Trade Comm’n v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950) (“[The FTC] has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurances that it is not. When investigatory and accusatory duties are delegated to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law.”).

<sup>19</sup> See Rules 2.8 (Investigational Hearings), 2.8A (Withholding Requested Materials), and 2.9 (Rights of Witnesses in Investigations), 16 C.F.R. §§ 2.8, 2.8A, 2.9.

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witnesses. Petition at 3 and 18. HW cites no legal authority for its burdensomeness claim.<sup>20</sup> Accordingly, the Commission finds that the burdens claimed are not of a magnitude sufficient to justify the discretionary quashing of these subpoenas by the Commission.<sup>21</sup> That said, the Commission is aware that reconvening investigational hearings will impose some burden. The Commission encourages staff to consider reconvening these investigational hearings at a location that will mitigate some of the travel burden for the witnesses.<sup>22</sup>

**IV. CONCLUSION AND ORDER**

For all the foregoing reasons, **IT IS ORDERED THAT** the Petition be, and it hereby is, **GRANTED** in part and **DENIED** in part.

**IT IS FURTHER ORDERED THAT** Commission staff may, subject to Petitioner's right to withhold information in accordance with the terms of the Commission's Rules of Practice and this Letter Ruling, reconvene the adjourned investigational hearings of

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<sup>20</sup> Furthermore, HW does not contest the relevance of the subject area to be covered in the resumed investigational hearing. Petition at 17-18 (“[HW] has never disputed or objected to Mr. Schuermann being questioned as to his views on ‘sales and market shares with respect to any relevant product being developed by HeartWare.’ [HW’s] sole objection has been with respect to questions about the substance of the document (and communications surrounding the document) to the extent that such questions would divulge information protected by the work-product doctrine or the attorney-client privilege.”).

<sup>21</sup> See *Fed. Trade Comm’n v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (*en banc*) (“Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency’s legitimate inquiry and the public interest. . . . Thus, courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.”). HW has provided the Commission with no cognizable justification for why it should afford HW greater relief than it could obtain from a district court in a subpoena enforcement action initiated by the Commission.

<sup>22</sup> The Commission does not know whether staff will need to recall both witnesses in light of this ruling, or whether they ever intended to re-examine Mr. Godshall concerning sales and market shares; the latter point was unclear from the June 24 letter to HW’s counsel.

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Messrs. Godshall and/or Schuermann at such dates and times as they may direct in writing, in accordance with the powers delegated to them by 16 C.F.R. § 2.9(b)(6).

By direction of the Commission.

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**CEPHALON, INC.***FTC File No. 061-0182, Decision, November 13, 2009*RESPONSE TO WATSON PHARMACEUTICALS, INC.'S PETITION TO  
LIMIT OR QUASH SUBPOENAS *AD TESTIFICANDUM*

Dear Mr. Sunshine:

On July 30, 2009, Paul M. Bisaro (Petitioner), the President and Chief Executive Officer of Watson Pharmaceuticals, Inc. ("Watson"), filed a Petition to Quash Subpoena *Ad Testificandum* Dated July, 22, 2009 ("Petition"). The challenged subpoena was issued in the Commission's ongoing investigation to determine whether Watson, or others, are depriving consumers of access to lower-cost, generic modafinil drug products through any unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

In the course of the investigation, a subpoena was issued for Petitioner's testimony at an investigational hearing ("IH") to be held on July 31, 2009 at the Commission's offices at 601 New Jersey Ave., N.W. in Washington, DC.<sup>1</sup> Petitioner did not provide the requested testimony. Instead, he filed a Petition asking the Commission to quash the subpoena on the grounds that (a) the Commission already has all the information that it might obtain from his responses to any questions propounded in such an investigational hearing;<sup>2</sup> (b) the subpoena is unreasonable in that it seeks the testimony of a high-level corporate executive;<sup>3</sup> and (c) the subpoena purportedly was issued for an improper purpose.<sup>4</sup>

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<sup>1</sup> Petition, Exhibit A at 1 (Subpoena *Ad Testificandum* issued to Paul Bisaro on July 27, 2009).

<sup>2</sup> *Id.* at 15-17.

<sup>3</sup> *Id.* at 17-19.

<sup>4</sup> *Id.* at 19-20. Watson also suggests (without supporting authority) that the investigatory resolution cited by staff as authority for issuing the instant subpoena expired when the Commission instituted a civil action against Cephalon in February 2008. *Id.* at 15 note 73. This claim is without merit. This is a continuing resolution that contains no time or other limitations. The

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The record does not support these claims. Therefore, the relief requested by the Petition is denied.

This letter advises you of the Commission's disposition of the Petition.<sup>5</sup> This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission's delegate. *See* 16 C.F.R. § 2.7(d)(4). Pursuant to 16 C.F.R. § 2.7(f), Petitioner has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.<sup>6</sup>

### Background and Summary

Watson develops, manufactures, and markets generic versions of brand-name drugs. In December 2004, Watson and its development partner (Carlsbad Technology, Inc.), filed an abbreviated new drug application ("ANDA") for a modafinil product with the United States Food and Drug Administration ("FDA"). Modafinil is the active ingredient in a wakefulness-enhancing drug that at present is distributed in the United States exclusively by Cephalon, Inc. under the brand name Provigil®. Provigil is covered by two Cephalon patents that are relevant to the Petition: U.S. Reissued Patent No. 37,516 ("the '516 Patent"); and U.S. Patent No. [REDACTED ] Patent"). Petition at 3, 6.

