

FEDERAL TRADE COMMISSION DECISIONS

**FINDINGS, OPINIONS, AND ORDERS
JULY 1, 2012, TO DECEMBER 31, 2012**

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**MEMBERS OF THE FEDERAL TRADE COMMISSION
DURING THE PERIOD
JULY 1, 2012 TO DECEMBER 31, 2012**

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Took oath of office January 5, 2006.

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Took oath of office April 4, 2012

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FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS
JULY 1, 2012, TO DECEMBER 31, 2012

IN THE MATTER OF

FACEBOOK, INC.

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

Docket No. C-4365; File No. 092 3184
Complaint, July 27, 2013 – Decision, July 27, 2012

This consent order addresses Facebook, Inc.'s claims regarding the privacy of users personal information while accessing and using their website. The complaint alleges that Facebook violated Section 5(a) of the Federal Trade Commission Act by allowing Apps and advertisers access to users' account information without adequately disclosing these policies to consumers. The complaint also alleges that Facebook falsely claimed to comply with the U.S.-EU Safe Harbor Framework. The consent order prohibits Facebook from misrepresenting the privacy or security of "covered information," as well as the company's compliance with any privacy, security, or other compliance program, including but not limited to the U.S.-EU Safe Harbor Framework.

Participants

For the *Commission: Laura D. Berger, Cora T. Han, David Lincicum, Manas Mohapatra, Kandi Parsons and Laura Riposo VanDruff.*

For the *Respondent: Ashlie Beringer, Sean Royall, and Eugene Scalia, Gibson, Dunn & Crutcher LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Facebook, Inc., a corporation ("Respondent") has violated the Federal Trade Commission Act ("FTC Act"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

Complaint

1. Respondent Facebook, Inc. (“Facebook”), is a Delaware corporation with its principal office or place of business at 1601 Willow Road, Menlo Park, California 94025.

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

FACEBOOK’S BUSINESS PRACTICES

3. Since at least 2004, Facebook has operated www.facebook.com, a social networking website. Users of the site create online profiles, which contain content about them such as their name, interest groups they join, the names of other users who are their “friends” on the site, photos albums and videos they upload, and messages and comments they post or receive from their friends. Users also may add content to other users’ profiles by sharing photos, sending messages, or posting comments. As of March 2012, Facebook had approximately 900 million users.

4. Since approximately May 2007, Facebook has operated the Facebook Platform (“Platform”), a set of tools and programming interfaces that enables third parties to develop, run, and operate software applications, such as games, that users can interact with online (“Platform Applications”).

5. Facebook obtains revenue by placing third-party advertisements on its site and by selling Facebook Credits, a virtual currency that it offers on its website and through retail outlets. The company also has obtained revenue from fees paid by applicants for its Verified Apps program, described below in Paragraphs 43-47. In 2009, the company had revenues of approximately \$777.2 million.

FACEBOOK’S COLLECTION AND STORAGE OF USER INFORMATION

6. Facebook has collected extensive “profile information” about its users, including, but not limited to:

Complaint

- a. mandatory information that a user must submit to register with the site, including Name, Gender, Email Address, and Birthday;
- b. optional information that a user may submit, such as:
 - i. Profile Picture;
 - ii. Hometown;
 - iii. Interested in (*i.e.*, whether a user is interested in men or women);
 - iv. Looking for (*i.e.*, whether a user is looking for friendship, dating, a relationship, or networking);
 - v. Relationships (*e.g.*, marital or other relationship status and the names of family members);
 - vi. Political and Religious Views;
 - vii. Likes and Interests (*e.g.*, activities, interests, music, books, or movies that a user likes); and
 - viii. Education and Work (*e.g.*, the name of a user's high school, college, graduate school, and employer);and
- c. other information that is based on a user's activities on the site over time, such as:
 - i. a Friend List (*i.e.*, a list of users with whom a user has become "Friends" on the site);
 - ii. Pages (*e.g.*, any web page on Facebook's web site, belonging to an organization, brand, interest group, celebrity, or other entity, that a user has clicked an online button to "fan" or "like");
 - iii. Photos and Videos, including any that a user has uploaded or been "tagged in" (*i.e.*, identified by a

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user such that his or her name is displayed when a user “hovers” over the likeness); and

- iv. messages that a user posts and comments made in response to other users’ content.

7. Each user’s profile information becomes part of the user’s online profile and can be accessible to others, as described below.

8. Facebook has stored users’ profile information on a computer network that it controls. It has assigned to each user a User Identification Number (“User ID”), a persistent, unique number that Platform Applications and others can use to obtain certain profile information from Facebook.

9. Facebook has designed its Platform such that Platform Applications can access user profile information in two main instances. First, Platform Applications that a user authorizes can access the user’s profile information. Second, if a user’s “Friend” authorizes a Platform Application, that application can access certain of the user’s profile information, even if the user has not authorized that Application. For example, if a user authorizes a Platform Application that provides reminders about Friends’ birthdays, that application could access, among other things, the birthdays of the user’s Friends, even if these Friends never authorized the application.

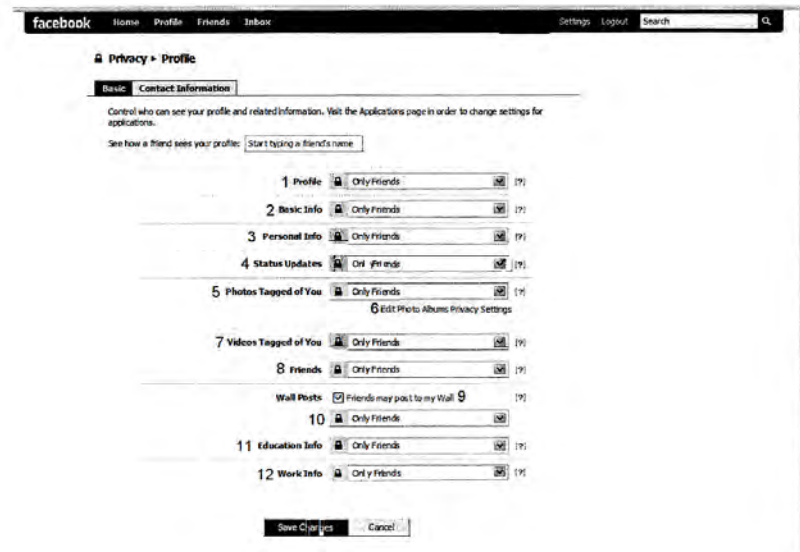
**FACEBOOK’S DECEPTIVE PRIVACY SETTINGS
(Count 1)**

10. Since at least November 2009, Facebook has, in many instances, provided its users with a “Central Privacy Page,” the same or similar to the one depicted below. Among other things, this page has contained a “Profile” link, with accompanying text that has stated “[c]ontrol who can see your profile and personal information.”

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11. When users have clicked on the “Profile” link, Facebook has directed them to a “Profile Privacy Page,” the same or similar to the one depicted below, which has stated that users could “[c]ontrol who can see your profile and related information.” For each “Profile Privacy Setting,” depicted below, users could click on a drop-down menu and restrict access to specified users, *e.g.*, “Only Friends,” or “Friends of Friends.”



12. Although the precise language has changed over time, Facebook’s Central Privacy Page and Profile Privacy Page have, in many instances, stated that the Profile Privacy Settings allow users to “control who can see” their profile information, by specifying who can access it, *e.g.*, “Only Friends” or “Friends of Friends.” (See Central Privacy Page and Profile Privacy Page screenshots, Exhibit A).

13. Similarly, although the precise interface has changed over time, Facebook’s Profile Privacy Settings have continued to

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specify that users can restrict access to their profile information to the audience the user selects, *e.g.*, “Only Friends,” “Friends of Friends.” (See Profile Privacy Page screenshots, Exhibits A, B). In many instances, a user’s Profile Privacy Settings have been accompanied by a lock icon. *Id.*

14. None of the pages described in Paragraphs 10-13 have disclosed that a user’s choice to restrict profile information to “Only Friends” or “Friends of Friends” would be ineffective as to certain third parties. Despite this fact, in many instances, Facebook has made profile information that a user chose to restrict to “Only Friends” or “Friends of Friends” accessible to any Platform Applications that the user’s Friends have used (hereinafter “Friends’ Apps”). Information shared with such Friends’ Apps has included, among other things, a user’s birthday, hometown, activities, interests, status updates, marital status, education (*e.g.*, schools attended), place of employment, photos, and videos.

15. Facebook’s Central Privacy Page and Profile Privacy Page have included links to “Applications,” “Apps,” or “Applications and Websites” that, when clicked, have taken users to a page containing “Friends’ App Settings,” which would allow users to restrict the information that their Friends’ Apps could access.

16. However, in many instances, the links to “Applications,” “Apps,” or “Applications and Websites” have failed to disclose that a user’s choices made through Profile Privacy Settings have been ineffective against Friends’ Apps. For example, the language alongside the Applications link, depicted in Paragraph 10, has stated, “[c]ontrol what information is available to applications **you use** on Facebook.” (Emphasis added). Thus, users who did not themselves use applications would have had no reason to click on this link, and would have concluded that their choices to restrict profile information through their Profile Privacy Settings were complete and effective.

Count 1

17. As described in Paragraphs 10-13, Facebook has represented, expressly or by implication, that, through their Profile Privacy Settings, users can restrict access to their profile

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information to specific groups, such as “Only Friends” or “Friends of Friends.”

18. In truth and in fact, in many instances, users could not restrict access to their profile information to specific groups, such as “Only Friends” or “Friends of Friends” through their Profile Privacy Settings. Instead, such information could be accessed by Platform Applications that their Friends used. Therefore, the representation set forth in Paragraph 17 constitutes a false or misleading representation.

**FACEBOOK’S UNFAIR AND DECEPTIVE DECEMBER
2009 PRIVACY CHANGES
(Count 2 and Count 3)**

19. On approximately November 19, 2009, Facebook changed its privacy policy to designate certain user information as “publicly available” (“PAI”). On approximately December 8, 2009, Facebook began implementing the changes referenced in its new policy (“the December Privacy Changes”) to make public in new ways certain information that users previously had provided.

20. Before December 8, 2009, users could, and did, use their Friends’ App Settings to restrict Platform Applications’ access to their PAI. For example, as of November 2009, approximately 586,241 users had used these settings to “block” Platform Applications that their Friends used from accessing any of their profile information, including their Name, Profile Picture, Gender, Friend List, Pages, and Networks. Following the December Privacy Changes, Facebook users no longer could restrict access to their PAI through these Friends’ App Settings, and all prior user choices to do so were overridden.

21. Before December 8, 2009, users could, and did, use their Profile Privacy Settings to limit access to their Friend List. Following the December Privacy Changes, Facebook users could no longer restrict access to their Friend List through their Profile Privacy Settings, and all prior user choices to do so were overridden, making a user’s Friend List accessible to other users. Although Facebook reinstated these settings shortly thereafter, they were not restored to the Profile Privacy Settings and instead were effectively hidden.

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22. Before December 8, 2009, users could, and did, use their Search Privacy Settings (available through the “Search” link on the Privacy Settings Page depicted in Paragraph 11) to restrict access to their Profile Picture and Pages from other Facebook users who found them by searching for them on Facebook. For example, as of June 2009, approximately 2.5 million users who had set their Search Privacy Settings to “Everyone,” still hid their Profile Picture. Following the December Privacy Changes, Facebook users could no longer restrict the visibility of their Profile Picture and Pages through these settings, and all prior user choices to do so were overridden.

23. To implement the December Privacy Changes, Facebook required each user to click through a multi-page notice, known as the Privacy Wizard, which was composed of:

- a. an introductory page, which announced:

We’re making some changes to give you more control of your information and help you stay connected. We’ve simplified the Privacy page and added the ability to set privacy on everything you share, from status updates to photos.

At the same time, we’re helping everyone find and connect with each other by keeping some information – like your name and current city – publicly available. The next step will guide you through choosing your privacy settings.

- b. privacy update pages, which required each users to choose, via a series of radio buttons, between new privacy settings that Facebook “recommended” and the user’s “Old Settings,” for ten types of profile information (*e.g.*, Photos and Videos of Me, Birthday, Family and Relationships, etc.), and which stated:

Facebook’s new, simplified privacy settings give you more control over the information you share. We’ve recommended settings

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below, but you can choose to apply your old settings to any of the fields.

and

- c. a confirmation page, which summarized the user's updated Privacy Settings.

(See Privacy Wizard screenshots, Exhibit C).

24. The Privacy Wizard did not disclose adequately that users no longer could restrict access to their newly-designated PAI via their Profile Privacy Settings, Friends' App Settings, or Search Privacy Settings, or that their existing choices to restrict access to such information via these settings would be overridden. For example, the Wizard did not disclose that a user's existing choice to share his or her Friend List with "Only Friends" would be overridden, and that this information would be made accessible to the public.

25. The information that Facebook failed to disclose as described in Paragraph 24 was material to Facebook users.

26. Facebook's designation of PAI caused harm to users, including, but not limited to, threats to their health and safety, and unauthorized revelation of their affiliations. Among other things:

- a. certain users were subject to the risk of unwelcome contacts from persons who may have been able to infer their locale, based on the locales of their Friends (*e.g.*, their Friends' Current City information) and of the organizations reflected in their Pages;
- b. each user's Pages became visible to anyone who viewed the user's profile, thereby exposing potentially controversial political views or other sensitive information to third parties – such as prospective employers, government organizations, or business competitors – who sought to obtain personal information about the user;

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- c. each user's Friend List became visible to anyone who viewed the user's profile, thereby exposing potentially sensitive affiliations, that could, in turn, reveal a user's political views, sexual orientation, or business relationships, to third parties – such as prospective employers, government organizations, or business competitors – who sought to obtain personal information about the user; and
- d. each user's Profile Photo became visible to anyone who viewed the user's profile, thereby revealing potentially embarrassing or political images to third parties whose access users previously had restricted.

Count 2

27. As described in Paragraph 23, Facebook has represented, expressly, or by implication, that its December Privacy Changes provided users with “more control” over their information, including by allowing them to preserve their “Old Settings,” to protect the privacy of their profile information.

28. As described in Paragraph 24-26, Facebook failed to disclose, or failed to disclose adequately, that, following the December Privacy Changes, users could no longer restrict access to their Name, Profile Picture, Gender, Friend List, Pages, or Networks by using privacy settings previously available to them. Facebook also failed to disclose, or failed to disclose adequately, that the December Privacy Changes overrode existing user privacy settings that restricted access to a user's Name, Profile Picture, Gender, Friend List, Pages, or Networks. These facts would be material to consumers. Therefore, Facebook's failure to adequately disclose these facts, in light of the representation made, constitutes a deceptive act or practice.

Count 3

29. As described in Paragraphs 19-26, by designating certain user profile information publicly available that previously had been subject to privacy settings, Facebook materially changed its promises that users could keep such information private. Facebook retroactively applied these changes to personal

Complaint

information that it had previously collected from users, without their informed consent, in a manner that has caused or has been likely to cause substantial injury to consumers, was not outweighed by countervailing benefits to consumers or to competition, and was not reasonably avoidable by consumers. This practice constitutes an unfair act or practice.

**SCOPE OF PLATFORM APPLICATIONS' ACCESS TO
FACEBOOK USERS' INFORMATION
(Count 4)**

30. Facebook has disseminated or caused to be disseminated numerous statements to users stating that Platform Applications they use will access only the profile information these applications need to operate, including, but not limited to:

- a. the following statement, which appeared within a dialog box that each user must click through before using a Platform Application for the first time:

Allowing [name of Application] access will let it pull your profile information, photos, your friends' info, and other content that it requires to work.

(Authorization Dialog box, Exhibit D); and

- b. the following additional statements on www.facebook.com:
 - i. Applications you use will access your Facebook information in order for them to work.

(Facebook Privacy Settings: What You Share, Exhibit E); and

- ii. When you authorize an application, it will be able to access any information associated with your account that it requires to work.

(Facebook Privacy Settings: How Applications Interact With Your Information, Exhibit F).

Complaint

31. Contrary to the statements set forth in Paragraph 30, in many instances, a Platform Application could access profile information that was unrelated to the Application's purpose or unnecessary to its operation. For example, a Platform Application with a narrow purpose, such as a quiz regarding a television show, in many instances could access a user's Relationship Status, as well as the URL for every photo and video that the user had uploaded to Facebook's web site, despite the lack of relevance of this information to the Application.

Count 4

32. As set forth in Paragraph 30, Facebook has represented, expressly or by implication, that it has provided each Platform Application access only to such user profile information as the Application has needed to operate.

33. In truth and in fact, as described in Paragraph 31, from approximately May 2007 until July 2010, in many instances, Facebook has provided Platform Applications unrestricted access to user profile information that such Applications have not needed to operate. Therefore, the representation set forth in Paragraph 32 constitutes a false or misleading representation.

**FACEBOOK'S DISCLOSURE OF USER INFORMATION
TO ADVERTISERS
(Count 5)**

34. Facebook has displayed advertisements ("ads") from third-parties ("Platform Advertisers") on its web site.

35. Facebook has allowed Platform Advertisers to target their ads ("Platform Ads") by requesting that Facebook display them to users whose profile information reflects certain "targeted traits," including, but not limited to:

- a. location (*e.g.*, city or state),
- b. age,
- c. sex,
- d. birthday,

Complaint

- e. “Interested in” responses (*i.e.*, as described in Paragraph 6(b), whether a user is interested in men or women),
- f. Relationship Status,
- g. Likes and Interests,
- h. Education (*e.g.*, level of education, current enrollment in high school or college, affiliation with a particular college, and choice of major in college), and
- i. name of employer.

36. Facebook has disseminated or caused to be disseminated numerous statements that it does not share information about its users with advertisers, including:

- a. Facebook may use information in your profile without identifying you as an individual to third parties. We do this for purposes such as . . . personalizing advertisements and promotions so that we can provide you Facebook. We believe this benefits you. You can know more about the world around you and, where there are advertisements, they’re more likely to be interesting to you. For example, if you put a favorite movie in your profile, we might serve you an advertisement highlighting a screening of a similar one in your town. But we don’t tell the movie company who you are.

(Facebook Privacy Policy, November 26, 2008, Exhibit G).

- b. We don’t share information with advertisers without your consent . . . We allow advertisers to choose the characteristics of users who will see their advertisements and we may use any of the non-personally identifiable attributes we have collected (including information you may have decided not to show other users, such as your birth year or other sensitive personal information or preferences) to select

Complaint

the appropriate audience for those advertisements. For example, we might use your interest in soccer to show you ads for soccer equipment, but we do not tell the soccer equipment company who you are . . . Even though we do not share your information with advertisers without your consent, when you click on or otherwise interact with an advertisement, there is a possibility that the advertiser may place a cookie in your browser and note that it meets the criteria they selected.

(Facebook Privacy Policy, November 19, 2009, Exhibit H).

- c. We do not give your content to advertisers. (Facebook Statement of Rights and Responsibilities, May 1, 2009, Exhibit I).
- d. Still others asked to be opted-out of having their information shared with advertisers. This reflects a common misconception about advertising on Facebook. We don't share your information with advertisers unless you tell us to ([e.g.], to get a sample, hear more, or enter a contest). Any assertion to the contrary is false. Period . . . we never provide the advertiser any names or other information about the people who are shown, or even who click on, the ads.

(Facebook Blog, <http://blog.facebook.com/blog.php>, "Responding to Your Feedback," Barry Schnitt, April 5, 2010, Exhibit J).

- e. We never share your personal information with advertisers. We never sell your personal information to anyone. These protections are yours no matter what privacy settings you use; they apply equally to people who share openly with everyone and to people who share with only select friends.

The only information we provide to advertisers is aggregate and anonymous data, so they can know how many people viewed their ad and general categories of

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information about them. Ultimately, this helps advertisers better understand how well their ads work so they can show better ads.

(Facebook Blog, <http://blog.facebook.com/blog.php>, “The Role of Advertising on Facebook,” Sheryl Sandberg, July 6, 2010, Exhibit K).

37. Contrary to the statements set forth in Paragraph 36(a)-(d), in many instances, Facebook has shared information about users with Platform Advertisers by identifying to them the users who clicked on their ads and to whom those ads were targeted. Specifically, from at least September 2008 until May 26, 2010, Facebook designed and operated its web site such that, in many instances, the User ID for a user who clicked on a Platform Ad was shared with the Platform Advertiser.

38. As a result of the conduct described in Paragraph 37, Platform Advertisers potentially could take steps to get detailed information about individual users. For example, a Platform Advertiser could use the User ID to:

- a. access the user’s profile page on www.facebook.com, to obtain his or her real name, and, after December 8, 2009, other PAI which has included a user’s Profile Picture, Gender, Current City, Friend List, Pages, and Networks;
- b. combine the user’s real name with:
 - i. any targeted traits used for the ad the user clicked (*e.g.*, if the ad targeted 23-year-old men who were “Interested In” men and “liked” a prescription drug, the advertiser could ascribe these traits to a specific user); and
 - ii. information about the user’s visit to the advertiser’s website, including: the time and date of the visit, the pages viewed, and time spent viewing the ad (collectively, “browsing information”); and

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- c. over time, combine the information described in subparts (a) - (b) with targeting traits related to additional ads or other information about the user's browsing activities across the web.

39. In addition, contrary to the statements set forth in Paragraph 36, Facebook has shared information about users with third parties that advertise on certain Platform Application web sites ("Application Advertisers"), by identifying to them the specific users who visited these applications. Specifically, at various times relevant to this Complaint, when a user visited certain Platform Applications, Facebook disclosed the user's User ID, in plain text, to any Application Advertiser that displayed an ad on the application's web page.

40. As a result of the conduct described in Paragraph 39, Application Advertisers potentially could take steps to get detailed information, similar to those steps described in Paragraph 38(a), (b)(ii), and (c), regarding the user and his or her activities on any Platform Application web site where the advertiser displayed an ad.

Count 5

41. As set forth in Paragraph 36, Facebook has represented, expressly or by implication, that Facebook does not provide advertisers with information about its users.

42. In truth and in fact, as described in Paragraphs 37-40, Facebook has provided advertisers with information about its users. Therefore, the representation set forth in Paragraph 41 constitutes a false or misleading representation.

**FACEBOOK'S DECEPTIVE VERIFIED APPS PROGRAM
(Count 6)**

43. From approximately May 2009 until December 2009, Facebook operated a Verified Apps program, through which it designated certain Platform Applications as "Facebook Verified Apps" ("Verified Apps").

Complaint

44. Facebook provided each Verified App with preferential treatment compared to other Platform Applications, including, but not limited to:

- a. a Verified Apps badge, the same or similar to the badge depicted below, for display on the application's profile page on www.facebook.com; and



- b. a green check mark alongside the Platform Application's name, and higher ranking among search results, on www.facebook.com and within Facebook's Application Directory.

45. To apply for the Verified Apps badge, a Platform Application developer paid Facebook a fee of \$375, or \$175 for a student or nonprofit organization. Facebook awarded the badge to approximately 254 Platform Applications.

46. Facebook has disseminated or caused to be disseminated statements to consumers conveying that it has taken steps to verify the security of Verified Apps, compared to the security of other Platform Applications, including:

- a. the Verified Apps badge, described in Paragraph 44(a);
- b. the Verified Apps green check mark, described in Paragraph 44(b); and
- c. the following statements on its website:
 - i. **Application Verification** Facebook is introducing the Application Verification program **which is designed to offer extra assurances to help users identify applications they can trust -- applications that are secure, respectful and transparent, and have demonstrated**

Complaint

commitment to compliance with Platform policies.

(Press Release, “Facebook Expands Power of Platform Across the Web and Around the World,” July 23, 2008, Exhibit L (latter emphasis added)); and

ii. What are Verified Applications?

Verified applications have passed a detailed Facebook review to confirm that the user experience they provide complies with Facebook policies. Verified Applications have committed to be transparent about how they work and will respect you and your friends when they send communication on your behalf.

What is the green check mark next to some applications?

Applications that choose to participate in Facebook’s Application Verification Program receive a green check mark when they pass Facebook’s detailed review process. The review process is designed to ensure that the application complies with Facebook policies. In addition, Verified applications have committed to be transparent about how they work and will respect you and your friends when they send communication on your behalf.

(Facebook Help Center FAQ, Exhibit M (emphases added)).

47. Contrary to the statements set forth in Paragraph 46, before it awarded the Verified Apps badge, Facebook took no steps to verify either the security of a Verified Application’s website or the security the Application provided for the user information it collected, beyond such steps as it may have taken regarding any other Platform Application.

Complaint

Count 6

48. As set forth in Paragraph 46, Facebook has represented, expressly or by implication, that Facebook has permitted a Platform Application to display its Verified Apps badge when Facebook's review of the security of such Applications has exceeded its review of the security of other Platform Applications.

49. In truth and in fact, as described in Paragraph 47, in many instances Facebook has permitted a Platform Application to display its Verified Apps badge when its review of the application's security has not exceeded its review of other Platform Applications. Therefore, the representation set forth in Paragraph 48 constitutes a false or misleading representation.

**FACEBOOK'S DISCLOSURE OF USER PHOTOS AND
VIDEOS
(Count 7)**

50. As described above, Facebook has collected and stored vast quantities of photos and videos that its users upload, including, but not limited to: at least one such photo from approximately ninety-nine percent of its users, and more than 100 million photos and 415,000 videos from its users, collectively, every day.

51. Facebook has stored users' photos and videos such that each one is assigned a Content URL – a uniform resource locator that specifies its location on Facebook's servers. Facebook users and Platform Applications can obtain the Content URL for any photo or video that they view on Facebook's web site by, for example, right-clicking on it. If a user or Application further disseminates this URL, Facebook will "serve" the user's photo or video to anyone who clicks on the URL.

52. Facebook has disseminated or caused to be disseminated statements communicating that a user can restrict access to his or her profile information – including, but not limited to, photos and videos that a user uploads – by deleting or deactivating his or her user account. Such statements include:

Complaint

- a. **Deactivating or deleting your account.** If you want to stop using your account you may deactivate it or delete it. When you deactivate an account, no user will be able to see it, but it will not be deleted . . . When you delete an account, it is permanently deleted from Facebook.

* * *

Backup copies. Removed and deleted information may persist in backup copies for up to 90 days, but will not be available to others;

(Facebook Privacy Policy, November 19, 2009, Exhibit H);

- b. To deactivate your account, navigate to the “Settings” tab on the Account Settings page. Deactivation will remove your profile and content associated with your account from Facebook. In addition, users will not be able to search for you or view any of your information.

(Facebook Help Center FAQ, Exhibit N);

If you deactivate your account, your profile and all information associated with it are immediately made inaccessible to other Facebook users.

(Facebook Help Center FAQ, Exhibit O); and

If you deactivate your account from the “Deactivate Account” section on the Account page, your profile and all information associated with it are immediately made inaccessible to other Facebook users.

(Facebook Help Center FAQ, Exhibit P).

53. Contrary to the statements set forth in Paragraph 52, Facebook has continued to display users’ photos and videos to anyone who accesses Facebook’s Content URLs for them, even after such users have deleted or deactivated their accounts.

Complaint

Count 7

54. As set forth in Paragraph 52, Facebook has represented, expressly or by implication, that after a user has deleted or deactivated his or her account, Facebook does not provide third parties with access to his or her profile information, including any photos or videos that the user has uploaded.

55. In truth and in fact, as described in Paragraph 53, in many instances, Facebook has provided third parties with access to a user's profile information – specifically photos or videos that a user has uploaded – even after the user has deleted or deactivated his or her account. Therefore, the representation set forth in Paragraph 54 constitutes a false or misleading representation.

**U.S.-EU SAFE HARBOR FRAMEWORK
(Count 8)**

56. The U.S.-EU Safe Harbor Framework provides a method for U.S. companies to transfer personal data outside of the European Union (“EU”) that is consistent with the requirements of the European Union Data Protection Directive (“Directive”). The Directive sets forth 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. This determination is commonly referred to as meeting the EU's “adequacy” standard.

57. To satisfy the EU's 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 is a voluntary framework that allows U.S. companies to transfer personal data lawfully from the EU to the U.S. 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.

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58. The Safe Harbor privacy principles, issued by Commerce on July 21, 2000, include the following:

NOTICE: An organization must inform individuals about the purposes for which it collects and uses information about them, how to contact the organization with any inquiries or complaints, the types of third parties to which it discloses the information, and the choices and means the organization offers individuals for limiting its use and disclosure. This notice must be provided in clear and conspicuous language when individuals are first asked to provide personal information to the organization or as soon thereafter as is practicable, but in any event before the organization uses such information for a purpose other than that for which it was originally collected or processed by the transferring organization or discloses it for the first time to a third party.

CHOICE: An organization must offer individuals the opportunity to choose (opt out) whether their personal information is (a) to be disclosed to a third party or (b) to be used for a purpose that is incompatible with the purpose(s) for which it was originally collected or subsequently authorized by the individual. Individuals must be provided with clear and conspicuous, readily available, and affordable mechanisms to exercise choice.

59. From at least May 10, 2007, until the present, Facebook has maintained a current self-certification to Commerce and has appeared on the list of Safe Harbor companies on the Commerce website. Pursuant to its self-certification, Facebook has transferred data collected from its users in the EU to the U.S. for processing.

60. From approximately May 2007 until the present, Facebook has stated in its Privacy Policy that it participates in, adheres to,

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and/or complies with “the EU Safe Harbor Privacy Framework as set forth by the United States Department of Commerce.” (*See* Facebook Privacy Policy, November 26, 2008, Exhibit G; Facebook Privacy Policy, November 19, 2009, Exhibit H; Facebook Privacy Policy, December 9, 2009, Exhibit Q; Facebook Privacy Policy, April 22, 2010, Exhibit R; Facebook Privacy Policy, December 22, 2010, Exhibit S). Similarly, from approximately November 19, 2009 until the present, Facebook has stated on the Commerce website that it “adheres to the U.S. Safe Harbor Framework developed by the U.S. Department of Commerce and the European Union.”

Count 8

61. As described in Paragraphs 59-60, Facebook has represented, expressly or by implication, that it has complied with the U.S. Safe Harbor Privacy Principles, including the principles of Notice and Choice.

62. In truth and in fact, as described in Paragraphs 10-42 and 50-55, in many instances, Facebook has not adhered to the U.S. Safe Harbor Privacy Principles of Notice and Choice. Therefore, the representation set forth in Paragraph 61 constitutes a deceptive act or practice.

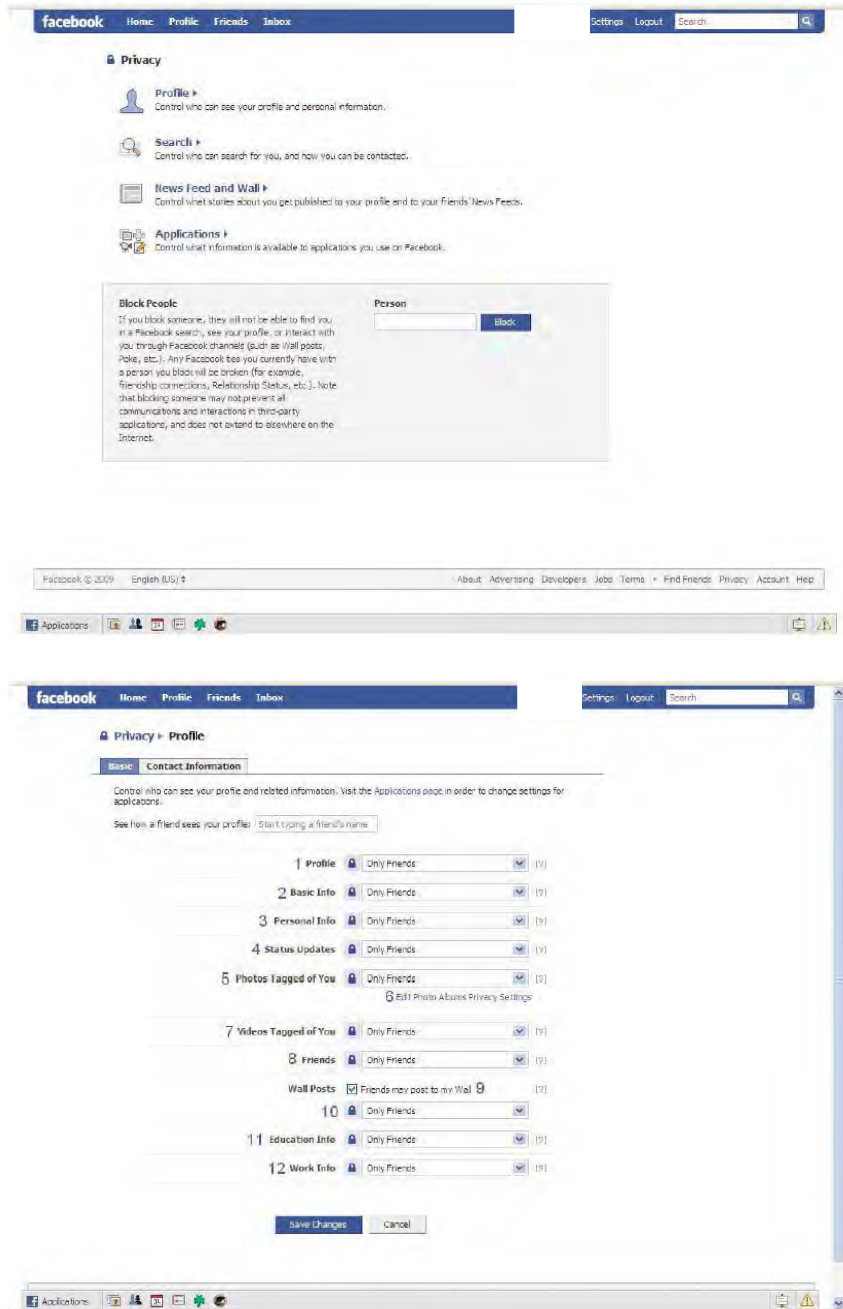
63. The acts and practices of Respondent as alleged in this complaint constitute unfair or deceptive acts or practices, in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this twenty-seventh day of July, 2012, has issued this complaint against Respondent.

By the Commission, Commissioner Rosch dissenting and Commissioner Ohlhausen not participating.

Complaint

Exhibit A



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Exhibit B

The screenshot shows the Facebook 'Choose Your Privacy Settings' page. At the top, there is a navigation bar with the Facebook logo, a search bar, and links for Home, Profile, and Friends. The main content area is titled 'Choose Your Privacy Settings' and contains several sections:

- Basic Directory Information:** A section with a sub-header and a brief description about how basic information is shared.
- Sharing on Facebook:** A large section with a table of settings. The table has columns for 'Everyone', 'Friends of Friends', and 'Friends Only'. The 'Friends Only' column is selected. The rows include:

	Everyone	Friends of Friends	Friends Only
My status, photos, and posts			<input checked="" type="checkbox"/>
Bio and favorite quotations			<input checked="" type="checkbox"/>
Family and relationships			<input checked="" type="checkbox"/>
Photos and videos I'm tagged in			<input checked="" type="checkbox"/>
Religious and political views			<input checked="" type="checkbox"/>
Birthday			<input checked="" type="checkbox"/>
Can comment on posts			<input checked="" type="checkbox"/>
Email addresses and list			<input checked="" type="checkbox"/>
Phone numbers and address			<input checked="" type="checkbox"/>
<input checked="" type="checkbox"/> Let friends of people I tagged in my photos and posts use them.			<input checked="" type="checkbox"/>
- Applications and Websites:** A section for managing app permissions.
- Block Lists:** A section for managing blocked users.
- Controlling How You Share:** A section for learning more about privacy controls.

At the bottom of the page, there is a footer with 'Facebook © 2010 English (US)' on the left and 'About · Advertising · Privacy · Terms · Help' on the right.

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Exhibit C

Privacy wizard: Step one



Complaint

Privacy wizard: Step two



Complaint

Privacy wizard: Step three



Complaint

Exhibit D



Complaint

Exhibit E

Facebook | Privacy Settings http://www.facebook.com/

Search Home Profile Find Friends Account


Privacy Settings Applications and Websites

Applications and Websites

What you share when visiting applications and websites

Applications you use will access your Facebook information in order for them to work. For example, a review application uses your location in order to surface restaurant recommendations.

When you visit a Facebook-enhanced application or website, it may access any information you have made visible to Everyone (Edit Profile Privacy) as well as your publicly available information. This includes your Name, Profile Picture, Gender, Current City, Networks, Friend List, and Pages. The application will request your permission to access any additional information it needs.



The diagram illustrates the flow of information from a user's profile to an application. On the left, there is a stack of three icons representing different types of user data: a book, a profile picture, and a document. A large green arrow points from these icons to a computer monitor on the right. The monitor displays a Facebook profile page, indicating that the application is accessing the user's public information.

You can view the full list of Applications you have authorized on this page.

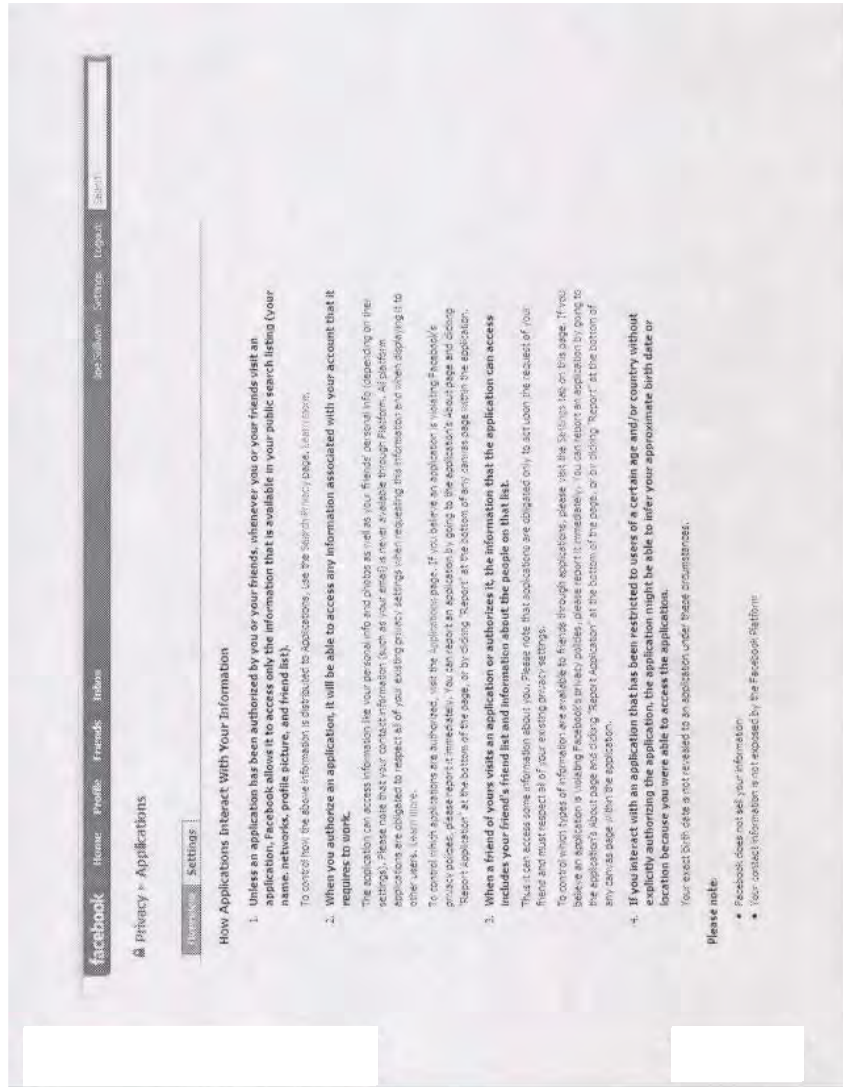
Facebook © 2010 English (US) About Advertising Developers Careers Terms • Find Friends Privacy Mobile Help Center

Chat (0)

1 of 1 5/28/2010 10:15 AM

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Exhibit F



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Exhibit G

This policy is effective as of November 26, 2008.

Facebook Principles

We built Facebook to make it easy to share information with your friends and people around you. We understand you may not want everyone in the world to have the information you share on Facebook; that is why we give you control of your information. Our default privacy settings limit the information displayed in your profile to your networks and other reasonable community limitations that we tell you about.

Facebook follows two core principles:

1. You should have control over your personal information.

Facebook helps you share information with your friends and people around you. You choose what information you put in your profile, including contact and personal information, pictures, interests and groups you join. And you control the users with whom you share that information through the privacy settings on the Privacy page.

2. You should have access to the information others want to share.

There is an increasing amount of information available out there, and you may want to know what relates to you, your friends, and people around you. We want to help you easily get that information.

Sharing information should be easy. And we want to provide you with the privacy tools necessary to control how and with whom you share that information. If you have questions or ideas, please send them to privacy@facebook.com.

Safe Use of Facebook

For information for users and parents about staying safe on Facebook, [click here](#).

Facebook's Privacy Policy

Facebook's Privacy Policy is designed to help you understand how we collect and use the personal information you decide to share, and help you make informed decisions when using Facebook, located at www.facebook.com and its directly associated domains (collectively, "Facebook" or "Website")

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By using or accessing Facebook, you are accepting the practices described in this Privacy Policy.

Facebook is a licensee of the TRUSTe Privacy Program. TRUSTe is an independent, non-profit organization whose mission is to build user's trust and confidence in the Internet by promoting the use of fair information practices. This privacy statement covers the site www.facebook.com and its directly associated domains. Because this Web site wants to demonstrate its commitment to your privacy, it has agreed to disclose its information practices and have its privacy practices reviewed for compliance by TRUSTe.

If you have questions or concerns regarding this statement, you should first contact our privacy staff at privacy@facebook.com. If you do not receive acknowledgement of your inquiry or your inquiry has not been satisfactorily addressed, you should contact TRUSTe Watchdog at http://www.truste.org/consumers/watchdog_complaint.php. TRUSTe will then serve as a liaison with us to resolve your concerns.

EU Safe Harbor Participation

We participate in the EU Safe Harbor Privacy Framework as set forth by the United States Department of Commerce. As part of our participation in the safe harbor, we have agreed to TRUSTe dispute resolution for disputes relating to our compliance with the Safe Harbor Privacy Framework. If you have any complaints regarding our compliance with the Safe Harbor you should first contact us at privacy@facebook.com. If contacting us does not resolve your complaint, you may raise your complaint with TRUSTe at http://www.truste.org/users/users_watchdog_intro.html.

The Information We Collect

When you visit Facebook you provide us with two types of information: personal information you knowingly choose to disclose that is collected by us and Web Site use information collected by us as you interact with our Web Site.

When you register with Facebook, you provide us with certain personal information, such as your name, your email address, your telephone number, your address, your gender, schools attended and any other personal or preference information that you provide to us.

When you enter Facebook, we collect your browser type and IP address. This information is gathered for all Facebook visitors. In addition, we store certain

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information from your browser using "cookies." A cookie is a piece of data stored on the user's computer tied to information about the user. We use session ID cookies to confirm that users are logged in. These cookies terminate once the user closes the browser. By default, we use a persistent cookie that stores your login ID (but not your password) to make it easier for you to login when you come back to Facebook. You can remove or block this cookie using the settings in your browser if you want to disable this convenience feature.

When you use Facebook, you may set up your personal profile, form relationships, send messages, perform searches and queries, form groups, set up events, add applications, and transmit information through various channels. We collect this information so that we can provide you the service and offer personalized features. In most cases, we retain it so that, for instance, you can return to view prior messages you have sent or easily see your friend list. When you update information, we usually keep a backup copy of the prior version for a reasonable period of time to enable reversion to the prior version of that information.

You post User Content (as defined in the Facebook Terms of Use) on the Site at your own risk. Although we allow you to set privacy options that limit access to your pages, please be aware that no security measures are perfect or impenetrable. We cannot control the actions of other Users with whom you may choose to share your pages and information. Therefore, we cannot and do not guarantee that User Content you post on the Site will not be viewed by unauthorized persons. We are not responsible for circumvention of any privacy settings or security measures contained on the Site. You understand and acknowledge that, even after removal, copies of User Content may remain viewable in cached and archived pages or if other Users have copied or stored your User Content.

Any improper collection or misuse of information provided on Facebook is a violation of the Facebook Terms of Service and should be reported to privacy@facebook.com.

If you choose to use our invitation service to tell a friend about our site, we will ask you for information needed to send the invitation, such as your friend's email address. We will send your friend an email or instant message in your name inviting him or her to visit the site, and may send up to two reminders to them. Facebook stores this information to send invitations and reminders, to register a friend connection if your invitation is accepted, to allow you to see invitations

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you have sent, and to track the success of our referral program. Your friend may contact us at privacy@facebook.com to request that we remove this information from our database.

Facebook may also collect information about you from other sources, such as newspapers, blogs, instant messaging services, and other users of the Facebook service through the operation of the service (e.g., photo tags) in order to provide you with more useful information and a more personalized experience.

By using Facebook, you are consenting to have your personal data transferred to and processed in the United States.

Children Under Age 13

Facebook does not knowingly collect or solicit personal information from anyone under the age of 13 or knowingly allow such persons to register. If you are under 13, please do not attempt to register for Facebook or send any information about yourself to us, including your name, address, telephone number, or email address. No one under age 13 may provide any personal information to or on Facebook. In the event that we learn that we have collected personal information from a child under age 13 without verification of parental consent, we will delete that information as quickly as possible. If you believe that we might have any information from or about a child under 13, please contact us at privacy@facebook.com.

Children Between the Ages of 13 and 18

We recommend that minors over the age of 13 ask their parents for permission before sending any information about themselves to anyone over the Internet.

Use of Information Obtained by Facebook

When you register with Facebook, you create your own profile and privacy settings. Your profile information, as well as your name, email and photo, are displayed to people in the networks specified in your privacy settings to enable you to connect with people on Facebook. We may occasionally use your name and email address to send you notifications regarding new services offered by Facebook that we think you may find valuable.

Profile information is used by Facebook primarily to be presented back to and edited by you when you access the service and to be presented to others permitted to view that information by your privacy settings. In some cases where

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your privacy settings permit it (e.g., posting to your wall), other Facebook users may be able to supplement your profile.

Profile information you submit to Facebook will be available to users of Facebook who belong to at least one of the networks you allow to access the information through your privacy settings (e.g., school, geography, friends of friends). Your name, network names, and profile picture thumbnail will be available in search results across the Facebook network and those limited pieces of information may be made available to third party search engines. This is primarily so your friends can find you and send a friend request. People who see your name in searches, however, will not be able to access your profile information unless they have a relationship to you (friend, friend of friend, member of your networks, etc.) that allows such access based on your privacy settings.

Facebook may send you service-related announcements from time to time through the general operation of the service. For instance, if a friend sends you a new message or poke, or someone posts on your wall, you may receive an email alerting you to that fact.

Generally, you may opt out of such emails from the Notifications page, though Facebook reserves the right to send you notices about your account even if you opt out of all voluntary email notifications.

Facebook may use information in your profile without identifying you as an individual to third parties. We do this for purposes such as aggregating how many people in a network like a band or movie and personalizing advertisements and promotions so that we can provide you Facebook. We believe this benefits you. You can know more about the world around you and, where there are advertisements, they're more likely to be interesting to you. For example, if you put a favorite movie in your profile, we might serve you an advertisement highlighting a screening of a similar one in your town. But we don't tell the movie company who you are.

We may use information about you that we collect from other sources, including but not limited to newspapers and Internet sources such as blogs, instant messaging services, Facebook Platform developers and other users of Facebook, to supplement your profile. Where such information is used, we generally allow you to specify in your privacy settings that you do not want this to be done or to

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take other actions that limit the connection of this information to your profile (e.g., removing photo tag links).

Sharing Your Information with Third Parties

Facebook is about sharing information with others — friends and people in your networks — while providing you with privacy settings that restrict other users from accessing your information. We allow you to choose the information you provide to friends and networks through Facebook. Our network architecture and your privacy settings allow you to make informed choices about who has access to your information. We do not provide contact information to third party marketers without your permission. We share your information with third parties only in limited circumstances where we believe such sharing is 1) reasonably necessary to offer the service, 2) legally required or, 3) permitted by you. For example:

Your News Feed and Wall may aggregate the information you provide and make it available to your friends and network members according to your privacy settings. You may set your preferences for your News Feed and Wall on your [Privacy page](#).

Unlike most sites on the Web, Facebook limits access to site information by third party search engine "crawlers" (e.g. Google, Yahoo, MSN, Ask). Facebook takes action to block access by these engines to personal information beyond your name, profile picture, and limited aggregated data about your profile (e.g. number of wall postings).

We may provide information to service providers to help us bring you the services we offer. Specifically, we may use third parties to facilitate our business, such as to host the service at a co-location facility for servers, to send out email updates about Facebook, to remove repetitive information from our user lists, to process payments for products or services, to offer an online job application process, or to provide search results or links (including sponsored links). In connection with these offerings and business operations, our service providers may have access to your personal information for use for a limited time in connection with these business activities. Where we utilize third parties for the processing of any personal information, we implement reasonable contractual and technical protections limiting the use of that information to the Facebook-specified purposes.

If you, your friends, or members of your network use any third-party applications developed using the Facebook Platform ("Platform Applications"), those Platform Applications may access and share certain information about you with others in accordance with your privacy settings. You may opt-out of any

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sharing of certain or all information through Platform Applications on the Privacy Settings page. In addition, third party developers who have created and operate Platform Applications ("Platform Developers"), may also have access to your personal information (excluding your contact information) if you permit Platform Applications to access your data. Before allowing any Platform Developer to make any Platform Application available to you, Facebook requires the Platform Developer to enter into an agreement which, among other things, requires them to respect your privacy settings and strictly limits their collection, use, and storage of your information. However, while we have undertaken contractual and technical steps to restrict possible misuse of such information by such Platform Developers, we of course cannot and do not guarantee that all Platform Developers will abide by such agreements. Please note that Facebook does not screen or approve Platform Developers and cannot control how such Platform Developers use any personal information that they may obtain in connection with Platform Applications. In addition, Platform Developers may require you to sign up to their own terms of service, privacy policies or other policies, which may give them additional rights or impose additional obligations on you, so please make sure to review these terms and policies carefully before using any Platform Application. You can report any suspected misuse of information through the Facebook Platform and we will investigate any such claim and take appropriate action against the Platform Developer up to and including terminating their participation in the Facebook Platform and/or other formal legal action.

We occasionally provide demonstration accounts that allow non-users a glimpse into the Facebook world. Such accounts have only limited capabilities (e.g., messaging is disabled) and passwords are changed regularly to limit possible misuse.

We may be required to disclose user information pursuant to lawful requests, such as subpoenas or court orders, or in compliance with applicable laws. We do not reveal information until we have a good faith belief that an information request by law enforcement or private litigants meets applicable legal standards. Additionally, we may share account or other information when we believe it is necessary to comply with law, to protect our interests or property, to prevent fraud or other illegal activity perpetrated through the Facebook service or using the Facebook name, or to prevent imminent bodily harm. This may include sharing information with other companies, lawyers, agents or government agencies.

We let you choose to share information with marketers or electronic commerce providers through on-site offers.

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We may offer stores or provide services jointly with other companies on Facebook. You can tell when another company is involved in any store or service provided on Facebook, and we may share customer information with that company in connection with your use of that store or service.

Facebook Beacon is a means of sharing actions you have taken on third party sites, such as when you make a purchase or post a review, with your friends on Facebook. In order to provide you as a Facebook user with clear disclosure of the activity information being collected on third party sites and potentially shared with your friends on Facebook, we collect certain information from that site and present it to you after you have completed an action on that site. You have the choice to have Facebook discard that information, or to share it with your friends.

To learn more about the operation of the service, we encourage you to read the tutorial [here](#). To opt out of the service altogether, [click here](#).

Like many other websites that interact with third party sites, we may receive some information even if you are logged out from Facebook, or that pertains to non-Facebook users, from those sites in conjunction with the technical operation of the system. In cases where Facebook receives information on users that are not logged in, or on non-Facebook users, we do not attempt to associate it with individual Facebook accounts and will discard it.

If the ownership of all or substantially all of the Facebook business, or individual business units owned by Facebook, Inc., were to change, your user information may be transferred to the new owner so the service can continue operations. In any such transfer of information, your user information would remain subject to the promises made in any pre-existing Privacy Policy.

When you use Facebook, certain information you post or share with third parties (e.g., a friend or someone in your network), such as personal information, comments, messages, photos, videos, Marketplace listings or other information, may be shared with other users in accordance with the privacy settings you select. All such sharing of information is done at your own risk. Please keep in mind that if you disclose personal information in your profile or when posting comments, messages, photos, videos, Marketplace listings or other items, this information may become publicly available.

Links

Facebook may contain links to other websites. We are of course not responsible for the privacy practices of other web sites. We encourage our users to be aware when they leave our site to read the privacy statements of each and every web site that collects personally identifiable information. This Privacy Policy applies solely to information collected by Facebook.

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Third Party Advertising

Advertisements that appear on Facebook are sometimes delivered (or "served") directly to users by third party advertisers. They automatically receive your IP address when this happens. These third party advertisers may also download cookies to your computer, or use other technologies such as JavaScript and "web beacons" (also known as "1x1 gifs") to measure the effectiveness of their ads and to personalize advertising content. Doing this allows the advertising network to recognize your computer each time they send you an advertisement in order to measure the effectiveness of their ads and to personalize advertising content. In this way, they may compile information about where individuals using your computer or browser saw their advertisements and determine which advertisements are clicked. Facebook does not have access to or control of the cookies that may be placed by the third party advertisers. Third party advertisers have no access to your contact information stored on Facebook unless you choose to share it with them.

This privacy policy covers the use of cookies by Facebook and does not cover the use of cookies or other tracking technologies by any of its advertisers.

Changing or Removing Information

Access and control over most personal information on Facebook is readily available through the profile editing tools. Facebook users may modify or delete any of their profile information at any time by logging into their account. Information will be updated immediately. Individuals who wish to deactivate their Facebook account may do so on the My Account page. Removed information may persist in backup copies for a reasonable period of time but will not be generally available to members of Facebook.

Where you make use of the communication features of the service to share information with other individuals on Facebook, however, (e.g., sending a personal message to another Facebook user) you generally cannot remove such communications.

Security

Facebook takes appropriate precautions to protect our users' information. Your account information is located on a secured server behind a firewall. When you enter sensitive information (such as credit card number or your password), we encrypt that information using secure socket layer technology (SSL). (To learn more about SSL, go to http://en.wikipedia.org/wiki/Secure_Sockets_Layer).

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Because email and instant messaging are not recognized as secure communications, we request that you not send private information to us by email or instant messaging services. If you have any questions about the security of Facebook Web Site, please contact us at privacy@facebook.com

Terms of Use, Notices and Revisions

Your use of Facebook, and any disputes arising from it, is subject to this Privacy Policy as well as our Terms of Use and all of its dispute resolution provisions including arbitration, limitation on damages and choice of law. We reserve the right to change our Privacy Policy and our Terms of Use at any time. Non-material changes and clarifications will take effect immediately, and material changes will take effect within 30 days of their posting on this site. If we make changes, we will post them and will indicate at the top of this page the policy's new effective date. If we make material changes to this policy, we will notify you here, by email, or through notice on our home page. We encourage you to refer to this policy on an ongoing basis so that you understand our current privacy policy. Unless stated otherwise, our current privacy policy applies to all information that we have about you and your account.

Contacting the Web Site

If you have any questions about this privacy policy, please contact us at privacy@facebook.com. You may also contact us by mail at 156 University Avenue, Palo Alto, CA 94301.

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Exhibit H**Facebook's Privacy Policy.**

Date of last revision: November 19, 2009.

We want to earn your trust by being transparent about how Facebook works. You should read this policy in its entirety, but should pay particular attention to these three highlights:

- Facebook is designed to make it easy for you to share your information with anyone you want. You decide how much information you feel comfortable sharing on Facebook and you control how it is distributed through your [privacy settings](#). You should review the default [privacy settings](#) and change them if necessary to reflect your preferences. You should also consider your settings whenever you share information.
- Facebook is not just a website. It is also a service for sharing your information on Facebook-enhanced applications and websites. You can control how you share information with those third-party applications and websites through your [application settings](#) and you can learn more about how information is shared with them on our [About Platform](#) page. You can also limit how your friends share your information with applications through your [privacy settings](#).
- Facebook is a free service supported primarily by advertising. We will not share your information with advertisers without your consent. We allow advertisers to select characteristics of users they want to show their advertisements to and we use the information we have collected to serve those advertisements.

This policy contains eight sections, and you can jump to each by selecting the links below:

- [1. Introduction](#)
- [2. Information We Receive](#)
- [3. Information You Share With Third Parties](#)
- [4. How We Use Your Information](#)
- [5. How We Share Information](#)
- [6. How You Can View, Change, or Remove Information](#)
- [7. How We Protect Information](#)
- [8. Other Terms](#)

1. Introduction

Questions. If you have any questions or concerns about our privacy policy, contact our privacy team through this [help page](#). You may also contact us by mail at 1601 S. California Avenue, Palo Alto, CA 94304.

TRUSTe Program. Facebook is a certified licensee of the TRUSTe Privacy Seal Program. This means that our privacy policy and practices have been reviewed by TRUSTe, an independent organization.

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focused on reviewing privacy and security policies and practices, for compliance with its strict program requirements. This privacy policy covers the website www.facebook.com. The TRUSTe program covers only information that is collected through this Web site, and does not cover other information, such as information that may be collected through software downloaded from Facebook.

If you have any complaints about our policy or practices please let us know through this [help page](#). If you are not satisfied with our response, you can contact [TRUSTe](#).



Safe Harbor. Facebook also adheres to the Safe Harbor framework developed by the U.S. Department of Commerce and the European Union. As part of our participation in the Safe Harbor, we agree to resolve all disputes you have with us in connection with our policies and practices through TRUSTe. To view our certification, visit the U.S. Department of Commerce's Safe Harbor [Web site](#).

Scope. This privacy policy covers all of Facebook. It does not, however, apply to entities that Facebook does not own or control, such as Facebook-enhanced applications and websites. By using or accessing Facebook, you agree to our privacy practices outlined [here](#).

No information from children under age 13. If you are under age 13, please do not attempt to register for Facebook or provide any personal information about yourself to us. If we learn that we have collected personal information from a child under age 13, we will delete that information as quickly as possible. If you believe that we might have any information from a child under age 13, please contact us through this [help page](#).

Parental participation. We strongly recommend that minors 13 years of age or older ask their parents for permission before sending any information about themselves to anyone over the Internet and we encourage parents to teach their children about safe internet use practices. Materials to help parents talk to their children about safe internet use can be found on this [help page](#).

2. Information We Receive

Information you provide to us:

Personal information. When you sign up for Facebook you provide us with your name, email, gender, and birth date. During the registration process we give you the opportunity to provide additional profile information, such as where you went to school and where you work, and to add a picture of yourself, to help your friends connect with you. In some cases we may ask for additional information for security reasons or to provide specific services to you. Once you register you can visit your profile at any time to add or remove personal information about yourself. You can add basic information about yourself, such



Complaint

as information about your hometown, family, relationships, and your political and religious views. You can also add other information about yourself including your activities, interests, contact information, as well as more information about your education and job history.

Content. One of the primary reasons people use Facebook is to share content with others. Examples include when you update your status, upload or take a photo, upload or record a video, share a link, create an event or a group, make a comment, write something on someone's Wall, write a note, or send someone a message. If you do not want us to store metadata associated with content you share on Facebook (such as photos), please remove the metadata before uploading the content.

Transactional Information. We may retain the details of transactions or payments you make on Facebook. However, we will only keep your payment source account number with your consent.

Friend Information. We offer contact importer tools to help you upload your friends' addresses so that you can find your friends on Facebook, and invite your contacts who do not have Facebook accounts to join. If you do not want us to store this information, visit this [help page](#). If you give us your password to retrieve those contacts, we will not store your password after you have uploaded your contacts' information.

Location Information. When you share your location with others or add a location to something you post, we treat that like any other content you post (for example, it is subject to your [privacy settings](#)). If we offer a service that supports this type of location sharing we will present you with an opt-in choice of whether you want to participate.

Information we collect when you interact with Facebook:

Site activity information. We keep track of the actions you take on Facebook, such as adding a friend, becoming a fan of a Facebook Page, joining a group or an event, creating a photo album, sending a gift, poking another user, indicating you "like" a post, attending an event, or authorizing an application. In some cases you are also taking an action when you provide information or content to us. For example, if you share a video, in addition to storing the actual content you uploaded, we might log the fact you shared it.

Access Device and Browser Information. When you access Facebook from a computer, mobile phone, or other device, we may collect information from that device about your browser type, location, and IP address, as well as the pages you visit.

Cookie Information. We use "cookies" (small pieces of data we store for an extended period of time on your computer, mobile phone, or other device) to make Facebook easier to use, to make our advertising better, and to protect both you and Facebook. For example, we use them to store your login ID (but never your password) to make it easier for you to login whenever you come back to Facebook. We also use them to confirm that you are logged into Facebook, and to know when you are interacting with Facebook Platform applications and websites, our widgets and Share buttons, and our advertisements. You can remove or block cookies using the settings in your browser, but in some cases that may impact your ability to use Facebook.

Information we receive from third parties:

Facebook Platform and Facebook Connect. We do not own or operate the applications that you use

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through Facebook Platform (such as games and utilities) or the websites that you interact with through Facebook Connect. We refer to them as "Facebook-enhanced" applications and websites because they use our Platform to provide you with social features. Whenever you authorize a Facebook-enhanced application or website, we will receive information from them, including information about actions you take. In some cases, in order to personalize the process of connecting, we may receive a limited amount of information even before you authorize the application or website.

Information from other websites. We may institute programs with advertising partners and other websites in which they share information with us:

- We may ask advertisers to tell us how our users responded to the ads we showed them (and for comparison purposes, how other users who didn't see the ads acted on their site). This data sharing, commonly known as "conversion tracking" helps us measure our advertising effectiveness and improve the quality of the advertisements you see.
- We may receive information about whether or not you've seen or interacted with certain ads on other sites in order to measure the effectiveness of those ads.

If in any of these cases we receive data that we do not already have, we will "anonymize" it within 180 days, meaning we will stop associating the information with any particular user. If we institute these programs, we will only use the information in the ways we explain in the "How We Use Your Information" section below.

Information from other users. We may collect information about you from other Facebook users, such as when a friend tags you in a photo or video, provides friend details, or indicates a relationship with you. You can limit who can see that you have been tagged in a photo or video "which we refer to as photos or videos "of me" in your [privacy settings](#).

3. Information You Share With Third Parties

We take steps to ensure that others use information that you share on Facebook in a manner consistent with your [privacy settings](#), but we cannot guarantee that they will follow our rules. Read the following section to learn more about how you can protect yourself when you share information with third parties.

Sharing information on Facebook. We designed our [privacy settings](#) to enable you to control how you share your information on Facebook. You should review the default [privacy settings](#) to make sure they reflect your preferences. Here are some specific things to remember:

- You can control the visibility of most of the information you share on Facebook through the [privacy settings](#) you select.
- Certain categories of information such as your name, profile photo, list of friends and pages you are a fan of, gender, and networks you belong to are considered publicly available, and therefore do not have privacy settings. (We will soon stop using regional networks, but your geographic region will still be considered publicly available). You can limit the ability of others to find this information on third party search engines through your search [privacy settings](#).
- Some of the content you share and the actions you take will show up on your friends' home pages and other pages they visit.

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- Even after you remove information from your profile or delete your account, copies of that information may remain viewable elsewhere to the extent it has been shared with others, it was otherwise distributed pursuant to your [privacy settings](#), or it was copied or stored by other users.

- You understand that information might be re-shared or copied by other users.

- Certain types of communications that you send to other users cannot be removed, such as messages.

- When you post information on another user's profile or comment on another user's post, that information will be subject to the other user's [privacy settings](#).

- If you use an external source to publish information to Facebook (such as a mobile application or a Connect site), you should check the privacy setting for that post, as it is set by that external source.

Everyone's Privacy Setting. Information set to "everyone" is publicly available information, may be accessed by everyone on the Internet (including people not logged into Facebook), is subject to indexing by third party search engines, may be associated with you outside of Facebook (such as when you visit other sites on the internet), and may be imported and exported by us and others without privacy limitations. The default privacy setting for certain types of information you post on Facebook is set to "everyone." You can review and change the default settings in your [privacy settings](#). If you delete "everyone" content that you posted on Facebook, we will remove it from your Facebook profile, but have no control over its use outside of Facebook.

Facebook Platform. As mentioned above, we do not own or operate Facebook-enhanced applications or websites. That means that when you visit Facebook-enhanced applications and websites you are making your Facebook information available to someone other than Facebook. To help those applications and sites operate, they receive publicly available information automatically when you visit them, and additional information when you formally authorize or connect your Facebook account with them. You can learn more details about which information the operators of those applications and websites can access on our [About Platform](#) page. Prior to allowing them to access any information about you, we require them to agree to terms that limit their use of your information (which you can read about in Section 9 of our [Statement of Rights and Responsibilities](#)) and we use technical measures to ensure that they only obtain authorized information. We also give you tools to control how your information is shared with them:

- You can choose to opt-out of Facebook Platform and Facebook Connect altogether through your [privacy settings](#).

- You can block specific applications from accessing your information by visiting your [application settings](#) or the application's "About" page.

- You can use your [privacy settings](#) to limit which of your information is available to "everyone" (by default, every application and website, including those you have not connected with, can access "everyone" and other publicly available content).

- You can use your [application settings](#) to limit which of your information your friends can make available to applications and websites.

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- We may make information about the location of your computer or access device and your age available to Facebook to enhance applications and websites in order to help them implement appropriate security measures and control the distribution of age-appropriate content.

You should always review the policies of third party applications and websites to make sure you are comfortable with the ways in which they use information you share with them. We do not guarantee that they will follow our rules. If you find an application or website that violates our rules, you should report the violation to us on this [help page](#) and we will take action as necessary.

Exporting Information. You (and those you make your information available to) may use tools like RSS feeds, mobile phone address books, or copy and paste functions, to capture and export information from Facebook, including your information and information about you.

Advertisements. Sometimes the advertisers who present ads on Facebook use technological methods to measure the effectiveness of their ads and to personalize advertising content. You may opt-out of the placement of cookies by many of these advertisers [here](#). You may also use your browser cookie settings to limit or prevent the placement of cookies by advertising networks.

Links. When you click on links on Facebook you may leave our site. We are not responsible for the privacy practices of other sites, and we encourage you to read their privacy statements.

4. How We Use Your Information

We use the information we collect to try to provide a safe, efficient, and customized experience. Here are some of the details on how we do that:

To manage the service. We use the information we collect to provide our services and features to you, to measure and improve those services and features, and to provide you with customer support. We use the information to prevent potentially illegal activities, and to enforce our [Statement of Rights and Responsibilities](#). For example, we ask for your date of birth to verify that you are over age 13 and so that we can better limit your access to content and advertisements that are not age appropriate. We also use a variety of technological systems to detect and address anomalous activity and screen content to prevent abuse such as spam. These efforts may on occasion result in a temporary or permanent suspension or termination of some functions for some users.

To contact you. We may contact you with service-related announcements from time to time. You may opt out of all communications except essential updates on your [account notifications](#) page. We may include content you see on Facebook in the emails we send to you.

To serve personalized advertising to you. We don't share your information with advertisers without your consent. (An example of consent would be if you asked us to provide your shipping address to an advertiser to receive a free sample.) We allow advertisers to choose the characteristics of users who will see their advertisements and we may use any of the non-personally identifiable attributes we have collected (including information you may have decided not to show to other users, such as your birth year or other sensitive personal information or preferences) to select the appropriate audience for those advertisements. For example, we might use your interest in soccer to show you ads for soccer equipment, but we do not tell the soccer equipment company who you are. You can see the criteria advertisers may select by visiting our [advertising page](#). Even though we do not share your information with advertisers without your consent, when you click on or otherwise interact with an advertisement

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there is a possibility that the advertiser may place a cookie in your browser and note that it meets the criteria they selected.

To serve social ads. We occasionally pair advertisements we serve with relevant information we have about you and your friends to make advertisements more interesting and more tailored to you and your friends. For example, if you become a fan of a Page, we may display your name and profile photo next to an advertisement for that Page that is displayed to your friends. We only share the personally identifiable information visible in the social ad with the friend who can see the ad. You can opt out of having your information used in social ads on this [help page](#).

To supplement your profile. We may use information about you that we collect from other Facebook users to supplement your profile (such as when you are tagged in a photo or mentioned in a status update). In such cases we generally allow you to direct how that information is shared in your [privacy settings](#) or give you the ability to remove the content (such as allowing you to remove a photo tag of you) or limit its visibility on Facebook.

To make Suggestions. We use your profile information, the addresses you import through our contact importers, and other relevant information, to help you connect with your friends, including making suggestions to you and other users that you connect with on Facebook. If you want to limit your visibility in suggestions we make to other people, you can adjust your search visibility [privacy setting](#), as you will only be visible in our suggestions to the extent you choose to be visible in public search listings. You may also block specific individual users from being suggested to you and you from being suggested to them.

Downloadable Software. Certain downloadable software applications and applets that we offer, such as our browser toolbars and photo uploaders, transmit data to us. We may not make a formal disclosure if we believe our collection of and use of the information is the obvious purpose of the application, such as the fact that we receive photos when you use our photo uploader. If we believe it is not obvious that we are collecting or using such information, we will make a disclosure to you the first time you provide the information to us so that you can decide whether you want to use that feature.

Memorializing Accounts. If we are [notified](#) that a user is deceased, we may memorialize the user's account. In such cases we restrict profile access to confirmed friends, and allow friends and family to write on the user's Wall in remembrance. We may close an account if we receive a formal request from the user's next of kin or other proper legal request to do so.

5. How We Share Information

Facebook is about sharing information with others' friends and people in your networks while providing you with [privacy settings](#) that you can use to restrict other users from accessing your information. We share your information with third parties when we believe the sharing is permitted by you, reasonably necessary to offer our services, or when legally required to do so. For example:

When you make a payment. When you enter into transactions with others or make payments on Facebook, we will only share transaction information with those third parties necessary to complete the transaction and will require those third parties to agree to respect the privacy of your information.

When you invite a friend to join. When you ask us to invite a friend to join Facebook, we will send your friend a message on your behalf using your name. We may also send up to two reminders to them

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in your name. If your friend does not want us to keep their information, we will remove it at their request on this [help page](#).

When you choose to share your information with marketers. You may choose to share information with marketers or electronic commerce providers that are not associated with Facebook through on-site offers. This is entirely at your discretion and we will not provide your information to these marketers without your consent.

To help your friends find you. By default, we make certain information you have posted to your profile available in search results on Facebook to help your friends find you. However, you can control who has access to this information, as well as who can find you in searches, through your [privacy settings](#). We also partner with email and instant messaging providers to help their users identify which of their contacts are Facebook users, so that we can promote Facebook to those users.

To give search engines access to publicly available information. We generally limit search engines' access to our site. We may allow them to access information set to the "everyone" setting and your public search listing (but you can turn off your public search listing in your [privacy settings](#)).

To help improve or promote our service. Sometimes we share aggregated information with third parties to help improve or promote our service. But we only do so in such a way that no individual user can be identified or linked to any specific action or information.

To provide you with services. We may provide information to service providers that help us bring you the services we offer. For example, we may use third parties to help host our website, send out email updates about Facebook, remove repetitive information from our user lists, process payments, or provide search results or links (including sponsored links). These service providers may have access to your personal information for use for a limited time, but when this occurs we implement reasonable contractual and technical protections to limit their use of that information to helping us provide the service.

To advertise our services. We may ask advertisers outside of Facebook to display ads promoting our services. We may ask them to deliver those ads based on the presence of a cookie, but in doing so will not share any other information with the advertiser.

To offer joint services. We may provide services jointly with other companies, such as the classifieds service in the Facebook Marketplace. If you use these services, we may share your information to facilitate that service. However, we will identify the partner and present the joint service provider's privacy policy to you before you use that service.

To respond to legal requests and prevent harm. We may disclose information pursuant to subpoenas, court orders, or other requests (including criminal and civil matters) if we have a good faith belief that the response is required by law. This may include respecting requests from jurisdictions outside of the United States where we have a good faith belief that the response is required by law under the local laws in that jurisdiction, apply to users from that jurisdiction, and are consistent with generally accepted international standards. We may also share information when we have a good faith belief it is necessary to prevent fraud or other illegal activity, to prevent imminent bodily harm, or to protect ourselves and you from people violating our [Statement of Rights and Responsibilities](#). This may include sharing information with other companies, lawyers, courts or other government entities.

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Facebook Beacon. [We have announced a settlement of a lawsuit related to the Beacon product: the Beacon product will be discontinued and this language removed from the privacy policy upon approval of a settlement by the court.] Facebook Beacon is a means of sharing actions you have taken on third party sites, such as when you make a purchase or post a review, with your friends on Facebook. In order to provide you as a Facebook user with clear disclosure of the activity information being collected on third party sites and potentially shared with your friends on Facebook, we collect certain information from that site and present it to you after you have completed an action on that site. You have the choice to have us discard that information, or to share it with your friends. To learn more about the operation of the service, we encourage you to read the tutorial [here](#). To opt out of the service altogether, click [here](#). Like many other websites that interact with third party sites, we may receive some information even if you are logged out from Facebook, or that pertains to non-Facebook users, from those sites in conjunction with the technical operation of the system. In cases where we receive information from Beacon sites on users that are not logged in, or on non-Facebook users, we do not attempt to associate it with individual Facebook accounts and will discard it.

Transfer in the Event of Sale or Change of Control. If the ownership of all or substantially all of our business changes, we may transfer your information to the new owner so that the service can continue to operate. In such a case, your information would remain subject to the promises made in any pre-existing Privacy Policy.

6. How You Can View, Change, or Remove Information

Viewing and editing your profile. You may change or delete your profile information at any time by going to your profile page and clicking "Edit My Profile." Information will be updated immediately. While you cannot delete your date of birth, you can use the setting on the info tab of your profile information page to hide all or part of it from other users.

Delete uploaded contacts. If you use our contact importer to upload addresses, you can later delete the list on this [help page](#).

Deactivating or deleting your account. If you want to stop using your account you may deactivate it or delete it. When you deactivate an account, no user will be able to see it, but it will not be deleted. We save your profile information (friends, photos, interests, etc.) in case you later decide to reactivate your account. Many users deactivate their accounts for temporary reasons and in doing so are asking us to maintain their information until they return to Facebook. You will still have the ability to reactivate your account and restore your profile in its entirety. When you delete an account, it is permanently deleted. You should only delete your account if you are certain you never want to reactivate it. You may deactivate your account on your [account settings](#) page or delete your account on this [help page](#).

Limitations on removal. Even after you remove information from your profile or delete your account, copies of that information may remain viewable elsewhere to the extent it has been shared with others, it was otherwise distributed pursuant to your [privacy settings](#), or it was copied or stored by other users. However, your name will no longer be associated with that information on Facebook. (For example, if you post something to another user's profile, and then you delete your account, that post may remain, but be attributed to an "Anonymous Facebook User.") Additionally, we may retain certain information to prevent identity theft and other misconduct even if deletion has been requested.

Backup copies. Removed and deleted information may persist in backup copies for up to 90 days, but will not be available to others.

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Non-user contact information. If a user provides your email address to us, and you are not a Facebook user but you want us to delete your address, you can do so on this [help page](#). However, that request will only apply to addresses we have at the time of the request and not to any addresses that users provide to us later.

7. How We Protect Information

We do our best to keep your information secure, but we need your help. For more detailed information about staying safe on Facebook, visit the Facebook [Security Page](#).

Steps we take to keep your information secure. We keep your account information on a secured server behind a firewall. When you enter sensitive information (such as credit card numbers and passwords), we encrypt that information using secure socket layer technology (SSL). We also use automated and social measures to enhance security, such as analyzing account behavior for fraudulent or otherwise anomalous behavior, may limit use of site features in response to possible signs of abuse, may remove inappropriate content or links to illegal content, and may suspend or disable accounts for violations of our [Statement of Rights and Responsibilities](#).

Risks inherent in sharing information. Although we allow you to set privacy options that limit access to your information, please be aware that no security measures are perfect or impenetrable. We cannot control the actions of other users with whom you share your information. We cannot guarantee that only authorized persons will view your information. We cannot ensure that information you share on Facebook will not become publicly available. We are not responsible for third party circumvention of any [privacy settings](#) or security measures on Facebook. You can reduce these risks by using common sense security practices such as choosing a strong password, using different passwords for different services, and using up to date antivirus software.

Report Violations. You should report any security violations to us on this [help page](#).

8. Other Terms

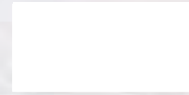
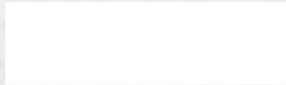
Changes. We may change this Privacy Policy pursuant to the procedures outlined in the Facebook [Statement of Rights and Responsibilities](#). Unless stated otherwise, our current privacy policy applies to all information that we have about you and your account. If we make changes to this Privacy Policy we will notify you by publication here and on the [Facebook Site Governance Page](#). You can make sure that you receive notice directly by becoming a fan of the [Facebook Site Governance Page](#).

Consent to Collection and Processing in the United States. By using Facebook, you consent to having your personal data transferred to and processed in the United States.

Defined Terms. "Us," "we," "our," "Platform" and "Facebook" mean the same as they do in the [Statement of Rights and Responsibilities](#). "Information" and "content" are used more generally and interchangeably here than in the [Statement of Rights and Responsibilities](#) unless otherwise limited by the context.

Helpful links

[Statement of Rights and Responsibilities](#)



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[Facebook Site Governance Page](#)
[application settings](#)
[privacy settings](#)
[account notifications page](#)
[help page](#) for complaints about our privacy policies or practices
[help page](#) to report use by a child under age 13
[help page](#) with info to help parents talk to children about safe internet use
[deleting an account](#)
[reporting a deceased user](#)
[reporting an impostor](#)
[reporting abusive content](#)
[reporting a compromised account](#)
[requesting deletion of data for non-user](#)
[removing Friend Finder contacts](#)
[reporting and blocking third-party applications](#)
[general explanation of third-party applications and how they access data](#)

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Exhibit I**Statement of Rights and Responsibilities**

This Statement of Rights and Responsibilities ("Statement") derives from the Facebook Principles, and governs our relationship with users and others who interact with Facebook. By using or accessing Facebook, you agree to this Statement.

1. Privacy

Your privacy is very important to us. We designed our [Privacy Policy](#) to make important disclosures to you about how we collect and use the information you post on Facebook. We encourage you to read the Privacy Policy, and to use the information it contains to help make informed decisions.

2. Sharing Your Content and Information

You own all of the content and information you post on Facebook, and you can control how we share your content through your [privacy](#) and [application](#) settings. In order for us to use certain types of content and provide you with Facebook, you agree to the following:

- 2.1 For content that is covered by intellectual property rights, like photos and videos ("IP content"), you specifically give us the following permission, subject to your [privacy](#) and [application](#) settings: you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook ("IP License"). This IP License ends when you delete your IP content or your account (except to the extent your content has been shared with others, and they have not deleted it).
- 2.2 When you delete IP content, it is deleted in a manner similar to emptying the recycle bin on a computer. However, you understand that removed content may persist in backup copies for a reasonable period of time (but will not be available to others).
- 2.3 We always appreciate your feedback or other suggestions about Facebook, but you understand that we may use them without any obligation to compensate you for them (just as you have no obligation to offer them).

3. Safety

We do our best to keep Facebook safe, but we cannot guarantee it. We need your help in order to do that, which includes the following commitments:

- 3.1 You will not send or otherwise post unauthorized commercial communications to users (such as spam).
- 3.2 You will not collect users' information, or otherwise access Facebook, using automated means (such as harvesting bots, robots, spiders, or scrapers) without our permission.
- 3.3 You will not upload viruses or other malicious code.
- 3.4 You will not solicit login information or access an account belonging to someone else.
- 3.5 You will not bully, intimidate, or harass any user.
- 3.6 You will not post content that is hateful, threatening, pornographic, or that contains nudity or graphic or gratuitous violence.
- 3.7 You will not develop or operate a third party application containing, or advertise or otherwise market alcohol-related or other mature content without appropriate age-based restrictions.
- 3.8 You will not use Facebook to do anything unlawful, misleading, malicious, or discriminatory.
- 3.9 You will not facilitate or encourage any violations of this Statement.

4. Registration and Account Security

Facebook users provide their real names and information, and we need your help to keep it that way. Here are some commitments you make to us relating to registering and maintaining the security of your account:

- 4.1 You will not provide any false personal information on Facebook, or create an account for anyone other than yourself without permission.
- 4.2 You will not use Facebook if you are under 13.
- 4.3 You will not use Facebook if you are located in a country embargoed by the U.S., or are on the U.S. Treasury Department's list of Specially Designated Nationals.
- 4.4 You will not use Facebook if you are a convicted sex offender.

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- 4.5 You will keep your contact information accurate and up-to-date.
- 4.6 You will not share your password, let anyone else access your account, or do anything else that might jeopardize the security of your account.
- 4.7 You will not transfer your account to anyone without first getting our written permission.

5. Protecting Other People's Rights

We respect other people's rights, and expect you to do the same.

- 5.1 You will not post content or take any action on Facebook that infringes someone else's rights or otherwise violates the law.
- 5.2 We can remove any content you post on Facebook if we believe that it violates this Statement.
- 5.3 We will provide you with tools to help you protect your intellectual property rights. To learn more, visit our [How to Report Claims of Intellectual Property Infringement](#) page.
- 5.4 If we removed your content for infringing someone else's copyright, and you believe we removed it by mistake, we will provide you with an opportunity to appeal.
- 5.5 If you repeatedly infringe other people's intellectual property rights, we will disable your account when appropriate.
- 5.6 You will not use our copyrights or trademarks (including Facebook, the Facebook and F Logos, FB, Face, Poke, Wall and 32685) without our written permission.
- 5.7 If you collect information from users, you will: obtain their consent, make it clear you (and not Facebook) are the one collecting their information, and post a privacy policy explaining what information you collect and how you will use it.
- 5.8 You will not post anyone's identification documents or sensitive financial information on Facebook.

6. Mobile

- 6.1 We currently provide our mobile services for free, but please be aware that your carrier's normal rates and fees, such as text messaging fees, will still apply.
- 6.2 In the event you change or deactivate your mobile telephone number, you will update your account information on Facebook within 48 hours to ensure that your messages are not sent to the person who acquires your old number.

7. Payments

If you purchase or use Facebook Credits, or make direct payments, you agree to our [Payments Terms](#).

8. Special Provisions Applicable to Share Links

If you include our Share Link button on your website, the following additional terms apply to you:

- 8.1 We give you permission to use Facebook's Share Link button so that users can post links or content from your website on Facebook.
- 8.2 You give us permission to use such links and content on Facebook.
- 8.3 You will not place a Share Link button on any page containing content that would violate this Statement if posted on Facebook.

9. Special Provisions Applicable to Developers/Operators of Applications and Websites

If you are a developer or operator of a Platform application or a website using Connect ("application") or otherwise use Platform, the following additional terms apply to you:

- 9.1 You are responsible for your application and its content and all uses you make of Platform. This includes ensuring your application or use of Platform meets our [Platform Guidelines](#).
- 9.2 When users add your application or connect it to their Facebook account, they give permission for you to receive certain data relating to them. Your access to and use of that data will be limited as follows:
 - 9.2.1 You will only use the data you receive for your application, and will only use it in connection with Facebook.

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- 9.2.2 You will make it clear to users what user data you are going to use and how you will use, display, or share that data.
- 9.2.3 You will not use, display, or share a user's data in a manner inconsistent with the user's [privacy settings](#) without the user's consent.
- 9.2.4 You will delete all data you received from us relating to any user who removes or disconnects from your application unless otherwise permitted in our [Platform Guidelines](#).
- 9.2.5 You will delete all data you received from Facebook if we disable your application or ask you to do so.
- 9.2.6 We can require you to update any data you have received from us.
- 9.2.7 We can limit your access to data.
- 9.2.8 You will not transfer the data you receive from us without our prior consent.
- 9.3 You will not give us data that you independently collect from a user or a user's content without that user's consent.
- 9.4 You will make it easy for users to remove or disconnect from your application.
- 9.5 You will make it easy for users to contact you. We can also share your email address with users.
- 9.6 You will provide customer support for your application.
- 9.7 You will not show ads or web search boxes on Facebook profiles.
- 9.8 We give you all rights necessary to use the code, APIs (along with all content and data received), or tools we provide to you, but only in connection with your application.
- 9.9 You will not sell, transfer, or sublicense our code, APIs, or tools to anyone.
- 9.10 You will not misrepresent your relationship with Facebook to others.
- 9.11 You may use the logos we make available to developers or issue a press release or other public statement so long as you follow our [Platform Guidelines](#).
- 9.12 We can issue a press release describing our relationship with you.
- 9.13 You will comply with all applicable laws. In particular you will (if applicable):
- 9.13.1 have a policy for removing infringing content and terminating repeat infringers that complies with the Digital Millennium Copyright Act;
 - 9.13.2 comply with the Video Privacy Protection Act ("VPPA"), and will obtain explicit, opt-in consent from users prior to sharing with Facebook user data subject to the VPPA. You acknowledge Facebook has no obligations under the VPPA.
 - 9.13.3
- 9.14 We do not guarantee that Platform will always be free.
- 9.15 You give us all rights necessary to enable your application to work with Facebook, including the right to:
- 9.15.1 incorporate your content into streams, profiles, and user action stories;
 - 9.15.2 link to or frame your application; and
 - 9.15.3 place content, including ads, around your application.
- 9.16 We can analyze your application, content, and data for any purpose, including commercial (such as for targeting the delivery of advertisements and indexing content for search).
- 9.17 To ensure your application is safe for users, we can audit it.
- 9.18 We can create applications that offer similar features and services to, or otherwise compete with, your application.
- 10. About Advertisements on Facebook**
- Our goal is to deliver ads that are not only valuable to advertisers, but also valuable to you. In order to do that, you agree to the following:
- 10.1 You can use your [privacy settings](#) to limit how your name and profile picture may be associated with commercial or sponsored content. You give us permission to use your name and profile picture in connection with that content, subject to the limits you place.
- 10.2 We do not give your content to advertisers.
- 10.3 You understand that we may not always identify paid services and communications as such.
- 11. Special Provisions Applicable to Advertisers**
- You can target your specific audience by buying ads on Facebook or our publisher network. The following additional terms apply to you if you place an order through our online advertising portal ("Order"):
- 11.1 When you place an Order, you will tell us the type of advertising you want to buy, the amount you want to spend, and your bid. If we accept your Order, we will deliver your ads as inventory becomes available.

Complaint

- 11.2 You will pay for your Orders in accordance with our [Payments Terms](#). The amount you owe will be calculated based on our tracking mechanisms.
- 11.3 Your ads will comply with our [Ad Guidelines](#).
- 11.4 We will determine the size, placement, and positioning of your ads.
- 11.5 We do not guarantee the activity that your ads will receive, such as the number of clicks you will get.
- 11.6 We cannot control how people interact with your ads, and are not responsible for click fraud or other improper actions that affect the cost of running ads.
- 11.7 You will not offer any contest or sweepstakes ("promotion") without our prior written consent. If we consent, you take full responsibility for the promotion, and will follow our [Promotions Guidelines](#) and all applicable laws.
- 11.8 You can cancel your Order at any time through our online portal, but it may take us seven days before the ad stops running.
- 11.9 Our license to run your ad will end when we have completed your Order. You understand, however, that if users have interacted with your ads, your ads may remain until the users delete it.
- 11.10 We can use your ads and related information for marketing or promotional purposes.
- 11.11 You will not issue any press release or make public statements about your relationship with Facebook without written permission.
- 11.12 We may reject or remove any ad for any reason.

If you are placing ads on someone else's behalf, we need to make sure you have permission to place those ads, including the following:

- 11.13 You warrant that you have the legal authority to bind the advertiser to this Statement.
- 11.14 You agree that if the advertiser you represent violates this Statement, we may hold you responsible for that violation.

12. Amendments

- 12.1 We can change this Statement so long as we provide you notice through Facebook (unless you opt-out of such notice) and an opportunity to comment.
- 12.2 For changes to sections 7, 8, 9, and 11 (sections relating to payments, application developers, website operators, and advertisers), we will give you a minimum of three days notice. For all other changes we will give you a minimum of seven days notice.
- 12.3 If more than 7,000 users comment on the proposed change, we will also give you the opportunity to participate in a vote in which you will be provided alternatives. The vote shall be binding on us if more than 30% of all active registered users as of the date of the notice vote.
- 12.4 We can make changes for legal or administrative reasons upon notice without opportunity to comment.

13. Termination

If you violate the letter or spirit of this Statement, or otherwise create possible legal exposure for us, we can stop providing all or part of Facebook to you. We will generally try to notify you, but have no obligation to do so. You may also delete your account or disable your application at any time. In all such cases, this Statement shall terminate, but the following provisions will still apply: 2.2, 2.3, 3-5, 8.2, 9.1-9.9, 9.9, 9.10, 9.11, 9.13, 9.15.1, 9.18, 10.3, 11.2, 11.5, 11.6, 11.9, 11.10, 11.13, 11.14, and 13-16.

14. Disputes

- 14.1 You will resolve any claim, cause of action or dispute ("claim") you have with us arising out of or relating to this Statement or Facebook in a state or federal court located in Santa Clara County. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions. You agree to submit to the personal jurisdiction of the courts located in Santa Clara County, California for the purpose of litigating all such claims.
- 14.2 If anyone brings a claim against us related to your actions or your content on Facebook, you will indemnify and hold us harmless from and against all damages, losses, and expenses of any kind (including reasonable legal fees and costs) related to such claim.
- 14.3 WE TRY TO KEEP FACEBOOK UP, BUG-FREE, AND SAFE, BUT YOU USE IT AT YOUR OWN RISK. WE ARE PROVIDING FACEBOOK "AS IS" WITHOUT ANY EXPRESS OR IMPLIED WARRANTIES INCLUDING, BUT NOT LIMITED TO, IMPLIED

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WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT. WE DO NOT GUARANTEE THAT FACEBOOK WILL BE SAFE OR SECURE. FACEBOOK IS NOT RESPONSIBLE FOR THE ACTIONS OR CONTENT OF THIRD PARTIES, AND YOU RELEASE US, OUR DIRECTORS, OFFICERS, EMPLOYEES, AND AGENTS FROM ANY CLAIMS AND DAMAGES, KNOWN AND UNKNOWN, ARISING OUT OF OR IN ANY WAY CONNECTED WITH ANY CLAIM YOU HAVE AGAINST ANY SUCH THIRD PARTIES. IF YOU ARE A CALIFORNIA RESIDENT, YOU WAIVE CALIFORNIA CIVIL CODE §1542, WHICH SAYS: "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR." WE WILL NOT BE LIABLE TO YOU FOR ANY LOST PROFITS OR OTHER CONSEQUENTIAL, SPECIAL, INDIRECT, OR INCIDENTAL DAMAGES ARISING OUT OF OR IN CONNECTION WITH THIS STATEMENT OR FACEBOOK, EVEN IF WE HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. OUR AGGREGATE LIABILITY ARISING OUT OF THIS STATEMENT OR FACEBOOK WILL NOT EXCEED THE GREATER OF ONE HUNDRED DOLLARS (\$100) OR THE AMOUNT YOU HAVE PAID US IN THE PAST TWELVE MONTHS. APPLICABLE LAW MAY NOT ALLOW THE LIMITATION OR EXCLUSION OF LIABILITY OR INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THE ABOVE LIMITATION OR EXCLUSION MAY NOT APPLY TO YOU. IN SUCH CASES, FACEBOOK'S LIABILITY WILL BE LIMITED TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW.

15. Definitions

- 15.1 By "Facebook" we mean the features and services we make available, including through (a) our website at www.facebook.com and any other Facebook branded or co-branded websites (including sub-domains, international versions, and mobile versions); (b) our Platform; and (c) other media, devices or networks now existing or later developed.
- 15.2 By "us," "we" and "our" we mean Facebook, Inc. and/or its affiliates.
- 15.3 By "Platform" we mean a set of APIs and services that enable applications, developers, operators or services to retrieve data from Facebook and provide data to us relating to Facebook users.
- 15.4 By "content" we mean the content and information you post on Facebook, including information about you and the actions you take.
- 15.5 By "post" we mean post on Facebook or otherwise make available to us.
- 15.6 By "use" we mean use, copy, publicly perform or display, distribute, modify, translate, and create derivative works of.

16. Other

- 16.1 This Statement makes up the entire agreement between the parties regarding Facebook, and supersedes any prior agreements.
- 16.2 If any portion of this Statement is found to be unenforceable, the remaining portion will remain in full force and effect.
- 16.3 If we fail to enforce any of this Statement, it will not be considered a waiver.
- 16.4 Any amendment to or waiver of this Statement must be made in writing and signed by us.
- 16.5 You will not transfer any of your rights or obligations under this Statement to anyone else without our consent.
- 16.6 All of our rights and obligations under this Statement are freely assignable by us in connection with a merger, acquisition, or sale of assets, or by operation of law or otherwise.
- 16.7 Nothing in this Agreement shall prevent us from complying with the law.
- 16.8 We may enter into separate agreements that vary from and supersede certain provisions of this Statement so long as such agreements are consistent with your intellectual property rights under this Statement and no less protective of your privacy than this Statement and the Privacy Policy.
- 16.9 This Statement does not confer any third party beneficiary rights.

Complaint

Exhibit J

Responding to Your Feedback | Facebook Page 1 of 3



Keep me logged in Forgot your password?

[Sign Up](#) Facebook helps you connect and share with the people in your life.

The Facebook Blog [Facebook Page](#) [Subscribe to RSS Feed](#)

Responding to Your Feedback
by [Benny Shinn](#) on Monday, April 5, 2010 at 9:42am

On Saturday, we concluded the public and comment process for our latest set of proposed changes to Facebook's governing documents. This was the fifth time we've reviewed new policies and asked for feedback since we adopted this framework early last year. I'm pleased to report that during the latest week-long process, we received more than 4,000 comments from people around the world, including users, regulators, and active privacy advocates.

As we announced at the opening of the period, these latest proposed revisions to our Privacy Policy and Statement of Rights and Responsibilities (SRR) were designed to make way for some exciting new products we're contemplating. Because not all of these products have been finalized and many aren't yet built at all, we'll be able to use your comments to help influence our product development.

In addition to taking your feedback into account as our product teams and engineers are designing and coding, we wanted to respond to some of the common comments.

For example, some of you commented, in connection with the proposed new Privacy Policy, that you'd like to be able to hide your Friends List. In fact, this is something that people already have the ability to do. We announced this feature back in December, and you can read more about it in our [Help Center](#).

Others had questions about the sections in the SRR requiring people to provide accurate information and limiting them to one account. These are not new requirements. Facebook has always been based on a real-name culture, and we feel strongly that these policies provide greater accountability and a safer and more trusted environment across the site.

Still others asked to be opted-out of having their information shared with advertisers. This reflects a common misconception about advertising on Facebook. We don't share your information with advertisers unless you tell us to (e.g. to get a sample, hear more, or enter a contest). Any assertion to the contrary is false. Instead, we enable advertisers to target anonymized demographics and attributes. That is, a company selling books can target people between 40 and 50 years old who expressed an interest in boating. However, we never provide the advertiser any names or other information about the people who are shown, or even who click on, the ads.

We also received questions about the proposed new language in the Privacy Policy relating to our plans to work with some pre-approved partner websites to offer a personalized experience when you arrive at these sites. Based on your comments, we think it's important to clarify a couple of points, even though this program has not yet been launched or even finalized.

First, it's important to understand that this will be a test with a handful of carefully selected partners to provide excess personalization on their sites. These partners will be pre-selected, reviewed, and bound by contracts with Facebook - much like other partners we have worked with in other contexts to deliver unique and innovative experiences. For example, we're working with [Vudu](#) to integrate Facebook across their properties, AOL to integrate our chat with AOL, and we first partnered with [Dail.com](#) to make their broadcast of the Presidential Inauguration more social with the launch of the Facebook live stream application.

In addition, partners who participate in this test will be required to provide an easy and prominent method for you to opt out directly from their website and delete your data if you do opt out. There will also be new features on Facebook.com to help you control your experience when you visit these sites.

In sum, the core idea behind this test is to work with partners to enable them to present you with a better, more relevant, and tailored experience when you visit their sites. While we have not finalized these features or partnerships, we think this is an exciting opportunity to make surfing the web a smoother and more engaging experience for people who use Facebook.

We're committed to building products that advance what's possible for people who want more personalized and social experiences on the Web. We're equally committed to evolving our products and technologies in a way that respects the trust you have put into Facebook.

As always, thanks for participating in our open governance process and sharing your feedback with

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A Continued Commitment to Security
15798 3079

Introducing Details
11036 1901

The New Profile Is Here
15465 11381

A Better Mobile Experience for More People
12035 2943

Introducing the New Profile
7253 15655

Facebook Page
 **Facebook**
Like 33,471,931

Facebook Favorites

- [Help Center](#)
- [Facebook Security](#)
- [Facebook Developer Blog](#)
- [Facebook Engineering](#)
- [Facebook Ads](#)
- [Facebook Marketing Solutions](#)

Comment Policy
We love your feedback, but be respectful and stay on topic. We reserve the right to delete profane, harassing, abusive and spam comments and to block repeat offenders. [Read more](#)

Blog Archive
Looking for a specific post? Visit our [full archive](#) of blog posts sorted by categories and dates.

<http://blog.facebook.com/blog.php?post=379388037130>

2/9/2011

Complaint


Responding to Your Feedback | Facebook Page 2 of 3

us. We expect the new documents to be live on the site in the coming days. Stay tuned for future updates by becoming a fan of the Facebook Site Governance Page.

Barry is a director on Facebook's communications and public policy team.

Topics: Privacy, Site governance, Statement of Rights and Responsibilities (SRR)

Like 2,983 people like this.



Facebook social plugin

<http://blog.facebook.com/blog.php?post=379388037130> 2/9/2011

Complaint

Exhibit K

The Role of Advertising on Facebook | Facebook Page 1 of 2



Keep me logged in Forgot your password?

Facebook helps you connect and share with the people in your life.

The Facebook Blog Facebook Page Subscribe to RSS Feed

The Role of Advertising on Facebook
by Sheryl Sandberg on Tuesday, July 6, 2010 at 11:53am

At Facebook, everything we do is about making the world more social and creating more personalized experiences. On Facebook, people do everything from remembering their friends' birthdays to reuniting with old classmates to even finding people willing to donate their organs to save their lives. We think making the world more personal and social is having a profound impact on the way we relate to the people, communities and institutions around us.

In a more connected world, advertisers are social too. This gives you the chance to connect to the companies and brands you like and learn more about their products and services. We believe that more personalized social advertising complements the ways that people use Facebook every day—to discover, share and connect with the people and the world around them.

Whether it's a new car, a local dentist or a t-shirt, many of the things you discover on Facebook come from your friends. Just as advertising has changed the experience of searching on the web, we think advertisers are a meaningful part of the social graph and the online experience as a whole.

We have designed Facebook to provide relevant and interesting advertising content to you in a way that protects your privacy completely. We never share your personal information with advertisers. We never sell your personal information to anyone. These protections are yours no matter what privacy settings you use; they apply equally to people who share openly with everyone and to people who share with only select friends.

We also protect your privacy by virtue of the way our advertising system works. Because our system chooses which ads to show you, we don't need to share any of your personal information with advertisers in order to show you relevant ads. In order to advertise on Facebook, advertisers give us an ad they want us to display and tell us the kinds of people they want to reach. We deliver the ad to people who fit those criteria without revealing any personal information to the advertiser.

The only information we provide to advertisers is aggregate and anonymous data, so they can know how many people viewed their ad and general categories of information about them. Ultimately, this helps advertisers better understand how well their ads work so they can show better ads.

Advertisers can also request that we display ads based on the things you have said you liked in your profile. We think this means you will get ads that are more personalized to your real interests and this makes your experience on Facebook even better. For example, if you are a small business selling tents you might want to target adults ages 18-49 who have liked camping or hiking. Our advertising system only shows the number of people who fit those criteria.

Once the ad runs, we report how many people saw or clicked on the ad and we provide aggregate demographic information. We do not show individual profiles or personal information in our reporting tools.

If you are interested in seeing how this works, you can watch this video:

We have built—and are continuing to grow—a successful advertising business that gives you the opportunity to discover and connect to things you like while respecting your privacy no matter how you choose to share your information. We think an online advertising experience that is social and puts consumers at the center of an ongoing, two-way conversation is better for people and

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Introducing Details
11035 1901

The New Profile Is Here
15465 11961

A Better Mobile Experience for More People
12635 2962

Introducing the New Profile
23953 25635

Facebook Page

 Facebook
Like

Facebook Favorites

[Help Center](#)
[Facebook Security](#)
[Facebook Developers Blog](#)
[Facebook Engineering](#)
[Facebook Ads](#)
[Facebook Marketing Solutions](#)

Comment Policy

We love your feedback, but be respectful and stay on topic. We reserve the right to delete profane, harassing, abusive and spam comments and to block repeat offenders. [Learn more.](#)

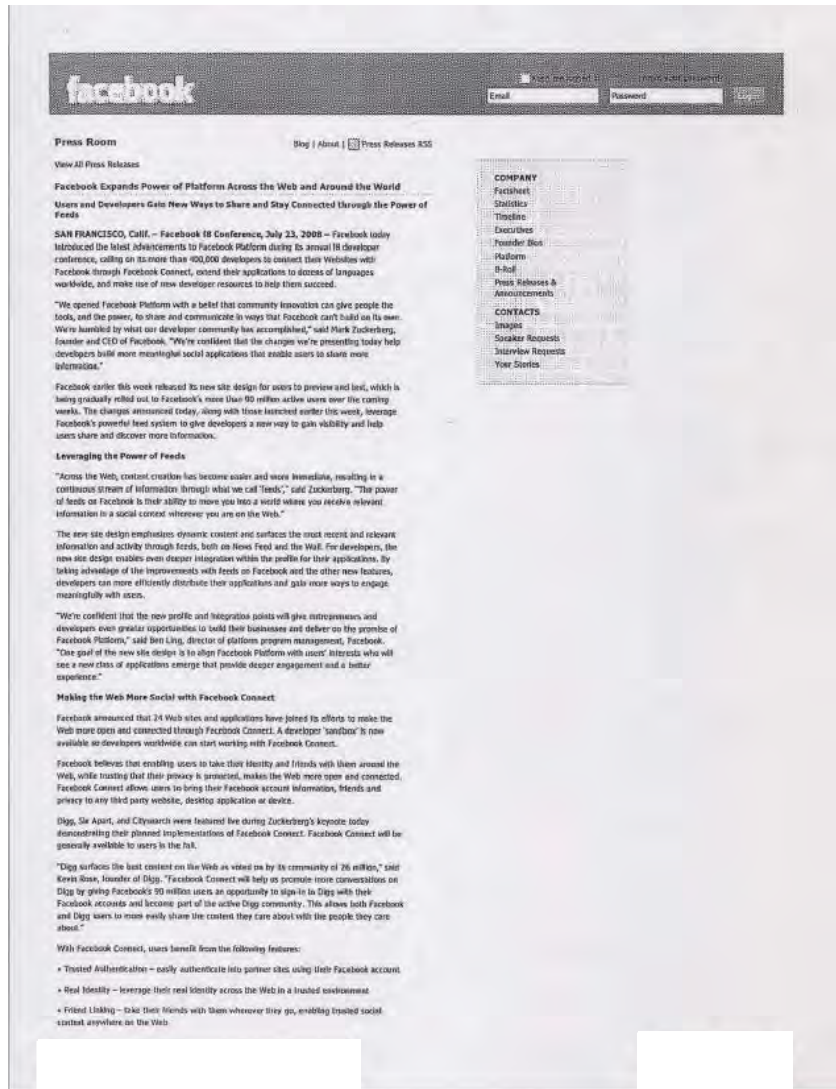
Blog Archive

Looking for a specific post? Visit our full archive of blog posts sorted by categories and dates.

http://www.facebook.com/blog.php?post=403570307130 2/9/2011

Complaint

Exhibit L



Complaint

• **Dynami Privacy** – assures that the same privacy settings users have set up on Facebook will follow them wherever they decide to go throughout the Web.

• **Social Distribution** – share actions on various sites with their friends back on Facebook through feeds. Additional planned participants at launch include: Amazon, CBS.com, CNN, CollegeHumor, Disney ABC Television Group, Evite, Flickr, Hulu, Kongregate, Last.fm, Myspace, Radar, Red Bull, Seznam, SoCrunch!, StumbleUpon, The Insider, Yahoo!, Xbox, Vimeo and Xobni.

Expanding Facebook Platform Internationally

As a result of the worldwide success of Facebook's translation system, the company has opened up the Translation Application to any developer using Facebook Platform. Starting today, any Facebook developer can make their application available in any of the 20 languages that are currently available on Facebook, with 60 more coming soon.

Developers can now access the Translation Application to either translate their applications themselves, or open up translation of their application to Facebook users around the world, who will work together to define it to their native languages.

This innovative approach combines the passion of Facebook users with technologies that are systematic and manageable. The Translation Application enables developers to get high-quality, fully-translated applications in front of users, no matter where they live or what language they speak – much faster than ever before, and without ever having to pick up a dictionary.

"Through Facebook's international platform, the possibilities are endless for both developers and users," said Chamath Rithapathy, vice president of growth, Facebook. "With no language barriers to break through, developers can take the stage with an even larger audience of users from all over the world, and users will have access to even more great applications than ever before built by the world's best developers."

Helping Developers Succeed

When Facebook Platform launched in 2007, it gave developers the opportunity to create applications that are deeply social and meaningful to users. More than 400,000 developers and entrepreneurs from 160 countries have signed up and developed applications. For the next phase of Platform, Facebook has focused on ensuring that developers have the resources and incentives they need to build applications that deliver on the vision of Facebook Platform.

Facebook launched four new and expanded developer programs and resources:

1) Great Apps Program Facebook's Great Apps program rewards applications that deliver value to users and advance the Facebook Platform vision. Great Apps embody Facebook's guiding principles for social applications through their meaningful, trustworthy and well-designed user experiences. Great Apps will gain greater visibility on Facebook, earlier access to new features and more feedback from Facebook. Facebook will open the Great Apps selection process to developers in September.

Facebook is excited to announce Like and Causes as the inaugural Great Apps. "Facebook Platform provided Like with an unprecedented opportunity to become one of the world's leading online music services in just over a year," said Ed Catmull, CEO of Pixar. "We delighted that Facebook is committed to recognizing the apps that are most appreciated by users. We expect the Great Apps program to have a very positive impact on the entire Facebook Platform ecosystem."

"The Causes application enables socially-conscious Facebook users to unlock the power of their social network in order to raise money and awareness for the causes they care about," said Sam Parker, chairman and co-founder of Causes. "With more than 100,000 causes created by 12 million Facebook users, we've had remarkable success building user trust and value on Facebook and we're excited to join the Great Apps program."

2) Application Verification Facebook is introducing the Application Verification program which is designed to offer extra assurances to help users identify applications they can trust – applications that are secure, respectful and transparent, and have demonstrated commitment to compliance with Platform policies. Verified applications will benefit from added visibility on Facebook. The program is a complement to Facebook's ongoing policy enforcement to keep the Platform ecosystem robust, and will be open to developers in September.

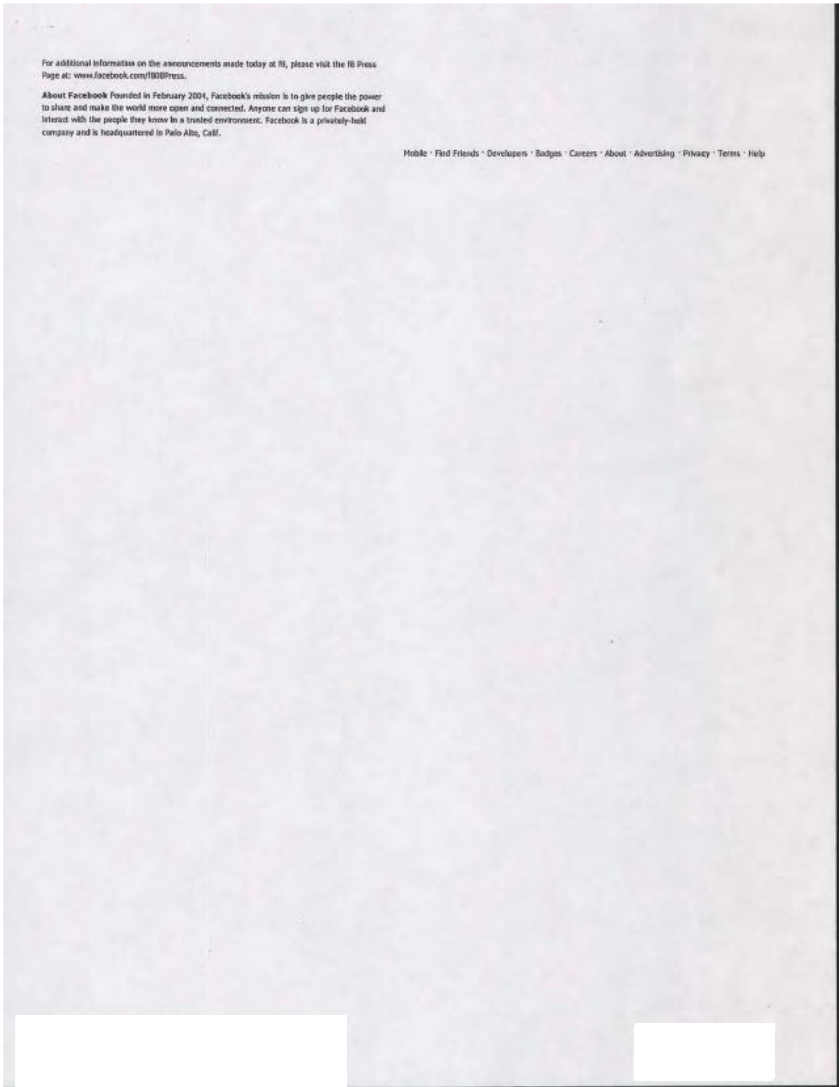
3) Expanded Refund Competition In an effort to grow the Facebook ecosystem, Refund was introduced last year to provide resources to developers, by eliminating some of the challenges of starting a company. As part of a new competition, Facebook will award nearly \$10 million in non-refundable grants to the top 25 applications. In addition to the Facebook judging committee, this year users will test applications and vote on their favorites after the first round deadline of August 25, 2008.

Winners from the first Refund competition were announced today and include: CauseMeSomething, CourseFeed by Classroom, GolfCamp, HotBerry, J2Play, LuckyCal, MyLimo, Padlock, Traciker, and Zenlike Casual app.

4) New Developer Website Facebook is introducing a new website for Facebook Platform. Improvements include better navigation and clearer access to the blog, wiki and forum to encourage community involvement. Facebook will also start highlighting social, meaningful and trustworthy application case studies.