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Commission's litigation against Cephalon has no effect on the Commission's ability to continue the investigation of other parties for potential acts of wrongdoing covered by the resolution. Watson also claims the subpoena is unreasonably burdensome because it is returnable in Washington, DC rather than New Jersey, Mr. Bisaro's place of residence. *Id.* at 14 note 72, 19. Petitioner, however, provides no factual basis for this claim of burden.

<sup>5</sup> The request for confidential treatment in the Petition is under review by the Commission Office of General Counsel. Pending the completion of that review, the bracketed material in boldface print in this letter ruling will be redacted from the public record version of this letter ruling. The public record version of this letter ruling will be placed on the public record, including the public Commission Website, at or after 9 a.m. on November 30, 2009.

<sup>6</sup> This letter ruling is being delivered by facsimile and express mail. The facsimile copy is provided as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you received the original by express mail. In accordance with the provisions of 16 C.F.R. § 2.7(f), the timely filing of a request for review of this matter by the full Commission shall not stay the return date established pursuant to this decision.

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On December 22, 2002, four manufacturers of generic drugs (the so-called four “first filers” for the ‘516 Patent) filed Paragraph IV ANDAs for modafinil – the first step in opening the U.S. market for modafinil to generic competition. Under the Hatch-Waxman Act (the Drug Price Competition and Patent Restoration Act of 1984, Pub. L. 98-417, as amended), the first firm(s) to file a Paragraph IV ANDA for a generic version of a branded drug are eligible for a 180-day period of marketing exclusivity before the FDA can approve later filed ANDAs. Petition at 3. The first-filers’ ANDAs certified that their generic versions of modafinil products either did not infringe Cephalon’s patents listed in the FDA’s Orange Book, or that those patents were invalid. *Id.*<sup>7</sup> Watson and Carlsbad filed their ANDA for modafinil on August 2, 2006, and were not first filers on the ‘516 patent; however, they were sued by Cephalon for patent infringement and did obtain a license to market generic modafinil as part of the settlement agreement for that suit. Sunshine Decl. at ¶ 7. Under that license, Watson may commence modafinil marketing on April 6, 2012. Petition at 4 n.6.

**[REDACTED  
REDACTED  
REDACTED  
REDACTED**

**REDACTED**

**REDACTED  
REDACTED**

.] Sunshine Decl. at ¶¶ 13-14.<sup>8</sup>

On February 13, 2008, the FTC filed an action against Cephalon, alleging that its settlements of the ensuing patent infringement litigation with the four first filers for the ‘516 Patent prevented generic competition to Provigil® in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. “None of the four first filers for the ‘516 Patent – at least some of whom

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<sup>7</sup> At that time, Cephalon’s listing in the FDA’s “Orange Book” included the ‘516 Patent, but did not **[REDACTED]** .] *Id.* at 3, Sunshine Decl. at ¶ 13.

<sup>8</sup> **[REDACTED  
REDACTED]**.

**REDACTED**

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had maintained their Hatch-Waxman exclusivity – were named in the FTC’s complaint.” Petition at 5-6.

**I. The Subpoena is Within the Commission’s Authority To Seek Relevant Information in a Law Enforcement Investigation**

The Congress provided the Commission with the power to issue subpoenas because law enforcement investigations, like this one, frequently require the FTC “to get information from those who best can give it and who are most interested in not doing so.” *United States v. Morton Salt Co.*, 338 U.S. 632, 643 (1950). The scope of information that may be required in response to a subpoena is broad. As a general matter, “it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably necessary,” *id.* at 652, and the information sought can be produced without being “unduly burdensome” or disruptive. *Fed. Trade Comm’n v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977). Further, the party who moves to quash an FTC administrative subpoena bears the burden of demonstrating that the subpoena is unreasonable. “[T]he burden of showing that an agency subpoena is unreasonable remains with the respondent, . . . and where, as here, the agency inquiry is authorized by law and the materials sought are relevant to the inquiry, that burden is not easily met. [citations omitted].” *Fed. Trade Comm’n v. Rockefeller*, 591 F.2d 182, 190 (2<sup>nd</sup> Cir. 1979), quoting *Sec. and Exchange Comm’n v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1056 (2<sup>nd</sup> Cir. 1973), *cert. denied*, 415 U.S. 915 (1974). As shown below, Petitioner has not demonstrated that the subpoena issued to Mr. Bisaro fails to meet these criteria. Nothing in *United States v. Powell*, 379 U.S.48 (1964), is to the contrary.

Specifically, an earlier civil investigative demand (CID) asked whether Watson’s settlement agreement with Cephalon [REDACTED REDACTED REDACTED

REDACTED REDACTED REDACTED].<sup>9</sup> The Petition effectively acknowledges

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<sup>9</sup> Petition at 15.



## Responses to Petitions to Quash

that Watson's prior responses regarding these issues have been incomplete. Watson's CID response stated unequivocally, "[REDACTED

**REDACTED**  
**REDACTED.]**"<sup>10</sup> But at the same time, the Petition confirms that Watson's CID response regarding the absence of a potentially illegal agreement was qualified such that its completeness, and accuracy, was questionable. See Petition at 16 n.75.<sup>11</sup>

On June 11, 2009, FTC staff advised Watson that its responses to the Commission's CID were deficient in that the responses failed, among other things, to indicate "the portion(s) of [each] agreement that [REDACTED

**REDACTED**  
**REDACTED]**"<sup>12</sup> Watson declined to supplement its CID responses, stating that the FTC has a copy of the Settlement Agreement, and "The Agreement speaks for itself."<sup>13</sup> Citing attorney-client privilege, Watson declined to state the reasons [REDACTED

**REDACTED ]** because "the decision whether to [REDACTED **REDACTED** ] is inextricably intertwined with legal matters; Watson's internal deliberations regarding this matter implicate legal advice and are protected from disclosure by the attorney-client privilege."<sup>14</sup>

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<sup>10</sup> *Id.* at 16.