Facebook ID 2010 - English (US)

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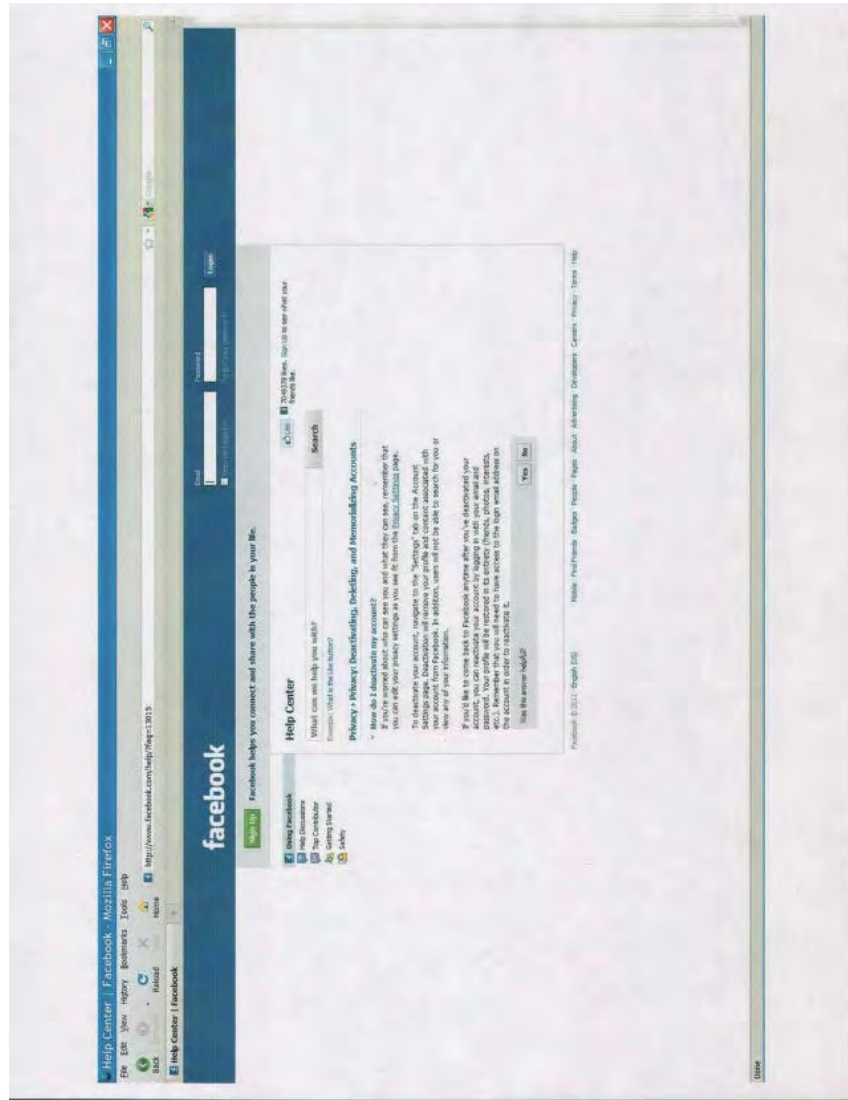
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Exhibit M



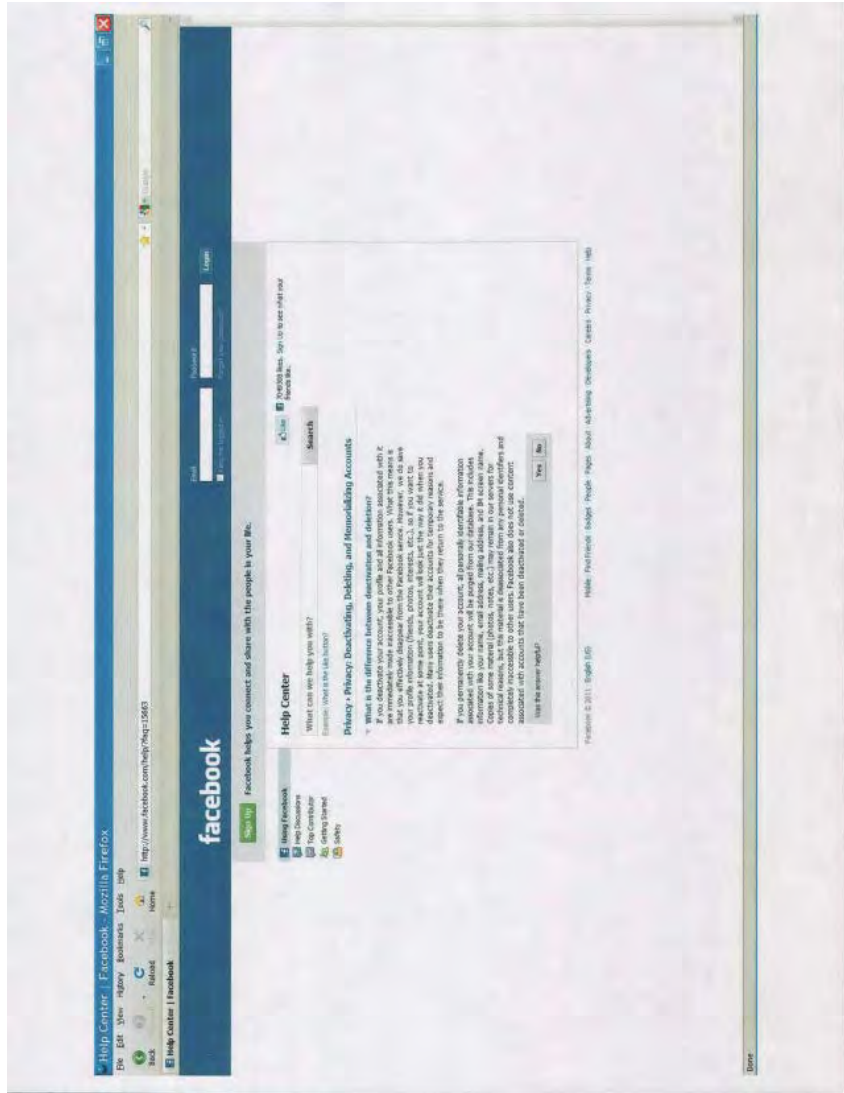
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Exhibit N

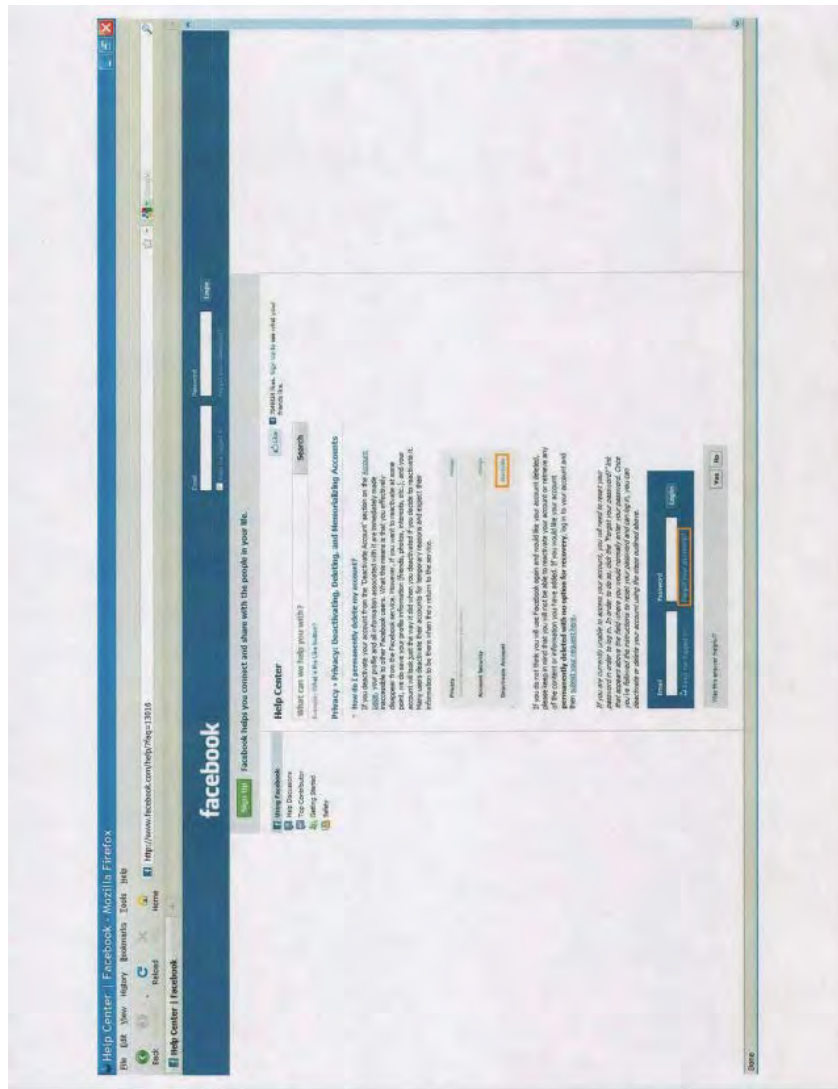


Complaint

Exhibit O



Complaint

Exhibit P

Complaint

Exhibit Q

Go to Profile

Search

Home Profile Account

Facebook's Privacy Policy

Date of last revision: December 9, 2009.

We want to earn your trust by being transparent about how Facebook works. You should read this policy in its entirety, but should pay particular attention to these four highlights:

- Facebook is designed to make it easy for you to share your information with anyone you want. You decide how much information you feel comfortable sharing on Facebook and you control how it is distributed through your privacy settings. You should review the default privacy settings and change them if necessary to reflect your preferences. You should also consider your settings whenever you share information.
- Facebook is not just a website. It is also a service for sharing your information on Facebook-enhanced applications and websites. You can control how you share information with those third-party applications and websites through your application settings and you can learn more about how information is shared with them on our About Platform page. You can also limit how your friends share your information with applications through your privacy settings.
- Certain categories of information such as your name, profile photo, list of friends and pages you are a fan of, gender, geographic region, and networks you belong to are considered publicly available to everyone, including Facebook-enhanced applications, and therefore do not have privacy settings. You can, however, limit the ability of others to find this information through search using your search privacy settings.
- Facebook is a free service supported primarily by advertising. We will not share your information with advertisers without your consent. We allow advertisers to select characteristics of users they want to show their advertisements to and we use the information we have collected to serve those advertisements.

This policy contains eight sections, and you can jump to each by selecting the links below:

1. Introduction
2. Information We Receive
3. Information You Share With Third Parties
4. How We Use Your Information
5. How We Share Information
6. How You Can View, Change, or Remove Information
7. How We Protect Information
8. Other Terms

1. Introduction

Questions. If you have any questions or concerns about our privacy policy, contact our privacy team through this help page. You may also contact us by mail at 1601 S. California Avenue, Palo Alto, CA 94304.

TRUSTe Program. Facebook is a certified licensee of the TRUSTe Privacy Seal Program. This means that our privacy policy and practices have been reviewed by TRUSTe, an independent organization focused on reviewing privacy and security policies and practices, for compliance with its strict program requirements. This privacy policy covers the website www.facebook.com. The TRUSTe program covers only information that is collected through this Web site, and does not cover other information, such as information that may be collected through software downloaded from Facebook.

If you have any complaints about our policy or practices please let us know through this help page. If you are not satisfied with our response, you can contact TRUSTe.

TRUSTe
CLICK TO VERIFY

TRUSTe
THE SAFE MANOR

Safe Harbor. Facebook also adheres to the Safe Harbor framework developed by the U.S. Department of Commerce and the European Union. As part of our participation in the Safe Harbor, we agree to resolve all disputes you have with us in connection with our policies and practices through TRUSTe. To view our certification, visit the U.S. Department of Commerce's Safe Harbor Web site.

Scope. This privacy policy covers all of Facebook. It does not, however, apply to entities that Facebook does not own or control, such as Facebook-enhanced applications and websites. By using or accessing Facebook, you agree to our privacy practices outlined here.

No information from children under age 13. If you are under age 13, please do not attempt to register for Facebook or provide any personal information about yourself to us. If we learn that we have collected personal information from a child under age 13, we will delete that information as quickly as possible. If you believe that we might have any information from a child under age 13, please contact us through this help page.

Parental participation. We strongly recommend that minors 13 years of age or older ask their parents for permission before sending any information about themselves to anyone over the Internet and we encourage parents to teach their children about safe Internet use practices. Materials to help parents talk to their children about safe Internet use can be found on this help page.

2. Information We Receive

Information you provide to us:

Personal information. When you sign up for Facebook you provide us with your name, email, gender, and birth date. During the registration process we give you the opportunity to provide additional profile information, such as where you went to school and where you work, and to add a picture of yourself, to help your friends connect with you. In some cases we may ask for additional information for security reasons or to provide specific services to you. Once you register you can visit your profile at any time to

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add or remove personal information about yourself. You can add basic information about yourself, such as information about your hometown, family, relationships, and your political and religious views. You can also add other information about yourself including your activities, interests, contact information, as well as more information about your education and job history.

Content. One of the primary reasons people use Facebook is to share content with others. Examples include when you update your status, upload or take a photo, upload or record a video, share a link, create an event or a group, make a comment, write something on someone's Wall, write a note, or send someone a message. If you do not want us to store metadata associated with content you share on Facebook (such as photos), please remove the metadata before uploading the content.

Transactional information. We may retain the details of transactions or payments you make on Facebook. However, we will only keep your payment source account number with your consent.

Friend information. We offer contact importer tools to help you upload your friends' addresses so that you can find your friends on Facebook, and invite your contacts who do not have Facebook accounts to join. If you do not want us to store this information, visit this help page. If you give us your password to retrieve those contacts, we will not store your password after you have uploaded your contacts' information.

Location information. When you share your location with others or add a location to something you post, we treat that like any other content you post. (For example, it is subject to your privacy settings.) If we offer a service that supports this type of location sharing we will present you with an opt-in choice of whether you want to participate.

Information we collect when you interact with Facebook:

Site activity information. We keep track of the actions you take on Facebook, such as adding a friend, becoming a fan of a Facebook Page, joining a group or an event, creating a photo album, sending a gift, poking another user, indicating you "like" a post, attending an event, or authorizing an application. In some cases you are also taking an action when you provide information or consent to us. For example, if you share a video, in addition to storing the actual content you uploaded, we might log the fact you shared it.

Access Device and Browser Information. When you access Facebook from a computer, mobile phone, or other device, we may collect information from that device about your browser type, location, and IP address, as well as the pages you visit.

Cookie Information. We use "cookies" (small pieces of data we store for an extended period of time on your computer, mobile phone, or other device) to make Facebook easier to use, to make our advertising better, and to protect both you and Facebook. For example, we use them to store your login ID (but never your password) to make it easier for you to login whenever you come back to Facebook. We also use them to confirm that you are logged into Facebook, and to know when you are interacting with Facebook Platform applications and websites, our widgets, and Share buttons, and our advertisements. You can remove or block cookies using the settings in your browser, but in some cases that may impact your ability to use Facebook.

Information we receive from third parties:

Facebook Platform and Facebook Connect. We do not own or operate the applications that you use through Facebook Platform (such as games and utilities) or the websites that you interact with through Facebook Connect. We refer to them as "Facebook-enhanced" applications and websites because they use our Platform to provide you with social features. Whenever you authorize a Facebook-enhanced application or website, we will receive information from them, including information about actions you take. In some cases, in order to personalize the process of connecting, we may receive a limited amount of information even before you authorize the application or website.

Information from other websites. We may institute programs with advertising partners and other websites in which they share information with us:

- We may ask advertisers to tell us how our users responded to the ads we showed them (and for comparison purposes, how other users who didn't see the ads acted on their site). This data sharing, commonly known as "conversion tracking," helps us measure our advertising effectiveness and improve the quality of the advertisements you see.
- We may receive information about whether or not you've seen or interacted with certain ads on other sites in order to measure the effectiveness of those ads.

If in any of these cases we receive data that we do not already have, we will "anonymize" it within 180 days, meaning we will stop associating the information with any particular user. If we institute these programs, we will only use the information in the ways we explain in the "How We Use Your Information" section below.

Information from other users. We may collect information about you from other Facebook users, such as when a friend tags you in a photo or video, provides friend details, or indicates a relationship with you. You can limit who can see that you have been tagged in a photo or video - which we refer to as photos or videos "of me" - in your privacy settings.

3. Information You Share With Third Parties

We take steps to ensure that others use information that you share on Facebook in a manner consistent with your privacy settings, but we cannot guarantee that they will follow our rules. Read the following section to learn more about how you can protect yourself when you share information with third parties.

Sharing information on Facebook. We designed our privacy settings to enable you to control how you share your information on Facebook. You should review the default privacy settings to make sure they reflect your preferences. Here are some specific things to remember:

- You can control the visibility of most of the information you share on Facebook through the privacy settings you select.
- Certain categories of information such as your name, profile photo, list of friends and pages you are a fan of, gender, geographic region, and networks you belong to are considered publicly available, and therefore do not have privacy settings. You can limit the ability of others to find this information on third party search engines through your search privacy settings.
- Some of the content you share and the actions you take will show up on your friends' home pages and other pages they visit.
- Even after you remove information from your profile or delete your account, copies of that information may remain viewable elsewhere to the extent it has been shared with others, it was otherwise distributed pursuant to your privacy settings, or it was copied or stored by other users.
- You understand that information might be re-shared or copied by other users.
- Certain types of communications that you send to other users cannot be removed, such as messages.
- When you post information on another user's profile or comment on another user's post, that information will be subject to the other user's privacy settings.
- If you use an external source to publish information to Facebook (such as a mobile application or a Connect site), you should check the privacy setting for that post, as it is set by that external source.

"Everyone" Privacy Setting. Information set to "everyone" is publicly available information, may be accessed by everyone on the Internet (including people not logged into Facebook), is subject to indexing by third party search engines, may be associated with you outside of Facebook (such as when you visit other sites on the Internet), and may be imported and exported by us and others without privacy limitations. The default privacy setting for certain types of information you post on Facebook is set to "everyone." You can review and change the default settings in your privacy settings. If you delete "everyone" content that you posted on Facebook, we will remove it from your Facebook profile, but have no control over its use outside of Facebook.

Facebook Platform. As mentioned above, we do not own or operate Facebook-enhanced applications or websites. That means that when you visit Facebook-enhanced applications and websites you are making your Facebook information available to someone other than Facebook. To help those applications and sites operate, they receive publicly available information automatically when you visit them, and additional information when you formally authorize or connect your Facebook account with them. You can learn more details about which information the operators of those applications and websites can access on our About Platform page. Prior to allowing them to access any information about you, we require them to agree to terms that limit their use of your information (which you can read about in Section 9 of our Statement of Rights and Responsibilities) and we use technical measures to ensure that they only obtain authorized information. We also give you tools to control how your information is shared with

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them:

[You can choose to opt out of Facebook Platform and Facebook Connect altogether through your privacy settings.] (We will remove this sentence in the next revision to our Privacy Policy as the product has changed.)

- You can block specific applications from accessing your information by visiting your application settings or the application's "About" page
- You can use your privacy settings to limit which of your information is available to "everyone" (by default, every application and website, including those you have not connected with, can access "everyone" and other publicly available content)
- You can use your application settings to limit which of your information your friends can make available to applications and websites
- We may make information about the location of your computer or access device and your age available to Facebook-enhanced applications and websites in order to help them implement appropriate security measures and control the distribution of age-appropriate content.

You should always review the policies of third party applications and websites to make sure you are comfortable with the ways in which they use information you share with them. We do not guarantee that they will follow our rules. If you find an application or website that violates our rules, you should report the violation to us on this help page and we will take action as necessary.

Exporting Information. You (and those you make your information available to) may not track like RSS feeds, mobile phone address books, or email and paste functions, to capture and export information from Facebook, including your information and information about you.

Advertisements. Sometimes, the advertisers who present ads on Facebook use technological methods to measure the effectiveness of their ads and to personalize advertising content. You may opt-out of the placement of cookies by many of these advertisers here. You may also use your browser cookie settings to limit or prevent the placement of cookies by advertising networks.

Links. When you click on links on Facebook you may leave our site. We are not responsible for the privacy practices of other sites, and we encourage you to read their privacy statements.

4. How We Use Your Information

We use the information we collect to try to provide a safe, efficient, and customized experience. Here are some of the details on how we do that:

To manage the service. We use the information we collect to provide our services and features to you, to measure and improve those services and features, and to provide you with customer support. We use the information to prevent potentially illegal activities, and to enforce our Statement of Rights and Responsibilities. For example, we ask for your date of birth to verify that you are over age 13 and so that we can better limit your access to content and advertisements that are not age appropriate. We also use a variety of technological systems to detect and address anomalous activity and screen content to prevent abuse such as spam. These efforts may on occasion result in a temporary or permanent suspension or termination of some functions for some users.

To contact you. We may contact you with service-related announcements from time to time. You may opt out of all communications except essential updates on your account notifications page. We may include content you see on Facebook in the emails we send to you.

To serve personalized advertising to you. We don't share your information with advertisers without your consent. (An example of consent would be if you asked us to provide your shipping address to an advertiser to receive a free sample.) We allow advertisers to choose the characteristics of users who will see their advertisements and we may use any of the non-personally identifiable attributes we have collected (including information you may have decided not to show to other users, such as your birth year or other sensitive personal information or preferences) to select the appropriate audience for those advertisements. For example, we might use your interest in soccer to show you ads for soccer equipment, but we do not tell the soccer equipment company who you are. You can see the criteria advertisers may select by visiting our advertising page. Even though we do not share your information with advertisers without your consent, when you click on or otherwise interact with an advertisement there is a possibility that the advertiser may place a cookie in your browser and note that it meets the criteria they selected.

To serve social ads. We occasionally pair advertisements we serve with relevant information we have about you and your friends to make advertisements more interesting and more tailored to you and your friends. For example, if you become a fan of a Page, we may display your name and profile photo next to an advertisement for that Page that is displayed to your friends. We only share the personally identifiable information visible in the social ad with the friend who can see the ad. You can opt out of having your information used in social ads on this help page.

To supplement your profile. We may use information about you that we collect from other Facebook users to supplement your profile (such as when you are tagged in a photo or mentioned in a status update). In such cases we generally allow you to direct how that information is shared in your privacy settings or give you the ability to remove the content (such as allowing you to remove a photo tag or you) or limit its visibility on Facebook.

To make Suggestions. We use your profile information, the addresses you import through our contact importers, and other relevant information, to help you connect with your friends, including making suggestions to you and other users that you connect with on Facebook. If you want to limit your visibility in suggestions we make to other people, you can adjust your search visibility privacy setting, so you will only be visible in our suggestions to the extent you choose to be visible in public search listings. You may also block specific individual users from being suggested to you and you from being suggested to them.

Downloadable Software. Certain downloadable software applications and applets that we offer, such as our browser toolbar and photo uploaders, transmit data to us. We may not make a formal disclosure if we believe our collection of and use of the information is the obvious purpose of the application, such as the fact that we receive photos when you use our photo uploader. If we believe it is not obvious that we are collecting or using such information, we will make a disclosure to you the first time you provide the information to us so that you can decide whether you want to use that feature.

Memorializing Accounts. If we are notified that a user is deceased, we may memorialize the user's account. In such cases we restrict profile access to confirmed friends, and allow friends and family to write on the user's Wall in remembrance. We may close an account if we receive a formal request from the user's next of kin or other proper legal request to do so.

5. How We Share Information

Facebook is about sharing information with others — friends and people in your networks — while providing you with privacy settings that you can use to restrict other users from accessing your information. We share your information with third parties when we believe the sharing is permitted by you, reasonably necessary to offer our services, or when legally required to do so. For example:

When you make a payment. When you enter into transactions with others or make payments on Facebook, we will only share transaction information with those third parties necessary to complete the transaction and will advise those third parties in advance to respect the privacy of your information.

When you invite a friend to join. When you ask us to invite a friend to join Facebook, we will send your friend a message on your behalf using your name. We may also send up to two reminders to them in your name. If your friend does not want us to keep their information, we will remove it at their request on this help page.

When you choose to share your information with marketers. You may choose to share information with marketers or electronic commerce providers that are not associated with Facebook through on-site offers. This is entirely at your discretion and we will not provide your information to these marketers without your consent.

To help your friends find you. By default, we make certain information you have posted to your profile available in search results on Facebook to help your friends find you. However, you can control who has access to this information, as well as who can find you in searches, through your privacy settings. We also partner with email and instant messaging providers to help their users identify which of their contacts are Facebook users, so that we can promote Facebook to those users.

To give search engines access to publicly available information. We generally limit search engines' access to our site. We may allow them to access information set in the "everyone" setting and your public search listing that you can turn off your public search listing in your privacy settings.

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To help improve or promote our service, sometimes we share aggregated information with third parties, to help improve or promote our service. But we only do so in such a way that no individual user can be identified or linked to any specific action or information.

To provide you with services, we may provide information to service providers that help us bring you the services we offer. For example, we may use third parties to help host our website, send you email updates about Facebook, remove repetitive information from our user lists, process payments, or provide search results or links (including sponsored links). These service providers may have access to your personal information for use for a limited time, but after this occurs we implement reasonable commercial and technical protections to limit their use of that information to helping us provide the service.

To advertise our services, we may ask advertisers outside of Facebook to display ads promoting our services. We may ask them to deliver those ads based on the presence of a cookie, but in doing so will not share any other information with the advertiser.

To offer joint services, we may provide services jointly with other companies, such as the classified service in the Facebook Marketplace. If you use these services, we may share your information to facilitate that service. However, we will identify the partner and present the joint service provider's privacy policy to you before you use that service.

To respond to legal requests and prevent harm, we may disclose information pursuant to subpoenas, court orders, or other requests (including criminal and civil matters) if we have a good faith belief that the request is required by law. This may include requesting requests from jurisdictions outside of the United States where we have a good faith belief that the request is required by law under the local laws in that jurisdiction, and we conform with generally accepted international standards. We may also share information when we have a good faith belief it is necessary to prevent fraud or other illegal activity, to protect ourselves, third parties, or to protect ourselves and you from people violating our Statement of Rights and Responsibilities. This may include sharing information with other companies, law enforcement, or other governmental entities.

Facebook Beacon. (We have announced a settlement of a lawsuit related to the Beacon product; the Beacon product will be discontinued and this language removed from the privacy policy upon approval of a settlement by the court.) Facebook Beacon is a means of sharing actions you have taken on third party sites, such as when you make a purchase or post a review, with your friends on Facebook. In order to provide you as a Facebook user with clear disclosure of the activity information being collected on third party sites and potentially shared with your friends on Facebook, we collect certain information from that site and present it to you after you have completed an action on that site. You have the choice to have us discard that information, or to share it with your friends, to learn more about the operation of the service. We encourage you to visit the control page. To opt out of the service altogether, click here. Like many other websites that interact with third party sites, we may receive some information even if you are logged out from Facebook, or that persons using Facebook apps, from those sites in conjunction with the technical operation of the system. In cases where we receive information from Beacon sites on users that are not logged in, or on non-Facebook users, we do not attempt to associate it with individual Facebook accounts and will discard it.

Transfer in the Event of Sale or Change of Control. If the ownership of all or substantially all of our business changes, we may transfer your information to the new owner so that the service can continue to operate. In such a case, your information would remain subject to the promises made in any one of our existing Privacy Policy.

6. How You Can View, Change, or Remove Information

Viewing and editing your profile. You may change or delete your profile information at any time by going to your profile page and clicking "Edit My Profile." Information will be updated immediately, while you cannot delete your date of birth. You can use the setting on the info tab of your profile information page to hide all or part of it from other users.

Delete uploaded content. If you use our content helpers to upload addresses, you can later delete the list on this help page.

Deactivating or deleting your account. If you want to stop using your account you may deactivate it or delete it. When you deactivate an account, no one will be able to see it but it will not be deleted. We save some profile information (friends, photos, interests, etc.) to make you later decide to reactivate your account. Many users deactivate their accounts for temporary reasons and in doing so are asking us to maintain their information until they return to Facebook. You will still have the ability to reactivate your account and restore your profile in its entirety. When you delete an account, it is permanently deleted. You should only delete your account if you are certain you never want to deactivate it. You may deactivate your account on your account settings page or delete your account on this help page.

Limitations on removal. Even after you remove information from your profile or delete your account, copies of that information may remain viewable elsewhere. To the extent it has been shared with others, it may otherwise be distributed pursuant to your privacy settings, or it may be copied or stored by other users. However, your name will no longer be associated with that information on Facebook. For example, if you post something to another user's profile, and then you delete your account, that post may remain, but be attributed to an "Anonymous Facebook User." Additionally, we may retain certain information to prevent identity theft and other misuses from ID deletion has been requested.

Backup copies. Removed and deleted information may persist in backup copies for up to 90 days, but will not be available to others.

Non-user contact information. If a user provides your email address to us, and you are not a Facebook user but you agree to delete your address, you can do so within help area. However, that request will only apply to addresses we have at the time of the request and not to any addresses that users provide to us later.

7. How We Protect Information

We do our best to keep your information secure, but we need your help. For more detailed information about staying safe on Facebook, visit the Facebook Security Page.

Alerts. We alert you to keep your information secure, by keeping your account information and account settings behind a Firewall. When you enter sensitive information (such as credit card numbers and passwords), we change that information using secure socket layer technology (SSL). We also use automated and manual measures to monitor accounts, such as analyzing account behavior for fraudulent or otherwise anomalous behavior, may limit use of the account in response to possible signs of abuse, may remove inappropriate content or take to legal action and may suspend or disable accounts for violation of our Statement of Rights and Responsibilities.

Risks inherent in sharing information. Although we allow you to set privacy options that limit access to your information, please be aware that no security measures are perfect or impenetrable. We cannot control the actions of other users with whom you share your information. We cannot guarantee that only authorized persons will view your information. We cannot ensure that information you share on Facebook will not become publicly available. We are not responsible for third party circumvention of any privacy settings or security measures on Facebook. You can reduce these risks by using common-sense security practices such as choosing a strong password, using different passwords for different services, and using up to date antivirus software.

Report violations. You should report any security violations to us on this help page.

8. Other Terms

Changes. We may change this Privacy Policy pursuant to the procedures outlined in the Facebook Statement of Rights and Responsibilities. Unless stated otherwise, our current privacy policy applies to all information that we have about you and your account. If we make changes to this Privacy Policy we will notify you by publication here and on the Facebook Site Governance Page. You can make sure that you receive future updates by following a link on the Facebook Site Governance Page.

Consent to Collection and Processing in the United States. By using Facebook, you consent to having your personal data transferred to and processed in the United States.

Defined Terms. "Us," "we," "our," "Platform" and "Facebook" mean the same as they do in the Statement of Rights and Responsibilities. "Information" and "content" are used more generally and interchangeably than in the Statement of Rights and Responsibilities unless otherwise limited by the context.

Helpful links

Statement of Rights and Responsibilities
Facebook Site Governance Page
application settings
privacy settings
account notifications page
help page for complaints about our privacy policies or practices

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[help page to report use by a child under age 13](#)
[help page with info to help parents talk to children about safe internet use](#)
[deleting an account](#)
[reporting a deceased user](#)
[reporting an impostor](#)
[reporting abusive content](#)
[reporting a compromised account](#)
[requesting deletion of data for non-user](#)
[removing Friend Finder contacts](#)
[reporting and blocking third-party applications](#)
[general explanation of third-party applications and how they access data](#)

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[About](#) [Advertising](#) [Developers](#) [Careers](#) [Terms](#) [Find Friends](#) [Privacy](#) [Mobile](#) [Help Center](#)

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Facebook's Privacy Policy

Date of last revision: April 27, 2018.

This policy contains eight sections. See [your page to learn why we're asking you to review it](#).

- 1. Introduction
- 2. Information We Receive
- 3. Information You Share With Third Parties
- 4. Sharing Information on Facebook
- 5. How We Use Your Information
- 6. How We Store Information
- 7. How You Can View, Change, or Remove Information
- 8. How We Protect Information
- 9. Other Terms

1. Introduction

Questions: If you have any questions or concerns about our privacy policy, [contact us](#) (please see [this page](#) for more info) or contact us by mail at: Facebook, Inc., 1601 S. California Avenue, Menlo Park, CA 94025.

TRUSTe Program: Facebook is a certified licensee of the TRUSTe Privacy Seal Program. This means that our privacy policy and practices have been reviewed by TRUSTe, an independent organization focused on reviewing privacy and security policies and practices, for compliance with its strict program requirements. This privacy policy covers the website [www.facebook.com](#). The TRUSTe program covers only information that is collected through this Web site, and does not cover other information, such as information that may be collected through software downloaded from Facebook.

If you have any comments about our policy or practices please let us know through this help page. If you are not satisfied with our response, you can contact TRUSTe.

Safe Harbor: Facebook also adheres to the Safe Harbor framework developed by the U.S. Department of Commerce and the European Union. As part of our participation in the Safe Harbor, we agree to receive all disputes you raise with us in connection with our policies and practices through TRUSTe. To learn more information, visit the U.S. Department of Commerce's Safe Harbor Web site.

Scope: This privacy policy covers all of Facebook. It does not, however, apply to entities that Facebook does not own or control, such as applications and websites using iFrame. If, despite our best efforts, you agree to our privacy practices on these items:

No information from children under age 13: If you are under age 13, please do not attempt to register for Facebook or provide any personal information about yourself to us. If you have had us use a non-essential personal information from a child under age 13, we will delete that information as quickly as possible. If you believe that we might have any information from a child under age 13, please contact us through this help page.

Parental participation: We strongly recommend that minors 13 years of age or older ask their parents for permission before sending any information about themselves to a person over the internet and we encourage parents to teach their children about safe internet and practices. Facebook is helping parents talk to their children about safe internet use can be found on this help page.

2. Information We Receive

Information you provide to us

Information About Yourself: When you sign up to Facebook you provide us with your name, email, gender, and birth date. During the registration process we give you the opportunity to connect with your friends, contacts, and employers. You will also be able to create a virtual ID for yourself. In some cases we may ask for additional information for security reasons. In our virtual ID service, we give you the opportunity to provide information about yourself to connecting with, for example, your current city, hometown, family, relationship, university, activities, interests, and photos. You may also provide personal information about yourself, such as your political and religious views.

Content: One of the primary reasons people use Facebook is to share content with others. Examples include when you update your status, upload or take a photo, upload or record a video, share a link, create an event or a group, make a comment, write something on someone's feed, write a note, or send someone a message. If you do not want us to store metadata associated with content you share on Facebook (such as photos), please remove the metadata before uploading the content.

Transactional Information: We may retain the details of transactions or payments you make on Facebook. If you do not want us to store your payment source information, you can remove it from your payments page.

Friend Information: We offer contact importer tools to help you upload your friend's addresses to the you can find your friends on Facebook, and invite your contacts who do not have Facebook accounts to join. If you do not want us to store this information, visit this help page. If you give us your password to retrieve these contacts, we will not store your password after you have uploaded your contacts information.

Information we collect when you interact with Facebook

Site activity information: We track some of some of the actions you take on Facebook, such as adding connections (including joining a group or adding a friend), creating a photo album, sending a gift, poking another user, indicating you "like" a post, attending an event, or connecting with an application. In some cases you are also taking an action when you provide information or content to us. For example, if you share a video, in addition to storing the actual content you uploaded, we might log the fact that you shared it.

Access Device and Browser Information: When you access Facebook from a computer, mobile phone, or other device, we may collect information from that device about your browser type, browser, and IP address, as well as the pages you visit.

Cookie Information: We use "cookies" (small pieces of data we store on an extended period of time on your computer, mobile device, or other device) to make Facebook easier to use, to make our advertising better, and to protect both you and Facebook. For example, we use them to store your login ID (we never store your password) to make it easier for you to login whenever you come back to Facebook. We also use them to confirm that you are logged into Facebook, and to know when you are interacting with Facebook Platform applications and websites, our widgets, and third parties, and their advertisements. You can remove or block cookies using the settings in your browser, but in some cases that may impact your ability to use Facebook.

Information we receive from third parties

Facebook Platform: We do not own or operate the applications or websites that you use through Facebook Platform (such as games and utilities). Whenever you connect with a Platform application or website, we will receive information from them, including information about actions you take. In some cases, in order to personalize the process of connecting, we may receive a limited amount of information even before you connect with the application or website.

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Information from other websites. We may include programs with advertising partners and other websites in which they share information with us:

We may ask advertisers to tell us how our users responded to the ads we showed them (and for companion purposes, how other users who didn't see the ads acted on their site). This data sharing, commonly known as "conversion tracking," is an important tool for measuring and improving the quality of the advertisements you see. We may receive information about whether or not you've seen or interacted with certain ads on other sites in order to measure the effectiveness of those ads.

If in any of these cases we receive data that we do not already have, we will "anonymize" it within 100 days, meaning we will also associate the information with any particular user. If we include these programs, we will only use the information in the ways we explain in the "How We Use Your Information" section below.

Information from other users. We may collect information about you from other Facebook users, such as when a friend tags you in a photo, video, or post, provides their details, or submits a relationship with you.

3. Sharing information on Facebook.

This section explains how your privacy settings work, and how your information is shared on Facebook. You should always consider your privacy settings before sharing information on Facebook.

Names and Profile Pictures. Facebook is designed to make it easy for you to find and connect with others. For this reason, your name and profile picture do not have privacy settings. If you are uncomfortable with sharing your profile picture, you should delete it (or not add one). You can also control who can find you when searching on Facebook or on public search engines using your search settings.

Contact Information. Your contact information settings control who can contact you on Facebook, and who can see your contact information such as your email and phone number(s). Remember that some of this information is required except for your email address, and you do not have to share your email address with anyone.

Personal Information. Your personal information settings control who can see your personal information, such as your religious and political views, if you choose to add them. We recommend that you share this information using the friends or friends of friends setting.

Posts by Me. You can select a privacy setting for every post you make using the publisher on our site. Whether you are uploading a photo or posting a status update, you can control exactly who can see it at the time you create it. Whenever you share something look for the lock icon. Clicking on the lock will bring up a menu that lets you choose who will be able to see your post. If you decide not to select your setting at the time you post the content, your content will be shared consistent with your Posts by Me privacy setting.

Connections. Facebook enables you to connect with virtually anyone or anything you want, from your friends and family to the city you live in to the restaurants you like to visit to the bands and movies you love. Because it takes time to connect, your privacy settings only control who can see the connection on your profile page. If you are uncomfortable with the connection being publicly available, you also (if consider removing (or not making) the connection.

Gender and Birth Date. In addition to name and email address, we require you to provide your gender and birth date during the registration process. We ask for your date of birth to verify that you are 13 or older, and so that we can better limit your access to content and advertisements that are not age appropriate. Because your date of birth and gender are required, you cannot delete them. You can, however, edit your profile to hide all (or part) of such fields from other users.

Other. Here are some other things to remember:

Some of the content you share and the actions you take will show up on your friends' home pages and other pages they visit. If another user tags you in a photo or video or at a place, you can remove the tag. You can also limit who can see that you have been tagged on your profile from your privacy settings. Even after you remove information from your profile or delete your account, copies of that information may remain viewable elsewhere to the extent it has been shared with others, it was otherwise distributed pursuant to your privacy settings, or it was copied or stored by other users. You understand that information might be retained or copied by other users. Certain types of communications that you send to other users cannot be removed, such as messages. When you post information on another user's profile or comment on another user's post, that information will be subject to the other user's privacy settings. If you use an external source to publish information to Facebook (such as a mobile application or a Connect site), you should check the privacy setting for that post, as it is set by that external source.

"Everyone" Information. Information set to "everyone" is publicly available information, just like your name, profile picture, and connections. Such information may, for example, be accessed by everyone on the Internet (including people not logged into Facebook), be indexed by third party search engines, and be imported, exported, distributed, and redistributed by us and others without privacy limitations. Such information may also be associated with you, including your name and profile picture, even outside of Facebook, such as on public search engines and when you visit other sites on the internet. The default privacy setting for certain types of information you post on Facebook is set to "Everyone." You can review and change the default settings in your privacy settings. If you delete "everyone" content that you posted on Facebook, we will remove it from your Facebook profile, but have no control over its use outside of Facebook.

Minors. We reserve the right to add special protections for minors (such as to provide them with an age-appropriate experience) and place restrictions on the ability of adults to share and contact with minors, recognizing this may provide minors a more limited experience on Facebook.

4. Information You Share With Third Parties.

Facebook Platform. As mentioned above, we do not own or operate the applications or websites that use Facebook Platform. That means that when you use these applications and websites you are making your Facebook information available to someone other than Facebook. Prior to allowing them to access any information about you, we require them to agree to terms that limit their use of your information (which you can read about in Section 9 of our Statement of Rights and Responsibilities) and we use technical measures to ensure that they only obtain authorized information. To learn more about Platform, visit our About Platform page.

Connecting with an Application or Website. When you connect with an application or website it will have access to General Information about you. The term General Information includes your and your friends' names, profile pictures, gender, user IDs, memberships, and any content shared using the Everyone privacy setting. We may also make information about the location of your computer or access device and your age available to applications and websites in order to help them implement appropriate security measures and control the distribution of age-appropriate content. If the application or website wants to access any other data, it will have to ask for your permission.

We give you tools to control how your information is shared with applications and websites that use Platform. For example, you can block specific applications from accessing your information by visiting your application settings or the application's "About" page. You can also use your privacy settings to limit which of your information is available to "everyone".

You should always review the policies of third party applications and websites to make sure you are comfortable with the ways in which they use information you share with them. We do not guarantee that they will follow our rules. If you find an application or website that violates our rules, you should report the violation to us on the help page and we will take action as necessary.

When your friends use Platform. If your friend connects with an application or website, it will be able to access your name, profile picture, gender, user ID, and information you have shared with "everyone." It will also be able to access your connections, except it will not be able to access your friend list. If you have already connected with (or have a separate account with) that website or application, it may also be able to connect you with your friend on that application or website. If the application or website wants to access any of your other content or information (including your friend list), it will have to obtain specific permission from your friend. If your friend grants specific permission to the application or website, it will generally only be able to access content and information about you that your friend can access. In addition, it will only be allowed to use that content and information in connection with that friend. For example, if a friend gives an application access to a photo you only shared with your friends, that application could allow your friend to view or print the photo, but it cannot show that photo to anyone else.

We provide you with a number of tools to control how your information is shared when your friend connects with an application or website. For example, you can use your application privacy settings to limit some of the information your friends can make available to applications and websites. You can also block particular applications or websites from accessing your information. You can use your privacy settings to limit which friends can access your information, or limit which of your information is available to "everyone." You can also disconnect from a friend if you are uncomfortable with how they are using your information.

Pre-Approved Third-Party Websites and Applications. In order to provide you with useful social experiences off of Facebook, we occasionally need to provide General Information about you to pre-approved third party websites and applications that use Platform at the time you visit them (if you are still logged in to Facebook). Similarly, when one of your friends visits a pre-

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approval means of approval), it will receive general information about you so you can your name can be connected to that website as well if you use that an account with that website. In these cases we require these notices and approvals to be provided to you through an established process that meets the appropriate requirements to protect your privacy. The notices and approvals include provisions relating to the access and deletion of your General Information, along with your ability to edit any of the information being offered. The notices and approvals are approved notices or applications you have created (a.k.a. "App") or that all information and applications from getting your General Information that you can see from that App (a.k.a. "App"). In addition, if you log out of Facebook before using a job-approved notification or website, it will not be able to access your information. You can see a complete list of job-approved websites on our About Platform page.

Exporting information. You (and those you share your information with) may wish to export your data, make phone records, book applications, or copy and paste content to other sites. We will make it as easy as possible for you to export your information. We will make it as easy as possible for you to export your information. We will make it as easy as possible for you to export your information. We will make it as easy as possible for you to export your information.

Advertisements. Sometimes the advertisers who present ads on Facebook use technical methods to measure the effectiveness of their ads and to complete advertising content. You may opt-out of the placement of cookies by many of these advertisers. You may also use your browser cookie settings to limit or prevent the placement of cookies by advertising providers. Links, when you click on links on Facebook you may leave our site. We are not responsible for the privacy practices of other sites, and we encourage you to read their privacy statements.

K. How We Use Your Information

We use the information we collect to fix or update a site, efficient, and customized experience. Here are some of the details on how we do this:

To manage the service. We use the information we collect to provide our services and features to you, to resolve and improve those services and features, and to provide you with customer support. We use the information to prevent, identify, and remove content that is abusive, inappropriate, or in violation of our policies. We also use a variety of technological systems to detect and address potential security and system issues to protect your data and privacy. These efforts help us protect your data and privacy, and we encourage you to read our privacy policy for more information on these systems.

To contact you. We may contact you with service-related announcements from time to time. We may opt out of all communications except essential updates on your account notifications. We may include content you see on Facebook in the emails we send to you.

To serve personalized advertising to you. We don't share your information with advertisers without your consent. An example of consent would be if you agree to provide your information to receive a free service. We share information to a third party to help them better understand your interests and to show you relevant ads. We may also use your information to help us better understand your interests and to show you relevant ads. We may also use your information to help us better understand your interests and to show you relevant ads. We may also use your information to help us better understand your interests and to show you relevant ads.

To serve personalized ads. We occasionally place advertisements on our site with relevant information. For example, we may show you ads for products or services that you've interacted with or shown interest in. We may also show you ads for products or services that you've interacted with or shown interest in. We may also show you ads for products or services that you've interacted with or shown interest in. We may also show you ads for products or services that you've interacted with or shown interest in.

To supplement your profile. We may use information about you that we collect from other Facebook users to supplement your profile (such as when you are tagged in a photo or mentioned in a status update). In such cases we generally give you the ability to remove the content (such as removing a photo tag or limiting visibility of your profile).

To make suggestions. We use your profile information, the addresses you input through our contact importer, and other relevant information, to help you connect with your friends, including making suggestions to you and other users that you connect with on Facebook. For example, if you have a friend's name in your address book, we may suggest that you connect with each other. If you want to limit your visibility of suggestions, you can adjust your search visibility privacy settings, as you will find in the settings of your profile.

To help you better find you. We also offer users to use contact information they have about you, such as your email address, to find you, including through contact importers and search. You can control what users can find about you by adjusting your privacy settings.

Downloadable software. Certain downloadable software applications and apps that we offer, such as our mobile applications and apps, collect data on you. We may not make a formal disclosure if we believe our collection of and use of this information is the obvious purpose of the application, such as the fact that we receive photos when you use our photo uploader. If we believe it is not obvious that we are collecting or using such information, we will make a disclosure to you. The first time you provide the information to us so that you can decide whether you want to use that feature.

Memorializing Accounts. If we are notified that a user is deceased, we may memorialize the user's account. In such cases we prohibit profile access to confirmed friends, and allow friends and family to view or share the user's past posts. We may close an account if we receive a formal request from the user's next of kin or other person legal next of kin.

6. How We Share Information

Facebook is always sharing information with others — friends and people in your communities — simply providing you with privacy settings that you can use to restrict other users from accessing some of your information. We also share your information with third parties when we believe this may be permitted by you, necessary to offer our services, or when legally required to do so. For example:

When you make a payment. When you enter into transactions with others or make payments on Facebook, we will share transaction information with our third parties necessary to complete the transaction. We will require those third parties to agree to respect the privacy of your information.

When you invite a friend to join. When you ask us to invite a friend to join Facebook, we will send your friend a message on your behalf using our terms. This feature may also include information about other users your friend might know. We may also send you an email invitation to join if you have a friend who has joined Facebook. You can see who has accepted your invitations, sent invitations, and delete your friend's email addresses on your profile history page. If your friend does not wish to keep their information, you will also receive an email request by using the help page.

When you choose to share your information with marketers. You may choose to share information with marketers or advertisers on our site. We are not associated with Facebook through private offers. This is entirely up to your discretion and we will not provide your information to these marketers without your consent.

To help your friends find you. By default, we make certain information you have posted to your profile available in search results on Facebook to help your friends find you. However, you can control who can see some of this information, so you can limit who it is shared with. You can also control who can see your profile picture. We may also share your information with third parties who use our services to help you find your friends. You can see who has accepted your invitations, sent invitations, and delete your friend's email addresses on your profile history page. If your friend does not wish to keep their information, you will also receive an email request by using the help page.

To give search engines access to publicly available information. We currently link search engines access to our site. We may allow them to access information set to the "public" setting (along with your name and profile picture) and your profile information that is visible to everyone. You can change the visibility of some of your profile information using your privacy settings. You can also prevent search engines from indexing your profile using your search settings.

To help improve or promote our services. Sometimes we share aggregated information with third parties to help improve or promote our services. But we only do so in such a way that no individual user can be identified or linked to any specific action or information.

To provide you with services. We may provide information to service providers that help us better provide our services to you. For example, we may use third parties to help host our website, send out email updates about Facebook, remove repetitive information from our user lists, process payments, or provide search results or links (including sponsored links). These service providers may have access to your personal information to use for a limited time, but when they access we implement reasonable contractual and technical protections to limit their use of that information to helping us provide the service.

To advertise our services. We may offer our services outside of Facebook, including advertising and promoting our services. We may ask third parties to help host our website for the purpose of exposing our services to you. We may also share your information with third parties to help us better provide our services to you.

To offer joint services. We may provide services jointly with other companies, such as the business service in the Facebook Marketplace. If you use these services, we may share your information to facilitate that service. However, we will identify the partner and describe the joint service's privacy policy to you before you use that service.

To respond to legal requests and prevent harm. We may disclose information in response to legal proceedings, investigations, or other requests including government and law enforcement if we believe

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good faith belief that the response is required by law. This may include respecting requests from jurisdictions outside of the United States where we have a good faith belief that the response is required by law under the local laws in that jurisdiction, apply to users from that jurisdiction, and are consistent with generally accepted international standards. We may also share information when we have a good faith belief it is necessary to prevent fraud or other illegal activity, to protect innocent third parties, or to protect ourselves and you from people violating our Statement of Rights and Responsibilities. This may include sharing information with other companies, lawyers, courts or other government entities.

Transfer in the Event of Sale or Change of Control. If the ownership of all or substantially all of our business changes, we may transfer your information to the new owner so that the service can continue to operate. In such a case, your information would remain subject to the promises made in any pre-existing Privacy Policy.

7. How You Can Change or Remove Information

Editing your profile. You may change or remove your profile information at any time by going to your profile page and clicking "Edit My Profile." Information will be updated immediately.

Delete uploaded contacts. If you use our contact importer to upload addresses, you can later delete the list on this help page. You can delete the email addresses of friends you have invited to join Facebook on your invite history page.

Deactivating or deleting your account. If you want to stop using your account, you may deactivate it or delete it. When you deactivate an account, you will be able to see it, but it will not be visible to others. In case you later decide to reactivate your account. Many users deactivate their accounts for temporary reasons and in doing so are asking us to maintain their information until they return to Facebook. We will still have the ability to reactivate your account and restore your profile in its entirety. When you delete an account, it is permanently deleted from Facebook. You should only delete your account if you are certain you never want to reactivate it. You may deactivate your account on your account settings page or delete your account on this help page.

Limitations on removal. Even after you remove information from your profile or delete your account, copies of that information may remain viewable elsewhere to the extent it has been shared with others, it was otherwise distributed pursuant to your privacy settings, or it was copied or stored by other users. However, your name will no longer be associated with that information on Facebook. (For example, if you post something to another user's profile and then you delete your account, that post may remain, but be attributed to an "Anonymous Facebook User.") Additionally, we may retain certain information to protect identity theft and other risks and as an if deletion has been requested. If you have given third party applications or websites access to your information, they may retain your information to the extent permitted under their terms of service or privacy policies. But they will no longer be able to access the information through our Platform after you disconnect from them.

Backup copies. Removed and deleted information may persist in backup copies for up to 90 days, but will not be available to others.

Non-user contact information. If a user provides your email address to us, and you are not a Facebook user but you want us to delete your address, you can do so on this help page. However, that request will only apply to addresses we have at the time of the request and not to any addresses that users provide to us later.

8. How We Protect Information

We do our best to keep your information secure, but we need your help. For more detailed information about staying safe on Facebook, visit the Facebook Security Page.

Steps we take to keep your information secure. We keep your account information on a secured server behind a firewall. When you enter sensitive information (such as credit card numbers and passwords), we encrypt that information using secure socket layer technology (SSL). We also use automated and manual measures to enhance security, such as analyzing account behavior for fraudulent or otherwise anomalous behavior, may limit use of site features in response to possible signs of abuse, may remove inappropriate content or links to illegal content, and may suspend or disable accounts for violations of our Statement of Rights and Responsibilities.

Risks inherent in sharing information. Although we allow you to set privacy options that limit access to your information, please be aware that no security measures are perfect or impenetrable. We cannot control the actions of other users with whom you share your information. We cannot guarantee that only authorized persons will view your information. We cannot ensure that information you share on Facebook will not become publicly available. We are not responsible for third party circumvention of any privacy settings or security measures on Facebook. You can reduce these risks by using common sense security practices such as choosing a strong password, using different passwords for different services, and using up to date antivirus software.

Report Violations. You should report any security violations to us on this help page.

9. Other Terms

Changes. We may change this Privacy Policy pursuant to the procedures outlined in the Facebook Statement of Rights and Responsibilities. Unless stated otherwise, our current privacy policy applies to all information that we have about you and your account. If we make changes to this Privacy Policy we will notify you by publication here and on the Facebook Site Governance Page. You can make sure that you receive notice directly by becoming a fan of the Facebook Site Governance Page.

Consent to Collection and Processing in the United States. By using Facebook, you consent to having your personal data transferred to and processed in the United States.

Defined Terms. "Us," "we," "our," "Platform" and "Facebook" mean the same as they do in the Statement of Rights and Responsibilities. "Information" and "content" are used more generally and interchangeably here than in the Statement of Rights and Responsibilities unless otherwise limited by the context.

Helpful links


Statement of Rights and Responsibilities
Facebook Site Governance Page
application settings
privacy settings
account notifications page
help page for complaints about our privacy policies or practices
help page to report use by a child under age 13
help page with info to help parents talk to children about safe internet use
deleting an account
reporting a deceased user
reporting an impostor
reporting abusive content
reporting a compromised account
requesting deletion of data for non-user
removing Photo Photo uploads
reporting and blocking third party applications
general explanation of third-party applications and how they access data

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Exhibit S

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Email Password
 Keep me logged in Forgot your password?

Facebook helps you connect and share with the people in your life.

Facebook's Privacy Policy.

Date of last update: December 22, 2010.

This policy contains nine sections, and you can jump to each by selecting the links below:

1. Introduction
2. Information We Receive
3. Sharing Information on Facebook
4. Information You Share With Third Parties
5. How We Use Your Information
6. How We Share Information
7. How You Can Change or Remove Information
8. How We Protect Information
9. Other Terms

1. Introduction

Questions. If you have any questions or concerns about our privacy policy, contact our privacy team through the help page. You may also contact us by email at 1601 S. California Avenue, Palo Alto, CA 94304.

TRUSTe Program. Facebook has been awarded TRUSTe's Privacy Seal signifying that this privacy policy and practices have been reviewed by TRUSTe for compliance with TRUSTe's program requirements. If you have questions or complaints regarding our privacy policy or practices, please contact us by mail at 1601 S. California Avenue, Palo Alto, CA 94304 or through the help page. If you are not satisfied with our response you can contact TRUSTe here. This privacy policy covers the website www.facebook.com. The TRUSTe program covers only information that is collected through the website, and does not cover other information, such as information that may be collected through software downloaded from Facebook.

Safe Harbor. Facebook also complies with the EU Safe Harbor Framework as set forth by the Department of Commerce regarding the collection, use, and retention of data from the European Union. As part of our participation in the Safe Harbor, we agree to resolve all disputes you have with us in connection with our policies and practices through TRUSTe. We will also provide initial responses to access requests within a reasonable period of time. To view our certification, visit the U.S. Department of Commerce's Safe Harbor Website.

Scope. This privacy policy covers all of Facebook. It does not, however, apply to entities that Facebook does not own or control, such as applications and websites using Platform. By using or accessing Facebook, you agree to our privacy practices outlined here.

No information from children under age 13. If you are under age 13, please do not attempt to register for Facebook or provide any personal information about yourself to us. If we learn that we have collected personal information from a child under age 13, we will delete that information as quickly as possible. If you believe that we might have any information from a child under age 13, please contact us through this help page.

Parental participation. We strongly recommend that minors 13 years of age or older ask their parents for permission before sending any information about themselves to anyone over the Internet and we encourage parents to teach their children about safe Internet use practices. Materials to help parents talk to their children about safe Internet use can be found on the help page.

2. Information We Receive

Information you provide to us:

Information About Yourself. When you sign up for Facebook you provide us with your name, email, gender, and birth date. During the registration process we give you the opportunity to connect with your friends, schools, and employers. You will also be able to add a picture of yourself. In some cases we may ask for additional information for security reasons or to provide specific services to you. Once you register you can provide other information about yourself by connecting with, for example, your current city, hometown, family, relationships, networks, activities, interests, and places. You can also provide personal information about yourself, such as your political and religious views.

Content. One of the primary reasons people use Facebook is to share content with others. Examples include when you update your status, upload or take a photo, upload or record a video, share a link, create an event or a group, make a comment, write something on someone's Wall, write a note, or send someone a message. If you do not want us to store metadata associated with content you share on Facebook (such as photos), please remove the metadata before uploading the content.

Transactional Information. We may retain the details of transactions or payments you make on Facebook. If you do not want us to store your payment source account number, you can remove it using your payment page.

Friend Information. We offer contact importer tools to help you upload your friend addresses so that you can find your friends on Facebook, and invite your contacts who do not have Facebook accounts to join. If you do not want us to store this information, visit the help page. If you give us your password to initiate these contacts, we will not store your password after you have uploaded your contacts' information.

Information we collect when you interact with Facebook:

Site activity information. We keep track of some of the actions you take on Facebook, such as adding connections (including joining a group or adding a friend), creating a photo album, sending a gift, posting another user, indicating you "like" a post, attending an event, or connecting with an application. In some cases you are also taking an action when you provide information or content to us. For example, if you share a video, in addition to storing the actual content you uploaded, we might log the fact that you shared it.

Access Device and Browser Information. When you access Facebook from a computer, mobile phone, or other device, we may collect information from that device about your browser type, location, and IP address, as well as the pages you visit.

<http://www.facebook.com/policy.php>

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Cookie Information. We use "cookies" (small pieces of data we store for an extended period of time on your computer, mobile phone, or other device) to make Facebook easier to use, to make our Advertising better, and to protect both you and Facebook. For example, we use them to store your login ID (but never your password) to make it easier for you to login whenever you come back to Facebook. We also use them to confirm that you are logged into Facebook, and to know when you are interacting with Facebook Platform applications and websites, our widgets and Share buttons, and our advertisements. You can remove or block cookies using the settings in your browser, but in some cases that may impact your ability to use Facebook.

Information we receive from third parties:

Facebook Platform. We do not own or operate the applications or websites that you use through Facebook Platform (such as games and apps). Whenever you connect with a Platform application or website, we will receive information from them, including information about actions you take. In some cases, in order to personalize the profile of connecting, we may receive a limited amount of information even before you connect with the application or website.

Information from other websites. We may institute programs with advertising partners and other websites in which they share information with us:

- We may ask advertisers to tell us how our users responded to the ads we showed them (and for comparison purposes, how other users who didn't see the ads acted on their site). This data sharing, commonly known as "conversion tracking," helps us measure our advertising effectiveness and improve the quality of the advertisements you see.
- We may receive information about whether or not you've seen or interacted with certain ads on other sites in order to measure the effectiveness of those ads.

If in any of these cases we receive data that we do not already have, we will "anonymize" it within 180 days, meaning we will stop associating the information with any particular user. If we institute these programs, we will only use the information in the ways we explain in the "How We Use Your Information" section below.

Information from other users. We may collect information about you from other Facebook users, such as when a friend tags you in a photo, video, or place, provides friend details, or indicates a relationship with you.

3. Sharing Information on Facebook.

This section explains how your privacy settings work, and how your information is shared on Facebook. You should always consider your privacy settings before sharing information on Facebook.

Name and Profile Picture. Facebook is designed to make it easy for you to find and connect with others. For the most part, your name and profile picture do not have privacy settings. If you are uncomfortable with sharing your profile picture, you should delete it (or not add one). You can also control who can find you when searching on Facebook or on public search engines using the Applications and Website privacy settings.

Contact Information. Your contact information settings control (available when customizing your privacy settings) who can contact you on Facebook, and who can see your contact information such as your email and phone numbers). Remember that none of the information is required except for your email address, and you do not have to share your email address with anyone.

Personal Information. Your personal information settings control who can see your personal information, such as your religious and political views, if you choose to add them. We recommend that you share this information using the Friends setting.

Posts by Me. You can select a privacy setting for every post you make using the publisher on our site. Whether you are uploading a photo or posting a status update, you can control exactly who can see it at the time you create it. Whenever you share something look for the lock icon. Clicking on the lock will bring up a menu that lets you choose who will be able to see your post. If you decide not to select your setting at the time you post the content, your content will be shared consistent with your Posts by Me default privacy setting.

(Available when customizing your privacy settings.)

Gender and Birth Date. In addition to name and email address, we require you to provide your gender and birth date during the registration process. We ask for your date of birth to verify that you are 13 or older, and so that we can better limit your access to content and advertisements that are not age appropriate. Because your date of birth and gender are required, you cannot delete them. You can, however, edit your profile to hide all (or part) of such fields from other users.

Other. Here are some other things to remember:

- Some of the content you share and the actions you take will show up on your friends' home pages and other pages they visit.
- If another user tags you in a photo or video or at a place, you can remove the tag. You can also limit who can see that you have been tagged on your profile from your privacy settings.
- Even after you remove information from your profile or delete your account, copies of that information may remain viewable elsewhere to the extent it has been shared with others, it was otherwise distributed pursuant to your privacy settings, or it was copied or stored by other users.
- You understand that information might be re-shared or copied by other users.
- Certain types of communications that you send to other users cannot be removed, such as messages.
- When you post information on another user's profile or comment on another user's post, that information will be subject to the other user's privacy settings.
- If you select an external source to publish information to Facebook (such as a mobile application or a Connect site), you should check the privacy setting for that post, as it is set by that external source.

"Everyone" Information. Information set to "everyone" is publicly available information, just like your name, profile picture, and connections. Such information may, for example, be accessed by everyone on the Internet (including people not logged into Facebook), be indexed by third party search engines, and be imported, exported, distributed, and redistributed by us and others without privacy limitations. Such information may also be associated with you, including your name and profile picture, even outside of Facebook, such as on public search engines and when you visit other sites on the Internet. The default privacy setting for certain types of information you post on Facebook is set to "everyone." You can review and change the default settings in your privacy settings. If you delete "everyone" content that you posted on Facebook, we will remove it from your Facebook profile, but it may not come off of us outside of Facebook.

Minors. We reserve the right to add special protections for minors (such as to provide them with an age appropriate experience) and place restrictions on the ability of adults to share and connect with minors, recognizing this may provide minors a more limited experience on Facebook.

4. Information You Share With Third Parties.

Facebook Platform. As mentioned above, we do not own or operate the applications or websites that use Facebook Platform. That means that when you use these applications and websites you are making your Facebook information available to someone other than Facebook. (We're allowing them to access any information about you, we require them to agree to terms that limit their use of your information (which you can read about in Section 9 of our Statement of Rights and Responsibilities) and we use technical measures to ensure that they only obtain authorized information. To learn more about Platform, visit our About Platform page.

Connecting with an Application or Website. When you connect with an application or website it will have access to General Information about you. The term General Information includes your and your friends' names, profile pictures, gender, user IDs, connections, and any content shared using the Everyone privacy setting. We may also make information about the location of your computer or access device and your age available to applications and websites in order to help them implement appropriate security measures and control the distribution of age appropriate content. If the application or website wants to access any other data, it will have to ask for your permission.

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We give you tools to control how your information is shared with applications and websites that use Platform. For example, you can block all platform applications and websites completely or block specific applications from accessing your information by visiting your Applications and Websites privacy setting or the specific application's "About" page. You can also use your privacy settings to limit which of your information is available to "everyone".

You should always review the policies of third party applications and websites to make sure you are comfortable with the ways in which they use information you share with them. We do not guarantee that they will follow our rules. If you find an application or website that violates our rules, you should report the violation to us on this help page and we will take action as necessary.

When your friends use Platform. If your friend connects with an application or website, it will be able to access your name, profile picture, gender, user ID, and information you have shared with "everyone." It will also be able to access your connections, except it will not be able to access your friends list. If you have already connected with (or have a separate account with) that website or application, it may also be able to connect you with your friend on that application or website. If the application or website wants to access any of your other content or information (including your friend list), it will have to obtain specific permission from your friend. If your friend grants specific permission to the application or website, it will generally only be able to access content and information about you that your friend can access. In addition, it will only be allowed to use that content and information in connection with that friend. For example, if a friend gives an application access to a photo you only shared with your friends, that application could allow your friend to view or print the photo, but it cannot show that photo to anyone else.

We provide you with a number of tools to control how your information is shared when your friend connects with an application or website. For example, you can use your Application and Website privacy setting to limit some of the information your friend can make available to applications and websites. You can block all platform applications and websites completely or block particular applications or websites from accessing your information. You can use your privacy settings to limit which friends can access your information, or limit which of your information is available to "everyone." You can also disconnect from a friend if you are uncomfortable with how they are using your information.

Pre-Approved Third-Party Websites and Applications. In order to provide you with useful social experiences off of Facebook, we occasionally need to provide General Information about you to pre-approved third party websites and applications that use Platform at the time you visit them (if you are still logged in to Facebook). Similarly, when one of your friends visits a pre-approved website or application, it will receive General Information about you so you and your friend can be connected on that website as well (if you also have an account with that website). In these cases we require these websites and applications to go through an approval process, and to enter into separate agreements designed to protect your privacy. For example, these agreements include provisions relating to the access and deletion of your General Information, along with your ability to opt out of the experience being offered. You can disable indirect personalization on all pre-approved websites and applications using your Applications and Websites privacy setting. You can also block a particular pre-approved website or application by clicking "No Thanks" in the blue bar when you visit that application or website. In addition, if you log out of Facebook before visiting a pre-approved application or website, it will not be able to access your information.

Exporting Information. You (and those you make your information available to) may use tools like RSS feeds, mobile phone address book applications, or copy and paste functions, to capture, export, and in some cases, import information from Facebook, including your information and information about you. For example, if you share your phone number with your friends, they may use third party applications to sync that information with the address book on their mobile phone.

Advertisements. Sometimes the advertisers who present ads on Facebook use technological methods to measure the effectiveness of their ads and to personalize advertising content. You may opt out of placement of cookies by many of these advertisers here. You may also use your browser cookie settings to limit or prevent the placement of cookies by advertising networks. Facebook does not share personally identifiable information with a advertiser unless we get your permission.

Links. When you click on links on Facebook you may leave our site. We are not responsible for the privacy practices of other sites, and we encourage you to read their privacy statements.

5. How We Use Your Information

We use the information we collect to try to provide a safe, efficient, and customized experience. Here are some of the data from how we do that:

To manage the service. We use the information we collect to provide our services and features to you, to measure and improve those services and features, and to provide you with customer support. We use the information to prevent potentially illegal activities, and to enforce our Statement of Rights and Responsibilities. We also use a variety of technological systems to detect and address anomalous activity and abuse content to prevent abuse such as spam. These efforts may on occasion result in a temporary or permanent suspension or termination of some features for some users.

To contact you. We may contact you with service related announcements from time to time. You may opt out of all communications (except essential updates on your account notifications page). We may include content you see on Facebook in the emails we send to you.

To serve personalized advertising to you. We don't show your information with advertisements without your consent. (An example of consent would be if you asked us to provide you with targeting advice to an advertiser to receive a free sample.) We allow advertisers to choose the characteristics of users who will see their advertisements and we may use any of the non-personally identifiable attributes we have collected (including information you may have elected not to share to other users, such as your birth year or other sensitive personal information or profession) to select the appropriate audience for these advertisements. For example, we might use your interest in soccer to show you ads for soccer equipment, but we do not tell the soccer equipment company who you are. You can see the target audiences may select by visiting our advertising page. Even though we do not share your information with advertisers without your consent, when you click on an otherwise interest with an advertisement there is a possibility that the advertiser may place a cookie in your browser and note that it came to the criteria they selected.

To serve social ads. We occasionally pair advertisements we serve with relevant information we have about you and your friends to make advertisements more interesting and more tailored to you and your friends. For example, if you connect with your favorite band's page, we may display your name and profile photo next to an advertisement for that page that is displayed to your friends. We only share the personally identifiable information visible in the social ad with the friend who can see the ad. You can opt out of having your information used in social ads on this help page.

To supplement your profile. We may use information about you that we collect from other Facebook users to supplement your profile (such as when you are tagged in a photo or mentioned in a status update). In such cases we generally give you the ability to remove the content (such as allowing you to remove a photo tag of you) or limit its visibility on your profile.

To make suggestions. We use your information, including the addresses you input through our contact importers, to make suggestions to you and other users on Facebook. For example, if another user inputs the same email address as you do, we may suggest that you add each other as friends. Similarly, if one of your friends uploads a picture of you, we may suggest that your friend tag you in the picture. We do this by comparing your friends pictures to information we've put together from the photos you've been tagged in. We may also suggest that you use certain links and features based on what your friend has used. You can control whether we suggest that another user add you as a friend through your "Search for you on Facebook" privacy setting. You can control whether we suggest that another user tag you in a photo by clicking "Customize" from your privacy settings.

To help your friends find you. We allow other users to use contact information they have about you, such as your email address, to find you, including through contact importers and search. You can prevent other users from using your email address to find you using the search section of your privacy settings.

Downloadable Software. Certain downloadable software applications and apps that we offer, such as our browser toolbar and photo uploader, transmit data to us. We may not make a formal disclosure if we believe our collection and use of the information is the obvious purpose of the application, such as the fact that we receive photos when you use our photo uploader. If we believe it is not obvious that we are collecting or using such information, we will make a disclosure to you the first time you provide the information to us so that you can decide whether you want to use that feature.

Memorializing Accounts. If we are notified that a user is deceased, we may memorialize the user's account. In such cases we restrict profile access to confirmed friends, and allow friends and family to write on the user's Wall in remembrance. We may close an account if we receive a formal request from the user's next of kin or other proper legal request to do so.

6. How We Share Information

<http://www.facebook.com/policy.php>

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Facebook is about sharing information with others— friends and people in your communities— while providing you with privacy settings that you can use to restrict other users from accessing some of your information. We share your information with third parties when we believe the sharing is permitted by you, reasonably necessary to offer our services, or when legally required to do so. For example:

When you make a payment. When you enter into transactions with others or make payments on Facebook, we will share transaction information with only those third parties necessary to complete the transaction. We will require those third parties to agree to respect the privacy of your information.

When you invite a friend to join. When you ask us to invite a friend to join Facebook, we will send your friend a message on your behalf using your name. The invitation may also contain information about the users your friend might know. We may also send up to two reminders to them in your name. You can see who has accepted your invitation, send reminders, and delete your friend's email address on your invite history page. If your friend does not want us to keep their information, we will also remove it at their request by using this help page.

When you choose to share your information with marketers. You may choose to share information with marketers or with one or more providers that are associated with Facebook through on-site offers. This is entirely at your discretion and we will not provide your information to these marketers without your consent.

To help your friends find you. By default, we make certain information you have posted to your profile available in search results on Facebook to help your friends find you. However, you do control who can see some of this information, as well as who can find you to search, through your privacy settings. We also partner with email and instant messaging providers to help their users identify which of their contacts are Facebook users, so that we can promote Facebook to those users.

To give search engines a chance to publicly available information. We generally limit search engines' access to our site. We may allow them to access information set to the "everyone" setting (along with your name and profile picture) and your profile information that is visible to everyone. You can change the visibility of some of your profile information using the customize section of your privacy settings. You can also prevent search engines from indexing your profile using the Applications and Websites privacy setting.

To help improve or promote our service. Sometimes we share aggregated information with third parties to help improve or promote our services. But we only do so in such a way that no individual user can be identified or linked to any specific action or information.

To provide you with services. We may provide information to service providers that help us bring you the services we offer. For example, we may use third parties to help host our website, send out email updates about Facebook, remove repetitive information from our user lists, process payments, or provide search results or links (including sponsored links). These service providers may have access to your personal information for use for a limited time, but when this occurs we implement reasonable contractual and technical protections to limit their use of that information to helping us provide the services.

To advertise our services. We may ask advertisers outside of Facebook to display ads promoting our services. We may ask them to deliver those ads based on the presence of a cookie, but in doing so will not share any other information with the advertiser.

To offer joint services. We may provide services jointly with other companies, such as the classifieds service in the Facebook Marketplace. If you use these services, we may share your information to facilitate that service. However, we will identify the partner and present the joint service provider's privacy policy to you before you use that service.

To respond to legal requests and prevent harm. We may disclose information pursuant to subpoenas, court orders, or other requests (including criminal and civil matters) if we have a good faith belief that the response is required by law. This may include requests from jurisdictions outside of the United States where we have a good faith belief that the response is required by law under the local laws in that jurisdiction, apply to users from that jurisdiction, and are consistent with generally accepted international standards. We may also share information when we have a good faith belief it is necessary to prevent fraud or other illegal activity, to prevent imminent bodily harm, or to protect ourselves and our firm people violating our Statement of Rights and Responsibilities. This may include sharing information with other companies, lawyers, courts, or other government entities.

Transfer in the Event of Sale or Change of Control. If the ownership of all or substantially all of our business changes, we may transfer your information to the new owner so that the service can continue to operate. In such a case, your information would remain subject to the promises made in any pre-existing Privacy Policy.

7. How You Can Change or Remove Information

Editing your profile. You may change or remove your profile information at any time by going to your profile page and clicking "Edit My Profile." Information will be updated immediately.

Delete uploaded contacts. If you use our contact importer to upload addresses, you can later delete the list on this help page. You can delete the email addresses of friends you have invited to join Facebook on your invite history page.

Deactivating or deleting your account. If you want to stop using your account, you may deactivate it or delete it. When you deactivate an account, no user will be able to see it, but it will not be deleted. We save your profile information (connections, photos, etc.) in case you later decide to reactivate your account. Many users deactivate their accounts for temporary reasons and in doing so are asking us to maintain their information until they return to Facebook. You will still have the ability to reactivate your account and restore your profile in its entirety. When you delete an account, it is permanently deleted from Facebook. You should only delete your account if you are certain you never want to reactivate it. You may deactivate your account on your account settings page or delete your account on this help page.

Limitations on removal. Even after you remove information from your profile or delete your account, copies of that information may remain viewable elsewhere to the extent it has been shared with others, it was otherwise distributed pursuant to your privacy settings, or it was copied or stored by third users. However, your name will no longer be associated with that information on Facebook. For example, if you post something in another user's profile and then you delete your account, that post may remain, but be attributed to an "Anonymous Facebook User." Additionally, we may retain certain information to prevent identity theft and other misconduct even if deletion has been requested. If you have given third party applications or websites access to your information, they may retain your information to the extent permitted under their terms of service or privacy policies, but they will no longer be able to access the information through our Platform after you disconnect from them.

Backup copies. Removed and deleted information may persist in backup copies for up to 90 days, but will not be available to others.

Non-user contact information. If a user provides your email address to us, and you are not a Facebook user but you want us to delete your address, you can do so on this help page. However, this request will only apply to addresses we have at the time of the request and not to any addresses that users provide to us later.

8. How We Protect Information

We do our best to keep your information secure, but we need your help. For more detailed information about staying safe on Facebook, visit the Facebook Security Page.

Steps we take to keep your information secure. We keep your account information on a secured server behind a firewall. When you enter sensitive information (such as credit card numbers and passwords), we encrypt that information using secure socket layer technology (SSL). We also use automated and social measures to enhance security, such as analyzing account behavior for fraudulent or otherwise anomalous behavior, may limit use of false features in response to possible signs of abuse, may remove inappropriate content or links to illegal content, and may suspend or delete accounts for violations of our Statement of Rights and Responsibilities.

Risks inherent to sharing information. Although we allow you to set privacy options that limit access to your information, please be aware that no security measures are perfect or impenetrable. We cannot control the actions of other users with whom you share your information. We cannot guarantee that only authorized persons will view your information. We do not ensure that information

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you share on Facebook will not become publicly available. We are not responsible for third party dissemination of any privacy settings or security measures on Facebook. You can reduce these risks by using common sense security practices such as choosing a strong password, using different passwords for different services, and using up to date antivirus software.

Report Violations. You should report any security violations to us on the help page.

5. Other Terms

Changes. We may change this Privacy Policy pursuant to the procedures outlined in the Facebook Statement of Rights and Responsibilities. Unless stated otherwise, our current privacy policy applies to all information that we have about you and your account. If we make changes to this Privacy Policy we will notify you by publication here and on the Facebook Site Governance Page. If the changes are material, we will provide you additional, prominent notice as appropriate under the circumstances. You can make sure that you receive notice directly by liking the Facebook Site Governance Page.

Consent to Collection and Processing in the United States. By using Facebook, you consent to having your personal data transferred to and processed in the United States.

Defined Terms. "Us," "we," "our," "Platform" and "Facebook" mean the same as they do in the Statement of Rights and Responsibilities. "Information" and "content" are used more generally and interchangeably here than in the Statement of Rights and Responsibilities unless otherwise limited by the context.

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DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it has reason to believe that the Respondent has violated the 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 Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having carefully considered the comments filed by interested persons, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Facebook, Inc. (“Facebook”) is a Delaware corporation with its principal office or place of business at 1601 Willow Road, Menlo Park, California 94025.

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

ORDER**DEFINITIONS**

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

- A. Unless otherwise specified, “Respondent” shall mean Facebook, its successors and assigns. For purposes of Parts I, II, and III of this order, “Respondent” shall also mean Facebook acting directly, or through any corporation, subsidiary, division, website, or other device.
- B. “Commerce” shall be defined as it is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
- C. “Clear(ly) and prominent(ly)” shall mean:
 1. in textual communications (*e.g.*, printed publications or words displayed on the screen of a computer or mobile device), 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 highly 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

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consistent with subpart (A) of this definition and shall appear on the screen for a duration sufficient for an ordinary consumer to read and comprehend them, and in the same language as the predominant language that is used in the communication; and

4. in all instances, the required disclosures: (1) are presented in an understandable language and syntax; and (2) include nothing contrary to, inconsistent with, or in mitigation of any statement contained within the disclosure or within any document linked to or referenced therein.
- D. “Covered information” shall mean information from or about an individual consumer including, but not limited to: (a) a first or last name; (b) a home or other physical address, including street name and name of city or town; (c) an email address or other online contact information, such as an instant messaging user identifier or a screen name; (d) a mobile or other telephone number; (e) photos and videos; (f) Internet Protocol (“IP”) address, User ID or other persistent identifier; (g) physical location; or (h) any information combined with any of (a) through (g) above.
- E. “Nonpublic user information” shall mean covered information that is restricted by one or more privacy setting(s).
- F. “Privacy setting” shall include any control or setting provided by Respondent that allows a user to restrict which individuals or entities can access or view covered information.
- G. “Representatives” shall mean Respondent’s officers, agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise.
- H. “Third party” shall mean any individual or entity that uses or receives covered information obtained by or on

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behalf of Respondent, other than: (1) a service provider of Respondent that (i) uses the covered information for and at the direction of Respondent and no other individual or entity and for no other purpose; and (ii) does not disclose the covered information, or any individually identifiable information derived from such covered information, except for, and at the direction of, Respondent, for the purpose of providing services requested by a user and for no other purpose; or (2) any entity that uses the covered information only as reasonably necessary: (i) to comply with applicable law, regulation, or legal process, (ii) to enforce Respondent's terms of use, or (iii) to detect, prevent, or mitigate fraud or security vulnerabilities.

- I. "User" shall mean an identified individual from whom Respondent has obtained information for the purpose of providing access to Respondent's products and services.

I.

IT IS ORDERED that Respondent and its representatives, in connection with any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, the extent to which it maintains the privacy or security of covered information, including, but not limited to:

- A. its collection or disclosure of any covered information;
- B. the extent to which a consumer can control the privacy of any covered information maintained by Respondent and the steps a consumer must take to implement such controls;
- C. the extent to which Respondent makes or has made covered information accessible to third parties;
- D. the steps Respondent takes or has taken to verify the privacy or security protections that any third party provides;

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- E. the extent to which Respondent makes or has made covered information accessible to any third party following deletion or termination of a user's account with Respondent or during such time as a user's account is deactivated or suspended; and
- F. 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 third party, including, but not limited to, the U.S.-EU Safe Harbor Framework.

II.

IT IS FURTHER ORDERED that Respondent and its representatives, in connection with any product or service, in or affecting commerce, prior to any sharing of a user's nonpublic user information by Respondent with any third party, which materially exceeds the restrictions imposed by a user's privacy setting(s), shall:

- A. clearly and prominently disclose to the user, separate and apart from any "privacy policy," "data use policy," "statement of rights and responsibilities" page, or other similar document: (1) the categories of nonpublic user information that will be disclosed to such third parties, (2) the identity or specific categories of such third parties, and (3) that such sharing exceeds the restrictions imposed by the privacy setting(s) in effect for the user; and
- B. obtain the user's affirmative express consent.

Nothing in Part II will (1) limit the applicability of Part I of this order; or (2) require Respondent to obtain affirmative express consent for sharing of a user's nonpublic user information initiated by another user authorized to access such information, provided that such sharing does not materially exceed the restrictions imposed by a user's privacy setting(s). Respondent may seek modification of this Part pursuant to 15 U.S.C. §45(b) and 16 C.F.R. 2.51(b) to address relevant developments that affect

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compliance with this Part, including, but not limited to, technological changes and changes in methods of obtaining affirmative express consent.

III.

IT IS FURTHER ORDERED that Respondent and its representatives, in connection with any product or service, in or affecting commerce, shall, no later than sixty (60) days after the date of service of this order, implement procedures reasonably designed to ensure that covered information cannot be accessed by any third party from servers under Respondent's control after a reasonable period of time, not to exceed thirty (30) days, from the time that the user has deleted such information or deleted or terminated his or her account, except as required by law or where necessary to protect the Facebook website or its users from fraud or illegal activity. Nothing in this paragraph shall be construed to require Respondent to restrict access to any copy of a user's covered information that has been posted to Respondent's websites or services by a user other than the user who deleted such information or deleted or terminated such account.

IV.

IT IS FURTHER ORDERED that Respondent shall, no later than the date of service of this order, establish and implement, and thereafter maintain, a comprehensive privacy program that is reasonably designed to (1) address privacy risks related to the development and management of new and existing products and services for consumers, and (2) protect the privacy and confidentiality of covered information. Such program, the content and implementation of which must be documented in writing, shall contain controls and procedures appropriate to Respondent's size and complexity, the nature and scope of Respondent's activities, and the sensitivity of the covered information, including:

- A. the designation of an employee or employees to coordinate and be responsible for the privacy program.
- B. the identification of reasonably foreseeable, material risks, both internal and external, that could result in

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Respondent's unauthorized collection, use, or disclosure of covered information and an assessment of the sufficiency of any safeguards in place to control these risks. At a minimum, this privacy risk assessment should include consideration of risks in each area of relevant operation, including, but not limited to: (1) employee training and management, including training on the requirements of this order, and (2) product design, development, and research.

- C. the design and implementation of reasonable controls and procedures to address the risks identified through the privacy risk assessment, and regular testing or monitoring of the effectiveness of those controls and procedures.
- D. the development and use of reasonable steps to select and retain service providers capable of appropriately protecting the privacy of covered information they receive from Respondent and requiring service providers, by contract, to implement and maintain appropriate privacy protections for such covered information.
- E. the evaluation and adjustment of Respondent's privacy program in light of the results of the testing and monitoring required by subpart C, any material changes to Respondent's operations or business arrangements, or any other circumstances that Respondent knows or has reason to know may have a material impact on the effectiveness of its privacy program.

V.

IT IS FURTHER ORDERED that, in connection with its compliance with Part IV of this order, Respondent shall obtain initial and biennial assessments and reports ("Assessments") from a qualified, objective, independent third-party professional, who uses procedures and standards generally accepted in the profession. A person qualified to prepare such Assessments shall have a minimum of three (3) years of experience in the field of

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privacy and data protection. All persons selected to conduct such Assessments and prepare such reports shall be approved by the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, in his or her sole discretion. Any decision not to approve a person selected to conduct such Assessments shall be accompanied by a writing setting forth in detail the reasons for denying such approval. The reporting period for the Assessments shall cover: (1) the first one hundred and eighty (180) days after service of the order for the initial Assessment, and (2) each two (2) year period thereafter for twenty (20) years after service of the order for the biennial Assessments. Each Assessment shall:

- A. set forth the specific privacy controls that Respondent has implemented and maintained during the reporting period;
- B. explain how such privacy controls are appropriate to Respondent's size and complexity, the nature and scope of Respondent's activities, and the sensitivity of the covered information;
- C. explain how the privacy controls that have been implemented meet or exceed the protections required by Part IV of this order; and
- D. certify that the privacy controls are operating with sufficient effectiveness to provide reasonable assurance to protect the privacy of covered information and that the controls have so operated throughout the reporting period.

Each Assessment shall be prepared and completed within sixty (60) days after the end of the reporting period to which the Assessment applies. Respondent shall provide the initial Assessment to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, within ten (10) days after the Assessment has been prepared. All subsequent biennial Assessments shall be retained by Respondent until the order is terminated and provided to the Associate Director of Enforcement within ten (10) days of request.

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VI.

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:

- A. for a period of three (3) years from the date of preparation or dissemination, whichever is later, all widely disseminated statements by Respondent or its representatives that describe the extent to which Respondent maintains and protects the privacy, security, and confidentiality of any covered information, including, but not limited to, any statement related to a change in any website or service controlled by Respondent that relates to the privacy of such information, along with all materials relied upon in making such statements, and a copy of each materially different privacy setting made available to users;
- B. for a period of six (6) months from the date received, all consumer complaints directed at Respondent or forwarded to Respondent by a third party, that relate to the conduct prohibited by this order and any responses to such complaints;
- C. for a period of five (5) years from the date received, any documents, prepared by or on behalf of Respondent, that contradict, qualify, or call into question Respondent's compliance with this order;
- D. for a period of three (3) years from the date of preparation or dissemination, whichever is later, each materially different document relating to Respondent's attempt to obtain the consent of users referred to in Part II above, along with documents and information sufficient to show each user's consent; and documents sufficient to demonstrate, on an aggregate basis, the number of users for whom each such privacy setting was in effect at any time Respondent has attempted to

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obtain and/or been required to obtain such consent;
and

- E. for a period of three (3) years after the date of preparation of each Assessment required under Part V of this order, all materials relied upon to prepare the Assessment, whether prepared by or on behalf of Respondent, including but not limited to all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, for the compliance period covered by such Assessment.

VII.

IT IS FURTHER ORDERED that Respondent shall deliver a copy of this order to (1) all current and future principals, officers, directors, and managers; (2) all current and future employees, agents, and representatives having supervisory responsibilities relating to the subject matter of this order, and (3) any business entity resulting from any change in structure set forth in Part VIII. 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. For any business entity resulting from any change in structure set forth in Part VIII, delivery shall be at least ten (10) days prior to the change in structure.

VIII.

IT IS FURTHER ORDERED that Respondent shall notify the Commission within fourteen (14) days of any change in Respondent that may affect compliance obligations arising under this order, including, but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in either corporate name or address. Unless otherwise directed by a representative of the Commission, all notices required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director of Enforcement,

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Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, D.C. 20580, with the subject line *In the Matter of Facebook, Inc.*, FTC File No.[]. *Provided, however*, that in lieu of overnight courier, notices may be sent by first-class mail, but only if an electronic version of any such notice is contemporaneously sent to the Commission at Debrief@ftc.gov.

IX.

IT IS FURTHER ORDERED that Respondent, within ninety (90) days after the date of service of this order, shall file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of their own compliance 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.

X.

This order will terminate on July 27, 2032, 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 fewer than twenty (20) years; and
- B. 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 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.

Statement of the Commission

By the Commission, Commissioner Rosch dissenting and Commissioner Ohlhausen not participating.

STATEMENT OF THE COMMISSION

The final consent order in *In re Facebook, Inc.* that we approve today advances the privacy interests of the nearly one billion Facebook users around the world by requiring the company to live up to its promises and submit to privacy audits. Notably, Facebook will be subject to civil penalties of up to \$16,000 for each violation of the order. We intend to monitor closely Facebook's compliance with the order and will not hesitate to seek civil penalties for any violations.

We write to address the arguments raised by our colleague, Commissioner Rosch, who opposes final approval of the order. One of his objections relates to the extent to which the order would reach the activities of third-party "apps" downloaded by consumers while using the Facebook platform. The Order broadly prohibits Facebook from misrepresenting in any manner, expressly or by implication, the extent to which it maintains the privacy or security of any information it collects from or about consumers. For a company whose entire business model rests on collecting, maintaining, and sharing people's information, this prohibition touches on virtually every aspect of Facebook's operations. Further, the Order sets forth clear examples of how this broad prohibition would apply in connection with apps, by prohibiting Facebook from misrepresenting (1) the extent to which it makes its users' information accessible to apps; or (2) the steps it takes to verify the privacy or security protections that apps provide.¹ A statement from Facebook about an app's conduct may well amount to a promise that Facebook is taking steps to assure the level of privacy or security that the app provides for

¹ Agreement Containing Consent Order, § I.C-D.

Statement of the Commission

consumers' information.² These provisions make clear that Facebook will be liable for conduct by apps that contradicts Facebook's promises about the privacy or security practices of these apps.

Commissioner Rosch also opposes the consent order because it includes a denial by Facebook of the substantive allegations in the Commission's complaint.³ Based on this denial, Commissioner Rosch asserts that the Commission lacks the requisite "reason to believe" that Facebook violated Section 5 of the Federal Trade Commission Act and a basis to conclude that the settlement is in "the interest of the public."⁴

We strongly disagree with Commissioner Rosch's view that if the Commission allows a respondent to deny the complaint's substantive allegations, or use language that is tantamount to a denial, there is no basis for the Commission to conclude that the respondent engaged in unlawful conduct or that the consent is in the public interest. As Commissioner Rosch is aware, an extensive investigation and detailed staff recommendation has given the Commission a strong—not just a reasonable—basis to issue its complaint in this case and to conclude that both the complaint and the resulting settlement are in the public interest. Here, as in all enforcement cases, it is the evidentiary record developed by FTC staff during the course of its investigation, not any ensuing settlement agreement, that forms the basis for action by the Commission. A respondent's denial of liability in a consent agreement does not diminish staff's extensive investigation or the ability of the Commission to find a reasonable basis to finalize a settlement or to enforce an order that results from settlement negotiations. Moreover, express denials of

2 Indeed, in light of Facebook's representations to users about apps when offering them the ability to install and use apps, the prohibition covers privacy disclosures by Facebook of the very sort that gave rise to Commissioner Rosch's concern.

3 The order states that Facebook "expressly denies the allegations set forth in the complaint, except for the jurisdictional facts." Agreement Containing Consent Order, ¶ 5.

4 Dissenting Statement of Commissioner Rosch at 1 (quoting 15 U.S.C. § 45(b)).

Statement of the Commission

liability are consistent with the Commission's current Rules of Practice.⁵

We view the final consent order in this matter to be a major step forward for consumer privacy and hereby approve it.

While we do not believe that a respondent's denial of liability is reason to reject a settlement that is in the public interest, we share Commissioner Rosch's desire to avoid any possible public misimpression that the Commission obtains settlements when it lacks reason to believe that the alleged conduct occurred. We commend Commissioner Rosch for focusing our attention on the issue; going forward, express denials will be strongly disfavored. We also appreciate Commissioner Rosch's suggestion that consent order language that the respondent "neither admits nor denies" a complaint's allegations may very well be a more effective way to ensure that there are no misimpressions about the Commission's process. Accordingly, we will consider in the coming months whether a modification to the Commission Rules of Practice is warranted.

⁵ Rule 2.32 of the FTC Rules of Practice, which governs administrative settlements, provides that "[t]he agreement may state that the signing thereof is for settlement purposes only and does not constitute an admission by any party that the law has been violated as alleged in the complaint." 16 C.F.R. § 2.32.

Dissenting Statement

Dissenting Statement of Commissioner J. Thomas Rosch

I dissent from acceptance of this final consent order for two reasons. First, in the Agreement Containing Consent Order, respondent Facebook “expressly denies the allegations set forth in the complaint, except for the jurisdictional facts.”¹ Our Federal Trade Commission Rules of Practice do not provide for such a denial.² Beyond that, as I read Section 5, Commissioners are authorized to accept a consent agreement only if there is reason to believe that a respondent is engaging in an unfair or deceptive act or practice and that acceptance of the consent agreement is in the interest of the public.³ I respectfully suggest that the whole reason for requiring the Commission to conclude that there is “reason to believe” is to force the Commission to come to grips with the probability that the respondent did engage in conduct creating liability. I would further argue that in the real world, if the Commission allows the respondent to expressly deny that it did engage in that conduct (or to use language that is tantamount to an express denial), there is a questionable basis for us to conclude that that probability exists (or that the consent is in the public interest either).⁴ Accordingly, I cannot find that either the “reason to believe” or the “in the interest of the public” requirement is satisfied when, as here, there is an express denial of the allegations set forth in the complaint.

¹ Agreement Containing Consent Order, ¶ 5.

² See Rule 2.32, 16 C.F.R. § 2.32 (“The agreement may state that the signing thereof is for settlement purposes only and *does not constitute an admission* by any party that the law has been violated as alleged in the complaint.”) (emphasis added).

³ 15 U.S.C. § 45(b). See *Johnson Prods. Co. v. FTC*, 549 F.2d 35, 38 (7th Cir. 1977) (“The Commission, unlike a private litigant, must act in furtherance of the public interest.”) (explaining that the public interest mandate entitles the Commission to reserve to itself the option of withdrawing its acceptance of a consent decree after the public comment period).

⁴ See *FTC v. Circa Direct LLC*, 2012 U.S. Dist. LEXIS 81878, *3-*6 (D.N.J. June 13, 2012) (expressing the concern that when being faced with a settlement without an admission of liability, it is difficult to determine whether or not the public interest is being served).

Dissenting Statement

I should add that I am also in favor of reconsidering Rule 2.32's authorization of the inclusion of language in a consent agreement that it "is for settlement purposes only and does not constitute an admission by any party that the law has been violated as alleged in the complaint." In comparison, the Securities and Exchange Commission's informal procedures provide that, "it is important to avoid creating, or permitting to be created, an impression that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur."⁵ Accordingly, the SEC has adopted a policy not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings.⁶ Importantly, the SEC also has concluded that "a refusal to admit the allegations is equivalent to a denial, unless the defendant or respondent states that he neither admits nor denies the allegations."⁷ I would encourage consideration of whether our authorization of language that a consent agreement "is for settlement purposes only and does not constitute an admission that the law has been violated" is tantamount to a denial and if so, whether the Commission should similarly embrace the "neither admits nor denies" model language.

Second, while I hope that the majority is correct in their assertion that the consent order covers the deceptive practices of Facebook as well as the applications ("apps") that run on the Facebook platform, it is not clear to me that it does. In particular, I am concerned that the order may not unequivocally cover all representations made in the Facebook environment (while a user is "on Facebook") relating to the deceptive information sharing practices of apps about which Facebook knows or should know. For example, a reporter from *Forbes* recently disclosed that while downloading an app on Facebook, a pop up screen informed users that "This app shares articles you read and more on Facebook with:" and then allowed users to choose between "public,"

⁵ 17 C.F.R. § 202.5(e).

⁶ *Id.*

⁷ *Id.*

Dissenting Statement

“friends,” or “only me.”⁸ The reporter assumed – as most users would – that choosing “only me” meant that no one else would be able to see what one was reading when using that app. However, to the contrary, according to this report, choosing “only me” merely meant that your reading habits didn’t show up in your friends’ news feed or tickers on Facebook.⁹ Users reading articles within the app would still see articles read by other users, even those users that had chosen the “only me” option. Apparently there is no way to turn off sharing within the app, except on an article-by article basis.¹⁰ I consider such inadequate disclosure to be deceptive when it occurs in the Facebook environment, irrespective of whether that failure to fully disclose stems from the conduct of the app or Facebook itself. I would include language in the order to make that clear, lest Facebook argue subsequently that the Commission order only covers deceptive conduct engaged in by Facebook itself.

⁸ Jeff Bercovici, *Despite FTC Settlement, Facebook Still Playing Coy on Privacy*, Forbes, Dec. 1, 2011, available at <http://www.forbes.com/sites/jeffbercovici/2011/12/01/despite-ftc-settlement-facebook-still-playing-coy-on-privacy/>.

⁹ Subsequently, some changes have been made to the Washington Post Social Reader application download page. There is now a small question mark icon located next to the “who can see activity from this app on Facebook” language. When a user scrolls over the question mark icon, it says “This does not control who can see your activity within the app itself.”

¹⁰ Users can learn about the app on the Washington Post website or on the Facebook website. The app is downloaded from the Facebook website itself and users access the application while on Facebook.

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

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

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.

Since at least 2004, Facebook has operated www.facebook.com, a social networking website that enables a consumer who uses the site (“user”) to create an online profile and communicate with other users. Among other things, a user’s online profile can include information such as the user’s name, a “profile picture,” interest groups they join, a “Friend List” of other users who are the user’s “Friends” on the site, photo albums and videos they upload, and messages and comments posted by them or by other users. Users can also use third-party applications through the site (“Apps”) to, for example, play games, take quizzes, track their physical fitness routines for comparison to their friends’ routines, or receive discount offers or calendar reminders. As of August 2011, Facebook had more than 750 million users.

The Commission’s complaint alleges eight violations of Section 5(a) of the FTC Act, which prohibits deceptive and unfair acts or practices in or affecting commerce, by Facebook:

- **Facebook’s Deceptive Privacy Settings:** Facebook communicated to users that they could restrict certain information they provided on the site to a limited audience, such as “Friends Only.” In fact, selecting these categories did not prevent users’ information from being shared with Apps that their Friends used.
- **Facebook’s Deceptive and Unfair December 2009 Privacy Changes:** In December 2009, Facebook changed

Analysis to Aid Public Comment

its site so that certain information that users may have designated as private – such as a user’s Friend List – was made public, without adequate disclosure to users. This conduct was also unfair to users.

- **Facebook’s Deception Regarding App Access:** Facebook represented to users that whenever they authorized an App, the App would only access the information of the user that it needed to operate. In fact, the App could access nearly all of the user’s information, even if unrelated to the App’s operations. For example, an App that provided horoscopes for users could access the user’s photos or employment information, even though there is no need for a horoscope App to access such information.
- **Facebook’s Deception Regarding Sharing with Advertisers:** Facebook promised users that it would not share their personal information with advertisers; in fact, Facebook did share this information with advertisers when a user clicked on a Facebook ad.
- **Facebook’s Deception Regarding its Verified Apps Program:** Facebook had a “Verified Apps” program through which it represented that it had certified the security of certain Apps when, in fact, it had not.
- **Facebook’s Deception Regarding Photo and Video Deletion:** Facebook stated to users that, when they deactivate or delete their accounts, their photos and videos would be inaccessible. In fact, Facebook continued to allow access to this content even after a user deactivated or deleted his or her account.
- **Safe Harbor:** Facebook deceptively stated that it complied with the U.S.-EU Safe Harbor Framework, a mechanism by which U.S. companies may transfer data from the European Union to the United States consistent with European law.

Analysis to Aid Public Comment

The proposed order contains provisions designed to prevent Facebook from engaging in practices in the future that are the same or similar to those alleged in the complaint.

Part I of the proposed order prohibits Facebook from misrepresenting the privacy or security of “covered information,” as well as the company’s compliance with any privacy, security, or other compliance program, including but not limited to the U.S.-EU Safe Harbor Framework. “Covered information” is defined broadly as “information from or about an individual consumer, including but not limited to: (a) a first or last name; (b) a home or other physical address, including street name and name of city or town; (c) an email address or other online contact information, such as an instant messaging user identifier or a screen name; (d) a mobile or other telephone number; (e) photos and videos; (f) Internet Protocol (“IP”) address, User ID, or other persistent identifier; (g) physical location; or (h) any information combined with any of (a) through (g) above.”

Part II of the proposed order requires Facebook to give its users a clear and prominent notice and obtain their affirmative express consent before sharing their previously-collected information with third parties in any way that materially exceeds the restrictions imposed by their privacy settings. A “material . . . practice is one which is likely to affect a consumer’s choice of or conduct regarding a product.” FTC Policy Statement on Deception, Appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984).

Part III of the proposed order requires Facebook to implement procedures reasonably designed to ensure that a user’s covered information cannot be accessed from Facebook’s servers after a reasonable period of time, not to exceed thirty (30) days, following a user’s deletion of his or her account.

Part IV of the proposed order requires Facebook to establish and maintain a comprehensive privacy program that is reasonably designed to: (1) address privacy risks related to the development and management of new and existing products and services, and (2) protect the privacy and confidentiality of covered information. The privacy program must be documented in writing and must contain controls and procedures appropriate to Facebook’s size

Analysis to Aid Public Comment

and complexity, the nature and scope of its activities, and the sensitivity of covered information. Specifically, the order requires Facebook to:

- designate an employee or employees to coordinate and be responsible for the privacy program;
- identify reasonably-foreseeable, material risks, both internal and external, that could result in the unauthorized collection, use, or disclosure of covered information and assess the sufficiency of any safeguards in place to control these risks;
- design and implement reasonable controls and procedures to address the risks identified through the privacy risk assessment and regularly test or monitor the effectiveness of these controls and procedures;
- develop and use reasonable steps to select and retain service providers capable of appropriately protecting the privacy of covered information they receive from respondent, and require service providers by contract to implement and maintain appropriate privacy protections; and
- evaluate and adjust its privacy program in light of the results of the testing and monitoring, any material changes to its operations or business arrangements, or any other circumstances that it knows or has reason to know may have a material impact on the effectiveness of its privacy program.

Part V of the proposed order requires that Facebook obtain within 180 days, and every other year thereafter for twenty (20) years, an assessment and report from a qualified, objective, independent third-party professional, certifying, among other things, that it has in place a privacy program that provides protections that meet or exceed the protections required by Part IV of the proposed order; and its privacy controls are operating with sufficient effectiveness to provide reasonable assurance that the privacy of covered information is protected.

Analysis to Aid Public Comment

Parts VI through X of the proposed order are reporting and compliance provisions. Part VI requires that Facebook retain all “widely disseminated statements” that describe the extent to which respondent maintains and protects the privacy, security, and confidentiality of any covered information, along with all materials relied upon in making such statements, for a period of three (3) years. Part VI further requires Facebook to retain, for a period of six (6) months from the date received, all consumer complaints directed at Facebook, or forwarded to Facebook by a third party, that relate to the conduct prohibited by the proposed order, and any responses to such complaints. Part VI also requires Facebook to retain for a period of five (5) years from the date received, documents, prepared by or on behalf of Facebook, that contradict, qualify, or call into question its compliance with the proposed order. Part VI additionally requires Facebook to retain for a period of three (3) years, each materially different document relating to its attempt to obtain the affirmative express consent of users referred to in Part II, along with documents and information sufficient to show each user’s consent and documents sufficient to demonstrate, on an aggregate basis, the number of users for whom each such privacy setting was in effect at any time Facebook has attempted to obtain such consent. Finally, Part VI requires that Facebook retain all materials relied upon to prepare the third-party assessments for a period of three (3) years after the date that each assessment is prepared.

Part VII requires dissemination of the order now and in the future to principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having supervisory responsibilities relating to the subject matter of the order. Part VIII ensures notification to the FTC of changes in corporate status. Part IX mandates that Facebook submit an initial compliance report to the FTC and make available to the FTC subsequent reports. Part X is a provision “sunsetting” the order after twenty (20) years, with certain exceptions.

The purpose of the analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint or proposed order, or to modify the proposed order’s terms in any way.

Complaint

IN THE MATTER OF

JOHNSON & JOHNSONCONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SECTION 7 OF THE CLAYTON ACT*Docket No. C-4363; File No. 111 0160*
Complaint, June 11, 2012 – Decision, August 7, 2012

This consent order addresses the \$21.3 billion acquisition by Johnson & Johnson of certain assets of Synthes, Inc. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by combining the two largest competitors in the U.S. market for volar distal radius plating systems. The consent order requires Johnson & Johnson to divest all assets (including intellectual property) related to its “DVR” volar distal radius plating system business to Biomet, Inc.

Participants

For the *Commission*: Brian A. O’Dea, Eric D. Rohlck, and Mark D. Seidman.

For the *Respondent*: Steven K. Bernstein, Vadim Brusser, Brianne Kucerik, Ann Malester, and Steven A. Newborn, Weil, Gotshal & Manges LLP

COMPLAINT

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

Complaint

I. DEFINITIONS

1. “Commission” means the Federal Trade Commission.

2. “J&J” or “Respondent J&J” means Johnson & Johnson, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Johnson & Johnson, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

3. “Synthes” means Synthes, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Synthes, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

4. “Volar distal radius plating system” means a plating system used to treat fractures of the distal portion of the radius bone that is implanted from the bottom of the wrist.

5. “DVR” means the DVR Anatomic Volar Plating System, the volar distal radius plating system owned by Respondent J&J.

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

II. RESPONDENT

7. Respondent J&J is a corporation organized, existing, and doing business under and by virtue of the laws of the state of New Jersey, with its office and principal place of business located at One Johnson & Johnson Plaza, New Brunswick, New Jersey 08933. J&J, among other things, is engaged in the research, development, marketing and sale of trauma products, including the DVR.

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

Complaint

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

III. PROPOSED ACQUISITION

9. On April 26, 2011, J&J and Synthes entered into an agreement and plan of merger (the “Purchase Agreement”) whereby J&J agreed to acquire Synthes in a transaction valued at approximately \$21.3 billion (the “Acquisition”).

IV. RELEVANT MARKET

10. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the research, development, manufacture, and sale of volar distal radius plating systems.

11. For the purposes of this Complaint, the United States is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant line of commerce. To compete effectively in the United States volar distal radius plating market, a firm must have FDA approval for its device, establish a local sales and service organization, and its product must not infringe any other firm’s intellectual property.

V. STRUCTURE OF THE MARKET

12. Combined, J&J and Synthes would control over 70 percent of the U.S. market for volar distal radius plating systems. Synthes is the leading supplier of volar distal radius plating systems, accounting for approximately 42 percent of the market by 2010 revenue. J&J’s volar distal radius plating system accounted for approximately 29 percent of the market by 2010 revenue. Although other companies sell volar distal radius plating systems in the United States, most achieve only minimal sales. The U.S. market for volar distal radius plating systems is highly concentrated as measured by the Herfindahl-Hirschman Index (“HHI”). If left unremedied, the acquisition would produce a post-merger HHI of over 5,000 and would represent an increase in the HHI of more than 2,500.

Complaint

VI. CONDITIONS OF ENTRY AND EXPANSION

13. A supplier attempting to enter the market for volar distal radius plating systems would have to invent around the patents held by J&J and Synthes, develop a reputation for quality products and support among surgeons, and establish a strong distribution network. Both the J&J and Synthes volar distal radius plating systems are protected by patents. The patents held by the two companies have largely prevented competitors from developing products that surgeons consider to be as effective as those of J&J and Synthes. Manufacturer product reputation and distribution presence also play a strong role in surgeon preferences. Many fringe competitors are limited by their lack of a strong distribution presence, and it would take a significant amount of time for one or more current fringe competitors to develop a reputation for quality, service, and consistency that rivals that of J&J and Synthes with respect to volar distal radius plating. Therefore, entry into the relevant line of commerce described in Paragraph 10 or expansion by fringe competitors would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition.

VII. EFFECTS OF THE ACQUISITION

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

- a. eliminating actual, direct, and substantial competition between J&J and Synthes in the market for the research, development, marketing, and sale of volar distal radius plating systems;
- b. increasing J&J's ability to raise prices unilaterally in the relevant market; and
- c. reducing research and development in the relevant market.

Order to Maintain Assets

VIII. VIOLATIONS CHARGED

15. The Purchase Agreement described in Paragraph 9 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

16. The Acquisition described in Paragraph 9, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eleventh day of June, 2012, issues its Complaint against said Respondent.

By the Commission.

ORDER TO MAINTAIN ASSETS
[Public Record Version]

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

Respondent J&J, its attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondent J&J 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

Order to Maintain Assets

constitute an admission by Respondent J&J 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 J&J has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues the following Order to Maintain Assets ("Asset Maintenance Order"):

1. Respondent J&J is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its headquarters address located at One Johnson & Johnson Plaza, New Brunswick, New Jersey 08933;
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent J&J, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that all capitalized terms used in this Asset Maintenance Order, but not defined herein, shall have the meanings attributed to such terms in the Decision and Order contained in the Consent Agreement. In addition to the definitions in Paragraph I of the Decision and Order attached to the Consent Agreement, the following definitions shall apply:

Order to Maintain Assets

- A. “Decision and Order” means:
1. the Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final Decision and Order by the Commission; and
 2. the Final Decision and Order issued and served by the Commission.
- B. “Orders” means the Decision and Order and this Asset Maintenance Order.

II. (Asset Maintenance)**IT IS FURTHER ORDERED** that:

- A. Except in the course of performing its obligations under a Remedial Agreement or as expressly allowed pursuant to this Asset Maintenance Order, Respondent J&J shall not, and shall instruct its Distributors not to, interfere, directly or indirectly, with the DVR Business of the Acquirer.

Provided however, that unless otherwise prohibited by the Order, nothing in this Paragraph II.A. shall prevent (a) Respondent J&J or its Distributors (i) from competing for contracts or for the business of suppliers, distributors, resellers, or customers; or (ii) from engaging in competition for the research, development, manufacture, marketing and sales of Wrist Plating Systems; and (b) Respondent J&J from using its Distributors for selling products other than DVR.

- B. During the time period before the Effective Date, Respondent J&J shall, except as otherwise provided in this Asset Maintenance Order:
1. take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of the DVR Business to minimize

Order to Maintain Assets

any risk of loss of competitive potential for the DVR Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the DVR Business, except for ordinary wear and tear. Respondent J&J shall not sell, transfer, encumber or otherwise impair the DVR Business (other than in the manner prescribed in this Order), nor take any action that lessens the full economic viability, marketability or competitiveness of the DVR Business including, but not limited to, hiring or offering to hire any Designated Employees;

2. retain all of Respondent J&J's rights, title, and interest in the DVR Business, except for the disposition of inventory in the regular and ordinary course of business, consistent with past practices;
3. maintain the operations of the DVR Business in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets, as necessary) and/or as may be necessary to preserve the marketability, viability, and competitiveness of the DVR Business and shall use its best efforts to preserve the existing relationships with the following: suppliers, vendors, distributors, customers, governmental agencies, employees, and others having business relations with the DVR Business; Respondent J&J's responsibilities shall include, but are not limited to, the following:
 - a. Respondent J&J shall provide the DVR Business with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such business and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for the DVR Business;
 - b. Respondent J&J shall continue, at least at their scheduled pace, any additional expenditures for

Order to Maintain Assets

the DVR Business authorized prior to the date the Consent Agreement was signed by Respondent J&J including, but not limited to, all research, Development, manufacture, distribution, marketing and sales expenditures;

- c. Respondent J&J shall provide such resources as may be necessary to respond to competition against the DVR Business and/or to prevent any diminution in sales of the DVR Business after the Acquisition Date and prior to the Effective Date;
- d. Respondent J&J shall provide such resources as may be necessary to maintain the competitive strength and positioning of the DVR Business in a business-as-usual manner and/or in accordance with the applicable DVR Business plan;
- e. Respondent J&J shall make available for use by the DVR Business funds in a business-as-usual manner and/or in accordance with the applicable DVR Business plan sufficient to perform all routine maintenance or replacement, and all other maintenance or replacement of assets as may be necessary to maintain the DVR Business;
- f. Respondent J&J shall provide the DVR Business with such funds as are necessary to maintain the full economic viability, marketability and competitiveness of the DVR Business; and
- g. Respondent J&J shall provide such support services to the DVR Business as were being provided to such business by Respondent J&J as of the date the Consent Agreement was signed by Respondent J&J.