<sup>11</sup> *Id.* at 16 note 75.

<sup>12</sup> Letter from Saralisa Brau to Maria Raptis (June 11, 2009) at 1-2.

<sup>13</sup> Letter from Maria Raptis to Saralisa Brau (June 17, 2009) at 2.

<sup>14</sup> *Id.* Mr. Buchen's [REDACTED **REDACTED** **REDACTED]** appear to have been conducted in the ordinary course of business. Likewise, his reports on the progress [REDACTED ] to his corporate superior, Mr. Bisaro, also appear to be ordinary course of business discussions. Petitioner has cited no authority to support a claim that a corporation can shield its day-to-day business activities from scrutiny merely by having those activities discharged by lawyers. See *Fine v. Facet Aerospace Products Co.*, 133 F.R.D. 439, 444 (S.D. NY 1990) (The attorney-client "privilege covers communications made

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Likewise, when FTC counsel asked Mr. Buchen at his investigational hearing on June 25, 2009, whether the patent settlement agreement with Cephalon [REDACTED

[REDACTED], counsel instructed Mr. Buchen not to answer because the Commission was asking “[REDACTED REDACTED].”<sup>15</sup> FTC counsel attempted to elicit additional information regarding particular provisions of the patent settlement agreement between Watson and Cephalon that related to [REDACTED], but Mr. Buchen’s counsel again instructed him not to answer because, “[REDACTED

[REDACTED].”<sup>16</sup>

It is not necessary to address the validity of Watson’s privilege claims to rule on this Petition. *See Petition of Hoechst Marion Roussel, Inc.*, 128 F.T.C. 798, 804 (Nov. 1, 1999) (“The issue here is simply whether Spears must appear for a hearing, not the validity of any privileges Hoechst might claim in response to questions asked during the hearing. Indeed, no assessment of privilege claims is even possible because as yet, no questions have been posed and no proper assertions of privilege have been lodged.”). In the event Mr. Bisaro appears and testifies at an investigational hearing, any unresolved dispute between the FTC and Mr. Bisaro concerning the validity of any privilege asserted will be resolved by the district court, if the Commission elects to challenge particular claims of privilege. See 16 C.F.R. § 2.13.

To summarize, the record clearly shows that fully responsive answers to the Commission’s questions regarding [REDACTED] have not been provided either by Watson or Mr. Buchen. The Commission understands that Mr. Bisaro is the only other Watson employee who possesses any knowledge regarding these issues.<sup>17</sup>

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in connection with the rendering of legal advice, it does not extend to the provision of business and management advice.”).

<sup>15</sup> Buchen IH 44:22-24, Jun. 25, 2009.

<sup>16</sup> Buchen IH 48:9-12. This privilege claim, however, fails to account for the Commission’s right to obtain information regarding Watson’s understanding of the duties and limitations that Watson, or its managers believe were imposed upon the firm by reason of this contract.

<sup>17</sup> Petition at 17; Buchen IH 39:1.

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Thus, Mr. Bisaro's testimony is necessary in order for the Commission to satisfy itself that the law is not being violated.<sup>18</sup> Furthermore, Watson's claim that its settlement with Cephalon "speaks for itself,"<sup>19</sup> lacks all merit. Mr. Bisaro's knowledge of the document and its meaning has independent evidentiary value. Thus, contrary to Petitioner's claims, the instant subpoena does not seek information that is already in the Commission's possession. Furthermore, whether the materials and testimony that have been made available to the Commission thus far satisfy its investigative needs is a matter for the Commission to determine, not Petitioner. *See Sec. and Exchange Comm'n v. Arthur Young & Co.*, 584 F.2d 1018, 1031 (D.C. Cir. 1978) ("The breadth of an investigation is for the investigators to determine."). There is therefore no apparent justification for Mr. Bisaro to refuse to answer questions regarding his understanding of Watson's settlement agreement with Cephalon.

## II. Exhaustion of Other Investigational Avenues Is Not Required

There is no support for Petitioner's claim that the FTC may only take testimony from Watson's CEO when it can show that he has personal information that is not obtainable through other means.<sup>20</sup> The initial mistake lies in Petitioner's assumption that the Commission's investigational hearings should be governed, by

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<sup>18</sup> *Morton Salt Co.*, 338 U.S. at 642-43.

<sup>19</sup> Letter from Maria Raptis to Saralisa Brau (June 17, 2009) at 2.

<sup>20</sup> Petitioner's reliance on cases holding that a district court judge has discretion to defer discovery depositions of a company's CEO until after other discovery means have been exhausted is not relevant to resolving the Petition. Petition at 17-20. Many of the cases relied upon by Petitioner appear to involve claims asserted by lower level employees in remote company offices about which the CEO was unlikely to have been either involved or informed. For instance, in *Thomas v. Internat'l Bus. Mach.*, 48 F.3d 478 (10<sup>th</sup> Cir. 1995), a wrongful termination suit, the court affirmed the district court's grant of a protective order where a former clerical employee in IBM's Oklahoma City marketing office sought to compel the CEO, located in New York, to appear in Oklahoma City for a deposition on five days notice. The record in that case indicated that the CEO did not have any knowledge of the employee, the quality of her prior work, or the reasons for her termination.