Order to Maintain Assets

4. maintain a work force substantially as large as, and with equivalent or better training and expertise to, what was associated with the DVR Business as of the Acquisition Date including, but not limited to, instructing Respondent J&J's Distributors to maintain a work force substantially as large as, and with equivalent or better training and expertise to, what was associated with the DVR Business as of the Acquisition Date.
 5. develop, sell, and manufacture the DVR consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the DVR Business pending divestiture.
- C. The purpose of this Paragraph II is to maintain the full economic viability, marketability and competitiveness of the DVR Business until the Effective Date, to minimize any risk of loss of competitive potential for the DVR Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the DVR Business, except for ordinary wear and tear.

III. (Divestiture and Post-Divestiture Requirements)**IT IS FURTHER ORDERED** that:

- A. Prior to the Effective Date, Respondent J&J shall secure all consents, assignments, and waivers from all Third Parties, other than the FDA, that are Related To the DVR Business including securing a lease for the Miami Facility and the Girardet Facility, if such facilities are being leased to the Acquirer, and securing consents from all customers of the DVR Business whose contracts are being assigned or extended to the Acquirer pursuant to Paragraph II.A. of the Decision and Order.

Provided, however, Respondent J&J may satisfy this requirement with respect to any one or more leases or agreements by certifying that the Acquirer has

Order to Maintain Assets

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

Provided, further, however, Respondent J&J shall not be required to obtain consents necessary to assign contracts from customers that, in the aggregate, represented less than five percent (5%) of Respondent J&J's United States DVR sales for calendar year 2011.

- B. Within ninety (90) days of the Effective Date, Respondent J&J shall transfer a Cloned Form of the TeamCenter, Agile, and EtQ software programs, together with all data belonging to the Acquirer, and resident on such programs, current as of such transfer date, in a manner that provides the Acquirer independent access to and control over such Cloned Form software programs.
- C. As of the Effective Date, Respondent J&J shall grant to the Acquirer direct access to data belonging to the Acquirer and resident on the TeamCenter, Agile, and EtQ software programs, pursuant to the Remedial Agreement and subject to non-disclosure agreements, until such time as the Acquirer notifies Respondent J&J and the Monitor that the Acquirer has validated the Cloned Form of the software programs with data belonging to the Acquirer, current as of the last transaction executed on Respondent J&J's versions of the TeamCenter, Agile, and EtQ software programs. Respondent J&J shall assist the Acquirer, as is reasonably necessary, to complete the validation process expeditiously.

IV. (Facilitate Hiring)

IT IS FURTHER ORDERED that:

- A. Beginning no later than the time Respondent J&J signs the Consent Agreement in this matter until ninety (90) days after the Effective Date:

Order to Maintain Assets

1. Respondent J&J shall provide, and Respondent J&J shall instruct Respondent J&J's Distributors to provide, the applicable Designated Employees with reasonable financial incentives to continue in their positions for such period. Such incentives shall include a continuation of all employee benefits offered by Respondent J&J and Respondent J&J's Distributors, as applicable, until the Designated Employee has been hired, the Acquirer has decided not to hire such Designated Employee, or the Designated Employee has declined, in writing, the Acquirer's offer, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to transition the DVR Business to the Acquirer;
2. Respondent J&J shall not, and shall instruct its Distributors not to, interfere with the interviewing, hiring, or employing of the Designated Employees by the Acquirer or the Acquirer's Distributors as described in this Order, and shall remove any impediments within the control of Respondent J&J, and instruct Respondent J&J's Distributors to remove such impediments, that may deter, or otherwise prevent or discourage the Designated Employees from accepting employment with the Acquirer or the Acquirer's Distributors including, but not limited to, any noncompete provisions of employment or other contracts with Respondent J&J or Respondent J&J Distributor that would affect the ability or incentive of those individuals to be employed by the Acquirer or the Acquirer's Distributors. In addition, Respondent J&J shall not make any counteroffer to a Designated Employee, and shall instruct Respondent J&J's Distributor that employs such Designated Employee not to make any counteroffer to a Designated Employee, who receives a written offer of employment from the Acquirer or the Acquirer's Distributors, unless and until the Designated Employee has declined, in

Order to Maintain Assets

writing, the Acquirer's or Acquirer's Distributor's offer.

3. Respondent J&J shall, or where applicable, Respondent J&J shall instruct its Distributors, in a manner consistent with local labor laws:
 - a. to facilitate employment interviews between each Designated Employee and the Acquirer or the Acquirer's Distributors, including providing the names and contact information for such employees and allowing such employees reasonable opportunity to interview with the Acquirer or the Acquirer's Distributors and shall not discourage such employee from participating in such interviews;
 - b. to not interfere in employment negotiations between each Designated Employee and the Acquirer or the Acquirer's Distributors;
 - c. with respect to each Designated Employee who receives an offer of employment from the Acquirer or the Acquirer's Distributors:
 - i. not to prevent, prohibit, or restrict, or threaten to prevent, prohibit, or restrict the Designated Employee from being employed by the Acquirer or the Acquirer's Distributors, and shall not offer any incentive to the Designated Employee to decline employment with the Acquirer or the Acquirer's Distributors including, but not limited to, the Acquirer or the Acquirer's Distributor offering to hire the Designated Employee;
 - ii. to cooperate with the Acquirer or the Acquirer's Distributors in effecting transfer of the Designated Employee to the employ of the Acquirer or the Acquirer's

Order to Maintain Assets

Distributors, if the Designated Employee accepts an offer of employment from the Acquirer or the Acquirer's Distributors;

- iii. to eliminate any confidentiality restrictions that would prevent the Designated Employee who accepts employment with the Acquirer from using or transferring to the Acquirer or the Acquirer's Distributors any information Relating To the manufacture and sale of the DVR; and
- iv. unless alternative arrangements are agreed upon with the Acquirer or the Acquirer's Distributors, to retain the obligation to pay the benefits of any Designated Employee who accepts employment with the Acquirer or the Acquirer's Distributors including, but not limited to, all accrued bonuses, vested pensions, and other accrued benefits.

Provided, however, that subject to the conditions of continued employment prescribed in this Order, this Paragraph IV.A. shall not prohibit Respondent J&J or Respondent J&J's Distributors from continuing to employ any Designated Employee under the terms of such employee's employment as in effect prior to the date of the written offer of employment from the Acquirer or the Acquirer's Distributor to such employee.

Provided further, however, that subject to the conditions of continued employment prescribed in this Order, this Paragraph IV.A. shall not prohibit Respondent J&J or Respondent J&J's Distributors from enforcing, or requiring as a condition of accepting employment with the Acquirer or the Acquirer's Distributors, an eighteen (18) month non-compete Related To products not divested pursuant to the Remedial Agreement.

Order to Maintain Assets

- B. Respondent J&J shall not, and Respondent J&J shall instruct its Distributors not to, for a period of two (2) years following the Effective Date, directly or indirectly, solicit, induce, or attempt to solicit or induce any Designated Employee, who is employed by the Acquirer or the Acquirer's Distributors, to terminate his or her employment relationship with the Acquirer or the Acquirer's Distributors.

Provided, however, Respondent J&J, Respondent J&J's Distributors, or recruiters retained by Respondent J&J or Respondent J&J's Distributors, may place general advertisements for or conduct general searches for employees including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at the Acquirer's or the Acquirer's Distributors' employees;

Provided further, however, Respondent J&J may hire Designated Employees who apply for employment with Respondent J&J as long as such employees were not solicited by Respondent J&J in violation of this Paragraph.

V. (Confidentiality)

IT IS FURTHER ORDERED that:

- A. Except in the course of performing its obligations under a Remedial Agreement, or as expressly allowed pursuant to the Orders:
1. Respondent J&J shall not use, provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information to any Person. Among other things, Respondent J&J shall not use such Confidential Business Information:
 - a. to assist or inform Respondent J&J employees who Develop, manufacture, solicit for sale, sell, or service Respondent J&J products that compete with the products divested, sold, or

Order to Maintain Assets

distributed pursuant to the Decision and Order including, but not limited to, the employees of the Wrist Plating System Business owned and operated by Synthes;

- b. to interfere with any suppliers, distributors, resellers, or customers of the Acquirer;
 - c. to interfere with any contracts divested, assigned, or extended to the Acquirer pursuant to the Decision and Order; or
 - d. to interfere in any other way with the Acquirer pursuant to the Orders or with the DVR Business divested pursuant to the Decision and Order.
2. Respondent J&J shall not disclose or convey Confidential Business Information, directly or indirectly, to any person except the Acquirer or other persons specifically authorized by the Acquirer to receive such information;
 3. Respondent J&J shall not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information to the employees associated with the Synthes Wrist Plating System Business; and
 4. Respondent J&J shall institute procedures and requirements to ensure that:
 - a. Respondent J&J employees with access to Confidential Business Information do not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information in contravention of the Orders; and
 - b. Respondent J&J employees associated with the Synthes Wrist Plating System do not solicit, access or use any Confidential Business

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Information that they are prohibited under the Orders from receiving for any reason or purpose.

- B. The requirements of this Paragraph V do not apply to Confidential Business Information that Respondent J&J demonstrates to the satisfaction of the Commission, in the Commission's sole discretion:
1. was or becomes generally available to the public other than as a result of a disclosure by Respondent J&J;
 2. is necessary to be included in mandatory regulatory filings; *Provided, however*, that Respondent J&J shall make all reasonable efforts to maintain the confidentiality of such information in the regulatory filings;
 3. was available, or becomes available, to Respondent J&J on a non-confidential basis, but only if, to the knowledge of Respondent J&J, the source of such information is not in breach of a contractual, legal, fiduciary, or other obligation to maintain the confidentiality of the information;
 4. is information the disclosure of which is consented to by the Acquirer;
 5. is necessary to be exchanged in the course of consummating the Acquisition or the transactions under the Remedial Agreement;
 6. is disclosed in complying with the Orders;
 7. is information the disclosure of which is necessary to allow Respondent J&J to comply with the requirements and obligations of the laws of the United States and other countries;
 8. is disclosed in defending legal claims, investigations or enforcement actions threatened or

Order to Maintain Assets

brought against Respondent J&J or the DVR Business; or

9. is disclosed in obtaining legal advice.
- C. The purpose of this Paragraph V is to maintain the full economic viability, marketability and competitiveness of the DVR Business until the Effective Date, to minimize any risk of loss of competitive potential for the DVR Business, to minimize the risk of disclosure and unauthorized use of Confidential Business Information of the DVR Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the DVR Business, except for ordinary wear and tear.

VI. (Monitor)**IT IS FURTHER ORDERED** that:

- A. Charles River Associates shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondent J&J and attached as Exhibit A (“Monitor Agreement”) and Confidential Exhibit A-1 (“Monitor Compensation”). The Monitor is appointed to assure that Respondent J&J expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order.
- B. The Monitor Agreement shall require that, no later than one (1) day after the Acquisition Date, Respondent J&J transfers to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities, pursuant to the Decision and Order and this Asset Maintenance Order, and consistent with the purposes of this Order.
- C. No later than one (1) day after the Acquisition Date, Respondent J&J shall, pursuant to the Monitor Agreement, transfer to the Monitor all rights, powers, and authorities necessary to permit the Monitor to

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perform his duties and responsibilities, pursuant to and consistent with, the purposes of this Order.

- D. Respondent J&J shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
1. The Monitor shall have the power and authority to monitor Respondent J&J's compliance with the terms of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission including, but not limited to:
 - a. Assuring that Respondent J&J expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order; and
 - b. Monitoring any agreements between Respondent J&J and the Acquirer.
 2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
 3. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondent J&J's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, Related To Respondent J&J's compliance with its obligations under the Order. Respondent J&J shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondent J&J's compliance with the Order.

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4. The Monitor shall serve, without bond or other security, at the expense of Respondent J&J on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondent J&J, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.
5. Respondent J&J 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, malfeasance, willful or wanton acts, or bad faith by the Monitor.
6. The Monitor Agreement shall provide that within one (1) month from the date the Monitor is appointed pursuant to this paragraph, and every sixty (60) days thereafter, the Monitor shall report in writing to the Commission concerning performance by Respondent J&J of its obligations under the Orders.
7. Respondent J&J 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.

Order to Maintain Assets

- E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Monitor's duties.
- F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor:
1. The Commission shall select the substitute Monitor, subject to the consent of Respondent J&J, which consent shall not be unreasonably withheld. If Respondent J&J has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondent J&J of the identity of any proposed Monitor, Respondent J&J shall be deemed to have consented to the selection of the proposed Monitor.
 2. Not later than ten (10) days after appointment of the substitute Monitor, Respondent J&J shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondent J&J's compliance with the relevant terms of the Orders in a manner consistent with the purposes of the Order.
- G. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.
- H. A Monitor appointed pursuant to this Order may be the same person appointed as the Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

Order to Maintain Assets

VII. (Compliance Reports)

IT IS FURTHER ORDERED that within thirty (30) days after the date this Asset Maintenance Order becomes final, and every sixty (60) days thereafter until the Asset Maintenance Order terminates, Respondent J&J shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with the Orders; *Provided, however*, that, after the Decision and Order becomes final, the reports due under this Asset Maintenance Order shall be consolidated with, and submitted to the Commission at the same time as, the reports required to be submitted by Respondent J&J pursuant to the Decision and Order.

VIII. (Change in Respondent J&J)

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

- A. dissolution of such Respondent;
- B. 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.

IX. (Access)

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

- A. access, during business office hours of Respondent J&J 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

Order to Maintain Assets

documents in the possession or under the control of Respondent J&J Relating To compliance with this Order, which copying services shall be provided by Respondent J&J at its expense; and

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

X. (Termination)

IT IS FURTHER ORDERED that this Asset Maintenance Order shall terminate on the earlier of:

- A. Three (3) days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. The later of:
 - 1. the day after the divestitures pursuant to Paragraph II of the Decision and Order are accomplished, or
 - 2. three (3) days after the related Decision and Order becomes final.

By the Commission.

Order to Maintain Assets

APPENDIX A**MONITOR AGREEMENT**

This Monitor Agreement (this "Agreement"), entered into this 24th day of May, 2012, by and between Johnson & Johnson ("Respondent") and Charles River Associates ("Monitor"), (collectively the "Parties"), provides as follows:

WHEREAS the Federal Trade Commission (the "Commission"), in In the Matter of Johnson & Johnson, has accepted or will shortly accept for Public Comment an Agreement Containing Consent Orders incorporating a Decision and Order and an Order to Maintain Assets (collectively, the "Orders"), which, among other things, requires Respondent to divest its DVR Business, as defined in the Orders, and contemplates the appointment of a Monitor to monitor Respondent's compliance with its obligations under the Orders;

WHEREAS, the Commission is expected to issue the Agreement Containing Consent Orders and appoint Monitor pursuant to the Orders to monitor Respondent's compliance with the terms of the Orders, and Monitor has consented to such appointment;

WHEREAS, the Orders further provide that Respondent shall execute an agreement, subject to the prior approval of the Commission, conferring all the rights and powers necessary to permit Monitor to carry out its duties and responsibilities pursuant to the Orders;

WHEREAS, this Agreement, although executed by Monitor and Respondent, is not effective for any purpose, including but not limited to imposing rights and responsibilities on Respondent or Monitor under the Orders, except for those obligations under the confidentiality provisions herein, until it has been approved by the Commission; and

WHEREAS, the Parties to this Agreement intend to be legally bound, subject only to the Commission's approval of this Agreement.

NOW, THEREFORE, the Parties agree as follows:

All capitalized terms used in this Agreement and not specifically defined herein shall have the respective definitions given to them in the Orders.

ARTICLE I

1.1 **Powers of the Monitor.** Monitor shall have all of the powers and responsibilities conferred upon Monitor by the Orders, including but not limited to: (a) monitoring Respondent's compliance with the divestiture and asset maintenance obligations and related requirements of the Orders; and (b) supervising the performance of any transition services required by the Orders.

1.2 **Access to Relevant Information and Facilities.** Subject to any demonstrated legally recognized privilege, Monitor shall have full and complete access to Respondent's personnel, to include those employees designated to be transferred to an Acquirer, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as Monitor may reasonably request, related to Respondent's compliance with the obligations of Respondent under the Orders in this matter. Documents,

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records and other relevant information are to be provided in an electronic format if they exist in that form. Respondent shall cooperate with any reasonable request of Monitor. Monitor shall give Respondent reasonable notice of any request for such access or such information and shall attempt to schedule any access or requests for information in such a manner as will not unreasonably interfere with Respondent's operations. At the request of the Monitor, Respondent shall promptly arrange meetings and discussions, including tours of relevant facilities, at reasonable times and locations between the Monitor and employees of Respondent who have knowledge relevant to the proper discharge of its responsibilities under the Orders.

1.3 Compliance Reports. Respondent shall provide Monitor with copies of all compliance reports filed with the Commission in a timely manner, but in any event, no later than five (5) days after the date on which Respondent files such report with the Commission.

1.4 Monitor's Obligations. Monitor shall:

(a) carry out the Monitor's duties and responsibilities, including submission of periodic reports, and such additional written reports as may be requested by the Commission staff, to the Commission staff regarding Respondent's compliance with the Orders;

(b) maintain the confidentiality of all confidential information, including Confidential Business Information as defined in the Orders, and any other information provided to the Monitor by the Respondent, the Acquirer of the DVR Business, any supplier or customer of Respondent or the DVR Business, or the Commission ("Confidential Information"), and shall use such information only for the purpose of discharging its obligations as Monitor and not for any other purpose, including, without limitation, any other business, scientific, technological, or personal purpose. Monitor may disclose Confidential Information only to: (i) persons employed by or working with Monitor under this Agreement; or (ii) persons employed at the Commission;

(c) require any consultants, accountants, attorneys, and any other representatives and/or assistants retained by Monitor to assist in carrying out the duties and responsibilities of Monitor to execute a confidentiality agreement, which Respondent will provide if requested, that requires such third parties to treat Confidential Information with the same standards of care and obligations of confidentiality to which the Monitor must adhere under this Agreement;

(d) maintain a record and inform the Commission of all persons (other than representatives of the Commission) to whom Confidential Information related to this Agreement has been disclosed;

(e) for a period of five (5) years after the termination of this Agreement, maintain the confidentiality of all other aspects of the performance of its duties under this Agreement and not disclose any Confidential Information, including Confidential Business Information, relating thereto; and

(f) upon the termination of the Monitor's duties under this Agreement, promptly destroy all written and electronic materials (both originals and copies) that relate to the performance of the Monitor's responsibilities under this Agreement. CRA may retain archival copies of any such materials for litigation defense purposes, provided that CRA continue to abide by all obligations under the confidentiality provisions herein.

Order to Maintain Assets

ARTICLE II

2.1 Retention and Payment of Counsel, Consultants, and other Assistants. Monitor shall have the authority to employ, at the cost and expense of the Respondent, such attorneys, consultants, accountants, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities pursuant to the Orders.

2.2 Monitor Compensation. Respondent will pay Monitor in accordance with the fee schedule attached as Confidential Appendix A for all reasonable time spent in the performance of the Monitor's duties, including all monitoring activities related to the efforts of the Commission-approved Acquirer of the DVR Business, all work in connection with the negotiation and preparation of this Agreement, and all reasonable and necessary travel time.

(a) In addition, Respondent will pay: (i) all out-of-pocket expenses reasonably incurred by Monitor in the performance of its duties under the Orders; and (ii) all reasonable fees of, and disbursements reasonably incurred by, any advisor appointed by Monitor pursuant to the first paragraph in Article II.

(b) The Monitor shall have full and direct responsibility for compliance with all applicable laws, regulations and requirements pertaining to work permits, income and social security taxes, unemployment insurance, worker's compensation, disability insurance, and the like.

2.3 Monitor's Indemnification. Respondent shall be liable to indemnify and hold harmless Monitor against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of 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 malfeasance, gross negligence, willful or wanton acts, or bad faith by Monitor.

2.4 Disputes. In the event of a disagreement or dispute between Respondent and Monitor concerning Respondent's obligations under the Orders, and, in the event that such disagreement or dispute cannot be resolved by the Parties, either party may seek the assistance of the individual in charge of the Commission's Compliance Division.

2.5 Conflicts of Interest. In the event that, during the term of this Agreement, Monitor becomes aware it has or may have a conflict of interest that may affect, or could have the appearance of affecting, performance by Monitor or persons employed by, or working with, Monitor, of any of its duties under this Agreement, Monitor shall promptly inform Respondent and the Commission of any such conflict or potential conflict.

Order to Maintain Assets

ARTICLE III

3.1 Termination. This Agreement shall terminate the earlier of: (a) the expiration or termination of the Orders; (b) Respondent's receipt of written notice from the Commission that the Commission has determined that Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve as Monitor; (c) with at least thirty (30) days advance notice to be provided by Monitor to Respondent and to the Commission, upon resignation of the Monitor; or (d) when Respondent's last obligation under the Orders that pertains to Monitor's service has been fully performed; provided, however, that the Commission may require that Respondent extend this Agreement as may be necessary or appropriate to accomplish the purposes of the Orders. If this Agreement is terminated for any reason, the confidentiality obligations set forth in this Agreement will remain in force, as will the provisions of Articles 2.2 and 2.3 of this Agreement.

3.2 Monitor's Removal. If the Commission determines that Monitor ceases to act or fails to act diligently and consistent with the purpose of the Orders, Respondent shall, upon written request of the Commission, terminate this Agreement and appoint a substitute Monitor, subject to Commission approval and consistent with the Orders.

3.3 Governing Law. This Agreement and the rights and obligations of the Parties hereunder shall in all respects be governed by the substantive laws of New York, including all matters of construction, validity and performance. The Orders shall govern this Agreement and any provisions herein which conflict or are inconsistent with the Orders may be declared null and void by the Commission and any provision not in conflict shall survive and remain a part of this Agreement.

3.4 Disclosure of Information. Nothing in this Agreement shall require Respondent to disclose any material or information that is subject to a legally recognized privilege or that Respondent is prohibited from disclosing by reason of law or an agreement with a third party.

3.5 Assignment. This Agreement may not be assigned or otherwise transferred by Respondent or Monitor without the consent of Respondent and Monitor and the approval of the Commission. Any such assignment or transfer shall be consistent with the terms of the Orders.

3.6 Modification. No amendment, modification, termination, or waiver of any provision of this Agreement shall be effective unless made in writing, signed by all Parties, and approved by the Commission. Any such amendment, modification, termination, or waiver shall be consistent with the terms of the Orders.

3.7 Approval by the Commission. This Agreement shall have no force or effect until approved by the Commission, other than the Parties' obligations under the confidentiality provisions herein.

3.8 Entire Agreement. This Agreement, and those portions of the Orders incorporated herein by reference, constitute the entire agreement of the Parties and supersede any and all prior agreements and understandings between the Parties, written or oral, with respect to the subject matter hereof.

3.9 Duplicate Originals. This Agreement may be executed in several counterparts,

Order to Maintain Assets

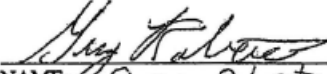
each of which shall be deemed an original, but all of which together shall constitute one and the same document.

3.10 Section Headings. Any heading of the sections is for convenience only and is to be assigned no significance whatsoever as to its interpretation and intent.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed as of the date first above written.

MONITOR

CHARLES RIVER ASSOCIATES


NAME: Gary Roberts
TITLE: Vice President

RESPONDENT

JOHNSON & JOHNSON

NAME: _____
TITLE: _____

Order to Maintain Assets

each of which shall be deemed an original, but all of which together shall constitute one and the same document.

3.10 Section Headings. Any heading of the sections is for convenience only and is to be assigned no significance whatsoever as to its interpretation and intent.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed as of the date first above written.

MONITOR**CHARLES RIVER ASSOCIATES**

NAME: _____
TITLE: _____

RESPONDENT**JOHNSON & JOHNSON**

Sue Hanna

NAME: _____
TITLE: *Assistant General Counsel*

Decision and Order

NON-PUBLIC APPENDIX A-1

MONITOR COMPENSATION

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

DECISION AND ORDER
[Public Record Version]

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

Respondent J&J, its attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondent J&J 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 J&J 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 J&J has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its

Decision and Order

Complaint and an Order to Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”).

1. Respondent J&J is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its headquarters address located at One Johnson & Johnson Plaza, New Brunswick, New Jersey 08933.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent J&J, and the proceeding is in the public interest.

ORDER**I.**

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

- A. “J&J” means Johnson & Johnson, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Johnson & Johnson (including DePuy Orthopaedics, Inc., and Synthes, Inc. after the Acquisition Date), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Synthes” means Synthes, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address located at 1302 Wrights Lane East, West Chester, PA 19380.

Decision and Order

- C. “Commission” means the Federal Trade Commission.
- D. “Biomet” means Biomet, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its headquarters address located at 56 East Bell Drive, Warsaw, IN 46581-0587.
- E. “Acquisition” means Respondent J&J’s acquisition of Synthes.
- F. “Acquisition Date” means the date on which the Acquisition is consummated.
- G. “Acquirer” means:
1. an entity that is specifically identified in this Order to acquire particular assets that Respondent J&J is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order and that has been approved by the Commission to accomplish the requirements of this Order in connection with the Commission’s determination to make this Order final; or
 2. an entity that receives the prior approval of the Commission to acquire particular assets that Respondent J&J is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.
- H. “Cloned Form” means a program (*e.g.*, an operating system or an application program) that has functions and behavior identical to another program but that does not contain source code from that program. The Cloned Form of the software will include a fully paid-up licenses or sub-licenses to the appropriate licenses that come with the software.
- I. “Confidential Business Information” means competitively sensitive, proprietary, and all other information, solely Relating To the DVR Business,

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that is not in the public domain, and includes, but is not limited to, information Relating To the research, Development, manufacturing, marketing, or sale of the DVR, including the terms of the Remedial Agreement, all customer lists, price lists, contracts, cost information, technologies, processes, or other trade secrets Related To the DVR and the DVR Business. *Provided, however,* that “Confidential Business Information” shall not include (1) information that subsequently falls within the public domain through no violation of this Order or of any confidentiality agreement with respect to such information by Respondent J&J or (2) information that Synthes can demonstrate it lawfully obtained without the assistance of Respondent J&J prior to the Acquisition Date.

- J. “Designated Employee” means a Person or Person filling the job description (if the Person listed is no longer employed at that particular job) listed on Non-Public Appendix B to this Order.
- K. “Development” means all preclinical and clinical device development activities, including test method development and stability testing, formulation, process development, manufacturing scale-up, development-stage manufacturing, quality assurance/quality control development, statistical analysis and report writing, conducting clinical trials for the purpose of obtaining any and all approvals, licenses, registrations or authorizations from any Agency necessary for the manufacture, use, storage, import, export, transport, promotion, marketing and sale of a DVR (including any governmental price or reimbursement approvals), and regulatory affairs activities Related To the foregoing. “Develop” means to engage in Development.
- L. “Distributor” means:
 - 1. any current independent distributor of DVR in the United States, or

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2. an independent distributor that may become or becomes a distributor of DVR in the United States by virtue of interviewing and hiring a Designated Employee.
- M. “DVR” means the DVR[®] Anatomic Volar Plating System owned by Respondent J&J prior to the Effective Date including, but not limited to, the plates, screws, pegs, case, and the instruments, tools, or products used in connection with the implantation of the plates, screws, and pegs.
- N. “DVR Business” means all of Respondent J&J’s assets, tangible and intangible, businesses and goodwill, Related To the research, Development, manufacture, distribution, marketing or sale of DVR in the United States including, without limitation, the following:
1. all DVR Intellectual Property;
 2. all DVR manufacturing technology;
 3. all rights to the name Hand Innovations, and all trademarks, trade names, and logos Related To Hand Innovations;
 4. all instruments, tools, or products used in connection with the implantation of or otherwise Related To the DVR;
 5. all DVR scientific and regulatory material;
 6. all DVR manufacturing equipment, to the extent owned by Respondent J&J;
 7. to the extent Related To the DVR, all of Respondent J&J’s rights, titles and interests in, and to, the contracts entered into in the ordinary course of business with customers, suppliers, personal property lessors, personal property lessees, licensors, licensees, consignors, and consignees, in

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each case that are Third Parties, including, without limitation, all of Respondent J&J's contracts with any Third Party to the extent Related To the supply of components used in the manufacture of the DVR; *Provided, however,* that Respondent J&J's contracts with its Distributors are excluded.

8. all inventory, including raw materials, packaging materials, work-in-process and finished goods, in each case to the extent consisting of, or intended for use in the manufacture of, the DVR;
9. all commitments and orders for the purchase of goods that have not been shipped, to the extent such goods are, or are intended for use in the manufacture of, the DVR;
10. all rights under warranties and guarantees, express or implied, with respect to the DVR;
11. all items of prepaid expenses, to the extent Related To the DVR; and
12. all books, records and files Related To the foregoing, or to the DVR.

Provided, however, that "DVR Business" does not include any portion of any of the foregoing assets, businesses and goodwill that does not Relate To the DVR;

Provided further, however, that "DVR Business" does not include assets or groups of assets specifically excluded, and listed at Schedule 2.02(b) of the J&J/Biomet Divestiture Agreement;

Provided further, however, that except as provided to the Acquirer for transition purposes, or as part of the Remedial Agreement, or otherwise provided for in this Order, "DVR Business" shall not include any of the following: (a) (i) the name "Johnson & Johnson" or "J&J," or the names of any other divisions,

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businesses, corporations or companies owned by Respondent J&J, including “DePuy,” “DePuy Orthopaedics,” and “DePuy Trauma,” or (ii) any Trademarks or Trade Dress used on Respondent J&J’s products other than DVR; (b) any interest in real property; or (c) any personal property.

- O. “DVR Intellectual Property” means all of the following Related To DVR:
1. all Respondent J&J intellectual property used in the Development, manufacturing, storage, distribution and sale of DVR including, but not limited to:
 - a. DVR Manufacturing Copyrights;
 - b. Software;
 - c. computer programs;
 - d. Patents including, but not limited to, the right to obtain and file for Patents and DVR Sales Copyrights, and DVR Manufacturing Copyrights, and registrations thereof;
 - e. licenses including, but not limited to, licenses to third-party Software if transferable and sub-licenses to Software modified by Respondent J&J;
 - f. know-how (including, but not limited to, flow sheets, process and instrumentation), diagrams, risk analysis, certificates of analysis, goodwill, technology (including, but not limited to, equipment specifications), drawings, utility models, designs, design rights, techniques, data, inventions, practices, recipes, raw material specifications, process descriptions;

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- g. technical information (including, but not limited to, material and final product specifications);
 - h. protocols (including, but not limited to, operational manuals);
 - i. quality control information and methods, and other confidential or proprietary technical, business, Development and other information;
 - j. trade secrets; and
 - k. all rights to limit the use or disclosure thereof of Trade Dress, and the modifications or improvements to such intellectual property; and
 - 2. subject to any mutually agreed covenant not to sue between Respondent J&J and Acquirer, rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach of any of the foregoing.
- P. “DVR Manufacturing Copyrights” means copyrights in all process development data and reports Relating To the research and development of the DVR, or of any materials used in the research, Development, manufacture, manufacturing records, manufacturing processes, and supplier lists of or for the DVR; all copyrights in data contained in laboratory notebooks Relating To the DVR; all copyrights in analytical and quality control data Relating To the DVR; and all correspondence with governmental agencies Relating To the foregoing.
- Q. “DVR Sales Copyrights” means rights to all original works of authorship of any kind directly Related To the sale of the DVR, and any registrations and applications for registrations thereof, including, but not limited to, all such rights with respect to:

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1. all promotional, marketing, sales, and advertising materials, educational and training materials for the sales force, and sales forecasting models;
 2. marketing or sale of the DVR including copyrights in all raw data, statistical programs developed (or modified in a manner material to the use or function thereof (other than through user preferences)) to analyze research data, market research data, market intelligence reports and statistical programs (if any) used for marketing and sales research; all such rights with respect to customer information; and
 3. records, including customer lists, sales force call activity reports, vendor lists, and sales data.
- R. “Effective Date” means the date on which the divestitures, licensing, and assignments pursuant to Paragraph II or Paragraph VI of this Order, are consummated.
- S. “Girardet Facility” means that portion of the facility and offices located at Rue de Girardet 29, 2400 Le Locle, Switzerland, that is Related To the DVR Business consisting of, among other things, office, manufacturing, production, and packaging space for the DVR Business.
- T. “J&J/Biomet Divestiture Agreement” means the asset purchase agreement, together with all licenses, assignments, and other agreements entered into by Respondent J&J and Biomet for the sale of the DVR Business, and all other agreements, leases, transfers, and licenses required by this Order. The J&J/Biomet Divestiture Agreement is attached as Confidential Exhibit A to this Order.
- U. “Miami Facility” means that portion of the facility and offices located at 6303 Blue Lagoon Drive, Miami, FL, that is Related to the DVR Business consisting of,

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among other things, office, and research and development space for the DVR Business.

- V. “Patents” means all patents, patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention and statutory invention registrations, in each case existing as of the Acquisition Date, and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions.
- W. “Person” means any natural person, partnership, corporation, association, trust, joint venture, limited liability company, government, government agency, division, or department, or other business or legal entity.
- X. “Relating To” or “Related To” means pertaining in any way to, and is not limited to that which pertains exclusively to or primarily to.
- Y. “Remedial Agreement” means the following:
1. the J&J/Biomet Divestiture Agreement if such agreement has not been rejected by the Commission pursuant to Paragraph II of this Order; and
 2. any agreement between Respondent J&J and a Commission-approved Acquirer (or between a Divestiture Trustee and a Commission-approved Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, and all amendments, exhibits, attachments, agreements, and schedules thereto, Related To the relevant assets to be granted, licensed, delivered or otherwise conveyed, that have been approved by

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the Commission to accomplish the requirements of this Order.

- Z. “Software” means executable computer code and the documentation for such computer code, but does not mean data processed by such computer code.
- AA. “Third Party(ies)” means any Person other than Respondent J&J, Synthes, or the Acquirer.
- BB. “Trade Dress” means the current trade dress of a particular product or Person including, without limitation, product packaging, logos, and the lettering of the product trade name, brand name, or corporate name.
- CC. “Trademark(s)” means all proprietary names or designations, trademarks, service marks, trade names, and brand names, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights therein, and the goodwill symbolized thereby and associated therewith.
- DD. “United States” means United States of America.
- EE. “Wrist Plating System” means:
1. any plating system or implantable device used to achieve the reduction and/or fixation of any fracture of the distal portion of the radius bone; and
 2. any instruments, tools, or products used in connection with the implantation of or otherwise Related To such system or device.
- FF. “Wrist Plating System Business” means any and all assets, tangible and intangible, businesses and goodwill, Related To the research, Development, manufacture, distribution, marketing or sale of a Wrist Plating System.

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II. (Divestiture)**IT IS FURTHER ORDERED** that:

- A. Within ten (10) days of the Acquisition Date, Respondent J&J shall divest the DVR Business absolutely and in good faith, to Biomet, pursuant to, and in accordance with, the J&J/Biomet Divestiture Agreement. The J&J/Biomet Divestiture Agreement (which shall include, among other things, the asset purchase agreement, a transition services agreement, the lease to or assignment of a lease to the Miami Facility and the Giradet Facility, and licenses between Respondent J&J and Biomet) shall not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of Biomet, or to reduce any obligations of Respondent J&J under such agreements, and such agreements, if approved by the Commission, shall be incorporated by reference into this Order and made a part hereof.

Provided, however, that with respect to documents or other materials included in the DVR Business that contain information (a) that Relates To both the DVR and to other products or businesses of Respondent J&J, or (b) for which Respondent J&J has a legal obligation to retain the original copies, Respondent J&J shall be required to divest to the Acquirer only copies or, at its option, relevant excerpts of such documents and materials, but Respondent J&J shall provide the Acquirer access to the originals of such documents as necessary, it being a purpose of this proviso to ensure that Respondent J&J not be required to divest itself completely of records or information that relates to products or businesses other than the DVR;

Provided further, however, that with respect to any contract or agreement included in the DVR Business that relates both to the DVR and to any other product, Respondent J&J may, concurrently with assigning

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such contract or agreement to the extent it relates to the DVR, retain its rights under such contract or agreement for purposes of such other product(s).

Provided further, however, if, at the time the Commission determines to make this Order final, the Commission notifies Respondent J&J that Biomet is not an acceptable Acquirer then, after receipt of such written notification: (1) Respondent J&J shall immediately notify Biomet of the notice received from the Commission and shall as soon as practicable effect the rescission of the J&J/Biomet Divestiture Agreement; and (2) Respondent J&J shall, within one-hundred-twenty (120) days from the date this Order becomes final, divest the DVR Business, enter into manufacturing and distribution agreements, assign or extend rights and obligations under customer contracts, and divest any other assets or enter into any other relief required to satisfy the purposes of this Order, absolutely and in good faith, at no minimum price, to or with an Acquirer, that receives the prior approval of the Commission, and in a manner that receives the prior approval of the Commission;

Provided further, however, that if Respondent J&J has complied with the terms of Paragraphs II.A. and II.B. before the date on which this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondent J&J that the manner in which the divestiture and assignments were accomplished is not acceptable, the Commission may direct Respondent J&J, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture and assignments including, but not limited to, entering into additional agreements or arrangements, as the Commission may determine are necessary to satisfy the requirements of this Order.

- B. Prior to the Effective Date, Respondent J&J shall secure all consents, assignments, and waivers from all Third Parties, other than the FDA, that are Related To the DVR Business including securing a lease for the

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Miami Facility and the Girardet Facility, if such facilities are being leased to the Acquirer, and securing consents from all customers of the DVR Business whose contracts are being assigned or extended to the Acquirer pursuant to Paragraph II.A.

Provided, however, Respondent J&J may satisfy this requirement with respect to any one or more leases or agreements by certifying that the Acquirer has executed such relevant agreements directly with each of the relevant Third Parties.

Provided, further, however, Respondent J&J shall not be required to obtain consents necessary to assign contracts from customers that, in the aggregate, represented less than five percent (5%) of Respondent J&J's United States DVR sales for calendar year 2011.

- C. Respondent J&J shall include, as part of a Remedial Agreement, any transition services agreement by which Respondent J&J contemplates providing services or assistance it will provide the Acquirer. Such transition services agreement shall include, but not be limited to:
1. the scope of services, term, and prices or costs for such services; and
 2. the option for the Acquirer to terminate a particular service in the United States:
 - a. at any time, with prior notice not greater than thirty (30) days, without penalty or payment for the remainder of the original service period; and
 - b. without automatically terminating, or incurring a penalty or additional cost for continuing, that particular service in another part of the world.
- D. Within ninety (90) days of the Effective Date, Respondent J&J shall transfer a Cloned Form of the

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TeamCenter, Agile, and EtQ software programs, together with all data belonging to the Acquirer, and resident on such programs, current as of such transfer date, in a manner that provides the Acquirer independent access to and control over such Cloned Form software programs.

- E. As of the Effective Date, Respondent J&J shall grant to the Acquirer direct access to data belonging to the Acquirer and resident on the TeamCenter, Agile, and EtQ software programs, pursuant to the Remedial Agreement and subject to non-disclosure agreements, until such time as the Acquirer notifies Respondent J&J and the Monitor that the Acquirer has validated the Cloned Form of the software programs with data belonging to the Acquirer, current as of the last transaction executed on Respondent J&J's versions of the TeamCenter, Agile, and EtQ software programs. Respondent J&J shall assist the Acquirer, as is reasonably necessary, to complete the validation process expeditiously.
- F. Any Remedial Agreement that has been approved by the Commission between Respondent J&J (or a Divestiture Trustee) and a Commission-approved Acquirer shall be deemed incorporated into this Order, and any failure by Respondent J&J to comply with any term of such Remedial Agreement shall constitute a failure to comply with this Order.
- G. Respondent J&J unilaterally shall not terminate any agreement that is part of a Remedial Agreement before the end of the term approved by the Commission without:
 - 1. prior approval of the Commission;
 - 2. the written agreement of the Acquirer and thirty (30) days prior notice to the Commission; or
 - 3. in the case of a proposed unilateral termination by Respondent J&J due to an alleged breach of an

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agreement by the Acquirer, sixty (60) days notice of such termination. *Provided, however*, such sixty (60) days notice shall be given only after the parties have:

- a. attempted to settle the dispute between themselves, and
 - b. either engaged in arbitration and received an arbitrator's decision, or received a final court decision after all appeals.
- H. The purposes of this Paragraph II of the Order are: (1) to ensure that the Acquirer will have the intention and ability to produce and sell the DVR independently of Respondent J&J; and (2) to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III. (Asset Maintenance)**IT IS FURTHER ORDERED** that:

- A. Except in the course of performing its obligations under a Remedial Agreement or as expressly allowed pursuant to this Order, Respondent J&J shall not, and shall instruct its Distributors not to, interfere, directly or indirectly, with the DVR Business of the Acquirer.

Provided however, that unless otherwise prohibited by the Order, nothing in this Paragraph III.A. shall prevent (a) Respondent J&J or its Distributors (i) from competing for contracts or for the business of suppliers, distributors, resellers, or customers; or (ii) from engaging in competition for the research, development, manufacture, marketing and sales of Wrist Plating Systems; and (b) Respondent J&J from using its Distributors for selling products other than DVR.

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- B. During the time period before the Effective Date, Respondent J&J shall, except as otherwise provided in the Order:
1. take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of the DVR Business to minimize any risk of loss of competitive potential for the DVR Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the DVR Business, except for ordinary wear and tear. Respondent J&J shall not sell, transfer, encumber or otherwise impair the DVR Business (other than in the manner prescribed in this Order), nor take any action that lessens the full economic viability, marketability or competitiveness of the DVR Business including, but not limited to, hiring or offering to hire any Designated Employees;
 2. retain all of Respondent J&J's rights, title, and interest in the DVR Business, except for the disposition of inventory in the regular and ordinary course of business, consistent with past practices;
 3. maintain the operations of the DVR Business in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets, as necessary) and/or as may be necessary to preserve the marketability, viability, and competitiveness of the DVR Business and shall use its best efforts to preserve the existing relationships with the following: suppliers, vendors, distributors, customers, governmental agencies, employees, and others having business relations with the DVR Business; Respondent J&J's responsibilities shall include, but are not limited to, the following:
 - a. Respondent J&J shall provide the DVR Business with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such

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business and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for the DVR Business;

- b. Respondent J&J shall continue, at least at their scheduled pace, any additional expenditures for the DVR Business authorized prior to the date the Consent Agreement was signed by Respondent J&J including, but not limited to, all research, Development, manufacture, distribution, marketing and sales expenditures;
- c. Respondent J&J shall provide such resources as may be necessary to respond to competition against the DVR Business and/or to prevent any diminution in sales of the DVR Business after the Acquisition Date and prior to the Effective Date;
- d. Respondent J&J shall provide such resources as may be necessary to maintain the competitive strength and positioning of the DVR Business in a business-as-usual manner and/or in accordance with the applicable DVR Business plan;
- e. Respondent J&J shall make available for use by the DVR Business funds in a business-as-usual manner and/or in accordance with the applicable DVR Business plan sufficient to perform all routine maintenance or replacement, and all other maintenance or replacement of assets as may be necessary to maintain the DVR Business;
- f. Respondent J&J shall provide the DVR Business with such funds as are necessary to maintain the full economic viability, marketability and competitiveness of the DVR Business; and

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- g. Respondent J&J shall provide such support services to the DVR Business as were being provided to such business by Respondent J&J as of the date the Consent Agreement was signed by Respondent J&J.
 4. maintain a work force substantially as large as, and with equivalent or better training and expertise to, what was associated with the DVR Business as of the Acquisition Date including, but not limited to, instructing Respondent J&J's Distributors to maintain a work force substantially as large as, and with equivalent or better training and expertise to, what was associated with the DVR Business as of the Acquisition Date.
 5. develop, sell, and manufacture the DVR consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the DVR Business pending divestiture.
- C. The purpose of this Paragraph III is to maintain the full economic viability, marketability and competitiveness of the DVR Business until the Effective Date, to minimize any risk of loss of competitive potential for the DVR Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the DVR Business, except for ordinary wear and tear.

IV. (Confidentiality)**IT IS FURTHER ORDERED** that:

- A. Except in the course of performing its obligations under a Remedial Agreement, or as expressly allowed pursuant to this Order:
 1. Respondent J&J shall not use, provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information to any

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Person. Among other things, Respondent J&J shall not use such Confidential Business Information:

- a. to assist or inform Respondent J&J employees who Develop, manufacture, solicit for sale, sell, or service Respondent J&J products that compete with the products divested, sold, or distributed pursuant to this Order including, but not limited to, the employees of the Wrist Plating System Business owned and operated by Synthes;
 - b. to interfere with any suppliers, distributors, resellers, or customers of the Acquirer;
 - c. to interfere with any contracts divested, assigned, or extended to the Acquirer pursuant to this Order; or
 - d. to interfere in any other way with the Acquirer pursuant to this Order or with the DVR Business divested pursuant to this Order.
2. Respondent J&J shall not disclose or convey Confidential Business Information, directly or indirectly, to any person except the Acquirer or other persons specifically authorized by the Acquirer to receive such information;
 3. Respondent J&J shall not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information to the employees associated with the Synthes Wrist Plating System Business; and
 4. Respondent J&J shall institute procedures and requirements to ensure that:
 - a. Respondent J&J employees with access to Confidential Business Information do not provide, disclose or otherwise make available, directly or indirectly, any Confidential

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Business Information in contravention of this Order; and

- b. Respondent J&J employees associated with the Synthes Wrist Plating System do not solicit, access or use any Confidential Business Information that they are prohibited under this Order from receiving for any reason or purpose.
- B. The requirements of this Paragraph IV do not apply to Confidential Business Information that Respondent J&J demonstrates to the satisfaction of the Commission, in the Commission's sole discretion:
1. was or becomes generally available to the public other than as a result of a disclosure by Respondent J&J;
 2. is necessary to be included in mandatory regulatory filings; *Provided, however,* that Respondent J&J shall make all reasonable efforts to maintain the confidentiality of such information in the regulatory filings;
 3. was available, or becomes available, to Respondent J&J on a non-confidential basis, but only if, to the knowledge of Respondent J&J, the source of such information is not in breach of a contractual, legal, fiduciary, or other obligation to maintain the confidentiality of the information;
 4. is information the disclosure of which is consented to by the Acquirer;
 5. is necessary to be exchanged in the course of consummating the Acquisition or the transactions under the Remedial Agreement;
 6. is disclosed in complying with this Order;

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7. is information the disclosure of which is necessary to allow Respondent J&J to comply with the requirements and obligations of the laws of the United States and other countries;
 8. is disclosed in defending legal claims, investigations or enforcement actions threatened or brought against Respondent J&J or the DVR Business; or
 9. is disclosed in obtaining legal advice.
- C. The purpose of this Paragraph IV is to maintain the full economic viability, marketability and competitiveness of the DVR Business until the Effective Date, to minimize any risk of loss of competitive potential for the DVR Business, to minimize the risk of disclosure and unauthorized use of Confidential Business Information of the DVR Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the DVR Business, except for ordinary wear and tear.

V. (Monitor)**IT IS FURTHER ORDERED** that:

- A. Charles River Associates shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondent J&J and attached as Exhibit C (“Monitor Agreement”) and Confidential Exhibit C-1 (“Monitor Compensation”). The Monitor is appointed to assure that Respondent J&J expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order.
- B. The Monitor Agreement shall require that, no later than one (1) day after the Acquisition Date, Respondent J&J transfers to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities,

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pursuant to this Order and the Order to Maintain Assets, and consistent with the purposes of this Order.

- C. No later than one (1) day after the Acquisition Date, Respondent J&J shall, pursuant to the Monitor Agreement, transfer to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities, pursuant to and consistent with, the purposes of this Order.
- D. Respondent J&J shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
1. The Monitor shall have the power and authority to monitor Respondent J&J's compliance with the terms of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission including, but not limited to:
 - a. Assuring that Respondent J&J expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order; and
 - b. Monitoring any agreements between Respondent J&J and the Acquirer.
 2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
 3. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondent J&J's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, Related To Respondent J&J's compliance with its obligations under the Order.

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Respondent J&J shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondent J&J's compliance with the Order.

4. The Monitor shall serve, without bond or other security, at the expense of Respondent J&J on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondent J&J, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.
5. Respondent J&J 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, malfeasance, willful or wanton acts, or bad faith by the Monitor.
6. The Monitor Agreement shall provide that within one (1) month from the date the Monitor is appointed pursuant to this paragraph, and every sixty (60) days thereafter, the Monitor shall report in writing to the Commission concerning performance by Respondent J&J of its obligations under the Order.
7. Respondent J&J may require the Monitor and each of the Monitor's consultants, accountants,

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attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *Provided, however,* such agreement shall not restrict the Monitor from providing any information to the Commission.

- E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Monitor's duties.
- F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor:
 - 1. The Commission shall select the substitute Monitor, subject to the consent of Respondent J&J, which consent shall not be unreasonably withheld. If Respondent J&J has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondent J&J of the identity of any proposed Monitor, Respondent J&J shall be deemed to have consented to the selection of the proposed Monitor.
 - 2. Not later than ten (10) days after appointment of the substitute Monitor, Respondent J&J shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondent J&J's compliance with the relevant terms of the Order in a manner consistent with the purposes of the Order.
- G. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Order.

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- H. A Monitor appointed pursuant to this Order may be the same person appointed as the Divestiture Trustee pursuant to the relevant provisions of this Order.

VI. (Divestiture Trustee)**IT IS FURTHER ORDERED** that:

- A. If Respondent J&J has not fully complied with the obligations as required by Paragraph II of this Order, the Commission may appoint a Divestiture Trustee to divest the DVR Business, and enter any other agreements, assignments, and licenses, in a manner that satisfies the requirements of this Order.

In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondent J&J shall consent to the appointment of a Divestiture Trustee in such action to effectuate the divestitures and other obligations as described in Paragraph II. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph VI shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent J&J to comply with this Order.

- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent J&J, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent J&J has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent J&J of the

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identity of any proposed Divestiture Trustee, Respondent J&J shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

- C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondent J&J 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 required by this Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph VI, Respondent J&J shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
 - 1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the DVR Business, and enter into all other agreements, licenses and assignments as described in Paragraph II of this Order.
 - 2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to divest the DVR Business, and enter into all other agreements, licenses and assignments as described in Paragraph II of this Order, absolutely and in good faith, at no minimum price, to one or more acquirers that receive the prior approval of the Commission and in a manner that receives the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period or periods may be extended by the Commission; *Provided, however,* the Commission may extend the divestiture period only two (2) times.

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3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities Related To the relevant assets that are required to be divested by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondent J&J shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent J&J shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent J&J shall extend the time for divestiture under this Paragraph VI in an amount equal to the delay, as determined by the Commission.
4. The Divestiture Trustee shall use best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent J&J's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an acquirer as required by this Order.

Provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity for assets and businesses to be divested pursuant to Paragraph II, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondent J&J from among those approved by the Commission;

Provided further, however, that Respondent J&J 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

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Respondent J&J, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent J&J, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondent J&J, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondent J&J shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, malfeasance, willful or wanton acts, or bad faith by the Divestiture Trustee.
7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.

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8. The Divestiture Trustee shall act in a fiduciary capacity for the benefit of the Commission.
 9. The Divestiture Trustee shall report in writing to Respondent J&J and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
 10. Respondent J&J 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.
 11. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.
- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph VI.
- F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the obligations under Paragraph II of this Order.
- G. The Divestiture Trustee(s) appointed pursuant to Paragraph VI of this Order may be the same Person

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appointed as the Monitor pursuant to Paragraph V of this Order, and the Order to Maintain Assets.

VII. (Employees)**IT IS FURTHER ORDERED** that:

- A. Beginning no later than the time Respondent J&J signs the Consent Agreement in this matter until ninety (90) days after the Effective Date:
1. Respondent J&J shall provide, and Respondent J&J shall instruct Respondent J&J's Distributors to provide, the applicable Designated Employees with reasonable financial incentives to continue in their positions for such period. Such incentives shall include a continuation of all employee benefits offered by Respondent J&J and Respondent J&J's Distributors, as applicable, until the Designated Employee has been hired, the Acquirer has decided not to hire such Designated Employee, or the Designated Employee has declined, in writing, the Acquirer's offer, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to transition the DVR Business to the Acquirer;
 2. Respondent J&J shall not, and shall instruct its Distributors not to, interfere with the interviewing, hiring, or employing of the Designated Employees by the Acquirer or the Acquirer's Distributors as described in this Order, and shall remove any impediments within the control of Respondent J&J, and instruct Respondent J&J's Distributors to remove such impediments, that may deter, or otherwise prevent or discourage the Designated Employees from accepting employment with the Acquirer or the Acquirer's Distributors including, but not limited to, any noncompete provisions of employment or other contracts with Respondent J&J or Respondent J&J Distributor that would

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affect the ability or incentive of those individuals to be employed by the Acquirer or the Acquirer's Distributors. In addition, Respondent J&J shall not make any counteroffer to a Designated Employee, and shall instruct Respondent J&J's Distributor that employs such Designated Employee not to make any counteroffer to a Designated Employee, who receives a written offer of employment from the Acquirer or the Acquirer's Distributors, unless and until the Designated Employee has declined, in writing, the Acquirer's or Acquirer's Distributor's offer.

3. Respondent J&J shall, or where applicable, Respondent J&J shall instruct its Distributors, in a manner consistent with local labor laws:
 - a. to facilitate employment interviews between each Designated Employee and the Acquirer or the Acquirer's Distributors, including providing the names and contact information for such employees and allowing such employees reasonable opportunity to interview with the Acquirer or the Acquirer's Distributors and shall not discourage such employee from participating in such interviews;
 - b. to not interfere in employment negotiations between each Designated Employee and the Acquirer or the Acquirer's Distributors;
 - c. with respect to each Designated Employee who receives an offer of employment from the Acquirer or the Acquirer's Distributors:
 - i. not to prevent, prohibit, or restrict, or threaten to prevent, prohibit, or restrict the Designated Employee from being employed by the Acquirer or the Acquirer's Distributors, and shall not offer any incentive to the Designated Employee to

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decline employment with the Acquirer or the Acquirer's Distributors including, but not limited to, the Acquirer or the Acquirer's Distributor offering to hire the Designated Employee;

- ii. to cooperate with the Acquirer or the Acquirer's Distributors in effecting transfer of the Designated Employee to the employ of the Acquirer or the Acquirer's Distributors, if the Designated Employee accepts an offer of employment from the Acquirer or the Acquirer's Distributors;
- iii. to eliminate any confidentiality restrictions that would prevent the Designated Employee who accepts employment with the Acquirer from using or transferring to the Acquirer or the Acquirer's Distributors any information Relating To the manufacture and sale of the DVR; and
- iv. unless alternative arrangements are agreed upon with the Acquirer or the Acquirer's Distributors, to retain the obligation to pay the benefits of any Designated Employee who accepts employment with the Acquirer or the Acquirer's Distributors including, but not limited to, all accrued bonuses, vested pensions, and other accrued benefits.

Provided, however, that subject to the conditions of continued employment prescribed in this Order, this Paragraph VII.A. shall not prohibit Respondent J&J or Respondent J&J's Distributors from continuing to employ any Designated Employee under the terms of such employee's employment as in effect prior to the date of the written offer of employment from the Acquirer or the Acquirer's Distributor to such employee.

Provided, further, however, that subject to the conditions of continued employment prescribed in this

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Order, this Paragraph VII.A. shall not prohibit Respondent J&J or Respondent J&J's Distributors from enforcing, or requiring as a condition of accepting employment with the Acquirer or the Acquirer's Distributors, an eighteen (18) month non-compete Related To products not divested pursuant to the Remedial Agreement.

- B. Respondent J&J shall not, and Respondent J&J shall instruct its Distributors not to, for a period of two (2) years following the Effective Date, directly or indirectly, solicit, induce, or attempt to solicit or induce any Designated Employee, who is employed by the Acquirer or the Acquirer's Distributors, to terminate his or her employment relationship with the Acquirer or the Acquirer's Distributors.

Provided, however, Respondent J&J, Respondent J&J's Distributors, or recruiters retained by Respondent J&J or Respondent J&J's Distributors, may place general advertisements for or conduct general searches for employees including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at the Acquirer's or the Acquirer's Distributors' employees;

Provided further, however, Respondent J&J may hire Designated Employees who apply for employment with Respondent J&J as long as such employees were not solicited by Respondent J&J in violation of this Paragraph.

VIII. (Prior Notice)

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

- A. any stock, share capital, equity, or other interest in any Person, corporate or non-corporate, that produces,

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designs, manufactures, or sells Wrist Plating Systems in or into the United States; or

- B. any business, whether by asset purchase or otherwise, that engages in or engaged in, at any time after the Acquisition, or during the six (6) month period prior to the Acquisition, the design, manufacture, production, or sale of Wrist Plating Systems in or into the United States.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (herein referred to as “the Notification”), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondent J&J and not of any other party to the transaction. Respondent J&J shall provide the Notification to the Commission at least thirty days prior to consummating the transaction (hereinafter referred to as the “first waiting period”). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondent J&J shall not consummate the transaction until thirty days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

Provided, however, that prior notification shall not be required by this paragraph for a transaction for which Notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

Provided, further, however, that prior notification shall not be required by this Paragraph VIII for any acquisition (1) after which Respondent J&J would hold no more than one percent (1%) of the outstanding securities or other equity interest in any Person described in this Paragraph VIII, or (2) where the Person or assets

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being acquired generated less than \$5 million in United States Wrist Plating System revenues in the most recent completed calendar year.

IX. (Compliance Reports)**IT IS FURTHER ORDERED** that:

- A. Within thirty (30) days after the date this Order becomes final, and every thirty (30) days thereafter until Respondent J&J has fully complied with Paragraphs II.A., II.B., II.C., III.B., and VII.A. of this Order, Respondent J&J shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondent J&J shall submit at the same time a copy of its report concerning compliance with this Order to the Monitor or Divestiture Trustee, if any Divestiture Trustee has been appointed pursuant to this Order. Respondent J&J shall include in its report, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant Paragraphs of the Order, including a description of all substantive contacts or negotiations Related To the divestiture of the relevant assets and the identity of all parties contacted. Respondent J&J shall include in its report copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing the obligations.
- B. Beginning twelve (12) months after the date this Order becomes final, and annually thereafter on the anniversary of the date this Order becomes final, for the next nine (9) years, Respondent J&J shall submit to the Commission a verified written report setting forth in detail the manner and form in which it has complied, is complying, and will comply with this Order. Respondent J&J shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to

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comply with the Order and copies of all written communications to and from all persons Relating To this Order. Additionally, Respondent J&J shall include in its compliance report whether or not it made any notifiable acquisitions pursuant to Paragraph VIII. Respondent J&J shall include a description of such acquisitions.

X. (Reorganization)

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

- A. dissolution of such Respondent;
- B. 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.

XI. (Access)

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

- A. access, during business office hours of Respondent J&J 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 J&J Relating To compliance with this Order, which copying services shall be provided by Respondent J&J at its expense; and

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

XII. (Termination)

IT IS FURTHER ORDERED that this Order shall terminate on August 7, 2022.

By the Commission.

CONFIDENTIAL EXHIBIT A**J&J/BIOMET DIVESTITURE AGREEMENT**

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

CONFIDENTIAL EXHIBIT B**DESIGNATED EMPLOYEES**

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

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EXHIBIT C**MONITOR AGREEMENT**

This Monitor Agreement (this "Agreement"), entered into this 24th day of May, 2012, by and between Johnson & Johnson ("Respondent") and Charles River Associates ("Monitor"), (collectively the "Parties"), provides as follows:

WHEREAS the Federal Trade Commission (the "Commission"), in In the Matter of Johnson & Johnson, has accepted or will shortly accept for Public Comment an Agreement Containing Consent Orders incorporating a Decision and Order and an Order to Maintain Assets (collectively, the "Orders"), which, among other things, requires Respondent to divest its DVR Business, as defined in the Orders, and contemplates the appointment of a Monitor to monitor Respondent's compliance with its obligations under the Orders;

WHEREAS, the Commission is expected to issue the Agreement Containing Consent Orders and appoint Monitor pursuant to the Orders to monitor Respondent's compliance with the terms of the Orders, and Monitor has consented to such appointment;

WHEREAS, the Orders further provide that Respondent shall execute an agreement, subject to the prior approval of the Commission, conferring all the rights and powers necessary to permit Monitor to carry out its duties and responsibilities pursuant to the Orders;

WHEREAS, this Agreement, although executed by Monitor and Respondent, is not effective for any purpose, including but not limited to imposing rights and responsibilities on Respondent or Monitor under the Orders, except for those obligations under the confidentiality provisions herein, until it has been approved by the Commission; and

WHEREAS, the Parties to this Agreement intend to be legally bound, subject only to the Commission's approval of this Agreement.

NOW, THEREFORE, the Parties agree as follows:

All capitalized terms used in this Agreement and not specifically defined herein shall have the respective definitions given to them in the Orders.

ARTICLE I

1.1 **Powers of the Monitor.** Monitor shall have all of the powers and responsibilities conferred upon Monitor by the Orders, including but not limited to: (a) monitoring Respondent's compliance with the divestiture and asset maintenance obligations and related requirements of the Orders; and (b) supervising the performance of any transition services required by the Orders.

1.2 **Access to Relevant Information and Facilities.** Subject to any demonstrated legally recognized privilege, Monitor shall have full and complete access to Respondent's personnel, to include those employees designated to be transferred to an Acquirer, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as Monitor may reasonably request, related to Respondent's compliance with the obligations of Respondent under the Orders in this matter. Documents,

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records and other relevant information are to be provided in an electronic format if they exist in that form. Respondent shall cooperate with any reasonable request of Monitor. Monitor shall give Respondent reasonable notice of any request for such access or such information and shall attempt to schedule any access or requests for information in such a manner as will not unreasonably interfere with Respondent's operations. At the request of the Monitor, Respondent shall promptly arrange meetings and discussions, including tours of relevant facilities, at reasonable times and locations between the Monitor and employees of Respondent who have knowledge relevant to the proper discharge of its responsibilities under the Orders.

1.3 Compliance Reports. Respondent shall provide Monitor with copies of all compliance reports filed with the Commission in a timely manner, but in any event, no later than five (5) days after the date on which Respondent files such report with the Commission.

1.4 Monitor's Obligations. Monitor shall:

(a) carry out the Monitor's duties and responsibilities, including submission of periodic reports, and such additional written reports as may be requested by the Commission staff, to the Commission staff regarding Respondent's compliance with the Orders;

(b) maintain the confidentiality of all confidential information, including Confidential Business Information as defined in the Orders, and any other information provided to the Monitor by the Respondent, the Acquirer of the DVR Business, any supplier or customer of Respondent or the DVR Business, or the Commission ("Confidential Information"), and shall use such information only for the purpose of discharging its obligations as Monitor and not for any other purpose, including, without limitation, any other business, scientific, technological, or personal purpose. Monitor may disclose Confidential Information only to: (i) persons employed by or working with Monitor under this Agreement; or (ii) persons employed at the Commission;

(c) require any consultants, accountants, attorneys, and any other representatives and/or assistants retained by Monitor to assist in carrying out the duties and responsibilities of Monitor to execute a confidentiality agreement, which Respondent will provide if requested, that requires such third parties to treat Confidential Information with the same standards of care and obligations of confidentiality to which the Monitor must adhere under this Agreement;

(d) maintain a record and inform the Commission of all persons (other than representatives of the Commission) to whom Confidential Information related to this Agreement has been disclosed;

(e) for a period of five (5) years after the termination of this Agreement, maintain the confidentiality of all other aspects of the performance of its duties under this Agreement and not disclose any Confidential Information, including Confidential Business Information, relating thereto; and

(f) upon the termination of the Monitor's duties under this Agreement, promptly destroy all written and electronic materials (both originals and copies) that relate to the performance of the Monitor's responsibilities under this Agreement. CRA may retain archival copies of any such materials for litigation defense purposes, provided that CRA continue to abide by all obligations under the confidentiality provisions herein.

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ARTICLE II

2.1 Retention and Payment of Counsel, Consultants, and other Assistants. Monitor shall have the authority to employ, at the cost and expense of the Respondent, such attorneys, consultants, accountants, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities pursuant to the Orders.

2.2 Monitor Compensation. Respondent will pay Monitor in accordance with the fee schedule attached as Confidential Appendix A for all reasonable time spent in the performance of the Monitor's duties, including all monitoring activities related to the efforts of the Commission-approved Acquirer of the DVR Business, all work in connection with the negotiation and preparation of this Agreement, and all reasonable and necessary travel time.

(a) In addition, Respondent will pay: (i) all out-of-pocket expenses reasonably incurred by Monitor in the performance of its duties under the Orders; and (ii) all reasonable fees of, and disbursements reasonably incurred by, any advisor appointed by Monitor pursuant to the first paragraph in Article II.

(b) The Monitor shall have full and direct responsibility for compliance with all applicable laws, regulations and requirements pertaining to work permits, income and social security taxes, unemployment insurance, worker's compensation, disability insurance, and the like.

2.3 Monitor's Indemnification. Respondent shall be liable to indemnify and hold harmless Monitor against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of 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 malfeasance, gross negligence, willful or wanton acts, or bad faith by Monitor.

2.4 Disputes. In the event of a disagreement or dispute between Respondent and Monitor concerning Respondent's obligations under the Orders, and, in the event that such disagreement or dispute cannot be resolved by the Parties, either party may seek the assistance of the individual in charge of the Commission's Compliance Division.

2.5 Conflicts of Interest. In the event that, during the term of this Agreement, Monitor becomes aware it has or may have a conflict of interest that may affect, or could have the appearance of affecting, performance by Monitor or persons employed by, or working with, Monitor, of any of its duties under this Agreement, Monitor shall promptly inform Respondent and the Commission of any such conflict or potential conflict.

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ARTICLE III

3.1 Termination. This Agreement shall terminate the earlier of: (a) the expiration or termination of the Orders; (b) Respondent's receipt of written notice from the Commission that the Commission has determined that Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve as Monitor; (c) with at least thirty (30) days advance notice to be provided by Monitor to Respondent and to the Commission, upon resignation of the Monitor; or (d) when Respondent's last obligation under the Orders that pertains to Monitor's service has been fully performed; provided, however, that the Commission may require that Respondent extend this Agreement as may be necessary or appropriate to accomplish the purposes of the Orders. If this Agreement is terminated for any reason, the confidentiality obligations set forth in this Agreement will remain in force, as will the provisions of Articles 2.2 and 2.3 of this Agreement.

3.2 Monitor's Removal. If the Commission determines that Monitor ceases to act or fails to act diligently and consistent with the purpose of the Orders, Respondent shall, upon written request of the Commission, terminate this Agreement and appoint a substitute Monitor, subject to Commission approval and consistent with the Orders.

3.3 Governing Law. This Agreement and the rights and obligations of the Parties hereunder shall in all respects be governed by the substantive laws of New York, including all matters of construction, validity and performance. The Orders shall govern this Agreement and any provisions herein which conflict or are inconsistent with the Orders may be declared null and void by the Commission and any provision not in conflict shall survive and remain a part of this Agreement.

3.4 Disclosure of Information. Nothing in this Agreement shall require Respondent to disclose any material or information that is subject to a legally recognized privilege or that Respondent is prohibited from disclosing by reason of law or an agreement with a third party.

3.5 Assignment. This Agreement may not be assigned or otherwise transferred by Respondent or Monitor without the consent of Respondent and Monitor and the approval of the Commission. Any such assignment or transfer shall be consistent with the terms of the Orders.

3.6 Modification. No amendment, modification, termination, or waiver of any provision of this Agreement shall be effective unless made in writing, signed by all Parties, and approved by the Commission. Any such amendment, modification, termination, or waiver shall be consistent with the terms of the Orders.

3.7 Approval by the Commission. This Agreement shall have no force or effect until approved by the Commission, other than the Parties' obligations under the confidentiality provisions herein.

3.8 Entire Agreement. This Agreement, and those portions of the Orders incorporated herein by reference, constitute the entire agreement of the Parties and supersede any and all prior agreements and understandings between the Parties, written or oral, with respect to the subject matter hereof.

3.9 Duplicate Originals. This Agreement may be executed in several counterparts,

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each of which shall be deemed an original, but all of which together shall constitute one and the same document.

3.10 Section Headings. Any heading of the sections is for convenience only and is to be assigned no significance whatsoever as to its interpretation and intent.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed as of the date first above written.

MONITOR

CHARLES RIVER ASSOCIATES


NAME: Gary Roberts
TITLE: Vice President

RESPONDENT

JOHNSON & JOHNSON

NAME: _____
TITLE: _____

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each of which shall be deemed an original, but all of which together shall constitute one and the same document.

3.10 Section Headings. Any heading of the sections is for convenience only and is to be assigned no significance whatsoever as to its interpretation and intent.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed as of the date first above written.

MONITOR**CHARLES RIVER ASSOCIATES**

NAME: _____
TITLE: _____

RESPONDENT**JOHNSON & JOHNSON**

Sue Hanna

NAME: _____
TITLE: *Assistant General Counsel*

Analysis to Aid Public Comment

CONFIDENTIAL EXHIBIT C-1

**COMPENSATION PROVISION OF MONITOR
AGREEMENT**

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

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

I. Introduction

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Johnson & Johnson (“J&J”). The purpose of the proposed Consent Agreement is to remedy the anticompetitive effects that would otherwise result from J&J’s acquisition of the volar distal radius plating system assets of Synthes, Inc. (“Synthes”). Under the terms of the proposed Consent Agreement, J&J is required to divest all assets (including intellectual property) related to its “DVR” volar distal radius plating system business to a third party, enabling that third party to make and sell the DVR for the treatment of distal radius wrist fractures.

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

Pursuant to an Agreement and Plan of Merger dated April 26, 2011, J&J proposes to acquire Synthes in exchange for cash and voting securities in a transaction valued at approximately \$21.3

Analysis to Aid Public Comment

billion. The Commission's complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by combining the two largest competitors in the U.S. market for volar distal radius plating systems. The proposed Consent Agreement would remedy the alleged violations by replacing the competition that otherwise would be lost in these markets as a result of the acquisition.

II. The Parties

J&J is a comprehensive and broad-based manufacturer of products related to all aspects of human health care. In 2011, J&J generated global sales of \$65 billion and U.S. sales of \$28.9 billion. J&J is divided into three business segments: Consumer, Pharmaceutical, and Medical Devices and Diagnostics. The products impacted by the proposed transaction, volar distal radius plating systems, fall within J&J's Medical Devices and Diagnostics segment.

Synthes is a medical device company that manufactures products in five main product groups: trauma, spine, cranio-maxillofacial, biomaterials, and power tools. In 2011, Synthes generated global sales of \$3.97 billion worldwide and U.S. sales of \$2.14 billion. Synthes's volar distal radius plating system sales are part of its trauma unit.

III. Volar Distal Radius Plating Systems

Volar distal radius plates are internal fixation devices that are implanted surgically from the underside of the wrist to achieve and maintain proper alignment of the radius bone following a fracture. Distal radius fractures, which are fractures of the portion of the radius bone closest to the wrist, are among the most common fractures in the human body. Distal radius fractures generally occur as a result of an individual bracing for a fall, whether it is a routine slip and fall by an elderly patient with a weak bone structure or a high-energy fall by a young, active patient engaged in sporting activities.

Analysis to Aid Public Comment

Most patients who experience distal radius fractures do not require surgical intervention and can be treated with simple casting. If the radius bone is displaced, however, it is almost always necessary to realign the fracture surgically. Volar distal radius plating systems are the primary option for treating displaced distal radius fractures in the United States. They are favored by surgeons because they provide solid fracture alignment, are easy to implant, and enable greater patient post-surgical freedom of movement and shorter patient recovery times. Other options exist to treat displaced distal radius fractures, such as external fixation, pinning, dorsal distal radius plating, and intramedullary nails, but those alternative methods are typically used only in specialized cases. For the large percentage of displaced distal radius fractures, the clinical benefits of volar distal radius plating systems cannot be matched by the alternative products available on the market, and doctors and their patients would not switch to using products other than volar distal radius plating systems in response to a small but significant increase in the price of these systems.

The U.S. market for volar distal radius plating systems is highly concentrated, with J&J and Synthes controlling over 70 percent of the market as measured by 2010 revenue. J&J acquired its volar distal radius plating system, the “DVR,” from Hand Innovations in 2006. The DVR was among the first anatomically contoured volar distal radius plating system. The design of the DVR incorporates unique, clinically relevant features that are protected by intellectual property rights. Many surgeons still consider the DVR to be the best volar distal radius plating system on the market, and it accounted for approximately 29 percent of U.S. volar distal radius sales in 2010. Synthes is the leading manufacturer of volar distal radius plating systems in the United States, and accounted for approximately 42 percent of the market by 2010 revenue. Synthes’s success selling distal radius plating systems derives in part from its leading position and strong clinical reputation in the overall trauma field. The next closest competitors to J&J and Synthes – Stryker and Acumed – would each be less than one-sixth the size of the combined firm.

The relevant geographic market for volar distal radius plating systems is the United States. Volar distal radius plating systems

Analysis to Aid Public Comment

are medical devices that are regulated by the United States Food and Drug Administration (“FDA”). Volar distal radius plating systems sold outside the United States, but not approved for sale in the United States, are not viable competitive alternatives for U.S. consumers and hence are not in the relevant market.

IV. Competitive Effects and Entry Conditions

The acquisition would cause significant competitive harm in the market for volar distal radius plating systems. J&J and Synthes are the leading suppliers of volar distal radius plating systems and each other’s most significant competitors. J&J and Synthes have responded directly to competition from each other with lower prices and improved products. Although there are a number of other suppliers of volar distal radius plates, they have not gained significant traction among surgeons and have substantially smaller market shares than the merging parties. By eliminating its closest competitor, the acquisition would allow J&J to unilaterally raise prices in the market for volar distal radius plating systems.

Entry would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the acquisition. Both J&J and Synthes employ patented technology in their volar distal radius plating systems. The patents owned by the two companies have prevented limited competitors from developing products that surgeons consider to be equally effective. Manufacturer product reputation and effective distribution presence also are important to play a strong role in surgeons and hospitals preferences. Many fringe competitors are limited by their lack of a strong distribution system presence, and it would take a significant amount of time for one or more current fringe competitors to develop a sufficient reputation for quality, service, and consistency that rivals that of J&J and Synthes in volar distal radius plating. Therefore, timely and sufficient entry in response to a small but significant price increase is unlikely.

V. The Proposed Consent Agreement

The proposed Decision and Order resolves the competitive concerns raised by J&J’s proposed acquisition of Synthes by

Analysis to Aid Public Comment

requiring the divestiture of J&J's U.S. DVR assets to a qualified buyer no later than ten (10) days after the acquisition is consummated. The parties have selected Biomet, Inc. ("Biomet") as the buyer for the assets to be divested. Although the Commission's competitive concerns are limited to the manufacture and sale of volar distal radius plating systems, the parties elected to divest the entire J&J trauma portfolio, including the volar distal radius plating systems, to Biomet. Biomet is a successful orthopedics company with a recognized brand name, an extensive nationwide sales force, and existing service relationships with surgeons and hospitals, but it currently has no meaningful presence in the volar distal radius plating or trauma product markets. Biomet is thus well positioned to replace the competition that will be eliminated as a result of the proposed transaction. A divestiture of J&J's volar distal radius assets will ensure that Biomet has a recognized high-quality volar distal radius plating system offering, enabling it to compete immediately with the merged entity.

The Commission's merger remedies are intended to maintain or to restore the competitive *status quo*. Based on the evidence gathered in the investigation, the Commission has determined that the divestiture of J&J's volar distal radius plating system assets to Biomet should replicate the competitive conditions for volar distal radius plating systems that existed prior to the proposed transaction between J&J and Synthes.

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

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

Analysis to Aid Public Comment

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

Complaint

IN THE MATTER OF

**KONINKLIJKE AHOLD N.V.
AND
SAFeway INC.**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SECTION 7 OF THE CLAYTON ACT

*Docket No. C-4367; File No. 121 0055
Complaint, August 16, 2012 – Decision, August 16, 2012*

This consent order addresses the \$106 million acquisition by Koninklijke Ahold N.V. of certain assets of Safeway Inc. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by removing an actual, direct, and substantial supermarket competitor from the Newtown, Pennsylvania, geographic market. The consent order requires Respondents Ahold and Safeway to divest the assets of the Genuardi's in Newtown to McCaffrey's.

Participants

For the *Commission*: *Jill M. Frumin* and *Michelle M. Yost*.

For the *Respondents*: *Douglas M. Jasinski* and *George Paul, White & Case LLP*; *Richard Weisberg, Law Offices of Richard C. Weisberg*.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission (“Commission”), having reason to believe that Respondent Koninklijke Ahold N.V. (“Ahold”), a corporation, and Respondent Safeway Inc. (“Safeway”), a corporation, all subject to the jurisdiction of the Commission, entered into an agreement, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, pursuant to which Ahold acquired certain assets of Safeway, 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, and it appearing to the Commission that

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a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Ahold is a corporation organized, existing, and doing business under and by virtue of the laws of the Netherlands, with its office and principal place of business located at Piet Heinkade 167-173, Amsterdam 1019-GM.

2. Respondent Safeway is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 5918 Stoneridge Mall Road, Pleasanton, California 94588. Respondent Safeway operates supermarkets under a number of different banners, including Genuardi's.

II. JURISDICTION

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

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

III. THE PROPOSED ACQUISITION

5. On or about January 4, 2012, Respondents Ahold and Safeway entered into an agreement pursuant to which Ahold would acquire 16 Genuardi's supermarkets owned and operated by Respondent Safeway. The purchase price was approximately \$106 million.

6. Prior to its proposed acquisition, Respondent Ahold owned and operated more than 750 supermarkets in 11 states and the District of Columbia. The Giant Carlisle division of

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Respondent Ahold operates 49 supermarkets in eastern Pennsylvania, which includes the Philadelphia metropolitan area.

7. Prior to the proposed acquisition, Respondent Safeway owned and operated more than 1,775 supermarkets throughout the United States. Respondent Safeway operated 37 supermarkets in the Philadelphia metropolitan area under the Genuardi's banner.

8. The proposed acquisition would combine two of three retail sellers of food and other grocery products in supermarkets in the Newtown, Pennsylvania, area. Respondent Ahold and Respondent Safeway both own and operate supermarkets in this area and compete and promote their businesses in this area.

IV. THE RELEVANT PRODUCT MARKET

9. The relevant line of commerce in which to analyze the Acquisition is the retail sale of food and other grocery products in supermarkets.

10. For purposes of this complaint, the term "supermarket" means a full-line grocery store that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products, refrigerated and frozen food and beverage products, fresh and prepared meats and poultry, produce, including fresh fruits and vegetables, shelf-stable food and beverage products, including canned and other types of packaged products, staple foodstuffs, and other grocery products, including non-food items, household products, and health and beauty aids.

11. Supermarkets provide a distinct set of products and services and offer consumers convenient one-stop shopping for food and grocery products. Supermarkets typically carry more than 10,000 different items, typically referred to as stock-keeping units or SKUs, as well as a deep inventory of those items. In order to accommodate the large number of food and non-food products necessary for one-stop shopping, supermarkets are large stores that typically have at least 10,000 square feet of selling space.

12. Supermarkets compete primarily with other supermarkets that provide one-stop shopping opportunities for food and grocery

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products. Supermarkets base their food and grocery prices primarily on the prices of food and grocery products sold at other nearby competing supermarkets. Supermarkets do not regularly conduct price checks of food and grocery products sold at other types of stores and do not typically set or change their food and grocery prices in response to prices at other types of stores.

13. Although retail stores other than supermarkets also sell food and grocery products, including neighborhood “mom & pop” grocery stores, convenience stores, specialty food stores, club stores, limited assortment stores, and mass merchants, these types of stores do not, individually or collectively, provide sufficient competition to effectively constrain prices at supermarkets. Those retail stores do not offer a supermarket’s distinct set of products and services that provide consumers with the convenience of one-stop shopping for food and grocery products. The vast majority of consumers shopping for food and grocery products at supermarkets are not likely to start shopping elsewhere, or significantly increase grocery purchases elsewhere, in response to a small but significant price increase by supermarkets.

V. THE RELEVANT GEOGRAPHIC MARKET

14. Customers shopping at supermarkets are motivated by convenience and, as a result, competition for supermarkets is local in nature. Generally, the overwhelming majority of consumers’ grocery shopping occurs at stores located very close to where they live.

15. Respondents operate supermarkets under the Giant and Genuardi’s banners within approximately two miles of each other in the Newtown, Pennsylvania area. The primary trade areas of the two stores overlap significantly.

16. The relevant geographic market in which to assess the competitive effects of the acquisition is a roughly three to three-and-a-half mile area surrounding Newtown, which includes Newtown Township, Newtown Borough, and the portion of Middletown Township north of the line formed by Bridgetown Pike and Langhorne-Yardley Road in Bucks County, Pennsylvania. A hypothetical monopolist controlling all

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supermarkets in this area could profitably raise prices by a small but significant amount.

VI. MARKET CONCENTRATION

17. The relevant market is already highly concentrated, and the acquisition will substantially increase concentration, whether measured by the Herfindahl Hirschman Index (“HHI”) or the number of competitively significant firms remaining in the market post-acquisition. Post-acquisition HHI in the relevant geographic market is 5,017 when measured by total square footage and 5,000 when measured by revenues. The acquisition would increase HHI levels by 1,373 points for square footage and by 1,221 points for revenues. These market concentration levels give rise to a presumption that the acquisition is unlawful in the Newtown, Pennsylvania, geographic market.

18. The acquisition reduces the number of supermarket competitors in the relevant geographic market from three to two.

VII. ENTRY CONDITIONS

19. Entry into the relevant market would not be timely, likely, or sufficient in magnitude to prevent or deter the likely anticompetitive effects of the acquisition. Significant entry barriers include the time and costs associated with conducting necessary market research, selecting an appropriate location for the supermarket, obtaining necessary permits and approvals, constructing a new supermarket or converting an existing structure to a supermarket, and generating sufficient sales to have a meaningful impact on the market.

VIII. EFFECTS OF THE ACQUISITION

20. The acquisition, if consummated, may substantially lessen competition for the retail sale of food and other grocery products in supermarkets in the relevant geographic market identified in Paragraph 16 in the following ways, among others:

- a. by eliminating rivalry and competitive initiatives between Respondents Ahold and Safeway;

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- b. by increasing the likelihood that Respondent Ahold will unilaterally exercise market power; or
- c. by increasing the likelihood of, or facilitating, coordinated interaction between the remaining two participants in the relevant market.

21. The ultimate effect of the acquisition would be to increase the likelihood that prices of food and other grocery products would rise above competitive levels, or that there would be a decrease in the quality or selection of food, other grocery products, or services.

IX. VIOLATIONS CHARGED

22. 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, and the 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.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this sixteenth day of August, 2012, issues its complaint against said Respondents.

By the Commission.

DECISION AND ORDER
[Redacted Public Version]

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Koninklijke Ahold N.V. (“Ahold”) of certain assets of Safeway Inc. (“Safeway”), hereinafter referred to as “Respondents,” and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to

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present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts 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 Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent Koninklijke Ahold N.V. is a corporation organized, existing, and doing business under and by virtue of the laws of the Netherlands, with its office and principal place of business located at Piet Heinkade 167-173, Amsterdam 1019-GM. Ahold U.S.A., Inc., a subsidiary of Koninklijke Ahold N.V., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1385 Hancock Street, Quincy, MA 02160.
2. Respondent Safeway Inc. is a corporation organized, existing, and doing business under and by virtue of the

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laws of the State of Delaware, with its office and principal place of business located at 5918 Stoneridge Mall Road, Pleasanton, CA 94588.

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**I.**

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

- A. “Ahold” means Koninklijke Ahold N.V, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries (including, but not limited to, Ahold U.S.A. and Giant Food Stores, LLC), divisions, groups, and affiliates controlled by Ahold and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Safeway” means Safeway Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, partnerships (including, but not limited to, Genuardi’s Family Markets LP), subsidiaries, divisions, groups, and affiliates controlled by Safeway and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Respondents” means Ahold and Safeway, individually and collectively.
- D. “Acquisition” means Ahold’s acquisition of certain Genuardi’s supermarkets, owned and operated by Safeway, in the greater Philadelphia, PA, area pursuant to the Acquisition Agreement.

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- E. “Acquisition Agreement” means the Asset Purchase Agreement by and among Genuardi’s Family Markets LP, Safeway Inc., and Giant Food Stores, LLC, dated January 4, 2012, together with the Schedules and Exhibits attached thereto, as the same may be amended from time to time in accordance with the terms hereof.
- F. “Commission-approved Acquirer” means the entity approved by the Commission to acquire the Genuardi’s Supermarket Assets pursuant to this Order.
- G. “Divestiture Agreement” means any agreement between the Respondents and a Proposed Acquirer (or a trustee appointed pursuant to Paragraph III. of this Order and an Acquirer) and all amendments, exhibits, attachments, agreements, and schedules thereto, related to divestiture of the Genuardi’s Supermarket Assets, that have been submitted to the Commission for its approval to accomplish the requirements of this Order. The term “Divestiture Agreement” includes, as appropriate, the McCaffrey’s Divestiture Agreement.
- H. “Divestiture Trustee(s)” means any person or entity appointed by the Commission pursuant to Paragraph III. of the Decision and Order to act as a trustee in this matter.
- I. “Genuardi’s Supermarket” means the Supermarket operated by Genuardi’s Family Markets LP at 2890 South Eagle Road, Newtown, PA 18910, and includes the distribution, marketing, promotion, and sale of all products and services offered at this location.
- J. “Genuardi’s Supermarket Assets” means all Respondents’ rights, title and interest in and to all assets, tangible and intangible, used in, and/or reserved for use in, the Genuardi’s Supermarket, including as follows:
1. Leasehold interest in the premises;
 2. Fixtures and equipment;

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3. Inventory;
4. Permits other than nontransferable permits;
5. Goodwill generated by or associated with the Genuardi's Supermarket;
6. Manufacturers' warranties solely in respect of the fixtures and equipment;
7. Phone and facsimile numbers at the Genuardi's Supermarket;
8. All prepaid expenses that are adjusted pursuant to the Divestiture Agreement; and
9. All property, title, liability, casualty and other insurance proceeds received or receivable under the Acquisition Agreement in connection with the damage or destruction of any of the foregoing assets that would have been included but for such damage or destruction, less the amount paid by Safeway in repairing or replacing such assets prior to the closing.

For the avoidance of doubt, the Genuardi's Supermarket Assets shall include all assets in connection with the Genuardi's Supermarket, as defined herein, that Respondent Ahold acquires from Respondent Safeway pursuant to the Acquisition Agreement; *provided, however*, that the assets shall not include those assets consisting of or pertaining to any of the Respondents' trademarks, trade dress, service marks, or trade names.

- K. "McCaffrey's" means a chain of supermarkets organized, existing and doing business under and by virtue of the laws of Pennsylvania and New Jersey, with its offices and principal place of business located at 2200 Cabot Boulevard West, Langhorne, PA 19047-1842.

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- L. “McCaffrey’s Divestiture Agreement” means the Agreement of Purchase and Sale of Assets and Assignment and Assumption of Lease made and entered into April 12, 2012, by and between Giant Food Stores, LLC, and an affiliate of McCaffrey’s.
- M. “Newtown, PA,” means Newtown Township, Newtown Borough and the portion of Middletown Township north of the line formed by Bridgetown Pike and Langhorne-Yardley Road in Bucks County, Pennsylvania, as depicted in the map attached to this Order as Appendix II.
- N. “Proposed Acquirer” means any proposed acquirer of the Genuardi’s Supermarket Assets submitted to the Commission for its approval under this Order; “Proposed Acquirer” includes, as appropriate, McCaffrey’s.
- O. “Supermarket” means any store that enables consumers to purchase substantially all of their weekly food and grocery shopping requirements in a single shopping visit with substantial offerings in each of the following product categories: bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.
- P. “Third-Party Consents” means all consents from any person other than the Respondents, including all landlords that are necessary to effectuate the complete transfer to the Commission-approved Acquirer of the Genuardi’s Supermarket Assets.

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

- A. Not later than ten (10) days after the date on which the Acquisition is consummated, Respondents shall divest the Genuardi's Supermarket Assets, absolutely and in good faith, as an ongoing business to McCaffrey's, pursuant to and in accordance with the McCaffrey's Divestiture Agreement, which is attached as non-public Appendix I.
- B. *Provided, however,* that if, prior to the date this Order becomes final, Respondents have divested the Genuardi's Supermarket Assets to McCaffrey's pursuant to the McCaffrey's Divestiture Agreement, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that:
1. McCaffrey's is not a Commission-approved Acquirer of the Genuardi's Supermarket Assets, then Respondents shall:
 - a. immediately rescind the transaction with McCaffrey's, and
 - b. divest the Genuardi's Supermarket Assets absolutely and in good faith, at no minimum price, to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission, and otherwise comply with the obligations of Paragraph II, no later than sixty (60) days from the date the Commission notifies Respondents that McCaffrey's is not a Commission-approved Acquirer; or
 2. 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 III. of

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this Order, to effect such modifications to the manner of divesting the Genuardi's Supermarket Assets to McCaffrey's (including, but not limited to, entering into additional agreements or arrangements, or modifying the McCaffrey's Divestiture Agreement) as may be necessary to satisfy the requirements of this Order.

- C. Pending divestiture of the Genuardi's Supermarket Assets, Respondents shall:
1. Take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Genuardi's Supermarket, to minimize any risk of loss of competitive potential for the Genuardi's Supermarket, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Genuardi's Supermarket Assets or the Genuardi's Supermarket, except for ordinary wear and tear; and
 2. Not sell, transfer, encumber, or otherwise impair the Genuardi's Supermarket Assets or the Genuardi's Supermarket (other than in the manner prescribed in this Decision and Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the Genuardi's Supermarket.
- D. The Divestiture Agreement approved by the Commission:
1. 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 agreement; and
 2. Shall be incorporated by reference into this Order and made a part hereof. Respondents shall comply

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with all terms of the Divestiture Agreement, and any breach by Respondents of any term of the Divestiture Agreement shall constitute a failure to comply with this Order. If any term of the Divestiture Agreement 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 Respondents’ obligations under this Order.

- E. Respondents shall obtain all required Third-Party Consents prior to the Acquisition.
- F. With respect to the McCaffrey’s Divestiture Agreement, no later than fifteen (15) days after signing the Consent Agreement (or with respect to a proposed divestiture to another Proposed Acquirer pursuant to another Divestiture Agreement, no later than fifteen (15) days after signing that Divestiture Agreement), Respondents shall provide an opportunity for McCaffrey’s (or that other Proposed Acquirer):
 - 1. To meet personally, and outside of the presence or hearing of any employee or agent of any Respondents, with any one or more of the employees of Genuardi’s Supermarket; and
 - 2. To make offers of employment to any one or more of the employees of Genuardi’s Supermarket;
- G. For a period of one (1) year from the date of the divestiture of the Genuardi’s Supermarket Assets to the Commission-approved Acquirer, Respondents shall not interfere with the hiring or employing by the Commission-approved Acquirer of employees of the Genuardi’s Supermarket, and shall remove any impediments within the control of Respondents that may deter these employees from accepting employment with such Commission-approved Acquirer including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondents that would affect

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the ability or incentive of those individuals to be employed by such Commission-approved Acquirer. In addition, Respondents shall not make any counteroffer to any employees who receive a written offer of employment from such Commission-approved Acquirer; *provided, however*, that this sub-Paragraph shall not prohibit Respondents from continuing to employ any employees of Genuardi's Supermarket under the terms of such employee's employment with Respondents prior to the date of the written offer of employment from the Commission-approved Acquirer to such employee.

- H. The purpose of the divestiture is to ensure the continuation of the Genuardi's Supermarket as an ongoing viable enterprise engaged in the Supermarket business and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

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

- A. If Respondents have not divested the Genuardi's Supermarket Assets as required by Paragraph II. of this Order, the Commission may appoint a trustee ("Divestiture Trustee") to divest the Genuardi's Supermarket Assets in a manner that satisfies the requirements of Paragraphs II. and III. 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 relevant assets in accordance with the terms of this Order. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee,

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pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- C. Within ten (10) days after appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture or transfer required by the Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
 - 1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the relevant assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed.
 - 2. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the

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trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however*, the Commission may extend the divestiture period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph III. in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.
4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than

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one acquiring person, and if the Commission determines to approve more than one such acquiring person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such person within five (5) days of receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.
6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties,

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

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.
 8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
 9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph II.
- F. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

IV.

IT IS FURTHER ORDERED that, for a period of ten (10) years commencing on the date this Order becomes final,

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Respondent Ahold shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, without providing advance written notification to the Commission:

- A. Acquire any ownership or leasehold interest in any facility that has operated as a Supermarket within six (6) months prior to the date of such proposed acquisition in Newtown, PA; or
- B. Acquire any stock, share capital, equity, or other interest in any entity that owns any interest in or operates any Supermarket, or owned any interest in or operated any Supermarket within six (6) months prior to such proposed acquisition, in Newtown, PA;

Provided, however, that advance written notification shall not apply to the construction of new facilities by Respondent Ahold or the acquisition or leasing of a facility that has not operated as a Supermarket within six (6) months prior to Respondent Ahold's offer to purchase or lease such facility.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondent Ahold and not of any other party to the transaction. Respondent Ahold shall provide the notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondent Ahold shall not consummate the transaction until thirty (30) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. *Provided, however,* that prior notification shall not be required by this Paragraph for a transaction for which notification is required

Decision and Order

to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

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

- A. Within sixty (60) days after the date this Order becomes final and every sixty (60) days thereafter until the Respondents have fully complied with the provisions of Paragraphs II. and III. of this Order, Respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs II. and III. of this Order. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II. and III. of this Order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondents shall include in their reports copies of all non- privileged written communications to and from such parties, all non- privileged internal memoranda, and all non-privileged reports and recommendations concerning completing the obligations; and
- B. One (1) year from the date this Order becomes final, annually for the next nine (9) years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondent Ahold shall file verified written reports with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order.

VI.

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

- A. Any proposed dissolution of such Respondents;

Decision and Order

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

VII.

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

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

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on August 16, 2022.

By the Commission.

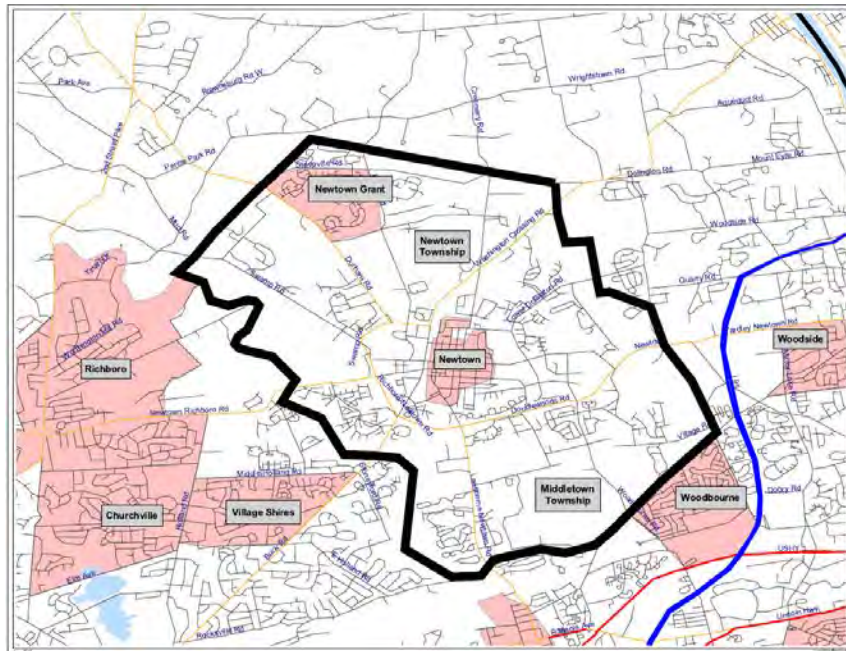
Decision and Order

Confidential Appendix I

[Redacted From the Public Version, But Incorporated By Reference]

Appendix II

[Map of Newtown, Pennsylvania]



Analysis to Aid Public Comment

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

The Federal Trade Commission (“Commission”) has accepted for public comment, and subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Koninklijke Ahold N.V. (“Ahold”), its subsidiary, Giant Food Stores, LLC (“Giant”), Safeway Inc. (“Safeway”), and its subsidiary (“Genuardi’s”) (collectively “Respondents”), that is designed to remedy the anticompetitive effects that otherwise would result from Ahold’s acquisition of certain Genuardi’s supermarkets owned by Safeway. The proposed Consent Agreement requires divestiture of the Genuardi’s supermarket in Newtown, Pennsylvania, and its related assets to a Commission-approved purchaser. The proposed Consent Agreement also requires Ahold and Safeway to divest all related assets and real property necessary to ensure the buyer of the divested supermarket will be able to quickly and fully replicate the competition that would have been eliminated by the acquisition.

The proposed Consent Agreement has been placed on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission again will review the proposed Consent Agreement and comments received, and decide whether it should withdraw the Consent Agreement, modify it, or make it final without modification.

On January 4, 2012, Ahold and Safeway executed an agreement whereby Ahold would acquire 16 of the Genuardi’s supermarkets from Safeway. 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 removing an actual, direct, and substantial supermarket competitor from the Newtown, Pennsylvania, geographic market. The proposed Consent Agreement would remedy the alleged violations by requiring a divestiture that will replace competition that otherwise would be eliminated in this market as a result of the acquisition.

Analysis to Aid Public Comment

II. The Parties

Ahold owns or has an interest in 2,970 supermarkets and specialty stores in Europe and the United States. Net sales for 2010 were \$36.8 billion, which represents a 5.7% increase over 2009. Ahold USA is organized into four retail divisions: Giant Carlisle, Giant Landover, Stop & Shop New York Metro, and Stop & Shop New England. Peapod, a grocery delivery service, also is included within Ahold USA.

Safeway is one of the largest food-and-drug retailers in the United States. It operates over 1,700 stores across the United States under a variety of banners, including Vons in southern California and Nevada, Randalls and Tom Thumb in Texas, Carrs in Alaska, Genuardi's in suburban Philadelphia, and Safeway throughout the rest of the country. There were 36 Genuardi's stores operating in Pennsylvania, New York, and New Jersey when Safeway purchased the chain in February 2001. Safeway is exiting the Philadelphia metropolitan market by selling or closing all 24 remaining Genuardi's markets in eastern Pennsylvania (Bucks, Montgomery, Delaware, and Chester counties), as well as four stores in New Jersey.

III. Supermarket Competition in Newtown, Pennsylvania

Ahold's proposed acquisition of Genuardi's in Newtown presents antitrust concerns in the retail sale of groceries. Competition in food retailing depends on proximity in both retailing format and in geographic location. Stores with similar formats located nearby each other provide a greater competitive constraint on each other's pricing than do stores of different formats or stores located at a greater distance. Giant and Genuardi's have stores in the Newton area, and they have a very similar format.

Giant and Genuardi's compete as supermarket retailers of grocery products. Supermarkets are full-line retail grocery stores that sell thousands of food and non-food products that typical families regularly consume at home (*e.g.*, fresh meat and seafood, dairy products, frozen goods, beverages, bakery goods, dry groceries, soaps, detergents, and health and beauty aids) and offer these products in a variety of sizes and brands. Supermarkets are

Analysis to Aid Public Comment

large stores with at least 10,000 square feet of selling space and 30,000 to 60,000 different items, typically referred to as stock-keeping units or “SKUs.” This broad set of products and services provides a “one-stop shopping” experience for consumers by enabling them to shop in a single store for all of their food and grocery needs. The ability to offer consumers one-stop shopping is a critical differentiating factor between supermarkets and other food retailers.

Other types of retailers that sell food and grocery items compete less strongly with Giant and Genuardi’s. These others include “mom & pop” stores, convenience stores, specialty food stores, “premium natural and organic” markets,¹ mass merchants, and club stores. Although these types of retailers provide some level of competition to supermarkets, they do not have a supermarket’s full complement of products and services, which means that if customers elect to shop at these retailers, they also must shop at a supermarket in order to satisfy their weekly grocery needs. Because of this, shoppers at one supermarket are more likely to respond to a price increase by switching to another supermarket than to choose a store with a different format, if both are equally convenient.²

To evaluate the effects of the acquisition on market concentration levels, we define the product market to be the retail sale of grocery products in supermarkets, consistent with practice in all but one prior grocery retailing case settled by consent order.³

1 See *FTC v. Whole Foods Mkt., Inc.*, 533 F.3d 869 (D.C. Cir. 2008).

2 Shoppers typically do not view these other food and grocery retailers as adequate substitutes for supermarkets and would be unlikely to switch to one of these retailers in response to a small but significant price increase or “SSNIP” by a hypothetical supermarket monopolist. See U.S. DOJ and FTC Horizontal Merger Guidelines § 4.1.1 (2010).

3 See, e.g., *Shaw’s/Star Markets*, Docket C- 3934 (June 28, 1999); *Kroger/Fred Meyer*, Docket C - 3917 (January 10, 2000); *Albertson’s/American Stores*, Docket C – 3986 (June 22, 1999); *Ahold/Giant*, Docket C - 3861 (April 5, 1999); *Albertson’s/Buttrey*, Docket C - 3838 (December 8, 1998); *Jitney-Jungle Stores of America, Inc.*, Docket C - 3784 (January 30, 1998). But see *Wal-Mart/Supermercados Amigo*, Docket C - 4066 (November 21, 2002) (the

Analysis to Aid Public Comment

Customers shopping at supermarkets are motivated primarily by convenience and, as a result, competition for supermarkets is local in nature. Generally, the overwhelming majority of consumers' grocery shopping occurs at stores located very close to where they live. Location is a critical component for closeness of competition between supermarkets. Supermarkets are a differentiated products industry with location serving as one of the primary drivers of differentiation and competition. A supermarket tends to be in most direct competition with those supermarkets located closest to it. Giant and Genuardi's are located approximately two miles from each other in the Newtown area, and the supermarkets' primary trade areas overlap significantly with each other. Acme is the only other supermarket operating in this area. The next-closest supermarket is located at least twice as far away as the Newtown supermarkets are to each other.

The relevant geographic market in which to measure concentration and analyze the competitive implications of Ahold's proposed acquisition of the Newtown Genuardi's is a roughly three to three-and-a-half mile circle measured from the center of Newtown and made up of the U.S. census tracts surrounding this area. Specifically, it consists of Newtown Township, Newtown Borough, and the portion of Middletown Township north of the line formed by Bridgetown Pike and Langhorne Yardley Road in Bucks County, Pennsylvania.

The Newtown, Pennsylvania, market for the sale of retail food and groceries in supermarkets is already highly concentrated, and would become significantly more so post-acquisition. The acquisition would reduce the number of supermarket competitors from three to two, creating a duopoly between Giant and Acme Markets. Under the Herfindal-Hirschman Index ("HHI"), which is the standard measure of market concentration under the 2010 Department of Justice and Federal Trade Commission Merger Guidelines, an acquisition is presumed to create or enhance market power or facilitate its exercise if it increases the HHI by

Commission's complaint alleged that in Puerto Rico, club stores should be included in a product market that included supermarkets because club stores in Puerto Rico enabled consumers to purchase substantially all of their weekly food and grocery requirements in a single shopping visit).

Analysis to Aid Public Comment

more than 200 points and results in a post-acquisition HHI that exceeds 2,500 points. Giant's proposed acquisition of the Newtown Genuardi's creates market concentration levels well in excess of these thresholds. The post-acquisition HHI is 5000-5017, representing an increase of between 1221-1373 from pre-acquisition levels.

Staff's investigation and analysis demonstrate that Giant and Genuardi's are close competitors that compete directly for grocery shoppers in Newtown. Because a substantial number of consumers in Newtown consider Giant's and Genuardi's stores to be close substitutes, a post-acquisition price increase at one (or both) of Giant's stores would be profitable because the other Giant-owned supermarket would likely recoup enough of the otherwise lost volume for the price increase to be profitable. Absent relief, the transaction may also facilitate tacit or express coordination since Acme would be Giant's only remaining competitor in Newtown post-acquisition. Given the transparency of pricing and promotional practices between supermarkets and the fact that supermarkets "price check" competitors in the ordinary course of business, reducing the number of nearby competitors from three to two may facilitate collusion between the remaining supermarket competitors by making coordination easier to establish and monitor.

New entry is unlikely to deter or counteract the likely anticompetitive effects of the proposed acquisition. Normally, as here, it takes two or more years for an entrant to secure a viable location, obtain the necessary permits and governmental approvals, build its retail establishment, and open to customers. Moreover, incumbent supermarkets often oppose entry efforts by competitor supermarkets, delaying further any potential entry into the relevant market. It is unlikely that entry sufficient to achieve a significant market impact would occur in a timely manner.

IV. The Proposed Consent Agreement

The proposed remedy, which requires the divestiture of the Genuardi's store in Newtown to a Commission-approved purchaser, will be sufficient to restore fully the competition that otherwise would be eliminated in the market as a result of the acquisition.

Analysis to Aid Public Comment

Respondents Ahold and Genuardi's have agreed to divest the Newtown Genuardi's supermarket to McCaffrey's. McCaffrey's appears to be a highly suitable purchaser, and is well-positioned to enter the relevant market and prevent the increase in market concentration and likely competitive harm that otherwise would have been caused by the acquisition.

All of the current McCaffrey's supermarkets are located outside the relevant geographic area. Its Yardley, Pennsylvania, store is approximately six miles, and approximately 15 minutes driving time, from the Genuardi's in Newtown. The Newtown Genuardi's is outside McCaffrey's primary service area and vice versa.

The proposed Order requires Respondents Ahold and Safeway to divest the assets of the Genuardi's to McCaffrey's no later than ten days following Ahold's acquisition of the 16 Genuardi's stores that are subject to the Asset Purchase Agreement. If McCaffrey's ultimately is not approved by the Commission to purchase the assets, Respondents must immediately rescind the divestiture and divest the Newtown Genuardi's assets to a buyer that receives the Commission's prior approval. The proposed Order contains additional provisions designed to ensure the adequacy of the proposed relief. For example, for a period of one year, the Order prohibits Respondents from interfering with the hiring of or employment of any employees currently working at the Newtown Genuardi's. Additionally, for a period of ten years, Ahold is required to give the Commission prior notice of plans to acquire a supermarket, or an interest in a supermarket, that has operated or is operating in Newtown, Pennsylvania.

V. Opportunity for Public Comment

The proposed Consent Agreement has been placed on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the proposed Consent Agreement, as well as the comments received, and will decide whether to modify the proposed Consent Agreement, withdraw its acceptance of the proposed Consent Agreement, or issue its final Consent Orders.

Analysis to Aid Public Comment

The sole purpose of this Analysis is to facilitate public comment on the proposed Consent Agreement. This Analysis does not constitute an official interpretation of the proposed Consent Agreement, nor does it modify its terms in any way.

Complaint

IN THE MATTER OF

**COSTAR GROUP, INC.,
LONESTAR ACQUISITION SUB, INC.
AND
LOOPNET, INC.**

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

*Docket No. C-4368; File No. 111 0172
Complaint, August 29, 2012 – Decision, August 29, 2012*

This consent order addresses the \$860 million acquisition by Lonestar Acquisition Sub, Inc., a wholly-owned subsidiary of CoStar Group, Inc., of certain assets of LoopNet, Inc. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by eliminating actual, direct, and substantial competition between CoStar and LoopNet, and between CoStar and Xceligent, Inc., increasing the likelihood that CoStar will exercise market power unilaterally in the provision of commercial real estate listings databases and information services. The consent order requires the divestiture of certain LoopNet data to Xceligent and LoopNet's interest in Xceligent to DMG Information, Inc.

Participants

For the *Commission: Rebecca P. Dick, Jessica S. Drake, J. Thomas Greene, Mara M. Grobins, Ashley M. Masters, Jeffrey S. Oliver, Justin Stewart-Teitelbaum, and Michelle A. Wyant.*

For the *Respondents: Kevin J. Arquit and Aimee Goldstein, Simpson Thacher & Bartlett LLP; Arthur Burke and Michael N. Sohn, Davis Polk & Wardwell LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by the Act, the Federal Trade Commission ("Commission"), having reason to believe that Respondents CoStar Group, Inc. and Lonestar Acquisition Sub, Inc. (collectively "CoStar"), and LoopNet, Inc. ("LoopNet") have entered into an acquisition agreement that

Complaint

constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and which, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18 and Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENTS

1. CoStar Group, Inc. is the largest provider of Commercial Real Estate (“CRE”) information services in the United States. It provides a proactively researched listings database with nationwide coverage. CoStar is a publicly held, for-profit corporation, 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 1331 L Street, NW, Washington, DC 20005. CoStar maintains an online CRE listings database containing approximately 1.5 million active sale and lease listings. It provides information services covering approximately 4.2 million CRE properties across the United States. CoStar also maintains CRE listings and information for properties located in the United Kingdom and France. CoStar’s historic strength and its current value propositions lie primarily in its uniquely comprehensive information services products. Indeed, many CRE brokers today require CoStar information services products in order to conduct their businesses.

2. Lonestar Acquisition Sub, Inc. is a wholly-owned subsidiary of CoStar Group, Inc., 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 1331 L Street, NW, Washington, DC 20005.

3. LoopNet, Inc. operates the most heavily trafficked CRE listings database in the United States. It provides CRE information services with nationwide scope. LoopNet is a publicly held, for-profit corporation, 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 185 Berry Street, Suite 4000, San Francisco, CA 94107. LoopNet maintains an online CRE listings database containing approximately 820,000

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active sale and lease listings. It provides information services covering more than 27 million CRE properties across the United States. LoopNet's historic strength and its current value propositions lie primarily in its vast listings database that provides broad exposure to user-input CRE availabilities. LoopNet also has a significant preferred ownership interest in Xceligent, Inc. ("Xceligent"), a third provider of CRE information services and listings databases with a business model that closely resembles CoStar's. Xceligent maintains an online CRE listings database and provides information services for properties in various regions of the United States. Today, LoopNet provides Xceligent with funding and information to aid Xceligent in expanding its geographic scope. In recent years and in part aided by its relationship with Xceligent, LoopNet has converged into CoStar's historic area of dominance, information services.

II. JURISDICTION

4. Respondents and each of their relevant operating subsidiaries are, and at all relevant times have been, engaged in activities in or affecting "commerce" as defined in Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

III. THE PROPOSED ACQUISITION

5. Pursuant to an Agreement and Plan of Merger dated April 27, 2011, CoStar proposes to acquire all of LoopNet's common stock in exchange for cash and stock considerations. The transaction represents a total equity value of \$860 million. The proposed acquisition of LoopNet's common stock includes LoopNet's ownership interest in Xceligent.

IV. RELEVANT MARKETS

6. The relevant lines of commerce in which to analyze the effects of the proposed acquisition are: (a) CRE listings databases; and (b) CRE information services. These services have a geographic dimension: suppliers offer listings and information services covering defined areas which can be local, regional, or national in scope.

Complaint

7. These services are often supplied and sold by phone and over the Internet, and the geographic scope of the relevant market is global, notwithstanding the more limited geographic scope of the services themselves.

V. STRUCTURE OF THE MARKETS

8. CRE listings databases provide two-sided online catalogues of CRE availabilities, allowing users simultaneously to publish and to search for CRE space available for sale and for lease. CRE industry participants require access to listings databases in order to publicize and locate available properties to meet their clients' needs.

9. CRE information services provide CRE industry participants with the in-depth information about specific properties necessary for accurate evaluation of potential transactions. CRE information services allow users to access in-depth information about specific properties and to compare similar properties based on location and value.

10. Some CRE listings database and information services customers require a narrowly defined set of listings and information covering a single metropolitan area. Others require broader coverage and demand a product with regional or national scope.

11. While providing products with differing focuses and strengths, CoStar and LoopNet today are the largest national providers of CRE listings databases and information services both in terms of comprehensiveness of coverage and of geographic scope. CoStar and LoopNet are the first and second choices for many U.S. CRE listings databases and information services customers, including CRE brokers, owners, and institutional investors.

12. Xceligent provides CRE listings databases and information services covering 33 metropolitan areas. Xceligent is a significant competitor to CoStar in the areas where it is present, and the closest competitive alternative to CoStar for many U.S. CRE listings database and information services customers.

Complaint

VI. EFFECTS OF THE ACQUISITION

13. The effects of the acquisition, if consummated, may be to substantially lessen competition in the relevant markets by, among other things: (a) eliminating actual, direct, and substantial competition between CoStar and LoopNet and between CoStar and Xceligent; and (b) increasing the likelihood that CoStar will exercise market power unilaterally.

VII. ENTRY CONDITIONS

14. Post-acquisition, entry or expansion into the relevant markets would not be timely, likely, or sufficient in scope to deter or negate the anticompetitive effects of the proposed acquisition.

VIII. VIOLATIONS CHARGED

15. 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.

16. 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 twenty-ninth day of August, 2012 issues its Complaint against Respondents.

By the Commission, Commissioner Ohlhausen not participating.

Decision and Order

DECISION AND ORDER
[Redacted Public Version]

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

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

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

1. CoStar Group, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of

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the state of Delaware, with its office and principal place of business located at 1331 L Street, NW, Washington, DC 20005.

2. Lonestar Acquisition Sub, Inc. is a wholly-owned subsidiary of CoStar Group, Inc., and is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 1331 L Street, NW, Washington, DC 20005.
3. LoopNet, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 185 Berry Street, Suite 4000, San Francisco, CA 94107.
4. The Commission has jurisdiction over the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

ORDER**I.****Definitions**

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

DEFINITIONS OF PERSONS

- A. “Commission” means the Federal Trade Commission.
- B. “CoStar” or “Respondent CoStar” means CoStar Group, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates controlled by CoStar Group, Inc., and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each. After the Acquisition Date, CoStar includes LoopNet.

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- C. “DMGI” means DMG Information, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its offices and principal place of business located at 3 Stamford Landing, Suite 400, 46 Southfield Avenue, Stamford, CT 06902.
- D. “LoopNet” or “Respondent LoopNet” means LoopNet, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates controlled by LoopNet, Inc., and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.
- E. “Lonestar” or “Respondent Lonestar” means Lonestar Acquisition Sub, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Lonestar Acquisition Sub, Inc., and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.
- F. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or governmental entity, and any subsidiaries, divisions, groups or affiliates thereof.
- G. “Xceligent” means Xceligent, Inc., a corporation, organized, existing, and doing business under and by virtue of the laws of the state of Missouri, with its office and principal place of business located at 4231 S. Hocker Dr., Building 13, Independence, MO 64055.

GENERAL DEFINITIONS

- H. “Acquirer” means DMGI or any other Person approved by the Commission to acquire the Xceligent Interest and the LoopNet Assets.

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- I. “Acquisition” means the proposed acquisition of LoopNet, Inc., by Respondent CoStar pursuant to an Agreement and Plan of Merger dated April 27, 2011, among LoopNet, Inc., CoStar Group, Inc., and Lonestar Acquisition Sub, Inc.
- J. “Acquisition Date” means the date the Acquisition closes and is consummated.
- K. “Commercial Real Estate” or “CRE” means land or real property in the United States, with or without any structures, fixtures, or other improvements of any kind, used at any time, suitable for use, or offered for sale or lease solely or primarily for retailing, manufacturing, shipping, governmental, the exploitation of natural resources, commercial, or business purposes of any kind. Commercial Real Estate includes residential structures containing five or more units used as short-term residences (e.g., hotels and motels) or as long-term residences (e.g., condominium and apartment buildings).
- L. “Commercialsearch.com” means a domain name currently assigned to LoopNet under the rules of the International Corporation for Assigned Names and Numbers, and the rights in such domain name appurtenant to such assignation, but not the content or files associated with such domain name.
- M. “CoStar Competitor” means any Person (other than Respondents) who regularly markets, sells, or licenses CRE Listings or CRE Information; *provided, however*, a Person that supplies CRE Listings or CRE Information as part of such Person’s CRE brokerage or appraisal services shall not be considered a CoStar Competitor.
- N. “CoStar Database” means an organized collection of CRE Listings or CRE Information owned solely by Respondent CoStar (including such materials as may be licensed from third parties) supporting CoStar’s

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CRE Product Offerings, whether stored digitally, electronically, magnetically, or in any other format.

- O. “CoStar Sales Market” means each CoStar sales market listed on Appendix A.
- P. “CRE Information” means information or databases containing property-level information (e.g., information about specific real property or structures) about Commercial Real Estate gathered and made available primarily to enable users to locate, research, or evaluate Commercial Real Estate. CRE Information includes, but is not limited to, Commercial Real Estate addresses, the prices at which property has been offered for lease or sale, the prices at which comparable property has been offered, leased or sold in the past, lease histories, property descriptions, detailed floor plans, photographs, tenant history, and vacancy rates. CRE Information does not include (i) Commercial Real Estate market analyses, market forecasts, or market projections prepared based upon the information gathered concerning Commercial Real Estate, (ii) software applications or products (and any related software integration services) offered for sale or lease, or sold or leased separately, from data relating to Commercial Real Estate. CRE Information does not include information or databases relating to the rental or leasing of residential units in residential structures containing five or more residential units, or the sale of individual units in such structures, which information or databases are not used by purchasers or sellers (or agents for purchasers or sellers) of residential structures containing five or more residential units to locate, research, or evaluate Commercial Real Estate, or to list Commercial Real Estate for sale or lease.
- Q. “CRE Listings” means the information or a collection of information concerning Commercial Real Estate available for lease or for sale. CRE Listings includes, but is not limited to, Commercial Real Estate addresses, price information, square footage,

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photographs, narrative descriptions of the property, and Representative's contact information.

- R. "CRE Product Offerings" means the offering, sale, lease, licensing, or other provision of data or other information from or constituting databases containing CRE Listings or CRE Information, and services and product support relating primarily to the offering, sale, lease or other provision of CRE Listings or CRE Information. CRE Product Offerings shall be defined as CoStar Property, CoStar COMPS, CoStar Tenant, LoopNet Premium Lister, and LoopNet Premium Searcher, and any modified or successor versions of those products (regardless of their names) that, in whole or in part, are functionally equivalent or substantially similar to them.
- S. "Currently Restricted Customer" means the Customers described on Confidential Appendix B.
- T. "Customer" means any Person who purchases, leases, licenses, subscribes to, or otherwise acquires a right to use one or more CRE Product Offerings marketed, sold, licensed, or otherwise made available by Respondents.
- U. "Customer Contract(s)" means any oral or written agreement between Respondents and any other Person for the sale, lease, license, subscription to, or other authorized use of one or more CRE Product Offerings marketed, sold, licensed, or otherwise made available by Respondents.
- V. "Divestiture Agreement(s)" means:
 - 1. The Purchase Agreement between Xceligent, Inc., Xceligent Holdings, Inc., DMG Information, Inc., and CoStar Group, Inc. (dated March 28, 2012), or any other agreement(s) approved by the Commission that effectuate the divestiture of the Xceligent Interest and the LoopNet Assets as required by this Order; or,

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2. Any other agreements between or among the Respondents, the Divestiture Trustee, and an Acquirer approved by the Commission that effectuate the divestiture of the Xceligent Interest and the LoopNet Assets as required by this Order.
- W. “Divestiture Date” means the date the Divestiture required by this Order is completed.
- X. “Divestiture Trustee” means the trustee appointed by the Commission pursuant to the relevant provisions of this Order.
- Y. “Divestiture Trustee Agreement” means any agreement between Respondents and the Divestiture Trustee approved by the Commission pursuant to the relevant provisions of this Order.
- Z. “Future Restricted Customer” means a Customer having a Customer Contract in effect at any time after the date the Agreement Containing Consent Order is executed by any one of the Respondents that:
1. Permits the Customer to receive a data extract or the right to maintain data from a CoStar Database in the Customer’s database; and,
 2. Conditions, restricts, or otherwise limits the Customer in a manner consistent with this Order from providing or furnishing CRE Information or CRE Listings derived independently from the CoStar Database to a CoStar Competitor.
- AA. “Intellectual Property” means any type of intellectual property, including all rights to intellectual property owned by any third party, and including without limitation, copyrights, trademarks, domain names, trade dress, trade secrets, customer data, customer lists, techniques, data, inventions, patents, practices, methods and other confidential know-how and proprietary technical, business, financial, research, or development information.

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- BB. “LoopNet Assets” means:
1. All of LoopNet’s rights, title, and interest in Commercialsearch.com; and,
 2. LoopNet Customer Data.
- CC. “LoopNet Customer Data” means a copy of an electronic data compilation transferable via an internet download, external hard drive, or some other technically feasible and commercially reasonable manner compatible with the information technology systems of Respondents, the Acquirer, and Xceligent that includes, for each of the geographic areas listed on Confidential Appendix C:
1. The customer or company name, street address, phone number, and name of a natural Person who is a contact for each Person who has entered, updated, imported, or electronically modified from January 1, 2009, to the Divestiture Date listings for the sale or lease of Commercial Real Estate in any database created, maintained, marketed, or sold by LoopNet on LoopNet.com, but not including listings solely maintained on LandAndFarm.com, LandsOfAmerica.com, Cityfeet.com, BizBuySell.com, and BizQuest.com; and,
 2. The number (e.g., quantity) of the listings, by customer and by listing type (e.g., office, industrial, mixed-use), that have been entered, updated, imported, or electronically modified from January 1, 2009, to the Divestiture Date in any database created, maintained, marketed, or sold by LoopNet on LoopNet.com, but not including listings solely maintained on LandAndFarm.com, LandsOfAmerica.com, Cityfeet.com, BizBuySell.com, and BizQuest.com.
- DD. “Monitor” means any Monitor appointed by the Commission pursuant to the relevant provisions of this Order.

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- EE. “Monitor Agreement” means any agreement between Respondents and the Monitor approved by the Commission pursuant to the relevant provisions of this Order.
- FF. “Non-Competition Restriction” means any contractual provision, or any restriction based on or arising from common law, that directly or indirectly restricts the ability or legal right of a Potential Employee to:
1. Accept employment or enter into an agency relationship with the Acquirer or Xceligent; or,
 2. Otherwise participate, directly or indirectly, in any business of the Acquirer or Xceligent.
- GG. “Non-Represented Property” means Commercial Real Estate for which a Person does not act, or in the prior 48 months has not acted, as a Representative.
- HH. “Non-Solicitation Restriction” means any contractual provision, or any restriction based on or arising from common law, that directly or indirectly restricts the ability or legal right of a Potential Employee to solicit, to provide any services or information (other than Respondent Confidential Information) to, to receive any information from, or otherwise contact any past, current, future, or potential customer, supplier, agent, or employee of the Acquirer or Xceligent.
- II. “Order Date” means the date this Order becomes final.
- JJ. “Potential Employee(s)” means all Persons employed by Respondent LoopNet at any time between April 27, 2011, and the Divestiture Date, but not including those Persons listed on Confidential Appendix D to this Order.
- KK. “REApplications” means the web-based software marketed, leased or sold to customers as REApplications and used by them for managing market research (including property inventory),

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listings and comparables, commissions, customer relationships, project tracking, and transactions.

LL. “Record Keeping Requirements” means, with respect to any CRE Listings or CRE Information relating to Non-represented Property provided by a Customer to a CoStar Competitor, a log or other record certified by the Customer that includes:

1. The source and manner of collection of the CRE Listings or CRE Information;
2. The date(s) the information was gathered and the name of the Person who gathered it;
3. A copy of the CRE Listings or CRE Information provided to the CoStar Competitor; and,
4. The name of the CoStar Competitor to whom the CRE Listings or CRE Information was provided and the date it was provided.

MM. “Relevant Information” means any knowledge or information that directly or indirectly relates to the:

1. Collection, organization, or research of CRE Listings or CRE Information;
2. Marketing or sale of CRE Listings or CRE Information; or,
3. The business of LoopNet.

Provided, however, Relevant Information does not include:

- a. Any electronic, magnetic, or paper reproduction, or copy in any format, of all or any part of any CRE Listings or CRE Information database owned solely by LoopNet; or,
- b. Respondent Confidential Information.

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- NN. “Relevant Person” means any Potential Employee:
1. Who has accepted an offer of employment from, or entered into an agency relationship with, the Acquirer or Xceligent at any time between the date the Agreement Containing Consent Order was signed and six (6) months after the Order Date; or
 2. Whose employment has been terminated by Respondents, at any time between the date the Agreement Containing Consent Order was signed and six (6) months after the date this Order becomes final, and who has accepted an offer of employment from, or entered into an agency relationship with, the Acquirer or Xceligent.
- OO. “Relevant Restriction” means any:
1. Non-Competition Restriction;
 2. Non-Solicitation Restriction; and,
 3. Restriction On The Use Of Relevant Information In Memory.
- PP. “Representative” means a Person who has been retained, whether exclusively or jointly with other Persons:
1. To act as an agent to market the lease or sale of Commercial Real Estate, or to identify or negotiate with Persons interested in leasing or purchasing Commercial Real Estate, as a listing agent or broker; or,
 2. To act as an agent to manage or operate all or any portion of Commercial Real Estate.
- QQ. “Represented Property” means Commercial Real Estate for which a Person acts, or in the prior 48 months has acted, as a Representative.

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RR. “Respondent Confidential Information” means any material, non-public information of Respondents relating to patents, technologies, processes, and future or planned products, or corporate-level marketing methods, business plans, and business strategies, including:

1. Design structure, technical specifications, databases, software structure, sequence and organization, and software source code related to LoopNet’s proprietary CRE listings search and display database technology;
2. Design structure, technical specifications, databases, software structure, sequence and organization and software source code related to LoopNet’s proprietary models used in search engine marketing and search engine optimization; and,
3. Design structure, technical specifications, databases, software structure, sequence and organization and software source code related to LoopNet’s proprietary models used to analyze LoopNet’s community of users for the purpose of identifying and scoring sales leads.
4. Without limiting the foregoing, Respondent Confidential Information does not include information of or relating to CRE Product Offerings, past or present pricing, marketing methods and practices, or sales methods and practices used by Potential Employees in the ordinary course of their duties in offering for lease or sale, or leasing or selling, CRE Product Offerings to Customers.

Provided, however, that Respondent Confidential Information shall not include:

- a. Information that is in the public domain;

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- b. Information that is not in the public domain when received by a Person and thereafter becomes public through no act or failure to act by the Person who received it;
 - c. Information that a Person develops or obtains independently, without violating any applicable law or this Order; and,
 - d. Information that becomes known to Respondents from a third party not in breach of applicable law or a confidentiality obligation with respect to the information.
- SS. “Restricted Customer” means all Currently Restricted Customers and all Future Restricted Customers.
- TT. “Restriction On The Use Of Relevant Information In Memory” means any contractual provision, or any restriction based on or arising from common law, that directly or indirectly restricts the ability or legal right of a Potential Employee to use Relevant Information:
1. Obtained by the Potential Employee at any time that the Potential Employee was an officer, director, employee, or agent of LoopNet; and,
 2. Retained by the Potential Employee only in his or her memory after ceasing to be an officer, director, employee, or agent of LoopNet.
- UU. “Xceligent Confidential Information” means any material non-public information relating to Xceligent either prior to or after the Divestiture Date, including, but not limited to, all customer lists, price lists, marketing methods, patents, technologies, processes, future or planned products or business strategies, or other trade secrets, and that is:
1. Obtained by Respondents prior to the Acquisition Date; or,

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2. Obtained by Respondents after the Acquisition Date, in the course of performing Respondents' obligations under this Order or under any agreement with an Acquirer.

Provided, however, that Xceligent Confidential Information shall not include:

- a. Information that is in the public domain when received by Respondents;
 - b. Information that is not in the public domain when received by Respondents and thereafter becomes public through no act or failure to act by Respondents;
 - c. Information that Respondents develops or obtains independently, without violating any applicable law or this Order; and
 - d. Information that becomes known to Respondents from a third party not in breach of applicable law or a confidentiality obligation with respect to the information.
- VV. "Xceligent Database" means an organized collection of data owned solely by Xceligent (including the materials licensed from third parties), whether stored digitally, electronically, magnetically, or in any other format.
- WW. "Xceligent Interest" means all of CoStar's or LoopNet's right, title, and interest in Xceligent, Inc.

II.

IT IS FURTHER ORDERED that:

- A. Not later than five (5) calendar days after the Acquisition Date, Respondents shall divest, absolutely and in good faith, the Xceligent Interest and the LoopNet Assets to DMGI pursuant to and in accordance with the Divestiture Agreement.

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Provided, however, if Respondents have divested the Xceligent Interest and the LoopNet Assets to DMGI prior to the Order Date, and if at the time the Commission determines to make this Order final and effective the Commission notifies Respondents that DMGI is not an acceptable acquirer of the Xceligent Interest and the LoopNet Assets, then Respondents shall immediately rescind the transaction with DMGI, in whole or in part, as directed by the Commission, and shall divest the Xceligent Interest and the LoopNet Assets within five (5) months of the Order Date, absolutely and at no minimum price, to an Acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission.

Provided further, however, if Respondents have divested the Xceligent Interest and the LoopNet Assets to DMGI prior to the Order Date, and if at the time the Commission determines to make this Order final and effective the Commission notifies Respondents that the manner of the divestiture is not acceptable, the Commission may direct Respondents, or direct a Divestiture Trustee, to effect such modifications to the manner of divestiture of Xceligent Interest and the LoopNet Assets as the Commission may determine are necessary to satisfy the requirements of the Order.

- B. The Divestiture Agreement:
1. May require the Acquirer to obtain Xceligent's consent that the Monitor may review and audit, upon Respondent's request and at Respondents' sole cost and expense and not more than once per six-month period, for a period ending on the fifth anniversary of the Divestiture Date, the Xceligent Database and the records supporting the Xceligent Database for the purpose of confirming and verifying that Xceligent has not obtained any CRE Listings or CRE Information derived improperly from any CoStar Database.

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Provided, however, that upon Respondents' request and at Respondents' sole cost and expense, and in the discretion of the Monitor in consultation with the Commission's staff, the Monitor may conduct one additional audit per twelve-month period consistent with the requirements above if Respondents provide information and documents to the Monitor sufficient to establish to the satisfaction of the Monitor and the Commission's staff that there is good cause to believe that the Xceligent Database contains any CRE Listings or CRE Information derived improperly from any CoStar Database.

Provided further, that if at Respondents' request the Acquirer obtains Xceligent's consent for the Monitor to review and audit the Xceligent Database and the records supporting the Xceligent Database as provided in Paragraph II.B.1. above, the Divestiture Agreement shall also require Respondents to consent, upon the Acquirer's or Xceligent's request and at the Acquirer's or Xceligent's sole cost and expense and not more than once per six-month period, for a period ending on the fifth anniversary of the Divestiture Date, to permit the Monitor to review and audit the CoStar Database and the records supporting the CoStar Database for the purpose of confirming and verifying that Respondents have not obtained any CRE Listings or CRE Information derived improperly from any Xceligent Database.

Provided further, that upon the Acquirer's or Xceligent's request and at the Acquirer's or Xceligent's sole cost and expense, and in the discretion of the Monitor in consultation with the Commission's staff, the Monitor may conduct one additional audit per twelve-month period consistent with the requirements above if the Acquirer or Xceligent provides information and documents to the Monitor sufficient to establish to the

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satisfaction of the Monitor and the Commission's staff that there is good cause to believe that the CoStar Database contains any CRE Listings or CRE Information derived improperly from any Xceligent Database.

2. For a period of three (3) years following the Divestiture Date, may require Respondents (through another Person mutually acceptable to Respondents and the Acquirer), upon the Acquirer's written request exercisable at such time as Xceligent commences the marketing, sale, or lease of CRE Product Offerings in each of the geographic areas listed on Confidential Appendix C, on a one-time per geographic area basis:
 - a. To prepare an email that provides notice that Xceligent has or will commence the marketing and sale of CRE Listings or CRE Information, contains a brief description of the products that Xceligent will offer, states the date that Xceligent will begin offering those products, and provides information reasonably sufficient to permit Customers to contact Xceligent for additional information or to request Xceligent to contact the Customer; and,
 - b. To transmit, within thirty (30) days of Respondents' receipt of Xceligent's written request, one such email to each Person that (before or after the Acquisition Date), at any time within three (3) years prior to the date of Xceligent's written request, entered, updated, imported, or electronically modified listings for the sale or lease of Commercial Real Estate in any database created, maintained, marketed, or sold by LoopNet on LoopNet.com, but not including listings solely maintained on LandAndFarm.com, LandsOfAmerica.com, Cityfeet.com, BizBuySell.com, and BizQuest.com.

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C. Notwithstanding any term of the Divestiture Agreement, Respondents shall divest, and transfer and deliver to the Acquirer, the LoopNet Customer Data in a form and manner that is consistent with the purposes of the Order.

D. Respondents:

1. Shall, not fewer than thirty five (35) days prior to the Acquisition Date, provide the Acquirer or Xceligent with an opportunity to interview any one or more of the Potential Employees in a manner (including, but not limited to, interviewing any one or more Potential Employees outside of the presence of any employee or agent of Respondent CoStar or Respondent LoopNet) sufficient to enable the Acquirer or Xceligent to determine whether to make offers of employment to them or to enter into agency relationships with them.

Provided, however, that if Respondent divests the Xceligent Interest and LoopNet Assets to DMGI pursuant to Paragraph II.A., then such divestiture shall satisfy the timing requirements of this Paragraph II.D.1.;

2. Shall, not fewer than twenty five (25) days prior to the Acquisition Date, provide the Acquirer or Xceligent with an opportunity, upon the request of a Potential Employee, to review the personnel files of all of the Potential Employees in a manner sufficient to enable the Acquirer or Xceligent to determine whether to make offers of employment to any one or more of them.

Provided, however, that if Respondent divests the Xceligent Interest and LoopNet Assets to DMGI pursuant to Paragraph II.A., then such divestiture shall satisfy the timing requirements of this Paragraph II.D.2.;

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3. Shall not in any way, between the date the Agreement Containing Consent Order was signed and six (6) months after the date the Order becomes final, prohibit, hinder, or interfere with:
 - a. The Acquirer or Xceligent making offers of employment to, employing, or entering into agency relationships with (including, but not limited to, retention as independent contractors or consultants), any one or more of the Potential Employees; and,
 - b. Any one or more of the Potential Employees accepting any offers of employment or entering into agency relationships with the Acquirer or Xceligent;
4. Shall provide all Potential Employees employed by Respondent LoopNet as of the date the Agreement Containing Consent Order is executed by Respondent LoopNet with reasonable financial incentives to continue in their positions until the Divestiture Date. Such incentives shall include, but are not limited to, a continuation of all such employee benefits (including offering Potential Employees the same employee benefits to LoopNet's employees prior to the Acquisition), including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by law and for Potential Employees covered by a pension plan), offered by Respondents;
5. Shall waive, and not threaten to enforce or enforce against any Relevant Person, the Acquirer, Xceligent, or any customer or supplier of the Acquirer or Xceligent, any Relevant Restriction relating directly or indirectly to a Relevant Person;
6. Shall not:
 - a. For a period of one (1) year following the date upon which each Potential Employee becomes

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an employee of the Acquirer or Xceligent, directly or indirectly, solicit or otherwise attempt to induce any such Potential Employee to terminate his or her employment with the Acquirer or Xceligent; and,

- b. For a period of one (1) year following the Divestiture Date, directly or indirectly, solicit or otherwise attempt to induce any employee of the Acquirer or Xceligent to terminate his or her employment with the Acquirer or Xceligent;

Provided, however, Respondents may:

- i. Advertise for employees in newspapers, trade publications or other media, or engage recruiters to conduct general employee searches for employees, in each either case not targeted specifically at employees of the Acquirer or Xceligent; and,
- ii. Hire Potential Employees who become employees of the Acquirer or Xceligent, or other employees of the Acquirer or Xceligent, who apply for employment with Respondents, so long as such employees were not solicited by Respondents in violation of this Order;

Provided further, that this Paragraph shall not prohibit Respondents from making offers of employment to or employing Persons: (i) who were Potential Employees and who became employees of the Acquirer or Xceligent; or, (ii) who were employees of the Acquirer or Xceligent, if the Acquirer or Xceligent has notified Respondents the Acquirer or Xceligent has terminated the employment of such Person; and,

7. Shall not threaten to seek or seek any damages or injunctive relief against any Relevant Person, the

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Acquirer, Xceligent, or any customer or supplier of the Acquirer or Xceligent for the violation of any Relevant Restriction relating directly or indirectly to a Relevant Person.

- E. Respondents shall not seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Divestiture Agreement or in this Order, a decision the result of which would be inconsistent with the terms or achieving the purposes of this Order.
- F. Respondents shall comply with all terms of the Divestiture Agreement, and any breach by Respondents of any term of the Divestiture Agreement shall constitute a violation of this Order. If any term of the Divestiture Agreement 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 Respondents’ obligations under this Order. Any modification of the Divestiture Agreement, without the prior approval of the Commission, or any failure to meet any material condition precedent to closing (whether waived or not), shall constitute a failure to comply with this Order.
- G. The purpose of the divestiture of the Xceligent Interest and the LoopNet Assets is to preserve Xceligent as an independent, viable, and effective competitor in the relevant markets in which Xceligent was engaged at the time of the announcement of the Acquisition, to facilitate Xceligent’s expansion of its product line and its geographic coverage, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission’s Complaint.

III.

IT IS FURTHER ORDERED that, acting directly or indirectly, or through any corporate or other device, in connection with the actual or potential marketing, sale, or other provision of

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CRE Listings or CRE Information, in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act:

- A. For five (5) years after the Order Date, Respondents shall cease and desist from inviting, entering into, implementing, continuing, enforcing, or attempting or threatening thereto, any existing or future oral or written condition, requirement, policy, agreement, contract or understanding (in effect on the Order Date or that goes into effect after the Order Date) with any Customer that:
1. Directly or indirectly prohibits or restricts a Customer from providing any CoStar Competitor (including, but not limited to, the Acquirer and Xceligent) CRE Listings or CRE Information that relates to Represented Property or Non-represented Property, which CRE Listings or CRE Information was obtained or derived by the Customer from a source other than a CoStar Database.

Provided, however, that Respondents may condition its agreement to any written contract or contractual amendment with a Restricted Customer on such Restricted Customer’s agreement that the contract include provisions that:

- a. Prohibit such Restricted Customer from downloading or otherwise providing all or any portion of a CoStar Database to any Person; and,
- b. Prohibit such Restricted Customer from entering into any written or oral agreement or understanding with any CoStar Competitor to employ, retain, or otherwise make available to the CoStar Competitor on a regular or recurring basis any employees or agents of the Restricted Customer for the purpose of gathering or collecting and providing to the CoStar Competitor any CRE Information or CRE Listings;

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- c. Require such Restricted Customer to comply with Record Keeping Requirements for Non-represented Properties provided to any CoStar Competitor; and,
- d. Require such Restricted Customer to permit the Monitor to review and audit, at Respondents' sole expense and cost and no more than once each calendar quarter, such Restricted Customers' compliance with the requirements of Paragraph III.A.1.(i)–(iii) above;

Provided, however, Respondents shall not require the Restricted Customer to provide the Respondents with any information or conclusions directly or indirectly relating to any review or audit of any Person conducted by the Monitor;

2. Directly or indirectly prohibits a Customer from subscribing to any service provided by, or purchasing access to any database containing CRE Listings or CRE Information from, a CoStar Competitor;
3. Directly or indirectly prohibits or otherwise restricts a Customer from purchasing a passive ownership or equity interest of up to twenty percent (20%) in a CoStar Competitor.

Provided, however, Respondents may prohibit or restrict a Customer from participating in the management (other than voting its shares of stock in any corporation or exercising its rights as a limited partner of a limited partnership) of a CoStar Competitor.

Provided further, Respondents may require that any Customer purchasing a passive ownership or equity interest of more than ten percent (10%) and less than twenty percent (20%) in a CoStar Competitor enter into a written agreement that requires such Customer

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to adhere to the provisions stated in Paragraph III.A.1.(i)–(iv) above; and,

4. Directly or indirectly prohibits a Customer from publicly endorsing or recommending that Persons subscribe to any service provided by, or purchase access to any database containing CRE Listings or CRE Information from, a CoStar Competitor.
- B. For five (5) years after the Order Date, Respondents shall:
1. Allow each Customer who is a party to a Customer Contract, written agreement, contract or understanding (whether in effect on or after the Order Date) having a term longer than one (1) year the right, on a one-time basis, for no or any cause, without payment or penalty of any kind, to terminate the Customer Contract, written agreement, contract, or understanding by delivering to Respondents a written notice of the Customer's intent to terminate at least one (1) year prior to the effective date of termination;
 2. Include in any Customer Contract, written agreement, contract or understanding executed or formed after the Order Date a right of termination consistent with Paragraph III.B.1.; and,
 3. Not modify its usual and customary practices and policies relating to the terms or periodic renewal cycle of Customer Contracts (including, but not limited to, adopting practices or policies that result in either, (i) a significant increase in the number of Customer Contracts having terms longer than one (1) year; or, (ii) a significant increase in the number of Customer Contracts expiring in the same calendar quarter), in either case with the intent or effect of significantly reducing the number of Customers or other Persons for which a CoStar Competitor commencing business in a

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geographic area can compete for the sale, lease, or license of CRE Listings or CRE Information.

- C. For five (5) years after the Order Date, Respondents shall not suspend or terminate the provision of CRE Listings or CRE Information pursuant to a Customer Contract:

1. Without the Customer's consent;

Provided, however, where explicitly provided by the Customer Contract, Respondents may, without obtaining the Customer's consent, suspend or terminate the provision of CRE Listings or CRE Information to natural Persons who: (a) cease to be employees or agents of a Customer; or (b) provide or otherwise allow other natural Persons to use their assigned user names and passwords to access a CRE Product Offering; or,

2. Without obtaining an order or injunction issued by a state or federal court or an arbitrator and providing written notice to the Monitor; or,

3. Unless:

- a. The Respondents have made a good faith determination (and created and retained a written record in reasonable detail of that determination) that the Customer is violating, or is engaged in a current pattern of repeated violations, of the Intellectual Property or use restrictions of the Customer Contract;
- b. The Respondents first provide a copy of the written record of its good faith determination to the Monitor;
- c. The Respondents agree, no more than two (2) calendar days after suspension or termination: (i) to meet in person at the Customer's principal place of business; or, (ii) to

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participate in a telephone call with the Customer to discuss and attempt in good faith to resolve Respondents' objections to the conduct by the Customer that the Respondents contend violates the Customer Contract;

- d. The Respondents, no more than five (5) calendar days after any meeting or telephone call with the Customer, notify the Customer and Monitor whether Respondents continue to believe that the Customer's conduct (or refusal to agree not to resume conduct) violates the Customer Contract, and if Respondents do not so believe, Respondents restore provision of CRE Listings or CRE Information to the Customer as promptly as practicable; and,
- e. If the Respondents agree that it terminated the provision of CRE Listings or CRE Information to the Customer without just cause, Respondents, in addition to any other remedy available to the Customer, provide the Customer with a double credit for the time that service was terminated or suspended.

Provided, however, that if the Customer disagrees with Respondents' determination it reserves the right to bring its grievance to the Monitor for further review; or,

4. For alleged breach of the Customer's obligation to make payment under the Customer Contract, unless:
 - a. Respondents have delivered to the Customer (and, if known, to its legal counsel) a notice of default of the Customer's payment obligation, provided to the Customer a commercially reasonable opportunity to cure the default, and the Customer has failed to cure the default; and,

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- b. Respondents have provided reasonable written notice to the Customer (and, if known, to its legal counsel) that Respondents will suspend or terminate the provision of CRE Listings or CRE Information no less than five (5) business days before suspension or termination.
- D. For five (5) years after the Order Date, Respondents shall allow, and each currently existing or future written agreement, contract or understanding with any Customers shall provide that, any Customer against whom Respondents have filed, or threatened to file, a judicial action alleging violation of Respondents' Intellectual Property rights or the use restrictions of a Customer Contract in any state or federal court may elect to resolve the Respondents' claims through arbitration, according to the following conditions:
 1. The arbitration will be governed by the American Arbitration Association's Rules and Commercial Arbitration Rules;
 2. Respondents must provide reasonable written notice to the Customer (and, if known, to its legal counsel) that the Customer may (i) elect to resolve Respondents' claims through arbitration; and, (ii) may request a meeting or telephonic conference with Respondents as provided by Paragraph III.C.3.c. of this Order, either:
 - a. By certified mail delivered within five (5) days after a Complaint is filed in a state or federal court; or,
 - b. By service with the summons and complaint on the Customer;
 3. The Customer must notify the Respondents no later than twenty (20) days after it receives service of a summons and complaint, or after it receives notice of Respondents' intent to file a court action, of its election to seek arbitration of the dispute, and the

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Customer's failure to provide such notice may (at Respondent's election) be a waiver of any right to arbitrate hereunder;

4. The arbitration will take place in Washington, DC, or at such other place as may be specified in the Customer Contract; and,
 5. The arbitrator will determine the dispute according to the law applicable in Washington, DC, or such other law as may be specified in the Customer Contract.
- E. Nothing in this Order shall be construed to prohibit or prevent Respondents from requesting any legal or equitable relief or remedy of any kind in any action commenced in state or federal court or in any arbitration proceeding.
- F. For five (5) years after the Order Date, Respondents shall cease and desist from inviting, entering into, implementing, continuing, enforcing, or attempting thereto, or threatening to enforce any oral or written condition, requirement, policy, agreement, contract or understanding with any Customer that either explicitly or implicitly:
1. Conditions the sale, lease, or license of, or the subscription to, one or more of Respondents' CRE Product Offerings to the sale, lease, or license of, or subscription to, one or more other of Respondents' CRE Product Offerings;
 2. Conditions the sale, lease, or license of, or the subscription to, one or more of Respondents' CRE Product Offerings to the sale, lease, or license of, or subscription to, one or more of Respondents' CRE Product Offerings in more than one CoStar Sales Market; or,
 3. Conditions the sale, lease, or license of, or the subscription to, one or more of Respondents' CRE

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Product Offerings to the sale, lease, or license of, or subscription to, one or more of Respondents' CRE Product Offerings in a different CoStar Sales Market.

Provided, however, Respondents may continue to offer LoopNet Premium Lister and LoopNet Premium Searcher on a national basis only.

Provided further, Respondents may offer to or provide Customers commercially reasonable or customary discounts and other incentives if Customers purchase more than one of Respondents' CRE Product Offerings or purchase CRE Product Offerings in more than one geographic area.

Provided further, that Respondents may offer CRE Product Offerings and/or other products together within a new product or within a new platform (e.g., an Android® application), or otherwise integrate data available from CRE Product Offerings and/or other products within a new product or within a new platform, but in each case only if Respondents, for three (3) years after the Divestiture Date, continue to offer for sale, license, or subscription, on a standalone basis, and at commercially reasonable prices, all CRE Product Offerings (and support for such CRE Product Offerings) offered or available to Customers at any time between April 27, 2011, and the Divestiture Date.

Provided further, that Respondents may prohibit a Customer from subscribing for access to a CRE Product Offering for a particular CoStar Sales Market at offices outside such CoStar Sales Market unless the office(s) of such Customer located within such CoStar Sales Market also subscribe to the CRE Product Offering for such CoStar Sales Market.

- G. For three (3) years after the Order Date, Respondents shall not prohibit, and each currently existing or future written or oral agreement, contract or understanding with any Customers for the sale, lease, or license of

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REApplications shall not prohibit, Customers from using REApplications to support, or in connection with, their purchase, lease, or license of CRE Listings or CRE Information from a CoStar Competitor for so long as Respondents continue to market, lease, license, or sell REApplications to any Customer.

Provided, however, Respondents are not obligated to customize, modify, or revise REApplications in any way to enable or improve its use with any products marketed, leased, licensed, or sold by any Person; and,

Provided further, that Respondents may discontinue the marketing, leasing, licensing, or sale of REApplications altogether.

- H. Respondents shall not discriminate against, penalize, or otherwise retaliate against a Customer because the Customer: (i) provides or considers providing CRE Listings or CRE Information obtained or derived by the Customer from a source other than a CoStar Database when such Customer has complied with its agreement to the provisions of Paragraph III.A.1.(i)–(iv) of this Order; (ii) subscribes, or considers subscribing, or leases or purchases access, or considers leasing or purchasing access, to any database containing CRE Listings or CRE Information from a CoStar Competitor; (iii) purchases or considers purchasing a passive ownership or equity interest of twenty percent (20%) or less in a CoStar Competitor (without participating in the management of the CoStar Competitor except by voting its shares or exercising its rights as a limited partner, and so long as the Customer complies with its agreement to the provisions of Paragraph III.A.1.(i)–(iv) of this Order); (iv) publicly endorses or recommends, or considers publicly endorsing or recommending, that Persons subscribe to any service provided by, or purchase or lease access from, a CoStar Competitor to any database containing CRE Listings or CRE Information; or, (v) exercises the Customer’s right to terminate its Customer Contract as provided by Paragraph III.B. of this Order.

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Examples of prohibited retaliation shall include, but not be limited to, the following:

1. Respondents' unilateral termination of services to a Customer or the unilateral termination of the provision of CRE Listings or CRE Information to a Customer without providing timely notice to the Monitor and complying with the provisions of Paragraph III.C. of this Order;

Provided, however, it shall not, by itself, constitute prohibited retaliation if Respondents unilaterally terminate or suspend services, or unilaterally terminate or suspend the provision of CRE Listings or CRE Information, to a Customer in compliance with Paragraph III.C. of this Order;

2. Respondents' imposition of unfavorable contract terms on a Customer including, but not limited to:
 - a. Offering materially less favorable price terms to Customers who purchase or lease services, CRE Listings, or CRE Information from a CoStar Competitor than to Customers who purchase or lease such products only from Respondents;

Provided, however, that, by itself, it shall not be considered offering materially less favorable price terms if the terms are comparable to terms offered or provided to Customers engaged in similar lines of business (e.g., brokers, financial institutions, real estate investment firms, etc.) who purchase, license, or subscribe to CRE Product Offerings for a comparable number of Persons who will use or have access to the CRE Product Offerings and who are located in a comparable CoStar Sales Market;

- b. Offering fewer products and services to Customers who purchase or lease services, CRE Listings, or CRE Information from a CoStar Competitor than to Customers who

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purchase or lease such products only from Respondents; and,

- c. Offering products and services relating to fewer or smaller geographic areas to Customers who purchase or lease services, CRE Listings, or CRE Information from a CoStar Competitor than to Customers who purchase or lease such products only from Respondents.

3. Respondents' (1) termination of a Customer Contract, or (2) refusal to renew a Customer Contract upon commercially reasonable terms;

Provided, however, it shall not constitute prohibited retaliation, by itself, if Respondents terminate or refuse to renew a Customer Contract because: (i) a Restricted Customer refuses to agree to the provisions of Paragraph III.A.1.(i)–(iv) of this Order and provides CRE Listings or CRE Information on Non-Represented Properties to a CoStar Competitor; or, (ii) a Restricted Customer purchases a passive ownership or equity interest of more than ten percent (10%) and less than twenty percent (20%) in a CoStar Competitor and (A) participates in the management of the CoStar Competitor (beyond merely voting its shares or exercising its rights as a limited partner) or (B) refuses to agree to the provisions of Paragraph III.A.1.(i)–(iv) of this Order; or (iii) a Restricted Customer breaches or fails to comply with its agreement to the provisions of Paragraph III.A.1.(i)–(iv) of this Order that are included in a Customer Contract.

Provided further, however, that, for Paragraphs H.2., and H.3(2) of this Paragraph III., Respondents may decline to include in New Customer Contracts CoStar Database extracts to, or allow the creation of internal databases incorporating portions of the CoStar Database by, Customers who purchase, license, or subscribe to CRE Product Offerings from CoStar Competitors. For purposes of this proviso, “New Customer Contracts” mean only: 1) the first or initial

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Customer Contract between CoStar and a Customer; or 2) a Customer Contract that results from a new agreement between CoStar and that Customer. For the avoidance of doubt, a New Customer Contract does not include any extension, continuation, or renewal of a Customer Contract by the Customer pursuant to the terms of that Customer Contract. During the initial, extension, continuation, or renewal term of any Customer Contract that expressly entitles a Customer to receive a CoStar Database extract or allows the Customer to create internal databases incorporating portions of CoStar's Database, CoStar shall honor such Customer Contract and shall not refuse to provide such CoStar Database extract or disallow the creation of such internal databases.

- I. Respondents shall waive on the Order Date any oral or written condition, requirement, policy, agreement, contract or understanding with any Customer that is inconsistent with the terms of this Order. Within thirty (30) days after the Order Date, Respondents shall amend or modify any oral or written condition, requirement, policy, agreement, contract or understanding with any Customer that is in effect on the Order Date to conform the condition, requirement, policy, agreement, contract or understanding to the terms of this Order.
- J. Any wrongful termination or suspension by Respondents of the provision of CRE Listings or CRE Information to a Customer in retaliation for the Customer's purchase or lease of CRE Listings or CRE Information from a CoStar Competitor shall constitute a violation of this Order, with each day the wrongful termination or suspension continues constituting a separate violation of this Order.
- K. Respondents shall not seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Customer Contract or in this Order, or in any judicial action, a decision the result of

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which would be inconsistent with the terms or achieving the purposes of this Order.

- L. Respondent CoStar shall:
1. Within thirty (30) days of the Order Date:
 - a. Mail a copy of Appendix E to this Order by first class mail to each Currently Restricted Customer of Respondent CoStar; and,
 - b. Mail a copy of Appendix F to this Order by first class mail to each of Respondent CoStar's Customers who is not a Currently Restricted Customer;
 2. Not fewer than five (5) business days prior to executing a Customer Contract after the Order Date that results in the Customer becoming a Future Restricted Customer, deliver a copy of Appendix G to the Customer (or to the Person that will become a Customer if the Customer Contract becomes effective); and,
 3. Deliver a copy of Appendix F to any Person who was not a Customer on the Order Date prior to or at the time that the Person executes a Customer Contract with Respondent CoStar.
- M. Nothing in this Order shall limit or reduce, or be construed to limit or reduce any rights or benefits of any Customer under any Customer's contract with CoStar.

IV.

IT IS FURTHER ORDERED that:

- A. Respondents shall not use, disclose or convey any Xceligent Confidential Information, directly or indirectly, to any Person who is not an agent or employee of the Respondents, except that Respondents may disclose Xceligent Confidential Information to the

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Acquirer or Persons specifically authorized by the Acquirer to receive such information.

- B. Within ten (10) days of the Acquisition Date, Respondents shall provide written notice of the restrictions on the disclosure and use of Xceligent Confidential Information contained in this Order to all employees who had or have access to Xceligent Confidential Information. Respondents shall provide such written notice by electronic mail with return receipt requested or similar transmission, and keep a file of such receipts for one (1) year after the Divestiture Date.

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

- A. For five (5) years after the Order Date, Respondents shall not, without providing advance written notification to the Commission in the manner described in Paragraph V.C., and without complying with the terms of the waiting period described in Paragraph V.D., acquire, directly or indirectly, any stock, share capital, equity, or other interest in or assets of any Person, corporate or non-corporate that gathers, markets, or sells CRE Listings or CRE Information in the United States, or has done so within six (6) months prior to the acquisition.

Provided, however, that such advance notification to the Commission is not required for any acquisition, directly or indirectly, of any stock, share capital, equity or other interests in or assets of any Person, corporate or non-corporate, that offers for sale, lease, or licensing only Commercial Real Estate software (and any related software integration services) or Commercial Real Estate analytic services.

- B. For an additional five (5) years after the Order Date (i.e., until ten (10) years after the Order Date), Respondents shall not, without providing advance

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written notification to the Commission in the manner described in Paragraph V.C., and without complying with the terms of the waiting period described in Paragraph V.D., acquire, directly or indirectly, any stock, share capital, equity, or other interest in or assets of any Person, corporate or non-corporate, that gathers, markets, or sells CRE Listings or CRE Information in the United States, or has done so within six (6) months prior to the acquisition, which Person had gross annual revenues exceeding fifteen Million Dollars (\$15,000,000.00) from the sale, lease, or licensing of CRE Listings and CRE Information in the most recently concluded full fiscal year.

Provided, however, that such advance notification to the Commission is not required for any acquisition, directly or indirectly, of any stock, share capital, equity or other interests in or assets of any Person, corporate or non-corporate, that offers for sale, lease, or licensing only Commercial Real Estate software (and any related software integration services) or Commercial Real Estate analytic services.

- C. The advance written notification provided by Respondents shall include:
1. A description of the acquisition and any executed letter agreement, letter of intent, purchase and sale agreement, stock acquisition agreement, or other contract or agreement between Respondents and the Person describing or effecting the proposed acquisition;
 2. All documents that would be responsive to Items 4(c) and 4(d) of the Premerger Notification and Report Form under the Hart-Scott-Rodino Premerger Notification Act, Section 7A of the Clayton Act, 15 U.S.C. § 18a, and Rules, 16 C.F.R. § 801-803, relating to the proposed acquisition;
 3. Gross annual revenues of CRE Listings and CRE Information:

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- a. Of the Person, stated separately for each geographic area (e.g., Metropolitan Statistical Area) in which the Person does or has done business for the last three (3) completed fiscal years;
 - b. Of Respondents stated separately for each geographic area in which the Person does business;
4. The name and address of the ten largest customers:
- a. Of the Person, stated separately for each geographic area (when available in the normal course of business) and in the most recently completed fiscal year, the gross revenues generated by transactions with each customer, and the name and phone number of a contact person at each customer; and,
 - b. Of Respondents in each geographic area in which the Person does business and, stated separately for each geographic area (when available in the normal course of business) in the most recently completed fiscal year, the gross revenues generated by transactions with each customer, and the name and phone number of a contact person at each customer;
5. The total number of customers (e.g., Persons who purchase, lease, or license CRE Listings or CRE Information):
- a. Of the Person (when available, in each geographic area in which the Person does business) in the most recently completed fiscal year; and,
 - b. Of Respondents in each geographic area in which the Person does business;

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6. Information in reasonable detail to identify Persons who were, but no longer remain, Respondents' Customers in each of the three (3) most recently completed fiscal years in each geographic area in which the Person does business, to the extent such information is available in the normal course of business; and,
7. A description in reasonable detail of the products and services offered by the Person from whom Respondents propose to acquire equity or assets, as well as the geographic areas in which such products and services are offered.

Provided, however, that prior notification shall not be required by this Paragraph for a transaction for which Notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

- D. Respondents shall provide the advance written notification at least thirty (30) days prior to consummating the transaction that is the subject of the notification (hereinafter the "First Waiting Period"). If, within the First Waiting Period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until thirty (30) days after submitting all of the additional information and documentary information (hereinafter the "Second Waiting Period"). Early termination of the First Waiting Period and the Second Waiting Period may be requested and, where appropriate, granted by a letter from the Commission's Bureau of Competition.

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

- A. The Commission appoints Guy Dorey as Monitor and approves the Monitor Agreement between Guy Dorey and Respondents, attached as Appendix H.
- B. Respondents shall facilitate the ability of the Monitor to comply with the duties and obligations set forth in this Order, and shall take no action that interferes with or hinders the Monitor's authority, rights or responsibilities as set forth in this Order or any agreement between the Monitor and Respondents.
- C. The Monitor's duties and responsibilities shall include the following, among other responsibilities that may be required:
 - 1. The Monitor shall act in a fiduciary capacity for the benefit of the Commission;
 - 2. The Monitor shall serve until the earlier of the date this Order terminates by its terms and such other time as the Commission may order;
 - 3. The Monitor shall have the power and authority to Monitor Respondents' compliance with Paragraphs II. through V. of the Order and the Divestiture Agreement, including, but not limited to:
 - a. Respondents' divestiture of the Xceligent Interest and the LoopNet Assets;
 - b. Respondents' compliance with its Order obligations relating to Potential Employees as set forth in Paragraph II.D. of this Order;
 - c. The waiver of any terms, and the amendment or modification, of any Customer Contracts as may be required by Paragraphs III.A. and III.D. of this Order; and,

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- d. Respondents' compliance with any of Respondents' obligations under this Order or with any Customer Contract term required by this Order;
4. The Monitor shall have power and authority to review and audit, at Respondents' sole cost and expense, compliance by Customers with their agreement to the provisions of Paragraph III.A.1. of this Order. The Monitor also shall have power and authority to verify that Customers' investments in CoStar Competitors are passive. The Monitor shall expeditiously provide written notice to any Customer, the Commission, and the Respondents if the Monitor reasonably believes that the Customer has failed to comply with their agreement to the provisions of Paragraph III.A.1.(i)–(iv) of this Order or that the Customer's investment in a CoStar Competitor is not passive. The written notice shall only:
 - a. Identify the Customer;
 - b. Identify the Commercial Real Estate to which the CRE Listings or CRE Information relates;
 - c. State the date upon which the CRE Listings or CRE Information was provided;
 - d. Identify the CoStar Competitor to which the CRE Listings or CRE Information was provided;
 - e. Describe any violation of the Customer's agreement to the provisions of Paragraph III.A.1.(i)–(iv) of this Order; and,
 - f. Identify the CoStar Competitor in which the Customer's investment is not passive;
 5. The Monitor shall have power and authority to review and audit, at the Acquirer's or

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Respondents' sole cost and expense (with the party responsible for the cost and expense determined by which party requested the review and audit), the books and records of Xceligent and Respondents pursuant to and for the purposes set forth in Paragraph II.B. of this Order. The Monitor shall expeditiously provide written notice to Xceligent, the Commission, and the Respondents if the Monitor reasonably believes that Xceligent or Respondents has received any CRE Listings or CRE Information derived from the database of the other. The written notice shall only:

- a. State that Xceligent or Respondents have received the CRE Listings or CRE Information;
 - b. Identify the Commercial Real Estate to which the CRE Listings or CRE Information relates; and,
 - c. State the date upon which the CRE Listings or CRE Information was received;
6. The Monitor shall exercise such power and authority and carry out his or her duties and responsibilities in a manner consistent with the purposes of the Order and in consultation with the Commission and its staff;
 7. The Monitor shall, in his or her sole discretion, consult with Third Parties in the exercise of his or her duties under this Order or any agreement between the Monitor and Respondents;
 8. The Monitor shall review all reports submitted to the Commission by Respondents pursuant to the Order and the Consent Agreement, and within thirty (30) days from the date the Monitor receives a report, and upon request of the Commission or its staff, report in writing to the Commission concerning performance by Respondents of their

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obligations under Paragraphs II. through V. of this Order; and,

9. The Monitor shall provide periodic written reports to the Commission upon a schedule (but at least annually) that is sufficient to provide the Commission with timely information to determine if Respondents have complied and are complying with their obligations under this Order (including the Divestiture Agreements). In addition, the Monitor shall provide such additional written reports as Commission staff may request that reasonably are related to determining if Respondents have complied and are complying with their obligations under this Order (including the Divestiture Agreements). The Monitor shall not provide to Respondents, and Respondents shall not be entitled to receive, copies of these reports.
- D. Respondents shall grant and transfer to the Monitor, and such 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. 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 Paragraphs II. through V. of this Order;
 2. Subject to any demonstrated legally recognized privilege, Respondents shall provide the Monitor full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondents' compliance with its obligations under Paragraphs II. through V. of this Order;

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3. Within five (5) calendar days of submitting a report required by this Order or the Consent Agreement to the Commission, Respondents shall deliver a copy of such report to the Monitor;
4. Except as otherwise set forth in this Order, the Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions to which the Monitor and Respondents agree and that the Commission approves;
5. The Monitor shall have authority to employ, at the expense of Respondents (except as otherwise set forth in this Order), such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;
6. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in 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; and,
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, that such agreement shall not restrict the Monitor from providing any information to the Commission or its staff, or require the Monitor to report to Respondents the substance of

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communications to or from the Commission, its staff, or the Acquirer.

- E. Respondents shall comply with all terms of the Monitor Agreement, and any breach by Respondents of any term of the Monitor Agreement shall constitute a violation of this Order. Notwithstanding any paragraph, section, or other provision of the Monitor Agreement, any modification of the Monitor Agreement, without the prior approval of the Commission, shall constitute a failure to comply with this Order.
- F. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.
- G. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor. The Commission shall select the substitute 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 substitute Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed substitute Monitor, Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor. 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 requirements of this Order and the Divestiture Agreement in a manner consistent with the purpose of this Order. If a

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substitute Monitor is appointed, Respondents shall consent to the terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor as set forth in this Paragraph.

- H. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Order.
- I. A Monitor appointed pursuant to this Order may be the same Person appointed as the Divestiture Trustee pursuant to the relevant provisions of this Order.

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

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

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by the Commission, for any failure by Respondents to comply with this Order.

- B. The Commission shall select the Divestiture Trustee, subject to the consent of the 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 (“Divestiture Trustee Agreement”) that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee’s powers, duties, authority, and responsibilities:
 - 1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed;
 - 2. The Divestiture Trustee shall have one (1) year from the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior

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approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission;

Provided, however, the Commission may extend the divestiture period only two (2) times;

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court;
4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order,

Provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity,

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and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission.

Provided further, that Respondents shall select such entity within five (5) business days after receiving notification of the Commission's approval;

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order;
6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the

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preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee;

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order,

Provided, however, that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Monitor pursuant to the relevant provisions of this Order;

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture; and
9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement,

Provided, however, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

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

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necessary or appropriate to accomplish the divestiture required by this Order.

- G. Respondents shall comply with all terms of the Divestiture Trustee Agreement, and any breach by Respondents of any term of the Divestiture Trustee Agreement shall constitute a violation of this Order. Notwithstanding any paragraph, section, or other provision of the Divestiture Trustee Agreement, any modification of the Divestiture Trustee Agreement, without the prior approval of the Commission, shall constitute a failure to comply with this Order.

VIII.**IT IS FURTHER ORDERED** that

- A. Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order:
1. Within sixty (60) days after the Order Date and every sixty (60) days thereafter until the second annual anniversary of the Order Date; and
 2. On the second anniversary of the Order Date, and thereafter on the annual anniversary until this Order terminates.
- B. In addition to such other information that may be required, each verified written report filed by Respondents shall identify each Person who claims or asserts (whether or not the claim has been submitted for arbitration or the subject of judicial action) that Respondents have breached or violated any provision of this Order or any provision or term of any Customer Contract that is required by or relates to any provision of this Order, and for each such Person:

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1. State the name, phone number, email address, and street address of a natural Person who is the primary contact for Respondents with such Person;
 2. Describe in reasonable detail the basis of the Person's claim or assertion;
 3. Describe in reasonable detail whether Respondents' dispute the Person's claim or assertion, and if Respondents do dispute the claim or assertion, why it does; and,
 4. Provide copies of any letters, emails, court pleadings, arbitration documents, or any other written or electronic document that describe or reference the Person's claim or assertion and Respondents' response thereto.
- C. For purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondents made to their principal United States offices, registered office of its United States subsidiary, or its headquarters address, Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission:
1. Access, during business office hours of Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondents related to compliance with this Order, which copying services shall be provided by Respondents at the request of the authorized representative(s) of the Commission and at the expense of the Respondents; and,

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2. To interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

IX.

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

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

X.

IT IS FURTHER ORDERED that this Order shall terminate on August 29, 2022.

By the Commission, Commissioner Ohlhausen not participating.

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Appendix A

Appendix A
CoStar Sales Markets

Market Name	Market Product Type
Albany/Schenectady/Troy	PROPERTY, TENANT & COMPS
Counties	Albany, Columbia, Fulton, Greene, Hamilton, Montgomery, Otsego, Rensselaer, Saratoga, Schenectady, Scholiarie, Warren, Washington
Albuquerque	PROPERTY, TENANT & COMPS
Counties	Bernalillo, Catron, Chaves, Cibola, Colfax, Curry, De Baca, Dona Ana, Eddy, Grant, Guadalupe, Harding, Hidalgo, Lea, Lincoln, Los Alamos, Luna, Mckinley, Mora, Otero, Quay, Rio Arriba, Roosevelt, San Juan, San Miguel, Sandoval, Santa Fe, Sierra, Socorro, Taos, Torrance, Union, Valencia
Anchorage	PROPERTY, TENANT & COMPS
Counties	Anchorage, Matanuska-Susitna
Asheville	PROPERTY, TENANT & COMPS
Counties	Alleghany, Ashe, Avery, Beaufort, Bertie, Bladen, Brunswick, Buncombe, Camden, Carteret, Caswell, Cherokee, Chowan, Clay, Columbus, Craven, Cumberland, Dare, Duplin, Edgecombe, Gates, Graham, Granville, Greene, Halifax, Harnett, Haywood, Henderson, Hertford, Hoke, Hyde, Jackson, Jones, Lee, Lenoir, Macon, Madison, Martin, McDowell, Mitchell, Montgomery, Moore, Nash, New Hanover, Northampton, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Pitt, Polk, Richmond, Robeson, Rutherford, Sampson, Scotland, Surry, Swain, Transylvania, Tyrrell, Vance, Warren, Washington, Watanga, Wayne, Wilkes, Wilson, Yancey
Atlanta	PROPERTY, TENANT & COMPS
Counties	Barrow, Bartow, Bibb, Butts, Carroll, Cherokee, Clayton, Cobb, Coweta, Crawford, Dawson, DeKalb, Douglas, Fayette, Forsyth, Fulton, Gwinnett, Hall, Haralson, Heard, Henry, Jackson, Jasper, Jones, Lamar, Meriwether, Monroe, Newton, Paulding, Pickens, Pike, Polk, Rockdale, Spalding, Twiggs, Walton

Augusta/Richmond County	PROPERTY, TENANT & COMPS
Counties	Abbeville, Aiken, Allendale, Appling, Atkinson, Bacon, Baker, Baldwin, Bamberg, Banks, Barnwell, Beaufort, Ben Hill, Berkeley, Berrien, Bibb, Bleckley, Brantley, Brooks, Bryan, Bulloch, Burke, Calhoun, Camden, Candler, Carroas, Charleston, Charlton, Chatam, Chattahoochee, Chattooga, Chesterfield, Clarendon, Clarke, Clay, Clinch, Coffee, Colleton, Colquitt, Columbia, Cook, Crawford, Crisp, Dade, Darlington, Decatur, Dillon, Dodge, Dooley, Dorchester, Dougherty, Early, Echols, Edgefield, Effingham, Elbert, Emanuel, Evans, Fairfield, Fannin, Florence, Floyd, Franklin, Georgetown, Gilmer, Glascock, Glynn, Gordon, Grady, Greene, Greenwood, Habersham, Hampton, Hancock, Harris, Hart, Horry, Houston, Irwin, Jasper, Jeff Davis, Jefferson, Jenkins, Johnson, Jones, Kershaw, Lanier, Laurens, Lee, Lexington, Liberty, Lincoln, Long, Lowndes, Lumpkin, Macon, Madison, Marion, Marlboro, McCormick, McDuffie, McIntosh, Miller, Mitchell, Montgomery, Morgan, Murray, Muscogee, Newberry, Oconee, Oglethorpe, Orangeburg, Peach, Pierce, Polk, Pulaski, Putnam, Quitman, Rabun, Randolph, Richland, Richmond, Saluda, Schley, Screven, Seminole, Stephens, Stewart, Sumter, Talbot, Taliaferro, Tattall, Taylor, Telfair, Terrell, Thomas, Tift, Toombs, Towns, Treutlen, Troup, Turner, Twiggs, Union, Upson, Walker, Ware, Warren, Washington, Wayne, Webster, Wheeler, White, Whitfield, Wilcox, Wilkes, Wilkinson, Williamsburg, Worth
AUSTIN	PROPERTY, TENANT & COMPS
Counties	Bastrop, Caldwell, Hays, Travis, Williamson
Bakersfield	PROPERTY, TENANT & COMPS
Counties	Amador, Calaveras, Fresno, Kern, Kings, Madera, Mariposa, Merced, San Joaquin, Stanislaus, Tulare, Tuolumne
Baltimore	PROPERTY, TENANT & COMPS
Counties	Anne Arundel, Baltimore City, Baltimore County, Carroll, Cecil, Harford, Howard, Kent, Queen Annes
Baton Rouge	PROPERTY, TENANT & COMPS
Counties	Acadia, Allen, Ascension, Assumption, Avoyelles, Beauregard, Bienville, Bossier, Caddo, Calcasieu, Caldwell, Cameron, Catahoula, Claiborne, Concordia, De Soto, E Baton Rouge, East Carroll, East Feliciana, Evangeline, Franklin, Grant, Iberia, Iberville, Jackson, Jeff n Davis, Jefferson, La Salle, Lafayette, Lafourche, Lincoln, Livingston, Madison, Morehouse, Natchitoches, Orleans, Ouachita, Plaquemines, Pointe Coupee, Rapides, Red River, Richland, Sabine, St Bernard, St Charles, St Helena, St James, St John Baptist, St Landry, St Martin, St Mary, St Tammany, Tangipahoa, Tensas, Terrebonne, Union, Vermilion, Vernon, W Baton Rouge, Washington, Webster, West Carroll, West Feliciana, Winn

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Beaumont/Port Arthur	PROPERTY, TENANT & COMPS
Counties	Acadia, Allen, Anderson, Andrews, Angelina, Aransas, Archer, Armstrong, Ascension, Assumption, Avoyelles, Bailey, Baylor, Beauregard, Bee, Bell, Bienville, Blanco, Borden, Bosque, Bossier, Bowie, Brazos, Brewster, Briscoe, Brooks, Brown, Burleson, Burnet, Caddo, Calcasieu, Caldwell, Calhoun, Callahan, Cameron, Camp, Carson, Cass, Castro, Catahoula, Cherokee, Childress, Claiborne, Clay, Cochran, Coke, Coleman, Collingsworth, Colorado, Comanche, Concho, Concordia, Cooke, Coryell, Cottle, Crane, Crockett, Crosby, Cullbertson, Dallam, Dawson, De Soto, De Witt, Deaf Smith, Dickens, Dimmit, Donley, Duval, E Baton Rouge, East Carroll, East Feliciana, Eastland, Ector, Edwards, El Paso, Erath, Evangeline, Falls, Fannin, Fayette, Fisher, Floyd, Foard, Franklin, Freestone, Frio, Gaines, Garza, Gillespie, Glasscock, Goliad, Gonzales, Grant, Gray, Grayson, Gregg, Grimes, Hale, Hall, Hamilton, Hansford, Hardeman, Hardin, Harrison, Hartley, Haskell, Hemphill, Hidalgo, Hill, Hockley, Hopkins, Houston, Howard, Hudspeth, Hutchinson, Iberia, Iberville, Irion, Jack, Jackson, Jasper, Jeff Davis, Jeff n Davis, Jefferson, Jim Hogg, Jim Wells, Jones, Karnes, Kenedy, Kent, Kerr, Kimble, King, Kinney, Kleberg, Knox, La Salle, Lafayette, Lafourche, Lamar, Lamb, Lampasas, Lavaca, Lee, Leon, Limestone, Lincoln, Lipscomb, Live Oak, Livingston, Llano, Loving, Lubbock, Lynn, Madison, Marion, Martin, Mason, Matagorda, Maverick, McCulloch, McLennan, McMullen, Menard, Midland, Milam, Mills, Mitchell, Montague, Moore, Morehouse, Morris, Motley, Nacogdoches, Natchitoches, Navarro, Newton, Nolan, Nueces, Ochiltree, Oldham, Orange, Orleans, Ouachita, Palo Pinto, Panola, Parmer, Pecos, Plaquemines, Pointe Coupee, Polk, Potter, Presidio, Rains, Randall, Rapides, Reagan, Real, Red River, Reeves, Refugio, Richland, Roberts, Robertson, Runnels, Rusk, Sabine, San Augustine, San Patricio, San Saba, Schleicher, Scurry, Shackelford, Shelby, Sherman, Smith, Somervell, St Bernard, St Charles, St Helena, St James, St John Baptist, St Landry, St Martin, St Mary, St Tammany, Starr, Stephens, Sterling, Stonewall, Sutton, Swisher, Tangipahoa, Taylor, Tensas, Terrebonne, Terrell, Terry, Throckmorton, Titus, Tom Green, Trinity, Tyler, Union, Upshur, Upton, Uvalde, Val Verde, Van Zandt, Vermillion, Vernon, Victoria, W Baton Rouge, Walker, Ward, Washington, Webb, Webster, West Carroll, West Feliciana, Wharton, Wheeler, Wichita, Wilbarger, Willacy, Winkler, Wynn, Wood, Yoakum, Young, Zapata, Zavala
Binghamton	PROPERTY ONLY
Counties	Broome, Tioga
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Birmingham	PROPERTY, TENANT & COMPS
Counties	Autauga, Baldwin, Barbour, Bibb, Blount, Bullock, Butler, Calhoun, Chambers, Cherokee, Chilton, Choctaw, Clarke, Clay, Cleburne, Coffee, Colbert, Conecuh, Coosa, Covington, Crenshaw, Cullman, Dale, Dallas, De Kalb, Elmore, Escambia, Etowah, Fayette, Franklin, Geneva, Greene, Hale, Henry, Houston, Jackson, Jefferson, Lamar, Lauderdale, Lawrence, Lee, Limestone, Lowndes, Macon, Madison, Marengo, Marion, Marshall, Mobile, Monroe, Montgomery, Morgan, Perry, Pickens, Pike, Randolph, Russell, Shelby, St Clair, Sumter, Talladega, Tallapoosa, Tuscaloosa, Walker, Washington, Wilcox, Winston
Boise City/Nampa	PROPERTY, TENANT & COMPS
Counties	Ada, Adams, Blaine, Bonanza, Bear Lake, Benewah, Bingham, Blaine, Boise, Bonner, Bonneville, Boundary, Butte, Camas, Canyon, Caribou, Cassia, Clark, Clearwater, Custer, Elmore, Franklin, Fremont, Gem, Gooding, Idaho, Jefferson, Jerome, Kootenai, Latah, Lemhi, Lewis, Lincoln, Madison, Malheur, Mimidoka, Nez Perce, Oneida, Owyhee, Payette, Power, Shoshone, Teton, Twin Falls, Valley, Washington
BOSTON	PROPERTY, TENANT & COMPS
Counties	Bristol, Essex, Hillsborough, Middlesex, Norfolk, Plymouth, Rockingham, Strafford, Suffolk, Worcester
Bremerton/Silverdale	PROPERTY, TENANT & COMPS
Counties	Kitsap
BRK BRX QU	COMPS ONLY
Counties	Bronx, Kings, Queens
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Brownsville/Harlingen		PROPERTY, TENANT & COMPS
Counties		Anderson, Andrews, Angelina, Aransas, Archer, Armstrong, Bailey, Baylor, Bee, Bell, Blanco, Borden, Bosque, Bowie, Brazos, Brewster, Briscoe, Brooks, Brown, Burleson, Burnet, Callahan, Callahan, Cameron, Camp, Carson, Cass, Castro, Cherokee, Childress, Clay, Cochran, Coke, Coleman, Collingsworth, Colorado, Comanche, Concho, Cooke, Coryell, Cottle, Crane, Crockett, Crosby, Culberson, Dallam, Dawson, De Witt, Deaf Smith, Dickens, Dimmit, Donley, Duval, Eastland, Ector, Edwards, El Paso, Erath, Falls, Fannin, Fayette, Fisher, Floyd, Foard, Franklin, Freestone, Frio, Gaines, Garza, Gillespie, Glasscock, Goliad, Gonzales, Gray, Grayson, Gregg, Grimes, Hale, Hall, Hamilton, Hansford, Hardeman, Hardin, Harrison, Hartley, Haskell, Hemphill, Hidalgo, Hill, Hockley, Hopkins, Houston, Howard, Hudspeth, Hutchinson, Irion, Jack, Jackson, Jasper, Jeff Davis, Jefferson, Jim Hogg, Jim Wells, Jones, Karnes, Kenedy, Kent, Kerr, Kimble, King, Kinney, Kleberg, Knox, La Salle, Lamar, Lamb, Lampasas, Lavaca, Lee, Leon, Limestone, Lipscomb, Live Oak, Llano, Loving, Lubbock, Lynn, Madison, Marion, Martin, Mason, Matagorda, Maverick, McCulloch, McLennan, McMullen, Menard, Midland, Milam, Mills, Mitchell, Montague, Moore, Morris, Motley, Nacogdoches, Navarro, Newton, Nolan, Nueces, Ochiltree, Oldham, Orange, Palo Pinto, Panola, Parmer, Pecos, Polk, Potter, Presidio, Rains, Randall, Reagan, Real, Red River, Reeves, Refugio, Roberts, Robertson, Runnels, Rusk, Sabine, San Augustine, San Patricio, San Saba, Schleicher, Scurry, Shackelford, Shelby, Sherman, Smith, Somervell, Starr, Stephens, Sterling, Stonewall, Sutton, Swisher, Taylor, Terrell, Terry, Throckmorton, Titus, Tom Green, Trinity, Tyler, Upshur, Upton, Uvalde, Val Verde, Van Zandt, Victoria, Walker, Ward, Washington, Webb, Wharton, Wheeler, Wichita, Willbarger, Willacy, Winkler, Wood, Yoakum, Young, Zapata, Zavala

Buffalo/Niagara Falls		PROPERTY, TENANT & COMPS
Counties		Erie, Niagara

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Charleston WV		PROPERTY, TENANT & COMPS
Counties		Accomack, Albemarle, Alleghany, Anberst, Appomattox, Augusta, Barbour, Bath, Bedford, Bedford City, Bland, Boone, Botetourt, Braxton, Bristol City, Brooke, Brunswick, Buchanan, Buckingham, Buena Vista, Cabell, Calhoun, Campbell, Carroll, Charlotte, Charlottesville, Clay, Clifton Forge, Covington City, Craig, Culpeper, Danville City, Dickenson, Doddridge, Emporia City, Essex, Fayette, Floyd, Fhvanna, Franklin, Galax City, Giles, Gilmer, Grant, Grayson, Greenbrier, Greene, Greenville, Halifax, Hampshire, Hancock, Hardy, Harrison, Harrisonburg, Henry, Highland, Jackson, Kanawha, Lancaster, Lee, Lewis, Lexington City, Lincoln, Logan, Lunenburg, Lynchburg City, Madison, Marion, Marshall, Martinsville, Mason, Medowell, Mecklenburg, Mercer, Middlesex, Mineral, Mingo, Monongalia, Monroe, Montgomery, Nelson, Nicholas, Northampton, Northumberland, Norton City, Nottoway, Ohio, Orange, Page, Patrick, Pendleton, Pittsylvania, Pleasants, Pocahontas, Preston, Prince Edward, Pulaski, Putnam, Radford City, Raleigh, Randolph, Rappahannock, Richmond, Ritchie, Roane, Roanoke, Roanoke City, Rockbridge, Rockingham, Russell, Salem City, Scott, Shenandoah, Smyth, South Boston, Southampton, Staunton City, Summers, Taylor, Tazewell, Tucker, Tyler, Upshur, Washington, Wayne, Waynesboro, Webster, Westmoreland, Wetzel, Wirt, Wise, Wood, Wyoming, Wytke

Charleston N Charleston		PROPERTY, TENANT & COMPS
Counties		Abbeville, Aiken, Allendale, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Chesterfield, Clarendon, Colleton, Darlington, Dillon, Dorchester, Edgefield, Fairfield, Florence, Georgetown, Greenwood, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Marlboro, McCormick, Newberry, Oconee, Orangeburg, Richland, Saluda, Sumter, Union, Williamsburg

Charlotte		PROPERTY, TENANT & COMPS
Counties		Alexander, Anson, Burke, Cabarrus, Caldwell, Catawba, Chester, Cleveland, Gaston, Iredell, Lancaster, Lincoln, Mecklenburg, Rowan, Stanly, Union, York

Chattanooga		PROPERTY, TENANT & COMPS
Counties		Anderson, Bedford, Benton, Bledsoe, Blount, Bradley, Bristol City, Buncombe, Campbell, Carroll, Carter, Catoosa, Chester, Claiborne, Clay, Cocke, Coffee, Crockett, Cumberland, Dade, De Kalb, Decatur, Dyer, Fentress, Franklin, Gibson, Giles, Grainger, Greene, Grundy, Hamblen, Hamilton, Hancock, Hardeman, Hardin, Hawkins, Haywood, Henderson, Henry, Houston, Humphreys, Jackson, Jefferson, Johnson, Knox, Lake, Lauderdale, Lawrence, Lewis, Lincoln, Loudon, Madison, Marion, Marshall, McMinn, McNairy, Meigs, Monroe, Moore, Morgan, Obion, Overton, Perry, Pickett, Polk, Putnam, Rhea, Roane, Scott, Sequatchie, Sevier, Sullivan, Union, Van Buren, Walker, Warren, Washington, Wayne, Weakley, White

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CHI COLLAR	COMPS ONLY
Counties	Boone, Kane, McHenry, Will, Winnebago
CHI COOK	COMPS ONLY
Counties	Cook, Kendall, Lake
Chicago	PROPERTY & TENANT
Counties	Boone, Bureau, Cook, DeKalb, DuPage, Grundy, Jasper, Kane, Kendall, Kenosha, La Salle, Lake, Lee, McHenry, Newton, Ogle, Porter, Racine, Will, Winnebago
Cincinnati	PROPERTY, TENANT & COMPS
Counties	Boone, Bracken, Brown, Butler, Campbell, Clark, Clermont, Dearborn, Franklin, Gallatin, Grant, Greene, Hamilton, Kenton, Miami, Montgomery, Ohio, Pendleton, Preble, Warren
CLEVELAND	PROPERTY, TENANT & COMPS
Counties	Ashtabula, Carroll, Cuyahoga, Erie, Geauga, Huron, Lake, Lorain, Medina, Portage, Richland, Stark, Summit
COL SPRNGS	PROPERTY & COMPS
Counties	El Paso, Teller
Columbia	PROPERTY, TENANT & COMPS
Counties	Abbeville, Aiken, Allendale, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Chesterfield, Clarendon, Colleton, Darlington, Dillon, Dorchester, Edgefield, Fairfield, Florence, Georgetown, Greenwood, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Marlboro, McCormick, Newberry, Orangeburg, Richland, Saluda, Sumter, Union, Williamsburg
COLUMBUS	PROPERTY, TENANT & COMPS
Counties	Delaware, Fairfield, Franklin, Licking, Madison, Morrow, Pickaway, Union

Columbus GA	PROPERTY, TENANT & COMPS
Counties	Aiken, Appling, Atkinson, Bacon, Baker, Baldwin, Banks, Ben Hill, Berrien, Bibb, Bleckley, Brantley, Brooks, Bryan, Bulloch, Burke, Calhoun, Camden, Candler, Catoosa, Charlton, Chatham, Chattahoochee, Chattooga, Clarke, Clay, Clinch, Coffee, Colquitt, Columbia, Cook, Crawford, Crisp, Dade, Decatur, Dodge, Dooly, Dougherty, Early, Echols, Edgefield, Effingham, Elbert, Emanuel, Evans, Fannin, Floyd, Franklin, Gilmer, Glascock, Glynn, Gordon, Grady, Greene, Habersham, Hamilton, Hancock, Harris, Hart, Houston, Irwin, Jeff Davis, Jefferson, Jenkins, Johnson, Jones, Lanier, Laurens, Lee, Liberty, Lincoln, Long, Lowndes, Lumpkin, Macon, Madison, Marion, McDuffie, McIntosh, Miller, Mitchell, Montgomery, Morgan, Murray, Muscogee, Oconee, Oglethorpe, Peach, Pierce, Polk, Pulaski, Putnam, Quitman, Rabun, Randolph, Richmond, Russell, Schley, Screven, Seminole, Stephens, Stewart, Sumter, Talbot, Taliaferro, Tatnall, Taylor, Telfair, Terrell, Thomas, Tift, Toombs, Towns, Treutlen, Troup, Turner, Twiggs, Union, Upson, Walker, Ware, Warren, Washington, Wayne, Webster, Wheeler, White, Whitfield, Wilcox, Wilkes, Wilkinson, Worth
Corpus Christi	PROPERTY, TENANT & COMPS
Counties	Anderson, Andrews, Angelina, Aransas, Archer, Armstrong, Bailey, Baylor, Bee, Bell, Blanco, Borden, Bosque, Bowie, Brazos, Brewster, Briscoe, Brooks, Brown, Burleson, Burnet, Calhoun, Callahan, Cameron, Camp, Carson, Cass, Castro, Cherokee, Childress, Clay, Cochran, Coke, Coleman, Collingsworth, Colorado, Comanche, Concho, Cooke, Coryell, Cottle, Crane, Crockett, Crosby, Culberson, Dallam, Dawson, De Witt, Deaf Smith, Dickens, Dimmit, Donley, Duval, Eastland, Ector, Edwards, El Paso, Erath, Falls, Fannin, Fayette, Fisher, Floyd, Foard, Franklin, Freestone, Frio, Gaines, Garza, Gillespie, Glascock, Goliad, Gonzales, Gray, Grayson, Gregg, Grimes, Hale, Hall, Hamilton, Hansford, Hardeman, Hardin, Harrison, Hartley, Haskell, Hemphill, Hidalgo, Hill, Hockley, Hopkins, Houston, Howard, Hudspeth, Hutchinson, Irion, Jack, Jackson, Jasper, Jeff Davis, Jefferson, Jim Hogg, Jim Wells, Jones, Kames, Kenedy, Kent, Kerr, Kimble, King, Kinney, Kriebel, Knox, La Salle, Lamar, Lamb, Lampasas, Lavaca, Lee, Leon, Limestone, Lipscomb, Live Oak, Llano, Loving, Lubbock, Lynn, Madison, Marion, Martin, Mason, Matagorda, Maverick, McCulloch, McLennan, McMullen, Menard, Midland, Milam, Mills, Mitchell, Montague, Moore, Morris, Motley, Nacogdoches, Navarro, Newton, Nolan, Nueces, Ochiltree, Oldham, Orange, Palo Pinto, Panola, Parker, Pecos, Polk, Potter, Presidio, Rains, Randall, Reagan, Real, Red River, Reeves, Refugio, Roberts, Robertson, Runnels, Rusk, Sabine, San Augustine, San Patricio, San Saba, Schleicher, Seary, Shackelford, Shelby, Sherman, Smith, Somervell, Starr, Stephens, Sterling, Stonevall, Sutton, Swisher, Taylor, Terrell, Terry, Throckmorton, Titus, Tom Green, Trinity, Tyler, Upton, Uvalde, Val Verde, Van Zandt, Victoria, Walker, Ward, Washington, Webb, Wharton, Wheeler, Wichita, Wilbarger, Willacy, Winkler, Wood, Yoakum, Young, Zapata, Zavala

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Additional Submarkets		Mustang Is/Port Aransas, Rockport/N Aransas, North Beach
Dallas/Ft. Worth		
PROPERTY, TENANT & COMPS		
Counties	Collin, Dallas, Delta, Denton, Ellis, Henderson, Hood, Hunt, Johnson, Kaufman, Parker, Rockwall, Tarrant, Wise	
Davenport/Moline/Rock Island		
PROPERTY, TENANT & COMPS		
Counties	Adair, Adams, Allamakee, Antelope, Appanoose, Arthur, Audubon, Banner, Benton, Black Hawk, Blaine, Boone, Box Butte, Boyd, Bremer, Brown, Buchanan, Buena Vista, Buffalo, Burt, Butler, Calhoun, Carroll, Cass, Cedar, Cerro Gordo, Chase, Cherokee, Cherry, Cheyenne, Chickasaw, Clarke, Clay, Clayton, Clinton, Colfax, Crawford, Cuming, Custer, Dakota, Dallas, Davis, Dawes, Dawson, Decatur, Delaware, Des Moines, Deuel, Dickinson, Dixon, Dodge, Douglas, Dubuque, Dundy, Emmet, Fayette, Fillmore, Floyd, Franklin, Fremont, Frontier, Furnas, Gage, Garden, Garfield, Gosper, Grant, Greeley, Greene, Grundy, Guthrie, Hall, Hamilton, Hancock, Hardin, Harlan, Harrison, Hayes, Henry, Hitchcock, Holt, Hooker, Howard, Humboldt, Ida, Iowa, Jackson, Jasper, Jefferson, Johnson, Jones, Keamey, Keith, Keokuk, Keya Paha, Kimball, Knox, Kossuth, Lancaster, Lee, Lincoln, Linn, Logan, Louisa, Loup, Lucas, Lyon, Madison, Mahaska, Marion, Marshall, Mepherston, Mercer, Merrick, Mills, Mitchell, Monona, Monroe, Montgomery, Morrill, Muscatine, Nance, Nemaha, Nuckolls, Obrien, Osceola, Otoe, Page, Palo Alto, Pawnee, Perkins, Phelps, Pierce, Platte, Plymouth, Pocahontas, Polk, Pottawattamie, Poweshiek, Red Willow, Richardson, Ringgold, Rock, Rock Island, Sac, Saline, Sarpy, Saunders, Scott, Scotts Bluff, Seward, Shelby, Sheridan, Sherman, Sioux, Stanton, Story, Tama, Taylor, Thayer, Thomas, Thurston, Union, Valley, Van Buren, Wapello, Warren, Washington, Wayne, Webster, Wheeler, Winnebago, Winneshiek, Woodbury, Worth, Wright, York	
Deltona/Daytona Beach		
PROPERTY, TENANT & COMPS		
Counties	Alachua, Bay, Bradford, Calhoun, Citrus, Columbia, Dixie, Escambia, Franklin, Gadsden, Gilchrist, Gulf, Hamilton, Holmes, Jackson, Jefferson, Lafayette, Leon, Levy, Liberty, Madison, Marion, Monroe, Okaloosa, Santa Rosa, Sumter, Suwannee, Taylor, Union, Volusia, Wakulla, Walton, Washington	
Denver		
PROPERTY, TENANT & COMPS		
Counties	Adams, Arapahoe, Boulder, Broomfield, Clear Creek, Denver, Douglas, Elbert, Gilpin, Jefferson, Larimer, Park, Weld	

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Des Moines		PROPERTY, TENANT & COMPS
Counties	Adair, Adams, Allamakee, Appanoose, Audubon, Benton, Black Hawk, Boone, Bremer, Buchanan, Buena Vista, Butler, Calhoun, Carroll, Cass, Cedar, Cerro Gordo, Cherokee, Chickasaw, Clarke, Clay, Clayton, Clinton, Crawford, Dallas, Davis, Decatur, Delaware, Des Moines, Dickinson, Dubuque, Emmet, Fayette, Floyd, Franklin, Fremont, Greene, Grundy, Guthrie, Hamilton, Hancock, Hardin, Harrison, Henry, Howard, Humboldt, Ida, Iowa, Jackson, Jasper, Jefferson, Johnson, Jones, Keokuk, Kossuth, Lee, Linn, Louisa, Lucas, Lyon, Madison, Mahaska, Marion, Marshall, Mills, Mitchell, Monona, Monroe, Montgomery, Muscatine, Obrien, Osceola, Page, Palo Alto, Plymouth, Pocahontas, Polk, Pottawattamie, Poweshiek, Ringgold, Sac, Scott, Shelby, Sioux, Story, Tama, Taylor, Union, Van Buren, Wapello, Warren, Washington, Wayne, Webster, Winnebago, Winneshiek, Woodbury, Worth, Wright	
DETROIT		
PROPERTY, TENANT & COMPS		
Counties	Clinton, Eaton, Genesee, Ingham, Lapeer, Livingston, Maconb, Monroe, Oakland, St. Clair, Washtenaw, Wayne	
Duluth		
PROPERTY, TENANT & COMPS		
Counties	Adams, Aitkin, Ashland, Barron, Bayfield, Becker, Beltrami, Benton, Big Stone, Blue Earth, Brown, Buffalo, Burnett, Calumet, Carlton, Cass, Chippewa, Clark, Clay, Clearwater, Cook, Cottonwood, Crawford, Crow Wing, Dodge, Door, Douglas, Dunn, Eau Claire, Faribault, Fillmore, Florence, Forest, Freeborn, Goodhue, Grant, Green, Green Lake, Houston, Hubbard, Iron, Itasca, Jackson, Juneau, Kanabec, Kandiyohi, Kewaunee, Kittson, Koochiching, La Crosse, Lac Qui Parle, Lafayette, Lake, Lake Of Woods, Langlade, Le Sueur, Lincoln, Lyon, Mahanomen, Manitowoc, Marathon, Marinette, Marquette, Marshall, Martin, Meleod, Meeker, Menominee, Mille Lacs, Monroe, Morrison, Mower, Murray, Nicollet, Nobles, Norman, Oconto, Olmsted, Oneida, Otter Tail, Outagamie, Pennington, Pepin, Pine, Pipestone, Polk, Pope, Portage, Price, Red Lake, Redwood, Renville, Rice, Richland, Rock, Roseau, Rusk, Sank, Sawyer, Shawano, Sibley, St Louis, Steele, Stevens, Swift, Taylor, Todd, Traverse, Trempealeau, Vernon, Vilas, Wabasha, Wadena, Waseca, Washburn, Watonwan, Watapuca, Waushara, Wilkin, Winnebago, Winona, Wood, Yellow Medicine	

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Decision and Order

El Paso	PROPERTY, TENANT & COMPS
Counties	Anderson, Andrews, Angelina, Aransas, Archer, Armstrong, Bailey, Baylor, Bee, Bell, Blanco, Borden, Bosque, Bowie, Brazos, Brewster, Briscoe, Brooks, Brown, Burleson, Burnet, Calhoun, Callahan, Cameron, Camp, Carson, Cass, Castro, Cherokee, Childress, Clay, Cochran, Coke, Coleman, Collingsworth, Colorado, Comanche, Concho, Cooke, Coryell, Cottle, Crane, Crockett, Crosby, Culberson, Dallam, Dawson, De Witt, Deaf Smith, Dickens, Dimmit, Donley, Duval, Eastland, Ector, Edwards, El Paso, Erath, Falls, Fannin, Fayette, Fisher, Floyd, Foard, Franklin, Freestone, Frio, Gaines, Garza, Gillespie, Glasscock, Goliad, Gonzales, Gray, Grayson, Gregg, Grimes, Hale, Hall, Hamilton, Hansford, Hardeman, Hardin, Harrison, Hartley, Haskell, Hemphill, Hidalgo, Hill, Hockley, Hopkins, Houston, Howard, Hudspeth, Hutchinson, Irion, Jack, Jackson, Jasper, Jeff Davis, Jefferson, Jim Hogg, Jim Wells, Jones, Karnes, Kenedy, Kent, Kerr, Kimble, King, Kinney, Kleberg, Knox, La Salle, Lamar, Lamb, Lampasas, Lavaca, Lee, Leon, Limestone, Lipscomb, Live Oak, Llano, Loving, Lubbock, Lynn, Madison, Marion, Martin, Mason, Matagorda, Maverick, McCulloch, McLennan, McMullen, Menard, Midland, Milam, Mills, Mitchell, Montague, Moore, Morris, Motley, Nacogdoches, Navarro, Newton, Nolan, Nueces, Ochiltree, Oldham, Orange, Palo Pinto, Panola, Parmer, Pecos, Polk, Potter, Presidio, Rains, Randall, Reagan, Real, Red River, Reeves, Refugio, Roberts, Robertson, Runnels, Rusk, Sabine, San Augustine, San Patricio, San Saba, Schleicher, Scurry, Shackelford, Shelby, Sherman, Smith, Somervell, Starr, Stephens, Sterling, Stonewall, Sutton, Swisher, Taylor, Terrell, Terry, Throckmorton, Titus, Tom Green, Trinity, Tyler, Upshur, Upton, Uvalde, Val Verde, Van Zandt, Victoria, Walker, Ward, Washington, Webb, Wharton, Wheeler, Wichita, Wilbarger, Willacy, Winkler, Wood, Yoakum, Young, Zapata, Zavala
Erie	PROPERTY, TENANT & COMPS
Counties	Bedford, Blair, Bradford, Cambria, Cameron, Centre, Clarion, Clearfield, Clinton, Crawford, Elk, Erie, Forest, Fulton, Greene, Huntingdon, Indiana, Jefferson, Juniata, Lawrence, Lycoming, Mckean, Mercer, Mifflin, Northumberland, Potter, Snyder, Somerset, Sullivan, Susquehanna, Tioga, Union, Venango, Warren, Wayne
Evausville	PROPERTY, TENANT & COMPS
Counties	Gibson, Henderson, Posey, Vanderburgh, Warrick, Webster
Fayetteville	PROPERTY, TENANT & COMPS
Counties	Cumberland, Hoke

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Fayetteville/Springdale/Rogers	PROPERTY, TENANT & COMPS
Counties	Arkansas, Ashley, Baxter, Benton, Boone, Bradley, Calhoun, Carroll, Chicot, Clark, Clay, Cleburne, Cleveland, Columbia, Conway, Craighead, Crawford, Cross, Dallas, Desha, Drew, Faulkner, Franklin, Fulton, Garland, Grant, Greene, Hempstead, Hot Spring, Howard, Independence, Izard, Jackson, Jefferson, Johnson, Lafayette, Lawrence, Lee, Lincoln, Little River, Logan, Lonoke, Madison, Marion, McDonald, Miller, Mississippi, Monroe, Montgomery, Nevada, Newton, Ouachita, Perry, Phillips, Pike, Poinsett, Polk, Pope, Prairie, Pulaski, Randolph, Saline, Scott, Searcy, Sebastian, Sevier, Sharp, St Francis, Stone, Union, Van Buren, Washington, White, Woodruff, Yell
Fort Smith	PROPERTY, TENANT & COMPS
Counties	Arkansas, Ashley, Baxter, Benton, Boone, Bradley, Calhoun, Carroll, Chicot, Clark, Clay, Cleburne, Cleveland, Columbia, Conway, Craighead, Crawford, Cross, Dallas, Desha, Drew, Faulkner, Franklin, Fulton, Garland, Grant, Greene, Hempstead, Hot Spring, Howard, Independence, Izard, Jackson, Jefferson, Johnson, Lafayette, Lawrence, Le Flore, Lee, Lincoln, Little River, Logan, Lonoke, Madison, Marion, Miller, Mississippi, Monroe, Montgomery, Nevada, Newton, Ouachita, Perry, Phillips, Pike, Poinsett, Polk, Pope, Prairie, Pulaski, Randolph, Saline, Scott, Searcy, Sebastian, Sequoyah, Sevier, Sharp, St Francis, Stone, Union, Van Buren, Washington, White, Woodruff, Yell
Fort Wayne	PROPERTY, TENANT & COMPS
Counties	Adams, Allen, Bartholomew, Benton, Blackford, Carroll, Cass, Clark, Clay, Clinton, Crawford, Daviess, Decatur, DeKalb, Dubois, Elkhart, Fayette, Floyd, Fountain, Fulton, Gibson, Grant, Greene, Harrison, Howard, Huntington, Jackson, Jay, Jefferson, Jennings, Knox, Kosciusko, La Porte, LaGrange, Lawrence, Marshall, Martin, Miami, Monroe, Montgomery, Noble, Orange, Owen, Parke, Perry, Pike, Posey, Pulaski, Randolph, Ripley, Rush, Scott, Spencer, St Joseph, Starke, Steuben, Sullivan, Switzerland, Tippecanoe, Tipton, Union, Vanderburgh, Vermillion, Vigo, Wabash, Warren, Warrick, Washington, Wayne, Wells, White, Whitley
Fresno	PROPERTY, TENANT & COMPS
Counties	Amador, Calaveras, Fresno, Kern, Kings, Madera, Mariposa, Merced, San Joaquin, Stanislaus, Tulare, Tuolumne
FRS - Fresno, Madera, Merced Counties (FR, MD, ME)	PROPERTY & TENANT
Counties	Fresno, Kings, Madera, Merced

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Decision and Order

Ft Lauderdale (Broward)	TENANT ONLY
Counties	Broward
FT LDRDALE	COMPS ONLY
Counties	Broward
Green Bay	PROPERTY, TENANT & COMPS
Counties	Adams, Ashland, Barron, Bayfield, Brown, Buffalo, Burnett, Calumet, Chippewa, Clark, Crawford, Door, Douglas, Dunn, Eau Claire, Florence, Forest, Grant, Green Lake, Iron, Jackson, Juneau, Kewaunee, La Crosse, Lafayette, Langlade, Lincoln, Manitowoc, Marathon, Marinette, Marquette, Menominee, Monroe, Oconto, Oneida, Outagamie, Pepin, Pierce, Polk, Portage, Price, Richland, Rusk, Sawyer, Shawano, St Croix, Taylor, Trempealeau, Vernon, Vilas, Washburn, Waupaca, Waushara, Winnebago, Wood
Greensboro/Winston-Salem	PROPERTY, TENANT & COMPS
Counties	Alamance, Davidson, Davie, Forsyth, Guilford, Randolph, Rockingham, Rowan, Stokes, Yadkin
Greenville/Spartanburg	PROPERTY, TENANT & COMPS
Counties	Anderson, Cherokee, Greenville, Laurens, Pickens, Spartanburg
Hampton Roads	PROPERTY, TENANT & COMPS
Counties	Chesapeake, Currituck, Franklin City, Gloucester, Hampton City, Isle Of Wight, James City, Mathews, Newport News, Norfolk City, Poquoson City, Portsmouth, Suffolk City, Surry, Virginia Beach, Williamsburg, York
Hartford	PROPERTY, TENANT & COMPS
Counties	Franklin, Hampden, Hampshire, Hartford, Litchfield, Middlesex, New Haven, New London, Tolland, Windham
HI DESERT	COMPS ONLY
Counties	92301, 92307, 92308, 92311, 92342, 92345, 92347, 92356, 92365, 92368, 92371, 92372, 92392, 92394, 92395
HOUSTON	PROPERTY, TENANT & COMPS
Counties	Austin, Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, San Jacinto, Waller

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Huntington/Ashland	PROPERTY, TENANT & COMPS
Counties	Adair, Adams, Allen, Anderson, Ashland, Athens, Auglaize, Ballard, Barbour, Barren, Bath, Bell, Belmont, Boone, Bourbon, Boyd, Boyle, Braxton, Breathitt, Breckinridge, Brooke, Bullitt, Butler, Cabell, Caldwell, Calhoun, Calloway, Carlisle, Carroll, Carter, Casey, Champaign, Clark, Clay, Clinton, Columbiana, Coshocton, Crawford, Crittenden, Cumberland, Darke, Davess, Defiance, Doddridge, Edmonson, Elliott, Estill, Fayette, Fleming, Floyd, Franklin, Fulton, Gallia, Garrard, Gilmer, Grant, Graves, Grayson, Green, Greenbrier, Greenup, Guernsey, Hampshire, Hancock, Hardin, Hardy, Harlan, Harrison, Hart, Henderson, Henry, Hickman, Highland, Hocking, Holmes, Hopkins, Jackson, Jefferson, Jessamine, Johnson, Kanawha, Knott, Knox, Larue, Laurel, Lawrence, Lee, Leslie, Letcher, Lewis, Lincoln, Livingston, Logan, Lucas, Lyon, Madison, Magoffin, Mahoning, Marion, Marshall, Martin, Mason, Mccracken, Mccreary, McDowell, Meade, Meigs, Menifee, Mercer, Metcalfe, Mineral, Mingo, Monongalia, Monroe, Montgomery, Morgan, Muhlberg, Muskingum, Nelson, Nicholas, Noble, Ohio, Oldham, Ottawa, Owen, Owsley, Paulding, Pendleton, Perry, Pike, Pleasants, Pocahontas, Powell, Preston, Pulaski, Putnam, Raleigh, Randolph, Ritchie, Roane, Robertson, Rockcastle, Ross, Rowan, Russell, Sandusky, Scioto, Scott, Seneca, Shelby, Simpson, Spencer, Summers, Taylor, Todd, Trimble, Trumbull, Tucker, Tuscarawas, Tyler, Union, Upshur, Van Wert, Vinton, Warren, Washington, Wayne, Webster, Wetzel, Whitley, Williams, Wirt, Wolfe, Wood, Woodford, Wyandot, Wyoming
Huntsville	PROPERTY, TENANT & COMPS
Counties	Autauga, Baldwin, Barbour, Bibb, Blount, Bullock, Butler, Calhoun, Chambers, Cherokee, Chilton, Choctaw, Clarke, Clay, Cleburne, Coffee, Colbert, Conecuh, Coosa, Covington, Crenshaw, Cullman, Dale, Dallas, De Kalb, Elmore, Escambia, Etowah, Fayette, Franklin, Geneva, Greene, Hale, Henry, Houston, Jackson, Jefferson, Lamar, Lauderdale, Lawrence, Lee, Limestone, Lowndes, Macon, Madison, Marengo, Marion, Marshall, Mobile, Monroe, Montgomery, Morgan, Perry, Pickens, Pike, Randolph, Russell, Shelby, St Clair, Sumter, Talladega, Tallapoosa, Tuscaloosa, Walker, Washington, Wilcox, Winston
Indianapolis	PROPERTY, TENANT & COMPS
Counties	Boone, Brown, Delaware, Hamilton, Hancock, Hendricks, Henry, Johnson, Madison, Marion, Morgan, Putnam, Shelby
Inland Empire	PROPERTY, TENANT & COMPS
Counties	Riverside, San Bernardino

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Decision and Order

Jackson	PROPERTY, TENANT & COMPS
Counties	Adams, Alcorn, Amite, Attala, Benton, Bolivar, Calhoun, Carroll, Chickasaw, Choctaw, Claiborne, Clarke, Clay, Coahoma, Copiah, Covington, Forrest, Franklin, George, Greene, Grenada, Hancock, Harrison, Hinds, Holmes, Humphreys, Issaquena, Itawamba, Jackson, Jasper, Jeff n Davis, Jefferson, Jones, Kemper, Lafayette, Lamar, Lauderdale, Lawrence, Leake, Lee, LeFlore, Lincoln, Lowndes, Madison, Mariou, Marshall, Monroe, Montgomery, Neshoba, Newton, Noxubec, Okfusbella, Panola, Pearl River, Perry, Pike, Pontotoc, Prentiss, Quitman, Rankin, Scott, Sharkey, Simpson, Smith, Stone, Sunflower, Tallahatchie, Tate, Tippah, Tishomingo, Tunica, Union, Walthall, Warren, Washington, Wayne, Webster, Wilkinson, Winston, Yazoo
Jacksonville	PROPERTY, TENANT & COMPS
Counties	Baker, Clay, Duval, Nassau, St. Johns
Kansas City	PROPERTY, TENANT & COMPS
Counties	Andrew, Atchison, Bates, Buchanan, Caldwell, Cass, Clay, Clinton, De Kalb, Doniphan, Douglas, Franklin, Jackson, Jefferson, Johnson, Lafayette, Leavenworth, Linn, Livingston, Miami, Osage, Platte, Ray, Shawnee, Wabaunsee, Wyandotte

Killeen/Temple/Fort Hood	PROPERTY, TENANT & COMPS
Counties	Anderson, Andrews, Angelina, Aransas, Archer, Armstrong, Bailey, Baylor, Bee, Bell, Blanco, Borden, Bosque, Bowie, Brazos, Brewster, Briscoe, Brooks, Brown, Burleson, Burnet, Calhoun, Callahan, Cameron, Camp, Carson, Cass, Castro, Cherokee, Childress, Clay, Cochran, Coke, Coleman, Collingsworth, Colorado, Comanche, Concho, Cooke, Coryell, Cottle, Crane, Crockett, Crosby, Culberson, Dallam, Dawson, De Witt, Deaf Smith, Dickens, Dimmit, Donley, Duval, Eastland, Ector, Edwards, El Paso, Erath, Falls, Fannin, Fayette, Fisher, Floyd, Foard, Franklin, Freestone, Frio, Gaines, Garza, Gillespie, Glasscock, Goliad, Gonzales, Gray, Grayson, Gregg, Grimes, Hale, Hall, Hamilton, Hansford, Hardeman, Hardin, Harrison, Hartley, Haskell, Hemphill, Hidalgo, Hill, Hockley, Hopkins, Houston, Howard, Hudspeth, Hutchinson, Irion, Jack, Jackson, Jasper, Jeff Davis, Jefferson, Jim Hogg, Jim Wells, Jones, Karnes, Kenedy, Kent, Kerr, Kimble, King, Kinney, Kleberg, Knox, La Salle, Lamar, Lamb, Lampasas, Lavaca, Lee, Leon, Limestone, Lipscomb, Live Oak, Llano, Loving, Lubbock, Lynn, Madison, Marion, Martin, Mason, Matagorda, Maverick, McCulloch, McLennan, McMullen, Menard, Midland, Milan, Mills, Mitchell, Montague, Moore, Morris, Motley, Nacogdoches, Navarro, Newton, Nolan, Nueces, Ochiltree, Oldham, Orange, Palo Pinto, Panola, Parmer, Pecos, Polk, Potter, Presidio, Rains, Randall, Reagan, Real, Red River, Reeves, Refugio, Roberts, Robertson, Runnels, Rusk, Sabine, San Augustine, San Patricio, San Saba, Schleicher, Scurry, Shackelford, Shelby, Sherman, Smith, Somervell, Starr, Stephens, Sterling, Stonewall, Sutton, Swisher, Taylor, Terrell, Terry, Throckmorton, Titus, Tom Green, Trinity, Tyler, Upshur, Upton, Uvalde, Val Verde, Van Zandt, Victoria, Walker, Ward, Washington, Webb, Wharton, Wheeler, Wichita, Wilbarger, Willacy, Winkler, Wood, Yoakum, Young, Zapata, Zavala

Decision and Order

Kingsport Bristol Bristol		PROPERTY, TENANT & COMPS
	Counties	Accomack, Albemarle, Alleghany, Amherst, Anderson, Appomattox, Augusta, Barbour, Bath, Bedford, Bedford City, Benton, Bland, Bledsoe, Blount, Boone, Botetourt, Bradley, Braxton, Bristol City, Brooke, Brunswick, Buchanan, Buckingham, Buena Vista, Cabell, Calhoun, Campbell, Carroll, Carter, Charlotte, Charlottesville, Chester, Claiborne, Clay, Clifton Forge, Cocke, Coffee, Covington City, Craig, Crockett, Culpeper, Cumberland, Danville City, De Kalb, Decatur, Dickenson, Doddridge, Dyer, Emporia City, Essex, Fayette, Fentress, Floyd, Fluvanna, Franklin, Galax City, Gibson, Giles, Gilmer, Grainger, Grant, Grayson, Greenbrier, Greene, Greensville, Grundy, Halifax, Hamblen, Hamilton, Hampshire, Hancock, Hardeman, Hardin, Hardy, Harrison, Harrisonburg, Hawkins, Haywood, Henderson, Henry, Highland, Houston, Humphreys, Jackson, Jefferson, Johnson, Kanawha, Knox, Lake, Lancaster, Landerdale, Lawrence, Lee, Lewis, Lexington City, Lincoln, Logan, Loudon, Lunenburg, Lynchburg City, Madison, Marion, Marshall, Martinsville, Mason, McDowell, Meunim, Menaury, Mecklenburg, Meigs, Mercer, Middlesex, Mineral, Mingo, Monongalia, Monroe, Montgomery, Moore, Morgan, Nelson, Nicholas, Northampton, Northumberland, Norton City, Nottoway, Obion, Ohio, Orange, Overton, Page, Patrick, Pendleton, Perry, Pickett, Pittsylvania, Pleasants, Pocahontas, Polk, Preston, Prince Edward, Pulaski, Putnam, Radford City, Raleigh, Randolph, Rappahannock, Rhea, Richmond, Ritchie, Roane, Roanoke, Roanoke City, Rockbridge, Rockingham, Russell, Salem City, Scott, Sequatchie, Sevier, Shenandoah, Smyth, South Boston, Southampton, Staunton City, Sullivan, Summers, Taylor, Tazewell, Tucker, Tyler, Unicoi, Union, Upshur, Van Buren, Warren, Washington, Wayne, Waynesboro, Weakley, Webster, Westmoreland, Wetzel, White, Wirt, Wise, Wood, Wyoming, Wythe

Knoxville		PROPERTY, TENANT & COMPS
	Counties	Anderson, Bedford, Benton, Bledsoe, Blount, Bradley, Bristol City, Buncombe, Campbell, Carroll, Carter, Catoosa, Chester, Claiborne, Clay, Cocke, Coffee, Crockett, Cumberland, Dade, De Kalb, Decatur, Dyer, Fentress, Franklin, Gibson, Giles, Grainger, Greene, Grundy, Hamblen, Hamilton, Hancock, Hardeman, Hardin, Hawkins, Haywood, Henderson, Henry, Houston, Humphreys, Jackson, Jefferson, Johnson, Knox, Lake, Landerdale, Lawrence, Lewis, Lincoln, Loudon, Madison, Marion, Marshall, Meunim, Menaury, Meigs, Monroe, Moore, Morgan, Obion, Overton, Perry, Pickett, Polk, Putnam, Rhea, Roane, Scott, Sequatchie, Sevier, Sullivan, Unicoi, Union, Van Buren, Walker, Warren, Washington, Wayne, Weakley, White

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LA CENTRAL		COMPS ONLY
	Zip Codes	90006, 90007, 90012, 90013, 90014, 90015, 90017, 90021, 90026, 90030, 90051, 90052, 90053, 90054, 90055, 90057, 90060, 90071, 90079, 90089

LA EAST		COMPS ONLY
	Zip Codes	90006, 90007, 90012, 90013, 90014, 90015, 90017, 90021, 90022, 90026, 90030, 90031, 90032, 90033, 90041, 90042, 90050, 90051, 90052, 90053, 90054, 90055, 90057, 90060, 90063, 90065, 90071, 90079, 90089, 90631, 91001, 91003, 91006, 91007, 91009, 91010, 91016, 91017, 91024, 91025, 91030, 91031, 91101, 91102, 91103, 91104, 91105, 91106, 91107, 91108, 91109, 91114, 91115, 91116, 91117, 91118, 91124, 91125, 91126, 91702, 91706, 91711, 91722, 91723, 91724, 91731, 91732, 91733, 91734, 91740, 91741, 91744, 91745, 91746, 91747, 91748, 91750, 91754, 91755, 91765, 91766, 91767, 91768, 91769, 91770, 91773, 91775, 91776, 91778, 91780, 91789, 91790, 91791, 91792, 91793, 91801, 91802, 91803, 92621

LA NORTH		COMPS ONLY
	Zip Codes	90006, 90007, 90012, 90013, 90014, 90015, 90017, 90021, 90026, 90030, 90039, 90051, 90052, 90053, 90054, 90055, 90057, 90060, 90071, 90079, 90089, 91011, 91012, 91020, 91021, 91040, 91041, 91042, 91043, 91046, 91201, 91202, 91203, 91204, 91205, 91206, 91207, 91208, 91209, 91210, 91214, 91221, 91222, 91224, 91225, 91226, 91301, 91302, 91303, 91304, 91305, 91306, 91307, 91311, 91316, 91321, 91324, 91325, 91326, 91330, 91331, 91335, 91340, 91341, 91342, 91343, 91344, 91345, 91350, 91351, 91352, 91354, 91355, 91356, 91361, 91362, 91364, 91367, 91381, 91384, 91387, 91390, 91401, 91402, 91403, 91404, 91405, 91406, 91407, 91408, 91409, 91411, 91412, 91413, 91423, 91436, 91501, 91502, 91503, 91504, 91505, 91506, 91523, 91601, 91602, 91603, 91604, 91605, 91606, 91607, 91608, 91609, 93510, 93532, 93534, 93535, 93536, 93543, 93544, 93550, 93551, 93552, 93553, 93563, 93591

LA SOUTH		COMPS ONLY
	Zip Codes	90001, 90002, 90003, 90006, 90007, 90011, 90012, 90013, 90014, 90015, 90017, 90021, 90023, 90026, 90030, 90040, 90051, 90052, 90053, 90054, 90055, 90057, 90058, 90059, 90060, 90061, 90071, 90079, 90089, 90201, 90220, 90221, 90222, 90223, 90224, 90240, 90241, 90242, 90248, 90255, 90262, 90270, 90274, 90275, 90280, 90601, 90602, 90603, 90604, 90605, 90606, 90607, 90608, 90631, 90637, 90638, 90639, 90640, 90650, 90660, 90670, 90701, 90703, 90704, 90706, 90712, 90713, 90714, 90715, 90716, 90723, 90731, 90732, 90733, 90744, 90745, 90746, 90747, 90748, 90755, 90801, 90802, 90803, 90804, 90805, 90806, 90807, 90808, 90809, 90810, 90813, 90814, 90815, 90822, 90840, 90846