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analogy, by discretionary limitations that may be placed on depositions conducted pursuant to the Federal Rules of Civil Procedure. Counsel has not provided appropriate authority to support its claim that the Commission can only take testimony from Mr. Bisaro regarding relinquishment as a last resort, and then only if the Commission can show that he has personal knowledge of the subjects that will be examined during the investigational hearing.<sup>21</sup>

More importantly, only Mr. Buchen and Mr. Bisaro possess relevant knowledge regarding the [REDACTED] issues being investigated by the Commission.<sup>22</sup> Counsel has instructed Mr. Buchen not to tell the FTC which provisions of the Cephalon settlement agreement related to [REDACTED] other than a provision regarding Cephalon's obligation to [REDACTED REDACTED].<sup>23</sup>

Unlike Mr. Buchen, Mr. Bisaro is not the General Counsel of Watson; rather, he is Watson's CEO. Mr. Bisaro is an attorney with significant prior business experience as both the general counsel and chief operating officer of another generic drug company.<sup>24</sup> Mr. Bisaro appears to be competent to answer questions regarding the Cephalon settlement agreement without having to disclose any privileged communications that he might have had with Mr. Buchen.

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<sup>21</sup> Petition at 17-18.

<sup>22</sup> Buchen IH at 39:1.

<sup>23</sup> *Id.* at 47:10-11. The relationship between Cephalon's [REDACTED] obligations to Watson and [REDACTED ] are not obvious. This is especially true in light of other provisions in that agreement that appear more likely to be related to [REDACTED ]; provisions about which Mr. Buchen was instructed by counsel not to testify. *Id.* at 51:6.

<sup>24</sup> Press Release, Watson, Watson Announces CEO Succession Plan (Aug. 2, 2007), available at: <http://ir.watson.com/phoenix.zhtml?c=65778&p=irol-newsArticle&ID=1035647&highlight=> (Last Visited Oct. 2, 2009).

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**III. The Subpoena Was Issued for A Proper Purpose.**

Petitioner claims that the subpoena should be quashed because it was issued by the FTC for an improper purpose – namely, “[REDACTED REDACTED REDACTED].”<sup>25</sup>

The analysis of the purpose for the issuance of this subpoena must begin by an examination of the resolution authorizing staff to use compulsory process in conducting this investigation.<sup>26</sup> The Commission’s resolution of August 30, 2006 authorized FTC staff to use compulsory process to “determine whether Cephalon, Inc., . . . Watson . . ., or others have engaged in any unfair methods of competition” in violation of the FTC Act “by entering into agreements regarding any modafinil product.”<sup>27</sup> Watson does not claim that an agreement not to [REDACTED

] regarding modafinil products is beyond the scope of the resolution, nor does it claim that its patent settlement and license with Cephalon would be beyond the scope of the resolution. Further, Watson does not claim that the Bisaro investigational hearing is beyond the scope of the resolution. Thus, the subpoena to Mr. Bisaro is authorized by the resolution, and Petitioner has the burden of establishing the existence of “extraordinary circumstances” before a further inquiry into the *bona fides* of this subpoena would be appropriate. *Carter*, 636 F.2d at 789.<sup>28</sup>

Petitioner speculates that the “[REDACTED REDACTED REDACTED

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<sup>25</sup> Petition at 19.

<sup>26</sup> *Fed. Trade Comm’n v. Invention Submission Corp.*, 965 F.2d 1086, 1092 (D.C. Cir. 1992), citing *Fed. Trade Comm’n v. Carter*, 636 F.2d 781, 789 (D.C. Cir. 1980).

<sup>27</sup> Petition, Exhibit B.

<sup>28</sup> The full scope of Petitioner’s burden is demonstrated by the D.C. Circuit’s reliance on *Donaldson v. United States*, 400 U.S. 517, 534-35 (1971), for the proposition that an administrative subpoena must be enforced whenever a valid purpose appears, even if an otherwise improper purpose also appeared.

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**REDACTED]**”<sup>29</sup> Rather than cooperate in the investigation, Watson has chosen to rely instead on incomplete and contradictory answers, and on dubious claims of privilege.<sup>30</sup> These stratagems deprive Petitioner’s speculations of probative value. Petitioner acknowledges that FTC staff have expressed concerns that certain provisions of the settlement agreement with Cephalon might delay consumer access to lower-cost generic drugs and violate the FTC Act.<sup>31</sup> Those concerns, even without considering Watson’s incomplete and contradictory responses to CIDs and subpoenas, provide ample grounds for asking Mr. Bisaro to sit for an investigational hearing as part of the Commission’s continuing investigation.

**CONCLUSION AND ORDER**

For all the foregoing reasons, **IT IS ORDERED THAT** the Petition be, and it hereby is, **DENIED**.

**IT IS FURTHER ORDERED THAT** Commission staff may reschedule the investigational hearing of Mr. Bisaro at such date and time as they may direct in writing, in accordance with the powers delegated to them by 16 C.F.R. § 2.9(b)(6).

By direction of the Commission.

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<sup>29</sup> Petition at 19-20.

<sup>30</sup> This record lends a hollow ring to any claim that Watson has “cooperated fully” throughout this investigation. Petition at 5, Sunshine Decl. at ¶ 12.

<sup>31</sup> Petition, Exhibit N at 2 (Letter from Maria Raptis to Saralisa Brau, dated July 21, 2009).