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LA WEST		COMPS ONLY
Zip Codes		90004, 90005, 90006, 90007, 90008, 90009, 90010, 90012, 90013, 90014, 90015, 90016, 90017, 90018, 90019, 90020, 90021, 90024, 90025, 90026, 90027, 90028, 90029, 90030, 90034, 90035, 90036, 90037, 90038, 90043, 90044, 90045, 90046, 90047, 90048, 90049, 90051, 90052, 90053, 90054, 90055, 90056, 90057, 90060, 90062, 90064, 90066, 90067, 90068, 90069, 90070, 90071, 90072, 90073, 90077, 90079, 90080, 90089, 90094, 90209, 90210, 90211, 90212, 90213, 90230, 90232, 90245, 90247, 90249, 90250, 90254, 90260, 90261, 90265, 90266, 90272, 90277, 90278, 90290, 90291, 90292, 90293, 90301, 90302, 90303, 90304, 90305, 90306, 90307, 90308, 90309, 90310, 90401, 90402, 90403, 90404, 90405, 90406, 90501, 90502, 90503, 90504, 90505, 90506, 90507, 90508, 90509, 90510, 90710, 90717
Lafayette		PROPERTY, TENANT & COMPS
Counties		Acadia, Allen, Ascension, Assumption, Avoyelles, Beauregard, Bienville, Bossier, Caddo, Calcasieu, Caldwell, Cameron, Catahoula, Claiborne, Concordia, De Soto, E Baton Rouge, East Carroll, East Feliciana, Evangeline, Franklin, Grant, Iberia, Iberville, Jackson, Jeff n Davis, Jefferson, La Salle, Lafayette, Lafourche, Lincoln, Livingston, Madison, Morehouse, Natchitoches, Orleans, Ouachita, Plaquemines, Pointe Coupee, Rapides, Red River, Richland, Sabine, St Bernard, St Charles, St Helena, St James, St John Baptist, St Landry, St Martin, St Mary, St Tammany, Tangipahoa, Tensas, Terrebonne, Union, Vermilion, Vernon, W Baton Rouge, Washington, Webster, West Carroll, West Feliciana, Winn
LAS VEGAS		PROPERTY, TENANT & COMPS
Counties		Clark

Lexington/Fayette		PROPERTY, TENANT & COMPS
Counties		Adair, Allen, Anderson, Ballard, Barren, Bath, Bell, Bourbon, Boyd, Boyle, Breathitt, Breckinridge, Bullitt, Butler, Caldwell, Calloway, Carlisle, Carroll, Carter, Casey, Clark, Clay, Clinton, Crittenden, Cumberland, Daviess, Edmonson, Elliott, Estill, Fayette, Fleming, Floyd, Franklin, Fulton, Garrard, Graves, Grayson, Green, Greenson, Hancock, Hardin, Harlan, Harrison, Hart, Henderson, Henry, Hickman, Hopkins, Jackson, Jefferson, Jessamine, Johnson, Knott, Knox, Lantier, Laurel, Lawrence, Lee, Leslie, Letcher, Lewis, Lincoln, Livingston, Logan, Lyon, Madison, Magoffin, Marion, Marshall, Martin, Mason, Mcracken, McCreary, McLean, Meade, Menifee, Mercer, Metcalfe, Monroe, Montgomery, Morgan, Muhlenberg, Nelson, Nicholas, Ohio, Oldham, Owen, Owsley, Perry, Pike, Powell, Pulaski, Robertson, Rockcastle, Rowan, Russell, Scott, Shelby, Simpson, Spencer, Taylor, Todd, Trimble, Union, Warren, Washington, Wayne, Webster, Whitley, Wolfe, Woodford
Lincoln		PROPERTY, TENANT & COMPS
Counties		Adair, Adams, Allamakee, Antelope, Appanoose, Arthur, Audubon, Banner, Benton, Black Hawk, Blaine, Boone, Box Butte, Boyd, Bremer, Brown, Buchanan, Buena Vista, Buffalo, Burt, Butler, Calhoun, Carroll, Cass, Cedar, Cerro Gordo, Chase, Cherokee, Cherry, Cheyenne, Chickasaw, Clarke, Clay, Clayton, Clinton, Colfax, Crawford, Cuming, Custer, Dakota, Dallas, Davis, Dawes, Dawson, Decatur, Delaware, Des Moines, Denel, Dickinson, Dixon, Dodge, Douglas, Dubuque, Dundy, Emmet, Fayette, Fillmore, Floyd, Franklin, Fremont, Frontier, Furnas, Gage, Garden, Garfield, Gosper, Grant, Greeley, Greene, Grundy, Guthrie, Hall, Hamilton, Hancock, Hardin, Harlan, Harrison, Hayes, Henry, Hitchcock, Holt, Hooker, Howard, Humboldt, Ida, Iowa, Jackson, Jasper, Jefferson, Johnson, Jones, Kearney, Keith, Keokuk, Keya Paha, Kimball, Knox, Kosuth, Lancaster, Lee, Lincoln, Linn, Logan, Louisa, Loup, Lucas, Lyon, Madison, Mahaska, Marion, Marshall, Mcpherson, Merrick, Mills, Mitchell, Monona, Monroe, Montgomery, Morrill, Muscatine, Nance, Nemaha, Nuckolls, O'Brien, Osceola, Otoe, Page, Palo Alto, Pawnee, Perkins, Phelps, Pierce, Platte, Plymouth, Pocahontas, Polk, Pottawattamie, Poweshiek, Red Willow, Richardson, Ringgold, Rock, Sac, Saline, Sarpy, Saunders, Scott, Scots Bluff, Seward, Shelby, Sheridan, Sherman, Sioux, Stanton, Story, Tama, Taylor, Thayer, Thomas, Thurston, Union, Valley, Van Buren, Wapello, Warren, Washington, Wayne, Webster, Wheeler, Winnebago, Winnesiek, Woodbury, Worth, Wright, York

Decision and Order

Little Rock/N Little Rock	PROPERTY, TENANT & COMPS
Counties	Arkansas, Ashley, Baxter, Benton, Boone, Bradley, Calhoun, Carroll, Chicot, Clark, Clay, Cleburne, Cleveland, Columbia, Conway, Craighead, Crawford, Cross, Dallas, Desha, Drew, Faulkner, Franklin, Fulton, Garland, Grant, Greene, Hempstead, Hot Spring, Howard, Independence, Izard, Jackson, Jefferson, Johnson, Lafayette, Lawrence, Lee, Lincoln, Little River, Logan, Lonoke, Madison, Marion, Miller, Mississippi, Monroe, Montgomery, Nevada, Newton, Ouachita, Perry, Phillips, Pike, Poinsett, Polk, Pope, Prairie, Pulaski, Randolph, Saline, Scott, Searcy, Sebastian, Sevier, Sharp, St Francis, Stone, Union, Van Buren, Washington, White, Woodruff, Yell
Long Island	PROPERTY, TENANT & COMPS
Counties	Kings, Nassau, Queens, Staten Island, Suffolk
Los Angeles	PROPERTY & TENANT
Counties	Los Angeles, Ventura
Additional Submarkets	East San Bernardino, San Bernardino Outlying, North San Bernardino, Airport Area, West San Bernardino, Seal Beach, Cypress/Los Alamitos Ind, Cypress/Los Alamitos, Buena Park, Buena Park Ind
Louisville	PROPERTY, TENANT & COMPS
Counties	Bullitt, Clark, Floyd, Harrison, Henry, Jefferson, Meade, Nelson, Ohio, Oldham, Shelby, Spencer, Trimble, Washington

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Lubbock	PROPERTY, TENANT & COMPS
Counties	Anderson, Andrews, Angelina, Aransas, Archer, Armstrong, Bailey, Baylor, Bee, Bell, Blanco, Borden, Bosque, Bowie, Brazos, Brewster, Briscoe, Brooks, Brown, Burtison, Burnet, Calhoun, Callahan, Cameron, Camp, Carson, Cass, Castro, Cherokee, Childress, Clay, Cochran, Coke, Coleman, Collingsworth, Colorado, Comanche, Concho, Cooke, Coryell, Cottle, Crane, Crockett, Crosby, Culberson, Dallam, Dawson, De Witt, Deaf Smith, Dickens, Dimmit, Donley, Duval, Eastland, Ector, Edwards, El Paso, Erath, Falls, Fannin, Fayette, Fisher, Floyd, Foard, Franklin, Freestone, Frio, Gaines, Garza, Gillespie, Glasscock, Goliad, Gonzales, Gray, Grayson, Gregg, Grimes, Hale, Hall, Hamilton, Hansford, Hardeman, Hardin, Harrison, Hartley, Haskell, Hemphill, Hidalgo, Hill, Hockley, Hopkins, Houston, Howard, Hudspeth, Hutchinson, Irion, Jack, Jackson, Jasper, Jeff Davis, Jefferson, Jim Hogg, Jim Wells, Jones, Karnes, Kenedy, Kent, Kerr, Kimble, King, Kinney, Kleberg, Knox, La Salle, Lamar, Lamb, Lampasas, Lavaca, Lee, Leon, Limestone, Lipscomb, Live Oak, Llano, Loving, Lubbock, Lynn, Madison, Marion, Martin, Mason, Matagorda, Maverick, McCulloch, McLennan, McMullen, Menard, Midland, Milam, Mills, Mitchell, Montague, Moore, Morris, Motley, Nacogdoches, Navarro, Newton, Nolan, Nueces, Ochiltree, Oldham, Orange, Palo Pinto, Panola, Parmer, Pecos, Polk, Potter, Presidio, Rains, Randall, Reagan, Real, Red River, Reeves, Refugio, Roberts, Robertson, Runnels, Rusk, Sabine, San Augustine, San Patricio, San Saba, Schleicher, Secury, Shackelford, Shelby, Sherman, Smith, Somervell, Starr, Stephens, Sterling, Stonewall, Sutton, Swisher, Taylor, Terrell, Terry, Throckmorton, Titus, Tom Green, Trinity, Tyler, Upshur, Upton, Uvalde, Val Verde, Van Zandt, Victoria, Walker, Ward, Washington, Webb, Wharton, Wheeler, Wichita, Wilbarger, Willacy, Winkler, Wood, Yoakum, Young, Zapata, Zavala
MANHATTAN	COMPS ONLY
Counties	New York County
Marin, Sonoma Counties(MS)	PROPERTY ONLY
Counties	Marin, Sonoma

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Decision and Order

McAllen	PROPERTY, TENANT & COMPS
Counties	Anderson, Andrews, Angelina, Aransas, Archer, Armstrong, Bailey, Baylor, Bee, Bell, Blanco, Borden, Bosque, Bowie, Brazos, Brewster, Briscoe, Brooks, Brown, Burleson, Burnet, Calhoun, Callahan, Cameron, Camp, Carson, Cass, Castro, Cherokee, Childress, Clay, Cochran, Coke, Coleman, Collingsworth, Colorado, Comanche, Concho, Cooke, Coryell, Cottle, Crane, Crockett, Crosby, Culberson, Dallam, Dawson, De Witt, Deaf Smith, Dickens, Dimmit, Donley, Duval, Eastland, Ector, Edwards, El Paso, Erath, Falls, Fannin, Fayette, Fisher, Floyd, Fossard, Franklin, Freestone, Frio, Gaines, Garza, Gillespie, Glasscock, Goliad, Gonzales, Gray, Grayson, Gregg, Grimes, Hale, Hall, Hamilton, Hansford, Hardeman, Hardin, Harrison, Hartley, Haskell, Hemphill, Hidalgo, Hill, Hockley, Hopkins, Houston, Howard, Huddspeth, Hutchinson, Irion, Jack, Jackson, Jasper, Jeff Davis, Jefferson, Jim Hogg, Jim Wells, Jones, Karnes, Kenedy, Kent, Kerr, Kimble, King, Kinney, Kleberg, Knox, La Salle, Lamar, Lamb, Lampasas, Lavaca, Lee, Leon, Limestone, Lipscomb, Live Oak, Llano, Loving, Lubbock, Lynn, Madison, Marion, Martin, Mason, Matagorda, Maverick, McCulloch, McLennan, Memmilen, Menard, Midland, Milam, Mills, Mitchell, Montague, Moore, Morris, Motley, Nacogdoches, Navarro, Newton, Nolan, Nueces, Ochiltree, Oldham, Orange, Palo Pinto, Panola, Parmer, Pecos, Polk, Potter, Presidio, Rains, Randall, Reagan, Real, Red River, Reeves, Refugio, Roberts, Robertson, Runnels, Rusk, Sabine, San Augustine, San Patricio, San Saba, Schleicher, Seury, Shackelford, Shelby, Sherman, Smith, Somervell, Starr, Stephens, Sterling, Stonewall, Sutton, Swisher, Taylor, Terrell, Terry, Throckmorton, Titus, Tom Green, Trinity, Tyler, Upshur, Upton, Uvalde, Val Verde, Van Zandt, Victoria, Walker, Ward, Washington, Webb, Wharton, Wheeler, Wichita, Wilbarger, Willacy, Winkler, Wood, Yoakum, Young, Zapata, Zavala
McAllen/Edinburg/Pharr	PROPERTY, TENANT & COMPS
Counties	Hidalgo
Memphis	PROPERTY, TENANT & COMPS
Counties	Crittenden, DeSoto, Fayette, Marshall, Shelby, Tate, Tipton, Tunica
Miami (Dade)	COMPS & TENANT
Counties	Miami-Dade
Milwaukee	PROPERTY, TENANT & COMPS
Counties	Columbia, Dane, Dodge, Fond Du Lac, Iowa, Jefferson, Kenosha, Milwaukee, Ozaukee, Racine, Rock, Sheboygan, Walworth, Washington, Waukesha

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Minneapolis	PROPERTY, TENANT & COMPS
Counties	Anoka, Benton, Carver, Chisago, Dakota, Hennepin, Isanti, Pierce, Ramsey, Scott, Sherburne, St Croix, Stearns, Washington, Wright
Mobile	PROPERTY, TENANT & COMPS
Counties	Baldwin, Mobile
Mobile/Pensacola	PROPERTY, TENANT & COMPS
Counties	Autauga, Baldwin, Barbour, Bay, Bibb, Blount, Bullock, Butler, Calhoun, Chambers, Cherokee, Chilton, Choctaw, Clarke, Clay, Cleburne, Coffee, Colbert, Conecuh, Coosa, Covington, Crenshaw, Cullman, Dale, Dallas, De Kalb, Elmore, Escambia, Etowah, Fayette, Franklin, Geneva, George, Greene, Hale, Hancock, Harrison, Henry, Holmes, Houston, Jackson, Jefferson, Lamar, Lauderdale, Lawrence, Lee, Limestone, Lowndes, Macon, Madison, Marengo, Marion, Marshall, Mobile, Monroe, Montgomery, Morgan, Perry, Pickens, Pike, Randolph, Russell, Santa Rosa, Shelby, St Clair, Stone, Sumter, Talladega, Tallapoosa, Tuscaloosa, Walker, Walton, Washington, Wilcox, Winston
Montgomery	PROPERTY, TENANT & COMPS
Counties	Autauga, Baldwin, Barbour, Bibb, Blount, Bullock, Butler, Calhoun, Chambers, Cherokee, Chilton, Choctaw, Clarke, Clay, Cleburne, Coffee, Colbert, Conecuh, Coosa, Covington, Crenshaw, Cullman, Dale, Dallas, De Kalb, Elmore, Escambia, Etowah, Fayette, Franklin, Geneva, Greene, Hale, Henry, Houston, Jackson, Jefferson, Lamar, Lauderdale, Lawrence, Lee, Limestone, Lowndes, Macon, Madison, Marengo, Marion, Marshall, Mobile, Monroe, Montgomery, Morgan, Perry, Pickens, Pike, Randolph, Russell, Shelby, St Clair, Sumter, Talladega, Tallapoosa, Tuscaloosa, Walker, Washington, Wilcox, Winston
Myrtle Beach/Conway	PROPERTY, TENANT & COMPS
Counties	Abbeville, Aiken, Allendale, Bamberg, Barnwell, Beaufort, Berkeley, Bladen, Brunswick, Calhoun, Carteret, Charleston, Chesterfield, Clarendon, Colleton, Columbus, Darlington, Dillon, Dorchester, Edgefield, Fairfield, Florence, Georgetown, Greenwood, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Marlboro, McCormick, New Hanover, Newberry, Oconee, Ouslow, Orangeburg, Pender, Richland, Robeson, Saluda, Scotland, Sumter, Union, Williamsburg
N VIRGINIA	COMPS ONLY
Counties	Alexandria, Arlington, Fairfax, Fairfax City, Falls Church, Fauquier, Loudoun, Manassas City, Manassas Park, Prince William, Stafford

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FEDERAL TRADE COMMISSION DECISIONS
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Nashville	PROPERTY, TENANT & COMPS
Counties	Cannon, Cheatham, Christian, Davidson, Dickson, Hickman, Macon, Maury, Montgomery, Robertson, Rutherford, Smith, Stewart, Sumner, Trigg, Trousdale, Williamson, Wilson
New Orleans/Metairie/Kenner	PROPERTY, TENANT & COMPS
Counties	Jefferson, Orleans, Plaquemines, St Bernard, St Charles, St John Baptist, St Tammany
New York (Manhattan)	TENANT ONLY
Counties	New York County
New York City	PROPERTY ONLY
Counties	New York County
New York City Metro	PROPERTY & TENANT
Counties	Bronx, Kings, New York, Queens, Staten Island
Additional Submarkets	Hudson Waterfront, Hudson Waterfront Ind
NEWARK NJ	COMPS ONLY
Counties	Bergen, Essex, Hudson, Hunterdon, Mercer, Middlesex, Monmouth, Morris, Ocean, Orange, Passaic, Pike, Rockland, Somerset, Sussex, Union, Warren
NORTHERN COLORADO	COMPS ONLY
Counties	Larimer, Weld
Northern New Jersey	PROPERTY & TENANT
Counties	Bergen, Essex, Hudson, Hunterdon, Mercer, Middlesex, Monmouth, Morris, Ocean, Orange, Passaic, Pike, Rockland, Somerset, Sussex, Union, Warren
NPA SOLANO	COMPS ONLY
Counties	Napa, Solano
Oakland (East Bay)	PROPERTY & TENANT
Counties	Alameda, Contra Costa, Napa
Additional Submarkets	Milpitas
Ocala	PROPERTY, TENANT & COMPS
Counties	Marion

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Oklahoma City	PROPERTY, TENANT & COMPS
Counties	Adair, Alfalfa, Atoka, Beaver, Beckham, Blaine, Bryan, Caddo, Canadian, Carter, Cherokee, Choctaw, Cimarron, Cleveland, Coal, Comanche, Cotton, Craig, Creek, Custer, Delaware, Dewey, Ellis, Garfield, Garvin, Grady, Grant, Greer, Harmon, Harper, Haskell, Hughes, Jackson, Jefferson, Johnston, Kay, Kingfisher, Kiowa, Latimer, Le Flore, Lincoln, Logan, Love, Major, Marshall, Mayes, McClain, McCurtain, McIntosh, Murray, Muskogee, Noble, Nowata, Okfuskee, Oklahoma, Okmulgee, Osage, Ottawa, Pawnee, Payne, Pittsburg, Pontotoc, Pottawatomie, Pushmataha, Roger Mills, Rogers, Seminole, Sequoyah, Stephens, Texas, Tillman, Tulsa, Wagoner, Washington, Washita, Woods, Woodward
Olympia	PROPERTY, TENANT & COMPS
Counties	Adams, Asotin, Benton, Chelan, Clallam, Columbia, Douglas, Ferry, Franklin, Garfield, Grant, Grays Harbor, Island, Jefferson, Kitsap, Kittitas, Klickitat, Lewis, Lincoln, Mason, Okanogan, Pacific, Pend Oreille, San Juan, Skagit, Spokane, Stevens, Thurston, Wahkiakum, Walla Walla, Whatcom, Whitman, Yakima
Omaha	PROPERTY, TENANT & COMPS
Counties	Adair, Adams, Allamakee, Antelope, Appanoose, Arthur, Audubon, Bannock, Benton, Black Hawk, Blaine, Boone, Box Butte, Boyd, Bremer, Brown, Buchanan, Buena Vista, Buffalo, Burt, Butler, Calhoun, Carroll, Cass, Cedar, Cerro Gordo, Chase, Cherokee, Cherry, Cheyenne, Chickasaw, Clarke, Clay, Clayton, Clinton, Colfax, Crawford, Cumming, Custer, Dakota, Dallas, Davis, Dawes, Dawson, Decatur, Delaware, Des Moines, Deuel, Dickinson, Dixon, Dodge, Douglas, Dubuque, Dundy, Emmet, Fayette, Fillmore, Floyd, Franklin, Fremont, Frontier, Fumas, Gage, Garden, Garfield, Gosper, Grant, Greeley, Greene, Grundy, Guthrie, Hall, Hamilton, Hancock, Hardin, Harlan, Harrison, Hayes, Henry, Hitchcock, Holt, Hooker, Howard, Humboldt, Ida, Iowa, Jackson, Jasper, Jefferson, Johnson, Jones, Kearney, Keith, Keokuk, Keya Paha, Kimball, Knox, Kossuth, Lancaster, Lee, Lincoln, Linn, Logan, Louisa, Loup, Lucas, Lyon, Madison, Malinska, Marion, Marshall, Mepherston, Merrick, Mills, Mitchell, Monona, Monroe, Montgomery, Morrill, Muscatine, Nance, Nemaha, Nockolls, Obrien, Osceola, Otoe, Page, Palo Alto, Pawnee, Perkins, Phelps, Pierce, Platte, Plymouth, Pocahontas, Polk, Pottawattamie, Poweshiek, Red Willow, Richardson, Ringgold, Rock, Sac, Saline, Sarpy, Saunders, Scott, Scotts Bluff, Seward, Shelby, Sheridan, Sherman, Sioux, Stanton, Story, Tama, Taylor, Thayer, Thomas, Thurston, Union, Valley, Van Buren, Wapello, Warren, Washington, Wayne, Webster, Wheeler, Winnebago, Wineshiek, Woodbury, Worth, Wright, York

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Decision and Order

Omaha/Council Bluffs	PROPERTY, TENANT & COMPS
Counties	Cass, Douglas, Harrison, Mills, Pottawattamie, Sarry, Saunders, Washington
Orange County	PROPERTY, TENANT & COMPS
Counties	Orange
Additional Submarkets	Downey Ind, Long Beach North Ind, Long Beach SW Ind, Norwalk/Bellflower Ind, Paramount North Ind, Paramount South Ind, Santa Fe Springs Ind, Signal Hill Ind, Diamond Bar Ind, Montebello/Whittier Ind, Mid-Cities, Southeast Los Angeles, Cerritos Ind, Long Beach SE Ind, Long Beach: Suburban, La Mirada Ind, Lakewood Ind, Long Beach: Downtown
Orlando	PROPERTY, TENANT & COMPS
Counties	Brevard, Lake, Orange, Osceola, Seminole
Pensacola/Ferry Pass/Brent	PROPERTY, TENANT & COMPS
Counties	Escambia, Santa Rosa
Peoria	PROPERTY, TENANT & COMPS
Counties	Adams, Alexander, Brown, Bureau, Carroll, Cass, Champaign, Christian, Clark, Clay, Coles, Crawford, Cumberland, De Witt, Douglas, Edgar, Edwards, Effingham, Fayette, Ford, Franklin, Fulton, Gallatin, Greene, Hamilton, Hancock, Hardin, Henderson, Henry, Iroquois, Jackson, Jasper, Jefferson, Jo Daviess, Johnson, Kane, Kanawha, Knox, Lawrence, Livingston, Logan, Macon, Marion, Marshall, Mason, Massac, McDonough, McLean, Menard, Mercer, Montgomery, Morgan, Moultrie, Peoria, Perry, Piatt, Pike, Pope, Pulaski, Putnam, Randolph, Richland, Rock Island, Saline, Sangamon, Schuyler, Scott, Shelby, Stark, Stephenson, Tazewell, Union, Vermillion, Wabash, Warren, Washington, Wayne, White, Whiteside, Williamson, Woodford
PHI 5 Counties	COMPS ONLY
Counties	Bucks, Chester, Delaware, Montgomery, Philadelphia
Philadelphia Metro & Suburbs	PROPERTY & TENANT
Counties	Adams, Atlantic, Berks, Bucks, Burlington, Camden, Carbon, Chester, Columbia, Cumberland, Dauphin, Delaware, Franklin, Gloucester, Kent, Lackawanna, Lancaster, Lebanon, Lehigh, Luzerne, Monroe, Montgomery, Montour, New Castle, Northampton, Perry, Philadelphia, Salem, Schuylkill, Sussex, Wyoming, York
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PHILADELPHIA	COMPS ONLY
Counties	Adams, Atlantic, Berks, Bucks, Burlington, Camden, Carbon, Chester, Columbia, Cumberland, Dauphin, Delaware, Franklin, Gloucester, Kent, Lackawanna, Lancaster, Lebanon, Lehigh, Luzerne, Monroe, Montgomery, Montour, New Castle, Northampton, Perry, Philadelphia, Salem, Schuylkill, Sussex, Wyoming, York
PHOENIX	PROPERTY, TENANT & COMPS
Counties	Maricopa, Pinal
Pittsburgh	PROPERTY, TENANT & COMPS
Counties	Allegheny, Armstrong, Beaver, Butler, Fayette, Washington, Westmoreland
Port St Lucie/Fort Pierce	PROPERTY, TENANT & COMPS
Counties	Alachua, Bay, Bradford, Calhoun, Citrus, Columbia, Dixie, Escambia, Franklin, Gadsden, Gilchrist, Gulf, Hamilton, Holmes, Jackson, Jefferson, Lafayette, Leon, Levy, Liberty, Madison, Marion, Martin, Monroe, Okaloosa, Santa Rosa, St Lucie, Sumter, Suwannee, Taylor, Union, Wakulla, Walton, Washington
PORTLAND	PROPERTY, TENANT & COMPS
Counties	Clackamas, Clark, Columbia, Clatsop, Deschutes, Lane, Linn, Marion, Multnomah, Polk, Skamania, Washington, Yamhill
Portland/South Portland	PROPERTY, TENANT & COMPS
Counties	Androscoggin, Aroostook, Cumberland, Franklin, Hancock, Kennebec, Knox, Lincoln, Oxford, Penobscot, Piscataquis, Sagadahoc, Somerset, Waldo, Washington, York
Providence	PROPERTY, TENANT & COMPS
Counties	Bristol, Kent, Newport, Providence, Washington
Raleigh/Durham	PROPERTY, TENANT & COMPS
Counties	Alamance, Chatham, Durham, Franklin, Johnston, Orange, Person, Wake
Reno/Sparks	PROPERTY, TENANT & COMPS
Counties	Carson City, Churchill, Douglas, Elko, Esmeralda, Eureka, Humboldt, Lander, Lincoln, Lyon, Mineral, Nye, Pershing, Storey, Washoe, White Pine
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Decision and Order

Richmond	PROPERTY, TENANT & COMPS
Counties	Amelia, Caroline, Charles City, Chesterfield, Colonial Hgts Cty, Cumberland, Dinwiddie, Fredericksburg, Goochland, Hanover, Henrico, Hopewell City, King And Queen, King George, King William, Louisa, New Kent, Petersburg, Powhatan, Prince George, Richmond, Richmond City, Spotsylvania, Stafford, Sussex
Roanoke	PROPERTY, TENANT & COMPS
Counties	Accomack, Albemarle, Alleghany, Amherst, Appomattox, Augusta, Barbour, Bath, Bedford, Bedford City, Bland, Boone, Botetourt, Braxton, Bristol City, Brooke, Brunswick, Buchanan, Buckingham, Buena Vista, Cabell, Callhoun, Campbell, Carroll, Charlotte, Charlottesville, Clay, Clifton Forge, Covington City, Craig, Culpeper, Danville City, Dickenson, Doddridge, Emporia City, Essex, Fayette, Floyd, Fluvanna, Franklin, Galax City, Giles, Gilmer, Grant, Grayson, Greenbrier, Greene, Greensville, Halifax, Hampshire, Hancock, Hardy, Harrison, Harrisonburg, Henry, Highland, Jackson, Kanawha, Lancaster, Lee, Lewis, Lexington City, Lincoln, Logan, Lunenburg, Lynchburg City, Madison, Marion, Marshall, Martinsville, Mason, Medowell, Mecklenburg, Mercer, Middlesex, Mineral, Mingo, Monongalia, Monroe, Montgomery, Nelson, Nicholas, Northampton, Northumberland, Norton City, Nottoway, Ohio, Orange, Page, Patrick, Pendleton, Pittsylvania, Pleasants, Pocahontas, Preston, Prince Edward, Pulaski, Putnam, Radford City, Raleigh, Randolph, Rappahannock, Richmond, Ritchie, Roome, Roanoke, Roanoke City, Rockbridge, Rockingham, Russell, Salem City, Scott, Shenandoah, Smyth, South Boston, Southampton, Staunton City, Summers, Taylor, Tazewell, Tucker, Tyler, Upslar, Washington, Wayne, Waynesboro, Webster, Westmoreland, Wetzel, Wirt, Wise, Wood, Wyoming, Wythe
Rochester	PROPERTY, TENANT & COMPS
Counties	Albany, Allegany, Broome, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Erie, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Monroe, Montgomery, Niagara, Oneida, Onondaga, Ontario, Orleans, Oswego, Orsego, Rensselaer, Saratoga, Schenectady, Schoharie, Schuyler, Seneca, St Lawrence, Steuben, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington, Wayne, Wyoming, Yates
SACRAMENTO	PROPERTY, TENANT & COMPS
Counties	El Dorado, Placer, Sacramento, San Joaquin, Solano, Sutter, Yolo, Yuba
Salinas	PROPERTY, TENANT & COMPS
Counties	Salinas

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Salt Lake City	PROPERTY, TENANT & COMPS
Counties	Cache, Davis, Franklin, Juab, Morgan, Salt Lake, Summit, Tooele, Utah, Weber
San Antonio	PROPERTY, TENANT & COMPS
Counties	Atascosa, Bandera, Bexar, Comal, Guadalupe, Kendall, Medina, Wilson
San Bernardino/Riverside (Inland Empire)	TENANT ONLY
Counties	Riverside, San Bernardino
San Diego	PROPERTY, TENANT & COMPS
Counties	San Diego
Additional Submarkets	South Riverside
San Francisco	PROPERTY & TENANT
Counties	San Francisco, San Mateo
Additional Submarkets	Palo Alto South, Embarcadero/101, Downtown Palo Alto
San Jose (South Bay)	PROPERTY & TENANT
Counties	San Benito, Santa Clara
Additional Submarkets	Newark, Menlo Park-Sand Hill, Menlo Park-Atherton, Menlo Park-East/EPA, Fremont West of 880, Fremont East of 880
San Luis Obispo/Paso Robles	PROPERTY, TENANT & COMPS
Counties	Kern, San Luis Obispo, Santa Barbara
Santa Barbara/Sta Maria/Goleta	PROPERTY, TENANT & COMPS
Counties	Kern, San Luis Obispo, Santa Barbara
Santa Cruz/Watsonville	PROPERTY, TENANT & COMPS
Counties	Monterey, Santa Cruz
Savannah	PROPERTY, TENANT & COMPS
Counties	Bryan, Chatham, Effingham
Seattle	PROPERTY, TENANT & COMPS
Counties	King, Pierce, Snohomish

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Decision and Order

Shreveport/Bossier City		PROPERTY, TENANT & COMPS
	Counties	Acadia, Allen, Ascension, Assumption, Avoyelles, Beauregard, Bienville, Bossier, Caddo, Calcasieu, Caldwell, Cameron, Catahoula, Claiborne, Concordia, De Soto, E Baton Rouge, East Carroll, East Feliciana, Evangeline, Franklin, Grant, Iberia, Iberville, Jackson, Jeff'n Davis, Jefferson, La Salle, Lafayette, Lafourche, Lincoln, Livingston, Madison, Morehouse, Natchitoches, Orleans, Ouachita, Plaquemines, Pointe Coupee, Rapides, Red River, Richland, Sabine, St Bernard, St Charles, St Helena, St James, St John Baptist, St Landry, St Martin, St Mary, St Tammany, Tangipahoa, Tensas, Terrebonne, Union, Vermilion, Vernon, W Baton Rouge, Washington, Webster, West Carroll, West Feliciana, Winn
SNJ 3 Counties		COMPS ONLY
	Counties	Burlington, Camden, Gloucester
SNTA CLARA		COMPS ONLY
	Counties	San Benito, Santa Clara
Additional Submarkets		Newark, Menlo Park-Sand Hill, Menlo Park-Atherton, Menlo Park-East/EPA, Fremont West of 880, Fremont East of 880
South Bend/Mishawaka		PROPERTY, TENANT & COMPS
	Counties	Adams, Allen, Bartholomew, Benton, Blackford, Carroll, Cass, Clark, Clay, Clinton, Crawford, Daviess, Decatur, Dekalb, Dubois, Elkhart, Fayette, Floyd, Fountain, Fulton, Gibson, Grant, Greene, Harrison, Howard, Huntington, Jackson, Jay, Jefferson, Jennings, Knox, Kosciusko, La Porte, LaGrange, Lawrence, Marshall, Martin, Miami, Monroe, Montgomery, Noble, Orange, Owen, Parke, Perry, Pike, Posey, Pulaski, Randolph, Ripley, Rush, Scott, Spencer, St Joseph, Starke, Steuben, Sullivan, Switzerland, Tippecanoe, Tipton, Union, Vanderburgh, Vermillion, Vigo, Wabash, Warren, Warrick, Washington, Wayne, Wells, White, Whitley
South Florida		PROPERTY & TENANT
	Counties	Broward, Miami/Dade, Palm Beach
Southwest Florida		PROPERTY, TENANT & COMPS
	Counties	Charlotte, Collier, Lee, Sarasota

Spokane		PROPERTY, TENANT & COMPS
	Counties	Ada, Adams, Asotin, Bannock, Bear Lake, Benewah, Benton, Bingham, Blaine, Boise, Bonner, Bonneville, Boundary, Butte, Camas, Canyon, Caribou, Cassia, Chelan, Clallam, Clark, Clearwater, Columbia, Custer, Douglas, Elmore, Ferry, Franklin, Fremont, Garfield, Gem, Gooding, Grant, Grays Harbor, Idaho, Island, Jefferson, Jerome, Kitsap, Kittitas, Klickitat, Kootenai, Latah, Lenhi, Lewis, Lincoln, Madison, Mason, Minidoka, Nez Perce, Okanogan, Oneida, Owyhee, Pacific, Payette, Pend Oreille, Power, San Juan, Shoshone, Skagit, Spokane, Stevens, Teton, Thurston, Twin Falls, Valley, Wahkiakum, Walla Walla, Washington, Whatcom, Whitman, Yakima
Springfield (Missouri)		PROPERTY, TENANT & COMPS
	Counties	Adair, Atchison, Audrain, Barry, Barton, Benton, Bollinger, Boone, Butler, Callaway, Camden, Cape Girardeau, Carroll, Carter, Cedar, Chariton, Christian, Clark, Cole, Cooper, Dade, Dallas, Daviess, Dent, Douglas, Dunklin, Gasconade, Gentry, Greene, Grundy, Harrison, Henry, Hickory, Holt, Howard, Howell, Iron, Jasper, Knox, LaClede, Lawrence, Lewis, Linn, Macon, Madison, Maries, Marion, McDonald, Mercer, Miller, Mississippi, Moniteau, Monroe, Montgomery, Morgan, New Madrid, Newton, Nodaway, Oregon, Osage, Ozark, Pemiscot, Perry, Pettis, Phelps, Pike, Polk, Pulaski, Putnam, Ralls, Randolph, Reynolds, Ripley, Saline, Schuyler, Scotland, Scott, Shannon, Shelby, St Clair, St Francois, Ste Genevieve, Stoddard, Stone, Sullivan, Taney, Texas, Vernon, Wayne, Webster, Worth, Wright
ST. LOUIS		PROPERTY, TENANT & COMPS
	Counties	Bond, Calhoun, Clinton, Crawford, Franklin, Jefferson, Jersey, Lincoln, Macoupin, Madison, Monroe, St. Charles, St. Clair, St. Louis, St. Louis City, Warren, Washington
STCK MDESTO		PROPERTY, TENANT & COMPS
	Counties	San Joaquin, Stanislaus
Stockton/Modesto		PROPERTY, TENANT & COMPS
	Counties	Amador, Calaveras, Fresno, Kern, Kings, Madera, Mariposa, Merced, San Joaquin, Stanislaus, Tulare, Tuolumne

Decision and Order

Syracuse	PROPERTY, TENANT & COMPS
Counties	Albany, Allegany, Broome, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Erie, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Monroe, Montgomery, Niagara, Oneida, Onondaga, Ontario, Orleans, Oswego, Otsego, Rensselaer, Saratoga, Schenectady, Schoharie, Schuyler, Seneca, St Lawrence, Steuben, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington, Wayne, Wyoming, Yates
Tallahassee	PROPERTY, TENANT & COMPS
Counties	Alachua, Bay, Bradford, Calhoun, Citrus, Columbia, Dixie, Escambia, Franklin, Gadsden, Gilchrist, Gulf, Hamilton, Holmes, Jackson, Jefferson, Lafayette, Leon, Levy, Liberty, Madison, Marion, Okaloosa, Santa Rosa, Sumter, Suwannee, Taylor, Union, Wakulla, Walton, Washington
TAMPA	PROPERTY, TENANT & COMPS
Counties	Hernando, Hillsborough, Manatee, Pasco, Pinellas, Polk, Sarasota
Toledo	PROPERTY, TENANT & COMPS
Counties	Fulton, Hancock, Henry, Lenawee, Lucas, Monroe, Ottawa, Sandusky, Seneca, Wood
TRNTON CNJ	COMPS ONLY
Counties	Mercer, Middlesex, Monmouth, Somerset
Tucson	PROPERTY, TENANT & COMPS
Counties	Pima, Pinal
Tulsa	PROPERTY, TENANT & COMPS
Counties	Adair, Alfalfa, Atoka, Beaver, Beckham, Blaine, Bryan, Caddo, Canadian, Carter, Cherokee, Choctaw, Cimarron, Cleveland, Coal, Comanche, Cotton, Craig, Creek, Custer, Delaware, Dewey, Ellis, Garfield, Garvin, Grady, Grant, Greer, Harmon, Harper, Haskell, Hughes, Jackson, Jefferson, Johnston, Kay, Kingfisher, Kiowa, Latimer, Le Flore, Lincoln, Logan, Love, Major, Marshall, Mayes, McClain, McCurtain, McIntosh, Murray, Muskogee, Noble, Nowata, Okfuskee, Oklahoma, Okmulgee, Osage, Ottawa, Pawnee, Payne, Pittsburg, Pontotoc, Pottawatomie, Pushmataha, Roger Mills, Rogers, Seminole, Sequoyah, Stephens, Texas, Tillman, Tulsa, Wagoner, Washington, Washita, Woods, Woodward

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Utica-Rome	PROPERTY, TENANT & COMPS
Counties	Albany, Allegany, Broome, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Erie, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Monroe, Montgomery, Niagara, Oneida, Onondaga, Ontario, Orleans, Oswego, Otsego, Rensselaer, Saratoga, Schenectady, Schoharie, Schuyler, Seneca, St Lawrence, Steuben, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington, Wayne, Wyoming, Yates
Visalia/Porterville	PROPERTY, TENANT & COMPS
Counties	Amador, Calaveras, Fresno, Kern, Kings, Madera, Mariposa, Merced, San Joaquin, Stanislaus, Tulare, Tuolumne
W PALM BCH	COMPS ONLY
Counties	Palm Beach
WASH DC	COMPS ONLY
Counties	Charles, District of Columbia, Fauquier, Frederick, Montgomery, Prince George's, Stafford, Washington
Washington DC Metro	PROPERTY & TENANT
Counties	Alexandria, Arlington, Berkeley, Calvert, Caroline, Charles, Clarke, District of Columbia, Fairfax, Fairfax City, Falls Church, Fauquier, Frederick, Fredericksburg, Hampshire, Jefferson, King George, Loudoun, Manassas City, Manassas Park, Montgomery, Morgan, Prince George's, Prince William, Spotsylvania, St Marys, Stafford, Warren, Washington, Winchester
West Michigan	PROPERTY, TENANT & COMPS
Counties	Alcona, Alger, Allegan, Alpena, Antrim, Arenac, Baraga, Barry, Bay, Benzie, Berrien, Branch, Calhoun, Cass, Charlevoix, Cheboygan, Chippewa, Clare, Clinton, Crawford, Delta, Dickinson, Eaton, Emmet, Gladwin, Gogebic, Grand Traverse, Gratiot, Hillsdale, Houghton, Huron, Ingham, Ionia, Iosco, Iron, Isabella, Jackson, Kalamazoo, Kalkaska, Kent, Keweenaw, Lake, Leelanau, Lenawee, Lapeer, Mackinac, Manistee, Marquette, Mason, Mecosta, Menominee, Midland, Missaukee, Montcalm, Montmorency, Muskegon, Newaygo, Oceana, Ogemaw, Ontonagon, Osceola, Oscoda, Otsego, Ottawa, Presque Isle, Roscommon, Saginaw, Sanilac, Schoolcraft, Shiawassee, St. Joseph, Tuscola, Van Buren, Wexford
West Palm Beach	TENANT ONLY
Counties	Palm Beach

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Westchester/Southern CT		PROPERTY, TENANT & COMPS
Counties	Bronx, Dutchess, Fairfield, Litchfield, New Haven, Putnam, Westchester	
Wichita		PROPERTY, TENANT & COMPS
Counties	Allen, Anderson, Barber, Barton, Bourbon, Brown, Butler, Chase, Chautauqua, Cherokee, Cheyenne, Clark, Clay, Cloud, Coffey, Comanche, Cowley, Crawford, Decatur, Dickinson, Edwards, Elk, Ellis, Ellsworth, Finney, Ford, Geary, Gove, Graham, Grant, Gray, Greeley, Greenwood, Hamilton, Harper, Harvey, Haskell, Hodgeman, Jewell, Kearny, Kingman, Kiowa, Labette, Lane, Lincoln, Logan, Lyon, Marion, Marshall, Mcpherson, Meade, Mitchell, Montgomery, Morris, Morton, Nemaha, Neosho, Ness, Norton, Osborne, Ottawa, Pawnee, Phillips, Pottawatomie, Pratt, Rawlins, Reno, Republic, Rice, Riley, Rooks, Rush, Russell, Saline, Scott, Sedgwick, Seward, Sheridan, Sherman, Smith, Stafford, Stanton, Stevens, Sumner, Thomas, Trego, Wallace, Washington, Wichita, Wilson, Woodson	
Wilmington (North Carolina)		PROPERTY, TENANT & COMPS
Counties	Alleghany, Ashe, Avery, Beaufort, Bertie, Bladen, Brunswick, Buncombe, Camden, Carteret, Caswell, Cherokee, Chowan, Clay, Columbus, Craven, Cumberland, Dare, Duplin, Edgecombe, Gates, Graham, Granville, Greene, Halifax, Harnett, Haywood, Henderson, Hertford, Hoke, Hyde, Jackson, Jones, Lee, Lenoir, Macon, Madison, Martin, McDowell, Mitchell, Montgomery, Moore, Nash, New Hanover, Northampton, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Pitt, Polk, Richmond, Robeson, Rutherford, Sampson, Scotland, Surry, Swain, Transylvania, Tyrrell, Vance, Warren, Washington, Watanga, Wayne, Wilkes, Wilson, Yancey	
Additional Submarkets		Carolina Beach
Yakima		PROPERTY, TENANT & COMPS
Counties	Adams, Asotin, Benton, Chelan, Clallam, Columbia, Douglas, Ferry, Franklin, Garfield, Grant, Grays Harbor, Island, Jefferson, Kitsap, Kittitas, Klickitat, Lewis, Lincoln, Mason, Okanogan, Pacific, Pend Oreille, San Juan, Skagit, Spokane, Stevens, Thurston, Wahkiakum, Walla Walla, Whatcom, Whitman, Yakima	

Youngstown Warren Boardman		PROPERTY, TENANT & COMPS
Counties	Adams, Allen, Ashland, Athens, Auglaize, Belmont, Champaign, Clinton, Columbiana, Coshoccon, Crawford, Darke, Defiance, Fayette, Fulton, Gallia, Guernsey, Hancock, Hardin, Harrison, Henry, Highland, Hocking, Holmes, Jackson, Jefferson, Knox, Lawrence, Logan, Lucas, Mahoning, Marion, Meigs, Mercer, Monroe, Morgan, Muskingum, Noble, Ottawa, Paulding, Perry, Pike, Putnam, Ross, Sandusky, Scioto, Seneca, Shelby, Trumbull, Tuscarawas, Van Wert, Vinton, Washington, Wayne, Williams, Wood, Wyandot	

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Confidential Appendix B**Currently Restricted Customers****[Redacted From the Public Record Version, But Incorporated
By Reference]****Confidential Appendix C****Core Based Statistical Areas for LoopNet Customer Data****[Redacted From the Public Record Version, But Incorporated
By Reference]****Confidential Appendix D****List of LoopNet Employeesa Excluded From the Definition of
“Potential Employee”****[Redacted From the Public Record Version, But Incorporated
By Reference]**

Decision and Order

Appendix E

APPENDIX E

To settle concerns arising from CoStar Group, Inc.'s ("CoStar") proposed acquisition of LoopNet, Inc. ("LoopNet"), CoStar has agreed to enter into a consent order (the "Order") with the Federal Trade Commission ("FTC"). This document explains some provisions of the Order that may affect how CoStar does business with you. The FTC and CoStar agreed that CoStar would send this document to you to be sure you are aware of the Order and its key terms.

This Order does not impose obligations on you. Rather, it gives you certain rights in your business dealings with CoStar. Below is a brief description of those rights, and directions on how you can get more information about the FTC's Order.

You are defined in the Order as a "Currently Restricted Customer," meaning that the Order grants you new rights under your contract with CoStar. First, CoStar must quickly modify your contract to allow you, if you want: (1) to provide commercial real estate listings and information derived independently from CoStar's databases to CoStar's competitors; (2) to subscribe to a commercial real estate listings or information product offered by CoStar's competitors; (3) to invest in CoStar's competitors (up to a limit); and (4) to endorse publicly services or products marketed by CoStar's competitors.

But if you decide to modify your contract with CoStar so as to allow you to provide commercial real estate listings and information to CoStar's competitors, or if you choose to make a passive investment of 10% or more of the equity in a CoStar competitor, the Order permits CoStar to require you to keep records to verify that any of the listings or information provided to CoStar's competitors were derived independently of CoStar's databases. CoStar also may require you to agree to occasional confidential audits conducted by a monitor, who the FTC has appointed at CoStar's expense, to verify that information from CoStar's database has not been provided to CoStar's competitors. The Order further permits CoStar to prohibit you from acquiring an interest of greater than 20% in a CoStar competitor or from participating in the management of a CoStar competitor. In addition, the Order allows CoStar to prohibit you from making your employees available on a regular or recurring basis to gather information for CoStar's competitors. These limitations may be part of the contract modification.

Also, if you have a contract with CoStar that has a term longer than 1 year, the Order allows you to terminate the contract, for any reason and without payment or penalty of any kind, on 1 year's written notice.

The Order also protects you from the early termination of your contract by CoStar except in certain circumstances. With a few exceptions, CoStar may not terminate its services without prior notice to you, unless: (1) CoStar obtains an order from a judge or an arbitrator; or (2) CoStar follows a procedure outlined in the Order that requires CoStar to provide written notice of the termination to the monitor, discuss the reasons for the termination with you within 2 days after the termination, and follow other steps. In many circumstances, you will have the right to arbitrate any contract dispute with CoStar.

Decision and Order

The Order also ensures that CoStar will not penalize you if you provide commercial real estate listings or information to CoStar's competitors, endorse or invest in CoStar's competitors, or exercise your right to terminate a multi-year contract. CoStar may continue to charge different prices and offer different products to its customers, and may terminate or decline to renew contracts if customers refuse to agree to the contract terms permitted by the Order. However, the Order generally ensures that CoStar will not offer less favorable prices, product offerings, or other contract terms, and will not terminate your relationship with CoStar because you are doing business with CoStar's competitors.

The Order gives you additional protections with respect to how you purchase CoStar products. For example, CoStar may not require you to subscribe to one of CoStar's products as a condition to subscribing to another CoStar product. Similarly, CoStar may not require you to subscribe to products covering one or several geographic areas as a condition to subscribing to products covering other geographic areas. However, CoStar may continue to offer its customers discounts if they purchase more than one of CoStar's products or subscribe to products covering more than one geographic area. CoStar also may offer its listings and information products to its customers bundled together on new platforms, although CoStar has agreed that if it does, it will also continue to offer the products separately for about 3 years at commercially reasonable prices.

For more information: This document summarizes some but not all of the Order and its terms. CoStar's actual obligations are described in the Order itself, which you can read and download in its entirety on the Federal Trade Commission's web site at [insert link]. If you have any questions about the Order, you may contact CoStar at ftccompliance@costar.com or the FTC at [link]. Guy Dorey is the FTC's monitor; you may reach him at guy@dorey.com.

Decision and Order

Appendix F

APPENDIX F

To settle concerns arising from CoStar Group, Inc.'s ("CoStar") proposed acquisition of LoopNet Inc. ("LoopNet"), CoStar has agreed to enter into a consent order (the "Order") with the Federal Trade Commission ("FTC"). This document explains some provisions of the Order that may affect how CoStar does business with you. The FTC and CoStar agreed that CoStar would send this document to you to be sure you are aware of the Order and its key terms.

This Order does not impose obligations on you. Rather, it gives you certain rights in your business dealings with CoStar. Below is a brief description of those rights, and directions on how you can get more information about the FTC's Order.

The Order makes clear that you may choose to do business and to provide commercial real estate listings and information to CoStar's competitors, and that CoStar won't offer you less favorable price or other contract terms because of that. CoStar may by contract continue to prohibit you from providing data from CoStar's database to CoStar's competitors. However, your contract allows you to provide CoStar's competitors with commercial real estate listings and information derived independently of CoStar's databases.

The Order also protects you from the early termination of your contract by CoStar except in certain circumstances. With a few exceptions, CoStar may not terminate its services without prior notice to you, unless: (1) CoStar obtains an order from a judge or an arbitrator; or (2) CoStar follows a procedure outlined in the Order that requires CoStar to provide written notice of the termination to the monitor appointed by the Commission, discuss the reasons for the termination with you within 2 days after the termination, and follow other steps. In many circumstances, you will have the right to arbitrate any contract dispute with CoStar.

The Order also ensures that CoStar will not penalize you if you provide commercial real estate listings or information to CoStar's competitors, endorse or invest in CoStar's competitors, or exercise your right to terminate a multi-year contract. CoStar may continue to charge different prices and offer different products to its customers, and may terminate or decline to renew contracts if customers do not agree to the contract terms permitted by the Order. However, the Order generally ensures that CoStar will not offer less favorable prices, product offerings, or other contract terms, and will not terminate your relationship with CoStar because you are doing business with CoStar's competitors.

The Order gives you additional protections with respect to how you purchase CoStar products. For example, CoStar may not require you to subscribe to one of CoStar's products as a condition to subscribing to another CoStar product. Similarly, CoStar may not require you to subscribe to products covering one or several geographic areas as a condition to subscribing to products covering other geographic areas. However, CoStar may continue to offer its customers discounts if they purchase more than one of CoStar's products or subscribe to products covering more than one geographic area. CoStar also may offer its listings and information products to its customers bundled together on new platforms, although CoStar has agreed that if it does, it will also continue to offer the products separately for about 3 years at commercially reasonable prices.

Decision and Order

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Decision and Order

Appendix G

APPENDIX G

To settle concerns arising from CoStar Group, Inc.'s ("CoStar") proposed acquisition of LoopNet, Inc. ("LoopNet"), CoStar has agreed to enter into a consent order (the "Order") with the Federal Trade Commission ("FTC"). This document explains some provisions of the Order that may affect how CoStar does business with you. The FTC and CoStar agreed that CoStar would send this document to you to be sure you are aware of the Order and its key terms.

This Order does not impose obligations on you. Rather, it gives you certain rights in your business dealings with CoStar. Below is a brief description of those rights, and directions on how you can get more information about the FTC's Order.

You do not have to contract with CoStar to accept a data extract or the right to maintain data from a CoStar database in your database. However, if you do contract with CoStar to accept a data extract or the right to maintain data from a CoStar database in your database, you may become a "Future Restricted Customer" as that term is defined by the Order. For Future Restricted Customers that choose to provide commercial real estate listings and information to CoStar's competitors, the Order permits CoStar to enter contracts with them to keep records to verify that any of the listings or information provided to CoStar's competitors were derived independently of CoStar's databases. CoStar also may contract with such customers to agree to occasional confidential audits conducted by a monitor, who the FTC has appointed at CoStar's expense, to verify that information from CoStar's database has not been provided to CoStar's competitors. The Order further permits CoStar to enforce contract terms prohibiting Future Restricted Customers from acquiring an interest of greater than 20% in a CoStar competitor or from participating in the management of a CoStar competitor. In addition, the Order allows CoStar to enforce contract terms to prohibit Future Restricted Customers from making their employees available on a regular or recurring basis to gather information for CoStar's competitors.

If you have a contract with CoStar that has a term longer than 1 year, the Order allows you to terminate the contract, for any reason and without payment or penalty of any kind, on 1 year's written notice.

The Order also protects you from the early termination of your contract by CoStar except in certain circumstances. With a few exceptions, CoStar may not terminate its services without prior notice to you, unless: (1) CoStar obtains an order from a judge or an arbitrator; or (2) CoStar follows a procedure outlined in the Order that requires CoStar to provide written notice of the termination to the monitor, discuss the reasons for the termination with you within 2 days after the termination, and follow other steps. In many circumstances, you will have the right to arbitrate any contract dispute with CoStar.

The Order also ensures that CoStar will not penalize you if you provide commercial real estate listings or information to CoStar's competitors, endorse or invest in CoStar's competitors, or exercise your right to terminate a multi-year contract. CoStar may continue to charge different prices and offer different products to its customers, and may terminate or decline to renew contracts if customers refuse to agree to the contract terms permitted by the Order. However, the

Decision and Order

Order generally ensures that CoStar will not offer less favorable prices, product offerings, or other contract terms, and will not terminate your relationship with CoStar because you are doing business with CoStar's competitors.

The Order gives you additional protections with respect to how you purchase CoStar products. For example, CoStar may not require you to subscribe to one of CoStar's products as a condition to subscribing to another CoStar product. Similarly, CoStar may not require you to subscribe to products covering one or several geographic areas as a condition to subscribing to products covering other geographic areas. However, CoStar may continue to offer its customers discounts if they purchase more than one of CoStar's products or subscribe to products covering more than one geographic area. CoStar also may offer its listings and information products to its customers bundled together on new platforms, although CoStar has agreed that if it does, it will also continue to offer the products separately for about 3 years at commercially reasonable prices.

For more information: This document summarizes some but not all of the Order and its terms. CoStar's actual obligations are described in the Order itself, which you can read and download in its entirety on the Federal Trade Commission's web site at [insert link]. If you have any questions about the Order, you may contact CoStar at ftccompliance@costar.com or the FTC at [link]. Guy Dorey is the FTC's monitor; you may reach him at guy@dorey.com.

Decision and Order

Confidential Appendix H

Monitor Agreement

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

Confidential Appendix I

CoStar DMG Information, Inc. Purchase Agreement

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

Confidential Appendix J

Audit Agreement

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

Analysis to Aid Public Comment

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

The Federal Trade Commission has accepted for public comment, subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) from CoStar Group, Inc. (“CoStar”), Lonestar Acquisition Sub, Inc., and LoopNet, Inc. (“LoopNet”) (collectively, “Respondents”). Pursuant to an Agreement and Plan of Merger dated April 27, 2011, Lonestar Acquisition Sub, Inc., a wholly-owned subsidiary of CoStar, intends to acquire all of the common stock of LoopNet in exchange for cash and stock considerations with a total equity value of approximately \$860 million (the “acquisition”). The Commission’s Complaint alleges that CoStar and LoopNet have entered into an acquisition agreement that constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and which, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18 and Section 5 of the Federal Trade Commission Act, by eliminating actual, direct, and substantial competition between CoStar and LoopNet, and between CoStar and Xceligent, Inc. (“Xceligent”), and increasing the likelihood that CoStar will exercise market power unilaterally in the provision of commercial real estate (“CRE”) listings databases and information services.

The proposed Consent Agreement would resolve these competitive concerns by requiring the divestiture of LoopNet’s interest in Xceligent, CoStar’s most direct competitor on a product basis. Owing to the circumstances surrounding the acquisition and the characteristics of the industry at issue, the proposed Consent Agreement further imposes certain conduct requirements to assure the continued viability of Xceligent as a competitor to the merged firm and to reduce barriers to competitive entry and expansion. These additional provisions will facilitate Xceligent’s geographic expansion and prevent foreclosure of Respondents’ established customer base. Together, the divestiture and conduct obligations will make Xceligent a stronger independent competitor to the merged firm. The proposed Consent Agreement will thus remedy the loss or diminution of competition that would result from the acquisition.

Analysis to Aid Public Comment

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 the comments received, and will decide whether it should withdraw from the proposed Consent Agreement, modify it, or make final the proposed Decision and Order (“Order”).

The sole purpose of this analysis is to facilitate public comment on the Consent Agreement. The analysis does not constitute an official interpretation of the Consent Agreement or the proposed Order, nor does the analysis modify their terms in any way.

I. Respondents and Other Relevant Entities

A. CoStar

CoStar is the largest provider of CRE information services in the United States, offering a researched listings database with nationwide coverage. CoStar proactively tracks and aggregates CRE listings and information to create and maintain an in-depth and comprehensive CRE database. CoStar is a publicly traded, for-profit corporation.

B. LoopNet

LoopNet operates the most heavily trafficked CRE listings database in the United States. LoopNet provides a platform for CRE market participants to post listings and other detailed information about available properties, and aggregates that user-generated content into a database searchable by the public. Through this platform, LoopNet also offers some CRE information services with nationwide coverage. LoopNet is a publicly traded, for-profit corporation.

Starting in 2007, LoopNet acquired a substantial ownership stake in Xceligent, a provider of CRE information and listings services, with coverage focused on the Midwest and South. Today, LoopNet provides Xceligent with funding and information to aid Xceligent in expanding its geographic scope.

Analysis to Aid Public Comment

C. Xceligent

Xceligent, a privately held corporation, is a third leading provider of CRE information services in the United States, offering a researched listings database. Xceligent's model closely resembles CoStar's, with a research staff that proactively tracks and aggregates CRE listings and information to create and maintain an in-depth and comprehensive CRE database.

II. The Proposed Complaint

CoStar's acquisition of LoopNet presents antitrust concerns in the markets for CRE listings databases and CRE information services. Listings databases provide a means for parties to CRE transactions to publicize and to search for available properties for sale and for lease. CRE information services compile the data industry participants need to evaluate CRE assets and opportunities, informing decisions ranging from the determination of asking price to whether to execute a given sale or lease agreement. Real estate brokers, lenders, investors, developers, appraisers, government agencies, and others connected to the CRE industry require listings databases and information services with geographic coverage that corresponds to their unique scope of operations. The coverage needs of a given customer may be as broad as the entire United States, or as narrow as a city neighborhood.

CoStar and LoopNet are the only two providers of CRE listings databases with nationwide coverage. CoStar is the only current provider of full-inventory, research verified CRE listings databases and information services with national coverage. CoStar's closest competitor on a product basis, Xceligent, today provides full-inventory, research-verified listings databases and information services in 33 metropolitan areas. Other providers offer CRE listings databases and information services with coverage of a particular local or regional area or of a particular subset of the total CRE landscape, but none have achieved the critical mass of users and data that CoStar and LoopNet possess today.

The acquisition may substantially lessen competition in these relevant markets by eliminating actual, direct, and substantial

Analysis to Aid Public Comment

competition between CoStar and LoopNet, and between CoStar and Xceligent because of LoopNet's substantial ownership stake in Xceligent. The acquisition therefore may also increase the likelihood that CoStar will exercise market power unilaterally.

Timely, competitively meaningful entry is unlikely to mitigate these anticompetitive effects. Significant network effects characterize the market for CRE listings databases and create a substantial barrier to new entry. For both listings databases and information services, entry and expansion are difficult, costly, and time-consuming.

III. The Proposed Consent Agreement

The proposed Consent Agreement and the Order include the obligation to divest certain LoopNet data to Xceligent and conduct requirements that may modify Respondents' current and future contractual agreements with its customers. These provisions are intended to ensure that the remedy is responsive to the history and characteristics of the relevant markets. The Order incorporates these carefully-tailored provisions to assure the successful implementation of the remedy and to effectuate the Order's remedial purpose. Some of these provisions are highlighted below.

A. Divestitures

The proposed Consent Agreement is intended to remedy the acquisition's alleged anticompetitive effects by, among other things, requiring the divestiture of LoopNet's interest in Xceligent to DMG Information, Inc. ("DMGI"). DMGI is a U.S.-based subsidiary of British media and data conglomerate Daily Mail & General Trust, PLC, a publicly traded, for-profit firm with 2011 revenues of nearly £2 billion. DMGI specializes in business-to-business information services and has significant experience in the CRE information space. DMGI's strong, existing presence in the CRE information space includes substantial and long-standing investments in CRE information firms including Trepp, LLC; Real Capital Analytics, Inc.; Environmental Data Resources, Inc.; and BUILDERadius, Inc.

Analysis to Aid Public Comment

Respondents have reached an agreement to sell to DMGI LoopNet's interest in Xceligent and in the URL "commercialsearch.com." In addition to these assets, Respondents have agreed to divest to DMGI certain LoopNet data that will facilitate Xceligent's expansion into new metropolitan areas. The need for this data divestiture arises from the unique historical relationship between LoopNet and Xceligent and from the high initial costs associated with entry and expansion in the relevant markets. These divestitures assure the continued viability of Xceligent as CoStar's competitor and enable Xceligent to grow rapidly into a more complete, national listings database and information services alternative to the merged firm. DMGI is well-equipped to replace LoopNet and become the controlling shareholder of Xceligent. DMGI has the resources and capability to provide Xceligent with the financial and strategic assistance required for effective and efficient continued expansion. The divestitures will therefore preserve the existing competition between CoStar and Xceligent and will allow Xceligent to replace any competition lost between CoStar and LoopNet as a result of the acquisition.

B. Conduct Provisions

The Order imposes certain conduct requirements that will lower entry barriers to the markets for CRE listings databases and information services. Paragraph III.A. of the Order prevents Respondents from restricting, directly or indirectly, customers' ability to support Xceligent. The history and data-driven nature of the relevant markets, coupled with the high costs of data collection and the network effects inherent in the industry, have led to significant barriers to entry and expansion. Paragraph III.A. ensures that industry participants, including the largest national CRE brokerage firms, can bolster entry efforts – whether through financial investment, CRE information-sharing, or public endorsement – without fear of reprisal. This provision thus reduces entry barriers by allowing industry participants to assist in the development and growth of Xceligent.

In order to prevent long-term CoStar subscription commitments from foreclosing competitive entry or expansion, Paragraph III.B. of the Order requires Respondents to allow current and future customers, without penalty, to terminate their

Analysis to Aid Public Comment

existing contracts with twelve (12) months' notice. This provision ensures that Xceligent has available customers in any and all metropolitan areas where they offer competing products. The resulting revenue opportunities and feasibility of gaining broad customer acceptance will make entry or expansion into local coverage areas more efficient and effective.

Similarly, Paragraphs III.F. and III.G. of the Order include provisions that aim to protect Xceligent for a limited period while it expands the breadth and geographic scope of its services. These restrictions are necessary because of the importance of such expansion in ensuring an effective remedy. Paragraph III.F. prevents Respondents from conditioning the sale, lease, or license of, or the subscription to, any of Respondents' products on the sale, lease, or license of, or the subscription to, any other of Respondents' products. Paragraph III.F. also prohibits Respondents from requiring customers to subscribe to multiple geographic coverage areas in order to gain access to a single coverage area of interest. These protections extend for a period of five (5) years post-acquisition. Paragraph III.F. also requires Respondents to continue to offer all currently available products on a stand-alone basis for three (3) years post-acquisition. A related provision, Paragraph III.G., prohibits Respondents from limiting the use of the REApplications product, a software tool for managing market research. For three (3) years after the Order date, if Respondents continue to offer REApplications, Paragraph III.G. provides that customers shall be permitted to use REApplications in support of, or in connection with, their purchase, lease, or license of CRE database services from Respondents' competitors. Together, Paragraphs III.F. and III.G. ensure that customers are free to turn to Xceligent or other firms for the services those firms provide, without forfeiting their access to other CoStar products on which they rely. These provisions therefore advance the Order's remedial purpose in recognition of, and in response to, the relatedness of the products at issue, the indispensable nature of those products, and the currently limited selection of providers to customers of those products.

Paragraphs III.C. and III.D. of the Order provide certain protections to Respondents' current and future customers so that they are free to avail themselves of their rights and opportunities

Analysis to Aid Public Comment

post-acquisition. Paragraph III.C. prohibits Respondents from intentionally disrupting or limiting service to customers except in specific, enumerated circumstances. This provision ensures that Respondents' customers are protected in their ability to conduct their day-to-day business by designating inappropriate suspension of service as a retaliatory act punishable under Paragraph III.H. of the Order. In order to address the possible chilling effects of the industry's historically litigious reputation, Paragraph III.D. grants Respondents' current and future customers the right to resolve any disputes with Respondents through arbitration.

C. Compliance and Notification Requirements

Paragraph V. of the Order requires Respondents to provide notice to the Federal Trade Commission thirty (30) days prior to any planned acquisition of any firm that gathers, markets, or sells CRE listings or CRE information in the United States for a period of five (5) years. For an additional five years thereafter, the Order requires Respondents to provide prior notice of planned acquisitions of any such firms with revenues of \$15 million or greater.

Paragraph VI. of the Order appoints Guy Dorey as Monitor to assure Respondents' ongoing compliance with their obligations and responsibilities under the Order. Among other responsibilities, Paragraph VI. empowers the Monitor, at Respondents' expense, to review and audit compliance with Order provisions relating to the divestitures of assets and information and to customers' rights to support Xceligent.

To assure that Respondents fully comply with the obligations of Paragraph II. of the Order, Paragraph VII. of the Order allows the Commission to appoint a Divestiture Trustee to assign, grant, license, divest, transfer, deliver, or otherwise convey the relevant assets and information.

Paragraph VIII. of the Order requires Respondents to submit periodic reports of compliance. The Order requires reporting every sixty (60) days for two (2) years following the Order date, and annually thereafter until the Order terminates in ten (10) years.

Analysis to Aid Public Comment

Paragraph IX. of the Order requires Respondents to give the Commission prior notice of certain events that might affect compliance obligations arising from the Order.

D. Additional Provisions

Paragraph X. of the Order provides that the Order shall terminate after ten (10) years.

Complaint

IN THE MATTER OF

MYSPLACE LLC

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

Docket No. C-4369; File No. 102 3058
Complaint, August 30, 2012 – Decision, August 30, 2012

This consent order addresses Myspace LLC's claims regarding the collection and use of personal information on their website. The complaint alleges that Myspace violated Section 5(a) of the FTC Act, by misleading users about what information third-party advertisers received about them. The consent order prohibits Myspace from misrepresenting the privacy and confidentiality of any "covered information," as well as the company's compliance with any privacy, security, or other compliance program, including but not limited to the U.S.-EU Safe Harbor Framework.

Participants

For the *Commission: Amanda Koulousias and Katherine Race Brin.*

For the *Respondent: Ashlie Beringer, Scott Mellon, and Sean Royall, Gibson Dunn & Crutcher LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Myspace LLC has violated the provisions of the Federal Trade Commission Act ("FTC Act"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Myspace LLC ("Myspace" or "respondent") is a Delaware limited liability company with its principal office or place of business at 407 North Maple Drive, Beverly Hills, CA 90210.
2. The acts and practices of respondent as alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

Complaint

RESPONDENT'S BUSINESS PRACTICES

3. Myspace operates a social networking website, www.myspace.com, that, among other features, enables a consumer who uses the site ("user") to create and customize a personal online profile. These profiles contain content about users, such as their name, the names of other users who are their "friends" on the site, photos and videos they upload, messages and comments they post or receive from their friends, and other personal information.

4. Myspace assigns a persistent unique numerical identifier, called a "Friend ID," to each user profile created on Myspace.

5. Myspace has collected extensive personal information about its users, including, but not limited to:

- a. registration information a user is required to provide in order to create a Myspace account, which consists of the user's full name, email address, date of birth, and gender;
- b. optional information that is used to populate the user's personal profile, such as:
 - i. display name (*e.g.*, a nickname or pseudonym displayed on the user's profile);
 - ii. profile picture;
 - iii. relationship status;
 - iv. sexual orientation;
 - v. hobbies;
 - vi. interests; and
- c. other information that is based on a user's activities on the site over time, such as:
 - i. a list of users with whom a user has become "friends" on the site;

Complaint

- ii. photos and videos; and
- iii. messages that a user posts and comments made in response to other users' content.

6. Myspace has provided users with privacy settings which allow them to designate whether the information in their personal profiles will be available to anyone visiting the web site or only those Myspace users who are their "friends" on the site.

7. Myspace has designated a subset of personal information, which it refers to as "basic profile information," as outside of the scope of the privacy settings. Basic profile information consists of the user's profile picture, Friend ID, location, gender, age, display name, and full name. The only piece of this information that users can hide from public view is their full name. Myspace's default setting makes the full name public, but users can change this default through a setting separate from their privacy settings. As of July 2010, approximately 16% of users had changed the default setting and made their full name private.

8. The Friend ID is a component of the URL for each user's profile page, for example, inserting www.myspace.com/12345678 into the address bar of a web browser will bring up the Myspace profile page of the user who is assigned Friend ID 12345678. Therefore, the Friend ID can be used to access, at a minimum, the user's basic profile information, which as of July 2010 included the full name of approximately 84% of Myspace users. Additionally, for a user who has designated that his or her profile be available to anyone who visits the site, the Friend ID can be used to access all of the information in that user's profile.

9. Myspace obtains revenue by allowing third-party or affiliate advertising networks to serve advertisements ("ads") directly on its site. When a Myspace page loads, Myspace sends a request to the advertising network ("ad call"), informing it to serve an ad on the Myspace page.

10. From January 2009 through June 2010, the majority of ads shown on the Myspace website were served through Fox Audience Network ("FAN"), an advertising network that was an affiliate of Myspace. In order to enable FAN to target ads to an

Complaint

individual user viewing a particular page, when Myspace made an ad call, it sent the Friend ID, age, and gender of the user who was viewing the page (“viewing user”) to FAN. From January 2009 through June 2010, this information was transmitted in plain text.

11. Since January 2009, Myspace has also shared the Friend ID, age, and gender of the viewing user with third-party advertisers as follows:

- a. In numerous instances, from January 2009 through June 2010, when Myspace made an ad call to FAN, but FAN did not have an appropriate ad to serve, FAN would send the request to a third-party advertiser to serve the ad. In numerous instances, from January 2009 through June 2010, when sending these requests, FAN transmitted the Friend ID, age and gender of the viewing user to third-party advertisers in plain text.
- b. Beginning in June 2010, Myspace encrypted the Friend ID, age, and gender of the viewing user and provided the encryption key to FAN, allowing FAN to decrypt this information and use it to target ads to the viewing user. Third-party advertisers serving ads through FAN did not receive the encryption key.
- c. On October 29, 2010, FAN was purchased by the Rubicon Project, Inc. (“Rubicon”), an advertising technology company unaffiliated with Myspace. From October 29, 2010 until Myspace’s contract with Rubicon expired on October 28, 2011, Myspace provided Rubicon the ability to decrypt the Friend ID, age, and gender of the viewing user included in each ad call.

12. Many internet advertisers have the capability to track users’ viewing habits across different websites using tracking cookies. Cookies are small text files that are commonly used to store information about a consumer’s online activities, including information such as the content or ads that a consumer views or the pages a consumer visits within a particular website.

Complaint

13. As a result of the conduct described in **Paragraph 11**, a third-party advertiser could take simple steps to get detailed information about individual users. For example, a third-party advertiser could use the Friend ID to:

- a. visit the user's personal profile on the Myspace website, to obtain his or her real name and other publicly available information; and
- b. combine the user's real name and other personal information with that advertiser's tracking cookie and the history of websites the user has visited that it contains.

RESPONDENT'S STATEMENTS

14. Since February 28, 2008, Myspace has disseminated or caused to be disseminated a privacy policy on the Myspace website, which includes, but is not limited to:

- a. the following statements regarding the notice and choice it gives to users before collecting or using their personally identifiable information ("PII"), defined as "full name, email address, mailing address, telephone number, or credit card number" (*See Exhibit 1, Page 1*):

When you voluntarily provide PII to MySpace, we will make sure you are being informed about who is collecting the information, how and why the information is being collected and the types of uses MySpace will make of the information to the extent it is being used in a manner that differs from what is allowed pursuant to this Privacy Policy. (*See Exhibit 1, Page 1.*)

At the time you provide your PII, MySpace will notify you of your options regarding our use of your PII . . . Except as described in this Privacy Policy, Myspace will not share your PII with third parties unless you have given

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Myspace permission to do so. (*See* Exhibit 1, Page 1.)

Except as described in this Privacy Policy, MySpace will get your permission before we use the PII you provide to us in a way that is inconsistent with the purpose for which it was submitted or share your PII with third parties that are not affiliated with MySpace. (*See* Exhibit 1, Page 2.)

- b. the following statements regarding Myspace's use of personal information to customize ads:

MySpace may use cookies and similar tools to customize the content and advertising you receive based on the Profile Information you have provided. Profile Information you provide in structured profile fields or questions . . . information you add to open-ended profile fields and questions . . . and other non-PII about you may also be used to customize the online ads you encounter to those we believe are aligned with your interests The information used for this feature does not provide your PII or identify you as an individual to third parties. (*See* Exhibit 1, Page 2.)

- c. and the following statement regarding the information Myspace shares with advertisers:

Anonymous click stream, number of page views calculated by pixel tags, and aggregated demographic information may [also] be shared with MySpace's advertisers and business partners. (*See* Exhibit 1, Page 3.)

Complaint

VIOLATIONS OF THE FTC ACT**Count I**

15. As described in **Paragraph 14a**, Myspace represents, expressly or by implication, that it will not use or share a user's PII except as described in the privacy policy, including sharing that information with third parties, without first giving notice to and receiving permission from that user.

16. In truth and in fact, as described in **Paragraphs 7 through 13**, in numerous instances Myspace provided the Friend ID of the viewing user to third-party advertisers who are not affiliated with Myspace. The Friend ID gives access to, at a minimum, the user's basic profile information, which for most users includes their full name. This use was not described in the privacy policy and Myspace did not receive permission from those users for such sharing. These facts would be material to consumers in their enrollment in and use of the Myspace service. Therefore, the representations set forth in **Paragraph 15** were and are false or misleading and constitute a deceptive act or practice.

Count II

17. As described in **Paragraph 14b**, Myspace represents, expressly or by implication, that the means through which it customizes ads does not allow advertisers to access PII or individually identify users.

18. In truth and in fact, as described in **Paragraphs 7 through 13**, the means through which Myspace customized ads in numerous instances transmitted the Friend ID of the viewing user to third-party advertisers. Receiving a user's Friend ID gives advertisers access to, at a minimum, the user's basic profile information, which for most users included their full name. These facts would be material to consumers in their enrollment in and use of the Myspace service. Therefore, the representations set forth in **Paragraph 17** were and are false or misleading and constitute a deceptive act or practice.

Complaint

Count III

19. As described in **Paragraph 14c**, Myspace represents, expressly or by implication, that users' web browsing activity shared with advertisers is anonymized.

20. In truth and in fact, as described in **Paragraphs 7 through 13**, Myspace shared the Friend ID of the viewing user with advertisers, which allows advertisers to tie a user's Friend ID, and the personal information to which it gives access, with tracking cookies. This allows advertisers to link web browsing activity with the personal information available in a user's Myspace profile. These facts would be material to consumers in their enrollment in and use of the Myspace service. Therefore, the representations set forth in **Paragraph 19**, were and are, false or misleading and constitute a deceptive act or practice.

Count IV

21. The U.S.-EU Safe Harbor Framework provides a method for U.S. companies to transfer personal data outside of the European Union ("EU") that is consistent with the requirements of the European Union Data Protection Directive ("Directive"). The Directive sets forth 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. This determination is commonly referred to as meeting the EU's "adequacy" standard.

22. To satisfy the EU's 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 is a voluntary framework that allows U.S. companies to transfer personal data lawfully from the EU to the U.S. 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

23. The Safe Harbor privacy principles, issued by Commerce on July 21, 2000, include the following:

NOTICE: An organization must inform individuals about the purposes for which it collects and uses information about them, how to contact the organization with any inquiries or complaints, the types of third parties to which it discloses the information, and the choices and means the organization offers individuals for limiting its use and disclosure. This notice must be provided in clear and conspicuous language when individuals are first asked to provide personal information to the organization or as soon thereafter as is practicable, but in any event before the organization uses such information for a purpose other than that for which it was originally collected or processed by the transferring organization or discloses it for the first time to a third party.

CHOICE: An organization must offer individuals the opportunity to choose (opt out) whether their personal information is (a) to be disclosed to a third party or (b) to be used for a purpose that is incompatible with the purpose(s) for which it was originally collected or subsequently authorized by the individual. Individuals must be provided with clear and conspicuous, readily available, and affordable mechanisms to exercise choice.

24. From December 9, 2010 until the present, Myspace has maintained a current self-certification to Commerce and has appeared on the list of Safe Harbor companies on the Commerce website. During this time period, Myspace has collected, used, and retained data from users in Europe. Myspace's certification on the Commerce website states:

Personal Information Received from the EU/EEA and/or Switzerland: Myspace is a free global social networking website designed to allow users to create profiles where they can discover content, make friends, and share information with others online, consistent with each user's personal preferences. In order to

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create a Myspace profile, a user must submit a name, gender, email address, a password, and date of birth. Myspace users have the additional option of providing details about themselves including interests, occupation, and hometown. Most of the information Myspace collects about its users is provided voluntarily by those users when they create or update their Myspace profile. All data collected by Myspace is hosted in the United States. (*See Exhibit 2, Page 1.*)

25. From approximately December 2010 until the present, Myspace made the following statements in its privacy policy regarding its participation in the U.S.-EU Safe Harbor Framework:

MySpace complies with the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework as set forth by the U.S. Department of Commerce regarding the collection, use, and retention of personal information from EU member countries. MySpace has certified that it adheres to the Safe Harbor Privacy Principles of notice, choice, onward transfer, security, data integrity, access, and enforcement. To learn more about the Safe Harbor program, and to view our certification page, please visit <http://www.export.gov/safeharbor/>.

Privacy Complaints by EU Citizens: In compliance with the Safe Harbor Principles, MySpace commits to resolve complaints about your privacy and our collection or use of your personal information. EU citizens with inquiries or complaints regarding this privacy policy should first contact MySpace by visiting <http://faq.myspace.com> and submitting your question through the Contact MySpace form or by mail at Myspace LLC, Attn:

Customer Care - Privacy, 8391 Beverly Blvd, #349,
Los Angeles, CA 90048.

(*See Exhibit 3, Page 3.*)

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26. As described in **Paragraphs 24 and 25**, Myspace has represented, expressly or by implication, that it has complied with the U.S. Safe Harbor privacy principles, including the principles of Notice and Choice.

27. In truth and in fact, as described in **Paragraphs 7 through 13**, Myspace did not adhere to the U.S. Safe Harbor privacy principles of Notice and Choice. Therefore, the representations set forth in **Paragraph 26** were, and are, false or misleading and constitute a deceptive act or practice.


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

THEREFORE, the Federal Trade Commission this thirtieth day of August, 2012, has issued this complaint against respondent.

By the Commission, Commissioner Ohlhausen not participating.

Complaint

Exhibit 1

Privacy Policy	
<p>Effective February 28, 2008:</p>	
<p>MySpace, Inc. ("MySpace" or "we") operates MySpace.com. This Privacy Policy describes MySpace's use and sharing of personally identifiable information ("PII"-- your full name, email address, mailing address, telephone number, or credit card number) that Members voluntarily provide to MySpace when they register (also known as "Registration PII"). The Term "User" refers to a Visitor or a Member. This Privacy Policy applies to the services offered by MySpace, including any MySpace-branded URL (the "MySpace Website"), the MySpace instant messaging service, the MySpace application developer service and other features (for example, music and video embedded players), MySpace mobile services, and any other features, content, or applications offered from time to time by MySpace in connection with the MySpace Website (collectively, the "MySpace Services"). The MySpace Services are hosted in the United States.</p>	
<p>The MySpace Website is a general audience site and does not knowingly collect PII from children under 13 years of age.</p>	
<p>From time to time MySpace may modify this Privacy Policy to reflect industry initiatives or changes in the law, our PII collection and use practices, the features of the MySpace Services, or technology, and such modifications shall be effective upon posting by MySpace on the MySpace Website. Your continued use of the MySpace Services after MySpace posts a revised Privacy Policy signifies your acceptance of the revised Privacy Policy. It is therefore important that you review this Privacy Policy regularly to ensure you are updated as to any changes. If MySpace materially changes its practices regarding collection or use of your PII, your PII will continue to be governed by the Policy under which it was collected unless you have been provided notice of, and have not objected to, the change.</p>	
<p>COLLECTION AND SUBMISSION OF PII AND NON-PII ON MYSACE</p>	
<p>General. When MySpace collects PII from you it is because you are voluntarily submitting Registration PII to us in order to register as a Member of MySpace. MySpace may also collect PII from you if you choose to participate in MySpace Services activities like sweepstakes, contests, and surveys, because you want us to furnish you with products, services, newsletters, or information, or in connection with content or suggestions you submit to MySpace for review.</p>	
<p>In addition, MySpace collects other non-PII including IP address, aggregate user data, and browser type. This data is used to manage and improve the MySpace Services, track usage, and for security purposes.</p>	
<p>MySpace Members may also choose to provide or store non-PII information in their profiles, including but not limited to date of birth, interests, hobbies, lifestyle choices, groups with whom they are affiliated (schools, companies), videos and/or pictures, private messages, bulletins or personal statements (collectively "Profile Information"). The Profile Information in a Member's profile is provided at his or her sole discretion.</p>	
<p>MySpace Members can change their Registration PII and Profile Information at any time and can control how Visitors, other Members and MySpace communicate with them by controlling their account settings, available within the "Edit Profile" portion of their MySpace profile. Link to Privacy Settings.</p>	
<p>Cookies. Cookies are small bits of information that MySpace places on your computer. MySpace uses cookies to identify your Internet browser, store Users' preferences, and determine whether you have installed the enabling software needed to access certain material on the MySpace Services. Data in cookies may be read to authenticate user sessions or provide services.</p>	
<p>Third party advertisements displayed on MySpace Services may also contain cookies set by Internet advertising companies or advertisers (known as "third party cookies"). MySpace does not control these third party cookies and Users of the MySpace Services should check the privacy policy of the Internet advertising company or advertiser to see whether and how it uses cookies. See the "Notice" section below for more information on customized advertising on MySpace. A pixel tag is a tiny image inserted in a webpage and used to record the number and types of views for that page. MySpace may allow third party pixel tags to be present on MySpace Services for purposes of advertising, providing services or data and statistics collection.</p>	
<p>You can program your computer to warn you each time a cookie is being sent, block third party cookies or block all cookies. However, by blocking all cookies you may not have access to certain features on the MySpace Services.</p>	
<p>NOTICE: MYSACE WILL PROVIDE YOU WITH NOTICE ABOUT ITS PII COLLECTION PRACTICES</p>	
<p>When you voluntarily provide PII to MySpace, we will make sure you are informed about who is collecting the information, how and why the information is being collected and the types of uses MySpace will make of the information to the extent it is being used in a manner that differs from what is allowed pursuant to this Privacy Policy.</p>	
<p>At the time you provide your PII, MySpace will notify you of your options regarding our use of your PII (See "Choice" below). Except as described in this Privacy Policy, MySpace will not share your PII with third parties unless you have given MySpace permission to do so (See "Use" below).</p>	

Complaint

MySpace Services may be linked to Internet sites operated by other companies. MySpace Services may also carry advertisements from other companies. MySpace is not responsible for the privacy practices of websites or other services operated by third parties that are linked to or integrated with the MySpace Services or for the privacy practices of third party Internet advertising companies. Once you leave MySpace Services via such a link, access a third party application (such as widgets) or click on an advertisement, you should check the applicable privacy policy of the third party or advertiser site to determine, among other things, how they will handle any PII they collect from you.

MySpace Services may also be linked to sites operated by companies affiliated with MySpace (i.e., that are part of the News America Group: "Affiliated Companies"). Although all Affiliated Companies adhere to the News America corporate Privacy Principles, Users who visit those Affiliated Company sites should still refer to their separate privacy policies and practices, which may differ in some respects from this Privacy Policy.

MySpace may use cookies and similar tools to customize the content and advertising you receive based on the Profile Information you have provided. Profile Information you provide in structured profile fields or questions (multiple choice questions like "Marital Status," "Education" and "Children") ("Structured Profile Information"), information you add to open-ended profile fields and questions (essay questions like "About Me," "Interests" and "Movies") ("Non-Structured Profile Information") and other non-PII about you may also be used to customize the online ads you encounter to those we believe are aligned with your interests. For example, based on your music interests we might display an advertisement to make sure you are advised when your favorite band is coming to town. The information used for this feature does not provide your PII or identify you as an individual to third parties. If you would like to disable advertising customization for Non-Structured Profile Information, please log in and click [here](#).

Some of the advertisements that appear on MySpace Services may also be delivered to you by third party Internet advertising companies. These companies utilize certain technologies to deliver advertisements and marketing messages and to collect non-PII about your visit to or use of MySpace Services, including information about the ads they display, via a cookie placed on your computer that reads your IP address. To opt out of information collection by these companies, or to obtain information about the technologies they use or their own privacy policies, please click [here](#).

Third party applications (such as widgets) created by third party developers may also be available on the MySpace Services. Third party applications are small bits of software, often with interactivity, that can be installed into Members' profiles or shared with other Users. However, MySpace does not control the third party developers, and cannot dictate their actions. When a Member engages with a third party application that Member is interacting with the third party developer, not with MySpace. MySpace encourages Members not to provide PII to the third party's application unless the Member knows the party with whom it is interacting.

CHOICE: MYSPACE WILL PROVIDE YOU WITH CHOICES ABOUT THE USE OF YOUR PII

Except as described in this Privacy Policy, MySpace will get your permission before we use the PII you provide to us in a way that is inconsistent with the purpose for which it was submitted or share your PII with third parties that are not affiliated with MySpace.

USE: MYSPACE'S USE OF PII

MySpace will only use the PII you provide under this Privacy Policy in a manner that is consistent with this Privacy Policy. If MySpace obtains PII from a third party, such as a business partner, our use of that information is also governed by this Privacy Policy.

In order to locate other MySpace Members that you may already know in the physical world, MySpace allows Users to search for Members using Registration PII (i.e., full name or email address). MySpace also allows Users to browse for certain Profile Information in order to help connect with Members (i.e., schools and/or companies where Users may have attended or worked). MySpace may also enable Members to publicly display some Registration PII as an element of their Profile Information if they choose to do so via a profile setting under "Edit Profile." Search engines may index the portion of a Member's profile (including the Profile Information it contains) that is publicly displayed.

If you have consented to receive promotional materials (e.g., newsletters) or notifications from MySpace, MySpace may periodically use your email address to send you such materials related to the MySpace Services, as applicable. If you want to stop receiving such materials from MySpace, you can change your profile settings under "Account Settings," or follow the unsubscribe instructions at the bottom of each email.

MySpace employees, agents and contractors must have a business reason to obtain access to your PII. MySpace may share your PII with those who help us manage or provide MySpace Services/ information activities (for example, message board administration, order fulfillment, statistical analyses, data processing), or with outside contractors, agents or sponsors who help us with the administration, judging and prize fulfillment aspects of contests, promotions and sweepstakes.

These outside contractors, agents or sponsors may temporarily store some information on their servers, but they may only use your PII to provide MySpace with a specific service and not for any other purpose. MySpace may also provide your PII to a third party in those instances where you have chosen to receive certain information and have been notified that the fulfillment of such a request requires the sharing of your PII. MySpace also may share your PII with Affiliated Companies if it has a business reason to do so.

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As described in "Notice" above, MySpace may customize the advertising and marketing messages you receive on the MySpace Website, or may work with outside companies to do so. Your non-PII and/or Profile Information may be shared with these companies so this customization can be accomplished. MySpace prohibits these companies from sharing your non-PII and/or Profile Information with any third party or from using it for any other purpose. Anonymous click stream, number of page views calculated by pixel tags, and aggregated demographic information may also be shared with MySpace's advertisers and business partners.

There may be instances when MySpace may access or disclose PII, Profile Information or non-PII without providing you a choice in order to: (i) protect or defend the legal rights or property of MySpace, our Affiliated Companies or their employees, agents and contractors (including enforcement of our agreements); (ii) protect the safety and security of Users of the MySpace Services or members of the public including acting in urgent circumstances; (iii) protect against fraud or for risk management purposes; or (iv) comply with the law or legal process. In addition, if MySpace sells all or part of its business or makes a sale or transfer of all or a material part of its assets or is otherwise involved in a merger or transfer of all or a material part of its business, MySpace may transfer your PII to the party or parties involved in the transaction as part of that transaction.

When a Member who is located in the European Union chooses to post Profile Information that will be publicly disclosed, that Member is responsible for ensuring that such information conforms to all local data protection laws. MySpace is not responsible under the EU local data protection laws for Member-posted information.

SECURITY: MYSACE PROTECTS THE SECURITY OF PII

MySpace uses commercially reasonable administrative, technical, personnel and physical measures to safeguard PII and credit card information in its possession against loss, theft and unauthorized use, disclosure or modification. In addition, MySpace uses reasonable methods to make sure that PII is accurate, up-to-date and appropriately complete.

ACCESS, REMEDIES AND COMPLIANCE: HOW TO ACCESS, CORRECT OR CHANGE YOUR PREFERENCES REGARDING YOUR PII AND HOW TO CONTACT MYSACE ABOUT PRIVACY CONCERNS

Whenever possible, MySpace Members may review the Registration PII we maintain about them in our records. We will take reasonable steps to correct any PII a Member informs us is incorrect. If you are a Member, you can view and change your Registration PII, Member preferences and Profile Information by logging into your account and accessing features such as "Edit Profile" and "Account Settings."

If you ask MySpace to stop using your PII, MySpace will honor that request while retaining any record of your PII that is necessary to comply with applicable federal, state or local law.

If you would like to communicate with us about this Privacy Policy or MySpace's collection and use of your PII, please use the Contact MySpace form on our Help site.

Mail:
8391 Beverly Blvd.
#349
Los Angeles, California 90048

Complaint

Exhibit 2**Organization Information:**

MySpace, LLC
407 North Maple Drive
Beverly Hills, California- 90210
Phone: 424-202-6001 x7208
Fax: 323-446-8437
www.myspace.com

Organization Contact:

Contact Office: Myspace - Customer Care
Name: Dominik Franceschi, Senior Manager of Support
Phone: 424-202-6001 x7060
Fax: 310-362-8854
Email: dfranceschi@myspace-inc.com

Corporate Officer:

Corporate Officer: Drew Bordages, General Counsel
Phone: 949-336-4859
Fax: 949-271-4047
Email: dbordages@specificmedia.com

Safe Harbor Information:

Original Certification: 12/9/2010
Next Certification: 12/9/2011

Personal Information Received from the EU/EEA and/or Switzerland:

Myspace is a free global social networking website designed to allow users to create profiles where they can discover content, make friends, and share information with others online, consistent with each user's personal preferences. In order to create a Myspace profile, a user must submit a name, gender, email address, a password, and date of birth. Myspace users have the additional option of providing details about themselves including interests, occupation, and hometown. Most of the information Myspace collects about its users is provided voluntarily by those users when they create or update their Myspace profile. All data collected by Myspace is hosted in the United States.

Privacy Policy Effective: 2/28/2008

Location: <http://www.myspace.com/Help/Privacy>

Regulated By: Federal Trade Commission

Privacy Programs:
BBB EU Safe Harbor

Verification: In-house.

Dispute Resolution:
BBB EU Safe Harbor

Personal Data Covered: On-line data

Organization Human Resource Data Covered: No

Do You Agree to Cooperate and Comply with the EU and/or Swiss Data Protection Authorities? No

Relevant Countries from which Personal Information is Received:

Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, United Kingdom

Industry Sectors:
Information Services - (INF)

Certification Status: Not Current
Compliance Status:

Complaint

Exhibit 3

Sign up Login Search People Music Video Games Browse People

Privacy Policy

Last Revised December 7th, 2010.

Myspace, LLC ("Myspace" or "we") operates Myspace.com. This Privacy Policy describes Myspace's use and sharing of personally identifiable information ("PII" - your full name, email address, mailing address, telephone number, or credit card number) that Members voluntarily provide to Myspace when they register (also known as "Registration PII"). The Term "User" refers to a Visitor or a Member. This Privacy Policy applies to the services offered by Myspace, including any Myspace-branded URL, the "Myspace Website", the Myspace instant messaging service, the Myspace application developer service and other features (for example, music and video embedd players), Myspace mobile services, and any other features, content, or applications offered from time to time by Myspace in connection with the Myspace Website (collectively, the "Myspace Services"). The Myspace Services are hosted in the United States.

The Myspace Website is a general audience site and does not knowingly collect PII from children under 13 years of age.

From time to time Myspace may modify this Privacy Policy to reflect industry initiatives or changes in the law, our PII collection and use practices, the features of the Myspace Services, or technology, and such modifications shall be effective upon posting by Myspace on the Myspace Website. Your continued use of the Myspace Services after Myspace posts a revised Privacy Policy signifies your acceptance of the revised Privacy Policy. It is therefore important that you review this Privacy Policy regularly to ensure you are updated as to any changes. If Myspace materially changes its practices regarding collection or use of your PII, your PII will continue to be governed by the Policy under which it was collected unless you have been provided notice of, and have not objected to, the change.

COLLECTION AND SUBMISSION OF PII AND NON-PII ON MYSPACE

General. When Myspace collects PII from you it is because you are voluntarily submitting Registration PII to us in order to register as a Member of Myspace. Myspace may also collect PII from you if you choose to participate in Myspace Services activities like sweepstakes, contests, and surveys, because you want us to furnish you with products, services, newsletters, or information, or in connection with content or suggestions you submit to Myspace for review.

In addition, Myspace collects other non-PII including IP address, aggregate user data, and browser type. This data is used to manage and improve the Myspace Services, track usage, and for security purposes.

Myspace Members may also choose to provide or store non-PII information in their profiles, including but not limited to date of birth, interests, hobbies, lifestyle choices, groups with whom they are affiliated (schools, companies), videos and/or pictures, private messages, bulletin or personal statements (collectively "Profile Information"). The Profile Information in a Member's profile is provided at his or her sole discretion.

Myspace Members can change their Registration PII and Profile Information at any time and can control how Visitors, other Members and Myspace communicate with them by controlling their account settings, available within the "Edit Profile" portion of their Myspace profile. Link to Privacy Settings.

Cookies. Cookies are small bits of information that Myspace places on your computer. Myspace uses cookies to identify your Internet browser, store Users' preferences, and determine whether you have installed the enabling software needed to access certain material on the Myspace Services. Data in cookies may be read to authenticate user sessions or provide services.

Third party advertisements displayed on Myspace Services may also contain cookies set by internet advertising companies or advertisers (known as "third party cookies"). Myspace does not control these third party cookies and Users of the Myspace Services should check the privacy policy of the internet advertising company or advertiser to see whether and how it uses cookies. See the "Notice" section below for more information on customized advertising on Myspace. A pixel tag is a tiny image inserted in a webpage and used to record the number and types of views for that page. Myspace may allow third party pixel tags to be present on Myspace Services for purposes of advertising, providing services or data and statistics collection.

You can program your computer to warn you each time a cookie is being sent, block third party cookies or block all cookies. However, by blocking all cookies you may not have access to certain features on the Myspace Services.

NOTICE: MYSPACE WILL PROVIDE YOU WITH NOTICE ABOUT ITS PII COLLECTION PRACTICES

When you voluntarily provide PII to Myspace, we will make sure you are informed about who is collecting the information, how and why the information is being collected and the types of uses Myspace will make of the information to the extent it is being used in a manner that differs from what is allowed pursuant to this Privacy Policy.

At the time you provide your PII, Myspace will notify you of your options regarding our use of your PII (See "Choice" below). Except as described in this Privacy Policy, Myspace will not share your PII with third parties unless you have given Myspace permission to do so (See "Use" below).

Myspace Services may be linked to internet sites operated by other companies. Myspace Services may also carry advertisements from other companies. Myspace is not responsible for the privacy practices of websites or other services operated by third parties that are linked to or integrated with the Myspace Services or for the privacy practices of third party internet advertising companies. Once you leave Myspace Services via such a link, access a third party application (such as widgets) or click on an advertisement, you should check the applicable privacy policy of the third party or advertiser site to determine, among other things, how they will handle any PII they collect from you.

Open Player

Myspace Support

Help Myspace Safety

Myspace Safety

Featuring tips for parents and educators, teens and all other Myspace users. Learn more.

Complaint

Myspace Services may also be linked to sites operated by companies affiliated with Myspace, Inc., that are part of the News America Group. Myspace, Inc. and its Affiliated Companies adhere to the News America Group's Privacy Policy. Users who visit those Affiliated Company sites should refer to their separate privacy policies and practices, which may differ in some respects from this Privacy Policy.

Myspace may use cookies and similar tools to customize the content and advertising you receive based on the Profile Information you have provided. Profile information you provide in structured profile fields or questions (multiple choice questions like "Marital Status," "Education" and "Children") ("Structured Profile Information"), information you add to open-ended profile fields and questions (essay questions like "About Me," "Interests" and "Movies") ("Non-Structured Profile Information") and other non-PII about you may also be used to customize the online ads you encounter to those we believe are aligned with your interests. For example, based on your music interests, we might display an advertisement to make sure you are advised when your favorite band is coming to town. The information used for this feature does not provide your PI or identify you as an individual to third parties. If you would like to disable advertising customization for Non-Structured Profile Information, please log in and click here.

Some of the advertisements that appear on Myspace Services may also be delivered to you by third party internet advertising companies. These companies utilize certain technologies to deliver advertisements and marketing messages and to collect non-PII about your visit to or use of Myspace Services, including information about the ads they display, via a cookie placed on your computer that reads your IP address. To opt out of information collection by these companies, or to obtain information about the technologies they use or their own privacy policies, please click here.

Third party applications (such as widgets) created by third party developers may also be available on the Myspace Services. Third party applications are small bits of software, often with interactivity, that can be installed via Members' profiles or shared with other Users. However, Myspace does not control the third party developers, and cannot dictate their actions. When a Member engages with a third party application, that Member is interacting with the third party developer, not with Myspace. Myspace encourages Members not to provide PII to the third party's application unless the Member knows the party with whom it is interacting.

CHOICE: MYSPACE WILL PROVIDE YOU WITH CHOICES ABOUT THE USE OF YOUR PII

Except as described in this Privacy Policy, Myspace will get your permission before we use the PII you provide to us in a way that is inconsistent with the purpose for which it was submitted or share your PII with third parties that are not affiliated with Myspace.

USE: MYSPACE'S USE OF PII

Myspace will only use the PII you provide under this Privacy Policy in a manner that is consistent with this Privacy Policy. If Myspace obtains PII from a third party, such as a business partner, our use of that information is also governed by this Privacy Policy.

In order to locate other Myspace Members that you may already know in the physical world, Myspace allows Users to search for Members using Registration PII (i.e., full name or email address). Myspace also allows Users to browse for certain Profile Information in order to help connect with Members (i.e., schools and/or companies where Users may have attended or worked). Myspace may also enable Members to publicly display some Registration PII as an element of their Profile Information if they choose to do so via a profile setting under "Edit Profile." Search engines may index the portion of a Member's profile (including the Profile Information it contains) that is publicly displayed.

If you have consented to receive promotional materials (e.g., newsletters) or notifications from Myspace, Myspace may periodically use your email address to send you such materials related to the Myspace Services, as applicable. If you want to stop receiving such materials from Myspace, you can change your profile settings under "Account Settings," or follow the unsubscribe instructions at the bottom of each email.

Myspace employees, agents and contractors must have a business reason to obtain access to your PII. Myspace may share your PII with those who help us manage or provide Myspace Services' information activities (for example, message board administration, order fulfillment, statistical analysis, data processing) or with outside contractors, agents or sponsors who help us with the administration, judging and prize fulfillment aspects of contests, promotions and sweepstakes.

These outside contractors, agents or sponsors may temporarily store some information on their servers, but they may only use your PII to provide Myspace with a specific service and not for any other purpose. Myspace may also provide your PII to a third party in those instances where you have chosen to receive certain information and have been notified that the fulfillment of such a request requires the sharing of your PII. Myspace also may share your PII with Affiliated Companies if it has a business reason to do so.

As described in "Notice" above, Myspace may customize the advertising and marketing messages you receive on the Myspace Website, or may work with outside companies to do so. Your non-PII and/or Profile Information may be shared with these companies so this customization can be accomplished. Myspace prohibits these companies from sharing your non-PII and/or Profile Information with any third party or from using it for any other purpose. Anonymous click stream, number of page views calculated by pixel tags, and aggregated demographic information may also be shared with Myspace's advertisers and business partners.

There may be instances when Myspace may access or disclose PII, Profile Information or non-PII without providing you a choice in order to: (i) protect or defend the legal rights or property of Myspace, our Affiliated Companies or their employees, agents and contractors (including enforcement of our agreements); (ii) protect the safety and security of Users of the Myspace Services or members of the public including acting in urgent circumstances; (iii) protect against fraud or for risk management purposes; or (iv) comply with the law or legal process. In addition, if Myspace sells all or part of its business or makes a sale or transfer of all or a material part of its assets or is otherwise involved in a merger or transfer of all or a material part of its business, Myspace may transfer your PII to the party or parties involved in the transaction as part of that transaction.

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Complaint

When a Member who is located in the European Union chooses to post Profile information that will be publicly disclosed, that Member is responsible for ensuring that such information conforms to all local data protection laws. Myspace.com is responsible under the EU local data protection laws for Member-posted information.

SECURITY: MYSPACE PROTECTS THE SECURITY OF PI

Myspace uses commercially reasonable administrative, technical, personnel and physical measures to safeguard PI and credit card information in its possession against loss, theft and unauthorized use, disclosure or modification. In addition, Myspace uses reasonable methods to make sure that PI is accurate, up-to-date and appropriately complete.

SAFE HARBOR

Safe Harbor. Myspace complies with the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework as set forth by the U.S. Department of Commerce regarding the collection, use, and retention of personal information from EU member countries. Myspace has certified that it adheres to the Safe Harbor Privacy Principles of notice, choice, onward transfer, security, data integrity, access, and enforcement. To learn more about the Safe Harbor program, and to view our certification page, please visit <http://www.esport.gov/safeharbor/>

Privacy Complaints by EU Citizens: In compliance with the Safe Harbor Principles, Myspace commits to resolve complaints about your privacy and our collection or use of your personal information. EU citizens with inquiries or complaints regarding this privacy policy should first contact Myspace by visiting <http://faq.myspace.com> and submitting your question through the Contact Myspace form or by mail at Myspace, LLC, Attn: Customer Care - Privacy, 8391 Beverly Blvd, #349, Los Angeles, CA 90048.

Myspace has further committed to refer unresolved privacy complaints under the Safe Harbor Principles to an independent dispute resolution mechanism, the BBB EU Safe Harbor, operated by the Council of Better Business Bureaus. If you do not receive timely acknowledgment of your complaint, or if your complaint is not satisfactorily addressed by Myspace, you may contact:

<http://www.bbb.org/us/safe-harbor-complaints>

ACCESS, REMEDIES AND COMPLIANCE: HOW TO ACCESS, CORRECT OR CHANGE YOUR PREFERENCES REGARDING YOUR PI AND HOW TO CONTACT MYSPACE ABOUT PRIVACY CONCERNS

Whenever possible, Myspace Members may review the Registration PI we maintain about them in our records. We will take reasonable steps to correct any PI a Member informs us is incorrect. If you are a Member, you can view and change your Registration PI, Member preferences and Profile information by logging into your account and accessing features such as "Edit Profile" and "Account Settings."

If you ask Myspace to stop using your PI, Myspace will honor that request while retaining any record of your PI that is necessary to comply with applicable federal, state or local law.

If you would like to communicate with us about this Privacy Policy or Myspace's collection and use of your PI, please use the Contact Myspace form on our help site.

Mail:
8391 Beverly Blvd.
#349
Los Angeles, California 90048

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Around Myspace

- Music
- Video
- Movies
- Television
- Celebrity
- Events

Also on Myspace

- IM
- Mobile
- Themes
- Sync

Join Myspace

- Sign up
- Developers
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- About us

What's Trending

- Bieber Suit Dropped
- Sexy Bradley Cooper
- Muppets Spoof Twilight
- Twilight Red Carpet
- Timberlake Attends B&B
- Spider-Man on SNL
- Brian Pitt Quitting
- MJ's Drug Use

IGN

- Video Games
- Game Reviews
- Video Game Cheats
- Game Videos
- Download Video Games

Get Help

- Help & FAQs
- Safety Tips
- Stream
- Privacy Settings
- Privacy Policy
- Learn more
- Advertisers
- Press Room

Report Abuse | **Change Country:** United States (English)

Open Player

Decision and Order

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the Respondent named in the caption hereof, and the Respondent having been furnished thereafter with a copy of a draft Complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the Respondent with violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq.*;

The Respondent, its attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), an admission by the Respondent of all the jurisdictional facts set forth in the aforesaid draft Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waives 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 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 Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having carefully considered the comments filed by interested persons, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and enters the following Order:

1. Myspace is a Delaware limited liability company with its principal office or place of business at 407 North Maple Drive, Beverly Hills, CA 90210.

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

ORDER DEFINITIONS

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

- A. Unless otherwise specified, “respondent” shall mean: Myspace and its successors and assigns.
- B. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
- C. “Covered information” shall mean information from or about an individual consumer including, but not limited to: (a) a first and last name; (b) a home or other physical address, including street name and city or town; (c) an email address or other online contact information, such as an instant messaging user identifier or screen name; (d) a mobile or other telephone number; (e) photos and videos; (f) an Internet Protocol (“IP”) address, User ID, device ID, or other persistent identifier; (g) list of contacts; or (h) physical location.

I.

IT IS ORDERED that respondent, and its officers, agents, representatives and employees, acting directly or through any corporation, subsidiary, division, website, or other device, in connection with the offering of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication:

- A. the extent to which respondent maintains and protects the privacy and confidentiality of any covered information, including, but not limited to: (1) the purposes for which it collects and discloses covered information, and (2) the extent to which it makes or

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has made covered information accessible to third parties.

- B. 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 entity, including, but not limited to, the U.S.-EU Safe Harbor Framework.

II.

IT IS FURTHER ORDERED that respondent shall, no later than the date of service of this order, establish and implement, and thereafter maintain, a comprehensive privacy program that is reasonably designed to: (1) address privacy risks related to the development and management of new and existing products and services for consumers, and (2) protect the privacy and confidentiality of covered information. Such program, the content and implementation of which must be documented in writing, shall contain privacy controls and procedures appropriate to respondent's size and complexity, the nature and scope of respondent's activities, and the sensitivity of the covered information, including:

- A. the designation of an employee or employees to coordinate and be responsible for the privacy program.
- B. the identification of reasonably foreseeable, material risks, both internal and external, that could result in respondent's unauthorized collection, use, or disclosure of covered information, and an evaluation of the sufficiency of any safeguards in place to control these risks. At a minimum, this privacy risk evaluation should include consideration of risks in each area of relevant operation, including, but not limited to: (1) employee training and management, including training on the requirements of this order, and (2) product design, development, and research.
- C. the design and implementation of reasonable privacy controls and procedures to address the risks identified

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through the privacy risk evaluation, and regular testing or monitoring of the effectiveness of those privacy controls and procedures.

- D. the development and use of reasonable steps to select and retain service providers capable of appropriately protecting the privacy of covered information they receive from respondent, and requiring service providers by contract to implement and maintain appropriate privacy protections.
- E. the evaluation and adjustment of respondent's privacy program in light of the results of the testing and monitoring required by subpart C, any material changes to respondent's operations or business arrangements, or any other circumstances that respondent knows or has reason to know may have a material impact on the effectiveness of its privacy program.

III.

IT IS FURTHER ORDERED that, in connection with its compliance with Part II of this order, respondent shall obtain initial and biennial assessments and reports ("Assessments") from a qualified, objective, independent third-party professional, who uses procedures and standards generally accepted in the profession. A person qualified to prepare such Assessments shall have a minimum of three (3) years of experience in the field of privacy and data protection. All persons selected to conduct such Assessments and prepare such reports shall be approved by the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, in his or her sole discretion. Any decision not to approve a person selected to conduct such Assessments shall be accompanied by a writing setting forth in detail the reasons for denying such approval. The reporting period for the Assessments shall cover: (1) the first one hundred and eighty (180) days after service of the order for the initial Assessment, and (2) each two (2) year period thereafter for twenty (20) years after service of the order for the biennial Assessments. Each Assessment shall:

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- A. set forth the specific privacy controls that respondent has implemented and maintained during the reporting period;
- B. explain how such privacy controls are appropriate to respondent's size and complexity, the nature and scope of respondent's activities, and the sensitivity of the covered information;
- C. explain how the privacy controls that have been implemented meet or exceed the protections required by Part II of this order; and
- D. certify that the privacy controls are operating with sufficient effectiveness to provide reasonable assurance to protect the privacy of covered information and that the controls have so operated throughout the reporting period.

Each Assessment shall be prepared and completed within sixty (60) days after the end of the reporting period to which the Assessment applies. Respondent shall provide the initial Assessment to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, within ten (10) days after the Assessment has been prepared. All subsequent biennial Assessments shall be retained by respondent until the order is terminated and provided to the Associate Director of Enforcement within ten (10) days of request.

IV.

IT IS FURTHER ORDERED that respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of:

- A. for a period of five (5) years from the date of preparation or dissemination, whichever is later, all widely disseminated statements by respondent or its officers, agents, representatives and employees, that describe the extent to which respondent maintains and

Decision and Order

protects the privacy, security and confidentiality of any covered information, including, but not limited to, any statement related to a change in any website or service controlled by respondent that relates to the privacy, security, and confidentiality of covered information, with all materials relied upon in making or disseminating such statements;

- B. for a period of five (5) years from the date received, all consumer complaints directed at respondent, or forwarded to respondent by a third party, that relate to the conduct prohibited by this order and any responses to such complaints;
- C. for a period of five (5) years from the date received, copies of all subpoenas and other communications with law enforcement entities or personnel, if such communications raise issues that relate to respondent's compliance with the provisions of this order;
- D. for a period of five (5) years from the date received, any documents, whether prepared by or on behalf of respondent, that contradict, qualify, or call into question respondent's compliance with this order; and
- E. for a period of five (5) years after the date of preparation of each Assessment required under Part III of this order, all materials relied upon to prepare the Assessment, whether prepared by or on behalf of respondent, including but not limited to all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, for the compliance period covered by such Assessment.

V.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to (1) all current and future principals, officers, directors, and managers, (2) all current and future employees, agents, and representatives having supervisory responsibilities relating to the subject matter of this order, and (3) any business entity resulting from any change in structure set forth in Part VI.

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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. For any business entity resulting from any change in structure set forth in Part VI, delivery shall be at least ten (10) days prior to the change in structure.

VI.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including, but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in either corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission, all notices required by this Part shall be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line *In the Matter of Myspace LLC*, Docket No. C-4369.

VII.

IT IS FURTHER ORDERED that respondent 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 days of receipt of written notice from a representative of the Commission, respondent shall submit additional true and accurate written reports.

Analysis to Aid Public Comment

VIII.

This order will terminate on August 30, 2032, 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 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, Commission Ohlhausen not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

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

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

Analysis to Aid Public Comment

decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

Myspace operates a social networking website, www.myspace.com, that, among other features, enables a consumer who uses the site to create and customize a personal online profile. These profiles contain content about users, such as their name, the names of other users who are their "friends" on the site, photos and videos they upload, messages and comments they post or receive from their friends, and other personal information. Myspace assigns a persistent unique numerical identifier, called a "Friend ID," to each user profile created on Myspace. The Friend ID is a component of the URL for each user's profile page. For example, inserting www.myspace.com/12345678 into the address bar of a web browser will bring up the Myspace profile page of the user who is assigned Friend ID 12345678. The Friend ID can be used to access information about the user, including the user's profile picture, location, gender, age, display name (*e.g.*, a nickname or pseudonym displayed on the user's profile), and, in many cases, the user's full name.

Myspace obtains revenue by allowing third-party or affiliate advertising networks to serve advertisements directly on its site. The FTC complaint alleges that Myspace made numerous promises to its users regarding the extent to which it shared consumers' personal information with third-party advertisers. The complaint alleges that Myspace promised that: (1) it would not use or share a user's personally identifiable information, defined as full name, email address, mailing address, telephone number, or credit card number, without first giving notice to and receiving permission from users; (2) the means through which it customized ads did not allow advertisers to access personally identifiable information or individually identify users; (3) the information shared with advertisers regarding web browsing activity was anonymized; and (4) it complied with the U.S.-EU Safe Harbor Framework.

The Commission's complaint alleges that Myspace violated Section 5(a) of the FTC Act, by misleading users about what information third-party advertisers received about them. According to the FTC complaint, from January 2009 through June 2010, and again from October 29, 2010 through October 28, 2011,

Analysis to Aid Public Comment

when Myspace displayed advertisements on its website from certain unaffiliated third-party advertisers, Myspace and/or its affiliate provided those advertisers with the Friend ID of the user who was viewing the page. With this information, a third-party advertiser could take simple steps to get detailed information about individual users. For example, a third-party advertiser could use the Friend ID to visit the user's personal profile on the Myspace website to obtain personal information, including, for most users, their full name. A third-party advertiser could also combine the user's real name and other personal information with additional information contained in the advertiser's tracking cookie, a small text file placed on a user's browser that may include information about the user's online browsing history.

The proposed order contains provisions designed to prevent Myspace from engaging in future practices similar to those alleged in the complaint.

Part I of the proposed order prohibits Myspace from misrepresenting the privacy and confidentiality of any "covered information," as well as the company's compliance with any privacy, security, or other compliance program, including but not limited to the U.S.-EU Safe Harbor Framework. "Covered information" is defined broadly to include an individual's: (a) first and last name; (b) home or other physical address, including street name and city or town; (c) email address or other online contact information, such as an instant messaging user identifier or screen name; (d) mobile or other telephone number; (e) photos and videos; (f) Internet Protocol ("IP") address, User ID, device ID, or other persistent identifier; (g) list of contacts; or (h) physical location.

Part II of the proposed order requires Myspace to establish and maintain a comprehensive privacy program that is reasonably designed to: (1) address privacy risks related to the development and management of new and existing products and services, and (2) protect the privacy and confidentiality of covered information. The privacy program must be documented in writing and must contain privacy controls and procedures appropriate to Myspace's size and complexity, the nature and scope of its activities, and the sensitivity of covered information. Specifically, the order requires Myspace to:

Analysis to Aid Public Comment

- designate an employee or employees to coordinate and be responsible for the privacy program;
- identify reasonably-foreseeable, material risks, both internal and external, that could result in the unauthorized collection, use, or disclosure of covered information and assess the sufficiency of any safeguards in place to control these risks;
- design and implement reasonable privacy controls and procedures to control the risks identified through the privacy risk assessment and regularly test or monitor the effectiveness of the safeguards' key controls and procedures;
- develop and use reasonable steps to select and retain service providers capable of appropriately protecting the privacy of covered information they receive from respondent, and require service providers by contract to implement and maintain appropriate privacy protections; and
- evaluate and adjust its privacy program in light of the results of the testing and monitoring, any material changes to its operations or business arrangements, or any other circumstances that it knows or has reason to know may have a material impact on the effectiveness of its privacy program.

Part III of the proposed order requires that Myspace obtain within 180 days, and on a biennial basis thereafter for twenty (20) years, an assessment and report from a qualified, objective, independent third-party professional, certifying, among other things, that: it has in place a privacy program that provides protections that meet or exceed the protections required by Part II of the proposed order; and its privacy controls are operating with sufficient effectiveness to provide reasonable assurance that the privacy of covered information is protected.

Parts IV through VIII of the proposed order are reporting and compliance provisions. Part IV requires that Myspace retain for a period of five (5) years: (a) all "widely disseminated statements"

Analysis to Aid Public Comment

that describe the extent to which respondent maintains and protects the privacy and confidentiality of any covered information, along with all materials relied upon in making or disseminating such statements; (b) all consumer complaints directed at Myspace, or forwarded to Myspace by a third party, that allege unauthorized collection, use, or disclosure of covered information and any responses to such complaints; (c) all subpoenas and other communications with law enforcement entities or personnel that relate to its compliance with the proposed order; (d) documents that contradict, qualify, or call into question its compliance with the proposed order. Part IV additionally requires that Myspace retain all materials relied upon to prepare the third-party assessments for a period of five (5) years after the date that each assessment is prepared.

Part V requires dissemination of the order now and in the future to principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having supervisory responsibilities relating to the subject matter of the order. Part VI ensures notification to the FTC of changes in corporate status. Part VII mandates that Myspace submit an initial compliance report to the FTC and make available to the FTC subsequent reports. Part VIII is a provision “sunsetting” the order after twenty (20) years, with certain exceptions.

The purpose of the analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.

Complaint

IN THE MATTER OF

NOVARTIS AGCONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SECTION 7 OF THE CLAYTON ACT*Docket No. C-4364; File No. 121 0144*
Complaint, July 13, 2012 – Decision, September 4, 2012

This consent order addresses the \$1.525 billion acquisition by Novartis AG of certain assets of Fougera Holdings Inc. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by substantially lessening competition in the U.S. markets for generic calcipotriene topical solution, generic lidocaine-prilocaine cream, generic metronidazole topical gel, and diclofenac sodium gel. The consent order requires Novartis to: (1) terminate Novartis's marketing agreement with Tolmar, Inc. with respect to the currently marketed products generic calcipotriene topical solution, generic lidocaine-prilocaine cream, and generic metronidazole topical gel ("Marketed Divestiture Products") and return all of Novartis's rights to distribute, market, and sell the Marketed Divestiture Products to Tolmar; and (2) return all rights to develop, distribute, market, and sell the development product generic diclofenac sodium gel to Tolmar.

Participants

For the *Commission*: *Christine Tasso* and *David Von Nirschl*.

For the *Respondent*: *Claudia Higgins* and *Saul Morgenstern*,
Kaye Scholar LLP.

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Novartis AG ("Novartis"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Fougera Holdings Inc. ("Fougera"), a corporation subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. § 45, that such acquisition, if consummated, would violate Section 7 of the of the Clayton Act, as amended, 15 U.S.C. § 18,

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and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent Novartis is a corporation organized, existing, and doing business under and by virtue of the laws of the Swiss Confederation, with its headquarters address located at Lichtstrasse 35, Basel, Switzerland, V8 CH4056, and the address of its United States subsidiary, Novartis Corporation, located at 230 Park Avenue, New York, NY 10169.

2. Respondent is, and at all times relevant herein, has been engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act as amended, 15 U.S.C. § 12, and is a company whose business is in or affects commerce, as “commerce” is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. THE ACQUIRED COMPANY

3. Fougera Holdings Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address located at 60 Baylis Road, Melville, NY 11747. The ultimate parent entity of Fougera Holdings Inc. is Fougera S.C.A. SICAR.

III. THE PROPOSED ACQUISITION

4. Pursuant to an Agreement and Plan of Merger (“Acquisition Agreement”) dated May 1, 2012, Novartis, through its subsidiary, Sandoz Inc., proposes to acquire Fougera for approximately \$1.525 billion (the “Acquisition”).

IV. THE RELEVANT MARKETS

5. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are the sale of:

- a. generic calcipotriene topical solution;

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- b. generic lidocaine-prilocaine cream;
- c. generic metronidazole topical gel; and
- d. generic diclofenac sodium gel.

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

V. THE STRUCTURE OF THE MARKETS

7. Generic calcipotriene topical solution is used to treat chronic, moderately severe scalp psoriasis. Only three companies offer generic calcipotriene topical solution in the United States: Novartis, Fougera, and G & W Laboratories (“G & W”). Novartis leads the market with a 67 percent share. G & W accounts for 22 percent, while Fougera represents an 11 percent share. The Acquisition would increase the Herfindahl-Hirschman Index concentration by 1,474 points to 6,568 points.

8. Generic lidocaine-prilocaine cream is used as a local anesthetic to treat intact skin and to relieve pain from injections and surgery. Lidocaine-prilocaine is available in both 30 gram tubes and packages containing five 5 gram tubes (“5-5 tubes”). The 5-5 tubes are used only in hospitals, while the 30 gram tubes are prescribed directly to patients for home use. Fougera, Hi-Tech Pharmaceutical Co. (“Hi-Tech”), and Novartis are the only U.S. suppliers of 30 gram tubes, with market shares of approximately 50 percent, 47 percent, and 3 percent, respectively. The Acquisition would increase the Herfindahl-Hirschman Index concentration in that market by 300 points to 5,018 points, and leave Hi-Tech as the only competitor to the combined Novartis/Fougera. Only Fougera and Novartis offer the 5-5 tubes, with respective market shares of approximately 83 percent and 17 percent. The Acquisition would therefore create a monopoly in that market.

9. Generic metronidazole topical gel is used to treat inflamed papules and pustules of rosacea, a condition that causes chronic redness of facial skin. Taro Pharmaceutical Industries (“Taro”) is the market leader with approximately 43 percent market share,

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Fougera has approximately 36 percent market share, Novartis has approximately 19 percent market share, and G & W has approximately 2 percent market share. The Acquisition would increase the Herfindahl-Hirschman Index concentration by 1,368 points to 4,878 points.

10. Solaraze is a branded drug sold by Fougera that is used to treat actinic keratosis. No companies currently market a generic version of the drug, diclofenac sodium gel, in the United States. Novartis is best positioned to be the first generic entrant into this market.

VI. ENTRY CONDITIONS

11. Entry into the relevant markets described in Paragraphs 5 and 6 would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. Entry would not take place in a timely manner because the combination of drug development times and U.S. Food and Drug Administration approval requirements are likely to take at least two years.

VII. EFFECTS OF THE ACQUISITION

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

- a. by eliminating actual, direct, and substantial competition between Novartis and Fougera and reducing the number of competitors in the markets for the sales of generic calcipotriene topical solution, generic lidocaine-prilocaine cream, and generic metronidazole topical gel, thereby: (1) increasing the likelihood that Novartis will be able to unilaterally exercise market power in these markets; (2) increasing the likelihood and degree of coordinated interaction between or among the remaining competitors; and (3) increasing the likelihood that customers would be forced to pay higher prices;

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- b. by eliminating potential competition between Novartis and Fougera in the market for the sale of diclofenac sodium gel and reducing the number of competitors in the future, thereby: (1) increasing the likelihood that the combined entity would forego or delay the launch of a generic diclofenac sodium gel product; and (2) increasing the likelihood that the combined entity would delay or eliminate the substantial price competition that would have resulted from an additional supplier of a diclofenac sodium gel product.

VIII. VIOLATIONS CHARGED

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

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

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this thirteenth day of July, 2012 issues its Complaint against said Respondent.

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Novartis AG (“Respondent”) of the voting securities of Fougera Holdings Inc. (“Fougera”), and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission,

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would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

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

1. Respondent Novartis AG is a corporation organized, existing and doing business under and by virtue of the laws of the Swiss Confederation, with its headquarters address located at Lichtstrasse 35, Basel, Switzerland, V8 CH4056, and the address of its United States subsidiary, Novartis Corporation, located at 230 Park Avenue, New York, New York 10169.
2. Fougera Holdings Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address located at 60 Baylis Road, Melville, New York, 11747. The ultimate parent entity of Fougera is Fougera S.C.A. SICAR.
3. The Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

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ORDER**I.**

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

- A. “Novartis” or “Respondent” means Novartis AG, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Novartis AG (including, without limitation, Sandoz Inc. f.k.a. Geneva Pharmaceuticals, Inc., and Jet Merger Sub Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Novartis shall include Fougera.
- B. “Fougera” means Fougera Holdings Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Fougera Holdings Inc. (including, without limitation, Fougera Pharmaceuticals Inc. and Nycomed US Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Commission” means the Federal Trade Commission.
- D. “Decision and Order” means the:
 - 1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final and effective Decision and Order by the Commission; and

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2. Final Decision and Order issued by the Commission following the issuance and service of a final Decision and Order by the Commission in this matter.
- E. “Divestiture Product Business(es)” means the business within the United States of America of distributing, marketing, and selling each of the Divestiture Products.
 - F. “Interim Monitor” means any monitor appointed pursuant to Paragraph III of this Order to Maintain Assets or Paragraph III of the Decision and Order.
 - G. “New Commercialization Partner” means any Third Party(ies) designated by Tolmar to market, distribute or sell the Divestiture Products.
 - H. “Orders” means the Decision and Order and this Order to Maintain Assets.
 - I. “Transition Period” means, for each Marketed Divestiture Product, the period beginning on the date this Order to Maintain Assets becomes final and effective and ending, with respect to each Marketed Divestiture Product, on the earlier of the following dates: (i) the date on which Tolmar directs the Respondent to cease the distribution, marketing and sale of that Marketed Divestiture Product; or (ii) the date on which the New Commercialization Partner commences the distribution, marketing, and sale of that Marketed Divestiture Product; *provided however*, the Transition Period shall end not later than six (6) months from the Order Date.

II.

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

- A. Until the end of the Transition Period, Respondent shall take such actions as are necessary to maintain the

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ongoing economic viability, marketability and competitiveness of each of the related Divestiture Product Businesses, to minimize any risk of loss of competitive potential for such Divestiture Product Businesses, and to prevent the deterioration, or impairment of such Divestiture Product Businesses.

- B. Other than in the manner as prescribed in the Orders, Respondent shall not sell, transfer, encumber or otherwise impair the Divestiture Product Assets.
- C. Until the end of the Transition Period, Respondent shall maintain the operations of the Divestiture Product Businesses in the regular and ordinary course of business and in accordance with past practice and/or as may be necessary to preserve the marketability, viability, and competitiveness of such Divestiture Product Businesses and as may be necessary to facilitate the transfer of such business to the New Commercialization Partner on behalf of Tolmar. During the Transition Period, Respondent shall use its best efforts to preserve the existing relationships with the following: suppliers; vendors and distributors; the High Volume Accounts; customers; Agencies; employees; and others having business relations with each of the respective Divestiture Product Businesses. Respondent's responsibilities shall include, but are not limited to, the following:
 - 1. providing each of the respective Divestiture Product Businesses with funds to operate at least at current rates of operation, to carry on, at least at their scheduled pace, all business plans, distribution, marketing and promotional activities for such Divestiture Product Businesses;
 - 2. providing such resources as may be necessary to respond to competition against each of the Marketed Divestiture Products and/or to prevent any diminution in sales of each of the Marketed Divestiture Products during the Transition Period; *provided however*, that in determining how to

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respond to competition, including pricing decisions, Respondent shall consult with Tolmar and follow decision made by Tolmar with respect thereto;

3. providing such resources as may be necessary to maintain the competitive strength and positioning of each of the Marketed Divestiture Products at the related High Volume Accounts;
4. providing each of the respective Divestiture Product Businesses with such funds as are necessary to maintain the ongoing economic viability, marketability and competitiveness of such Divestiture Product Business;
5. providing such support services to each of the respective Divestiture Product Businesses as have been provided to such businesses by Respondent (prior to Respondent's decision to make the Acquisition) under the terms of the Collaboration, Development and Supply Agreement, including without limitation:
 - a. receiving, fulfilling and processing customer orders for the Marketed Divestiture Products, consistent with past practice, including without limitation, direct order entry capability and processing;
 - b. coordinating with Tolmar on matters related to supply and demand for the Marketed Divestiture Products consistent with past practice, including without limitation, maintaining inventory levels adequate to serve the market;
 - c. providing field sales force, telemarketing staff, and distribution centers, for the Marketed Divestiture Products;

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- d. coordinating with Tolmar on matters related to advertising and marketing support materials; and
 - e. advising Tolmar in a timely manner of any issues that may materially or adversely affect Respondent's ability to market a Marketed Divestiture Product; and
6. maintaining a work force at least as equivalent in size, training, and expertise to what has been associated with the Marketed Divestiture Products for the relevant Marketed Divestiture Product's last fiscal year.
- D. During the Transition Period, Respondent, in consultation with Tolmar, for the purposes of ensuring an orderly transition to the New Commercialization Partner, shall:
1. develop and implement a detailed transition plan to ensure that the commencement of the marketing, distribution and sale of the Marketed Divestiture Products by the New Commercialization Partner is not delayed or impaired by the Respondent;
 2. designate employees of Respondent knowledgeable about the marketing, distribution and sale related to each of the Marketed Divestiture Products who will be responsible for communicating directly with Tolmar and/or Tolmar's New Commercialization Partner, and the Interim Monitor (if one has been appointed), for the purpose of assisting in the transfer of the Divestiture Product Businesses to the New Commercialization Partner;
 3. subject to delivery of sufficient levels of supply by Tolmar, maintain and manage inventory levels of the Marketed Divestiture Products in consideration of the transition;

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4. negotiate in good faith with Tolmar and/or its New Commercialization Partner (in consultation with the Interim Monitor, if one has been appointed) to provide a non-exclusive fully paid up and royalty free license on commercially reasonable terms that are customary for the transition of product ownership to Tolmar and/or its New Commercialization Partner to use Respondent's existing product packaging and/or labeling (including Respondent's corporate name(s) and logo(s)) for a period of time sufficient to allow Tolmar and/or its New Commercialization Partner to commence the distribution, marketing and sale of that Divestiture Product (including without limitation, obtaining the authorization by the FDA of new product labeling and/or packaging for each of the Marketed Divestiture Products); *provided however*, nothing in this sub-paragraph shall require that Respondent and Tolmar and/or its New Commercialization Partner enter into such a license if Respondent negotiates in good faith as required above but notwithstanding such good faith negotiations, the parties are unable to agree to acceptable terms and conditions for such a license;
5. continue to market, distribute and sell the Marketed Divestiture Product on behalf of Tolmar;
6. ensure that all Confidential Business Information is delivered to Tolmar:
 - a. in good faith;
 - b. in a timely manner, *i.e.*, as soon as practicable, avoiding any delays in transmission of the respective information; and
 - c. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;
7. allow Tolmar access at reasonable business hours to all such Confidential Business Information and

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employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to the Divestiture Products that contain such Confidential Business Information pending the complete delivery of such Confidential Business Information to Tolmar;

8. establish projected time lines for accomplishing all tasks necessary to effect the transition in an efficient and timely manner;
 9. provide Tolmar with a listing of the inventory levels (weeks of supply) for each customer on a regular basis and in a timely manner;
 10. provide Tolmar with anticipated reorder dates for each customer on a regular basis and in a timely manner; and
 11. enter into any agreements with Tolmar and/or its New Commercialization Partner, on customary and commercially reasonable terms for the type of transaction or arrangement, to the extent such agreements are necessary to effectuate the foregoing.
- E. During the Transition Period, Respondent shall:
1. not use, directly or indirectly, any such Confidential Business Information related to the research, Development, manufacturing, marketing, or sale of the Divestiture Products other than as necessary to comply with the following:
 - a. the requirements of this Order;
 - b. Respondent's obligations to Tolmar under the terms of any related Remedial Agreement; or
 - c. applicable Law;

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2. not disclose or convey any Confidential Business Information, directly or indirectly, to any Person except Tolmar or other Persons specifically authorized by Tolmar to receive such information;
3. not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information related to the marketing or sales of the Marketed Divestiture Products to Respondent's employees responsible for making pricing decisions related to those Retained Products that are prescription pharmaceuticals for the treatment of the same disease as the Marketed Divestiture Products; and
4. not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information related to the research, Development, manufacture, marketing, commercialization, importation, exportation, cost, supply, sales, sales support, or use of each of the Development Divestiture Product to any of Respondent's employees that (i) prior to the Acquisition, were employees or agents of Fougera, or (ii) are responsible for making business decisions related to those Retained Products that are prescription pharmaceuticals for the treatment of the same disease as the Development Divestiture Product;

provided, however, that the restrictions contained in this Order to Maintain Assets regarding the Respondent's use, conveyance, provision, or disclosure of "Confidential Business Information" shall not apply to the following: (i) oral antibiotics; (ii) information that subsequently falls within the public domain through no violation of this Order or breach of confidentiality or non-disclosure agreement with respect to such information by the Respondent; (iii) information that is required by Law or rules of an applicable stock exchange to be publicly disclosed; (iv) information specifically excluded from the

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Divestiture Product Assets; and (v) all intellectual property licensed on a non-exclusive basis to Tolmar and/or its New Commercialization Partner.

- F. Not later than thirty (30) days from the date that this Order to Maintain Assets becomes final and effective, Respondent shall provide to all of Respondent's employees and other personnel who may have access to Confidential Business Information related to the Divestiture Products notification of the restrictions on the use of such information by Respondent's personnel. Respondent shall give such notification by e-mail with return receipt requested or similar transmission, and keep a file of such receipts for one (1) year after the date this Order to Maintain Assets is issued by the Commission to become final and effective. Respondent shall provide a copy of such notification to Tolmar. Respondent shall maintain complete records of all such agreements at Respondent's registered office within the United States and shall provide an officer's certification to the Commission stating that such acknowledgment program has been implemented and is being complied with. Respondent shall provide Tolmar with copies of all certifications, notifications and reminders sent to Respondent's personnel.
- G. Respondent shall monitor the implementation by its employees and other personnel of all applicable restrictions, and take corrective actions for the failure of such employees and personnel to comply with such restrictions or to furnish the written agreements and acknowledgments required by this Order to Maintain Assets. Respondent shall provide Tolmar with copies of all certifications, notifications and reminders sent to Respondent's employees and other personnel.
- H. Respondent shall adhere to and abide by the Remedial Agreements (which agreements shall not limit or contradict, or be construed to limit or contradict, the terms of the Orders, it being understood that nothing in the Orders shall be construed to reduce any obligations

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of Respondent to Tolmar under such agreement(s)), which are incorporated by reference into this Order to Maintain Assets and made a part hereof.

- I. The purpose of this Order to Maintain Assets is to maintain the ongoing economic viability, marketability and competitiveness of the Divestiture Product Businesses within the Geographic Territory through the Transition Period, to minimize any risk of loss of competitive potential for the Divestiture Product Businesses within the Geographic
- J. Territory, and to prevent the destruction, deterioration, or impairment of any of the Divestiture Assets.

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

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

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Monitor to monitor Respondent's compliance with the relevant requirements of the Orders in a manner consistent with the purposes of the Orders.

- D. If an Interim Monitor is appointed, Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:
1. The Interim Monitor shall have the power and authority to monitor Respondent's compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission.
 2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.
 3. The Interim Monitor shall serve until the end of the Transition Period; *provided, however*, that, the Interim Monitor's service shall not exceed one (1) year from the Order Date; *provided, further*, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.
 4. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondent's personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondent's compliance with its obligations under the Orders, including, but not limited to, its obligations related to the relevant assets. Respondent shall cooperate with any reasonable request of the Interim Monitor and shall take no

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action to interfere with or impede the Interim Monitor's ability to monitor Respondent's compliance with the Orders.

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

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performance by Respondent of its obligations under the Orders.

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

IV.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order to Maintain Assets is issued by the Commission to become final and effective, and every thirty (30) days thereafter until the end of the Transition Period, Respondent shall submit to the Commission a verified written report setting

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forth in detail the manner and form in which it intends to comply, is complying, and has complied with the Orders. Respondent shall submit at the same time a copy of its report concerning compliance with this Order to the Interim Monitor, if any Interim Monitor has been appointed. Respondent shall include in its reports, among other things that are required from time to time, a detailed description of the efforts being made to comply with the relevant paragraphs of the Orders, including a detailed description of all substantive contacts, negotiations, or recommendations related to the transitional services being provided by the Respondent to Tolmar and/or the New Commercialization Partner, and a detailed description the timing for the completion of such obligations.

Provided, however, that, after the Decision and Order in this matter becomes final and effective, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission at the same time as, the reports required to be submitted by Respondent pursuant to Paragraph VI of the Decision and Order.

V.

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

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

VI.

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

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United States offices, registered office of its United States subsidiary, or its headquarters address, the Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

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

VII.

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

- A. Three (3) days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. The day after the end of the Transition Period and the Interim Monitor, in consultation with Commission staff and Tolmar, notifies the Commission that all transitional services related to the Marketed Divestiture Products have been completed by the Respondent, or the Commission otherwise directs that this Order to Maintain Assets is terminated.

Decision and Order

DECISION AND ORDER
[Redacted Public Version]

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

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

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

1. Respondent Novartis AG is a corporation organized, existing and doing business under and by virtue of the laws of the Swiss Confederation, with its headquarters address located at Lichtstrasse 35, Basel, Switzerland,

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V8 CH4056, and the address of its United States subsidiary, Novartis Corporation, located at 230 Park Avenue, New York, New York 10169.

2. Fougera Holdings Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address located at 60 Baylis Road, Melville, New York, 11747. The ultimate parent entity of Fougera Holdings Inc. is Fougera S.C.A. SICAR.
3. The Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

ORDER**I.**

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

- A. “Novartis” or “Respondent” means Novartis AG, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Novartis AG (including, without limitation, Sandoz Inc. f.k.a. Geneva Pharmaceuticals, Inc., and Jet Merger Sub Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Novartis shall include Fougera.
- B. “Fougera” means Fougera Holdings Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Fougera Holdings Inc. (including, without limitation, Fougera Pharmaceuticals Inc. and Nycomed US Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

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- C. “Commission” means the Federal Trade Commission.
- D. “Acquirer(s)” means the following:
1. a Person specified by name in this Order to acquire particular assets or rights that the Respondent is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order and that has been approved by the Commission to accomplish the requirements of this Order in connection with the Commission’s determination to make this Order final and effective; or
 2. a Person approved by the Commission to acquire particular assets or rights that the Respondent is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.
- E. “Acquisition” means Respondent’s acquisition of fifty percent (50%) or more of the voting securities of Fougera. The Acquisition is contemplated by the Agreement and Plan of Merger by and among Sandoz Inc., Jet Merger Sub Inc., and Fougera Holdings Inc., dated as of May 1, 2012, submitted to the Commission.
- F. “Acquisition Date” means the date on which the Acquisition is consummated.
- G. “Agency(ies)” means any government regulatory authority or authorities in the world responsible for granting approval(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the research, Development, manufacture, marketing, distribution, or sale of a Product. The term “Agency” includes, without limitation, the United States Food and Drug Administration (“FDA”).
- H. “Application(s)” means all of the following: “New Drug Application” (“NDA”), “Abbreviated New Drug Application” (“ANDA”), “Supplemental New Drug Application” (“SNDA”), or “Marketing Authorization

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Application” (“MAA”), the applications for a Product filed or to be filed with the FDA pursuant to 21 C.F.R. Part 314 et seq., and all supplements, amendments, and revisions thereto, any preparatory work, drafts and data necessary for the preparation thereof, and all correspondence between the Respondent and the FDA related thereto. The term “Application” also includes an “Investigational New Drug Application” (“IND”) filed or to be filed with the FDA pursuant to 21 C.F.R. Part 312, and all supplements, amendments, and revisions thereto, any preparatory work, drafts and data necessary for the preparation thereof, and all correspondence between the Respondent and the FDA related thereto.

- I. “Collaboration, Development, and Supply Agreement” means the Collaboration, Development, and Supply Agreement between Atrix Laboratories, Inc., and Geneva Pharmaceuticals, Inc., dated August 28, 2000, and the following amendments to the Collaboration and Development and Supply Agreement:
1. Amendment No. 1, effective July 17, 2003;
 2. Amendment No. 2, effective November 11, 2004;
 3. Amendment No. 3, effective March 15, 2007;
 4. Amendment No. 4, effective February 28, 2012;
and
 5. the amendments thereto that constitute the Divestiture Product Agreements.

The Collaboration, Development, and Supply Agreement is contained in Non-Public Appendix A attached to this Order.

- J. “Clinical Trial(s)” means a controlled study in humans of the safety or efficacy of a Product, and includes, without limitation, such clinical trials as are designed to support expanded labeling or to satisfy the

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requirements of an Agency in connection with any Product Approval and any other human study used in research and Development of a Product.

- K. “Confidential Business Information” means all information owned by, or in the possession or control of, the Respondent that is not in the public domain and that is directly related to the research, Development, manufacture, marketing, commercialization, importation, exportation, cost, supply, sales, sales support, or use of each of the Divestiture Products. The term “Confidential Business Information” *excludes* (i) information relating to the Respondent’s general business strategies or practices relating to research, Development, manufacture, marketing, or sales of Products that does not discuss with particularity the Divestiture Products, (ii) information that is protected by the attorney work product, attorney-client, joint defense or other privilege prepared in connection with the Acquisition and relating to any United States, state, or foreign antitrust or competition Laws, and (iii) information that is contained in documents, records, or books of the Respondent provided to the Acquirer by the Respondent that is unrelated to the Divestiture Products or that is exclusively related to Retained Product(s).
- L. “Development” means all preclinical and clinical drug development activities (including formulation), including test method development and stability testing, toxicology, formulation, process development, manufacturing scale-up, development-stage manufacturing, quality assurance/quality control development, statistical analysis and report writing, conducting Clinical Trials for the purpose of obtaining any and all approvals, licenses, registrations or authorizations from any Agency necessary for the manufacture, use, storage, import, export, transport, promotion, marketing, and sale of a Product (including any government price or reimbursement approvals),

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Product approval and registration, and regulatory affairs related to the foregoing. “Develop” means to engage in Development.

- M. “Development Divestiture Product” means the following Product Developed or in Development: Tolmar’s gel containing 3% diclofenac sodium and any such Product that is the subject of ANDA No. 20-936.
- N. “Development Divestiture Product Patents” means the following United States Patents:
1. U.S. Patent No. 5,639,738;
 2. U.S. Patent No. 5,852,002;
 3. U.S. Patent No. 5,929,048;
 4. U.S. Patent No. 5,792,753;
 5. U.S. Patent No. 5,985,850; and
 6. U.S. Patent No. 5,914,322.
- O. “Divestiture Product Agreements” mean:
1. Amendment No. 5 to the Collaboration, Development, and Supply Agreement; and,
 2. Amendment No. 6 to the Collaboration, Development, and Supply Agreement, dated as of July 5, 2012.
- The Divestiture Product Agreements are contained in Non-Public Appendix A attached to this Order.
- P. “Divestiture Product Assets” means, the following:
1. for each Divestiture Product, all of Respondent’s rights to import, Develop, manufacture, process, commercialize, distribute, sell, advertise, market, promote, out-license, or offer for sale, any of the

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Divestiture Products. Such rights include, without limitation, all of the foregoing rights acquired or held by Respondent as a result of the Collaboration, Development, and Supply Agreement and all rights to any and all improvements to the Divestiture Products;

2. a perpetual, non-exclusive, fully paid-up and royalty-free license(s) with rights to sublicense under the Development Divestiture Product Patents to research, Develop, manufacture, distribute, market, sell, store and transport the Development Divestiture Product within the United States;
3. rights to require the Respondent to withdraw from, seek the dismissal (with prejudice) of, and not participate in, any existing patent infringement litigation related to the Development Divestiture Product in which the Respondent is a party and that is directed against Tolmar or any Divestiture Product Releasee and rights to prohibit Respondent from providing assistance to any party adverse to Tolmar in any existing or future patent infringement litigation related to the Development Divestiture Product;
4. all rights to all Product Marketing Materials related to each Divestiture Product;
5. all rights to all Website(s) related exclusively to each Divestiture Product;
6. all content related exclusively to each Divestiture Product that is displayed on any Website that is not dedicated exclusively to the specified Divestiture Product;
7. rights, to the extent permitted by Law:
 - a. to require Respondent to discontinue the use of the NDC Numbers related to each Divestiture Product in the sale or marketing of the

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specified Divestiture Product *except* for returns, rebates, allowances, and adjustments for such Product sold prior to the end of the Transition Period and *except* as may be required by applicable Law;

- b. to prohibit Respondent from seeking from any customer any type of cross- referencing of those NDC Numbers with any Retained Product(s) *except* for returns, rebates, allowances, and adjustments for such Product sold prior to the end of the Transition Period and *except* as may be required by applicable Law;
 - c. to approve the timing of Respondent's discontinued use of those NDC Numbers in the sale or marketing of such Divestiture Product *except* for returns, rebates, allowances, and adjustments for such Divestiture Product sold prior to the end of the Transition Period and *except* as may be required by applicable Law; and
 - d. to approve any notification(s) from Respondent to any customer(s) regarding the use or discontinued use of such NDC numbers by the Respondent prior to such notification(s) being disseminated to the customer(s);
8. a list of all customers and targeted customers for each Divestiture Product and, the following:
- a. a listing of the net sales (in either units or dollars) of the Divestiture Product to such customers on either an annual, quarterly, or monthly basis including, but not limited to, a separate list specifying the above-described information for the High Volume Accounts and including the name of the employee(s) for each High Volume Account that is or has been responsible for the purchase of the Divestiture

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Product on behalf of the High Volume Account and his or her business contact information;

- b. a listing of the inventory levels (weeks of supply) for each customer as of the date the Order to Maintain Assets is issued to become final and effective; and
 - c. anticipated reorder dates for each customer as of the date the Order to Maintain Assets is issued to become final and effective.
9. at the option of Tolmar, copies of all unfilled customer purchase orders for the specified Divestiture Product at any date during the Transition Period;
10. at the option of Tolmar, all unfilled customer purchase orders for the specified Divestiture Product; and
11. copies of all of the Respondent's books, records, and files directly related to the foregoing;

provided, however, that "Divestiture Product Assets" shall not include: (i) documents relating to the Respondent's general business strategies or practices relating to research, Development, manufacture, marketing or sales of generic pharmaceutical Products, where such documents do not discuss with particularity the Divestiture Product(s); (ii) administrative, financial, and accounting records; (iii) quality control records that are determined by the Interim Monitor or Tolmar not to be material to the marketing, distribution or sale of the specified Divestiture Product; (iv) formulas used to determine the final pricing of any Divestiture Product and/or Retained Products to customers; (v) competitively sensitive pricing information to the extent that it is related to the Retained Products; (vi) rights to the corporate names or corporate trade dress of "Novartis" or "Sandoz", or the related corporate logos

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thereof, or the corporate names or corporate trade dress of any other corporations or companies owned or controlled by Respondent or the related corporate logos thereof, or general registered images or symbols by which Novartis or Sandoz can be identified or defined; and (vii) information that is contained in documents, records, or books of the Respondent provided to the Acquirer by the Respondent that is unrelated to the Divestiture Products or that is exclusively related to Retained Product(s);

provided further, however, the Respondent shall provide Tolmar access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes and Respondent may require Tolmar to enter into an agreement to return such original documents under terms that are customary and reasonable for such purposes.

- Q. “Divestiture Product(s)” means the Marketed Divestiture Products and the Development Divestiture Product, individually and collectively.
- R. “Divestiture Product Releasee(s)” means the following Persons:
1. Tolmar;
 2. any Person controlled by or under common control with Tolmar; and
 3. any licensees, sublicensees, manufacturers, suppliers, distributors, and customers of that Tolmar, or of such Acquirer-affiliated entities, including, without limitation, the New Commercialization Partner.
- S. “Divestiture Trustee” means the trustee appointed by the Commission pursuant to the relevant provisions of this Order.

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- T. “Domain Name” means the domain name(s) (universal resource locators), and registration(s) thereof, issued by any Person or authority that issues and maintains the domain name registration.
- U. “Geographic Territory” shall mean the United States of America, including all of its territories and possessions, unless otherwise specified.
- V. “Government Entity” means any Federal, state, local or non-U.S. government, or any court, legislature, government agency, or government commission, or any judicial or regulatory authority of any government.
- W. “High Volume Account(s)” means any retailer, wholesaler or distributor whose annual aggregate purchase volumes, in units or in dollars, of a Marketed Divestiture Product from Respondent were among the largest customers of the Respondent for that Marketed Divestiture Product in the United States of America and which customers, when aggregated together, represent at least 80% of Respondent’s sales of that Marketed Divestiture Product during 2011.
- X. “Interim Monitor” means any monitor appointed pursuant to Paragraph III of this Order or Paragraph III of the related Order to Maintain Assets.
- Y. “Law” means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.
- Z. “Marketed Divestiture Products” means all Products marketed, distributed, or sold, pursuant to the following ANDAs:
1. No. A077029, and any supplements, amendments, or revisions thereto (Calcipotriene Topical Solution);

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2. No. A076320, and any supplements, amendments, or revisions thereto (Lidocaine/Prilocaine Cream); and
 3. No. A077547, and any supplements, amendments, or revisions thereto (Metronidazole Topical Gel).
- AA. “NDC Numbers” means the National Drug Code numbers, including both the labeler code assigned by the FDA and the additional numbers assigned by an Application holder as a product code for a specific Product.
- BB. “New Commercialization Partner” means any Third Party(ies) designated by Tolmar to market, distribute or sell the Divestiture Products.
- CC. “Order Date” means the date on which this Decision and Order is issued by the Commission to become final and effective.
- DD. “Order to Maintain Assets” means the Order to Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.
- EE. “Patent(s)” means all patents, patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention and statutory invention registrations, in each case existing as of the Acquisition Date (*except* where this Order specifies a different time), and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions, related to any Product of or owned by the Respondent as of the Acquisition Date (*except* where this Order specifies a different time).
- FF. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust,

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unincorporated organization, or other business or Government Entity, and any subsidiaries, divisions, groups or affiliates thereof.

- GG. “Product(s)” means any pharmaceutical, biological, or genetic composition containing any formulation or dosage of a compound referenced as its pharmaceutically, biologically, or genetically active ingredient and/or that is the subject of an Application.
- HH. “Product Approval(s)” means any approvals, registrations, permits, licenses, consents, authorizations, and other approvals, and pending applications and requests therefor, required by applicable Agencies related to the research, Development, manufacture, distribution, finishing, packaging, marketing, sale, storage or transport of the Product within the United States of America, and includes, without limitation, all approvals, registrations, licenses or authorizations granted in connection with any Application.
- II. “Product Marketing Materials” means all marketing materials used specifically in the marketing or sale of the specified Marketed Divestiture Product in the Geographic Territory pursuant to the Collaboration, Development and Supply Agreement, including, without limitation, all advertising materials, training materials, product data, mailing lists, sales materials (*e.g.*, detailing reports, vendor lists, sales data), marketing information (*e.g.*, competitor information, research data, market intelligence reports, statistical programs (if any) used for marketing and sales research), customer information (including customer net purchase information to be provided on the basis of either dollars and/or units for each month, quarter or year), sales forecasting models, educational materials, and advertising and display materials, speaker lists, promotional and marketing materials, Website content and advertising and display materials, artwork for the production of packaging components, television

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masters and other similar materials related to the specified Divestiture Product.

- JJ. “Product Trademark(s)” means all proprietary names or designations, trademarks, service marks, trade names, and brand names, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights, and the goodwill symbolized thereby and associated therewith, for the specified Divestiture Product(s).
- KK. “Remedial Agreement(s)” means the following:
1. any agreement between the Respondent and an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, including without limitation, (i) any agreement to supply specified products or components thereof, or (ii) any agreement to provide transitional services related to the business being transferred to the Acquirer, and that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission’s determination to make this Order final and effective;
 2. any agreement between the Respondent and a Third Party to effect the assignment of assets or rights of the Respondent related to a Divestiture Product to the benefit of an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission’s determination to make this Order final and effective;

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3. any agreement between the Respondent and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, including without limitation, (i) any agreement to supply specified products or components thereof, or (ii) any agreement to provide transitional services related to the business being transferred to the Acquirer, and that has been approved by the Commission to accomplish the requirements of this Order; and/or
 4. any agreement between the Respondent and a Third Party to effect the assignment of assets or rights of the Respondent related to a Divestiture Product to the benefit of an Acquirer that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto.
- LL. “Retained Product” means any Product(s) of Respondent other than a Divestiture Product, including any such Product(s) acquired by the Respondent as a result of the Acquisition.
- MM. “Third Party(ies)” means any non-governmental Person other than the following: the Respondent; or, Tolmar.
- NN. “Tolmar” means Tolmar Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address located at 701 Centre Avenue, Fort Collins, Colorado 80526. Tolmar was formerly known as Atrix Laboratories, Inc., the party to the Collaboration, Development and Supply Agreement.

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- OO. “Transition Period” means, for each Marketed Divestiture Product, the period beginning on the date the Order to Maintain Assets becomes final and effective and ending, with respect to each Marketed Divestiture Product, on the earlier of the following dates: (i) the date on which Tolmar directs the Respondent to cease the distribution, marketing and sale of that Marketed Divestiture Product; or (ii) the date on which the New Commercialization Partner commences the distribution, marketing, and sale of that Marketed Divestiture Product; *provided however*, the Transition Period shall end not later than six (6) months from the Order Date.
- PP. “Website” means the content of the Website(s) located at the Domain Names, the Domain Names, and all copyrights in such Website(s), to the extent owned by the Respondent; *provided, however*, “Website” shall not include the following: (1) content owned by Third Parties and other Product Intellectual Property not owned by the Respondent that are incorporated in such Website(s), such as stock photographs used in the Website(s), *except* to the extent that the Respondent can convey its rights, if any, therein; or (2) content unrelated to any of the Divestiture Products.

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

- A. Not later than the earlier of: (i) ten (10) days after the Acquisition Date or (ii) ten (10) days after the Order Date, Respondent shall divest the Divestiture Product Assets (to the extent that such assets are not already owned, controlled or in the possession of Tolmar), absolutely and in good faith, to Tolmar pursuant to, and in accordance with, the Divestiture Product Agreements (which agreements shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of Tolmar or to reduce any obligations of Respondent

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under such agreements), and each such agreement, if it becomes a Remedial Agreement related to the Divestiture Product Assets is incorporated by reference into this Order and made a part hereof;

provided, however, that if Respondent has divested the Divestiture Product Assets to Tolmar prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondent that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondent, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Divestiture Product Assets to Tolmar (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

- B. Prior to the Acquisition Date, Respondent shall secure all consents and waivers from all Third Parties that are necessary to permit Respondent to divest the Divestiture Product Assets to Tolmar; *provided, however*, Respondent may satisfy this requirement by certifying that Tolmar has executed all such agreements directly with each of the relevant Third Parties.
- C. Respondent shall:
1. submit to Tolmar, at Respondent's expense, all Confidential Business Information;
 2. deliver all Confidential Business Information to Tolmar:
 - a. in good faith;
 - b. in a timely manner, *i.e.*, as soon as practicable, avoiding any delays in transmission of the respective information; and

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- c. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;
3. pending complete delivery of all such Confidential Business Information to Tolmar, provide Tolmar and the Interim Monitor (if any has been appointed) with access at reasonable business hours to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files that contain Confidential Business Information and facilitating the delivery in a manner consistent with this Order;
4. not use, directly or indirectly, any such Confidential Business Information other than as necessary to comply with the following:
 - a. the requirements of this Order;
 - b. Respondent's obligations to Tolmar under the terms of any related Remedial Agreement; or
 - c. applicable Law;
5. except as otherwise permitted by the Orders, not disclose or convey any Confidential Business Information, directly or indirectly, to any Person except Tolmar or other Persons specifically authorized by Tolmar to receive such information;
6. not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information related to the marketing or sales of the Marketed Divestiture Products to Respondent's employees responsible for making pricing decisions related to those Retained Products that are prescription pharmaceuticals for the treatment of the same disease as the Marketed Divestiture Products; and

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7. not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information related to the research, Development, manufacture, marketing, commercialization, importation, exportation, cost, supply, sales, sales support, or use of each of the Development Divestiture Product to any of Respondent's employees that (i) prior to the Acquisition, were employees or agents of Fougera, or (ii) are responsible for making business decisions related to those Retained Products that are prescription pharmaceuticals for the treatment of the same disease as the Development Divestiture Product;

provided, however, that the restrictions contained in this Order regarding the Respondent's use, conveyance, provision, or disclosure of "Confidential Business Information" shall not apply to the following: (i) oral antibiotics; (ii) information that subsequently falls within the public domain through no violation of this Order or breach of confidentiality or non-disclosure agreement with respect to such information by the Respondent; (iii) information that is required by Law or rules of an applicable stock exchange to be publicly disclosed; (iv) information specifically excluded from the Divestiture Product Assets; and (v) all intellectual property licensed on a non-exclusive basis to Tolmar.

- D. Respondent shall require that each of Respondent's employees that has had access to Confidential Business Information within the one (1) year period prior to the Acquisition Date sign a confidentiality agreement pursuant to which that employee shall be required to maintain all Confidential Business Information related to the Divestiture Products as strictly confidential, including the nondisclosure of that information to all other employees, executives or other personnel of Respondent (other than as necessary to comply with the requirements of the Orders).

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- E. Not later than thirty (30) days after the Acquisition Date, Respondent shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information related to the Divestiture Products by Respondent's personnel to all of Respondent's employees who are covered by Paragraph II.C.6 and II.C.7. Respondent shall give the above-described notification by e-mail with return receipt requested or similar transmission, and keep a file of those receipts for one (1) year after the date the Order to Maintain Assets is issued by the Commission to become final and effective. Respondent shall provide a copy of the notification to Tolmar. Respondent shall maintain complete records of all such notifications at Respondent's registered office within the United States and shall provide an officer's certification to the Commission stating that the acknowledgment program has been implemented and is being complied with. Respondent shall provide Tolmar with copies of all certifications, notifications and reminders sent to Respondent's personnel.
- F. Respondent shall:
1. until the end of the Transition Period, take such actions with respect to the marketing, sales or distribution of the Marketed Divestiture Products as are necessary to:
 - a. maintain the ongoing economic viability and marketability of the businesses associated with that Marketed Divestiture Product;
 - b. minimize any risk of loss of competitive potential for that business;
 2. until the end of the Transition Period, not take any action that lessens the ongoing economic viability, marketability, or competitiveness of businesses related to the Marketed Divestiture Products; and

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3. other than as in the manner prescribed in this Order, not sell, transfer, encumber or impair the Divestiture Product Assets.
- G. Respondent shall not join, file, prosecute or maintain any suit, in law or equity, against Tolmar or the Divestiture Product Releasee(s) for the research, Development, manufacture, use, import, export, distribution, marketing or sale of the Divestiture Product(s) under the following:
1. any Patent owned or licensed by Respondent as of the day after the Acquisition Date (*excluding* those Patents that claim inventions conceived by and reduced to practice after the Acquisition Date) that claims a method of making, using, or administering, or a composition of matter, relating to the Divestiture Product(s), or that claims a device relating to the use thereof;
 2. any Patent owned or licensed by Respondent at any time after the Acquisition Date (*excluding* those Patents that claim inventions conceived by and reduced to practice after the Acquisition Date) that claim any aspect of the research, Development, manufacture, use, import, export, distribution, or sale of the Divestiture Product(s);

if such suit would have the potential to interfere with Tolmar's freedom to practice the following: (1) the research, Development, or manufacture of the Divestiture Product(s) anywhere in the World for the purposes of marketing or sale in the United States of America; or (2) the use within, import into, export from, or the supply, distribution, marketing, or sale within, the United States of America of a particular Divestiture Product. Respondent shall also covenant to that Acquirer that as a condition of any assignment, transfer, or license to a Third Party of the above-described Patents, the Third Party shall agree to provide a covenant whereby the Third Party covenants not to sue that Acquirer or the related Divestiture

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Product Releasee(s) under such Patents, if the suit would have the potential to interfere with that Acquirer's freedom to practice the following: (1) the research, Development, or manufacture of the Divestiture Product(s) anywhere in the World for the purposes of marketing or sale in the United States of America; or (2) the use within, import into, export from, or the supply, distribution, marketing, or sale within, the United States of America of a particular Divestiture Product.

- H. For any patent infringement suit in which the Respondent or Tolmar is alleged to have infringed a Patent of a Third Party prior to the Acquisition Date or for such suit as the Respondent or Tolmar has prepared or is preparing as of the Acquisition Date to defend against such infringement claim(s), and where such a suit would have the potential to interfere with Tolmar's freedom to practice the following: (1) the research, Development, or manufacture of the Divestiture Product(s); or (2) the use, import, export, supply, distribution, or sale of that Divestiture Product(s), Respondent shall:
1. cooperate with Tolmar and provide any and all necessary technical and legal assistance, documentation and witnesses from Respondent in connection with obtaining resolution of any pending patent litigation involving that Divestiture Product;
 2. waive conflicts of interest, if any, to allow the Respondent's outside legal counsel to represent Tolmar in any ongoing patent litigation involving that Divestiture Product; and
 3. permit the transfer to Tolmar of all of the litigation files and any related attorney work-product in the possession of Respondent's outside counsel relating to that Divestiture Product.

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- I. Respondent shall not, in the Geographic Territory:
1. use the Product Trademarks or any mark confusingly similar to such Product Trademarks, as a trademark, trade name, or service mark;
 2. attempt to register such Product Trademarks;
 3. attempt to register any mark confusingly similar to such Product Trademarks;
 4. challenge or interfere with Tolmar's use and registration of such Product Trademarks; or
 5. challenge or interfere with Tolmar's efforts to enforce its trademark registrations for and trademark rights in such Product Trademarks against Third Parties;
- provided however*, that this paragraph shall not preclude Respondents from continuing to use all trademarks, tradenames, or service marks that have been in use in commerce on a Retained Product at any time prior to the Acquisition Date.
- J. The purpose of the divestiture of the Divestiture Product Assets and the related obligations imposed on the Respondent by this Order is:
1. to provide for the future use of such assets for the distribution, sale and marketing of each Divestiture Product in the Geographic Territory;
 2. to create a viable and effective competitor, that is independent of the Respondent in the distribution, sale and marketing of the each Divestiture Product in the Geographic Territory; and,
 3. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

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

- A. At any time after the Respondent signs the Consent Agreement in this matter, the Commission may appoint a monitor (“Interim Monitor”) to assure that the Respondent expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order, the Order to Maintain Assets and the Remedial Agreements.
- B. The Commission shall select the Interim Monitor, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Interim Monitor, Respondent shall be deemed to have consented to the selection of the proposed Interim Monitor.
- C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondent shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondent’s compliance with the relevant requirements of the Order in a manner consistent with the purposes of the Order.
- D. If an Interim Monitor is appointed, Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:
 - 1. The Interim Monitor shall have the power and authority to monitor Respondent’s compliance with the divestiture and asset maintenance obligations and related requirements of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim

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Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission.

2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.
3. The Interim Monitor shall serve until the end of the Transition Period; *provided, however*, that the Interim Monitor's service shall not exceed one (1) year from the Order Date; *provided, further*, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.
4. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondent's personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondent's compliance with its obligations under the Order, including, but not limited to, its obligations related to the relevant assets. Respondent shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondent's compliance with the Order.
5. The Interim Monitor shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.

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6. Respondent shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.
 7. Respondent shall report to the Interim Monitor in accordance with the requirements of this Order and as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondent, and any reports submitted by the Acquirer with respect to the performance of Respondent's obligations under the Order or the Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondent of its obligations under the Order.
 8. Respondent may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission

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materials and information received in connection with the performance of the Interim Monitor's duties.

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

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

- A. If Respondent has not fully complied with the obligations to assign, grant, license, divest, transfer, deliver or otherwise convey the Divestiture Product Assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver or otherwise convey these assets in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondent shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief

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available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent to comply with this Order.

- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Divestiture Trustee, Respondent shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondent shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
 - 1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed.
 - 2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust

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agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however*, the Commission may extend the divestiture period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondent shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.
4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission

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determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondent from among those approved by the Commission; *provided further, however*, that Respondent shall select such Person within five (5) days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondent, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.
6. Respondent shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether

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or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order; *provided, however,* that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Interim Monitor pursuant to the relevant provisions of this Order or the Order to Maintain Assets in this matter.
 8. The Divestiture Trustee shall report in writing to Respondent and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
 9. Respondent may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph.
- F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

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

- G. Any Remedial Agreement shall be deemed incorporated into this Order.
- H. Any failure by the Respondent to comply with any term of such Remedial Agreement shall constitute a failure to comply with this Order.
- I. Respondent shall include in each Remedial Agreement related to each of the Divestiture Products a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of the Respondent's obligations to the Acquirer pursuant to this Order.
- J. Respondent shall not seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Remedial Agreement, or in any agreement related to any of the Divestiture Products a decision the result of which would be inconsistent with the terms of this Order or the remedial purposes thereof.
- K. Respondent shall not modify or amend any of the terms of any Remedial Agreement without the prior approval of the Commission.

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

- A. Within five (5) days of the Acquisition Date, Respondent shall submit to the Commission a letter certifying the date on which the Acquisition occurred.
- B. Within thirty (30) days after the date the Order to Maintain Assets is issued, and every thirty (30) days thereafter until Respondent has fully complied with Paragraphs II.A, II.B., II.C. of this Order, and until the end of the Transitional Period, Respondent shall

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submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with the Orders. Respondent shall submit at the same time a copy of its report concerning compliance with this Order to the Interim Monitor, if any Interim Monitor has been appointed. Respondent shall include in its reports, among other things that are required from time to time, a detailed description of the efforts being made to comply with the relevant paragraphs of the Orders, including a detailed description of all substantive contacts, negotiations, or recommendations related to the transitional services being provided by the Respondent to Tolmar and/or the New Commercialization Partner, and a detailed description the timing for the completion of such obligations.

- C. One (1) year after the Order Date, and annually for three (3) years on the anniversary of the Order Date, and at other times as the Commission may require, Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with the Order.

VII.

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

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

Decision and Order

VIII.

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

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

IX.

IT IS FURTHER ORDERED that this Order shall terminate on September 4, 2022.

By the Commission.

Analysis to Aid Public Comment

NON-PUBLIC APPENDIX A

**THE COLLABORATION, DEVELOPMENT AND SUPPLY
AGREEMENT**

AND

THE DIVESTITURE AGREEMENTS

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

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

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Novartis AG (“Novartis”) that is designed to remedy the anticompetitive effects of Novartis’s acquisition of Fougera Holdings Inc. (“Fougera”) in several generic pharmaceutical markets. Under the terms of the proposed Consent Agreement, Novartis is required to: (1) terminate Novartis’s marketing agreement with Tolmar, Inc. (“Tolmar”) with respect to the currently marketed products generic calcipotriene topical solution, generic lidocaine-prilocaine cream, and generic metronidazole topical gel (“Marketed Divestiture Products”) and return all of Novartis’s rights to distribute, market, and sell the Marketed Divestiture Products to Tolmar; and (2) return all rights to develop, distribute, market, and sell the development product generic diclofenac sodium gel to Tolmar.

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

Analysis to Aid Public Comment

withdraw from the proposed Consent Agreement, modify it, or make final the Decision and Order (“Order”).

Pursuant to an Agreement and Plan of Merger executed on May 1, 2012, Novartis proposes to acquire Fougera in a transaction valued at approximately \$1.525 billion (the “Proposed Acquisition” or “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 substantially lessening competition in the U.S. markets for generic calcipotriene topical solution, generic lidocaine-prilocaine cream, generic metronidazole topical gel, and diclofenac sodium gel. The proposed Consent Agreement will remedy the alleged violations by replacing the competition that would otherwise be eliminated by the Acquisition.

The Products and Structure of the Markets

The Acquisition would reduce the number of generic suppliers in three current generic drug markets with likely anticompetitive consequences. In human pharmaceutical product markets with generic competition, price generally decreases as the number of generic competitors increases. Accordingly, the reduction in the limited number of suppliers within each relevant market has a direct and substantial effect on pricing.

Generic calcipotriene topical solution is used to treat chronic, moderately severe scalp psoriasis. Only three companies offer generic calcipotriene topical solution in the United States: Novartis, Fougera, and G & W Laboratories (“G & W”). Novartis leads the market with a 67 percent share. G & W accounts for 22 percent, while Fougera represents an 11 percent share.

Generic lidocaine-prilocaine cream is used as a local anesthetic to treat intact skin and to relieve pain from injections and surgery. Lidocaine-prilocaine is available in both 30 gram tubes and packages containing five 5 gram tubes (“5-5 tubes”). The 5-5 tubes are used only in hospitals, while the 30 gram tubes are prescribed directly to patients for home use. Fougera, Hi-Tech Pharmaceutical Co. (“Hi-Tech”), and Novartis are the only U.S. suppliers of 30 gram tubes. The market for the generic 5-5

Analysis to Aid Public Comment

tubes is even more concentrated as only Fougera and Novartis offer them. The Acquisition would therefore create a monopoly in the generic lidocaine-prilocaine 5-5 tube market.

Generic metronidazole topical gel is used to treat inflamed papules and pustules of rosacea, a condition that causes chronic redness of facial skin. Taro Pharmaceutical Industries (“Taro”) is the market leader with approximately 43 percent market share, Fougera has approximately 36 percent market share, Novartis has approximately 19 percent market share, and G & W has approximately 2 percent market share.

Furthermore, the Acquisition could inhibit significant future competition by reducing the number of potential suppliers in the diclofenac sodium gel market. Solaraze is a branded drug sold by Fougera that is used to treat actinic keratosis. No companies currently market a generic version of the drug, diclofenac sodium gel, in the United States. Novartis is best positioned to be the first generic entrant into this market.

Entry

Entry into the relevant markets for the sale of the products would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. Entry would not take place in a timely manner because the combination of drug development times and U.S. Food and Drug Administration (“FDA”) approval requirements are likely to take at least two years.

Effects

In each of the relevant product markets, the Proposed Acquisition likely would eliminate one of a limited number of suppliers and cause significant competitive harm by facilitating price increases – or eliminating decreases – after the transaction is consummated.

In generic pharmaceuticals markets, pricing is heavily influenced by the number of competitors with sufficient supply that participate in the market. Market participants consistently characterize generic drug markets as commodity markets in which

Analysis to Aid Public Comment

the number of generic suppliers has a direct impact on pricing. Customers and competitors alike have confirmed that the price of a generic pharmaceutical product decreases with the entry of the second, third, and even fourth and fifth generic competitor. Further, customers generally believe that having at least four suppliers in a generic pharmaceutical market produces the most competitive prices.

Evidence gathered during our investigation indicates that anticompetitive effects are likely to result from a decrease in the number of independent competitors in the markets at issue. The Proposed Acquisition, by reducing an already limited number of competitors or potential competitors in each of these markets, would cause anticompetitive harm to U.S. consumers by increasing the likelihood of higher post-acquisition prices. In the market for generic calcipotriene topical solution, Novartis and Fougera are two of only three suppliers. In the lidocaine-prilocaine cream 30 gram tube market, Novartis and Fougera are two of only three suppliers of the product, and the Proposed Acquisition would eliminate Fougera as an independent competitor to Novartis leaving only Hi-Tech. In the generic lidocaine-prilocaine cream 5-5 gram tubes market, the Acquisition would result in a merger to monopoly. In the generic metronidazole gel market, Novartis and Fougera are two of four competitors, and combined, Novartis and Fougera represent 55 percent of the market. In all of these markets, industry participants have indicated that the presence of Fougera as a competitor has allowed them to negotiate lower prices.

Finally, the Acquisition would eliminate significant potential competition between Novartis and Fougera in the market for the sale of diclofenac sodium gel. Novartis, through its agreement with Tolmar, was the first to file for an approval of a generic form of Solaraze with the FDA. Thus, Fougera's brand, Solaraze, is likely to face competition solely from Novartis for a significant period of time when generic competition is introduced into this market. As a result, the Acquisition would increase the likelihood that the launch of a generic diclofenac sodium gel product would be delayed or abandoned altogether and increase the likelihood that the combined entity would delay or eliminate the substantial price competition that would have resulted from the entry of a supplier of a generic diclofenac sodium gel product.

Analysis to Aid Public Comment

The Consent Agreement

The proposed Consent Agreement effectively remedies the Proposed Acquisition's anticompetitive effects in the relevant product markets. Pursuant to the Consent Agreement, Novartis is required to return certain rights related to the relevant products to Tolmar no later than ten (10) days after the Acquisition. Specifically, the proposed Consent Agreement requires that Novartis: (1) terminate its marketing agreement with Tolmar, thereby returning all of its rights to distribute, market, and sell the Marketed Divestiture Products back to Tolmar; and (2) return all rights to develop, distribute, market, and sell generic diclofenac sodium gel to Tolmar. Tolmar is the Colorado-based developer and manufacturer of the relevant generic products.

If Novartis does not fully comply with its obligations to return all rights to generic calcipotriene topical solution, generic lidocaine-prilocaine cream, generic metronidazole topical gel, and generic diclofenac sodium gel, the Commission may appoint a trustee to effect the return of such rights.

The proposed remedy contains several provisions to ensure that the transfer of rights back to Tolmar is successful. The Consent Agreement contains an Order to Maintain Assets that requires Novartis to continue to market the Marketed Divestiture Products in a manner that maintains the full economic viability and marketability of the businesses until Tolmar directs Novartis to cease marketing the Marketed Divestiture Products or Tolmar's new marketing partner commences the distribution, marketing, and sale of the Marketed Divestiture Products.

The Commission appointed William Rahe of Quantic Regulatory Services, LLC to act as an interim monitor to assure that Novartis expeditiously complies with all of its obligations and performs all of its responsibilities as required by the Consent Agreement. In order to ensure that the Commission remains informed about the status of the returned rights and assets, the Consent Agreement requires Novartis to file reports with the interim monitor who will report in writing to the Commission concerning performance by Novartis of its obligation under the Consent Agreement.

Analysis to Aid Public Comment

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

Complaint

IN THE MATTER OF

**FRANKLIN'S BUDGET CAR SALES, INC.
DBA
FRANKLIN TOYOTA/SCION****CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND THE
GRAMM-LEACH-BLILEY ACT**

*Docket No. C-4371; File No. 102 3094
Complaint, October 3, 2012 – Decision, October 3, 2012*

This consent order addresses Franklin's Budget Car Sales, Inc.'s practices that, taken together, failed to provide reasonable and appropriate security for personal information on its computers and networks. The complaint alleges that Franklin Toyota misrepresented that it implements reasonable and appropriate measures to protect consumers' personal information from unauthorized access, in violation of Section 5 of the Federal Trade Commission Act; and violated the Gramm-Leach-Bliley Privacy Rule by failing to send consumers annual privacy notices and by failing to provide a mechanism by which consumers could opt out of information sharing with nonaffiliated third parties. The consent order prohibits Franklin Toyota from violating any provision of the Gramm-Leach-Bliley Act's Standards for Safeguarding Consumer Information Rule ("Safeguards Rule") and making misrepresentations about the privacy, security, confidentiality, and integrity of any personal information collected from or about consumers.

Participants

For the *Commission*: *Karen Jagielski*.

For the *Respondent*: *Michael A. Goodman, Hudson Cook, LLP*.

COMPLAINT

The Federal Trade Commission ("FTC" or "Commission"), having reason to believe that Franklin's Budget Car Sales, Inc., also dba Franklin Toyota/Scion ("Franklin Toyota" or "respondent") has violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a); the provisions of the Commission's Standards for Safeguarding Customer Information Rule ("Safeguards Rule"), 16 C.F.R. Part 314, issued pursuant to Title V, Subtitle A of the Gramm-Leach-Bliley Act ("GLB Act") (codified at 15 U.S.C. §§

Complaint

6801-6809); and the Commission's Privacy of Customer Financial Information Rule ("Privacy Rule"), 16 C.F.R. Part 313, issued pursuant to the GLB Act; and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Franklin's Budget Car Sales, Inc., also dba Franklin Toyota/Scion ("Franklin Toyota") is a Georgia corporation with its registered address as P.O. Box 648, Statesboro, Georgia 30459 and its places of business at 500 Commerce Boulevard, Statesboro, Georgia 30458; 400 Northside Drive, Statesboro, Georgia 30458; and 733 Northside Drive East, Statesboro, Georgia 30459.

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

RESPONDENT'S BUSINESS PRACTICES

3. Respondent Franklin Toyota is a franchise automobile dealership that sells both new and used automobiles, leases automobiles, provides repair services for automobiles, and sells automobile parts. In connection with its automobile sales, Franklin Toyota provides financing services to individual consumers.

4. Since at least 2001, respondent has disseminated, or caused to be disseminated, to consumers statements concerning Franklin Toyota's privacy and data security policies and practices, including, but not limited to the following:

We restrict access to non public personal information about you to only those employees who need to know that information to provide products and services to you. We maintain physical, electronic, and procedural safe guards that comply with federal regulations to guard non public personal information.

Franklin Toyota Privacy Policy, attached as Exhibit A.

Complaint

5. In conducting business, respondent routinely collects personal information from or about its customers, including, but not limited to names, Social Security numbers, addresses, telephone numbers, dates of birth, and drivers' license numbers (collectively, "personal information").

6. Respondent uses computer networks to conduct its business and collect consumer information. Among other things, it uses the networks to obtain an online credit application from consumers; obtain outside lead information; maintain customer automobile and payment records; and manage customer car sales records, finance, and insurance records.

7. Respondent did not provide its customers with annual privacy notices and did not provide a clear and conspicuous opt-out notice that accurately explains to its customers their rights to opt out of any sharing of nonpublic information with unaffiliated third parties.

RESPONDENT'S SECURITY PRACTICES

8. Respondent has engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for personal information on its computers and networks. Among other things, respondent failed to:

- a. Assess risks to the consumer personal information it collected and stored online;
- b. Adopt policies, such as an incident response plan, to prevent, or limit the extent of, unauthorized disclosure of personal information;
- c. Use reasonable methods to prevent, detect, and investigate unauthorized access to personal information on its networks, such as inspecting outgoing transmissions to the internet to identify unauthorized disclosures of personal information;
- d. Adequately train employees about information security to prevent unauthorized disclosures of personal information; and

Complaint

- e. Employ reasonable measures to respond to unauthorized access to personal information on its networks or to conduct security investigations where unauthorized access to information occurred.

9. As a result of the failures set forth in Paragraph 8, customers' personal information was accessed and disclosed on peer-to-peer ("P2P") networks by a P2P application installed on a computer that was connected to respondent's computer network.

10. Information for approximately 95,000 consumers, including, but not limited to, names, Social Security numbers, addresses, dates of birth, and drivers' license numbers ("customer files") was made available on a P2P network. Such information can easily be misused to commit identity theft and fraud.

11. Files shared to a P2P network are available for viewing or downloading by anyone using a computer that operates a compatible P2P application. Generally, a file that has been shared cannot be removed from P2P networks.

VIOLATIONS OF THE FTC ACT

12. Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits unfair or deceptive acts or practices in or affecting commerce.

13. As set forth in Paragraph 4, respondent has represented, expressly or by implication, that it implements reasonable and appropriate measures to protect consumers' personal information from unauthorized access.

14. In truth and in fact, respondent did not implement reasonable and appropriate measures to protect consumers' personal information from unauthorized access. Therefore, the representation set forth in Paragraph 13 was, and is, false or misleading, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

VIOLATIONS OF THE SAFEGUARDS RULE

15. The Safeguards Rule, which implements Section 501(b) of the GLB Act, 15 U.S.C. § 6801(b), requires financial institutions

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to protect the security, confidentiality, and integrity of customer information by developing a comprehensive written information security program that contains reasonable administrative, technical, and physical safeguards, including: (1) designating one or more employees to coordinate the information security program; (2) identifying reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information, and assessing the sufficiency of any safeguards in place to control those risks; (3) designing and implementing information safeguards to control the risks identified through risk assessment, and regularly testing or otherwise monitoring the effectiveness of the safeguards' key controls, systems, and procedures; (4) overseeing service providers and requiring them by contract to protect the security and confidentiality of customer information; and (5) evaluating and adjusting the information security program in light of the results of testing and monitoring, changes to the business operation, and other relevant circumstances. 16 C.F.R. §§ 314.3 and 314.4. Violations of the Safeguards Rule are enforced through the FTC Act. 15 U.S.C. § 6805(a)(7).

16. Respondent is a "financial institution" as that term is defined in Section 509(3)(A) of the GLB Act, 15 U.S.C. § 6809(3)(A).

17. As set forth in Paragraph 8, respondent has failed to implement reasonable security policies and procedures, and has thereby engaged in violations of the Safeguards Rule, by, among other things:

- a. Failing to identify reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information;
- b. Failing to design and implement information safeguards to control the risks to customer information and failing to regularly test and monitor them;
- c. Failing to investigate, evaluate, and adjust the information security program in light of known or identified risks;

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- d. Failing to develop, implement, and maintain a comprehensive written information security program; and
- e. Failing to designate an employee to coordinate the company's information security program.

VIOLATION OF THE PRIVACY RULE

18. The Privacy Rule, which implements Section 503 of the GLB Act, 15 U.S.C. § 6803, requires financial institutions to provide customers, no later than when a customer relationship arises and annually for the duration of that relationship, “a clear and conspicuous notice that accurately reflects [the financial institution’s] privacy policies and practices,” including its security policies and practices. 16 C.F.R. § 313.4(a), 313.5(a)(1), 313.6(a)(8). In addition, the Privacy Rule requires financial institutions to provide reasonable means for its customers to opt out of the institution’s sharing of nonpublic customer information to nonaffiliated third parties and provide opt-out notices to consumers. 16 C.F.R. § 313.7. Violations of the Privacy Rule are enforced through the FTC Act. 15 U.S.C. § 6805(a)(7).

19. As set forth in Paragraph 7, respondent failed to send consumers annual privacy notices and did not provide a mechanism by which consumers could opt out of information sharing with nonaffiliated third parties in violation of the Privacy Rule.

20. 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 FTC Act.

THEREFORE, the Federal Trade Commission this third day of October, 2012, has issued this complaint against respondent.

By the Commission.

Complaint

Exhibit A

Notice Applied to

Franklin Chevrolet Co., Inc. (also as Franklin Chevrolet Cadillac Buick Pontiac GMC and Franklin Toyota, Inc.) Here in referred to as Franklin Auto Group.

Franklin Auto Group is committed to respecting the individual privacy of its customers. In accordance with federal regulations, vehicle financial activity in automobile dealerships leasing, credit sales and insurance product sales would likely be considered financial activities. Therefore because the Gramm, Leach, Bliley Act (GLB Act) requires a privacy notice the following notice is provided:

Privacy Notice

In connection with your transaction Franklin Auto Group may obtain information about you as described in this notice, which we handle as stated in this notice.

- 1. We collect non public personal information about you from the following sources:
a. Information we receive from your application and other forms.
b. Information about your transactions with our affiliates and others; and
c. Information we receive from credit reporting agencies.
2. We may disclose all the information we collect, as described above to auto manufacturers/ distributors that we have franchises with and companies that perform marketing services or other functions on our behalf or to other financial institutions with whom we have joint marketing agreements. We may make disclosures about you as a consumer, a customer, or a former customer. We do not sell list of our customers or otherwise make that information available to nonaffiliated third parties except as described above.
3. We may also disclose non public personal information about you as a consumer, a customer or a former customer, as provided by law.
4. We restrict access to non public personal information about you to only those employees who need to know that information to provide products and services to you. We maintain physical, electronic, and procedural safe guards that comply with federal regulations to guard non public personal information.
5. We do not provide for an opt-out due to agreements made in items 2, 3, & 4 above where the disclosure is necessary to process or service a transaction for you the consumer therefore not required. Any questions may be directed to 1-800-684-6348.

Consumer acknowledgment: I (we) acknowledge that I (we) received a copy of this notice on the date indicated below.

Customer Signature _____ Date _____
Customer Name Printed _____
Co-Customer Signature _____ Date _____
Co-Customer Name Printed _____

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission” or “FTC”), 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 violations of Section 5 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 45, the Standards for Safeguarding Consumer Information Rule (“Safeguards Rule”), 16 C.F.R. Part 314, and the Privacy of Consumer Financial Information Rule (“Privacy Rule”), 16 C.F.R. Part 313;

The respondent, its attorney, 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 FTC Act, the Safeguards Rule, and the Privacy Rule, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comment received from an interested person pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure prescribed in Commission Rule 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following Order:

1. Respondent Franklin's Budget Car Sales, Inc., also dba Franklin Toyota/Scion is a Georgia corporation with

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its registered address as P.O. Box 648, Statesboro, Georgia 30459 and its places of business at 500 Commerce Boulevard., Statesboro, Georgia 30458; 400 Northside Drive, Statesboro, Georgia 30458; and 733 Northside Drive East, Statesboro, Georgia 30459.

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 Franklin's Budget Car Sales, Inc., also dba Franklin Toyota/Scion, its successors and assigns, and each of their successors and assigns.
- B. "Personal information" shall mean individually identifiable information from or about an individual consumer including, but not limited to: (a) first and last name; (b) date of birth; (c) home or other physical address, including street name and name of city or town; (d) email address or other online contact information, such as an instant-messaging user identifier or a screen name that reveals an individual's email address; (e) telephone number; (f) driver's license number; (g) financial account information; (h) Social Security number; (i) credit or debit card information, including card number, expiration date, and security code; (j) persistent identifier, such as a customer number held in a "cookie" or processor serial number; and (k) any information that is combined with any of (a) through (j) above.
- C. "Commerce" shall mean "commerce" as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

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- D. All other terms are synonymous in meaning and equal in scope to the usage of such terms in the Gramm-Leach-Bliley Act (codified at 15 U.S.C. § 6801 *et seq*) (“GLB Act”).

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees, directly or indirectly, 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, is prohibited from misrepresenting in any manner, expressly or by implication, the extent to which respondent maintains and protects the privacy, confidentiality, or security of any personal information collected from or about consumers.

II.

IT IS FURTHER ORDERED that respondent and its officers, agents, representatives, and employees, shall not, directly or indirectly, or through any corporation, subsidiary, division, website, or other device, violate any provision of the GLB Act’s Standards for Safeguarding Consumer Information Rule (“Safeguards Rule”), 16 C.F.R. Part 314, or the GLB Act’s Privacy of Consumer Financial Information Rule (“Privacy Rule”), 16 C.F.R. Part 313.

In the event that the Safeguards Rule or Privacy Rule is hereafter amended or modified, respondent’s compliance with these Rules as so amended or modified shall not be a violation of this order.

III.

IT IS FURTHER ORDERED that respondent, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall, no later than the date of service of this order, establish and implement, and thereafter maintain, a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers. Such program, the content

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and implementation of which must be fully documented in writing, shall contain administrative, technical, and physical safeguards appropriate to respondent's size and complexity, the nature and scope of its activities, and the sensitivity of the personal information collected from or about consumers, including:

- A. The designation of an employee or employees to coordinate and be accountable for the information security program;
- B. The identification of material internal and external risks to the security, confidentiality, and integrity of personal information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, and assessment of the sufficiency of any safeguards in place to control these risks. At a minimum, this risk assessment should include consideration of risks in each area of relevant operation, including, but not limited to: (1) employee training and management; (2) information systems, including network and software design, information processing, storage, transmission, and disposal; and (3) prevention, detection, and response to attacks, intrusions, or other systems failures;
- C. The design and implementation of reasonable safeguards to control the risks identified through risk assessment, and regular testing or monitoring of the effectiveness of the safeguards' key controls, systems, and procedures;
- D. The development and use of reasonable steps to select and retain service providers capable of appropriately safeguarding personal information they receive from respondent, and requiring service providers by contract to implement and maintain appropriate safeguards; and
- E. The evaluation and adjustment of respondent's information security program in light of the results of

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the testing and monitoring required by sub-part C, any material changes to respondent's operations or business arrangements, or any other circumstances that respondent knows or has reason to know may have a material impact on the effectiveness of its information security program.

IV.

IT IS FURTHER ORDERED that, in connection with its compliance with the Safeguards Rule and Part III of this order, respondent shall obtain initial and biennial assessments and reports ("Assessments") from a qualified, objective, independent third-party professional, who uses procedures and standards generally accepted in the profession. Professionals qualified to prepare such assessments shall be: a person qualified as a Certified Information System Security Professional (CISSP) or as a Certified Information Systems Auditor (CISA); a person holding Global Information Assurance Certification (GIAC) from the SysAdmin, Audit, Network, Security (SANS) Institute; or a similarly qualified person or organization approved by the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580. The reporting period for the Assessments shall cover: (1) the first one hundred and eighty (180) days after service of the order for the initial Assessment, and (2) each two (2) year period thereafter for twenty (20) years after service of the order for the biennial Assessments. Each Assessment shall:

- A. Set forth the specific administrative, technical, and physical safeguards that respondent has implemented and maintained during the reporting period;
- B. Explain how such safeguards are appropriate to respondent's size and complexity, the nature and scope of its activities, and the sensitivity of the personal information collected from or about consumers;
- C. Explain how the safeguards that have been implemented meet or exceed the protections required by the Part III of this order; and

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- D. Certify that respondent's information security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of personal information is protected and has so operated throughout the reporting period.

Each Assessment shall be prepared and completed within sixty (60) days after the end of the reporting period to which the Assessment applies. Respondent shall provide the initial Assessment to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, within ten (10) days after the Assessment has been prepared. All subsequent biennial Assessments shall be retained by respondent until the order is terminated and provided to the Associate Director for Enforcement within ten (10) days of request. Unless otherwise directed by a representative of the Commission, initial and biennial Assessments shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, D.C. 20580, with the subject line "In re Franklin's Budget Car Sales, Inc., FTC File Number 1023094." *Provided, however,* that, in lieu of overnight courier, Assessments may be sent by first-class mail, but only if an electronic version of such Assessments is contemporaneously sent to the Commission at DEBrief@ftc.gov.

V.

IT IS FURTHER ORDERED that respondent shall maintain and, upon request, make available to the Commission for inspection and copying:

- A. For a period of five (5) years, a print or electronic copy of each document relating to compliance, including but not limited to documents, prepared by or on behalf of respondent, that contradict, qualify, or call into question respondent's compliance with this order; and
- B. For a period of three (3) years after the date of preparation of each Assessment required under Part III of this order, all materials relied upon to prepare the

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

VI.

IT IS FURTHER ORDERED that for a period of five (5) years from the date of entry of this Order, respondent shall deliver copies of the Order as directed below:

- A. Respondent must deliver a copy of this Order to (1) all current and future principals, officers, directors, and managers, (2) all current and future employees, agents and representatives who engage in conduct related to the subject matter of the Order, and (3) any business entity resulting from any change in structure set forth in Part VII. For current personnel, delivery shall be within five (5) days of service of this Order. For new personnel, delivery shall occur prior to them assuming their responsibilities. For any business entity resulting from any change in structure set forth in Part VII, delivery shall be at least ten (10) days prior to the change in structure.
- B. Respondent must secure a signed and dated statement acknowledging receipt of this Order, within thirty (30) days of delivery, from all persons receiving a copy of the Order pursuant to this section.

VII.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change that may affect compliance obligations arising under this order, including, but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor company; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to

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this order; the proposed filing of a bankruptcy petition; or a change in respondent's name or address. *Provided, however,* that, with respect to any proposed change in the entity 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. Unless otherwise directed by a representative of the Commission, all notices required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, D.C. 20580, with the subject line "In re Franklin's Budget Car Sales, Inc., FTC File Number 1023094." *Provided, however,* that, in lieu of overnight courier, notices may be sent by first-class mail, but only if an electronic version of such notices is contemporaneously sent to the Commission at DEBrief@ftc.gov.

VIII.

IT IS FURTHER ORDERED that respondent and its successors and assigns, within sixty (60) days after the date of service of this order, shall file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of its compliance 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. Unless otherwise directed by a representative of the Commission, each report required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, D.C. 20580, with the subject line "In re Franklin's Budget Car Sales, Inc., FTC File Number 1023094." *Provided, however,* that, in lieu of overnight courier, reports may be sent by first-class mail, but only if an electronic version of such reports is contemporaneously sent to the Commission at DEBrief@ftc.gov.

Analysis to Aid Public Comment

IX.

This order will terminate on October 3, 2032, 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 OF CONSENT ORDER TO AID PUBLIC
COMMENT**

The Federal Trade Commission has accepted, subject to final approval, a consent agreement from Franklin's Budget Car Sales, Inc., also doing business as Franklin Toyota/Scion ("Franklin Toyota").

Analysis to Aid Public Comment

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

The Commission's proposed complaint alleges that Franklin Toyota, a Georgia corporation, is a franchise automobile dealership that sells both new and used automobiles, leases automobiles, provides repair services for automobiles, and sells automobile parts. In connection with its automobile sales, Franklin Toyota also provides financing services to individual consumers. The complaint alleges that In the course of its business, Franklin Toyota routinely collects personal information from or about its customers, including but not limited to names, Social Security numbers, addresses, telephone numbers, dates of birth, and drivers' license numbers. The complaint alleges that Franklin Toyota is a "financial institution" as defined in the Gramm-Leach-Bliley ("GLB") Act, 15 U.S.C. § 6801 et seq.

According to the complaint, Franklin Toyota engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for personal information on its computers and networks. In particular, Franklin Toyota failed to: (1) assess risks to the consumer personal information it collected and stored online; (2) adopt policies, such as an incident response plan, to prevent, or limit the extent of, unauthorized disclosure of personal information; (3) use reasonable methods to prevent, detect, and investigate unauthorized access to personal information on its networks, such as inspecting outgoing transmissions to the internet to identify unauthorized disclosures of personal information; (4) adequately train employees about information security to prevent unauthorized disclosures of personal information; and (5) employ reasonable measures to respond to unauthorized access to personal information on its networks or to conduct security investigations where unauthorized access to information occurred.

The complaint alleges that as a result of these failures, Franklin Toyota customers' personal information was accessed

Analysis to Aid Public Comment

and disclosed on peer-to-peer (“P2P”) networks by a P2P application installed on a computer connected to Franklin Toyota’s computer network. The complaint alleges that information for approximately 95,000 consumers, including but not limited to consumers’ names, Social Security numbers, addresses, dates of birth, and drivers’ license numbers, was made available on a P2P network. Such information can easily be used to facilitate identity theft and fraud.

Files shared to a P2P network are available for viewing or downloading by anyone using a personal computer with access to the network. Generally, a file that has been shared cannot be permanently removed from P2P networks.

In fact, the use of P2P software poses very significant data security risks to consumers. A 2010 FTC examination of P2P-related breaches uncovered a wide range of sensitive consumer data available on P2P networks, including health-related information, financial records, and drivers' license and social security numbers. *See Widespread Data Breaches Uncovered by FTC Probe: FTC Warns of Improper Release of Sensitive Consumer Data on P2P File-Sharing Networks* (Feb. 22, 2010), <http://www.ftc.gov/opa/2010/02/p2palert.shtm>. Files shared to a P2P network are available for viewing or downloading by any computer user with access to the network. Generally, a file that has been shared cannot be removed permanently from the P2P network. In addition, files can be shared among computers long after they have been deleted from the original source computer.

According to the complaint, Franklin Toyota violated the GLB Safeguards Rule by, among other things, failing to identify reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information; design and implement information safeguards to control the risks to customer information and failing to regularly test and monitor them; investigate, evaluate, and adjust the information security program in light of known or identified risks; develop, implement, and maintain a comprehensive written information security program; and designate an employee to coordinate the company's information security program.

Analysis to Aid Public Comment

In addition, the proposed complaint alleges that Franklin Toyota misrepresented that it implements reasonable and appropriate measures to protect consumers' personal information from unauthorized access, in violation of Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(a). Furthermore, the proposed complaint alleges that Franklin violated the GLB Privacy Rule by failing to send consumers annual privacy notices and by failing to provide a mechanism by which consumers could opt out of information sharing with nonaffiliated third parties.

The proposed order contains provisions designed to prevent Franklin Toyota from engaging in the future in practices similar to those alleged in the complaint.

Part I of the proposed order prohibits misrepresentations about the privacy, security, confidentiality, and integrity of any personal information collected from or about consumers.

Part II of the proposed order prohibits Franklin Toyota from violating any provision of the GLB Act's Standards for Safeguarding Consumer Information Rule ("Safeguards Rule"), 16 C.F.R. Part 314, or the GLB Act's Privacy of Consumer Financial Information Rule ("Privacy Rule"), 16 C.F.R. Part 313. Part III requires Franklin Toyota to establish, implement, and thereafter maintain a comprehensive information security program, including the designation of an employee to oversee Franklin Toyota's security program, employee training, and implementation of reasonable safeguards. Part IV of the order requires Franklin Toyota to obtain, for a period of twenty years, biennial assessments of its information security program from an independent third-party professional possessing certain credentials or certifications.

Parts V through IX of the proposed order are reporting and compliance provisions. Part V requires Franklin Toyota to retain documents relating to its compliance with the order. For most records, the order requires that the documents be retained for a five-year period. For the third party assessments and supporting documents, Franklin Toyota must retain the documents for a period of three years after the date that each assessment is prepared. Part VI requires dissemination of the order now and in

Analysis to Aid Public Comment

the future to persons with responsibilities relating to the subject matter of the order. Part VII ensures notification to the FTC of changes in corporate status. Part VIII mandates that Franklin Toyota submit a compliance report to the FTC within 90 days, and periodically thereafter as requested. Part IX is a provision “sunsetting” the order after twenty (20) years, with certain exceptions.

The purpose of the analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.

Complaint

IN THE MATTER OF

**EPN, INC.
D/B/A
CHECKNET, INC.**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket No. C-4370; File No. 112 3143
Complaint, October 3, 2012 – Decision, October 3, 2012*

This consent order addresses EPN, Inc.'s allowing an EPN employee to install a P2P application on her desktop computer, which was connected to EPN's computer network, resulting in two files containing personal information about a client's customers being made available on a P2P network. The complaint alleges that EPN violated of Section 5(a) of the Federal Trade Commission Act by failing to employ reasonable and appropriate measures to prevent unauthorized access to personal information which caused, or is likely to cause substantial injury to consumers that is not offset by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. The consent order prohibits misrepresentations about the privacy, security, confidentiality, and integrity of any personal information collected from or about consumers.

Participants

For the *Commission*: Karen Jagielski, Jessica Lyon, and Manas Mohapatra.

For the *Respondent*: Amy Purcell and Scott Vernick, Fox Rothschild LLP.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that EPN, Inc., d/b/a Checknet Inc. ("EPN") 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 EPN is a Utah corporation with its principal office or place of business at 746 East 1910 South, Suite 3, Provo, UT 84606.

Complaint

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

RESPONDENT’S BUSINESS PRACTICES

3. At all relevant times, Respondent has been in the business of collecting debts for clients in a variety of industries, including commercial credit, retail, and healthcare.

4. In conducting business, Respondent routinely obtains information about its clients’ customers. This information includes, but is not limited to: name, address, date of birth, gender, Social Security number, employer address, employer phone number, and in the case of healthcare clients, physician name, insurance number, diagnosis code, and medical visit type (collectively, “personal information”).

5. Respondent operates computer networks in conducting its business. Among other things, it uses the networks to receive, store, and use personal information about its clients’ customers to assist in collecting debts on its clients’ behalf.

EPN’S SECURITY PRACTICES

6. EPN has engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for personal information on its computers and networks. Among other things, Respondent failed to:

- a. Adopt an information security plan that was appropriate for its networks and the personal information processed and stored on them. For example, EPN did not have an incident response plan;
- b. Assess risks to the consumer personal information it collected and stored online;
- c. Adequately train employees about security to prevent unauthorized disclosure of personal information;
- d. Use reasonable measures to assess and enforce compliance with its security policies and procedures,

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such as scanning networks to identify unauthorized peer-to-peer (“P2P”) file sharing applications and other unauthorized applications operating on the networks or blocking installation of such programs; and

- e. Use reasonable methods to prevent, detect, and investigate unauthorized access to personal information on its networks, such as by adequately logging network activity and inspecting outgoing transmissions to the Internet to identify unauthorized disclosures of personal information.

7. As a result of the failures set forth in Paragraph 6, EPN’s chief operating officer was able to install a P2P application on her desktop computer, which was connected to EPN’s computer network. Respondent is unaware of the date the application was installed; it was disabled in April 2008 when EPN was informed by a client that two files containing personal information about the client’s debtors were available on a P2P network (“breached files”). EPN had no business need for the P2P application.

8. The breached files contained personal information about approximately 3,800 consumers, including each consumer’s name, address, date of birth, Social Security number, employer name, employer address, health insurance number, and a diagnosis code. Such information, among other things, can easily be used to facilitate identity theft (which also could result in medical histories that are inaccurate because they include the medical records of identity thieves) and exposes sensitive medical data.

9. The breached files were shared to the P2P network from EPN’s chief operating officer’s computer, and other files containing personal information may have been shared to P2P networks from that computer.

10. Files shared to a P2P network are available for viewing or downloading by anyone using a personal computer with access to the network. Generally, a file that has been shared cannot be permanently removed from P2P networks.

Decision and Order

VIOLATION OF THE FTC ACT

11. As set forth in Paragraphs 6 through 10, Respondent's failure to employ reasonable and appropriate measures to prevent unauthorized access to personal information caused, or is likely to cause, substantial injury to consumers that is not offset by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. Therefore, Respondent's practices were, and are, an unfair act or practice.

12. 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 October, 2012, has issued this complaint against Respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission" or "FTC"), 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 respondent with violations of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45 *et seq.*;

The respondent, its attorney, 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 said agreement is for settlement purposes only and

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does not constitute an admission by respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the FTC Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comment received from an interested person pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure prescribed in Commission Rule 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following Order:

1. Respondent, EPN, Inc., also d/b/a Checknet Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Utah, with its office and principal place of business located in the City of Provo, State of Utah.
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 EPN, Inc., also dba Checknet, Inc., and each of their successors and assigns.
- B. "Personal information" shall mean individually identifiable information from or about an individual

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consumer including, but not limited to: (a) first and last name; (b) date of birth; (c) a home or other physical address, including street name and name of city or town; (d) an email address or other online contact information, such as an instant messaging user identifier or a screen name that reveals an individual's email address; (e) a telephone number; (f) a Social Security number; (g) credit or debit card information, including card number, expiration date, and security code; (h) a persistent identifier, such as a customer number held in a "cookie" or processor serial number; and (i) any information that is combined with any of (a) through (h) above.

- C. "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 indirectly, 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 maintains and protects the privacy, confidentiality, or security of any personal information collected from or about consumers.

II.

IT IS ORDERED that respondent, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall, no later than the date of service of this order, establish and implement, and thereafter maintain, a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers. Such program, the content and implementation of which must be fully documented in writing, shall contain administrative, technical, and physical safeguards appropriate to respondent's size and complexity, the nature and

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scope of respondent's activities, and the sensitivity of the personal information collected from or about consumers, including:

- A. The designation of an employee or employees to coordinate and be accountable for the information security program.
- B. The identification of material internal and external risks to the security, confidentiality, and integrity of personal information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, and assessment of the sufficiency of any safeguards in place to control these risks. At a minimum, this risk assessment should include consideration of risks in each area of relevant operation, including, but not limited to: (1) employee training and management; (2) information systems, including network and software design, information processing, storage, transmission, and disposal; and (3) prevention, detection, and response to attacks, intrusions, or other systems failures.
- C. The design and implementation of reasonable safeguards to control the risks identified through risk assessment, and regular testing or monitoring of the effectiveness of the safeguards' key controls, systems, and procedures.
- D. The development and use of reasonable steps to select and retain service providers capable of appropriately safeguarding personal information they receive from respondent, and requiring service providers by contract to implement and maintain appropriate safeguards.
- E. The evaluation and adjustment of respondent's information security program in light of the results of the testing and monitoring required by sub-Part C, any material changes to respondent's operations or business arrangements, or any other circumstances that respondent knows or has reason to know may have a

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material impact on the effectiveness of its information security program.

III.

IT IS FURTHER ORDERED that, in connection with its compliance with Part II of this order, respondent shall obtain initial and biennial assessments and reports (“Assessments”) from a qualified, objective, independent third-party professional, who uses procedures and standards generally accepted in the profession. Professionals qualified to prepare such assessments shall be: a person qualified as a Certified Information System Security Professional (CISSP) or as a Certified Information Systems Auditor (CISA); a person holding Global Information Assurance Certification (GIAC) from the SysAdmin, Audit, Network, Security (SANS) Institute; or a similarly qualified person or organization approved by the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580. The reporting period for the Assessments shall cover: (1) the first one hundred and eighty (180) days after service of the order for the initial Assessment, and (2) each two (2) year period thereafter for twenty (20) years after service of the order for the biennial Assessments. Each Assessment shall:

- A. Set forth the specific administrative, technical, and physical safeguards that respondent has implemented and maintained during the reporting period;
- B. Explain how such safeguards are appropriate to respondent’s size and complexity, the nature and scope of respondent’s activities, and the sensitivity of the personal information collected from or about consumers;
- C. Explain how the safeguards that have been implemented meet or exceed the protections required by the Part II of this order; and
- D. Certify that respondent’s security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and

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integrity of personal information is protected and has so operated throughout the reporting period.

Each Assessment shall be prepared and completed within sixty (60) days after the end of the reporting period to which the Assessment applies. Respondent shall provide the initial Assessment to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, within ten (10) days after the Assessment has been prepared. All subsequent biennial Assessments shall be retained by respondent until the order is terminated and provided to the Associate Director for Enforcement within ten (10) days of request. Unless otherwise directed by a representative of the Commission, initial and biennial Assessments shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, D.C. 20580, with the subject line "In re EPN, Inc., FTC File Number 1123143." *Provided, however*, that, in lieu of overnight courier, Assessments may be sent by first-class mail, but only if an electronic version of such Assessments is contemporaneously sent to the Commission at DEBrief@ftc.gov.

IV.

IT IS FURTHER ORDERED that respondent shall maintain and, upon request, make available to the Federal Trade Commission for inspection and copying:

- A. For a period of five (5) years, a print or electronic copy of each document relating to compliance, including but not limited to documents, prepared by or on behalf of respondent, that contradict, qualify, or call into question respondent's compliance with this order; and
- B. For a period of three (3) years after the date of preparation of each Assessment required under Part II of this order, all materials relied upon to prepare the Assessment, whether prepared by or on behalf of respondent, including, but not limited to, all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, and any other

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materials relating to respondent's compliance with Parts I and II of this order, for the compliance period covered by such Assessment.

V.

IT IS FURTHER ORDERED that for a period of five (5) years from the date of entry of this Order, respondent shall deliver copies of the Order as directed below:

- A. Respondent must deliver a copy of this order to (1) all current and future principals, officers, directors, and managers, (2) all current and future employees, agents and representatives who engage in conduct related to the subject matter of the Order, and (3) any business entity resulting from any change in structure set forth in Part VI. For current personnel, delivery shall be within thirty (30) days of service of this Order. For new personnel, delivery shall occur prior to them assuming their responsibilities. For any business entity resulting from any change in structure set forth in Part VI, delivery shall be at least ten (10) days prior to the change in structure.
- B. Respondent must secure a signed and dated statement acknowledging receipt of this Order, within thirty (30) days of delivery, from all persons receiving a copy of the Order pursuant to this section.

VI.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change that may affect compliance obligations arising under this order, including, but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor company; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in respondent's name or address. *Provided, however,* that, with respect to any proposed change in the entity about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent

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shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission, all notices required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, D.C. 20580, with the subject line “In re EPN, Inc., FTC File Number 1123143.” *Provided, however,* that, in lieu of overnight courier, notices may be sent by first-class mail, but only if an electronic version of such notices is contemporaneously sent to the Commission at DEBrief@ftc.gov.

VII.

IT IS FURTHER ORDERED that respondent within ninety (90) days after the date of service of this order, shall file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of its compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, it shall submit additional true and accurate written reports. Unless otherwise directed by a representative of the Commission, each report required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, D.C. 20580, with the subject line “In re EPN, Inc., FTC File Number 1123143.” *Provided, however,* that, in lieu of overnight courier, reports may be sent by first-class mail, but only if an electronic version of such reports is contemporaneously sent to the Commission at DEBrief@ftc.gov.

VIII.

This order will terminate on October 3, 2032, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

Analysis to Aid Public Comment

- A. Any 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 OF CONSENT ORDER TO AID PUBLIC
COMMENT**

The Federal Trade Commission has accepted, subject to final approval, a consent agreement from EPN, 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.

The Commission's proposed complaint alleges that EPN, which does business as Checknet, Inc., is a Utah corporation that is in the business of collecting debts for clients in a variety of

Analysis to Aid Public Comment

industries, including commercial credit, retail, and healthcare. According to the complaint, In conducting business, EPN routinely obtains information about its clients' customers, which includes, but is not limited to: name, address, date of birth, gender, Social Security number, employer address, employer phone number, and in the case of healthcare clients, physician name, insurance number, diagnosis code, and medical visit type.

The complaint further alleges that EPN engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for personal information on its computers and networks. In particular, EPN failed to: (1) adopt an information security plan that was appropriate for its networks and the personal information processed and stored on them; (2) assess risks to the consumer personal information it collected and stored online; (3) adequately train employees about security to prevent unauthorized disclosure of personal information; (4) use reasonable measures to assess and enforce compliance with its security policies and procedures, such as scanning networks to identify unauthorized peer-to-peer ("P2P") file sharing applications and other unauthorized applications operating on the networks or blocking installation of such programs; and (5) use reasonable methods to prevent, detect, and investigate unauthorized access to personal information on its networks, such as by adequately logging network activity and inspecting outgoing transmissions to the Internet to identify unauthorized disclosures of personal information.

The complaint alleges that as a result of these failures, an EPN employee was able to install a P2P application on her desktop computer, which was connected to EPN's computer network, resulting in two files containing personal information about a client's customers being made available on a P2P network; other files containing personal information may also have been shared to P2P networks from that computer. The breached files contained personal information about approximately 3,800 consumers, including each consumer's name, address, date of birth, Social Security number, employer name, employer address, health insurance number, and a diagnosis code. The complaint alleges that such information, among other things, can easily be used to facilitate identity theft (which also could result in medical

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histories that are inaccurate because they include the medical records of identity thieves) and exposes sensitive medical data.

In fact, the presence of P2P software on business computers can pose significant data security risks. A 2010 FTC examination of P2P-related breaches uncovered a wide range of sensitive consumer data available on P2P networks, including health-related information, financial records, and drivers' license and social security numbers. *See* Press Release, FTC, Widespread Data Breaches Uncovered by FTC Probe (Feb. 22, 2010), <http://www.ftc.gov/opa/2010/02/p2palert.shtm>. Files shared to a P2P network are available for viewing or downloading by any computer user with access to the network. Generally, a file that has been shared cannot be removed permanently from the P2P network. In addition, files can be shared among computers long after they have been deleted from the original source computer.

According to the complaint, EPN's failure to employ reasonable and appropriate measures to prevent unauthorized access to personal information caused, or is likely to cause substantial injury to consumers that is not offset by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. Therefore, EPN's practices were, and are an unfair act or practice, in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. §45(a).

The proposed order contains provisions designed to prevent EPN from engaging in the future in practices similar to those alleged in the complaint.

Part I of the proposed order prohibits misrepresentations about the privacy, security, confidentiality, and integrity of any personal information collected from or about consumers.

Part II of the proposed order requires EPN to establish, implement, and thereafter maintain a comprehensive information security program, including the designation of an employee to oversee EPN's security program, employee training, and implementation of reasonable safeguards. Part III of the order requires EPN to obtain, for a period of twenty years, biennial assessments of its information security program from an

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independent third-party professional possessing certain credentials or certifications.

Parts IV through VIII of the proposed order are reporting and compliance provisions. Part IV requires EPN to retain documents relating to its compliance with the order. For most records, the order requires that the documents be retained for a five-year period. For the third party assessments and supporting documents, EPN must retain the documents for a period of three years after the date that each assessment is prepared. Part V requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part VI ensures notification to the FTC of changes in corporate status. Part VII mandates that EPN submit a compliance report to the FTC within 90 days, and periodically thereafter as requested. Part VIII is a provision “sunsetting” the order after twenty (20) years, with certain exceptions.

The purpose of the analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.

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IN THE MATTER OF

**COOPERATIVA DE FARMACIAS
PUERTORRIQUEÑAS**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4374; File No. 101 0079**Complaint, November 6, 2012 – Decision, November 6, 2012*

This consent order addresses Cooperativa de Farmacias Puertorriqueñas's ("Coopharma") negotiating, entering into, and implementing agreements among its member pharmacy owners to fix the prices on which they contract with third-party payers in Puerto Rico. The complaint alleges that Coopharma's member pharmacies restrained competition by jointly negotiating and entering into agreements with third-party payers. Coopharma achieved this result by encouraging its members: (1) to refuse to deal with third-party payers except through Coopharma; and (2) to threaten termination, or actually terminate, contracts with payers that refused to deal with Coopharma on the terms it demanded. The consent order prohibits Respondent from entering into or facilitating agreements between or among any pharmacies: (1) to negotiate on behalf of any pharmacy with any payer; (2) to refuse to deal or threaten to refuse to deal with any payer; (3) to include any term, condition, or requirement upon which any pharmacy deals, or is willing to deal, with any payer, but not limited to, price terms; or (4) not to deal individually with any payer, or not to deal with any payer other than through Respondent.

Participants

For the *Commission*: Linda Blumenreich and Randy David Marks.

For the *Respondent*: David Balto, Brendan Coffman, and Brad Wasser, Law Offices of David Balto.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41, et seq., and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Cooperativa de Farmacias Puertorriqueñas ("Coopharma") violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding

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by it in respect thereof would be in the public interest, hereby issues this Complaint, stating its charges in that respect as follows:

I. NATURE OF THE CASE

1. This matter concerns an agreement among competing pharmacies in Puerto Rico, through their membership and participation in Coopharma, to fix prices in their negotiations with third-party payers. In furtherance of their conspiracy, the pharmacies collectively negotiated contracts, including price terms; contracted jointly with some payers; and organized boycotts to coerce payers to accept their demands. Coopharma has not undertaken any efficiency-enhancing integration sufficient to justify the challenged conduct. By collectively negotiating prices without any legitimate justification or state action or other defense, Coopharma has unreasonably restrained competition and engaged in unfair methods of competition in violation of the Federal Trade Commission Act.

II. RESPONDENT AND JURISDICTION

2. The Cooperativa de Farmacias Puertorriqueñas is a not-for-profit corporation that is organized, exists, and does business as a cooperative under and by virtue of the laws of the Commonwealth of Puerto Rico. Its principal address is 2 Calle Colon, Aguada, Puerto Rico 00602.

3. Coopharma has approximately 300 pharmacy owner members who together own approximately 360 community pharmacies that operate in Puerto Rico. Coopharma members control at least a third of all pharmacies in Puerto Rico and the organization has a particularly strong presence on the western side of the island.

4. At all times relevant to the Complaint, Coopharma has been engaged in the business of contracting with third-party payers, on behalf of its members, for the provision of pharmacy services. Except to the extent that competition has been restrained as alleged herein, Coopharma's members compete with one another for the provision of pharmacy services.

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5. Coopharma is organized for the purpose, in part, of fostering its members' material interests and acts to further those interests. By virtue of such purposes and activities, Respondent is a corporation organized for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

6. The general business practices of Coopharma, including the acts and practices alleged herein, affect the interstate purchase of supplies and products and the interstate flow of funds, and are in or affect "commerce" as defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. OVERVIEW OF PHARMACY CONTRACTING

7. Pharmacies often contract with third-party payers — including health insurers and managed care organizations — to establish the terms and conditions, including price and other competitively significant terms, under which they will provide services to subscribers of health plans. To negotiate for pharmacy services, payers often use pharmacy benefit managers (PBMs) to create networks of pharmacies and administer pharmacy benefit programs.

8. Pharmacies entering into payer contracts often agree to discount or lower their prices in exchange for access to additional patients made available by the payers' relationship with their subscribers. These contracts with pharmacies may reduce payers' costs and enable payers to lower the price of health insurance and reduce patients' out-of-pocket medical care expenditures.

9. Absent agreements among pharmacies on prices and other contract terms on which they will provide services to subscribers of health plans, competing pharmacies decide individually whether to enter into contracts with payers, and at what prices they will accept payment for services rendered pursuant to such contracts.

10. Third-party payers reimburse pharmacies for filling a prescription based on a formula consisting of an ingredient cost and a dispensing fee. For brand prescriptions, the ingredient cost

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traditionally has been a percentage of Average Wholesale Price or “AWP.”

IV. ANTICOMPETITIVE CONDUCT

11. Coopharma, acting as a combination of its members, and in conspiracy with them, has acted to restrain competition by, among other things:

- a. negotiating, entering into, and implementing agreements to fix the prices on which their members contract with third-party payers, and
- b. encouraging its members to (i) refuse to deal with third-party payers except through Coopharma and (ii) threaten to terminate, and terminate, contracts with payers who refuse to deal with Coopharma on the terms it demands.

Coopharma’s coercive activities have led some payers to enter into individual contracts with Coopharma members at higher rates than the payer would otherwise have paid.

A. Agreement to Negotiate and Contract Jointly

12. Pursuant to Coopharma’s By-Laws, Coopharma’s pharmacy owner members elect fellow members to serve on Coopharma’s Board of Directors and manage Coopharma’s operations. The Board oversees contract negotiations and approves contracts between Coopharma and third party payers.

13. Coopharma members, in joining Coopharma, agree to participate in Coopharma’s contracts with payers. Coopharma’s Rules (“Reglamento de Socios de Coopharma”) state that its members “shall comply with the agreements and contracts which are approved by the Member’s Assembly and the Board of Directors.”

14. Coopharma’s Medical Plans Committee was responsible for negotiating payer contracts from late 2002 until 2008 and supervised negotiations since then. Between 2008 and 2011, Coopharma hired consultants to negotiate contracts. The

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Committee has had between two and four members since its establishment in 2002.

15. Coopharma's Board Presidents and the Medical Plans Committee supervised the consultants in their consulting role when they negotiated with payers.

16. According to Coopharma's Board, Coopharma "was established with the principal purpose to be able to negotiate in representation of all of its members, of which include PBM [pharmacy benefit manager] and/or health insurance negotiations . . . and to establish master contracts which adhere and unite all of the Coopharma pharmacies." A "master contract" is a single-signature contract between Coopharma and a payer that binds all Coopharma pharmacies to its terms.

17. Coopharma believes "being able to get the best contract that is possible is something fundamental for pharmacies" and that the "best contract" includes the highest reimbursement rates. Coopharma's goal has been to obtain 90 percent of AWP plus a \$3.00 dispensing fee for brand pharmaceuticals. That is higher than many Coopharma pharmacies were receiving on most of their individual contracts with payers. Coopharma's contract with one negotiating consultant stated that he should seek to obtain 90 percent of AWP plus a \$3.00 dispensing fee in his negotiations with payers.

18. Since 2006, Coopharma negotiated with more than ten payers over reimbursement levels and reached agreements on behalf of its members with seven of them. These contracts set rates for brand pharmaceuticals ranging from 87 percent to 90 percent of AWP, with dispensing fees ranging from \$2.50 to \$5.00.

B. Collective Efforts Coerced CVS-Caremark to Contract with Coopharma

19. Through its members' collective action, Coopharma forced pharmacy benefits manager CVS-Caremark ("Caremark") to rescind a rate cut and to enter into a master contract at a higher rate.

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20. In 2008, Caremark paid all pharmacies in Puerto Rico, including Coopharma's members, a Medicare Part D reimbursement rate of 87 percent of AWP plus a dispensing fee of \$2.50 for each brand prescription. For commercial business, Caremark's reimbursement to Coopharma pharmacies ranged from 85-90 percent of AWP plus a dispensing fee of \$2.00-\$3.00.

21. To remain competitive with other PBMs, Caremark notified pharmacies throughout the country that, effective January 1, 2009, it was reducing the Medicare Part D reimbursement rate to 86 percent of AWP plus a \$2.00 dispensing fee. Pharmacies across the United States accepted these terms.

22. Coopharma organized its members to oppose the Caremark terms. It held regional meetings in December 2008 and communicated to members the status of the negotiations. Its contract negotiator co-signed a memorandum telling members of "the HISTORIC opportunity we have today to negotiate as one single [*sic*] institution, **'COOPHARMA THE BIGGEST CHAIN OF PHARMACIES IN ALL OF PUERTO RICO.'**" [Emphasis in original.] Coopharma provided members with a template letter to reject Caremark's rate change and demand that Caremark negotiate with Coopharma.

23. Many Coopharma member pharmacies responded by sending the form letter rejecting the new Medicare Part D and commercial contracts and telling Caremark to negotiate through Coopharma. Coopharma then told Caremark that its members would not accept Caremark's reimbursement offer and wanted 90 percent of AWP.

24. Coopharma also informed Caremark that it was telling Caremark clients that Caremark was threatening to terminate pharmacies that did not accept Caremark's rate change. This pressured Caremark to acquiesce to Coopharma's demands or face losing customers with a more limited pharmacy network.

25. Responding to the pressure, Caremark rescinded the Part D rate change for the pharmacies that sent letters rejecting the change.

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26. Coopharma also pressured Caremark to enter into a master contract on all lines of business, including Medicare Part D. Coopharma used three tactics: demanding to negotiate and contract collectively, threatening that its members would terminate their Caremark contracts, and contacting Caremark's clients.

27. First, Coopharma repeatedly asserted its "authority to represent the pharmacies" in its communications with Caremark. For example, its contract negotiator told Caremark that "effective immediately none of our members will negotiate independently." Coopharma also instructed its members "**TO NOT SIGN ANY CONTRACT SEPRATELY [sic] OR INDIVIDUALLY!**" and to tell Caremark that they would not negotiate directly and Caremark should call Coopharma to negotiate. [Emphasis in original.] More than 75 percent of Coopharma's members authorized Coopharma to negotiate with Caremark on their behalf.

28. Second, throughout the negotiations, Coopharma repeatedly threatened that its members would terminate their individual contracts with Caremark and individual members did so. After telling members that their responses to Caremark affirming their contract cancellations "**MUST BE CLEAR AND DIRECT,**" Coopharma said "[w]e maintain that this responsibility to maintain a united front is shared by all the Coopharma members. . . . [W]e remind you that this is the time to demonstrate that we are one: **WE ARE COOPHARMA.**" [Emphasis in original.] At one point, Coopharma hand-delivered a package to Caremark of virtually identical letters from members notifying Caremark of their terminations. Coopharma also placed a newspaper advertisement stating that negotiations with Caremark had failed and that, as of May 28, 2009, "we will not continue providing services" to Caremark plans. At an April 25, 2009 meeting, Coopharma's membership confirmed its united position and 91 percent of attendees voted to affirm the decision to terminate the contracts.