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**LIQUIFIED PETROLEUM GAS INVESTIGATION***FTC File No. 091-0115, Decision, December 3, 2009*RESPONSE TO RAMÓN GONZÁLEZ CORDERO'S AND RAMÓN  
GONZÁLEZ SIMONET'S PETITION TO QUASH OR MODIFY CIVIL  
INVESTIGATIVE DEMAND AND SUBPOENA *AD TESTIFICANDUM*

Dear Mr. Méndez-Gómez:

The Commission is investigating whether Empire Gas, Inc. and Liquilux Gas Corp, or others, are engaged in violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, or violations of federal antitrust laws, including without limitation price fixing, customer allocation, exclusive dealing, unlawful acquisitions, or other conduct regarding liquified petroleum gas ("LPG") or related products in Puerto Rico. Petition at 2. On November 19, 2009, Petitioners, Ramón González Cordero and Ramón González Simonet, officers of Empire and Liquilux, timely filed a petition to quash or modify civil investigative demands ("CID") and subpoenas *ad testificandum* on the grounds that: (1) the FTC does not have jurisdiction to investigate the conduct of Empire and Liquilux because their conduct is not covered by the FTC Act or the federal antitrust laws by reason of the state action doctrine, Petition at 3-5; and (2) the returns on the subpoenas, if required, should be held in Puerto Rico, not Washington, DC, Petition at 13. These claims are wholly without merit, and the Petition must, therefore, be denied.

This letter advises you of the Commission's disposition of the Petition. This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission's delegate. *See* 16 C.F.R. § 2.7(d)(4). Pursuant to 16 C.F.R. § 2.7(f), Petitioner has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.<sup>1</sup>

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<sup>1</sup> This letter ruling is being delivered by e-mail and express mail. The e-mailed copy is provided as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you received the original by express mail. In accordance with the provisions of 16 C.F.R. § 2.7(f), the

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**This Challenge to the FTC's Jurisdiction Is Premature.**

“With rare exceptions . . . , a subpoena enforcement action is not the proper forum in which to litigate disagreements over an agency’s authority to pursue an investigation. Unless it is patently clear that an agency lacks the jurisdiction that it seeks to assert, an investigative subpoena will be enforced.” *Fed. Trade Comm’n v. Ken Roberts Co.*, 276 F. 3d 583, 584 (D.C. Cir. 2001). “[A]t the subpoena enforcement stage, courts need not determine whether the subpoenaed party is within the agency’s jurisdiction or covered by the statute it administers; rather the coverage determination should wait until an enforcement action is brought against the subpoenaed party.” *United States v. Construction Prods. Research, Inc.* 73 F.3d 464, 470 (2d Cir. 1996). Investigations should not be bogged down prematurely with jurisdictional challenges. *Fed. Trade Comm’n v. Monahan*, 832 F. 2d 688, 690 (1<sup>st</sup> Cir. 1987) (Breyer).<sup>2</sup> Petitioners do not claim that the FTC Act excludes their companies or their activities on behalf of those companies from its coverage; rather, they erroneously claim that the so-called state action doctrine is an immunity that excludes them from the Commission’s investigatory reach. Petition at 3-4. Petitioners misapprehend the nature and effect of the state action doctrine.

**The State Action Doctrine Is Only An Affirmative Defense Assertable In Litigation.**

The Petition correctly notes that the Supreme Court determined in *Parker v. Brown*, 317 U.S. 341 (1943), that Congress did not intend by its adoption of the Sherman Act, 15 U.S.C. § 1, to permit the antitrust laws to regulate the sovereign activities of state governments. This so called “state action

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timely filing of a request for review of this matter by the full Commission shall not stay the return date established pursuant to this decision.

<sup>2</sup> *Monahan* relied on *Fed. Trade Comm’n v. Swanson*, 560 F.2d 1, 2 (1<sup>st</sup> Cir. 1977) (“An agency’s investigations should not be bogged down by premature challenges to its regulatory jurisdiction. These subpoenas do not fit within the narrow exception proscribing agency investigations that wander unconscionably far afield; the Commission’s regulatory jurisdiction over appellants may be clouded but it is not plainly spurious.”). The parties in *Swanson* were tour operators who claimed to be subject only to regulation by the Civil Aeronautics Board.



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doctrine” creates a potential affirmative defense to be asserted in litigation – it does not create an immunity from law enforcement proceedings. *South Carolina Bd. of Dentistry v. Fed. Trade Comm’n*, 455 F.3d 436, 444 (4<sup>th</sup> Cir. 2006).

Assuming, *arguendo*, that Empire Gas, Inc., Liquilux Gas Corp. or others may have some basis for asserting a state action doctrine defense in the event of a Commission law enforcement action against them, that still does not excuse them from responding to valid FTC investigatory compulsory process. To do so would improperly limit the Commission’s ability to evaluate the facts that might form the basis for such a defense and whether the Commission has a basis for pursuing a law enforcement action. *Monahan*, 832 F.2d at 689-90 (“We, like the FTC, must wait to see the results of the investigation before we know whether, or the extent to which, the activity falls within the scope of a ‘clearly articulated and affirmatively expressed’ state policy. . . . Again, we cannot now say, without knowing more facts, whether or not this additional ‘state supervision’ condition will apply.”).<sup>3</sup> Unlike Petitioners’ employers, the party seeking state action protection from an FTC investigation in *Monahan* was an agency of the Commonwealth of Massachusetts itself. Petitioners have offered no plausible justification for why the Commission should accord a private party’s claims for protection under the state action doctrine from an FTC investigation any greater weight than was accorded to the Massachusetts Board of Registration in Pharmacy by the First Circuit Court of Appeals in *Monahan*. Petitioners are not entitled to have their CIDs or subpoenas quashed or modified by reason of the state action doctrine.<sup>4</sup>