29. Third, Coopharma contacted Caremark clients American Health Medicare and MAPFRE Grupo PRAICO. Coopharma's contract negotiator and its Chair of the Medical Plans Committee told American Health Medicare that hundreds of Coopharma pharmacies would terminate their contracts with Caremark, thus making Coopharma pharmacies unavailable to American Health

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Medicare members. That led American Health Medicare to intervene in the Caremark-Coopharma negotiations to press Caremark to reach an agreement with Coopharma.

30. In August 2009, Caremark agreed to replace Coopharma's members' individual contracts with a master contract with Coopharma. The master contract continued the 2008 Medicare Part D reimbursement rate for 2009. The contract negotiator told the Board that the master contract was a "success." Without Coopharma members' collective action, Caremark would have paid all members the lower rates it pays to non-Coopharma independent pharmacies in Puerto Rico. Caremark's price concessions to Coopharma cost it approximately \$640,000 in 2009 alone.

C. Payer Concessions in Individual Contracts

31. The mere threat of collective terminations benefitted individual Coopharma pharmacies at a cost of millions of dollars to third-party payers. Coopharma pharmacies obtained higher reimbursement rates from Medco and Medicare Mucho Mas, through its PBM, even though negotiations with Coopharma did not result in a master contract with Coopharma.

32. Coopharma informed the Medco PBM in 2006 that Coopharma members would contract with Medco only through Coopharma. When Coopharma and Medco reached an impasse in negotiations, Coopharma threatened to pull all of its pharmacies out of Medco's network. In response, Medco raised the rates of all Coopharma members from 85-87 percent of AWP to 88 percent of AWP to encourage them to ignore Coopharma's orders. Despite Coopharma's efforts to persuade its members to hold out, Medco offered high enough rates to create a sufficient network without signing a master contract with Coopharma. Coopharma took credit for Medco's improved reimbursement terms, which cost Medco and/or its clients over \$2 million for 2007-2011.

33. Medicare Mucho Mas, a large Medicare Advantage payer in Puerto Rico, feared a disruption in its pharmacy network from Coopharma's activities. As a result, Medicare Mucho Mas, through its PBM, paid Coopharma members a reimbursement rate higher than it paid non-Coopharma members. A Medicare Mucho

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Mas document states that it “conceded and gave Coopharma better rates.”

D. Collective Efforts to Force Humana to Maintain Rates

34. While ultimately unsuccessful, Coopharma also threatened to terminate its members’ contracts with Humana Health Plans of Puerto Rico, Inc. and Humana Insurance of Puerto Rico, Inc. (“Humana”) for Medicare Part D and commercial health benefit programs to coerce Humana to maintain the reimbursement rates it was paying Coopharma pharmacies under individual contracts and to enter into a master contract.

35. Coopharma’s conduct arose from the settlement of a class action lawsuit against First Data Bank and Medi-Span and related decisions by them that resulted in a market-wide reduction in AWP benchmark drug prices they reported effective September 26, 2009. Making no changes in the terms of Humana’s AWP-based contracts with pharmacies would have resulted in reduced rates. Humana decided to propose amendments to its pharmacy contracts that mitigated the reduction in part, but would have still reduced net rates from what they had been previously. Outside Puerto Rico, Humana’s pharmacies generally accepted the revision.

36. At an October 25, 2009 meeting, Coopharma’s members agreed to terminate their contracts with any payer that failed to adjust reimbursement rates to maintain the existing level of reimbursement, which they called “AWP cost neutrality.”

37. Pursuant to their collective decision, Coopharma members resisted Humana’s amended rates and sought restoration of the pre-September 26, 2009 compensation levels. On December 7, 2009, Coopharma wrote Humana that it was terminating its members’ contracts, stating “as approved in an Extraordinary Assembly of the COOPHARMA membership held on October 25, 2009, . . . all members of COOPHARMA withdraw as pharmacy services providers to Humana and its policyholders. . . . This decision is final and is the end result of a deliberate process involving the entire membership.” Coopharma demanded that Humana agree to contract terms that would raise payment levels back to the pre-September 26, 2009 amounts.

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38. When Humana asserted that Coopharma lacked legal authority to terminate its members' contracts, Coopharma encouraged its members to terminate their contracts, and most did so. Although Humana was able to maintain enough of a network to continue to operate in Puerto Rico, Coopharma's conduct disrupted its business.

VI. NO LEGITIMATE JUSTIFICATION FOR THE CONDUCT

39. Coopharma did not undertake any activities to integrate the delivery of pharmacy services of its members and thus cannot justify its acts and practices described in the foregoing paragraphs. Its members neither shared financial risk in providing pharmacy services nor integrated their delivery of care to patients.

40. Coopharma's conduct has not been reasonably related to any efficiency-enhancing integration among its members.

VII. PUERTO RICO REGULATION OF HEALTH CARE COOPERATIVES

41. In 2004, Puerto Rico enacted Law 239 to provide for the establishment and regulation of cooperatives. (5 L.P.R.A. § 4381, *et seq.*) Law 239 declares that such cooperatives "shall not be considered conspiracies or cartels to restrict business...nor shall the contracts entered between the same and their members...be interpreted as illegal restrictions of business. . . ." Law 239 establishes the Corporacion para la Supervision y Seguro de Cooperativas de Puerto Rico, known as COSSEC, to regulate cooperatives.

42. COSSEC has no process for reviewing cooperatives' negotiations with purchasers or for approving or disapproving prices and other terms that result from such negotiations. A May 7, 2012 letter from COSSEC to Coopharma's counsel, stated that COSSEC was "currently drafting" regulations to "provide a set of procedures to review and approve the business activities and contracts of health care provider cooperatives on an ongoing basis." COSSEC does not have any regulations now, nor did they exist while Coopharma was engaging in the conduct alleged in Paragraphs 11-40.

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43. Neither COSSEC nor any other Puerto Rico agency or official has approved any Coopharma contract with any payer.

44. In 2008, four years after enacting Law 239, Puerto Rico enacted Law 203 (26 L.P.R.A. § 3101, *et seq.*) to regulate “collective bargaining” between providers of health care services, including pharmacies, and “third-party administrators and health services organizations.” Law 203 authorizes such collective bargaining, but only under specified conditions. Among other things, it requires that the group of health care providers comprise less than 20 percent of their specialty or service in each specified geographic area and that the group register with the Puerto Rico government before initiating any collective bargaining. Law 203 also bars “threats to boycott, go on strike, or other coordinated action” and requires the mandatory arbitration of any bargaining impasse.

45. In December 2008, the Commonwealth of Puerto Rico issued Regulation 91 to implement Law 203. Under Regulation 91, the threshold step for a health care provider group seeking to bargain collectively is to obtain certification from the Puerto Rico Department of Justice. To obtain this certification, the group must demonstrate that it represents less than 20 percent of the specialty or service in its specified geographic area(s).

46. Coopharma has neither sought nor received on behalf of its member pharmacies any determination that it has satisfied the 20 percent limit on providers or services in the geographic areas in which it operates, or any other requirements of Law 203 and its implementing regulations.

47. Under Law 203, Puerto Rico has not clearly articulated a policy to displace competition with respect to Coopharma’s challenged conduct. Moreover, Puerto Rico has not actively supervised that conduct. As a result, Coopharma’s conduct is not entitled to immunity under the state action doctrine.

VIII. ANTICOMPETITIVE EFFECTS

48. Coopharma’s actions have the purpose and had the effect of unreasonably restraining trade and hindering competition in the

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provision of pharmacy services in Puerto Rico in the following ways, among others:

- a. Unreasonably restraining prices of pharmacy services and other competition among Coopharma members;
- b. Increasing prices for pharmacy services; and
- c. Depriving third-party payers and consumers of the benefits of such competition.

IX. VIOLATION OF THE FTC ACT

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

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission has caused this Complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this sixth day of November, 2012.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of the Cooperativa de Farmacias Puertorriqueñas (“Coopharma”), hereinafter referred to as “Respondent,” and Respondent having been furnished thereafter with a copy of the draft Complaint that counsel for the Commission proposed to present to the Commission for its consideration and which, if issued, would charge Respondent with

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violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order 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 any 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 said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comment filed thereafter by an interested person pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure described in Commission Rule 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues the following Order:

1. The Cooperativa de Farmacias Puertorriqueñas is a not-for-profit corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico with its principal address at 2 Calle Colon, Aguada, Puerto Rico 00602.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

Decision and Order

ORDER**I.**

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

- A. “Respondent” means the Cooperativa de Farmacias Puertorriqueñas (“Coopharma”); its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and subsidiaries, divisions (including, but not limited to, the PSAO Department), groups, and affiliates controlled by it; and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- B. “Distribute” means to provide a copy of the specified documents by (1) personal delivery, with a signed receipt of confirmation; (2) first-class mail with delivery confirmation or return receipt requested; (3) facsimile with return confirmation; or (4) electronic mail with electronic return confirmation.
- C. “Participate” in an entity or an arrangement means (1) to be a partner, shareholder, owner, member, or employee of such entity or arrangement, or (2) to provide services, agree to provide services, or offer to provide services to a Payer through such entity or arrangement. This definition applies to all tenses and forms of the word “Participate,” including, but not limited to, “Participating,” “Participated,” and “Participation.”
- D. “Payer” means any person that pays or arranges for payment, for all or any part of any Pharmacy services to itself or any other Person, as well as any Person that develops, leases, or sells access to networks of Pharmacies.

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- E. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.
- F. “Pharmacy” means any Person licensed by the Commonwealth of Puerto Rico to dispense pharmaceuticals.
- G. “Preexisting Contract” means a contract for the provision of Pharmacy services that was in effect on the date of the receipt by a Payer that is a party to such contract of notice sent by Respondent pursuant to Paragraph III.A.2 of this Order of such Payer’s right to terminate such contract.

II.

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

- A. Entering into, adhering to, Participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any Pharmacies with respect to the provision of Pharmacy services:
 - 1. To negotiate on behalf of any Pharmacy with any Payer;
 - 2. To refuse to deal or threaten to refuse to deal with any Payer, 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 Pharmacy deals, or is willing to deal, with any Payer, including, but not limited to, price terms; or

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4. Not to deal individually with any Payer, or not to deal with any Payer other than through Respondent;
- B. Exchanging or facilitating in any manner the exchange or transfer of information among Pharmacies concerning any Pharmacy's willingness to deal with a Payer, or the terms or conditions, including price terms, on which the Pharmacy is willing to deal with a Payer;
 - C. Attempting to engage in any action prohibited by Paragraphs II.A through 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.

III.

IT IS FURTHER ORDERED that Respondent shall:

- A. Within thirty (30) days from the date this Order becomes final:
 1. Distribute this Order and the Complaint to each current officer, director, member, or employee of Respondent; and
 2. Send by first-class mail, with return receipt requested, with the letter attached as the Appendix, to the chief executive officer of each Payer with which Respondent has contracted at any time since January 1, 2008.
- B. Terminate, without penalty or charge, and in compliance with any applicable laws, any Preexisting Contract with any Payer, at the earlier of: (1) receipt by Respondent of a written request from a Payer to terminate such contract, or (2) the earliest termination

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or renewal date (including any automatic renewal date) of such contract.

Provided, however, a Preexisting Contract 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:

1. the Payer submits to Respondent 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
2. Respondent has determined not to exercise any right to terminate.

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

- C. Within ten (10) days of receiving notification from a Payer to terminate, pursuant to Paragraph III.B of the Order, notify in writing, by first class mail with return receipt requested, each Pharmacy that provides services through that contract to be terminated.
- D. For three (3) years from the date this Order becomes final:
 1. Distribute this Order and the Complaint to each Person who becomes an officer, director, member, or employee of Respondent, and who did not previously receive a copy of this Order and the Complaint, within thirty (30) days of the time that he or she becomes an officer, director, member, or employee;
 2. send by first class mail, return receipt requested, a copy of this Order and the Complaint to each Payer who contracts with Respondent for the provision of Pharmacy services and who did not previously

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receive a copy of this Order and the Complaint, within thirty (30) days of the time that such Payer enters into such contract; and

3. post and maintain on Respondent's website and annually publish in an official annual report or newsletter sent to all Pharmacy members of Respondent, this Order and the Complaint with such prominence as is given to regularly featured articles.

IV.

IT IS FURTHER ORDERED that Respondent shall:

- A. File a verified written report 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 Respondent has complied and is complying with this Order;
 2. the name, address, and telephone number of each Payer with which each Respondent has had any contact during the one (1) year period preceding the date for filing such report; and
 3. the status of each contract required to be terminated;
- B. In addition to the information required by Paragraph IV.A, the sixty day report shall include:
 1. the identity of each Payer sent a copy of the letter in the Appendix to the Order and the response of each Payer to that letter;
 2. a copy of each verification of Distribution required by Paragraph III.A.1; and

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3. a copy of each return receipt required by Paragraph III.A.2 and Paragraph III.C
- C. In addition to the information required by Paragraph IV.A, each annual report shall include:
1. a copy of each verification of Distribution required by Paragraph III.D.1;
 2. a copy of each return receipt required by Paragraph III.C that Respondent received subsequent to filing its 60 day report.
 3. a copy of each return receipt required by Paragraph III.D.2; and
 4. evidence that the copy of the Order and Complaint has been published, as required by Paragraph III.D.3.

V.

IT IS FURTHER ORDERED that Respondent shall notify the Commission:

- A. Of any change in its primary business 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.

VI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondent, that Respondent shall,

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without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during office hours of Respondent, and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, 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;
- B. To interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

VII.

IT IS FURTHER ORDERED that this Order shall terminate on November 6, 2032. By the Commission.

APPENDIX

[letterhead of Coopharma]
[name of Payer's CEO] [address]

Dear __:

Enclosed is a copy of a complaint and a consent order ("Order") issued by the Federal Trade Commission against Cooperativa de Farmacias Puertorriqueñas ("Coopharma").

Pursuant to Paragraph III.B of the Order, Coopharma must allow you to terminate, upon your written request, without any penalty or charge, any contracts with Coopharma that are in effect as of the date you receive this letter.

Analysis to Aid Public Comment

If you do not make a written request to terminate the contract, Paragraph III.B. further provides that the contract will terminate on the earlier of the contract's termination date, renewal date (including any automatic renewal date), or anniversary date, which is [date].

You may, however, ask Coopharma to extend the contract beyond [date], the termination, renewal, or anniversary date, to any date no later than [date], one (1) year after the date the Order becomes final.

If you choose to extend the term of the contract, you may later terminate the contract at any time.

Any request either to terminate or to extend the contract should be made in writing, and sent to me at the following address: [address].

Sincerely,

[Coopharma to fill in information in brackets]

**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 Cooperativa de Farmacias Puertorriqueñas (“Coopharma” or “Respondent”). The agreement settles charges that Coopharma violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by negotiating, entering into, and implementing agreements among its member pharmacy owners to fix the prices on which they contract with third-party payers in Puerto Rico.

The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons.

Analysis to Aid Public Comment

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 proposed complaint (other than jurisdictional facts) are true.

The Proposed Complaint

Coopharma is a not-for-profit corporation organized and doing business as a cooperative under the laws of Puerto Rico. Coopharma consists of approximately 300 pharmacy owners who own roughly 360 community pharmacies in Puerto Rico. Coopharma members control at least a third of the pharmacies in Puerto Rico and the organization has a particularly strong presence on the western side of the main island.

Coopharma was established with the principal purpose of negotiating on behalf of its members and entering into single-signature “master contracts” with payers that bind all Coopharma pharmacies. The proposed complaint alleges that Coopharma members negotiated collectively through Coopharma to obtain higher reimbursement rates than its members were receiving in their individual contracts with payers, including pharmacy benefits managers and insurers.

The proposed complaint alleges that Coopharma’s member pharmacies restrained competition by jointly negotiating and entering into agreements with third-party payers. Coopharma achieved this result by encouraging its members: (1) to refuse to deal with third-party payers except through Coopharma; and (2) to threaten termination, or actually terminate, contracts with payers that refused to deal with Coopharma on the terms it demanded.

Analysis to Aid Public Comment

Coopharma collectively negotiated reimbursement rates with more than ten payers and has reached agreements on behalf of its members with seven of them. The mere threat of Coopharma members' collective action led two additional payers to pay higher rates. The proposed complaint alleges that Coopharma's actions caused payers to pay higher reimbursement rates to Coopharma members, and that this price increase ultimately may be passed along to consumers in the form of higher premium payments, diminished service, or reduced coverage. As a result, Coopharma's actions caused substantial harm to the consumers of Puerto Rico. Coopharma's conduct was unrelated to any efficiency-enhancing integration among its members.

Negotiations with CVS-Caremark

As a specific example of Coopharma's misconduct, the proposed complaint alleges that CVS-Caremark ("Caremark"), a pharmacy benefits manager operating in Puerto Rico, was forced to rescind a rate cut and to enter into a master contract at a higher rate because of the collective action of Coopharma members.

In 2008, Caremark notified pharmacies throughout the country that it was reducing reimbursement on its Medicare Part D contracts. Coopharma mobilized its members to collectively resist that rate change. Coopharma provided its members with a form letter, which many sent, rejecting the new Medicare Part D contracts and telling Caremark to negotiate rates through Coopharma. Coopharma then informed Caremark that its members would not accept Caremark's reimbursement offer and demanded higher rates. Coopharma also informed certain Caremark clients that Caremark was threatening to terminate pharmacies that did not accept Caremark's rate change. This pressure led Caremark to rescind the Part D rate change for the pharmacies that sent letters rejecting the change.

Coopharma continued to pressure Caremark to enter into a master contract on all lines of business, including Medicare Part D. Coopharma used the same basic tactics to accomplish this goal, by: (1) demanding that Caremark negotiate exclusively through Coopharma; (2) threatening that its members would terminate their Caremark contracts; and (3) contacting Caremark's clients. Indeed, Coopharma took the matter public by placing a

Analysis to Aid Public Comment

newspaper advertisement stating that negotiations with Caremark had failed and that, as of May 28, 2009, “we will not continue providing services” to Caremark patients.

In August 2009, Caremark agreed to replace Coopharma’s members’ individual contracts with a master contract with Coopharma. The proposed complaint alleges that Caremark’s price concessions cost it approximately \$640,000 in 2009 alone.

Other Coercive Conduct

In addition, the proposed complaint alleges that in at least two instances, the mere threat of collective terminations benefitted individual Coopharma pharmacies at a cost of millions of dollars to third-party payers. Coopharma pharmacies obtained higher reimbursement rates from third-party payers Medco and Medicare Mucho Mas even though negotiations with Coopharma did not result in a master contract. During its negotiations with Medco, Coopharma threatened to pull all Coopharma pharmacies out of Medco’s network. In an attempt to prevent such a disruption of its network, Medco raised the reimbursement rates it paid to individual Coopharma pharmacies, a concession that cost Medco and its clients over \$2 million between 2007 and 2011. Medicare Mucho Mas, a large Medicare Advantage payer, also feared that Coopharma could cause a similar disruption in its pharmacy network. As a result, Medicare Mucho Mas’ pharmacy benefits manager offered a higher reimbursement rate to Coopharma pharmacies.

Finally, the proposed complaint alleges that Coopharma attempted to use collective action to resist a reimbursement rate reduction by health insurer Humana. Coopharma attempted to coerce Humana into maintaining its reimbursement rates by threatening termination of the individual contracts and pressuring it into entering into a master contract. When Humana asserted that Coopharma lacked the legal authority to terminate its members’ contracts, Coopharma encouraged its members to terminate their contracts individually.

Analysis to Aid Public Comment

Coopharma Cannot Qualify for State Action Immunity

The proposed complaint alleges that Coopharma's anticompetitive conduct cannot be shielded by the state action doctrine. The state action doctrine provides that states are not subject to federal antitrust liability, and that by extension certain subordinate state entities and private parties exercising state-granted powers may be immunized as well.¹ Private parties claiming the protection of this immunity must meet two elements. First, private parties must demonstrate that the challenged conduct was undertaken pursuant to a clearly articulated state policy to displace competition with regulation. Second, private parties must show that the challenged conduct has been actively supervised by the state.² The proposed complaint alleges that neither requirement is satisfied here.

Puerto Rico has not clearly articulated a policy to replace competition with the challenged conduct. Law 203 regulates "collective bargaining" between providers of health care services, including pharmacies, on the one hand, and payers, on the other.³ However, Law 203 limits collective bargaining to situations where the providers obtain a certificate verifying that they constitute less than 20 percent of providers in a particular area, do not engage in boycotts, submit to mandatory arbitration in the case of an impasse, and comply with certain other requirements.⁴ Coopharma has not – and cannot – satisfy these requirements.⁵

¹ See, e.g., *Parker v. Brown*, 317 U.S. 341 (1943).

² *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

³ 26 L.P.R.A. § 3101, *et seq.*

⁴ E.g., 26 L.P.R.A. §§ 31.040; 31.050; 31.060.

⁵ The Commission is aware that Law 239, which regulates cooperatives generally, declared that cooperatives "shall not be considered conspiracies or cartels to restrict business." 5 L.P.R.A. § 4516 (Law 239, § 20.5). The Commission and the Puerto Rico Department of Justice interpret Law 203 (which was passed after Law 239) to supersede Law 239. At the very least, Law 203 imposes additional requirements on health care cooperatives, which Coopharma cannot meet.

Analysis to Aid Public Comment

The proposed complaint also alleges that Puerto Rico has not actively supervised Coopharma's conduct because no Puerto Rican official has exercised the power to review, approve, or disapprove either the rates in Coopharma's contracts with payers or the coercive collective action it used to obtain them.⁶ Under Law 203, Coopharma has neither sought to comply with nor satisfied any of the law's requirements. Even under Law 239, the Puerto Rico agency charged with the general regulation of cooperatives, the Corporacion para la Supervision y Seguro de Cooperativas de Puerto Rico ("COSSEC"), has no process in place for reviewing cooperatives' negotiations with payers or for approving or disapproving prices and other terms that result from such negotiations.

The Proposed Consent Order

The proposed consent order is designed to prevent the continuance and recurrence of the illegal conduct alleged in the proposed complaint, while allowing Coopharma to engage in legitimate joint conduct.

Paragraph II prevents Coopharma from continuing the challenged conduct. Paragraph II.A prohibits Respondent from entering into or facilitating agreements between or among any pharmacies: (1) to negotiate on behalf of any pharmacy with any payer; (2) to refuse to deal or threaten to refuse to deal with any payer; (3) to include any term, condition, or requirement upon which any pharmacy deals, or is willing to deal, with any payer, but not limited to, price terms; or (4) not to deal individually with any payer, or not to deal with any payer other than through Respondent.

The other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits Respondent from facilitating exchanges of information between pharmacies concerning whether, and on what terms, to contract with a payer. Paragraph II.C bars attempts to engage in any action prohibited by

⁶ Cf. *Patrick v. Burget*, 486 U.S. 94, 101 (1988) ("The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.").

Analysis to Aid Public Comment

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.

Paragraph III is designed to prevent the challenged conduct from reoccurring. Paragraph III.A requires Coopharma to send a copy of the complaint and consent order to its members, its management and staff, and any payers with whom Coopharma has contracted at any time since January 1, 2008. Paragraph III.B allows for contract termination if a payer voluntarily submits a request to Coopharma to terminate its contract. Pursuant to such a request, Paragraph III.B requires Coopharma to terminate, without penalty, any pre-existing payer contracts. Upon receiving such request, Paragraph III.C requires that Coopharma notify in writing each pharmacy that provides services through that contract to be terminated. Paragraph III.D requires Coopharma, for three years, to distribute a copy of the complaint and consent order to new members, officers, directors, and employees, and to payers who begin contracting with Coopharma and to post them on its website.

Paragraphs IV, V, and VI impose various obligations on Coopharma to report or to provide access to information to the Commission to facilitate its compliance with the consent order. Finally, Paragraph VII provides that the proposed consent order will expire 20 years from the date it is issued.

Complaint

IN THE MATTER OF

**BRAIN-PAD, INC.
AND
JOSEPH MANZO**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4375; File No. 122 3073**Complaint, November 15, 2012 – Decision, November 15, 2012*

This consent order addresses Brain-Pad, Inc.'s advertising and promotion of mouth guards. The complaint alleges that respondents did not have a reasonable basis to represent in advertising and on packaging for their mouth guards that they reduced the risk of concussions. The complaint further alleges that the respondents made the false and misleading claim that they possessed scientific studies that proved their concussion-reduction risk claims because, in fact, they did not have such evidence. The consent order prohibits the respondents from misrepresenting that any product will reduce the risk of concussions or reduce the risk of concussions from lower jaw impacts.

Participants

For the *Commission*: Victor DeFrancis and Andrew Wone.

For the *Respondents*: Patrick Wolfe, Jr., Zarwin, Baum, DeVito, Kaplan, Schaer & Toddy P.C.; Bridget Calhoun, Crowell & Moring LLP.

COMPLAINT

The Federal Trade Commission, having reason to believe that Brain-Pad, Inc., a corporation, and Joseph Manzo, an individual (“Respondents”), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Brain-Pad, Inc. (“BPI”) is a Pennsylvania corporation with its principal office or place of business at 322 Fayette Street, Conshohocken, Pennsylvania 19428.
2. Respondent Joseph Manzo is the President of BPI. Individually or in concert with others, he formulates, directs,

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controls, or participates in the policies, acts, or practices of BPI, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of BPI.

3. Respondents have labeled, advertised, promoted, offered for sale, sold, and distributed, throughout the United States, “Brain-Pad”-branded mouth guards (“Brain-Pad mouth guards”) to consumers. Brain-Pad mouth guards are “devices” within the meaning of Sections 12 and 15 of the Federal Trade Commission 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 Federal Trade Commission Act.

5. Respondents have disseminated or caused to be disseminated advertisements for Brain-Pad mouth guards, including, but not limited to, the attached Exhibits A through F. These advertisements contain the following statements and depictions, among others:

- a. **Product Packaging:** Brain-Pad Pro+ (front of package)



Complaint

Brain-Pad Pro+ (back of package)

**[[BRAIN PAD]]
PRO+**

PROTECTION | PERFORMANCE | ENDURANCE
DOUBLE INJECTION DUAL ARCH DESIGN

Triple Benefits

- 1. Creates & Maintains Brain Safety Space**
- 2. Lower Channel Jaw Stabilizer**
- 3. Opens Airway**

ALL RIGHTS RESERVED.
OTHER U.S. & FOREIGN PATENTS PENDING.
MADE IN TAIWAN.

- Tested and proven to reduce risk of internal head injuries and concussions from lower jaw impacts
- Exclusive high-impact inner material helps absorb concussive blows
- Gel form liner molds firmly to teeth supporting entire dental arch
- Air Flow Clench & Breathe™ technology enhances breathing and endurance
- Protects upper and lower teeth, lips, tongue
- Fits over braces
- 30 second custom fitting instructions inside
- Can be worn with or without included strap
- Increases helmet safety and effectiveness
- Approved for Mandate by: International Kickboxing Federation, International Sport Karate Association, and Kick International
- Includes hard shell anti-microbial storage case
- Latex Free
- \$12,000 Dental Insurance Warranty

Complaint

- b. **Product Packaging:** Brain Pad LoPro+
(front of package)



Complaint

Brain Pad LoPro+ (back of package)

BRAIN-PAD
HEAD GEAR THAT FITS IN YOUR MOUTH

The Patented BRAIN-PAD repositions & secures the lower jaw in a safety position, reducing the risk of concussions from lower jaw Impacts.

With Other Mouthguards: Protects only the UPPER TEETH!
Clench No Air
IMPACT
Brain Injuries!
Jaw can Slam the TMJ & base of skull!

With The BRAIN-PAD: Securely Locks & Cushions Teeth & Jaw!
CLENCH and BREATHE
IMPACT
Brain Safety!
Helps Prevent Jaw from Slamming TMJ & base of the Skull!
CREATES NEW BRAIN SAFETY SPACE!

Upon Impact, the Lower Jaw can SLAM into the TMJ & the Base of the Skull!

The Patented BRAIN-PAD transmits the impact energy away from the base of the skull to the BRAIN-PAD!

New 'streamline design' Secures & Cushions lower jaw while protecting ALL teeth!

Use 1 strap
*NEW STRAP, LANYARD or STRAPLESS attachment system!
Offers constant mouth breathing - Even while CLENCHING!
Patented inner injection process creates a shock absorber that helps reduce lower jaw impact concussions!

UPPER ONLY Mouthguards allow clench
CUSTOM MOLDS TO ALL TEETH!

2 straps included for NEW-LANYARD style "NON-HELMETED" or HELMETED USE!

Patented "PROTECTION & PERFORMANCE" in 1 Package!

System Includes:
Boiling Stick, Protective Case
Warranty, Warnings, Care,
and Custom Fitting Instructions.

* Meets & exceeds all youth, high school & Collegiate Regulations

CAN UNLOCK MUSCULAR POTENTIAL!
CUSHIONS TEETH!

LPP-05 Black/Clear JUNIOR SIZE
7 57920 80050 9
"STRAP / STRAPLES in-one" Model!

Manufactured exclusively by Brain-Pad, Inc., 322 Fayette St., Conshohocken, PA 19428, 610.397.0893 www.brainpads.com
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Protected under U.S. & Foreign Patents: # 6,936,379, # D493,578S, # D500,866S, # D523,994, # D525,749, # D526,093,
D526,095, # D527,848, # D530,863, # D532,559, # D537,986S, # D537,987S, # 000408947-0001, # 000408947-0002, # CA2251672
All Rights Reserved. Other U.S. & Foreign Patents pending. Made in Taiwan. LPPY 06 15 07

Complaint

c. **Product Packaging:** Brain-Pad Pro-Plus Junior
(front of package)



Complaint

Brain-Pad Pro-Plus Junior (back of package)



The patented **BRAIN-PAD**[®] Positions, Secures & Cushions the lower jaw in a Safety Position, reducing the risk of concussions from the lower jaw slamming into the TMJ, base of the skull and brain.

With Other Mouthguards

Bottom Teeth & Jaw Slide & Slam!

Brain Injuries!

Clench No Air!

IMPACT

Jaw Slams TMJ and base of skull!

Upon Impact, the Lower Jaw can SLAM into the TMJ & the Base of the Skull!

With The BRAIN-PAD

Secures & Cushions Teeth & Jaw!

Brain Safety!

CLENCH and BREATHE!

IMPACT

Helps Prevent Jaw from Slamming TMJ & base of the Skull!

CREATES NEW BRAIN SAFETY SPACE!

The Patented BRAIN-PAD transmits the impact energy away from the brain to the BRAIN-PAD!

! MAXIMUM BREATHING !



Increased airway space WITH THE BRAIN-PAD!

UPPER ONLY Mouthguards - airway closes.

Only upper & lower channels can secure & stabilize Jaw Position while protecting the upper AND lower teeth!



Use 1 strap

*NEW: STRAP LANYARD or STRAPLESS attachment system!

Offers constant mouth breathing - Even while CLENCHING!

Patented inner injection process creates a shock absorber that protects against lower jaw impact concussions!

30 sec. Bob-N-Bite CUSTOM FIT

2 STRAPS included for:

NEW - LANYARD style "NON-HELMETED" or HELMETED USE!

Patented "PROTECTION & PERFORMANCE" in 1 Package!

System Includes:

PRO+PLUS, 2 Optional Straps, Storage Case, Warranty, Warnings, Care & Custom Fitting Instructions.

* Meets & exceeds all youth, high school & Collegiate Regulations



CAN UNLOCK MUSCULAR POTENTIAL!
CUSHIONS TEETH!

WPRY-2004 JUNIOR SIZE BLACK/GRAY



7 57920 50510 7

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PRO+PLUS 08/02/07


Complaint

- d. **Product Packaging:** Brain-Pad LoPro Fem (front of package)



Complaint

Brain-Pad LoPro Fem (back of package)



The Patented BRAIN PAD[®] repositions & secures the lower jaw in a safety position, reducing the risk of concussions from lower jaw Impacts.

Your Brain With Upper Mouthguards

Bottom Teeth & Jaw Slide & Slam!

Brain Injuries

Upper mouthguards can induce internal head injuries & limit breathing!

Your Brain With The BRAIN-PAD


Secures & Stabilizes lower jaw while Cushioning Teeth!

Brain Safety!

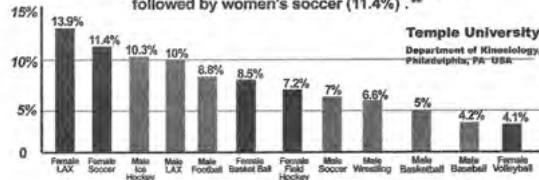
CREATES NEW BRAIN SAFETY SPACE!

The Patented BRAIN-PAD transmits the impact energy away from the base of the skull to the BRAIN-PAD!

GET MORE AIR!



"Of all the reported injuries, women lacrosse players (13.9%), reported the highest percentage of suffering a concussion during a game followed by women's soccer (11.4%)".^{*,**}



Sport	Concussion Rate (%)
Female LAX	13.9%
Female Soccer	11.4%
Male Top Hockey	10.3%
Male LAX	10%
Male Football	8.8%
Female Basketball	8.5%
Female Field Hockey	7.2%
Male Soccer	7%
Male Wrestling	6.6%
Male Basketball	5%
Male Baseball	4.2%
Female Volleyball	4.1%


^{**} Female athletes were found to be at a greater risk for suffering concussions during games compared to male athletes.^{*,**}

System Includes: Boiling Stick, Storage Pouch, Warranty, Warnings, Care, & Custom Fitting Instructions.

* Frank Hillary, Ph.D., Kessler Med. Rehab. Research and Educ. Corp. Colleen Mann, Philip Schatz, Ph.D. Saint Joseph's University, Dept. of Psychology, Philadelphia PA.


** Total Participants' - SGMA INTERNATIONAL 200 CastleWood Dr., North Palm Beach, FL 33408-5696 - .382 concussion ratio per 1000 AES (estimated 35 AES per participant).

*** Epidemiological considerations of concussions among intercollegiate athletes. - Covassin T, Swanik CB, Sachs ML. Appl Neuropsychol 2003; 10(1): 12-22. Correspondence: Tracey Covassin, Department of Kinesiology, Temple University, Philadelphia, Pennsylvania, USA, (email: tracey.covassin@temple.edu). (Copyright © 2003, Lawrence Erlbaum Associates).



UNLOCKS CARDIOVASCULAR & MUSCULAR POTENTIAL!
CUSHIONS TEETH!

WFL-200 Blue/Clear



7 57920 40010 5

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LoPro Female US 15 96

Complaint

- e. **Product Packaging:** Brain-Pad Double mouth guard (front of package)



Complaint

f. **Internet Website: www.brainpads.com**

VIDEO: (Brain-Pad Commercial featuring Joseph Manzo) (Transcript at Exhibit A)

ON SCREEN: BRAIN PAD

Protective & Performance Solutions

BIOMECHANICALLY TESTED

REDUCES RISK OF CONCUSSIONS!

For All CONTACT SPORTS

(Exhibit A at 3).

* * *

MALE ANNOUNCER: So much attention is now being paid to concussions, literally a contusion to the brain.

ON SCREEN: THE IMPORTANCE OF JAW POSITION

MALE ANNOUNCER: And Brain Pad may be on the verge of a huge breakthrough in prevention after 15 years of hard work and belief.

(Exhibit A at 4).

* * *

JOSEPH MANZO: Every time we got a school involved with it, at the end of the year, they would say, wow, man, our concussions went from nine to zero or nine

to one. You know, it was just this constant feedback. My head -- we don't play with the headaches anymore.

(Exhibit A at 5).

Complaint

g. **Print Advertisement** (Exhibit B) (BP00075)

(depiction of MMA fighter and Brain-Pad mouth guard)

MMA ORGANIZATIONS

FIGHT CONCUSSIONS

with BRAIN-PAD!

h. **Print Advertisement** (Exhibit C) (BP00157)

‘Creates and retains’
a TMJ/Brain Safety
Space protecting
the TMJ AND Base
of Skull & Brain

Helping Coaches . . .
REDUCE
CONCUSSION
RISK

* * *

“BIO-MECHANICALLY TESTED & PROVEN”

REDUCES THE RISK OF CONCUSSIONS

FROM: FACEMASK IMPACTS, CHIN CUP

FORCES & DIRECT LOWER JAW IMPACTS!

i. **Print Advertisement** (Exhibit D) (BP00131)

PROTECTION & PERFORMANCE!

Protects TMJ & Brain from Jaw Impacts

- Reduces the risk of **Concussion**

Complaint

**Only ‘Jaw Joint Protectors’ Reduce the Risk of
Concussions & Internal Head Injuries.**j. **Email Advertisement** (Exhibit E) (BP00254 – 55)

(Headline) Athletes Turn to Brain-Pad Mouth Guards
for Concussion Protection

* * *

As Congress prepares to examine the issue of concussions in the NFL, NCAA, and high school sports for the second time on January 4, a Pennsylvania company has been successfully marketing a mouth guard device designed to protect players from the probability of a concussion caused by lower jaw impact.

* * *

“We have said for years that concussions are serious injuries and should be avoided at all costs,” says Joe Manzo, President of Brain-Pad. “The devastating effects of concussions can have a lasting impact on athletes and their families. . . . When used properly, there is a 40 percent reduction of impact energy to the base of the skull, these forces can cause a concussion or knock out as boxers call it. Athletes from the NFL to the MMA and at every level from professional to local youth leagues are recognizing the significant health benefits of our Brain-Pad mouth guards to offer protection against these dangerous injuries.”

k. **Point of Purchase Display** (Exhibit F) (BP00308)

BRAIN PAD

BIOMECHANICALLY TESTED:

REDUCES RISK OF CONCUSSIONS!

Complaint

6. Through the means described Paragraph 5, including the statements and depictions contained in the advertisements attached as Exhibits A through F, among others, Respondents have represented, expressly or by implication, that:

- a. Brain-Pad mouth guards reduce the risk of concussions; and
- b. Brain-Pad mouth guards reduce the risk of concussions from lower jaw impacts.

7. 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 representations set forth in Paragraph 6, at the time the representations were made.

8. In truth and in fact, Respondents 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. Therefore, the representation set forth in Paragraph 7 was, and is, false or misleading.

9. Through the means described in Paragraph 5, including the statements and depictions contained in the advertisements attached as Exhibits A through F, among others, Respondents have represented that:

- a. scientific studies prove that Brain-Pad mouth guards reduce the risk of concussions; and
- b. scientific studies prove that Brain-Pad mouth guards reduce the risk of concussions from lower jaw impacts.

10. In truth and in fact, scientific studies do not prove that Brain-Pad mouth guards reduce the risk of concussions or reduce the risk of concussions from lower jaw impacts. Therefore, the representations set forth in Paragraph 9 were, and are, false or misleading.

11. The acts and practices of Respondents as alleged in this complaint constitute unfair or deceptive acts or practices, and

Complaint

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 fifteenth day of November, 2012, has issued this complaint against Respondents

By the Commission.

Complaint

Exhibit A**OFFICIAL TRANSCRIPT PROCEEDING****FEDERAL TRADE COMMISSION**

MATTER NO. 1223015

TITLE ANTI-CONCUSSION PRODUCTS

DATE RECORDED: DATE UNKNOWN
TRANSCRIBED: NOVEMBER 21, 2011
REVISED: JANUARY 10, 2012

PAGES 1 THROUGH 8

BRAIN PAD COMMERCIAL

Complaint

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FEDERAL TRADE COMMISSION

I N D E X

RECORDING:

Brain Pad Commercial

PAGE:

3

Complaint

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FEDERAL TRADE COMMISSION

In the Matter of:)
Anti-Concussion Products) Matter No. 1223015
)
-----)
 Date Unknown

The following transcript was produced from a
digital recording provided to For The Record, Inc. on
November 9, 2011.

Complaint

3

1 P R O C E E D I N G S
2 - - - - -
3 BRAIN PAD COMMERCIAL
4 MALE ANNOUNCER: While long-time anchor stores
5 like Flaco Shoes still line Fayette Street, this
6 storefront houses the most modern in technology and --
7 JOSEPH MANZO: Onto the face mask.
8 MALE ANNOUNCER: -- football. This company is
9 called Brain Pad. Got that? Brain Pad.
10 MALE INTERVIEWER: Is your primary push into
11 football or boxing or any sport with this?
12 ON SCREEN: Joseph Manzo
13 PRESIDENT, CEO
14 JOSEPH MANZO: Football, boxing, MMA. MMA is
15 like taking over.
16 ON SCREEN: Brain Pad photo
17 Model: PRO+PLUS
18 MALE ANNOUNCER: This may look like a sports
19 mouthpiece, but as the name implies, it protects more
20 than teeth.
21 ON SCREEN: BRAIN PAID
22 Protective & Performance Solutions
23 BIOMECHANICALLY TESTED:
24 REDUCES RISK OF CONCUSSIONS!
25 For All CONTACT SPORTS

For The Record, Inc.
(301) 870-8025 - www.ftrinc.net - (800) 921-5555

Complaint

4

1 JOSEPH MANZO: The way the product is designed
2 is that it brings the lower jaw forward about a half a
3 millimeter in front of your upper teeth and the thickness
4 of the unit brings your jaw down, so you get this down
5 and forward motion, creating a safety space here.

6 **ON SCREEN: Actual Lab Impact Test**

7 JOSEPH MANZO: No matter if you're taking
8 direct hits, lateral hits, it's keeping -- these are the
9 strongest bones in the skull. So, a lot of that energy
10 is absorbed there and into the jaw joint protector.

11 **MALE ANNOUNCER:** So much attention is now being
12 paid to concussions, literally a contusion to the brain.

13 **ON SCREEN: THE IMPORTANCE OF JAW POSITION**

14 ~~MALE ANNOUNCER:~~ And Brain Pad may be on the
15 verge of a huge breakthrough in prevention after 15 years
16 of hard work and belief.

17 **ON SCREEN: PROTECTION PERFORMANCE ENDURANCE**

18 **BRAIN PAD ,**

19 **PROTECTION**

20 **Creates this:**

21 **BRAIN SAFETY SPACE!**

22 **PERFORMANCE**

23 **Jaw/TMJ alignment**

24 **promotes Strength &**

25 **Competitive Edge**

For The Record, Inc.
(301) 870-8025 - www.ftrinc.net - (800) 921-5555

Complaint

5

1 **ENDURANCE**
2 **Creates Increased**
3 **Constant Breathing-**
4 **EVEN WHILE CLENCHING!**
5 **ON SCREEN: Joseph Manzo**
6 **PRESIDENT, CEO**
7 JOSEPH MANZO: Every time we got a school
8 involved with it, at the end of the year, they would say,
9 wow, man, our concussions went from nine to zero or nine
10 to one. You know, it was just this constant feedback.
11 My head -- we don't play with the headaches anymore.
12 MALE ANNOUNCER: Finally, a big breakthrough
13 and now a breakout from Brain Pad's humble beginning in
14 Conshohocken.
15 JOSEPH MANZO: The product is available in all
16 500 Sports Authority stores --
17 **ON SCREEN: SPORTS AUTHORITY**
18 **"Spring into...Sport Safety!"**
19 Brain-Pad's 2011 Jaw-Joint Protector
20 Mouth Guard Series
21 Brain-Pad
22 **"Jaw-Joint Protectors" are a patented Sport**
23 **Safety Technology!**
24 **REDUCES Jaw Impact CONCUSSION Risk!**
25 Includes: Dental Warranty, hard-shell anti-

For The Record, Inc.
(301) 870-8025 - www.ftrinc.net - (800) 921-5555

Complaint

6

1 microbial case, optional strap & custom fitting
2 instructions
3 PROTECTION PERFORMANCE ENDURANCE
4 JOSEPH MANZO: -- and it's in over 1,000
5 Walmart stores.
6 ON SCREEN: BRAIN PAD advertisement
7 JOSEPH MANZO: We have at least 500 mom-and-pop
8 retailers, single brick and mortar retail outlets.
9 ON SCREEN: BRAIN PAD
10 IMPACT PROTECTIVE
11 ALL AGES
12 HEADBANDS & WRISTBANDS
13 WITH IMPACT ABSORBENT INNER MATERIAL
14 YEAR-ROUND PROTECTION for ALL
15 SPORTS, ACTIVITIES & ALL AGES!
16 JOSEPH MANZO: So, the product is easily
17 accessible now.
18 ON SCREEN: BRAIN PAD
19 PROTECTIVE & PERFORMANCE SOLUTIONS
20 JAW-JOINT PROTECTORS
21 322 FAYETTE STREET
22 CONSHOHOCKEN, PA
23 WWW.BRAINPADS.COM
24 610-397-0893
25 MALE ANNOUNCER: Brain Pad is located at 322

For The Record, Inc.
(301) 870-8025 - www.ftrinc.net - (800) 921-5555

Complaint

7

1 Fayette Street and their website will show and tell you
2 all you need to know at www.brainpads.com. And you can
3 reach them by phone at (break in recording) 97-0893.

4 **(The recording was concluded.)**

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Complaint

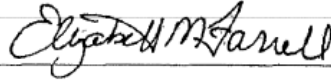
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C E R T I F I C A T I O N O F T Y P I S T

MATTER NUMBER: 1223015
CASE TITLE: ANTI-CONCUSSION PRODUCTS
TAPING DATE: DATE UNKNOWN
TRANSCRIPTION DATE: NOVEMBER 21, 2011
REVISED: JANUARY 10, 2012

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the tapes transcribed by me on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

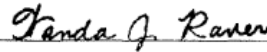
DATED: JANUARY 10, 2012



ELIZABETH M. FARRELL

C E R T I F I C A T I O N O F P R O O F R E A D E R

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.



WANDA J. RAVER

Complaint

Exhibit B

11/2009 ^{Worldwide} MMA ~~Mag~~ MAG.

BRAIN-PAD
PROTECTIVE SOLUTIONS

MMA ORGANIZATIONS
FIGHT CONCUSSIONS
with **BRAIN-PAD**!

SECURES JAW!
CUSHIONS JAW!
PROTECTS TMJ!
PROTECTS BRAIN!
UNLOCKS STRENGTH!
CLENCH for POWER!
CLENCH & BREATHE DESIGN!

"I've worn
The Brain-Pad
HP Model
for 11 yrs -
I WILL NOT
FIGHT
WITHOUT IT!"
- Champion
Cung Le
Official mouth guard of:

Model: WPR-300
HIGH PERFORMANCE

UCL
UNIVERSITY OF CALIFORNIA

BRAIN-PAD: NO LIMIT - PATRONS DISCOUNT - Enter Code: BRMMA

15% OFF
RECYCLED BOTTLE
by Phone or Online

**IS YOUR MOUTH GUARD
MAKING YOU SICK?**

Bacteria on mouth guards can get into your
LUNGS STOMACH BLOOD-STREAM
Case study by: Thomas Gleason, DDS, PhD
Professor at The Academy of General Dentistry

NATUREZONE
ORAL APPLIANCE SANITIZER & DEODORIZER

3000x
MORE
EFFECTIVE
than
chlorine!

**KILLS DEADLY:
MRSA, STAFF,
Bacteria
Viruses
& fungi -
IN A FAST
3mins!**

PERSONAL
UV/OZONE
GENERATOR
Sanitizes
Deodorizes
8,000 hr Bulb
No tablets. No refills.
Battery Powered -
for use anywhere!

Brain-Pad, Inc.
810-397-0893
www.brainpads.com
info@brainpads.com
Distributorships available

Designed for: sport guards - night guards - retainers - dental appliances - tooth brush heads

BP00075

Complaint

Exhibit C



PROTECTION PERFORMANCE ENDURANCE
(((BRAIN PAD)))
JAW JOINT PROTECTORS

Helping Coaches
REDUCE CONCUSSION RISK!

PROTECTION PERFORMANCE ENDURANCE

"BIO-MECHANICALLY TESTED & PROVEN"
REDUCES THE RISK OF CONCUSSIONS FROM: FACEMASK IMPACTS, CHIN CUP FORCES & DIRECT LOWER JAW IMPACTS!

WPR-2004 10 3XS-WP 10 LPP-02 10

*Includes Two Belt Straps, Foam Inserts, Removable Chin Cup, Copied Logo



NHSCA 10% Discount Promo Code: NHSCA
 Premium models only. Call 800-444-4444 for details. Order from Sports Authority or visit www.sportsauthority.com. Order from Sports Authority.

Available Nationwide at:

SPORTS AUTHORITY
(Call 800-444-4444 for details)

See mechanical Head Form Testing

Research & Results

5-10 Year Warranty (See Website for details) to protect your investment.

See the other endorsed low Brain Pad Jaw-Joint Protectors™ such as:

Official Site: www.brainpad.com

Eighty+ National Over Stock

See the link & more details. I've always worn Brain Pad!

Official Merchandise

See Website for details

(((onlin)))
www.onlin.com 800-444-4444

Emailer for National High School coaches Association

July 2011

Complaint

Exhibit D

11/2010 MMA AUTHORITY MAG.

Jaw Joint Protectors™

PROTECTION & PERFORMANCE!

Protects TMJ & Brain from Jaw Impacts

- Reduces the risk of **Concussion**
- **Dual Arch** protective designs
- Offers **Clench & Breathe** technology
- Protects Upper and Lower Braces

Create and maintain brain safety space

3XS-NP (non-strap)
3XS-WP (with-strap)

Tapered Channel Ends Remove need to trim!

Lower channel jaw stabilizer

Opens airway

PRO+®
Helmet tether included

NEW! HIGH-IMPACT Gel-pad Inserts!

Intl. Combat Sport Organizations Mandate Dual Arch Mouth Guard Designs -

Only 'Jaw Joint Protectors' Reduce the Risk of Concussion & Internal Head Injuries.

Brain-Pad® Designs create a Jaw Joint / Brain 'Safety Space'!

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((BRAIN PAD)) 610 397 0893 www.brainpads.com info@brainpads.com

BP00131

Complaint

Exhibit E**Andrew Piacine, Brain-Pad Inc****Subject:** FW: Athletes Turn to Brain-Pad Mouth Guards

Bates # CC-21 from 2009 to 2011 Delivery Date: Wednesday, December 30, 2009 at 3:05 PM EST Sent 2909 opens 569

Brain-Pad, Inc.

December 29, 2009 10:00 AM Eastern Time

Athletes Turn to Brain-Pad Mouth Guards for Concussion Protection



Bi-molar mouth guard line is tested and proven to stabilize the jaw and protect the temporomandibular joint during sports-related impact

CONSHOHOCKEN, Pa.--As Congress prepares to examine the issue of concussions in the NFL, NCAA, and high school sports for the second time on January 4, a Pennsylvania company has been successfully marketing a mouth guard device designed to protect players from the probability of a concussion caused by lower jaw impact.

"I treat many athletes looking for teeth, mouth and jaw protection on the playing field," says Dr. Robert B. Mongrain, DMD. "I recommend Brain-Pad to all my patients who play aggressive contact sports. Protecting the lower jaw and TM joints is critical to minimize the risks of potential concussions. I am glad to see that institutions like the NFL and Congress are finally taking a serious look at the dangers of these injuries and putting more emphasis on protection and recovery."

Unlike traditional mouth guards that offer protection for either the upper or lower teeth only, Brain-Pad is a dual arch, bi-molar, mouth guard. The Brain-Pad technology repositions the lower jaw while protecting both the upper and lower teeth. The jaw is stabilized into a neutral position, creating a safety space that greatly reduces the risk of jaw impact concussions and TMJ injuries. When put into place, the Brain-Pad mouth guards also open the airway in the throat 100 percent, allowing users to breathe better and gain a competitive advantage.

"We have said for years that concussions are serious injuries and should be avoided at all costs," says Joe Manzo, President of Brain-Pad. "The devastating effects of concussions can have a lasting impact on athletes and their families. We have designed these mouth

Complaint

unprotected area for athletes. When used properly, there is a 40 percent reduction of impact energy to the base of the skull, these forces can cause a concussion or knock out as boxers call it. Athletes from the NFL to the MMA and at every level from professional to local youth leagues are recognizing the significant health benefits of our Brain-Pad mouth guards to offer protection against these dangerous injuries."

The House Judiciary Committee, chaired by Representative John Conyers, D-Michigan, will hear testimony on Monday to examine the NFL's response to concussion injuries and assess the protocols or lack thereof, in place for college and high school football players. Scheduled witnesses include NFL neurologist Ira Casson, DeMaurice Smith, the executive director of the NFL Players Association, David Klossner, the NCAA's director of health and safety and Dr. Bennet Omalu, a neuropathologist and primary researcher into brain damage in football players.

Brain-Pad mouth guards are available at leading athletic retailers including Wal-Mart® stores nationwide, and retail between \$7 and \$30 based on the model.

ABOUT BRAIN-PAD, INC.

A privately held corporation, founded in 1995 specifically for the promotion, manufacture, and sale of customized Brain-Pad® dual-arch mouth-guards designed to reduce the risk of concussion from lower jaw impacts while increasing endurance and performance. Brain-Pad, Inc. has become a leader in technology development in this field. Its Brain-Pad® products are available in retail and wholesale outlets as well as through distributors, contact sports leagues, professional organizations, school teams at intermediate, high-school, college, and university level. Brain-Pad® products are well-accepted by professional sports athletes in boxing, mixed martial arts, football and many other contact sports. Brain-Pad® products also include shock-absorbing wrist, arm and head-bands as well as: juniors', women's, men's, and professional athlete's dual-arch protective and high performance mouth-guards.

Additionally, Brain-Pad, Inc. recently developed, patented, and commercially released a premium ultra-violet/ozone oral appliance sanitizer, the NatureZone™, available to the retailers and distributors but exclusively distributed to the professional dental industry by Henry Schein, Inc., the largest global distributor of dental and medical products to dentists, dental laboratories and physicians.

Brain-Pad, Inc.'s corporate headquarters are located in Conshohocken, Pennsylvania. For product or company details contact 610-397-0893, info@brainpads.com, or visit www.brainpads.com

Photos/Multimedia Gallery Available: <http://www.businesswire.com/cgi-bin/mimg.cgi?eid=6127151&lang=en>

Contacts

Brain Pad Protective Solutions

Bill Samuel

Director of Sales

bsamuel@brainpads.com

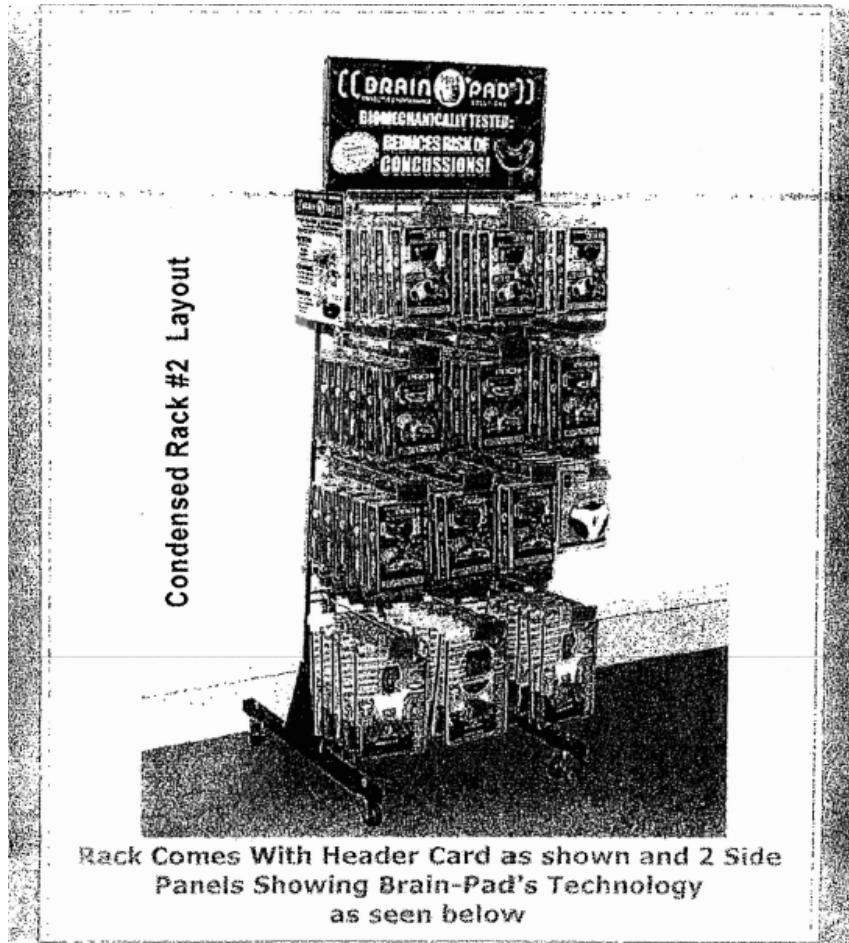
www.brainpads.com

1-888-424-9477

Forward email

Complaint

Exhibit F



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 violation of the Federal Trade Commission Act, 15 U.S.C § 45 *et seq.*; and

The respondents, their attorney, 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 the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that the respondents have violated the 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 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 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Brain-Pad, Inc. (“BPI”) is a Pennsylvania corporation with its principal office or place of business at 322 Fayette Street, Conshohocken, Pennsylvania 19428.
2. Respondent Joseph Manzo is the President of BPI. Individually or in concert with others, he formulates,

Decision and Order

directs, controls, or participates in the policies, acts, or practices of BPI. His principal office or place of business is the same as that of BPI.

ORDER**DEFINITIONS**

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

- A. Unless otherwise specified, “respondent BPI” shall mean Brain-Pad, Inc., a corporation, its successors and assigns and their officers, and each of the above’s agents, representatives, and employees.
- B. “Respondent Manzo” shall mean Joseph Manzo and his agents, representatives, and employees.
- C. “Respondents” shall mean respondent BPI and respondent Manzo.
- 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, or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results.
- F. “Covered Product” shall mean any (1) mouthguard or (2) equipment used in athletic activities that is intended, in whole or in part, to protect the brain from injury.
- G. The term “including” in this Order shall mean “without limitation.”
- H. 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.

Decision and Order

I.

IT IS ORDERED that respondents, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product, in or affecting commerce, shall not represent, in any manner, expressly or by implication, including through the use of a trade name, product name, endorsement, depiction, or illustration, that such product will:

- A. reduce the risk of concussions; or
- B. reduce the risk of concussions from lower jaw impacts,

unless the representation is true, non-misleading, and, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true.

II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, 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, 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, including, but not limited to, any misrepresentation that:

- A. scientific studies prove such product reduces the risk of concussions; or
- B. scientific studies prove such product reduces the risk of concussions from lower jaw impacts.

Decision and Order

III.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, 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, in or affecting commerce, shall not represent in any manner, expressly or by implication, including through the use of a trade name, product name, endorsement, depiction, or illustration, the health benefits, health-related performance, or health-related efficacy of any such product, unless the representation is true, non-misleading, and, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true.

IV.

IT IS FURTHER ORDERED that respondent BPI, and its successors and assigns, and respondent Manzo 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

V.

IT IS FURTHER ORDERED that respondent BPI, and its successors and assigns, and respondent Manzo shall deliver a copy of this Order to all current and future principals, officers, directors, and other employees 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 date of service of this Order, and to future personnel having responsibilities with respect to the subject matter of this Order within thirty (30) days after the person assumes such position or responsibilities.

VI.

IT IS FURTHER ORDERED that respondent BPI, 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 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. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov or sent by overnight courier to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: Brain-Pad, Inc., FTC File No. 122-3073.

VII.

IT IS FURTHER ORDERED that respondent Manzo, for ten (10) years after the date of issuance of this Order, shall notify

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the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov or sent by overnight courier to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: Brain-Pad, Inc., FTC File No. 122-3073.

VIII.

IT IS FURTHER ORDERED that respondent BPI, and its successors and assigns, and respondent Manzo, within sixty (60) days after the date of service of this Order, shall each file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of their own compliance with this Order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondents shall submit additional true and accurate written reports.

IX.

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

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

Analysis to Aid Public Comment

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

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from Brain-Pad, Inc. and Joseph Manzo, an officer and director of the corporation (“respondents”).

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 respondents’ advertising and promotion of mouthguards. According to the FTC complaint, respondents did not have a reasonable basis to represent in advertising and on packaging for their mouthguards that they reduced the risk of concussions. The FTC further alleges that the respondents made the false and misleading claim that they possessed scientific studies that proved their concussion-reduction risk claims because, in fact, they did not have such evidence.

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 of the proposed order prohibits the proposed respondents from misrepresenting that any product will reduce the risk of concussions or reduce the risk of concussions from lower jaw impacts.

Part II of the proposed order prohibits proposed respondents from misrepresenting, with respect to any Covered Product, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research, including, but not limited to, any misrepresentation that scientific studies prove that such product reduces the risk of concussions or reduces the risk of concussions from lower jaw impacts. The proposed order defines “Covered Product” as any (1) mouthguard or (2) equipment used in athletic activities that is intended to protect the brain from injury.

Part III of the proposed order prohibits proposed respondents, in connection with the marketing of any Covered Product, from misrepresenting the health benefits, health-related performance, or health-related efficacy of such product.

Parts IV through VIII of the proposed order require respondents: to keep copies of any documents relating to any representation covered by the order; 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 corporate business or employment as to proposed respondent Joseph Manzo individually; 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 interpretation of the agreement and proposed order or to modify in any way their terms.

Complaint

IN THE MATTER OF

**ALAN B. MILLER
AND
UNIVERSAL HEALTH SERVICES, INC.**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SECTION 7 OF THE CLAYTON ACT

*Docket No. C-4372; File No. 121 0157
Complaint, October 5, 2012 – Decision, November 27, 2012*

This consent order addresses the \$517 million acquisition by Alan B. Miller and Universal Health Services, Inc. of certain assets of Ascend Health Corporation. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by removing an actual, direct, and substantial competitor from one local market for acute inpatient psychiatric services. The consent order requires UHS to divest its Peak Behavioral Health Services facility, and all relevant assets and real property in the local market encompassing El Paso, Texas and its suburb, Santa Teresa, New Mexico.

Participants

For the *Commission: Chester Choi, Michelle Fettennan, Janelle Filson, Jeanne Nichols, and Nancy Park.*

For the *Respondents: Robin Landis and Christine Varney, Cravath, Swaine & Moore LLP.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act (“FTC Act”), and by virtue of the authority vested in it by said Acts, the Federal Trade Commission (“Commission”), having reason to believe that Respondent Universal Health Services, Inc. (“UHS”), a corporation controlled by Alan B. Miller and subject to the jurisdiction of the Commission, has agreed to acquire Ascend Health Corp. (“Ascend”), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that

Complaint

a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

Respondents

1. Respondent Alan B. Miller is a natural person with his offices and principal place of business located at 367 South Gulph Road, P.O. Box 61558, King of Prussia, PA 19406-0958. Alan B. Miller is the ultimate parent entity of Respondent UHS.

2. Respondent UHS is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 367 South Gulph Road, P.O. Box 61558, King of Prussia, PA 19406-0958. UHS is controlled by Respondent Alan B. Miller.

3. UHS owns or operates 25 general acute care hospitals and 198 behavioral health facilities located in 36 states, Washington, D.C., Puerto Rico, and the U.S. Virgin Islands. UHS's revenues from all operations totaled approximately \$7.5 billion in 2011. UHS's 198 behavioral health facilities generated approximately \$3.4 billion in revenue (45% of total revenues) from over 19,000 licensed beds and over five million patient days. UHS is, and at all times relevant herein has been, engaged in the sale and provision of acute inpatient psychiatric services.

The Acquired Company

4. Ascend is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 32 E. 57th Street, 17th Floor, New York, NY 10022.

5. Ascend operates eight inpatient behavioral health facilities located in four states, namely, Texas, Oregon, Arizona, and Utah, as well as an addiction treatment center in Seattle, Washington. Ascend's revenues for the 12 months ending December 31, 2011 were approximately \$159 million. Ascend is, and at all times relevant herein has been, engaged in the sale and provision of acute inpatient psychiatric services.

Complaint

The Proposed Merger

6. Pursuant to an Agreement and Plan of Merger dated June 3, 2012, UHS proposes to purchase all of the outstanding voting securities of Ascend (“the Merger”).

7. The Merger would combine the only two significant providers of acute inpatient psychiatric services to commercially insured patients in the relevant geographic market of El Paso, Texas/Santa Teresa, New Mexico. Respondent UHS and Ascend each own and operate a psychiatric facility in this area and compete and promote their businesses based on name recognition, reputation, location, price, range of available services, quality of service, associated product offerings, and the appearance of the facilities.

Jurisdiction

8. Respondents, and each of their relevant operating subsidiaries and parent entities, are, and at all times relevant herein have been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the FTC Act, 15 U.S.C. § 44.

9. The Merger constitutes an acquisition under Section 7 of the Clayton Act.

The Relevant Product Market

10. The relevant line of commerce in which to analyze the Merger is the provision and sale of acute inpatient psychiatric services to commercially insured patients, meaning inpatient psychiatric services for the diagnosis, treatment, and care of patients deemed, due to an acute psychiatric condition, to be a threat to themselves or others or unable to perform basic life functions.

11. Acute inpatient psychiatric care is distinct from other psychiatric services such as partial hospitalization, intensive outpatient programs, outpatient care, and residential treatment. Other, less intensive, psychiatric services are not substitutes for acute inpatient psychiatric services.

Complaint

The Relevant Geographic Market

12. The relevant geographic market in which to assess the competitive effects of the Merger is El Paso, Texas/Santa Teresa, New Mexico. Santa Teresa is a northwestern suburb of El Paso.

13. In general, patients prefer to be treated for acute inpatient psychiatric services close to home or work. Accordingly, most residents of El Paso and Santa Teresa obtain acute inpatient psychiatric services from providers located in El Paso or Santa Teresa.

Concentration

14. The affected local market for the provision and sale of acute inpatient psychiatric services already is highly concentrated, and the Merger will substantially increase concentration in this market as measured by the Herfindahl-Hirschman Index (“HHI”).

15. Post-merger, UHS would have a post-merger market share of nearly 100 percent in the relevant line of commerce, based on beds in the El Paso/Santa Teresa market and other information obtained by the Commission. The Merger would increase the HHI by approximately 3806 points, from 6194 to 10,000, combining the only two significant providers of acute inpatient psychiatric services to commercially insured patients.

16. Even if El Paso Psychiatric Hospital, a state-run hospital located in El Paso, Texas that primarily serves indigent, forensic, and long-term patients, competes in the relevant line of commerce, UHS would have a post-merger market share of approximately 75%, based on bed counts. Under this assumption, the Merger would increase the HHI by approximately 2127 points, from 4098 to 6225.

Entry Conditions

17. Entry into the relevant market would not be timely, likely, or sufficient to prevent or deter the likely anticompetitive effects of the Merger. Significant entry barriers include the time and costs associated with constructing or expanding an acute care psychiatric services facility, as well as the need to satisfy regulatory and licensing requirements that govern such services.

Complaint

Effects of the Acquisition

18. The Merger, if consummated, may substantially lessen competition for acute inpatient psychiatric services in the relevant geographic market, identified in Paragraph 12, in the following ways, among others:

- a. by eliminating direct and substantial competition between UHS and Ascend; and
- b. by increasing the likelihood that Respondent UHS will unilaterally exercise market power.

19. The ultimate effect of the Merger would be to increase the likelihood that prices of acute inpatient psychiatric services would rise above competitive levels, or that there would be a decrease in the quality or availability of acute inpatient psychiatric services, in the relevant geographic market.

Violations Charged

20. The agreement described in Paragraph 6 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and the Merger, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fifth day of October, 2012, issues its Complaint against said Respondents.

By the Commission.

Order to Hold Separate

**ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS
[Redacted Public Version]**

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition of voting securities of Ascend Health Corporation (“Ascend”), by Universal Health Services, Inc. (“UHS”), an entity controlled by Alan B. Miller (UHS and Alan B. Miller hereinafter referred to as Respondents), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, 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 determined to accept the executed Consent Agreement and to place such Consent Agreement containing the Decision and Order on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues the following Order to Hold Separate and Maintain Assets (“Hold Separate Order”):

1. Respondent Alan B. Miller is a natural person with his offices and principal place of business located at 367

Order to Hold Separate

South Gulph Road, PO Box 51448, King of Prussia, PA 19406-0958.

2. Respondent Universal Health Services, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its corporate head offices and principal place of business located at 367 South Gulph Road, PO Box 61558, King of Prussia, PA 19406-0958.
3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Respondents, and this proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Hold Separate Order, the following definitions, and all other definitions used in the Consent Agreement and the Decision and Order, shall apply:

- A. “Acquisition Date” means the date on which Respondent Universal Health Services, Inc., directly or indirectly, acquires a controlling interest in Ascend.
- B. “Decision and Order” means
 1. the Proposed Decision and Order contained in the Consent Agreement in this matter until issuance and service of a final Decision and Order by the Commission; and
 2. the Final Decision and Order issued by the Commission following issuance and service of a final Decision and Order by the Commission.
- C. “Hold Separate Business” means the Peak Behavioral Health Assets.
- D. “Hold Separate Employees” means all full-time employees, part-time, employees, contract employees,

Order to Hold Separate

and independent contractors, whose duties, at any time during the ninety (90) days preceding the Acquisition Date or any time after the Acquisition Date related or relates primarily to the Peak Behavioral Health Assets, a complete list of whom has been submitted to and approved by the Hold Separate Trustee, in consultation with the Commission staff, no later than three (3) days after the Acquisition Date; *provided, however*, that the persons listed in Confidential Appendix B shall not be considered Hold Separate Employees, as long as the Hold Separate Business is staffed with a chief executive officer and a military liaison with the necessary skills, expertise, and experience to perform those positions.

- E. “Hold Separate Order” means this Order to Hold Separate and Maintain Assets.
- F. “Hold Separate Period” means the period during which the Hold Separate Order is in effect, which shall begin on the Acquisition Date and terminate pursuant to Paragraph XI. of this Hold Separate Order.
- G. “Hold Separate Trustee” means the Person appointed pursuant to Paragraph II. of this Hold Separate Order.
- H. “Manager” means the Person appointed pursuant to Paragraph IV. of this Hold Separate Order.
- I. “Mesilla Valley Hospital Employees” means all full-time employees, part-time employees, contract employees, and independent contractors, whose duties, at any time during the ninety (90) days preceding the Acquisition Date or any time after the Acquisition Date related or relates primarily to the Mesilla Valley Hospital Assets.
- J. “Orders” means the Decision and Order and this Hold Separate Order.

Order to Hold Separate

- K. “Person” means any individual, partnership, firm, corporation, association, trust, unincorporated organization, or other entity or governmental body.
- L. “Support Service Employees” means the persons listed on Confidential Appendix A of this Hold Separate Order; at any time during the Hold Separate Period, Respondents may, in consultation with the Hold Separate Trustee, modify the list of Support Service Employees on Confidential Appendix A.
- M. “Support Services” means assistance with respect to the operation of the Psychiatric Hospital Business, including, but not limited to, (i) human resources and administrative services such as payroll processing and employee benefits; (ii) financial accounting services; (iii) reimbursement department support (i.e., Medicare cost reports); (iv) tax-related support; (v) treasury support; (vi) insurance support; (vii) clinical information systems support; (viii) information technology software and support services; (ix) participation in group purchasing arrangements; (x) online training programs; (xi) legal services; and (xii) federal and state regulatory compliance support.

II.

IT IS FURTHER ORDERED that during the Hold Separate Period:

- A. With respect to the Hold Separate Business, Respondents shall:
 - 1. Hold the Hold Separate Business separate, apart, and independent of Respondents’ other businesses and assets as required by this Hold Separate Order and shall vest the Hold Separate Business with all rights, powers, and authority necessary to conduct its business;
 - 2. Not exercise direction or control over, or influence directly or indirectly, the Hold Separate Business

Order to Hold Separate

or any of its operations, the Manager, or the Hold Separate Trustee, except to the extent that Respondents must exercise direction and control over the Hold Separate Business as is necessary to assure compliance with this Hold Separate Order, the Consent Agreement, the Decision and Order, and all applicable laws; and

3. Take all actions necessary to maintain and assure the continued viability, marketability, and competitiveness of the Hold Separate Business, and prevent the destruction, removal, wasting, deterioration, or impairment of any of the Peak Behavioral Health Assets, except for ordinary wear and tear, and shall not sell, transfer, encumber, or otherwise impair the Hold Separate Business (except as required by the Decision and Order).
- B. With respect to the Mesilla Valley Hospital Assets, Respondents shall:
1. Maintain the operations of the Mesilla Valley Hospital Assets, in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets of such Business) and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Mesilla Valley Hospital Assets and minimize any risk of loss of competitive potential of the Mesilla Valley Hospital Assets;
 2. Use their best efforts, in a manner consistent with past practices, to preserve the existing relationships with third parties, including payors, providers, suppliers, and others having business relations with the Mesilla Valley Hospital Assets; and
 3. Take all actions necessary to maintain the continued viability, marketability, and competitiveness of the Mesilla Valley Hospital Assets, and prevent the destruction, removal,

Order to Hold Separate

wasting, deterioration, or impairment of any of the Mesilla Valley Hospital Assets, except for ordinary wear and tear, and shall not sell, transfer, encumber, or otherwise impair the Mesilla Valley Hospital Assets (except as required by the Decision and Order), and take no action that lessens the viability, marketability, or competitiveness of the Mesilla Valley Hospital Assets.

- C. The purpose of this Hold Separate Order is to (1) maintain and preserve the Hold Separate Business as a viable, competitive, and ongoing business independent of Respondents until the divestiture required by the Decision and Order is achieved; (2) maintain and preserve the viability, marketability, and competitiveness of the Mesilla Valley Hospital Assets and to minimize any risk to the competitive potential of the Mesilla Valley Hospital Assets during the Hold Separate Period; (3) assure that no Confidential Business Information is exchanged between Respondents and the Hold Separate Business, except in accordance with the provisions of this Hold Separate Order; and (4) prevent interim harm to competition pending the divestiture and other relief.

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

- A. At any time after Respondents sign the Consent Agreement, the Commission may appoint Michael Krupa as Hold Separate Trustee to monitor and supervise the management of the Hold Separate Business and ensure that Respondents comply with their obligations under this Hold Separate Order and the Decision and Order.
- B. Respondents shall enter into an agreement with the Hold Separate Trustee that shall become effective no later than one (1) day after the Acquisition Date, and that, subject to the prior approval of the Commission, transfers to and confers upon the Hold Separate

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Trustee all rights, powers, and authority necessary to permit the Hold Separate Trustee to perform his/her duties and responsibilities pursuant to this Hold Separate Order in a manner consistent with the purposes of this Hold Separate Order and the Decision and Order and in consultation with Commission staff; and shall require that the Hold Separate Trustee act in a fiduciary capacity for the benefit of the Commission:

1. The Hold Separate Trustee shall have the responsibility for monitoring the organization of the Hold Separate Business; supervising the management of the Hold Separate Business by the Manager; maintaining the independence of the Hold Separate Business; and monitoring Respondents' compliance with their obligations pursuant to this Hold Separate Order and the Decision and Order.
2. The Hold Separate Trustee shall act in a fiduciary capacity for the benefit of the Commission.
3. Subject to all applicable laws and regulations, the Hold Separate Trustee shall have full and complete access to all personnel, books, records, documents, and facilities of the Hold Separate Business, and to any other relevant information as the Hold Separate Trustee may reasonably request including, but not limited to, all documents and records kept by Respondents in the ordinary course of business that relate to the Hold Separate Business. The Hold Separate Trustee shall have access to relevant information of the Mesilla Valley Hospital Assets as is necessary to monitor Respondents' compliance with their obligations pursuant to this Hold Separate Order. Respondents shall develop such financial or other information as the Hold Separate Trustee may reasonably request.
4. The Hold Separate Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other

Order to Hold Separate

representatives and assistants as are reasonably necessary to carry out the Hold Separate Trustee's duties and responsibilities.

5. The Commission may require the Hold Separate Trustee and each of the Hold Separate Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to materials and information received from the Commission in connection with performance of the Hold Separate Trustee's duties.
6. Respondents may require the Hold Separate Trustee and each of the Hold Separate Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement; *provided, however*, that such agreement shall not restrict the Hold Separate Trustee from providing any information to the Commission.
7. The Hold Separate Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on reasonable and customary terms commensurate with the person's experience and responsibilities.
8. Respondents shall indemnify the Hold Separate Trustee and hold him/her harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Hold Separate 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 the Hold Separate Trustee's gross negligence or willful misconduct.

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9. Thirty (30) days after the Acquisition Date, and every thirty (30) days thereafter until the Hold Separate Order terminates, the Hold Separate Trustee shall report in writing to the Commission concerning the efforts to accomplish the purposes of this Hold Separate Order and Respondents' compliance with their obligations under the Hold Separate Order and the Decision and Order. Included within each report shall be the assessment of the Hold Separate Trustee, consistent with his responsibilities and obligations in this Hold Separate Order, of the extent to which the Hold Separate Business and the Mesilla Valley Hospital Assets are meeting (or exceeding) their projected goals as are reflected in operating plans, budgets, projections, or any other regularly prepared financial statements.
- C. If the Hold Separate Trustee ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate Order, the Commission may appoint a substitute Hold Separate Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld, as follows:
1. If Respondents have not opposed in writing, including the reasons for opposing, the selection of the proposed substitute Hold Separate Trustee within five (5) business days after notice by the staff of the Commission to Respondents of the identity of the proposed substitute Hold Separate Trustee, then Respondents shall be deemed to have consented to the selection of the proposed substitute trustee.
 2. Respondents shall, no later than five (5) days after the Commission appoints a substitute Hold Separate Trustee, enter into an agreement with the substitute Hold Separate Trustee that, subject to the approval of the Commission, confers on the substitute Hold Separate Trustee all the rights, powers, and authority necessary to permit the

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substitute Hold Separate Trustee to perform his or her duties and responsibilities on the same terms and conditions as provided in Paragraph III. of this Hold Separate Order.

- D. The Hold Separate Trustee shall serve through the Hold Separate Period; *provided, however,* that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.
- E. The Commission may on its own initiative or at the request of the Hold Separate Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Hold Separate Order.

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

- A. No later than three (3) days after the Acquisition Date, Respondents shall appoint Matthew J. Winchester as the Manager to manage and maintain the operations of the Hold Separate Business in the regular and ordinary course of business and in accordance with past practice.
- B. Respondents shall enter into a management agreement with the Manager that shall become effective no later than three (3) days after the Acquisition Date, and that, subject to the approval of the Hold Separate Trustee, in consultation with the Commission staff, transfers all rights, powers, and authority necessary to permit that Manager to perform his/her duties and responsibilities pursuant to this Hold Separate Order:
 - 1. The Manager shall be responsible for managing the operations of the Hold Separate Business and shall report directly and exclusively to the Hold Separate Trustee and shall manage the Hold Separate

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Business independently of the management of Respondents and their other businesses.

2. The Manager shall make no material changes in the ongoing operations of the Hold Separate Business except with the approval of the Hold Separate Trustee, in consultation with the Commission staff.
3. The Manager, in consultation with the Hold Separate Trustee, shall have the authority to employ such Persons as are reasonably necessary to assist the Manager in managing the Hold Separate Business, including consultants, accountants, attorneys, and other representatives and assistants. Nothing contained herein shall preclude the Manager from contacting or communicating directly with the staff of the Commission either at the request of the staff of the Commission or in the discretion of the Manager.
4. Respondents shall provide the Manager with reasonable financial incentives to undertake this position. Such incentives shall include a continuation of all employee benefits, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to assure the continuation, and prevent any diminution, of the Hold Separate Business's viability, marketability, and competitiveness, and as may otherwise be necessary to achieve the purposes of this Hold Separate Order.
5. The Manager shall serve, without bond or other security, at the cost and expense of Respondents, on reasonable and customary terms commensurate with the person's experience and responsibilities.
6. Respondents shall indemnify the Manager and hold him or her harmless against any losses, claims, damages, liabilities, or expenses arising out of, or

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in connection with, the performance of the Manager'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 the Manager's gross negligence or willful misconduct.

- C. The Manager shall have the authority, in consultation with the Hold Separate Trustee, to staff the Hold Separate Business with sufficient employees to maintain the viability and competitiveness of the Hold Separate Business, including:
1. Replacing any departing or departed employee with a person who has similar experience and expertise or determine not to replace such departing or departed employees;
 2. Removing any Hold Separate Employee who ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate Order, and replacing such employee with another person of similar experience or skills;
 3. Ensuring that no Hold Separate Employee shall (i) be involved in any way in the operations of Respondents' other businesses, and (ii) receive or have access to, or use or continue to use, any Confidential Business Information pertaining to Respondents' other businesses;
 4. Providing each Hold Separate Employee with reasonable financial incentives, including continuation of all employee benefits and regularly scheduled raises and bonuses, to continue in his or her position pending divestiture of the Peak Behavioral Health Assets (and the Mesilla Valley Hospital Assets, if the New Mexico Psychiatric Hospital Assets are required to be divested) .

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- D. The Manager may be removed for cause by the Hold Separate Trustee, in consultation with the Commission staff. If the Manager is removed, resigns, or otherwise ceases to act as Manager, Respondents shall, within three (3) days of such action, subject to the approval of the Hold Separate Trustee and in consultation with Commission staff, on the same terms and conditions as provided in this Hold Separate Order, (i) appoint a substitute Manager, and (ii) enter into an agreement with the substitute Manager.

V.

IT IS FURTHER ORDERED that:

- A. Respondents shall cooperate with, and take no action to interfere with or impede the ability of: (i) the Hold Separate Trustee, (ii) the Manager, (iii) any Hold Separate Employee, or (iv) any Support Services Employee, to perform his or her duties and responsibilities consistent with the terms of this Hold Separate Order and the Decision and Order.
- B. Respondents shall continue to provide, or offer to provide, Support Services and goods to the Hold Separate Business and to the Mesilla Valley Hospital Assets as are being provided to the Hold Separate Business and the Mesilla Valley Hospital Assets by Respondents as of the date the Consent Agreement is signed by Respondents;
1. For Support Services and goods that Respondents provided to the Hold Separate Business or the Mesilla Valley Hospital Assets as of the date the Consent Agreement is signed by Respondents, Respondents may charge no more than the same price, if any, charged by Respondents for such Support Services and goods as of the date the Consent Agreement is signed by Respondents;
 2. For any other Support Services and goods that Respondents may provide to the Hold Separate

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Business or the Mesilla Valley Hospital Assets, Respondents may charge no more than Respondents' Direct Cost for the same or similar Support Services;

3. Notwithstanding the above, the Hold Separate Business shall have, at the option of the Manager and in consultation with the Hold Separate Trustee, the ability to acquire Support Services from Third Parties.
- C. Respondents shall not permit:
1. Any of its employees, officers, agents, or directors, other than (i) the Manager, (ii) any Hold Separate Employees, and (iii) any Support Services Employees, to be involved in the operations of the Hold Separate Business, except to the extent otherwise provided in this Hold Separate Order.
 2. The Manager or any Hold Separate Employee to be involved, in any way, in the operations of Respondents' businesses other than the Hold Separate Business.
- D. Respondents shall provide the Hold Separate Business and the Mesilla Valley Hospital Assets with sufficient financial and other resources as are appropriate in the judgment of the Hold Separate Trustee, consistent with his obligations and responsibilities in this Hold Separate Order, to:
1. Operate the Hold Separate Business and the Mesilla Valley Hospital Assets at least as they are currently operated (including efforts to generate new business) consistent with the practices of the Hold Separate Business and the Mesilla Valley Hospital Assets in place prior to the Acquisition Date;
 2. Perform all maintenance to, and replacements or remodeling of, the assets of the Hold Separate

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Business and the Mesilla Valley Hospital Assets in the ordinary course of business and in accordance with past practice and with current plans;

3. Carry on such capital projects, physical plant improvements, and business plans as are already under way or planned for which all necessary regulatory and legal approvals have been obtained, including but not limited to existing or planned renovation, remodeling, and expansion projects; and
4. Maintain the viability, competitiveness, and marketability of the Hold Separate Business and the Mesilla Valley Hospital Assets.

Such financial resources to be provided to the Hold Separate Business and the Mesilla Valley Hospital Assets shall include, but shall not be limited to, (i) general funds, (ii) capital, (iii) working capital, and (iv) reimbursement for any operating losses, capital losses, or other losses; *provided, however*, that, consistent with the purposes of the Decision and Order and in consultation with the Hold Separate Trustee, the Manager may reduce in scale or pace any capital or research and development project of the Hold Separate Business, or substitute any capital or research and development project of the Hold Separate Business for another of the same cost.

- E. Respondents shall provide each Hold Separate Employee and each Mesilla Valley Hospital Employee with reasonable financial incentives to continue in his or her position consistent with past practices and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Peak Behavioral Health Assets and the Mesilla Valley Hospital Assets pending divestiture. Such incentives shall include a continuation of all employee benefits, including funding of regularly scheduled raises and bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to assure the

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continuation, and prevent any diminution, of the viability, marketability, and competitiveness of the Hold Separate Business and the Mesilla Valley Hospital Assets until the Closing Date, and as may otherwise be necessary to achieve the purposes of this Hold Separate Order.

- F. No later than ten (10) days after the Acquisition Date, Respondents shall establish and implement procedures, subject to the approval of the Hold Separate Trustee, covering the management, maintenance, and independence of the Hold Separate Business and the monitoring of the operations of the Mesilla Valley Hospital Assets consistent with the provisions of this Hold Separate Order.
- G. No later than ten (10) days after the Acquisition Date, Respondents shall circulate to Hold Separate Employees, Mesilla Valley Hospital Employees, and to persons who are employed in Respondents' businesses that compete with the Hold Separate Business in the Relevant Area, a notice of this Hold Separate Order and the Consent Agreement, in a form approved by the Hold Separate Trustee in consultation with Commission staff.

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

- A. After the Acquisition Date, Respondents' employees, other than employees of the Hold Separate Business and Support Services Employees, shall not receive, or have access to, or use or continue to use any Confidential Business Information of the Hold Separate Business except in the course of:
 - 1. Performing their obligations or as permitted under this Hold Separate Order or the Decision and Order;

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2. Performing their obligations under the Divestiture Agreement;
3. Negotiating agreements to divest assets pursuant to the Decision and Order and engaging in related due diligence; and
4. Complying with financial reporting requirements, obtaining legal advice, defending legal claims, conducting investigations, or enforcing actions threatened or brought against the Hold Separate Business, or as required by law. Notwithstanding the above, Respondents may receive aggregate financial and operational information relating to the Hold Separate Business only to the extent necessary to allow Respondents to comply with the requirements and obligations of the laws and regulations of the United States and other countries, to prepare consolidated financial reports, tax returns, reports required by securities laws, and personnel reports, and to comply with this Hold Separate Order or in complying with or as permitted by the Decision and Order. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this Order.

For purposes of this Paragraph VI.A., Respondents' employees that provide Support Services or staff the Hold Separate Business shall be deemed to be performing obligations under this Hold Separate Order.

- B. If access to or disclosure of Confidential Business Information of the Hold Separate Business to Respondents' employees is necessary and permitted under Paragraph VI.A. of this Hold Separate Order, Respondents shall:
 1. Implement and maintain a process and procedures, as approved by the Hold Separate Trustee, such approval not to be unreasonably withheld, pursuant

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to which Confidential Business Information of the Hold Separate Business may be disclosed or used only:

- a. to or by those employees who require such information;
 - b. to the extent such Confidential Business Information is required; and
 - c. after such employees have signed an appropriate agreement in writing to maintain the confidentiality of such information.
2. Enforce the terms of this Paragraph VI. as to any of Respondents' employees and take such action as is necessary to cause each such employee to comply with the terms of this Paragraph VI., including training of Respondents' employees and all other actions that Respondents would take to protect their own trade secrets and proprietary information.
- C. Respondents shall implement, and maintain in operation, a system, as approved by the Hold Separate Trustee, of access and data controls to prevent unauthorized access to or dissemination of Confidential Business Information of the Hold Separate Business, including, but not limited to, the opportunity by the Hold Separate Trustee, on terms and conditions agreed to with Respondent, to audit Respondents' networks and systems to verify compliance with this Hold Separate Order.
- D. Neither the Manager nor any Hold Separate Employees shall receive or have access to, or use or continue to use, any confidential business information relating to Respondents' businesses (not subject to the Hold Separate Order), except such information as is necessary to maintain and operate the Hold Separate Business.

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VII.

IT IS FURTHER ORDERED that Respondents shall:

- A. No later than ten (10) days after a request from a Prospective Acquirer, provide the Prospective Acquirer with the following information for each Relevant Employee, as and to the extent permitted by law:
1. name, job title or position, date of hire, and effective service date;
 2. a specific description of the employee's responsibilities;
 3. the base salary or current wages;
 4. the most recent bonus paid, aggregate annual compensation for Respondents' last fiscal year, and current target or guaranteed bonus, if any;
 5. employment status (i.e., active or on leave or disability; full-time or part-time);
 6. any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and
 7. at the Prospective Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the Relevant Employee.
- B. Within a reasonable time after a request from a Prospective Acquirer, provide to the Prospective Acquirer an opportunity to meet personally and outside the presence or hearing of any employee or agent of any Respondent, with any one or more of the Relevant Employees, and to make offers of employment to any one or more of the Relevant Employees;

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- C. Not interfere, directly or indirectly, with the hiring or employing by the Prospective Acquirer of any Relevant Employees, not offer any incentive to such employees to decline employment with the Prospective Acquirer, and not otherwise interfere with the recruitment of any Relevant Employee by the Prospective Acquirer;
- D. Remove any impediments within the control of Respondents that may deter Relevant Employees from accepting employment with the Prospective Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Prospective Acquirer, and shall not make any counteroffer to a Relevant Employee who receives a written offer of employment from the Prospective Acquirer; *provided, however*, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee;
- E. Not, for a period of one (1) year following the Closing Date, directly or indirectly, solicit or otherwise attempt to induce any of the Relevant Employees who have accepted offers of employment with the Commission-approved Acquirer to terminate his or her employment with the Commission-approved Acquirer; *provided, however*, that Respondents may:
1. advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at Relevant Employees; or
 2. hire Relevant Employees who apply for employment with Respondents, as long as such employees were not solicited by Respondents in violation of this Paragraph; *provided further*,

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however, that this Paragraph shall not prohibit Respondents from making offers of employment to or employing any Relevant Employee if the Commission-approved Acquirer has notified Respondents in writing that the Commission-approved Acquirer does not intend to make an offer of employment to that employee, or where such an offer has been made and the employee has declined the offer, or where the employee's employment has been terminated by the Commission-approved Acquirer.

VIII.

IT IS FURTHER ORDERED that, within thirty (30) days after this Hold Separate Order becomes final, and every thirty (30) days thereafter until this Hold Separate Order terminates, 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 all provisions of this Hold Separate Order. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with this Hold Separate Order.

IX.

IT IS FURTHER ORDERED that Respondents 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 such Respondent; and
- C. Any other change in such Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Hold Separate Order.

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X.

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

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

XI.

IT IS FURTHER ORDERED that this Hold Separate Order shall terminate at the earlier of:

- A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. The day after the Closing Date.

By the Commission.

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Confidential Appendix A**List of Respondents' Support Service Employees****[Redacted From the Public Record Version, But Incorporated
By Reference]****Confidential Appendix B****Exceptions To Hold Separate Employees Definition****[Redacted From the Public Record Version, But Incorporated
By Reference]****DECISION AND ORDER**

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of voting securities of Ascend Health Corporation ("Ascend") by Universal Health Services, Inc. ("UHS"), an entity controlled by Alan B. Miller (UHS and Alan B. Miller hereinafter referred to as Respondents), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by

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

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

1. Respondent Alan B. Miller is a natural person with his offices and principal place of business located at 367 South Gulph Road, PO Box 61558, King of Prussia, PA 19406-0958.
2. Respondent Universal Health Services, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its corporate head offices and principal place of business located at 367 South Gulph Road, PO Box 61558, King of Prussia, PA 19406-0958.
3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Respondents, and this proceeding is in the public interest.

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ORDER**I.**

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

- A. “Acquisition” means the proposed acquisition described in and contemplated by the Agreement and Plan of Merger by and among UHS and Ascend dated as of June 3, 2012.
- B. “Acute Inpatient Psychiatric Services” means the provision of inpatient psychiatric services for the diagnosis, treatment, and care of patients deemed, due to an acute psychiatric condition, to be a threat to themselves or others or unable to perform basic life functions.
- C. “Alan B. Miller” means Alan B. Miller, a natural person, and all partnerships, joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Alan B. Miller, and the respective partners, directors, officers, employees, agents, attorneys, representatives, successors, and assigns of each.
- D. “Ascend” means Ascend Health Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its corporate head offices and principal place of business located at 32 E. 57th Street, 17th Floor, New York, NY 10022.
- E. “Business Records” means all information, documents, and records, including all electronic records wherever stored, including without limitation, client and customer lists, patient and payor information, referral sources, research and development reports, production reports, service and warranty records, equipment logs, operating guides and manuals, financial and accounting documents, creative materials, advertising materials, promotional materials, studies, reports,

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correspondence, financial statements, financial plans and forecasts, operating plans, price lists, cost information, supplier and vendor contracts, marketing analyses, customer lists, customer contracts, employee lists, salaries and benefits information, and, subject to legal requirements, copies of all personnel files.

- F. “Closing Date” means the date on which Respondents (or a Divestiture Trustee, if the New Mexico Psychiatric Hospital Assets are required to be divested) consummate a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey the Peak Behavioral Health Assets (or the New Mexico Psychiatric Hospital Assets, if required to be divested) to the Commission-approved Acquirer.
- G. “Commission” means the Federal Trade Commission.
- H. “Commission-approved Acquirer” means the Person approved by the Commission to acquire the Peak Behavioral Health Assets (or the New Mexico Psychiatric Hospital Assets, if required to be divested) pursuant to this Order.
- I. “Confidential Business Information” means information not in the public domain that is primarily related to or primarily used in connection with the Psychiatric Hospital Business, except for any information that was or becomes generally available to the public other than as a result of disclosure by Respondents, and includes, but is not limited to, pricing information, marketing methods, market intelligence, competitor information, commercial information, management system information, business processes and practices, payor and provider communications, bidding practices and information, procurement practices and information, supplier qualification and approval practices and information, and training practices.
- J. “Direct Cost” means cost not to exceed the cost of labor, material, travel, and other expenditures to the

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extent the costs are directly incurred to provide Transitional Services. “Direct Cost” to a Commission-approved Acquirer for its use of any of Respondents’ employees’ labor shall not exceed the then-current average wage rate for such employee, including benefits.

- K. “Divestiture Agreement” means the agreement(s) between Respondents and the Commission-approved Acquirer (or between a Divestiture Trustee and the Commission-approved Acquirer, if the New Mexico Psychiatric Hospital Assets are required to be divested), and all amendments, exhibits, attachments, agreements, and schedules thereto, related to divestiture of the Peak Behavioral Hospital Assets (or the New Mexico Psychiatric Hospital Assets, if required to be divested) that have been approved by the Commission to accomplish the requirements of this Order.
- L. “Hold Separate Order” means the Order to Hold Separate and Maintain Assets issued by the Commission in this matter.
- M. “Intellectual Property” means, without limitation:
1. all patents, patent applications, and inventions and discoveries that may be patentable;
 2. all know-how, trade secrets, software, technical information, data, registrations, applications for governmental approvals, inventions, processes, best practices (including clinical pathways), formulae, protocols, standards, methods, techniques, designs, quality control practices and information, research and test procedures and information, and safety, environmental and health practices and information;
 3. all confidential or proprietary information, commercial information, management systems, business processes and practices, customer lists,

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customer information, customer records and files, customer communications, procurement practices and information, supplier qualification and approval practices and information, training materials, sales and marketing materials, customer support materials, advertising and promotional materials; and

4. all rights in any jurisdiction to limit the use or disclosure of any of the foregoing, and rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation, or breach of any of the foregoing.
- N. “Mesilla Valley Hospital Assets” means the Psychiatric Hospital Assets associated with and the Psychiatric Hospital Business conducted at the Psychiatric Hospital Facility, doing business as Mesilla Valley Hospital located at 3751 Del Rey Boulevard, Las Cruces, New Mexico 88012.
- O. “New Mexico Psychiatric Hospital Assets” means:
1. Peak Behavioral Health Assets; and
 2. Mesilla Valley Hospital Assets.
- P. “Peak Behavioral Health Assets” means the Psychiatric Hospital Assets associated with and the Psychiatric Hospital Business conducted at the Psychiatric Hospital Facility, doing business as Peak Behavioral Health Services, LLC, located at 5055 McNutt Road, Santa Teresa, New Mexico 88088.
- Q. “Person” means any individual, partnership, firm, corporation, association, trust, unincorporated organization, or other entity or governmental body.
- R. “Prospective Acquirer” means a Person that Respondents (or the Divestiture Trustee, if the New Mexico Psychiatric Hospital Assets are required to be divested) intend to submit to the Commission for its

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prior approval pursuant to Paragraph II.A. (or Paragraph VI. if applicable) of this Order.

- S. “Psychiatric Hospital Assets” means all of Respondents’ rights, title, and interest in all property and assets, tangible or intangible, of whatever nature and wherever located, relating to or used in connection with the Psychiatric Hospital Business, including, without limitation, the following:
1. all real property interests (including fee simple interests and real property leasehold interests, whether as lessor or lessee) to the extent transferable, including all easements, appurtenances, licenses, and permits, together with all buildings and other structures, facilities, and improvements located thereon, owned, leased, or otherwise held;
 2. all Tangible Personal Property, including, without limitation, any Tangible Personal Property removed from and not replaced at the specific Psychiatric Hospital Facility, if such property was used by or in connection with the Psychiatric Hospital Business conducted at such facility on or after the date Respondents execute the Consent Agreement;
 3. all rights under any and all contracts and agreements (e.g., leases, service agreements such as dietary and housekeeping services, supply agreements, procurement contracts) to the extent assignable, including but not limited to contracts and agreements with physicians, other health care providers, unions, third-party payors, HMOs, customers, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, cosigners, and consignees;

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4. all rights and title in and to use the name of each of the hospitals on a permanent and exclusive basis (even as to Respondents);
5. all Intellectual Property;
6. all intangible rights and property other than Intellectual Property, including, going concern value, goodwill, internet, telephone, telecopy and telephone numbers, domain names, listings, and web sites;
7. all approvals, consents, licenses, certificates, registrations, permits, waivers, or other authorizations issued, granted, given, or otherwise made available by or under the authority of any governmental body or pursuant to any legal requirement, and all pending applications therefore or renewals thereof, to the extent assignable;
8. all inventories, stores, and supplies;
9. all accounts receivable;
10. all rights under warranties and guarantees, express or implied;
11. all books, records, and files (electronic and hard copy); and
12. all Business Records;

provided, however, that the Psychiatric Hospital Assets shall not include Respondents' rights, title, and interest to or in property and assets, tangible or intangible, that are not primarily related to or primarily used in connection with the Psychiatric Hospital Business conducted at the specified Psychiatric Hospital Facility;

provided, however, at the option of the Commission-approved Acquirer, that the Psychiatric Hospital Assets need not include any property or assets that the

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Commission-approved Acquirer determines it does not need or want, if the Commission approves the Divestiture Agreement without such property or assets; and

provided, however, that Respondents may retain a copy of all books, records, files, and Business Records to the extent necessary to comply with applicable law, regulations, and other legal requirements.

- T. “Psychiatric Hospital” means a health care facility, licensed or certified as a psychiatric hospital (except for a facility limited by its license or certificate to residential treatment or other long-term care), that provides Acute Inpatient Psychiatric Services.
- U. “Psychiatric Hospital Business” means the operation of a Psychiatric Hospital Facility and includes but is not limited to the provision of Acute Inpatient Psychiatric Services, whether provided or performed at the facility or in a different location within the Relevant Area, and also includes all other services, businesses, and operations primarily related to the specified Psychiatric Hospital Facility.
- V. “Psychiatric Hospital Facility” means a Psychiatric Hospital or a Psychiatric Unit.
- W. “Psychiatric Unit” means a department, unit, or other organizational subdivision of a hospital, licensed or certified as a provider of inpatient psychiatric care (except for a facility limited by its license or certificate to residential treatment or other long-term care), that provides Acute Inpatient Psychiatric Services.
- X. “Relevant Area” means the El Paso Metropolitan Statistical Area, as defined by the US Office of Management and Budget, and the Las Cruces Metropolitan Statistical Area, as defined by the US Office of Management and Budget.

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- Y. “Relevant Employees” means any and all full-time employees, part-time employees, contract employees, or independent contractors whose duties, at any time during the ninety (90) days preceding the Acquisition Date or at any time after the Acquisition Date, related or relate primarily to the Peak Behavioral Health Business (or the New Mexico Psychiatric Hospital Assets, if required to be divested); *provided, however*, that the persons listed in the Confidential Appendix shall not be considered Relevant Employees.
- Z. “Respondents” means Alan B. Miller and UHS, collectively or individually.
- AA. “Tangible Personal Property” means all machinery, equipment, tools, fixtures, vehicles, furniture, inventories, computer hardware, and all other items of tangible personal property of every kind owned or leased by Respondents, wherever located, together with any express or implied warranty by the manufacturers or sellers or lessors of any item or component part thereof and all maintenance records and other documents relating thereto.
- BB. “Third Parties” means Persons other than Respondents or the Commission-approved Acquirer.
- CC. “Transitional Administrative Services” means administrative assistance with respect to the operation of a Psychiatric Hospital Facility or the provision of Acute Inpatient Psychiatric Services, including but not limited to assistance relating to billing, accounting, governmental regulation, human resources management, information systems, managed care contracting, and purchasing, as well as providing assistance in acquiring, obtaining access, and customizing all software used in the provision of such services.
- DD. “Transitional Clinical Services” means clinical assistance and support services with respect to the

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operation of a Psychiatric Hospital Facility or the provision of Acute Inpatient Psychiatric Services.

- EE. “Transitional Services” means Transitional Administrative Services and Transitional Clinical Services.
- FF. “UHS” means Universal Health Services, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by UHS, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each; after the Acquisition, UHS includes Ascend.

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

- A. No later than six (6) months after the Order is issued, Respondents shall divest the Peak Behavioral Health Assets, absolutely and in good faith and at no minimum price, as an on-going business, only to a single acquirer that receives the prior approval of the Commission, and only in a manner (including an executed Divestiture Agreement) that receives the prior approval of the Commission.
- B. Respondents shall cooperate with the Commission-approved Acquirer to ensure that the Peak Behavioral Health Assets are transferred to the Commission-approved Acquirer as a financially and competitively viable Psychiatric Hospital Facility, operating as an ongoing business providing Acute Inpatient Psychiatric Services, including but not limited to providing assistance necessary to transfer to the Commission-approved Acquirer all governmental approvals needed to operate the Peak Behavioral Health Assets.

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- C. Prior to the Closing Date, Respondents shall:
1. secure all consents and waivers from all Third Parties that are necessary for Respondents to divest the Peak Behavioral Health Assets and/or to grant any license(s) to the Commission-approved Acquirer to permit the Commission-approved Acquirer to operate the Peak Behavioral Health Assets; *provided, however*, that Respondents may satisfy this requirement by certifying that such Commission-approved Acquirer has executed all such agreements directly with each of the relevant Third Parties; and
 2. take all actions necessary to ensure that the Peak Behavioral Health Assets meet federal, state, local, and municipal requirements necessary to allow the transfer of the Peak Behavioral Health Assets to the Commission-approved Acquirer.
- D. The purpose of the divestiture is to ensure the continuation of the Peak Behavioral Health Assets (or the New Mexico Psychiatric Hospital Assets, if required to be divested) as an ongoing, viable Psychiatric Hospital Facility and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

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

- A. After the Closing Date, Respondents shall not use, solicit, or access, directly or indirectly, any Confidential Business Information of the Peak Behavioral Health Assets (or of the New Mexico Psychiatric Hospital Assets, if required to be divested), and shall not disclose, provide, discuss, exchange, circulate, convey, or otherwise furnish such Confidential Business Information, directly or indirectly, to or with any Person other than:

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1. as necessary to comply with the requirements of this Order or the Hold Separate Order;
 2. pursuant to a Divestiture Agreement;
 3. to enforce the terms of a Divestiture Agreement or prosecute or defend against any dispute or legal proceeding; or
 4. to comply with applicable law, regulations and other legal requirements.
- B. No later than five (5) days after the Acquisition Date, Respondents shall provide written notification of the restrictions, prohibitions, and requirements of this Paragraph III. to all of Respondents' employees, agents, and representatives employed at, or with responsibilities relating to, a Psychiatric Hospital Facility located in the Relevant Area or who had or have access to or possession, custody or control of any Confidential Business Information of the Peak Behavioral Health Assets (or of the New Mexico Psychiatric Hospital Assets, if required to be divested).
1. such notification shall include a plain language explanation of the requirements of this Order and a description of the consequences of failing to comply with the requirements.
 2. Respondents shall provide such notification by US mail or by e-mail, with return receipt requested acknowledging receipt of the notification or similar transmission.
 3. Respondents shall maintain complete records of all such notifications at Respondents' corporate headquarters and keep a file of all receipts and acknowledgments for one (1) year after the Closing Date.
 4. Respondents shall provide the Commission-approved Acquirer (and the Hold Separate Trustee,

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if one is appointed) with a copy of such notification and with copies of all other certifications, notifications, and reminders sent to Respondents' personnel.

C. Respondents shall:

1. no later than thirty (30) days after the Closing Date, obtain, as a condition of continued employment post-divestiture, from each of Respondents' employees, agents, and representatives employed at or with responsibilities relating to a Psychiatric Hospital Facility located in the Relevant Area or who had or have access to or possession, custody or control of any Confidential Business Information of the Peak Behavioral Health Assets (or of the New Mexico Psychiatric Hospital Assets, if required to be divested) an executed confidentiality agreement that complies with the restrictions, prohibitions and requirements of this Order and the Hold Separate Order; and
2. no later than thirty (30) days after the Closing Date, institute procedures and requirements and take such actions as are necessary to ensure that Respondents' personnel comply with the restrictions, prohibitions and requirements of this Paragraph III., including all actions that Respondents would take to protect their own trade secrets and confidential information.

IV.

IT IS FURTHER ORDERED that Respondents shall:

- A. No later than ten (10) days after a request from a Prospective Acquirer, provide the Prospective Acquirer with the following information for each Relevant Employee, as and to the extent permitted by law:

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1. name, job title or position, date of hire, and effective service date;
 2. a specific description of the employee's responsibilities;
 3. the base salary or current wages;
 4. the most recent bonus paid, aggregate annual compensation for Respondents' last fiscal year, and current target or guaranteed bonus, if any;
 5. employment status (i.e., active or on leave or disability; full-time or part-time);
 6. any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and
 7. at the Prospective Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the Relevant Employee.
- B. Within a reasonable time after a request from a Prospective Acquirer, provide to the Prospective Acquirer an opportunity to meet personally and outside the presence or hearing of any employee or agent of any Respondent, with any one or more of the Relevant Employees, and to make offers of employment to any one or more of the Relevant Employees;
- C. Not interfere, directly or indirectly, with the hiring or employing by the Prospective Acquirer of any Relevant Employees, not offer any incentive to such employees to decline employment with the Prospective Acquirer, and not otherwise interfere with the recruitment of any Relevant Employee by the Prospective Acquirer;

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- D. Remove any impediments within the control of Respondents that may deter Relevant Employees from accepting employment with the Prospective Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Prospective Acquirer, and shall not make any counteroffer to a Relevant Employee who receives a written offer of employment from the Prospective Acquirer; *provided, however*, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee;
- E. Provide all Relevant Employees with reasonable financial incentives to continue in their positions until the Closing Date. Such incentives shall include, but are not limited to, a continuation, until the Closing Date, of all employee benefits, including the funding of regularly scheduled raises and bonuses, and the vesting of pension benefits (as permitted by law and for those Relevant Employees covered by a pension plan), offered by Respondents;
- F. Not, for a period of one (1) year following the Closing Date, directly or indirectly, solicit or otherwise attempt to induce any of the Relevant Employees who have accepted offers of employment with the Commission-approved Acquirer to terminate his or her employment with the Commission-approved Acquirer; *provided, however*, that Respondents may:
1. advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at Relevant Employees; or
 2. hire Relevant Employees who apply for employment with Respondents, as long as such

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employees were not solicited by Respondents in violation of this Paragraph; *provided further, however*, that this Paragraph shall not prohibit Respondents from making offers of employment to or employing any Relevant Employee if the Commission-approved Acquirer has notified Respondents in writing that the Commission-approved Acquirer does not intend to make an offer of employment to that employee, or where such an offer has been made and the employee has declined the offer, or where the employee's employment has been terminated by the Commission-approved Acquirer.

V.

IT IS FURTHER ORDERED that, at the request of a Commission-approved Acquirer, for a period not to exceed twelve (12) months, or as otherwise approved by the Commission, and in a manner (including pursuant to an agreement) that receives the prior approval of the Commission:

- A. Respondents shall provide Transitional Services to the Commission-approved Acquirer sufficient to enable the Commission-approved Acquirer to operate each of the Psychiatric Hospital Facilities to be divested and to provide Acute Inpatient Psychiatric Services in substantially the same manner that Respondents have operated such facilities and provided such services at each of the Psychiatric Hospital Facilities to be divested; and
- B. Respondents shall provide the Transitional Services required by this Paragraph at substantially the same level and quality as such services are provided by Respondents in connection with the operation of each of the Psychiatric Hospital Facilities to be divested.

Provided, however, that Respondents shall not (i) require the Commission-approved Acquirer to pay compensation for Transitional Services that exceeds the Direct Cost of providing such goods and services, or (ii) terminate its obligation to provide

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Transitional Services because of a material breach by the Commission-approved Acquirer of any agreement to provide such assistance unless Respondents are unable to provide such services due to such material breach.

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

- A. If Respondents have not fully complied with the obligations imposed by Paragraph II. of this Order, the Commission may appoint a Divestiture Trustee to divest the New Mexico Psychiatric Hospital Assets and perform Respondents' other obligations 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 Section 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 VI.A. 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 Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.
- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, and stated in writing their 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,

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Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

1. 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 divestiture required by, and satisfy the additional obligations imposed by, this Order.
2. 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:
 - a. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to effectuate the divestiture required by, and satisfy the additional obligations imposed by, this Order.
 - b. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan to satisfy the obligations of Paragraph II. of this Order, or believes that such obligations 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*, that the Commission may extend the period only two (2) times.
 - c. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full

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and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be divested by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays caused by Respondents shall extend the time under this Paragraph VI. for a time period equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

- d. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such entity within five (5) days after receiving notification of the Commission's approval.
- e. 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

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Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

- f. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, malfeasance, willful or wanton acts, or bad faith by the Divestiture Trustee.
- g. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.

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- h. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
 - i. 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.
- C. If the Commission determines that the Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph VI.
- D. 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.
- E. The Divestiture Trustee appointed pursuant to this Paragraph VI. may be the same person appointed as Hold Separate Trustee pursuant to the relevant provisions of the Hold Separate Order.

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

- A. No Divestiture Agreement shall 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.

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- B. The Divestiture Agreement shall be incorporated by reference into this Order and made a part hereof.
- C. Respondents shall comply with all terms of the Divestiture Agreement, and any breach by Respondents of any term of the Divestiture Agreement shall constitute a failure to comply with this Order. If any term of the Divestiture Agreement 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 Respondents’ obligations under this Order.