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<sup>3</sup> *Fed. Trade Comm’n v. Ernstthal*, 607 F.2d 488, 490 (D.C. Cir. 1979) (“But where, as here, the FTC does not plainly lack jurisdiction, and the jurisdictional question turns on issues of fact, the agency is not obliged to prove its jurisdiction in a subpoena enforcement proceeding prior to the conclusion of the agency’s adjudication.”); *South Carolina Bd. of Dentistry*, 455 F.3d at 444 (holding that the Board’s state action defense did not qualify for interlocutory appeal because the state action issue would not be “effectively unreviewable” on appeal from the FTC’s final decision).

<sup>4</sup> Petitioners’ claim that the subpoenas should be made returnable in Puerto Rico is without merit. Petitioner’s citation to provisions regarding the taking of testimony pursuant to a CID issued under 15 U.S.C. § 57b-1,

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### **CONCLUSION AND ORDER**

For all the foregoing reasons, **IT IS ORDERED THAT** the Petition be, and it hereby is, **DENIED**.

**IT IS FURTHER ORDERED THAT** Petitioners shall comply with the CIDs on December 11, 2009. Commission staff may reschedule the investigational hearings for Petitioners pursuant to the subpoenas at such dates and times as they may direct in writing, in accordance with the powers delegated to them by 16 C.F.R. § 2.9(b)(6).

By direction of the Commission.

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Petition at 13, is unavailing in this case. The subpoenas at issue in this matter were issued under 15 U.S.C. § 49; this latter provision of the FTC Act permits the taking of testimony “at any designated place of hearing.”

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**CHURCH & DWIGHT CO., INC.***FTC File No. 091-0037, Decision, December 23, 2009*RESPONSE TO PETITION TO QUASH OR LIMIT SUBPOENA *DUCES*  
*TECUM* AND CIVIL INVESTIGATIVE DEMAND ISSUED TO CHURCH &  
DWIGHT, INC.

Dear Mr. Hittinger:

The Commission is investigating whether Church & Dwight (“C&D”) has used exclusionary practices to monopolize or attempt to monopolize the domestic distribution and sales of condoms or other C&D products in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.<sup>1</sup> On November 13, 2009, C&D filed, out of time, its Petition to Quash or Limit Subpoena *Duces Tecum* and Civil Investigative Demand Issued to Church & Dwight, Inc. on June 29, 2009 (“Petition”) on the grounds that the subpoena and CID seek irrelevant Canadian marketing documents,<sup>2</sup> and that it would be unduly burdensome for it to produce Canadian marketing documents that are located in Canada. *Id.*<sup>3</sup> By letter dated October 30, 2009, C&D’s counsel for the first time sought an “extension” in time to file a petition to quash or modify the subpoena and CID. Staff responded to this request on November 4, 2009, and indicated that they were “willing to grant a short extension of time to file a petition to quash on that issue alone . . . until c.o.b. Friday, November 13.”

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<sup>1</sup> The Petition at 1.

<sup>2</sup> The Petition’s suggestion on page 1 that the investigation is further limited to C&D’s marketing practices through retail chains is incorrect. The scope of the investigation is defined by the resolution authorizing the use of compulsory process. *Fed. Trade Comm’n v. Invention Submission Corp.*, 965 F.2d 1086, 1092 (D.C. Cir. 1992) (“ . . . we have previously made clear that ‘the validity of Commission subpoenas is to be measured against the purposes stated in the resolution, and not by reference to extraneous evidence.’ [ *Fed. Trade Comm’n v. Carter*, 636 F.2d 781, 789 (D.C. Cir. 1980)].”). The Petition’s reliance on particular specifications of the subpoena or CID for this claimed limitation is, therefore, unavailing.

<sup>3</sup> The subpoena and CID were served on C&D on July 2, 2009, and were returnable on July 30, 2009.

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Petition, Exhibit C at 1 (Letter from Assistant Regional Director Graybill to Lesli Esposito and Carl Hittinger dated Nov. 4, 2009).

On December 7, 2009, C&D filed a Request for Leave to File Out of Time (“Request”) a further petition to quash or modify the subpoena because staff refused to accede to C&D’s request to be allowed to redact “irrelevant” information from responsive documents that relate to C&D’s non-condom products. C&D claims it should be allowed to redact such information because: (1) non-condom information is irrelevant to the investigation; and (2) press reports about the investigation (based on non-FTC sources) indicate that there may be a potential FTC data security problem that entitles C&D to redact such information, Request, Exhibit 1 at 9.

The FTC cannot prevent private party-witnesses or complainants from providing the media with information about an FTC investigation. In any event, there is nothing in the media reports cited by C&D, Request, Exhibits 1 (F & G), that shows the existence of a data security problem at the FTC. Further, C&D has provided no evidence that its legitimate concerns with the security of its confidential business information in the hands of the FTC will not be adequately protected by the provisions of 15 U.S.C. §§ 46(f) and 57b-2.

The Petition and Request are both time barred and otherwise wholly without merit; and must, therefore, be denied. C&D shall comply with the subpoena and CID on January 26, 2010.

This letter advises you of the Commission’s disposition of the Petition and Request. This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission’s delegate. *See* 16 C.F.R. § 2.7(d)(4). Pursuant to 16 C.F.R. § 2.7(f), Petitioner has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.<sup>4</sup>

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<sup>4</sup> This letter ruling is being delivered by e-mail and express mail. The e-mail copy is provided as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you receive the original by express mail. In accordance with the provisions of 16 C.F.R. § 2.7(f), the

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**I. The Petition and Request Are Time Barred.****A. The Petition Is Time Barred.**

The Commission's rules of practice have separate provisions regarding extensions of time to comply with a subpoena or CID, Rule 2.7(c), 16 C.F.R. § 2.7(c), and extensions of time within which a petition to quash or limit a subpoena or CID may be filed. Rule 2.7(d)(3). Petitions to quash or limit a subpoena or CID must be filed by the earlier of the return date of the subpoena or CID or twenty (20) days after service of the subpoena or CID. In the absence of a timely extension of time within which to file a petition to quash or limit, the Petition and Request in this matter should have been filed no later than July 22, 2009. After the expiration of the time within which to file a petition to quash or limit, the recipient of a subpoena or CID can only file such a challenge if the Commission grants it leave to file a petition out of time based on a showing of extraordinary or unforeseeable circumstances. Rule 2.7(d)(3) grants certain staff managers the authority to "rule upon requests for extensions of time within which to file" a petition to quash or limit; however, the grant of such authority does not extend to requests to revive already expired periods of limitation.

The rules prescribe a reasonably short period within which petitions to quash or limit must be filed in order to insure that such petitions are resolved as early in the investigation as is practicable. The issues raised by the Petition and Request in this matter illustrate why these issues should be resolved as soon as possible. Objections should have been filed by July 22<sup>nd</sup>, so that these issues could have been resolved in July or August of this year. Because these issues were not presented in a timely manner, the Commission's ability to finish its investigation and assess whether an enforcement action against C&D would be in the public interest has been impaired, without any countervailing benefit to the public. In short, reading the provisions of Rule 2.7(d)(3) so it would permit staff to revive elapsed periods of

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timely filing of a request for review of this matter by the full Commission shall not stay the return date established pursuant to this decision.

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limitation would eviscerate the rule's salutary purpose (expediting the resolution of petitions to quash or limit process).

There appears to have been some confusion on the part of both staff and C&D with regards to staff's authority to grant an extension of time to file a petition to quash or limit after the expiration of the limitations period for such filing. Accordingly, the Petition will be treated as if it had been filed as a motion for leave to file the Petition out of time.

**B. C&D Waived the Right to Raise the Issues Set Forth In the Request.**

C&D's justification for not filing the Request raising the redaction issues along with the Petition was "because appropriate grounds for filing [such] a petition to quash or limit the subpoena did not arise before at least October 30, 2009." Request at 2. C&D's Exhibits, however, do not support its claim. Instruction R to the subpoena (Petition, Exhibit A) expressly prohibited redactions on any basis other than a claim of privilege. Additionally, on July 28, 2009, staff advised C&D in writing that it had no right to redact information unless the redaction was based on a claim of privilege. Request, Exhibit (1)(C) (Letter from Sylvia Kundig to Carl Hittinger and Lesli Esposito dated Jul. 28, 2009). That letter directed C&D to "please produce unredacted versions of all non-privileged, responsive documents." *Id.* at 1. The clear directive contained in the letter of July 28 cannot reasonably be construed to apply only to some subset of documents, instead of the entirety of the documents to be produced. In short, C&D knew, or should have known, that it had no right to redact non-privileged information from responsive documents at least as early as some point shortly after its receipt of the subpoena.

Even if it were assumed, *arguendo*, that there was some lingering ambiguity regarding redaction of non-privileged information until sometime on or about October 30, 2009, it does not explain C&D's filing of a piecemeal petition with the Commission—Part A on November 13<sup>th</sup> and Part B on December 7<sup>th</sup>. *Wellness Support Network*, File No. 072-3179 at 2 (FTC Apr. 24, 2008) (Letter Ruling dismissing appeal from denial of petition

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to quash CID) (“The rule is clear on its face that all grounds for challenging a CID shall be joined in the initial application, absent some extraordinary circumstances. To construe the rule in any other fashion would serve no purpose other than inviting piecemeal challenges to CIDs and a parade of dilatory motions seeking seriatim deconstruction of each CID.”). C&D has offered no evidence to support its decision to file the Petition and Request separately.

As set forth below, the Petition and Request are substantially without merit; therefore, denial of leave to file the Petition and Request out of time leads to the same result that would have been obtained had such leave been granted. Accordingly, leave to file the Petition and Request out of time is denied.

## **II. The Information Being Sought Is Reasonably Relevant to the Investigation.**

### **A. The Canadian Marketing Documents and Information Are Reasonably Relevant to the Investigation.**

The Petition correctly notes that documents are relevant to investigatory process if they are reasonably relevant to the FTC’s investigation measured against the scope and purpose set forth in the resolution authorizing the use of compulsory process. Petition at 4 (quoting *Fed. Trade Comm’n v. Texaco, Inc.*, 555 F.2d 862, 874 (D.C. Cir. 1977) (“The relevance of the material sought by the FTC must be measured against the scope and purpose of the FTC’s investigation, as set forth in the Commission’s resolution.”)). The Petition further acknowledges that a United States company may be compelled to produce records of its foreign subsidiaries. Petition at 5 (citing *In re Polypore*, 2009 WL 569708 (F.T.C. Feb. 3, 2009) (Chappell, A.L.J.)).<sup>5</sup>

Petitioner argues that its Canadian marketing documents do not meet the requisite relevance standard because differences in law and practices, as well as market conditions, between the United States and Canada would render the Canadian records incapable of any probative value regarding either comparable or

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<sup>5</sup> Docket No. 9327.

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comparative marketing practices undertaken by C&D in the United States. The Petition claims this is so, because the Commission would be incapable of acquiring data sufficient to support a “natural experiment” that would be admissible in evidence. Petition at 5-8. It is premature to speculate on whether the Canadian marketing documents might be admissible in evidence during an enforcement action to support a natural experiment or for any other purpose.<sup>6</sup> A fuller quotation from the *Texaco* case relied upon by Petitioner will illustrate the point:

We agree with the FTC that comparative information of this sort is “reasonably relevant” to its investigation. While, in response to the companies’ arguments, the FTC has advanced several examples to demonstrate the relevance of bid files, the Commission emphasized that this approach which requires, in effect, the delineation of a particular theory of violation is inappropriate in the pre-complaint stage; and here, too, we agree. While the FTC has not articulated the specific anti-competitive practices which may be present, it could not reasonably do so without access to the relevant documents. Certainly a wide range of investigation is necessary and appropriate where, as here, multifaceted activities are involved, and the precise character of possible violations cannot be known in advance.

*Texaco*, 555 F.2d at 877 (footnotes omitted). It is early in the Commission’s investigation. The Commission is not yet in a

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<sup>6</sup> “There is also this question of what counts as evidence. Economists have this thing that it’s not evidence unless you can run a regression.” Fed. Trade Comm’n Resale Price Maintenance Hearings: Examining Theories of Benefit from Resale Price Maintenance, Tr.100, Feb. 17, 2009 (Dr. Benjamin Klein). It is premature to even speculate either whether the Canadian marketing data will be able to produce reliably predictive regression analyses or whether it might otherwise be admissible for some other purposes at trial. More importantly, however, even if C&D’s Canadian marketing records were neither capable of supporting regression analysis nor admissible at trial, those records will still help the Commission decide whether there is reason to believe that an enforcement action against C&D would be in the public interest.



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position to “anticipate” potential theories of liability or resolve questions of evidence admissibility; and *Texaco* confirms that the FTC should not be asked to do so at this point in an investigation.

**B. Information and Documents About C&D’s Non-Condom Products Are Reasonably Relevant to the Investigation.**

The Request claims that C&D should be allowed to redact information regarding C&D’s non-condom products because such information bears “absolutely no relation to the stated purpose of the Commission’s investigation . . . as set forth in the Resolution.” Request, Exhibit 1 at 4. This claim is without merit on a variety of levels. This claim misstates the terms of the resolution authorizing the use of process. Petition, Exhibit D at 1 (“Nature and Scope of Investigation: To determine whether [C&D] has attempted to acquire . . . a monopoly in the distribution or sale of condoms in the United States . . . through exclusionary practices [regarding] . . . Trojan brand condoms and other products distributed and sold by [C&D] . . . in violation of Section 5 of the Federal Trade Commission Act. . .”). The resolution on its face authorizes an investigation regarding the marketing of all of C&D’s products. Additionally, the probative value of any given part of a document can be and is affected by its context; that is to say that context can sometimes be as important as text. It is frequently necessary in a law enforcement investigation for witnesses to be able to identify and authenticate documents; those witnesses may need to see the entire document to be able to tell whether they are looking at a final document as opposed to earlier drafts or proposals. Finally, a comparative analysis of C&D’s marketing strategies can have significant probative value; for instance, a comparison of marketing strategies for products where C&D may have market power to the marketing practices where it may not have market power could be informative. The request to redact information relating to C&D’s non-condom products must be denied because those materials are reasonably relevant to the Commission’s investigation.

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**III. No Evidence Supports C&D's Burden Claim**

“Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency’s legitimate inquiry and the public interest. The burden of showing that the request is unreasonable is on the subpoenaed party,” *Texaco*, 555 F.2d at 882, and is not easily met where, as here, the FTC seeks information that is reasonably relevant to its investigation. Petitioner claims that compliance will cost it “hundreds of thousands of dollars” and involve more than 1,000 staff-hours of effort. Petition at 8. C&D has not supported this claim with facts, and has not noted that staff have repeatedly offered to work with it to mitigate production costs wherever possible. “At a minimum, a petitioner alleging burden must (i) identify the particular requests that impose an undue burden; (ii) describe the records that would need to be searched to meet that burden; and (iii) provide evidence in the form of testimony or documents establishing the burden (*e.g.*, the person-hours and cost of meeting the particular specifications at issue).” *Nat’l Claims Service, Inc.*, 125 F.T.C. 1325, 1328-29 (Jun. 2, 1998). C&D made no reasonable attempt to show factually that the production of its Canadian marketing documents would “unduly disrupt or seriously hinder normal operations of [its] business.”<sup>7</sup>

**IV. CONCLUSION AND ORDER**

For all the foregoing reasons, **IT IS ORDERED THAT** C&D be, and it hereby is, **DENIED** leave to file its Petition and Request out of time.

**IT IS FURTHER ORDERED THAT** Petitioner shall comply with the subpoena and CID on January 26, 2010.

By direction of the Commission.

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<sup>7</sup> *Texaco*, 555 F.2d at 882 (“Thus courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.”). Further, C&D’s relevance and burden claims appear to be contradicted by its own records. It appears that C&D has already produced some documents showing that C&D can and does readily produce Canadian marketing experience records to interested US retailers.

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