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

- A. For a period of ten (10) years from the date this Order is issued, Respondents shall not, without providing advance written notification to the Commission in the manner described in this Paragraph, directly or indirectly:
 - 1. Acquire any stock, share capital, equity, or other interest in any Person that, at any time during the twelve (12) months immediately preceding such acquisition, was engaged in or is engaged in providing Acute Inpatient Psychiatric Services in the Relevant Area; or
 - 2. Enter into any agreement or other arrangement to manage or otherwise control a Third Party Psychiatric Facility which, during the twelve (12) months immediately preceding such agreement or arrangement, was engaged or is engaged in providing Acute Inpatient Psychiatric Services in the Relevant Area.

Nothing herein shall be construed to require advance written notification if Respondents seek to open a new Psychiatric Hospital Facility or expand existing Acute

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Inpatient Psychiatric Services at one of Respondents' Psychiatric Hospital Facilities in the Relevant Area.

- B. Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (herein referred to as "the Notification"), 16 C.F.R. § 803 App., and shall be prepared and transmitted in accordance with the requirements of that Part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until thirty (30) days after submitting such additional information or documentary material. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. *Provided, however,* that prior notification shall not be required by this Paragraph for a transaction for which Notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a. *Provided further, however,* that prior notification shall not be required by this Paragraph for Respondents' continued ownership, management, or operation of the assets required to be divested (i) pursuant to Paragraphs II. or VI. of this Order pending such divestiture; and (ii) pursuant to the Divestiture Agreement.

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

- A. Within thirty (30) days after this Order is issued, and every sixty (60) days thereafter until Respondents have complied with their obligations in Paragraph II. (or Paragraph VI. of this Order, if the New Mexico Psychiatric Hospital Assets are required to be divested) of this Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraph II. (or Paragraph VI. of this Order, if the New Mexico Psychiatric Hospital Assets are required to be divested) of this Order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraph II. (or Paragraph VI. of this Order, if the New Mexico Psychiatric Hospital Assets are required to be divested) of this Order, including a description of all substantive contacts or negotiations for the divestitures and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communication to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestiture.
- B. One (1) year after this Order is issued, annually for the next nine (9) years on the anniversary of that date, and at other times as the Commission may require, Respondents shall file verified written reports with the Commission setting forth in detail the manner and form in which they have complied and are complying with this Order.

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X.

IT IS FURTHER ORDERED that Respondents 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 such Respondent; and
- C. Any other change in such Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

XI.

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

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

Analysis to Aid Public Comment

XII.

IT IS FURTHER ORDERED that this Order shall terminate on November 27, 2022.

By the Commission.

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT****I. INTRODUCTION AND BACKGROUND**

The Federal Trade Commission (“Commission”) has accepted for public comment, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Alan B. Miller and Universal Health Services, Inc. (collectively, “UHS”). The purpose of the proposed Consent Agreement is to remedy the anticompetitive effects that otherwise would result from the merger of UHS with Ascend Health Corporation (“Ascend”). Under the terms of the proposed Consent Agreement, UHS is required to divest, within six months after the Decision and Order is issued, its Peak Behavioral Health Services facility (“Peak”), and all relevant assets and real property in the local market encompassing El Paso, Texas and its suburb, Santa Teresa, New Mexico (“El Paso/Santa Teresa”), to an acquirer that receives the approval of the Commission. UHS will acquire University Behavioral Health of El Paso, the Ascend facility, when the merger closes. To ensure that the divested assets attract a buyer that can adequately compete with UHS post-divestiture, the Consent Agreement requires a second UHS hospital, Mesilla Valley Hospital (“Mesilla Valley”), located in Las Cruces, New Mexico, to be divested if the original divestiture assets are not sold to an approved buyer within the six-month timeframe. UHS and Ascend have also agreed to hold the to-be-divested assets separate, and to maintain the economic viability, marketability, and competitiveness of both the Peak and Mesilla Valley assets

Analysis to Aid Public Comment

until the potential acquirer is approved by the Commission and the divestiture is complete.

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

On June 3, 2012, UHS agreed to acquire Ascend in a transaction valued at approximately \$517 million. The Commission's complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. ' 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 45, by removing an actual, direct, and substantial competitor from one local market for acute inpatient psychiatric services. The proposed Consent Agreement would remedy the alleged violations by requiring a complete divestiture in the affected market. The divestiture will replace the competition that otherwise would be lost in the El Paso/Santa Teresa market as a result of the proposed acquisition.

II. THE PARTIES

UHS, headquartered in King of Prussia, Pennsylvania, owns or operates 25 general acute care hospitals and 198 behavioral health facilities located in 36 states, Washington, D.C., Puerto Rico, and the U.S. Virgin Islands. It is one of the largest hospital management companies in the United States, with 2011 revenues totaling approximately \$7.5 billion. In 2011, UHS's 198 behavioral health facilities generated approximately \$3.4 billion in revenue (25% of total revenues) from nearly 19,000 licensed beds and over 5 million patient days. The top revenue sources for its behavioral health centers are commercial payors (38% of 2011 net revenue), Medicaid (24%), and Medicare (17%). In November 2010, UHS completed its acquisition of Psychiatric Solutions, Inc., which had operated the nation's largest network of freestanding inpatient behavioral health facilities, subject to an FTC consent order that required UHS to divest facilities in Nevada, Delaware, and Puerto Rico.

Analysis to Aid Public Comment

Ascend, headquartered in New York, New York, owns or operates nine behavioral health facilities located in Arizona, Oregon, Texas, Utah, and Washington, including seven acute inpatient psychiatric hospitals, a substance abuse residential treatment center, and an addiction treatment center.

III. ACUTE INPATIENT PSYCHIATRIC SERVICES

UHS's proposed acquisition of Ascend poses substantial antitrust concerns in the relevant product market of acute inpatient psychiatric services provided to commercially insured patients. Acute inpatient psychiatric services are those provided for the diagnosis, treatment, and care of patients deemed to be a threat to themselves or others or unable to perform basic life functions, due to an acute psychiatric condition. Acute inpatient psychiatric care is distinct from other psychiatric services such as partial hospitalization, intensive outpatient programs, outpatient care, and residential treatment. Other, less intensive, psychiatric services are not substitutes for acute inpatient psychiatric services.

The acute inpatient psychiatric services market is local in nature. Analysis of patient flow data and evidence gathered from market participants indicate that patients and their families prefer to find care as close to home as possible and to stay within the city where they live or work. Accordingly, most residents of El Paso and Santa Teresa obtain acute inpatient psychiatric services from providers located in El Paso or Santa Teresa. Health plans also have internal guidelines or regulatory "geo-access" standards requiring that services be made available within a certain, usually short, distance from their members. The acute inpatient psychiatric services market affected by the proposed acquisition is thus limited to the El Paso/Santa Teresa market.

The proposed acquisition would lead to a virtual monopoly in the provision of acute inpatient psychiatric services provided to commercially insured patients in the El Paso/Santa Teresa market, which creates a strong presumption that the acquisition would create or enhance market power or facilitate its exercise. The presumption of anticompetitive harm is further supported by evidence of the close competition between the UHS- and Ascend-owned facilities that would be eliminated by the proposed merger. Consumers in El Paso/Santa Teresa have benefitted from the

Analysis to Aid Public Comment

head-to-head competition in the form of lower health care costs, higher quality of care, and improved service offerings. Left unremedied, the proposed acquisition likely would cause anticompetitive harm by enabling UHS to profit by unilaterally raising the reimbursement rates negotiated with commercial health plans. These costs are ultimately borne by consumers in the form of higher premiums, co-pays, and other out-of-pocket costs. The loss of competition also reduces UHS's incentive to improve quality and provide better service.

New entry or expansion is unlikely to deter or counteract the anticompetitive effects of the proposed acquisition. While regulatory barriers to opening a new psychiatric facility or unit are lower in Texas and New Mexico than in other states (*e.g.*, there are no Certificate of Need regulations in either state), local zoning regulations, Medicaid and Medicare certifications, and the need to develop strong relationships with local patient referral sources hinder the ability of firms to enter the market. Cuts to Medicaid funding may also affect the financial incentive of a provider to offer inpatient psychiatric services. Thus, it is unlikely that new entry or expansion sufficient to achieve a significant market impact will occur in a timely manner.

IV. THE PROPOSED CONSENT AGREEMENT

The proposed Consent Agreement wholly remedies the anticompetitive effects in the El Paso/Santa Teresa market by requiring UHS to divest Peak, located in Santa Teresa, New Mexico, and its associated operations and businesses within six months after issuance of the Decision and Order. The potential acquirer of Peak is subject to prior approval of the Commission. The Consent Agreement also provides that, if Peak is not sold to an approved acquirer within six months, a Divestiture Trustee will be appointed and empowered to divest both Peak and Mesilla Valley. The purpose of this provision is to address the uncertainty of whether Peak alone is sufficient to attract an acquirer that would compete as effectively as UHS competed prior to the merger.

Until completion of the requisite divestiture(s), UHS is required to abide by the Order to Hold Separate and Maintain Assets, which includes a requirement that UHS hold Peak

Analysis to Aid Public Comment

separate from its other businesses and facilities, and a requirement to take all actions necessary to maintain the economic viability, marketability, and competitiveness of the both the Peak and Mesilla Valley assets. The Consent Agreement also requires UHS to provide transitional services to the approved acquirer for one year, as needed to assist the acquirer with operating the divested assets as a viable and ongoing business. In addition, the proposed order allows the Commission to appoint a Hold Separate Trustee to oversee UHS's compliance with the Order to Hold Separate and Maintain Assets. Finally, the proposed order contains a ten-year prior notice requirement for acquisitions of acute inpatient psychiatric service providers in the local area, as well as compliance reporting requirements.

The sole purpose of this analysis is to facilitate public comment on the Consent Agreement. This analysis does not constitute an official interpretation of the Consent Agreement or modify its terms in any way.

Complaint

IN THE MATTER OF

RENOWN HEALTHCONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SECTION 7 OF THE CLAYTON ACT

Docket No. C-4366; File No. 111 0101
Complaint, August 3, 2012 – Decision, November 30, 2012

This consent order addresses the acquisition by Renown Health of Sierra Nevada Cardiology Associates and Reno Heart Physicians. The complaint alleges that Renown Health violated Section 7 of the Clayton Act by substantially lessening competition in the market for cardiology services in and around Reno, Nevada. The consent order requires Renown Health to release a certain number of its cardiologist employees from their employment contracts freeing them to practice either as employees of other health care entities or as part of independent medical groups in the Reno area.

Participants

For the *Commission*: *Thomas Dahdouh, John Wiegand, and Erika Wodinsky.*

For the *Respondent*: *William Berlin, Ober Kaler; Kelly Testolin, in-house counsel.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (“FTC Act”), and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that Respondent Renown Health, directly or by or through its wholly-owned subsidiaries Nevada Heart Institute and NHI-1, Inc. (collectively “Renown Health”) has acquired the medical practices and assets of Sierra Nevada Cardiology Associates, Inc. (“SNCA”), and Reno Heart Physicians, Inc. (“RHP”), and has employed the physician members and physician employees previously providing cardiology services in connection with those entities, and has violated and is violating Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and it appearing to the Commission that a proceeding by it in respect thereof would

Complaint

be in the public interest, hereby issues its Complaint, stating its charges as follows.

NATURE OF THE CASE

1. Renown Health's acquisition of two cardiology groups in Reno, Nevada, SNCA and RHP, and the employment of the doctors who had formerly practiced in association with these medical group entities, is likely to lead to anticompetitive effects including increased prices and reduced non-price competition. This consolidation resulted in 15 of the cardiologists who had been associated with SNCA and 17 of the physicians who had been associated with RHP becoming employees of Renown Health.

2. Prior to the transactions at issue, SNCA and RHP, the two largest groups of physicians providing adult cardiology services in the Reno/Sparks, Nevada Metropolitan Statistical Area ("Reno area"), competed head-to-head to serve cardiology patients.

3. As a result of Renown Health's acquisition of SNCA in 2010 and the employment of the SNCA-affiliated cardiologists, Renown Health employed approximately 47% of the cardiologists serving private patients in the Reno area. As a result of Renown Health's subsequent acquisition of RHP in 2011 and employment of the RHP-affiliated cardiologists, Renown Health then employed approximately 97% of the cardiologists serving private patients in the Reno area. Renown Health's acquisition of RHP makes it likely that Renown Health will be able to exercise unilateral market power in the Reno area, which will result in higher prices and a reduction in non-price competition for the provision of cardiology services.

4. Although health plans are the direct customers for cardiology services provided to many patients, higher prices for those services are passed on to employers, unions, and other group purchasers of health insurance plans, and such costs are ultimately borne by patients in the Reno area through higher premiums, co-payments, and other out-of-pocket expenditures.

5. The price and non-price competition eliminated by Renown Health's acquisition of RHP and employment of its

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cardiologists will not be replaced by other providers. Prior to the acquisition, RHP was the only group of cardiologists that competed meaningfully with Renown Health for Reno-area cardiology patients.

RESPONDENT

6. Respondent Renown Health is a non-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Nevada, with its office and principal place of business located at 1155 Mill Street, Reno, Nevada 89502. In Reno, Renown Health owns and operates Renown Regional Medical Center, with 808 licensed beds, and Renown South Meadows Medical Center, with 76 licensed beds. Renown Health also operates Carson Valley Medical Center in Gardnerville, Nevada, as part of a joint venture with Barton Healthcare Service. In addition, Renown Health owns and operates Hometown Health Plan, a commercial health insurance company that does business in northern Nevada as well as other portions of the state.

7. Respondent Renown Health is, and at all times herein has been engaged in commerce or in activities in or affecting commerce within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12. The acquisitions of SNCA and RHP constitute acquisitions under Section 7 of the Clayton Act, 15 U.S.C. § 18.

THE TRANSACTIONS

8. On or about November 24, 2010, Arger, DiPaolo, Drummer, Fuller, Newmark & Spring, a Nevada professional corporation doing business as SNCA was converted to a Nevada for-profit corporation. SNCA, was then merged into Renown Health. In addition, Renown Health purchased certain of SNCA's assets, including its interest in a free-standing cardiac catheterization laboratory and its goodwill, for approximately \$3.4 million. This merger of SNCA into Renown Health ("SNCA merger") became effective on January 1, 2011.

9. On or about November 24, 2010, 15 physicians associated with SNCA signed employment agreements with Renown Health, providing that each such physician would become employed by Renown Health for a specified numbers of years, for a salary and

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certain specified benefits. The effective date of the employment agreements between Renown Health and each of the SNCA physicians was January 1, 2011.

10. The employment agreements between the former SNCA doctors and Renown Health contain “covenants,” including a covenant not to compete, a covenant of non-solicitation, and a covenant of non-interference. The covenant not to compete contained in the employment agreements between Renown Health and each of the physicians formerly affiliated with SNCA provides, *inter alia*, that a Renown Health-employed cardiologist who chooses to leave Renown Health’s employ is barred for two years from negotiating or entering into an agreement to provide cardiology services at any hospital, medical practice or medical facility at a location within 50 miles of the physician’s principal place of practice with Renown Health, or from owning, operating, managing, becoming an employee, or in any way becoming connected with any hospital, medical practice or medical facility at a location within 50 miles of the physician’s principal place of practice with Renown Health. The covenant of non-solicitation contained in the employment agreements between Renown Health and each of the physicians formerly affiliated with SNCA provides, *inter alia*, that a Renown Health-employed cardiologist who chooses to leave Renown Health’s employ is barred for a period of two years after leaving from soliciting or contacting former patients. The covenant of non-interference contained in the employment agreements between Renown Health and each of the physicians formerly affiliated with SNCA provides, *inter alia*, that a Renown Health-employed cardiologist who chooses to leave Renown Health’s employ is barred from causing any entity with a contractual relationship with Renown Health from terminating such relationship with Renown Health.

11. On or about March 17, 2011, Berndt, Chaney-Roberts, Davee, Ganchan, Ichino, Juneau, Noble, Seher, Smith, Swackhamer, Thompson, Williamson and Zebrack, Ltd., a professional corporation doing business as Reno Heart Physicians was converted to a Nevada for-profit corporation. This corporation was then merged into Renown Health. In addition, Renown Health purchased certain of RHP’s assets, for approximately \$4 million. This merger of RHP into Renown

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Health (“RHP merger”) became effective on or about March 29, 2011.

12. On or about March 17, 2011, 17 physicians associated with RHP signed employment agreements with Renown Health, providing that each such physician would become employed by NHI for specified numbers of years, for a salary and certain specified benefits. The effective date of the employment agreements between Renown Health and each of the RHP physicians was March 29, 2011. Of the 17 cardiologists affiliated with RHP who became Renown Health employees, 16 practiced primarily and regularly in the Reno area; one cardiologist practiced regularly in an office located in Carson City, Nevada. The employment agreements between the former RHP doctors and Renown Health also contain “covenants” including a covenant not to compete, a covenant of non-solicitation, and a covenant of non-interference, which are identical or virtually identical to those contained in the employment agreements between the SNCA doctors and Renown Health.

13. Prior to the SNCA merger, Renown Health did not employ any cardiologists. With the SNCA merger and employment of the former SNCA cardiologists, Renown Health employed 15 cardiologists who competed with RHP in the provision of cardiology services in the Reno area. After the RHP merger, Renown Health, either directly or through its subsidiaries, employed 31 cardiologists in Reno and one cardiologist in Carson City.

14. The effect of the acquisition of RHP by Renown Health was to combine 31 of the 32 cardiologists then practicing in the Reno area under Renown Health, the owner and operator of the largest hospital system in that area.

THE RELEVANT MARKET

15. For the purposes of this Complaint, the relevant line of commerce is the provision of adult cardiology services. “Cardiology services” includes diagnostic or treatment services by cardiologists who provide non-invasive services (general cardiology), invasive services (including diagnostic cardiac catheterization procedures), interventional cardiology (including

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placement of stents), and electrophysiology services (including the insertion and/or removal of devices related to heart rhythm functions). For purposes of this complaint, cardiology services does not include pediatric cardiology services or cardiac surgery.

16. The relevant geographic market in which to assess the effect of the SNCA and RHP mergers with Renown Health is the Reno area, including Washoe County, Nevada, but not including Carson City, Nevada.

THE STRUCTURE OF THE MARKET

17. The merger of RHP into Renown Health and the employment of the RHP physicians by Renown Health reduced from two to one the number of adult cardiology service providers that offer a broad range of adult cardiology subspecialties in the Reno area. These cardiology subspecialties, including non-invasive, invasive, interventional, and electrophysiology, are required to fully meet the needs of patients with heart conditions. At the time of the RHP transaction, the only other cardiologist serving adult cardiology patients in the Reno area was a sole practitioner, who could not provide a comparable range of services.

18. At the time of the consummation of the transaction at issue here, Renown Health employed 97% of the cardiologists in the relevant market. The Herfindahl-Hirschman Index (“HHI”) in the market for the provision of cardiology services, based on the number of cardiologists serving the market, increased from 4707 to 9395, an increase of 4688 points.

19. Since the time the former RHP doctors became employees of Renown Health, two Renown Health cardiologists have left the Reno area. In addition, three cardiologists who are not affiliated with Renown Health have started practicing cardiology in the Reno area. As a result, Renown Health now employs approximately 88% of the cardiologists in the area. The current HHI, based on the number of cardiologists serving the market is now 7815, an increase of 3108 points over the HHI prior to the Renown Health’s acquisition of RHP.

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20. Prior to January 1, 2011, the effective date of the SNCA physicians' employment by Renown Health, SNCA and RHP were actual and substantial competitors in the relevant market. After Renown Health's employment of the SNCA physicians, Renown Health became an actual and substantial competitor of RHP in the provision of cardiology services to patients in the Reno area.

21. Prior to March 29, 2011, the effective date of the RHP physicians' employment by Renown Health, health plans and self-insured employers, seeking to contract with cardiologists for the provision of cardiology services to their members and/or employees, would have been able to choose between RHP and Renown Health based on price and non-price terms offered by the respective groups of cardiologists. Health plans and employers contracting for adult cardiology services benefitted from this head-to-head competition with lower prices and improved quality and service.

22. The availability and number of alternative providers is the primary source of a health plan's bargaining power to negotiate competitive rates on behalf of its members. Thus, an acquisition that reduces a health plan's choice of providers reduces the health plan's bargaining power when negotiating with providers, and can lead to higher prices and reduced quality. Renown Health's acquisition of RHP reduced the number of cardiology practices capable of providing a full range of cardiology services from two to one, creating a significant risk of higher prices and reduced quality.

ENTRY CONDITIONS

23. The most significant barrier to entry into the market for adult cardiology services in the Reno area is the need for new entrants to recruit a sufficient number of cardiologists with appropriate training, experience and areas of specialization. Because cardiologists within a practice must provide coverage for each other, unless an entity can recruit a sufficient number of cardiologists in each necessary subspecialty, any cardiologists recruited to the market will not have a sufficient number of other cardiologists with whom they can share responsibilities.

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24. New entry into the relevant geographic market sufficient to deter or counteract the anticompetitive effects described in Paragraphs 25 and 26 is unlikely to occur in a timely manner because recruitment of a sufficient number of cardiologists to provide a competitive constraint to Renown Health would take more than two years.

EFFECTS OF THE TRANSACTION

25. The effects of Renown Health's acquisition of RHP and employment of the RHP physicians may be substantially to lessen competition and tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, in the following ways, among others:

- a. eliminating actual, direct and substantial competition between Renown Health and RHP in the market for the provision of cardiology services;
- b. increasing the ability of the merged entity unilaterally to raise prices for cardiology services; and
- c. reducing incentives to improve service or product quality in the relevant markets

26. After the consummation of the transaction with its combination of the two largest cardiology physician groups in the Reno area, health plans can no longer threaten, implicitly or explicitly, to exclude Renown Health or the cardiologists employed by Renown Health. This substantially reduces the health plans' bargaining power, and substantially increases Renown Health's bargaining power, when negotiating rates for adult cardiology services in the Reno area.

VIOLATIONS CHARGED

27. The transaction described in Paragraph 11, and Renown Health's subsequent employment of RHP doctors, described in Paragraph 12, constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

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WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this third day of August, 2012, issues its Complaint against said Respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of the acquisition by Renown Health of Reno Heart Physicians (“RHP”), and Renown Health (hereafter referred to as “Renown Health” or “Respondent Renown”) having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent Renown with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18; and

Respondent Renown, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondent Renown 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 Renown 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 Renown has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and its Order to Suspend Enforcement of Renown Non-Compete (“Order to Suspend Enforcement”), and having accepted the executed Consent Agreement and placed such

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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 filed thereafter by interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure described in Commission Rule 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent Renown is a not-for-profit corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada with its office and principal place of business located at 1155 Mill Street, Reno, Nevada 89502.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent Renown, and the proceeding is in the public interest.

ORDER**I.**

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

- A. “Renown Health” means Renown Health, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Renown Health, including but not limited to Nevada Heart Institute, Inc., and NHI-1, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Commission” means the Federal Trade Commission.
- C. “Acceptable Termination” means any termination of employment with Renown Health resulting from (1) a Termination Notification which, upon consultation between the Monitor and the Commission’s staff, is submitted, after the Order becomes final, to Renown

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Health by the Monitor, or (2) Renown Health notifying the Monitor that a Cardiologist Employee is otherwise leaving employment with Renown Health with the intention of Participating in a Reno Cardiology Practice for a period of at least one year and the Monitor consulting with the Commission's staff regarding such notice.

- D. "Cardiologist Employee" means a Physician who provides Cardiology Services in the Reno/Sparks Geographic Area as an employee of Renown Health and who, prior to providing Contract Services for Renown Health, offered Cardiology Services as a Participant in SNCA or as a Participant in Reno Heart.
- E. "Cardiology Services" means medical professional services in general cardiology (*e.g.*, medical management of heart and vascular conditions), invasive cardiology (*e.g.*, cardiac catheterizations), interventional cardiology (*e.g.*, angioplasty, placement of stents), and electrophysiology (*e.g.*, placement of pacemakers and defibrillators); *provided, however*, Cardiology Services does not include services provided to pediatric patients or services provided by cardiac surgeons.
- F. "Contract Services" means any service performed pursuant to any Employment Agreement between Renown Health and a Cardiologist Employee.
- G. "Employment Agreement" means, as applicable to the Cardiologist Employee, either an employment agreement between Renown Health and a Participant in SNCA entered into on or around November 24, 2010, or an employment agreement between Renown Health and a Participant in Reno Heart entered into on or around March 17, 2011.
- H. "Monitor" means the Person appointed to act as monitor by the Commission pursuant to Paragraph VII of this Order.

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- I. “Participate” in an entity or an arrangement means (1) to be a partner, joint venturer, shareholder, owner, member, or employee of such entity or arrangement, or (2) to provide services, agree to provide services, or offer to provide services through such entity or arrangement. This definition applies to all tenses and forms of the word “participate,” including but not limited to, “participating,” “participated,” “participation,” and “participant.”
- J. “Payer” 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.
- K. “Person” means any natural person or artificial person, including, but not limited to, any corporation, unincorporated entity, or government entity. For the purpose of this Order, any corporation includes the subsidiaries, divisions, groups, and affiliates controlled by it.
- L. “Physician” means a doctor of allopathic medicine (“M.D.”) or a doctor of osteopathic medicine (“D.O.”).
- M. “Relating To” means pertaining in any way to, and is not limited to that which pertains exclusively to or primarily to. This definition applies to all tenses and forms of the word “relate to,” including but not limited to, “relates to,” and “related to.”
- N. “Release Period” means the period of time beginning on the date this Order becomes final and ending thirty (30) days from the date this Order becomes final.
- O. “Reno Cardiology Practice” means Cardiology Services offered in the Reno/Sparks Geographic Area by a cardiologist Participating in a medical practice or in an employment arrangement, excluding that of a Cardiologist Employee.

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- P. “Reno Heart Physicians” or “Reno Heart” means the professional corporation formerly known as Berndt, Chaney-Roberts, Davee, Ganchan, Ichino, Juneau, Noble, Seher, Smith, Swackhamer, Thompson, Williamson and Zebrack, Ltd. doing business as Reno Heart Physicians.
- Q. “Reno/Sparks Geographic Area” means the Reno/Sparks Metropolitan Statistical Area, as defined by the United States Office of Management and Budget, consisting of Washoe and Storey Counties.
- R. “Renown Non-Compete Provisions” means, (1) with respect to the Share Purchase Agreement (i) Sections 10.5 as it relates to disclosing the identities of and communicating with patients treated by a Cardiologist Employee; and (ii) Section 10.7(a) as it relates to interfering with relationships between Renown and patients treated by a Cardiologist Employee; (iii) Sections 10.6, 10.7(b)-(d), 10.8, 10.9, 10.12, 10.15, and Exhibit A (Additional Breach Damages - Article 10) as such action under (i), (ii) or (iii) relates to a Cardiologist Employee Participating in a Reno Cardiology Practice pursuant to an Acceptable Termination; and (2) with respect to any Employment Agreement between Renown Health and any Cardiologist Employee, (i) Sections 7.5 and 11 as they relate to disclosing the identities of and communicating with patients treated by a Cardiologist Employee; (ii) Section 7.7(a) as it relates to interfering with relationships between Renown and patients treated by a Cardiologist Employee; (iii) Sections 7.6, 7.7(b)-(d), 7.8, 7.9, 7.12, 7.15, 10.4, and Exhibit C as such action under (i), (ii) or (iii) relates to a Cardiologist Employee Participating in a Reno Cardiology Practice pursuant to an Acceptable Termination.
- S. “Separation Agreement” and “Separation Agreements” mean any agreement Related To terms by which a Cardiologist Employee terminates his or her Contract Services. *Provided, however*, a Separation Agreement

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shall not include (1) any agreement between Renown Health and such Cardiologist Employee to Participate in a Reno Cardiology Practice for a period of at least a year; or (2) any agreement by Renown Health to provide support to such Cardiologist Employee to Participate Reno Cardiology Practice.

- T. “Share Purchase Agreements” means any share purchase agreements entered into between Renown Health and SNCA, or any of SNCA’s members, in or around December 2010, and any share purchase agreement entered into between Renown Health and Reno Heart Physicians, or any of its members, in or around March 2011.
- U. “Suspension Period” means the period from the date the Order to Suspend Enforcement becomes final until the Termination Date.
- V. “SNCA” means Sierra Nevada Cardiology Associates, the professional corporation formerly known as Arger, DiPaolo, Drummer, Fuller, Newmark & Spring doing business as Sierra Nevada Cardiology Associates.
- W. “Termination Date” means the date on which the Decision and Order becomes final, or on the date Renown Health receives notice from the Commission that a Decision and Order will not be issued in this matter.
- X. “Termination Notification” means (1) written notification submitted to the Monitor by a Cardiologist Employee of that employee’s intention to terminate his or her Employee Agreement and intention to Participate in a Reno Cardiology Practice for a period of at least one year after such termination, or (2) independent determination by the Monitor that a Cardiologist Employee intends to Participate in a Reno Cardiology Practice for a period of at least one year after such termination.

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II.

IT IS FURTHER ORDERED that Renown Health shall:

- A. Not enforce any of the Renown Non-Compete Provisions against any Cardiologist Employee for any activity that Cardiologist Employee engaged in during the Suspension Period through the Release Period that Relates To providing Termination Notification; *provided, however*, that this Paragraph II.A does not prohibit Renown Health from enforcing any of the Renown Non-Compete Provisions against any Cardiologist Employee who terminates Contract Services prior to the Release Period;
- B. Within two (2) days from the date the Order becomes final, certify that Renown Health has sent by first-class mail, return receipt requested to each Cardiologist Employee the letter attached as Appendix A to this Order within two (2) days of the Agreement Containing Consent Order in this matter being placed on the public record;
- C. For each Termination Notification that is (1) submitted during the Release Period and (2) received by Renown Health as an Acceptable Termination, terminate Contract Services of the Cardiologist Employee who submitted that Termination Notification, and allow that Cardiologist Employee to leave Renown Health's employment on or before sixty (60) days of Renown Health's receipt of such notification from the Monitor;
- D. For any activity Related To this Paragraph II, waive all rights to seek or obtain legal or equitable relief for breach of contract for violation by any Cardiologist Employee of any of the Renown Non-Compete Provisions; and
- E. Not take any other action to discourage, impede, or otherwise prevent any Cardiologist Employee from terminating Contract Services pursuant to this Paragraph II.

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Provided, however, upon receipt by the Commission of Renown Health's Paragraph VIII.A verified report of Acceptable Termination by ten (10) Cardiologist Employees, the Release Period shall end. *Provided further* that, if during the Release Period there are more than ten (10) Acceptable Terminations, the Monitor, after consultation with the Commission's staff, shall forward to Renown Health the first ten (10) such notifications received by the Monitor and shall not reveal the identity of any of the additional Cardiologist Employees who submitted Termination Notifications.

III.

IT IS FURTHER ORDERED that, if after the expiration of the Release Period, Renown Health has not received Acceptable Termination for at least six (6) Cardiologist Employees, then until receipt by the Commission of Renown Health's Paragraph VIII.A verified report of Acceptable Termination by six (6) Cardiologist Employees, Renown Health shall:

- A. Not enforce, directly or indirectly, the Renown Non-Compete Provisions against any Cardiologist Employee seeking to provide Termination Notification;
- B. Upon Acceptable Termination of any Cardiologist Employee, terminate Contract Services of each such Cardiologist Employee and allow that cardiologist to leave Renown Health's employment on or before ninety (90) days from the date such notification was received;
- C. For any activity Related To this Paragraph III, waive all rights to seek or obtain legal or equitable relief for breach of contract for violation by any Cardiologist Employee of any of the Renown Non-Compete Provisions; and
- D. Not take any other action to discourage, impede, or otherwise prevent any Cardiologist Employee from

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terminating Contract Services pursuant to this Paragraph III.

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

- A. With respect to each Cardiologist Employee who terminates his or her Contract Services pursuant to Paragraph II or III of this Order, Renown Health shall not:
1. Offer any incentive to such Cardiologist Employee to decline to provide Cardiology Services in a Reno Cardiology Practice;
 2. Enforce any provision of such Cardiologist Employee's Employment Agreement that would prevent that cardiologist from informing patients treated by that cardiologist of his or her new Reno Cardiology Practice and providing Cardiology Services to those patients;
 3. Enforce any of the Renown Non-Compete Provisions for any activity Relating To terminating Contract Services;
 4. Require any Cardiologist Employee, prior to terminating his or her Contract Services to enter into a Separation Agreement, including but not limited to any agreement to provide any payment to Renown Health;
 5. Prevent, impede, or otherwise interfere with the provision of Cardiology Services by such Cardiologist Employee; *provided however*, that nothing in this Paragraph IV.A.5 shall require Renown Health to include any cardiologist in Renown Health's emergency room call panel, in the provider network of any health plan, network, or provider organization or to compensate any cardiologist for providing professional services to

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Renown Health or to its patients or its contractors beyond any requirement contained in Paragraph V of this Order;

6. For a period of three (3) years from the date this Order becomes final deny, terminate or suspend medical staff privileges, or reduce or change medical staff membership status, of such Cardiologist Employee based solely on the status of that cardiologist's employment or lack of employment by Renown Health. *Provided, however,* that Renown Health may deny, terminate or suspend a cardiologist's medical staff privileges, or reduce or change medical staff membership status, due to (a) quality or patient safety determinations; or (b) violations by the cardiologist of facility rules and regulations or standards of conduct that apply to all medical staff members; and
 7. For a period of two (2) years from the date such Cardiologist Employee terminates his or her Contract Services, directly or indirectly, solicit, induce, or attempt to solicit or induce the employment of such Cardiologist Employee. *Provided, however,* that Renown Health may make general advertisements for cardiologists including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at the cardiologist who so terminated his or her employment or who was released from the Renown Non-Compete Provisions. *Provided further* that Renown Health may employ any cardiologist who applies to Participate with Renown Health, as long as such cardiologist was not solicited by Renown Health in violation of this Paragraph.
- B. The purpose of Paragraphs II, III, and IV of this Order is to ensure that those Cardiologist Employees who terminate their Contract Services can offer Cardiology Services in a Reno Cardiology Practice in competition

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with Renown Health and to remedy the lessening of competition alleged in the Commission's Complaint.

V.

IT IS FURTHER ORDERED that, for a period of one (1) year from the date any Cardiologist Employee terminates Contract Services pursuant to Paragraphs II or III of this Order, if that cardiologist's Employment Agreement with Renown Health contained any provisions for support in the event that termination of employment was required by a determination, order, or agreement with a governmental agency, Renown Health shall provide such support in accordance with the terms of the cardiologist's Employment Agreement if requested by the Cardiologist Employee; *provided, however*, that Renown Health shall not, whether or not it is so provided in the Employment Agreement, negotiate with any Payer on behalf of that cardiologist.

VI.

IT IS FURTHER ORDERED that for a period of five (5) years from the date this Order becomes final, Renown Health shall not, without providing advance written notification to the Commission in the manner described in this paragraph, directly or indirectly:

- A. Acquire any assets of or financial interest in any group that provides Cardiology Services in the Reno/Sparks Geographic Area; or
- B. Enter into any Contract Services with any group that provides Cardiology Services in the Reno/Sparks Geographic Area.

Said advance written notification shall contain (i) either a detailed term sheet for the proposed acquisition or the proposed agreement with all attachments, and (ii) documents that would be responsive to Item 4(c) and Item 4(d) of the Premerger Notification and Report Form under the Hart-Scott-Rodino Premerger Notification Act, Section 7A of the Clayton Act, 15 U.S.C. § 18a, and Rules,

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16 C.F.R. § 801-803, Relating To the proposed transaction (hereinafter referred to as “the Notification”).

Provided, however, that (i) no filing fee will be required for the Notification, (ii) an original and one copy of the Notification shall be filed only with the Secretary of the Commission and need not be submitted to the United States Department of Justice, and (iii) the Notification is required from Renown Health and not from any other party to the transaction. Renown Health shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the “first waiting period”). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Renown Health shall not consummate the transaction until thirty days after submitting such additional information or documentary material. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

Provided further, that prior notification shall not be required by this paragraph for a transaction for which Notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

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

- A. Judge Charles McGee shall be appointed Monitor to assure that Renown Health expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order.
- B. No later than one (1) day after this Order issues, Renown Health shall, pursuant to the Monitor Agreement, attached as Appendix B and Confidential Appendix B-1 to this Order, transfer to the Monitor all the rights, powers, and authorities necessary to permit the Monitor to perform its duties and responsibilities in a manner consistent with the purposes of this Order.

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- C. In the event a substitute Monitor is required, the Commission shall select the Monitor, subject to the consent of Renown Health, which consent shall not be unreasonably withheld. If Renown Health has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Renown Health of the identity of any proposed Monitor, Renown Health shall be deemed to have consented to the selection of the proposed Monitor. Not later than ten (10) days after appointment of a substitute Monitor, Renown Health 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 Renown Health's compliance with the terms of this Order and the Order to Suspend Enforcement in a manner consistent with the purposes of this Order.
- D. Renown Health 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 Renown Health's compliance with the terms of this Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of this Order and in consultation with the Commission, including, but not limited to:
 - a. receiving Termination Notifications from Cardiologist Employees;
 - b. notifying each Cardiologist Employee that submitted a Termination Notification whether or not such notification will be an Acceptable Termination;

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- c. forwarding such Acceptable Terminations to Renown Health pursuant to this Order; and
 - d. assuring that Renown Health expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order.
2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
3. The Monitor shall serve for such time as is necessary to monitor Renown Health's compliance with the Paragraphs II, III, IV.A.1-4, and V of this Order.
4. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Renown Health's personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, Related To Renown Health's compliance with its obligations under this Order. Renown Health 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 Renown Health's compliance with this Order.
5. The Monitor shall serve, without bond or other security, at the expense of Renown Health on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Renown Health, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.

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6. Renown Health 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 malfeasance, gross negligence, willful or wanton acts, or bad faith by the Monitor.
7. Renown Health shall report to the Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by Renown Health, and any reports submitted by a current or former Cardiologist Employee with respect to the performance of Renown Health's obligations under this Order.
8. Within one (1) month from the date the Monitor is appointed pursuant to this Paragraph, every sixty (60) days thereafter, until the later of: (i) one (1) year; or (ii) no fewer than six (6) Cardiologist Employees have terminated their Employment Agreements to provide Cardiology Services in the Reno/Sparks Geographic Area, and otherwise as requested by the Commission, the Monitor shall report in writing to the Commission concerning performance by Renown Health of its obligations under this Order.
9. Renown Health 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*, that such agreement shall not restrict the Monitor from providing any information to the Commission.

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- E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement Relating To Commission materials and information received in connection with the performance of the Monitor's duties.
- F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph VII.
- G. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.
- H. The Monitor appointed pursuant to this Order may be the same Person appointed as Monitor under the Order to Suspend Enforcement.

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

- A. No later than thirty (30) days after the date this Order becomes final, and every thirty (30) days thereafter until Renown Health has fully complied, as relevant, with Paragraphs II, and III of this Order, Renown Health shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with all the terms of this Order. Renown Health shall submit at the same time a copy of these reports to the Monitor.
- B. Beginning twelve (12) months after the date this Order becomes final, and annually thereafter on the anniversary of the date this Order becomes final, for the next four (4) years, Renown Health shall submit to the Commission verified written reports setting forth in

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detail the manner and form in which it is complying and has complied with this Order.

IX.

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

- A. Any proposed dissolution of Renown Health;
- B. Any proposed acquisition, merger or consolidation of Renown Health; or
- C. Any other change in the Renown Health, 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.

X.

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

- A. Access, during office hours of Renown Health 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 Renown Health Related To compliance with this Order, which copying services shall be provided by Renown Health at the request of the authorized representative(s) of the Commission and at the expense of Renown Health; and
- B. Upon five (5) days' notice to Renown Health and without restraint or interference from Renown Health, to interview officers, directors, or employees of Renown Health, who may have counsel present, regarding such matters.

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XI.

IT IS FURTHER ORDERED that this Order shall terminate on November 30, 2022.

By the Commission.

Appendix A - Letter to Cardiologist Employees

Dear Physician:

Renown Health (“Renown”) has entered into an agreement with the Federal Trade Commission to resolve allegations that its acquisitions of certain cardiology medical practices and employment of the associated physicians has or will restrict competition in violation of Section 7 of the Clayton Act. Although Renown has not admitted liability or admitted that the facts alleged in the Commission’s complaint (other than jurisdictional facts) are true, it has agreed to two FTC orders containing certain terms which the Commission believes will ameliorate the competitive effects of the acquisitions.

For your convenience, Renown’s obligations under the FTC’s Orders, including the terms under which you may terminate your employment, are summarized below. These obligations are described more fully in the FTC’s Orders and its Analysis to Aid Public Comment which are both attached to this letter. **Nothing in this summary is intended to modify any of the terms of the Commission’s Orders or to provide legal advice.**

Description of the Orders: The first order (“Order to Suspend Enforcement of Renown Non-Compete” or “Order to Suspend”) establishes a period of time during which you, as a cardiologist currently employed by Renown, may explore all employment and professional opportunities in the Reno/Sparks area, whether as an employee, a member of a medical group, or in private practice. Renown cannot enforce any non-compete or non-solicitation

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provisions in your employment contract to interfere with your discussions during this time period. If you actually terminate your employment with Renown during this period, however, the Order to Suspend does not prohibit Renown from pursuing its contract rights.

The second order (“Decision and Order”), if accepted by the Commission after a period allowing for public comment, will allow you to terminate your employment with Renown without penalty so long as the following conditions are met:

- (1) You must submit written notice of your intention to terminate your employment with Renown to the special monitor who has been appointed for the purpose of assuring confidentiality. Contact information for the monitor is provided at the conclusion of this letter;
- (2) You must intend to continue to practice in the Reno/Sparks area for at least one year;
- (3) You must be among the first 10 physicians to submit your notice to terminate employment. Renown is not required to terminate more than 10 employment contracts. To protect the confidentiality of the doctors who want to leave, the monitor will submit to Renown no more than the first 10 notices he receives; and
- (4) You must leave employment with Renown within 60 days of Renown receiving your notice from the monitor, but you may not leave prior to the monitor delivering your notice to Renown.

Timing of the Orders: The Order to Suspend begins on August 6, 2012, and continues for at least 30 days while the Commission receives public comment on the Decision and Order and considers those comments. You may enter into discussions and negotiations for new employment during this period. If you decide during this period to terminate your employment, you may notify the special monitor so that your name will be included in the event that the Decision and Order is accepted as final. Because the Order to Suspend will continue in effect until the Commission votes to accept (or reject) the Decision and Order, the conclusion of this

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time period cannot be determined at this time. It will, however, not end before September 5, 2012.

If the Commission accepts and issues the Decision and Order as final, a second 30-day period (Release Period) will begin. During this period, you may begin or continue discussions and negotiations for new employment. If you decide to terminate your employment, you should notify the monitor of your intention. The monitor will forward to Renown the names of the first ten physicians who have provided notice of their desire to terminate their employment. Renown is not required to allow more than 10 physicians who have given notice to the monitor and satisfied all of the conditions described above to terminate their employment without any penalty. On the other hand, if at the end of this 30-day Release Period fewer than six doctors have notified the monitor of their intent to terminate employment, the period in which cardiologists may continue to explore other employment opportunities and leave Renown's employment without penalty will remain open. This period will continue to remain open until six (rather than 10) cardiologists have terminated their employment with Renown.

PLEASE NOTE:

- The Orders do not *require* any doctor to terminate employment with Renown or to work for any other entity.
- The Orders do not *require* Renown to fire any doctors. However, the Orders also do not prohibit Renown from negotiating with a doctor regarding a mutual agreement for that physician's employment to be terminated.
- The Orders prohibit Renown from enforcing any non-compete or non-solicitation provisions in any contract, pursuing any breach of contract action, or taking any retaliatory action against any physician who either terminated his or her employment under the terms of the Orders or who sought new employment as allowed by the Orders but decided not to leave.
- If you terminate your employment at times or under terms not described in the Decision and Order, the Decision and

Decision and Order

Order does not prohibit Renown from pursuing its contract rights.

- Renown may be required to provide you with transitional assistance if you terminate employment to practice as an independent physician (rather than as an employee of another entity) in the Reno/Sparks area. Please review the proposed Decision and Order and your employment agreement with Renown (or contact the monitor) to determine whether these transitional services are available to you.
- If six or more physicians have terminated their employment with Renown by the end of the Release Period, Renown may pursue its legal remedies against any employee who *subsequently* terminates employment with Renown in violation of that employee's contract.

If you have questions about the information contained in this letter or in the Analysis to Aid Public Comment, including questions regarding timing or implementation of the Orders, please contact the monitor, Judge Charles McGee at (775) 823-9975, or FTC's Bureau of Competition's Compliance Division at (202) 326-2031.

Written notifications of intent to terminate employment should be provided to:

Judge Charles McGee
1575 Delucchi Lane, Suite 115-1
Reno, NV 89502
Facsimile: (775) 823-9973
Email: [judgemcgee@msn.com](mailto:judgetcmcg@msn.com)

Decision and Order

**Appendix B – Monitor Agreement
[Redacted Public Version]**

MONITOR AGREEMENT

This Monitor Agreement (“Monitor Agreement”) entered into this 18 day of July, 2012 by Renown Health and Judge Charles McGee provides as follows:

WHEREAS, the United States Federal Trade Commission (the “Commission”), *In the Matter of Renown Health*, has accepted for public comment an Agreement Containing Consent Order (“Consent Agreement”), incorporating an Order to Suspend Enforcement of Renown Non-Compete (“Order to Suspend Enforcement”) and a Decision and Order (“Decision and Order”), collectively referred to as the “Commission Orders,” with Renown Health, and the State of Nevada, through its Attorney General (“Nevada Attorney General”), has filed in the United States District Court for the District of Nevada, a Final Judgment (“Nevada Order”) with Renown Health (collectively, the Commission Orders and the Nevada Order are referred to as the “Orders”). The Orders, among other things, require Renown Health to waive enforcement of certain contractual terms with its Cardiologist Employees so that a certain number of those employees can leave Renown Health’s employment to practice cardiology in the Reno area, and provides for the appointment of one or more Monitors to ensure that Renown Health complies with its obligations under the Orders;

WHEREAS, the staff of the Commission and the Nevada Attorney General have appointed Charles McGee as such monitor (the “Monitor”) pursuant to the Orders to monitor Renown Health’s compliance with the terms of the Consent Agreement and Orders, and Charles McGee has consented to such appointment;

WHEREAS, the staff of the Commission and the Nevada Attorney General on July 17, 2012 notified Renown Health of the selection of Judge Charles McGee as the Monitor, and Renown Health on July 18, 2012 agreed to the selection of Judge Charles McGee, and is executing this agreement that, subject to the prior approval of the Commission and the Nevada Attorney General, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Renown Health’s compliance with the relevant requirements of the Orders in a manner consistent with the purpose of the Orders;

WHEREAS, this Monitor Agreement, although executed by the Monitor and Renown Health is not effective for any purpose, including but not limited to imposing rights and responsibilities on Renown Health or the Monitor under the Orders, until it has been approved by the Commission and the Nevada Attorney General; and

WHEREAS, the parties to this Monitor Agreement intend to be legally bound;

NOW, THEREFORE, the parties agree as follows:

1. Capitalized terms used herein and not specifically defined herein shall have the respective definitions given to them in the Orders.
2. The Monitor shall have all of the powers and responsibilities conferred upon the Monitor by the Orders.

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3. Renown Health hereby agrees that it will fully comply with all terms of the Orders requiring it to confer all rights, powers, authority and privileges upon the Monitor, or to impose upon itself any duties or obligations with respect to the Monitor, to enable the Monitor to perform the duties and responsibilities of the Monitor thereunder.
4. The Monitor shall have the power and authority to monitor Renown Health's compliance with the terms of the Orders, and shall carry out the duties of the Monitor in consultation with the Commission and the Nevada Attorney General, including but limited to:
 - a. receiving Termination Notifications from Cardiologist Employees;
 - b. receiving from Renown Health notification that it has terminated the employment of a Cardiologist Employee;
 - c. notifying each Cardiologist Employee that submitted a Termination Notification whether or not such notification will be an Acceptable Termination;
 - d. forwarding all Acceptable Terminations to Renown Health pursuant to the Order; and
 - e. assuring Renown Health's expeditious compliance with all of its obligations and performance of all of its responsibilities as required by the Orders.
5. Renown Health further agrees that:
 - a. it will provide the Monitor with copies of all reports submitted to the Commission and the Nevada Attorney General pursuant to the Orders, simultaneous with the submission of such reports to the Commission and the Nevada Attorney General, for the duration of the Monitor's term under this Agreement;
 - b. it will, subject to any demonstrated legally recognized privilege, grant the Monitor full and complete access to Renown Health's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Renown Health's compliance with their obligations under the Orders; and
 - c. it will cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Renown Health's compliance with the Orders.
6. Renown Health shall promptly notify the Monitor of any significant written or oral communication that occurs after the date of this Monitor Agreement between Renown Health, the Commission, and the Nevada Attorney General related to the Orders, together with copies of such communications.

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7. The Monitor shall serve, without bond or other security, at the expense of Renown Health on such reasonable and customary terms and conditions as the Commission and the Nevada Attorney General may set. The Monitor shall have authority to employ, at the expense of Renown Health, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.
8. Renown Health shall pay the Monitor, in accordance with the fee schedule attached hereto as Confidential Appendix A, for all reasonable time spent in the performance of the Monitor's duties and responsibilities, including all monitoring activities, all work in connection with the negotiation and preparation of this Monitor Agreement, all work in the nature of final reporting and file closure, and all reasonable and necessary travel time.
 - a. In addition, Renown Health will pay (i) all out-of-pocket expenses reasonably incurred by the Monitor in the performance of the Monitor's duties and responsibilities, including any international telephone calls and any auto, train or air travel in the performance of the Monitor's duties, and (ii) all fees and disbursements reasonably incurred by such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.
 - b. The Monitor shall have full and direct responsibility for compliance with all applicable laws, regulations and requirements pertaining to work permits, income and social security taxes, unemployment insurance, worker's compensation, disability insurance, and the like.
9. The Monitor shall maintain the confidentiality of all information provided to the Monitor by Renown Health. Such information shall be used by the Monitor only in connection with the performance of the Monitor's duties pursuant to this Monitor Agreement. Such information shall not be disclosed by the Monitor to any third party other than:
 - a. persons employed by, or working with, the Monitor under this Monitor Agreement, in which case such persons shall be informed of, and agree in writing to abide by, the confidentiality obligations applicable to the Monitor, in accordance with Paragraph 12 below, or
 - b. persons employed at or retained by the Commission or the Nevada Attorney General who are working on this matter.
10. The Monitor shall maintain a record and inform the Commission and the Nevada Attorney General of all persons (other than representatives of the Commission and the Nevada Attorney General) to whom confidential information related to this Monitor Agreement has been disclosed.

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11. The Monitor shall act in a fiduciary capacity for the benefit of the Commission and the Nevada Attorney General.
12. Upon termination of the Monitor's duties under this Monitor Agreement, the Monitor shall promptly return to Renown Health all material provided to the Monitor by Renown Health and shall destroy any material prepared by the Monitor that contains or reflects any confidential information of Renown Health. Nothing herein shall abrogate the Monitor's duty of confidentiality.
13. To the extent that the Monitor wishes to retain any employee, agent, consultant or any other third party to assist the Monitor in accordance with the Orders, the Monitor shall ensure that, prior to being retained, such persons execute a confidentiality agreement in a form agreed upon by the Monitor and Renown Health.
14. Nothing in this Monitor Agreement shall require Renown Health to disclose any material or information that is subject to a legally recognized privilege or that Renown Health is prohibited from disclosing by reason of law or an agreement with a third party.
15. Each party shall be reasonably available to the other to discuss any questions or issues that either party may have concerning compliance with the Orders as they relate to Renown Health.
16. Renown Health hereby confirms its obligation to indemnify the Monitor and hold the Monitor harmless in accordance with and to the extent required by the Orders. Renown Health 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.
17. In the event of a disagreement or dispute between Renown Health and the Monitor concerning Renown Health's obligations under the Orders, and in the event that such disagreement or dispute cannot be resolved by the parties, either party may seek the assistance of the Commission's Compliance Division or the staff of the Nevada Attorney General to resolve this issue.
18. This Monitor Agreement shall be subject to the substantive law of the State of Nevada (regardless of the choice of law principles of Nevada or those of any other jurisdiction).
19. This Monitor Agreement shall terminate when the last obligation under Paragraphs II, III, IV.A.1-4, and V of the Decision and Order and Paragraphs 33, 34, 35(a)-(d), and 36 of the Nevada Order have been fully performed; provided, however, that the Commission and the Nevada Attorney General may extend this Monitor Agreement as may be necessary or appropriate to accomplish the purposes of the Orders.

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20. In the event that, during the term of this Monitor Agreement, the Monitor becomes aware that he has or may have a conflict of interest that may affect or could have the appearance of affecting the performance by the Monitor of any of his duties under this Monitor Agreement, the Monitor shall promptly inform Renown Health, the Commission, and the Nevada Attorney General of such conflict or potential conflict.
21. In the performance of his functions and duties under this Monitor Agreement, the Monitor shall exercise the standard of care and diligence that would be expected of a reasonable person in the conduct of his or her own business affairs.
22. It is understood that the Monitor will be serving under this Monitor Agreement as an independent contractor and that the relationship of employer and employee shall not exist between Monitor and Renown Health.
23. This Monitor Agreement is for the sole benefit of the parties hereto and their permitted assigns, the Commission, and the Nevada Attorney General, and nothing herein express or implied shall give or be construed to give any other person any legal or equitable rights hereunder.
24. This Monitor Agreement contains the entire agreement between the parties hereto with respect to the matters described herein and replaces any and all prior agreements or understandings, whether written or oral.
25. Any notices or other communication required to be given hereunder shall be deemed to have been properly given if sent by mail, facsimile (with acknowledgment of receipt of such facsimile having been received), or electronic mail, to the applicable party at its address below (or to such other address as to which such party shall hereafter notify the other party):

If to the Monitor, to:

Judge Charles McGee
1575 Delucchi Lane, Suite 115-1
Reno, NV 89502

Telephone: (775) 823-9975
Facsimile: (775) 823-9973
Email: judgemcgee@msn.com

If to Renown Health, to:

Renown Health
Attention: Kelly Testolin, General Counsel
1155 Mill Street, Z-7

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Reno, NV 89502

Telephone: (775) 982-6054
Facsimile: (775) 982-5754
Email: ktestolin@renown.com

With copy to:

William Berlin
Ober Kaler
1401 H Street, N.W., Suite 500
Washington, DC. 20005

Telephone: (202) 326-5011
Facsimile: (202) 408-0640
Email: weberlin@ober.com

If to the Commission, to:

Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580
Attention: Secretary
Telephone: (202) 326-2514
Facsimile: (202) 326-2496

With copy to:

Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20001
Attention: Assistant Director for Compliance
Telephone: (202) 326-2526
Facsimile: (202) 326-3396

If to the Nevada Attorney General, to:

State of Nevada Office of the Attorney General
Bureau of Consumer Protection
Attention: Antitrust Unit
10791 W. Twain Avenue, Suite 100
Las Vegas, NV 89135
Telephone: (702) 486-3420
Facsimile: (702) 486-3283

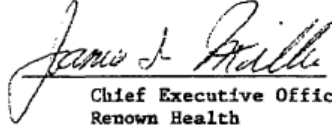
Decision and Order

26. This Monitor Agreement shall not become binding until it has been approved by the Commission and the Nevada Attorney General.

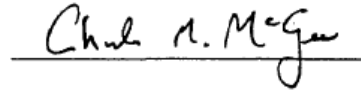
27. This Monitor Agreement may be signed in counterparts.

IN WITNESS WHEREOF, the parties hereto have executed this Monitor Agreement as of the date first above written.

Renown Health


Chief Executive Officer
Renown Health

MONITOR



Analysis to Aid Public Comment

Confidential Appendix B-1

[Redacted From the Public Version, But Incorporated By Reference]

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

I. Overview

The Federal Trade Commission has accepted an agreement containing two consent orders with Renown Health. The agreement settles charges that Renown Health violated Section 7 of the Clayton Act, 15 U.S.C. § 18, by substantially lessening competition in the market for cardiology services in and around Reno, Nevada, through its acquisition of the two largest cardiology practices in the Reno area and its employment of the cardiologists whose practices it acquired.

The Decision and 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 Decision and Order final. The Order to Suspend, which is final immediately, will remain in force either until the Decision and Order becomes final or the Commission decides not to issue an order.

The purpose of this analysis is to facilitate public comment on the proposed Consent Orders. The analysis is not intended to constitute an official interpretation of the agreement and proposed Consent Orders or to modify their terms in any way. Further, the proposed Consent Orders have been entered into for settlement purposes only and do not constitute an admission by Renown

Analysis to Aid Public Comment

Health that it violated the law or that the facts alleged in the Complaint (other than jurisdictional facts) are true.

II. Background and Structure of the Market

Renown Health is based in Reno, Nevada, and operates general acute care hospitals and commercial health plans which serve the Reno area. It is the largest provider of acute care hospital services in northern Nevada.

Prior to the transactions at issue, most of the cardiologists practicing in the Reno area were affiliated with two medical groups which did business under the names Sierra Nevada Cardiology Associates (“SNCA”) and Reno Heart Physicians (“RHP”). Cardiologists are generally internal medicine physicians who specialize in the practice of cardiology, including the provision of non-invasive services (general cardiology), invasive cardiology services (e.g., diagnostic cardiac catheterization), interventional cardiology services (e.g., catheterizations and the placement of stents), and electrophysiology services (e.g., services related to the diagnosis and treatment of heart rhythm conditions). The practices of the SNCA and RHP physicians did not generally include cardiac surgery or pediatric cardiology. Other than the physicians affiliated with SNCA and RHP, there are very few cardiologists practicing adult cardiology in the Reno, Nevada, area.

In late 2010, Renown Health reached agreements to acquire SNCA’s medical practice and to employ the 15 SNCA cardiologists who practiced in the Reno area. Prior to Renown Health’s acquisition of SNCA, it did not employ any cardiologists. With the employment of the SNCA cardiologists, Renown Health competed with RHP in the provision of cardiology services. In March 2011, Renown Health acquired RHP. As part of this acquisition, Renown Health employed the 16 RHP cardiologists who practiced in the Reno area.

Among other terms, the employment agreements between Renown Health and the cardiologists from both SNCA and RHP contain covenants that prohibit the cardiologists from entering into medical practice in competition with Renown Health (“non-compete provisions”). As a result of the acquisitions of the two

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medical groups (and the employment of the physicians affiliated with those groups), Renown Health now employs approximately 88% of the physicians providing cardiology services for adults in the Reno area.

III. The Complaint

The complaint alleges that Renown Health's acquisitions of the two cardiology practices created a highly concentrated market for the provision of cardiology services in the Reno area. According to the complaint, the consolidation of the two competing groups into a single group of cardiologists employed by Renown Health has eliminated competition based on price, quality, and other terms of competition. The consolidation of the two groups into one increased the bargaining power of Renown Health and may lead to higher prices. The complaint further alleges that entry into the market at a scale large enough to form a competitive alternative for health plans is unlikely to be timely or sufficient to deter the likely price increases.

IV. The Consent Orders

The goal of the Consent Orders in this matter is to restore competition for cardiology services in the Reno area as quickly as possible. The Commission believes that competition is likely to be restored if Renown Health is required to release a certain number of its cardiologist employees from their employment contracts freeing them to practice either as employees of other health care entities or as part of independent medical groups in the Reno area. Renown Health has entered in an Agreement Containing Consent Orders, which includes the Order to Suspend Enforcement of Renown Non-Compete ("Order to Suspend") and the Decision and Order.

A. Order to Suspend Enforcement of Renown Non-Compete

The Order to Suspend establishes a period of time during which the former SNCA and RHP cardiologists currently employed by Renown Health in Reno may explore other employment and professional opportunities in the Reno area confidentially, whether as an employee, a member of a medical

Analysis to Aid Public Comment

group, or in private practice. During this period, Renown Health is prohibited from interfering with the cardiologists' employment discussions and from enforcing the provisions in their employment contracts prohibiting such activities. The purpose of this Order to Suspend is to allow Renown Health's cardiologists to communicate with possible employers without the risk of violating the non-compete provisions in their current employment contracts. In order to facilitate this process, the Order to Suspend requires Renown Health to inform all of its cardiologists through an explanatory letter, as well as copies of the Orders and this Analysis to Aid Public Comment within two days of the Orders being placed on the public record.

The Order to Suspend is effective immediately, i.e., without a public comment period, upon the Agreement Containing Consent Orders being placed on the public record, and operates for at least 30 days while the Commission receives and considers public comment on the Decision and Order. Cardiologists may decide during this period to terminate employment, and may notify the special monitor (who has been appointed) to ensure their inclusion in the group of up to ten cardiologists who will be allowed to leave Renown Health in the event that the Commission issues the Decision and Order. However, nothing in the Order to Suspend requires Renown Health to release any physician from his or her employment agreement until the Decision and Order becomes final.

B. Decision and Order

If the Commission issues the final Decision and Order, a second 30-day period ("Release Period") will begin. During this period, cardiologist employees can terminate their employment with Renown without penalty so long as the following conditions are met:

- (1) The cardiologist must submit notice of an intention to terminate employment with Renown Health to the monitor who has been appointed for the purpose of assuring confidentiality;
- (2) The cardiologist must state his or her intention to continue to practice in the Reno area for at least one year;

Analysis to Aid Public Comment

- (3) The cardiologist must be among the first 10 physicians to submit notice to terminate employment. Renown Health is not required to release more than 10 cardiologists from their employment contracts. To protect the confidentiality of the doctors who want to leave, the monitor will submit to Renown Health no more than the first 10 notices received; and
- (4) The cardiologist may not leave prior to the monitor delivering notice to Renown Health, but must leave employment with Renown Health within 60 days of Renown Health receiving notice from the monitor.

At any time during the Release Period, after the monitor has informed Renown that 10 physicians have met the requirements to terminate without penalty, Renown may request that the Release Period be terminated.

If at the end of this Release Period fewer than six doctors have notified the monitor of their intent to terminate employment, the period in which cardiologists may continue to explore other employment opportunities and leave Renown's employment without penalty will remain open until six cardiologists have terminated their employment with Renown. This provision is included in the Decision and Order to ensure that *at least* six physicians can leave.

Paragraph II describes the basic terms under which cardiologists may terminate their employment with Renown Health. It prohibits Renown from (1) enforcing any non-compete, non-solicitation, or non-interference provisions in their employment agreements, (2) pursuing any breach of contract action for violation of any of these provisions, or (3) taking any retaliatory action against any physician who either leaves under the terms of the Orders or who decides not to leave after exploring other employment as allowed by the Orders.¹ The Order does not,

¹ The Order does not require that any doctor terminate employment with Renown or work for any other entity. Similarly, it does not require Renown to fire any doctor. It also does not prohibit Renown from negotiating with a doctor to reach a mutual agreement for that physician's employment to be terminated.

Analysis to Aid Public Comment

however, require Renown to allow cardiologists to terminate their employment agreements in a manner other than that specified in the Decision and Order.

Paragraph III provides for the extension of the period for cardiologists to terminate their employment if at least six cardiologists do not terminate during the initial period.

Paragraph IV includes a number of provisions to ensure that Renown Health will not take any actions to discourage physicians from exploring opportunities to leave or from leaving its employment pursuant to the Decision and Order. In addition, Paragraph IV.A.6 prohibits Renown Health, for a period of three years, from denying, terminating or suspending the medical staff privileges of any physician who leaves Renown Health's employment pursuant to the Consent Orders.

Paragraph V preserves Renown Health's obligation to provide transition services to cardiologists whose employment contracts include such provisions, excluding transitional services relating to negotiating with health plans. Paragraph VI requires Renown Health to give advance notification for future acquisitions affecting this market. Paragraph VII specifies the rules governing the work of the special monitor.

The remaining order provisions are standard reporting requirements to allow the Commission to monitor on-going compliance with the provisions of the Order.

V. Renown Health's Agreement with the Nevada Attorney General

The State of Nevada, through its Attorney General, worked with the Commission staff in the investigation and resolution of this matter. The Nevada Attorney General filed her own complaint containing allegations similar to those in the Commission's complaint, and Renown Health has entered into a stipulated agreement with the Nevada Attorney General that contains obligations similar to those in the Commission's orders. This agreement is embodied in a document called a Final

Analysis to Aid Public Comment

Judgment, and is subject to court approval. Copies of these documents can be obtained from the Nevada Attorney General's Office.

Complaint

IN THE MATTER OF

CAREPATROL, INC.CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4379; File No. 112 3155**Complaint, December 3, 2012 – Decision, December 3, 2012*

This consent order addresses CarePatrol, Inc.'s statements made in Internet advertising regarding its placement services for seniors requiring long-term care in assisted living facilities and other non-nursing home facilities servicing the frail elderly. The complaint alleges that CarePatrol violated of Section 5(a) of the Federal Trade Commission Act by making the false and unsubstantiated claims: (a) that it monitors or grades the care history and violations of virtually all or a substantial majority of assisted living facilities in a consumer's desired location; (b) that its senior care consultants are located in every state; and (c) that its monitoring or grading of assisted living facilities is based on a review of the facilities' most recent state inspection reports. The consent order prohibits CarePatrol from making false or unsubstantiated representations regarding its placement services.

Participants

For the *Commission*: Zachary Hunter and David R. Spiegel.

For the *Respondent*: Chuck Bongiovanni, Chief Executive Officer, *pro se*.

COMPLAINT

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

1. Respondent is an Arizona corporation with its principal office or place of business at 625 N. Gilbert Rd., Ste. 200, Gilbert, Arizona 85234. Respondent provides its services through 18 franchises located in 12 states.
2. Respondent advertises that its "senior care consultants" offer consumers free assistance in obtaining placements at

Complaint

assisted living communities and other facilities which provide care for the frail elderly. CarePatrol states that it receives compensation for its placement services from the facilities at which it makes its placements.

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. There are least 39,000 assisted living facilities in the United States, as well as thousands of smaller, residential care homes which provide assistance and living arrangements for the frail elderly. Many states have one thousand or more such facilities and homes.

5. Respondent has disseminated or has caused the dissemination of promotional materials for its placement services through web-based advertising. *See, e.g.*, Exhibits A through C, attached hereto. CarePatrol’s promotional materials contain the following statements or depictions:

a. **CarePatrol’s Web Site:**

Safe, Pre-Screened, Qualified Providers Fast & Easy

Families usually do not start their search in hopes to find the assisted living or independent living community with:

- **The most citations or violations**
- **The worst care history or**
- **The highest staff turnover**

But that is **exactly what can happen** when you request a list of assisted living options from other assisted living websites. **You Deserve Qualified, Safe Choices!**

That’s why CarePatrol’s local, Nationally Certified Advisors **look beyond the chandeliers and fancy**

Complaint

lobbies to monitor each community's care history and state violations so we can recommend:

The Safest Options For Your Loved One

Pre-Approved Options

Whether the choice is in-home care, an assisted living community, adult family home, nursing home or a retirement community, your Senior Care Consultant keeps safety and comfort in mind. You receive only the best, prescreened options for care, based on your desired location, needs and affordability. **Only about 30% of all care options meet our high standards.**

Viewing Your Options

After completing an assessment, your **Senior Care Consultant will coordinate or accompany you on a tour** of our prescreened providers that's tailored to your needs. Until your senior living decision is made, we are with you every step of the way to provide local, expert counsel, guidance, and reassurance.

Exh. A

b. **CarePatrol's Web Site:**

You Have Choices...

We Have Their Grades

You can spend your time on the Internet **SEARCHING** for Assisted Living options for your loved one and **find pretty pictures and fluffy descriptions** of care facilities near you..... **Does that Help You Find A Safe, Quality Care Facility?**

At CarePatrol, We Don't Just Send You a List of Facilities Like Everyone Else Does. We Grade Each and Every Facility From "A" to "F" Based On Their

Complaint

Last State Survey. Our Local Senior Care Consultants also Pre-Screen every home we recommend

Exh. B

c. **CarePatrol's Web Site:**

Click Below to Meet our Consultants

[Alabama](#) [Iowa](#) [Nevada](#) [South Dakota](#)
[Alaska](#) [Kansas](#) [New Hampshire](#) [Tennessee](#)
[Arizona](#) [Kentucky](#) [New Jersey](#) [Texas](#)
[Arkansas](#) [Louisiana](#) [New Mexico](#) [Utah](#)
[California](#) [Maine](#) [New York](#) [Vermont](#)
[Colorado](#) [Maryland](#) [North Carolina](#) [Virginia](#)
[Connecticut](#) [Massachusetts](#) [North Dakota](#) [Washington](#)
[Delaware](#) [Michigan](#) [Ohio](#) [West Virginia](#)
[Florida](#) [Minnesota](#) [Oklahoma](#) [Wisconsin](#)
[Georgia](#) [Mississippi](#) [Oregon](#) [Wyoming](#)
[Hawaii](#) [Missouri](#) [Pennsylvania](#)
[Idaho](#) [Montana](#) [Rhode Island](#)
[Illinois](#) [Nebraska](#) [South Carolina](#)
[Indiana](#)

Exh. C

6. Through the means described in Paragraph 5, CarePatrol has made representations, expressly or by implication that:

- a. It monitors or grades the care history and violations of virtually all, or a substantial majority, of all assisted living facilities in a consumer's desired location (Exhs. A through C);
- b. It provides services through a network of senior care consultants who are located in every state (Exh. C); and

Complaint

- c. It monitors or grades assisted living facilities based on a review of the facilities' latest state inspection reports (Exh. B).

7. In truth and in fact:

- a. CarePatrol does not monitor or grade the care history and violations of virtually all, or a substantial majority, of assisted living facilities in a consumer's desired location. In most states listed on CarePatrol's website, it has not monitored or graded any facilities;
- b. CarePatrol does not provide its services through a network of senior care consultants who are located in every state; and
- c. In numerous instances, CarePatrol does not monitor or grade assisted living facilities based on a review of the facilities' most recent state inspection reports.

Therefore, the representations set forth in Paragraph 6 are false or misleading.

8. Through the means described in Paragraph 5, 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.

9. 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. Therefore, the representation set forth in Paragraph 8 is false or misleading.

10. Respondent's practices, as alleged in this complaint, constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission, this third day of December, 2012, has issued this complaint against respondent.


By the Commission.

Complaint

Exhibit A

Find Assisted Living|Independent Living|Senior Housing|Nursing Home

Page 1 of 2




Care Patrol


A FREE COMMUNITY SERVICE

Speak With A Senior Care Consultant


877-654-0344

DAYS | EVENINGS | WEEKENDS





FEATURED NATIONALLY ON



Safe, Pre-Screened, Qualified Providers Fast & Easy!


Families usually do not start their search in hopes to find the assisted living or independent living community with:


- The most citations or violations
- The worst care history or
- The highest staff turnover

But that is exactly what can happen when you request a list of assisted living options from other assisted living websites. You **Deserve Qualified, Safe Choices!**

That's why CarePatrol's local, Nationally Certified Advisors look beyond the chandeliers and fancy lobbies to monitor each community's care history and state violations so we can recommend:

The Safest Options For Your Loved One





Popular Searches

- [Albuquerque Assisted Living](#)
- [Birmingham Assisted Living](#)
- [Charlotte NC Assisted Living](#)
- [Connecticut Assisted Living](#)
- [Dallas Assisted Living](#)
- [Denver Assisted Living](#)
- [Detroit Assisted Living](#)
- [Houston Assisted Living](#)
- [Milwaukee Assisted Living](#)
- [New Jersey Assisted Living](#)
- [New York Assisted Living](#)
- [Phoenix Assisted Living](#)
- [Pittsburgh Assisted Living](#)
- [Portland Assisted Living](#)
- [Seattle Assisted Living](#)
- [St. Louis Assisted Living](#)
- [Tucson Assisted Living](#)
- [West Virginia Assisted Living](#)

STEPS IN FINDING QUALITY CARE

Your Care Needs Identified

1 Your Senior Care Consultant's top priority is to **alleviate your stress** through personalized attention and knowledge. To assess your needs we'll meet you wherever and whenever it matters most: at the doctor's office, hospital, a skilled nursing facility or an existing residence or **if you feel more comfortable, we can speak with you over the telephone.**

Pre-Approved Options

2 Whether the choice is in-home care, an assisted living community, adult family home, nursing home or a retirement community, your Senior Care Consultant keeps safety and comfort in mind. You receive only the best, prescreened options for care based on your desired location, needs and affordability. **Only about 30% of all care options meet our high standards**

Viewing Your Options

3 After completing an assessment, your **Senior Care Consultant will coordinate or accompany you on a tour** of our prescreened providers that's tailored to your needs. Until your senior living decision is made, we are with you every step of the way to provide local, expert counsel, guidance and reassurance.

Start Your Search

Exhibit A

Complaint

Exhibit B

Search For Assisted Living

Page 1 of 1



Speak To A Senior Care Consultant
877-654-0344
DAYS | EVENINGS | WEEKENDS



A FREE COMMUNITY SERVICE

Home CareCheck Our Services Resources Meet Our Consultants Corporate Office

Home > Services > Search For Care > Search For Assisted Living > Search For In Home Care > Search For A Nursing

You Have Choices....

We Have Their Grades.

You can spend your time on the Internet **SEARCHING** for Assisted Living options for your loved one and find pretty pictures and fluffy descriptions of care facilities near you.....**Does That Help You Find A Safe, Quality Care Facility?**

At CarePatrol, We Don't Just Send You a List of Facilities Like Everyone Else Does. We Grade Each and Every Facility From "A" to "F" Based On Their Last State Survey. Our Local Senior Care Consultants also Pro-Screen every home we recommend

We take the time to:

Speak to you directly to find out in detail about your loved one's care needs so we can "match" them to appropriate facilities that meet their medical, social, physical, financial and location considerations.

Arrange to personally tour you to our recommended care options in your area. Let us drive and answer your questions while you concentrate on making the best choice for your family.

We will follow up with you to make sure that your loved one's needs are being met and assist you in case his or her care needs change.

Our Services Are FREE OF CHARGE.

We are paid by our thousands of pre-screened providers across the country

Please complete the form below and one of our Senior Care Consultants will contact you shortly to assist you and your family **FREE OF CHARGE**

Need Assisted Living Near:

*City:

*State:

*Zip Code:

Your First Name:

Your Last Name:

Your Email Address:

Your Phone Number:



**To Speak With A Senior Care Consultant In Your Area,
Please Call 877-654-0344**

Complaint

Exhibit C

Meet Our Consultants

Page 1 of 1



Speak To A Senior Care Consultant
877-654-0344
DAYS | EVENINGS | WEEKENDS



"Helping Families Make Safer Choices" A FREE COMMUNITY SERVICE

Home Our Services Resources Meet Our Consultants Corporate Office

Click Below To Meet Our Consultants

Alabama	Iowa	Nevada	South Dakota
Alaska	Kansas	New Hampshire	Tennessee
Arizona	Kentucky	New Jersey	Texas
Arkansas	Louisiana	New Mexico	Utah
California	Maine	New York	Vermont
Colorado	Maryland	North Carolina	Virginia
Connecticut	Massachusetts	North Dakota	Washington
Delaware	Michigan	Ohio	West Virginia
Florida	Minnesota	Oklahoma	Wisconsin
Georgia	Mississippi	Oregon	Wyoming
Hawaii	Missouri	Pennsylvania	
Idaho	Montana	Rhode Island	
Illinois	Nebraska	South Carolina	
Indiana			



CarePatrol Franchise Systems, LLC 625 N Gilbert Rd Suite 200, Gilbert, Arizona 85234

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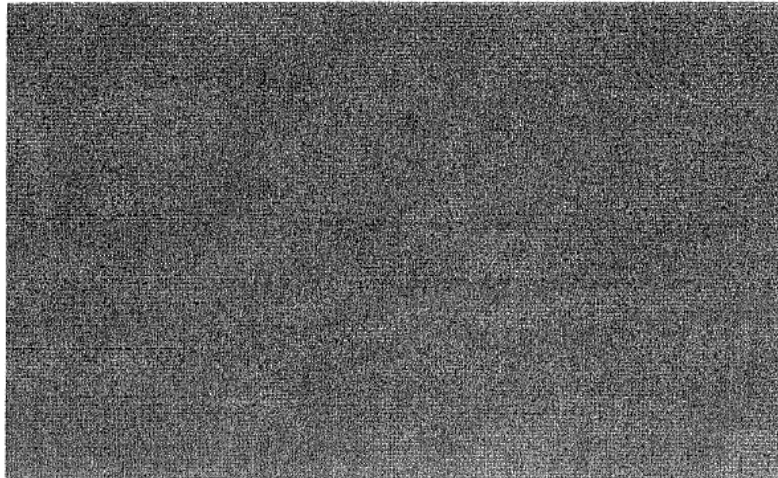


Exhibit C

Decision and Order

DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of a 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 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 order:

1. Respondent CarePatrol is an Arizona corporation with its principal office or place of business at 625 N. Gilbert Rd., Ste. 200, Gilbert, Arizona 85234.
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 CarePatrol, Inc., 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. “Covered service” shall mean any service involving placements in an assisted living facility.
- D. “Assisted living facility,” or “ALF” shall mean any congregate residential setting, which provides housing for persons sixty (60) years or older, as well as assistance in activities of daily living (e.g., bathing and dressing) and medication administration. The definition includes residential care facilities for the elderly (“RCFEs”), as well as any other facilities which perform the functions of ALFs or RCFEs, but excludes facilities which a state has licensed as skilled nursing facilities.
- E. “State survey” shall mean a state inspection report for an assisted living facility which describes or evaluates the facility’s performance, including any violations of applicable state statutes and regulations.

I. Prohibited Misrepresentations; Substantiation

- A. **IT IS ORDERED** that respondent, directly or through any corporation, subsidiary, division, franchisee, or other device, in connection with the advertising, promotion, offering for sale, or sale of any covered service in or affecting commerce, shall not represent in any manner, directly or indirectly, expressly or by implication, that:

Decision and Order

1. It or its franchisees monitor or evaluate the care history or state violations of any number, portion, or percentage of assisted living facilities in a consumer's desired location;
2. It or its franchisees provide their services through officers, agents, employees, and/or contractors who are located in any geographic area of the United States; or
3. It or its franchisees evaluate assisted living facilities based on a review of information, including state surveys, or any other records detailing the performances of these facilities,

unless the representation is non-misleading and, at the time it is made, respondent possesses and relies upon competent and reliable evidence that, when considered in light of the entire body of relevant evidence, substantiates that the representation is true.

*Provided, however,*² that any permitted claim in connection with Part I.A.3, above, shall be based on the most recent inspection record of an assisted living facility.

- B. **IT IS FURTHER ORDERED** that respondent, directly or through any corporation, subsidiary, division, franchisee or other device, in connection with the advertising, promotion, offering for sale, or sale of any covered service in or affecting commerce, shall not make any representation about its placement services in any manner, directly or indirectly, expressly or by implication, unless the representation is non-misleading and, at the time it is made, respondent possesses and relies upon competent and reliable evidence that, when considered in light of the entire body of relevant evidence, substantiates that the representation is true.

Decision and Order

II. Records

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

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

III. Acknowledgments

IT IS FURTHER ORDERED that respondent CarePatrol, Inc., and its successors and assigns, 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. Respondent CarePatrol, Inc., and its successors and assigns shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities. Respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying all acknowledgments of receipt of this order obtained pursuant to this Part.

Decision and Order

IV. Notices

IT IS FURTHER ORDERED that respondent CarePatrol, Inc., and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation or any business entity that it directly or indirectly controls, or has an ownership interest in, that may affect compliance obligations arising under this order, including the 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 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.

Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: "CarePatrol, Inc., File No. 1123155."

V. Reports

IT IS FURTHER ORDERED that respondent CarePatrol, Inc., and its successors and assigns, within sixty (60) days after the date of service of this order, shall file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of its own compliance 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. Sunset

This order will terminate on December 3, 2032, or twenty (20) years from the most recent date that the United States or the

Analysis to Aid Public Comment

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 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 ("Commission") has accepted, subject to final approval, an agreement containing a consent order from CarePatrol, Inc. ("CarePatrol" or "respondent").

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will

Analysis to Aid Public Comment

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

The matter involves certain statements CarePatrol has made in Internet advertising regarding its placement services for seniors requiring long term care in assisted living facilities (“ALFs”) and other non-nursing home facilities servicing the frail elderly. According to the Commission’s complaint, CarePatrol made the following false and unsubstantiated claims: (a) that it monitors or grades the care history and violations of virtually all or a substantial majority of ALFs in a consumer’s desired location; (b) that its senior care consultants are located in every state; and (c) that its monitoring or grading of assisted living facilities is based on a review of the facilities’ most recent state inspection reports. Thus, the complaint states that CarePatrol has engaged in deceptive practices in violation of Section 5(a) of the FTC Act.

The proposed order contains four provisions designed to prevent CarePatrol, or other persons who are in active concert or participation with it, from engaging in similar acts and practices in the future. Part I.A.1 of the proposed order prohibits respondent from misrepresenting, or making unsubstantiated representations, that it has monitored or evaluated a number, portion, or percentage of the assisted living facilities in a consumer’s desired location.

Part I.A.2 prohibits CarePatrol from misrepresenting or making unsubstantiated representations that it or its franchisees provide placement services through a network of officers, agents, employees and contractors who are located in any geographic region.

Part I.A.3 prohibits CarePatrol from claiming that its monitoring or grading of assisted living facilities is based on a review of information contained in state inspection reports, or any other records detailing the performance of assisted living facilities, unless the claim is non-misleading and based on competent and reliable evidence. It also requires such claims to be based upon the most recent inspection reports.

Finally, Part I.B prohibits CarePatrol from making false or unsubstantiated representations regarding its placement services.

Analysis to Aid Public Comment

Parts II through V of the proposed order require CarePatrol to: keep copies of advertisements and materials relied upon in disseminating any representation covered by the order; provide copies of the order to certain personnel, agents, and representatives having supervisory responsibilities with respect to the subject matter of the order; notify the Commission of changes in its structure that might affect compliance obligations under the order; and file a compliance report with the Commission and respond to other requests from FTC staff. Part VI provides that the order will terminate after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint or the proposed order, or to modify the proposed order's terms in any way.

Complaint

IN THE MATTER OF

ABCSP, INC.CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4378; File No. 112 3168**Complaint, December 3, 2012 – Decision, December 3, 2012*

This consent order addresses ABCSP, Inc.'s statements made in Internet advertising regarding its placement services for seniors requiring long-term care in assisted living facilities and other non-nursing home facilities servicing the frail elderly. The complaint alleges that ABC violated of Section 5(a) of the Federal Trade Commission Act by making false and unsubstantiated claims that it, or its care coordinators, view or evaluate virtually all or a substantial majority of such facilities in every geographic region of the United States. The consent order prohibits ABC from making any false or unsubstantiated representations regarding its placement services.

Participants

For the *Commission*: Zachary Hunter and David R. Spiegel.

For the *Respondent*: Carl Zwisler, Gray, Plant, and Mooty.

COMPLAINT

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

1. Respondent is a California corporation with its principal office or place of business at 1406 Blue Oaks Blvd., Ste. 100, Roseville, CA 95747. Respondent does business under its own name as well as the name, “Always Best Care.” Respondent provides its services through a network of franchisees located throughout the United States.

2. Respondent advertises that its locally-based “care coordinators” offer consumers free assistance in obtaining placements at assisted living communities, residential care homes, and other facilities which provide care for the frail elderly. ABC

Complaint

states that it receives compensation for its placement services from the facilities at which it makes its placements.

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. There are least 39,000 assisted living facilities in the United States, as well as thousands of smaller, residential care homes which provide assistance and living arrangements for the frail elderly. In many of the geographic areas in which ABC’s franchisees operate, there are at least one thousand such facilities and homes.

5. ABC’s training manual for new franchisees recommends that they sign contracts with at least 35 to 40 such facilities before opening for business. ABC typically does not know the identity of the assisted living facilities and residential care homes with which its franchisees have contracts.

6. Respondent has disseminated or has caused the dissemination of promotional materials for its placement services through web-based advertisements. *See, e.g.*, Exhibits A through C, attached hereto. ABC’s promotional materials contain the following statements or depictions:

a. **ABC’s Web Site:**

To help guide you through the maze of assisted living communities, independent communities and residential care homes, Always Best Care visits or evaluates most every facility in our markets. If you need help selecting assisted living facilities that are ideal for your loved ones, let us provide our expertise.

Exh. A.

b. **ABC’s Web Site:**

With our free assisted living placement program, we match our clients with the top three or four most

Complaint

appropriate living options based upon individual needs, custom screening, and available budgets.

....

Understanding what community is right for your loved one can be a daunting task. Always Best Care helps seniors and their families through the entire process. Our Care Coordinators are local and have personally viewed virtually all of the assisted living communities in your area. Contact your Always Best Care representative today.

Exh. B.

c. **ABC's Web Site:**

Our Care Coordinators are local and have personally viewed most RCFE [Residential Care Facility for Elderly] homes in your area.

Exh. C.

7. Through the means described in Paragraph 6, ABC has represented, expressly or by implication, that its placement recommendations for assisted living facilities and residential care homes in different geographic regions are based on the personal knowledge of its personnel or agents regarding virtually all, or a substantial majority, of such facilities in these geographic regions.

8. In truth and in fact, in numerous geographic regions of the United States, ABC's placement recommendations for assisted living facilities and residential care homes are not based on the personal knowledge of its personnel or agents of virtually all, or a substantial majority, of the facilities in that geographic region. Therefore, the representation set forth in Paragraph 7 is false or misleading.

9. Through the means described in Paragraph 6, respondent has represented, expressly or by implication, that it possessed and

Complaint

relied upon a reasonable basis that substantiated the representation set forth in Paragraph 7, 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 7, at the time the representation was made. Therefore, the representation set forth in Paragraph 9 is false or misleading.

11. Respondent's practices, as alleged in this complaint, constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.


THEREFORE, the Federal Trade Commission, this third day of December, 2012, has issued this complaint against respondent.

By the Commission.

Complaint

Exhibit A


Always Best Care : Exceptional Senior Care : In Home Care : Assisted Living Communit... Page 2 of 3



What Health Care Professionals Say About Always Best Care...

Professional Testimonial!

PLAY VIDEO



Click on a state to display the Always Best Care locations near you. Show All

State:

City:

Click here to learn more about in-home care, senior care, assisted living placement services and skilled home health care.

The Best In Professional and Compassionate Senior Care Services

If you're in need of in-home care (also known as senior care or elderly care) or other related services, Always Best Care Senior Services can help. Our array of services allows you to find the ideal solution for your senior care needs. With a commitment to exceeding your expectations, we strive to deliver the optimum care for our clients. Put our expertise to work for your loved ones to ensure they receive the care and attention they deserve. Who is only the best will do. Always Best Care is here for you. Always Best Care offers senior care services such as:

- **Home Care** – In-home care services tailored to your needs. Our team of home care experts guarantees your loved ones need on the high level of care they deserve. At Always Best Care, you'll find only the best agencies trained to help seniors and, very knowledgeable in the areas that can make senior care a rewarding experience.
- **Assisted Living Placements** – To help guide you through the maze of assisted living communities, independent communities and residential care homes, Always Best Care visits or evaluations most every facility in our markets. If you need help selecting assisted living facilities that are ideal for your loved one, let us provide our expertise.
- **Alzheimer's & Dementia Care** – Specialized home care and senior care services that provide your loved ones the Alzheimer's care and other dementia care they require.
- **Skilled Nursing** – Our team of experienced registered nurses can provide critical care for seniors that prefer to stay in their home, but require a higher level of skilled care. Our skilled home health care services are available in select locations – call your local Always Best Care office to determine if these services are available in your area.

With unparalleled professionalism and exceptional care, you can count on Always Best Care Senior Services to assist with your elderly care needs.

Home Care Agencies

Our home care agencies have served more than 25,000 seniors across the USA and Canada.

Our home care providers can offer assistance with:

- Meal Preparation
- Medication Management
- Dressing
- Bathing
- Cleaning the Bathrooms
- Medication Reminders
- Mobility
- Mail Bills and Letters
- Groceries
- Answer the Door and Phone
- And Much More

Do you need to determine which assisted living facility is right for your loved one? Let Always Best Care help you in your search. Our team is experienced in assisted living placements and we can provide the expertise you need in selecting the best community. Always Best Care can help you:

- Research potential assisted living facilities
- Make arrangements to tour assisted living communities with you
- Assess the facility's ability to meet the needs of your loved one
- Skilled Nursing Care You Can Trust

When available, our skilled nursing care is second to none. Always Best Care provides skilled home health care to assist with:

- Blood Drawn
- Catheter Maintenance
- Chronic Disease Management
- IV Therapy
- Injections
- Healthy Living Education
- Medication Management
- New Diagnostic Education
- Pain Management
- Post-Surgery Care
- Restorative Care
- And More

When you're searching for in-home care, we make it easy to find the home care agencies and skilled home health care agencies that operate in the area in which you need assistance. From elderly care to dementia care and many other senior care services, we're here to simplify your search for the care you need. Let us help in your search for assisted living facilities or any other elderly care needs you may have. Let Always Best Care help you secure the best senior care services in your area.

We Assist In Evaluating Financial, Physical, & Special Needs So You Find The Ideal Care Solution

Exhibit A

Complaint

Exhibit B

Free Senior Housing Placement Services : Assisted Living Facilities : Dementia Care : Alzheimer's Care : ... Page 1 of 1

Always BEST CARE SENIOR SERVICES

For a free care consultation, call toll-free 1-855-470-CARE

Home Care | Assisted Living | Alzheimer's / Dementia | Skilled Nursing | Careers

FREE SENIOR HOUSING PLACEMENT SERVICES

Since 1996, Always Best Care Senior Services has been changing the way people think about senior living. We take pride in helping seniors enjoy fulfilling lives. Our experience and commitment to serving seniors has fostered independence and promote individuality. We provide the best choices to our clients while maintaining the highest standards for living arrangements. We work directly with medical professionals, care coordinators, seniors and their families to ensure that wherever our client chooses to live, they continue to receive the highest level of care, dignity, and respect. With our free assisted living placement program, we match our clients with the top three or four most appropriate living options based upon individual needs, custom screening and available budgets. Then, we personally take our clients and their families on a tour of the matched assisted living communities, residential care homes, Alzheimer's and dementia care communities or retirement communities so they may decide which senior housing option is best for them. Best of all, the services we provide are paid by the community selected.

Understanding what community is right for your loved one can be a daunting task. Always Best Care helps seniors and their families through the entire process. Our Care Coordinators are local and have personally viewed virtually all of assisted living communities in your area. Contact your local Always Best Care representative today for your free no-obligation consultation.

[Contact Us](#)

Each office is independently owned and operated

Home | Feature Articles | Emergency Response | In the News | Franchise Opportunities | About Us | Contact Us | Sitemap | Privacy Policy Login

Exhibit B

Complaint

Exhibit C

Residential Care Homes for Elderly RCFE : 24 Hour Health Services : Assisted Living : Home Care for S... Page 1 of 2

The screenshot shows the top portion of the website. On the left is the logo for "Always BEST CARE SENIOR SERVICES". To the right of the logo are two buttons: "Complimentary Care Consultation" and "Request Information". Below the logo, the text "How Can We Help You" is partially visible. A horizontal navigation menu contains the following items: "In-Home Care Services", "Find Senior Housing", "Alzheimer's Care", "Emergency Response System", "Become a Care Provider", and "About Us". Below the navigation menu is a dark banner with the text "Residential Care Homes for the Elderly".

What is a Residential Care Home or Board and Care Home for the Elderly (RCFE)?

A residential care home for seniors or RCFE is typically a home like yours or mine that has been converted to a care home and is licensed by the state to take care of seniors. Most RCFE's are set-up to provide care to 6 seniors; however they can be smaller or larger in size. RCFE homes were the first widely recognized form of assisted living, and as such, they provide similar care but typically not as much social interaction. Residents of a RCFE Home have a private or shared room and may have private or shared bathrooms. The rooms usually do not include a kitchen, since providing meals is a major function of the home. RCFE homes generally have some common areas for socializing which include a dining area and one or more other rooms that are mainly for informal contact.

- Some but not all of the key Characteristics of RCFE home are;
- Activities of Daily Living (dressing, personal care, bathing, incontinence care)
 - Meals served (usually communal style)
 - 24-hour supervision (around the clock staff but not necessary Awake staff)
 - Community Services (laundry, cleaning, etc.)
 - Health Services (medications management and dispensing, diabetes care)
 - Overall Health (physical, emotional)

As with any type of senior community understanding what community is right for your loved one can be a daunting task. For over a decade Always Best Care has been helping our seniors through this process. Let Always Best Care guide you through the health care maze. Our Care Coordinators are local and have personally viewed most RCFE homes in your area. Call Always Best Care today for your free no obligation consultation or visit us at www.alwaysbestcare.com to find the office nearest you.

To learn more about "what is residential care home for seniors" click here.

The screenshot shows the footer of the website. It features a dark background with white text. At the top of the footer area, there are three small icons: "Free Care Consultation", "Call (800) 476-4773", and "Free, No Obligation, Call". Below these icons is the text "Each Always Best Care Senior Services Franchise is Independently Owned and Operated". Underneath this is a horizontal line of navigation links: "Home | In-Home Care Services | Find Senior Housing | Alzheimer's Care | Emergency Response System | Become a Care Provider | About Us | Complimentary Care Consultation | Request Information". At the very bottom, there is another row of links: "Always Best Care Franchise | Assisted Living For Seniors | Assisted Living Placement | Preventing Caregiver Burnout | Residential Senior Services Franchise | Senior Care Franchise Business | Senior Homecare | Starting Senior Care Business | Homecare".

Exhibit C

Decision and Order

DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of a 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, and having duly considered the comments received from an interested person pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure prescribed in Commission Rule 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent ABC is a California corporation with its principal office or place of business at 406 Blue Oaks Blvd., Ste. 100, Roseville, CA 95747.

Decision and Order

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

ORDER**DEFINITIONS**

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

- A. Unless otherwise specified, respondent shall mean ABCSP, Inc., 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. Covered service shall mean any service involving placements in an assisted living facility.
- D. Assisted living facility, or ALF shall mean any congregate residential setting, which provides housing for persons 60 years or older, as well as assistance in activities of daily living (e.g., bathing and dressing) and medication administration. The definition includes residential care facilities for the elderly (RCFEs), as well as any other facilities which perform the functions of ALFs or RCFEs, but excludes facilities which a state has licensed as skilled nursing facilities.

I. Prohibited Misrepresentations; Substantiation

- A. **IT IS ORDERED** that respondent or other persons who are in active concert or participation with them, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, or sale of any covered service in or affecting commerce, shall not represent in any manner, directly or indirectly, expressly or by implication, that its personnel or agents

Decision and Order

personally view, inspect, or monitor assisted living facilities, including representations regarding the viewing, inspecting, or monitoring of any number, portion, or percentage of assisted living facilities in a geographic region, unless the representation is non-misleading and, at the time it is made, respondent possesses and relies upon competent and reliable evidence that, when considered in light of the entire body of relevant evidence, substantiates that the representation is true.

- B. **IT IS FURTHER ORDERED** that respondent, or other persons who are in active concert or participation with them, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, or sale of any covered service in or affecting commerce, shall not make any representation about its placement services in any manner, directly or indirectly, expressly or by implication, unless the representation is non-misleading and, at the time it is made, respondent possesses and relies upon competent and reliable evidence that, when considered in light of the entire body of relevant evidence, substantiates that the representation is true.

II. Records

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

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

Decision and Order

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.

III. Acknowledgments

IT IS FURTHER ORDERED that respondent ABCSP, Inc., and its successors and assigns, 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 decision-making authority 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 ABCSP, Inc., and its successors and assigns shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities. Respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying all acknowledgments of receipt of this order obtained pursuant to this Part.

IV. Notices

IT IS FURTHER ORDERED that respondent ABCSP, Inc., and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation or any business entity that it directly or indirectly controls, or has an ownership interest in, that may affect compliance obligations arising under this order, including the 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 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.

Decision and Order

Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: ABCSP, Inc., File No. 1123168.

V. Reports

IT IS FURTHER ORDERED that respondent ABCSP, Inc., and its successors and assigns, within sixty (60) days after the date of service of this order, shall file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of its own compliance 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. Sunset

This order will terminate on December 3, 2032, 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 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

Analysis to Aid Public Comment

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 (“Commission”) has accepted, subject to final approval, an agreement containing a consent order from ABCSP, Inc. (“ABC” or “respondent”)

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

The matter involves certain statements ABC has made in Internet advertising regarding its placement services for seniors requiring long term care in assisted living facilities (“ALFs”) and other non-nursing home facilities servicing the frail elderly. According to the Commission’s complaint, ABC made false and unsubstantiated claims that it, or its care coordinators, view or evaluate virtually all or a substantial majority of such facilities in every geographic region of the United States. Thus, the complaint states that ABC has engaged in deceptive practices in violation of Section 5(a) of the FTC Act.

The proposed order contains two provisions designed to prevent ABC, or other persons who are in active concert or participation with it, from engaging in similar acts and practices in the future. Part I.A prohibits respondent from misrepresenting or making unsubstantiated representations that it, or its agents,

Analysis to Aid Public Comment

personally view, inspect, or monitor assisted living facilities, including representations that it personally views, inspects, or monitors any particular number, portion, or percentage of ALFs in a geographic region.

Part I.B prohibits ABC from making any false or unsubstantiated representations regarding its placement services.

Parts II through V require ABC to: keep copies of advertisements and materials relied upon in disseminating any representation covered by the order; provide copies of the order to certain personnel, agents, and representatives having supervisory responsibilities with respect to the subject matter of the order; notify the Commission of changes in its structure that might affect compliance obligations under the order; and file a compliance report with the Commission and respond to other requests from FTC staff. Part VI provides that the order will terminate after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint or the proposed order, or to modify the proposed order's terms in any way.

Complaint

IN THE MATTER OF

**READING HEALTH SYSTEM
AND
SURGICAL INSTITUTE OF READING**COMPLAINT AND ORDER IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SECTION 7 OF THE CLAYTON ACT*Docket No. 9353; File No. 121 0155
Complaint, November 16, 2012 – Decision, December 7, 2012*

This case addresses the \$43 million acquisition by Reading Health System of Surgical Institute of Reading. The complaint alleges that the acquisition, if consummated, would violate Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act by significantly reducing competition in the markets for inpatient orthopedic/spine surgery; outpatient orthopedic/spine surgery; outpatient general surgery; and outpatient ear, nose, and throat (“ENT”) surgery in the Reading, Pennsylvania area. The order dismisses the Administrative Complaint without prejudice because Respondents abandoned the proposed acquisition and the Commission is not reaching a decision on the merits.

Participants

For the *Commission*: Maggie DiMoscato, Janelle Filson, Kevin Hahm, Douglas Litvack, Jeremy Morrison, Paul Nolan, Sean Pugh and Stephanie Reynolds.

For the *Respondents*: Joanne M. Judge, Neil Schur, and Joseph Wolfson, Stevens & Lee; Jeffrey Brennan, McDermott, Will & Emery.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by the Act, the Federal Trade Commission (“Commission”), having reason to believe that Respondents Reading Health System (“RHS”) and Surgical Institute of Reading (“SIR”), having executed an asset purchase agreement in violation of Section 5 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 45, and which if consummated would violate Section 7 of the Clayton Act, as

Complaint

amended, 15 U.S.C. § 18, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), stating its charges as follows:

I.**NATURE OF THE CASE**

1. RHS's acquisition of SIR (the "Acquisition") will substantially lessen competition for critical surgical services in the Reading, Pennsylvania area, leading to increased healthcare costs for local residents and reduced quality of care. SIR, a surgical specialty hospital, opened in 2007 and immediately challenged RHS's dominance in the Reading area. Specifically, by offering lower rates to health plans and higher quality to patients and physicians, SIR has drawn away significant volumes of commercially-insured patients in important surgical service lines from RHS. For its part, RHS did not take this new competitive threat lying down; it chose to compete head-to-head with SIR by offering to lower its rates and aggressively seeking to improve its quality to attract patients back to its facilities from SIR. As evidenced by their competitive interactions, SIR considered RHS to be its "primary competitor" and RHS, in turn, described SIR as its "nemesis." Not surprisingly, then, in high-level, internal communications, RHS described the Acquisition as a "defensive and offensive" strategy designed to "protect the hospital's market share." If the Acquisition proceeds, these benefits of the head-to-head competition between RHS and SIR described above – lower costs and quality improvements – will vanish.

2. One of RHS's principal motivations in acquiring SIR is to protect its market share. Ordinary-course-of-business documents reveal that RHS was concerned by "notable losses in surgical volumes" to SIR. Executives were alarmed that market shares in key surgical service lines were "not a pretty picture with SIR in the mix" and that patients were "choosing to go to SIR" over RHS. RHS responded vigorously to SIR's competitive threat by offering reimbursement rate discounts to health plans in exchange for the plans' agreement to exclude SIR from their provider

Complaint

networks. It also planned to “improve [its] services so that patients will want to come to [RHS]” instead of SIR. This competitive rivalry – which would be eliminated by the Acquisition – has produced substantial benefits for local employers and patients in Reading.

3. Notably, most health plans declined RHS’s discount offers, which were contingent on excluding SIR from their provider networks. SIR contracted with health plans at significantly lower rates than RHS and successfully attracted patients from RHS because of its lower prices, high quality, and convenience. Rate increases impose a significant burden on local employers and employees, either directly or indirectly through higher health insurance premiums, co-pays, and other out-of-pocket healthcare expenses. Higher costs, in turn, force employers to reduce or eliminate health insurance coverage for their employees, or take other cost-cutting measures, such as reducing wages. These effects are not purely financial; increases in already-high healthcare costs ultimately force individuals to drop their health insurance, and even those that maintain insurance may delay or forgo medical care that they cannot afford.

4. The Acquisition threatens competitive harm in four relevant markets where RHS and SIR compete to offer services to commercially-insured patients: (1) inpatient orthopedic surgical services; (2) outpatient orthopedic surgical services; (3) outpatient ear, nose, and throat (“ENT”) surgical services; and (4) outpatient general surgical services. The relevant geographic market in which to analyze the effects of the Acquisition for each relevant service market is the area corresponding to Reading Hospital’s primary service area.

5. The Acquisition reduces the number of significant competitors from three to two – a virtual duopoly – for the inpatient orthopedic surgical services market, with St. Joseph Medical Center (“St. Joseph”) as the only other meaningful competitor in the Reading area. The markets for outpatient general surgical services and outpatient ENT surgical services would each also be left with only one other significant competitor. In the fourth relevant market, outpatient orthopedic surgical services, the Acquisition reduces the number of significant competitors from four to three.

Complaint

6. The Acquisition is presumptively unlawful in each of the four affected markets under the relevant case law and the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (“Merger Guidelines”). Post-Acquisition market shares in each of the four relevant markets are extraordinarily high, ranging from 49 percent to 71 percent, with correspondingly high concentration levels.

7. Health plans with members in the Reading area believe that the Acquisition will increase RHS’s already immense bargaining leverage, subjecting their members to higher rates. For some health plans, an increase in SIR’s rates to those of RHS equates to a _____, and thousands more dollars in out-of-pocket costs for many individual patients. For example, for one local health plan’s members, a hip and knee replacement would cost a patient with 20 percent co-insurance _____ more if performed at RHS’s rates rather than SIR’s rates. In addition, two health plans are currently negotiating to bring SIR into their provider networks; for these health plans, RHS will be able to demand and obtain much higher rates than SIR could independently. Local employers are equally concerned that the Acquisition will burden them with even higher employee healthcare costs, potentially forcing them to cut benefits.

8. The Acquisition also would eliminate important competition between SIR and RHS to maintain and improve the quality of their facilities and services. SIR’s high quality and patient satisfaction is likely to be diminished under RHS’s more bureaucratic management. The Acquisition also eliminates RHS’s acknowledged incentive to improve its own quality to compete with SIR.

9. Entry or expansion by other providers of the relevant surgical services will not mitigate the loss of price and non-price competition in the near future, if ever. Hospitals in the area surrounding the Reading area, and the existing ambulatory surgery centers within the Reading area, are unable to and uninterested in expanding their services due to, among other things, RHS’s dominance over primary care physicians and a shortage of surgical specialists in the area. Even St. Joseph, the only other general acute-care hospital in the Reading area, has had

Complaint

difficulty recruiting specialists for services included in the relevant service markets, and thus could not likely increase its surgical capacity. In addition, because the Patient Protection and Affordable Care Act (“PPACA”) precludes the building of any new physician-owned hospitals, as well as expansion of existing physician-owned hospitals, a group of physicians cannot replicate SIR’s entry for inpatient services. There are no verifiable or merger-specific efficiencies or quality claims that would come close to offsetting the serious competitive harm threatened by the Acquisition.

II.**BACKGROUND****A.****Jurisdiction**

10. RHS and SIR are, and at all relevant times have been, engaged in commerce or in activities affecting commerce, within the meaning of the FTC Act and the Clayton Act. The Acquisition constitutes an acquisition under Section 7 of the Clayton Act.

B.**Respondents**

11. Respondent RHS is a not-for-profit healthcare system incorporated under and by virtue of the laws of Pennsylvania. RHS is headquartered at 300 South 6th Avenue, West Reading, Pennsylvania 19611. RHS owns and operates Reading Hospital, a general acute-care hospital that has 735 licensed beds. RHS also owns a 112-bed post-acute rehabilitation center and a continuing care retirement community facility. RHS is by far the largest employer of physicians in the Reading area, employing about 332 physicians. During fiscal year 2011, RHS generated \$47 million in operating income with \$132 million in EBITDA income. RHS currently holds approximately \$1.05 billion of unrestricted cash and investments.

Complaint

12. RHS is also a 50 percent owner of SurgiCenter at Spring Ridge (“SurgiCenter”), an outpatient ambulatory surgery center with eight operating rooms, and of Berkshire Health Partners (“BHP”), a provider network that contracts with employers and health plans and does credentialing of physicians and organizations to participate in the network. RHS negotiates reimbursement rates with health plans on behalf of SurgiCenter and it has significant control over SurgiCenter’s daily operations. In the ordinary course of business, RHS treats SurgiCenter as its own facility in competitive analyses and market share calculations. Thus for purposes of the competitive analysis, and for measuring market shares and market concentration, SurgiCenter is properly included as part of RHS. Similarly, BHP is effectively controlled by RHS. For example, BHP’s CEO reports directly to RHS’s CEO.

13. Respondent SIR, organized as a limited partnership under the laws of Pennsylvania, is a for-profit specialty surgical hospital located at 2752 Century Boulevard, Wyomissing, Pennsylvania 19610. SIR has 15 licensed beds and provides a variety of inpatient and outpatient surgical services, including ENT, orthopedic, spine, neurological, and general surgery procedures. A group of 16 physicians owns 85 percent of SIR, with the remaining 15 percent owned by Nueterra Healthcare LLC (“Nueterra”), a developer and manager of surgery centers. During fiscal year 2011, SIR generated _____ in operating revenue and its net income totaled over _____

C.

The Acquisition

14. Under the terms of the asset purchase agreement signed on May 21, 2012, RHS will acquire all of SIR’s assets, including Nueterra’s 15 percent ownership interest. Accordingly, RHS will control SIR’s strategic planning, contracting and pricing decisions, operating and capital budgets, large unbudgeted expenditures, and borrowing and contracting decisions.

Complaint

RHS agreed to pay _____ to acquire SIR than the next-highest bidder.

D.**Competition Between Healthcare Facilities**

15. Competition between hospitals occurs in two stages. In the first stage, hospitals compete to be selected as in-network providers to commercial health plans' members. To become an in-network provider, each hospital engages in negotiations with each health plan and enters into a contract. Reimbursement rates that apply when the health plan's members obtain care at the facility or from its employed physicians are the chief contractual terms to be negotiated and agreed upon.

16. Hospitals benefit from in-network status by gaining access to the health plan's members as patients. Health plans benefit by being able to create commercially marketable and appealing provider networks, with geographic coverage and a scope of services sufficient to attract and satisfy a localized group of members, typically employers and their employees.

17. Changes in the reimbursement rates negotiated between the facilities and the health plans impact the health plan's members, *i.e.*, local employers and their employees, greatly. "Self-insured" employers rely on the health plan for access to the provider network and the health plan's negotiated rates, but such employers pay their employees' health care claims directly. Thus, self-insured employers, not commercial health insurance companies, bear the full burden of any increases in the rates applicable to services used by their employees. "Fully-insured" employers and their employees pay premiums, co-pays, and deductibles in exchange for access to a health plan's provider network and also for insurance against the cost of care. Nevertheless, when the cost of care rises, for example due to rate increases, health plans ultimately pass on some or all of the increases to their fully-insured customers. Regardless of whether an employer is self-insured or fully-insured, the health plan acts on its behalf – and by extension acts on behalf of its employees – in creating provider networks that offer convenience, high quality of care, and negotiated reimbursement rates.

Complaint

18. In the second stage of competition, each hospital or facility competes with other in-network providers to attract patients. Health plans typically seek to offer multiple in-network providers with similar out-of-pocket costs. Providers included in the same network must compete to attract patients by offering better services, amenities, convenience, quality of care, and patient satisfaction than their competitors.

III.

ANTICOMPETITIVE EFFECTS

A.

Loss of Price Competition and Increased Bargaining Leverage of RHS

19. The Acquisition will eliminate significant head-to-head competition between the Respondents and therefore increase RHS's ability and incentive to unilaterally demand higher reimbursement rates from commercial health plans.

20. RHS already is the dominant healthcare provider in the Reading area due to its market share and its ownership of the largest hospital, several outpatient facilities, two large physician groups, and a local provider network. Health plans, credit rating agencies, and RHS's own executives agree that RHS is dominant in the area. A consumer survey commissioned by RHS reflected the views of local residents, who describe RHS as "dominating," "power hungry," "large and expensive," and "taking over everything."

21. As the dominant provider in the Reading area, RHS already has significant bargaining leverage during contract negotiations with health plans, enabling it to extract very high rates for its services. Indeed, it is one of the most expensive healthcare providers in central Pennsylvania. RHS is widely recognized by health plans as having the highest rates in the Reading area and for making aggressive rate increase demands, relative to other hospitals. RHS's CFO provided testimony that it uses its leverage over health plans to receive the highest rates possible.

Complaint

22. SIR entered the market in 2007 as a small but potent challenger to RHS's dominance. SIR offers substantially lower rates to health plans for its services than RHS and also offers a convenient, high-quality alternative for patients. Competition from RHS has helped to keep SIR's rates low in the years since its opening.

23. Even before SIR opened, RHS prepared for the impact it would have on its revenue and volumes. In January 2007 – on the virtual eve of SIR's entry – RHS executives projected losing 60 percent of their surgical cases at Reading Hospital and 80 percent of cases at RHS's SurgiCenter facility.

24. Shortly after SIR's opening, there was indeed a significant shift in patient volume for surgical services from RHS to SIR. RHS's former CFO testified that "SIR's entry had a significant impact on both RHS's patient volume and revenue." A third-party analysis, commissioned by RHS in 2010, notes "declines in surgical procedures, as high as 80 [percent]" at RHS between 2008 and 2010 and attributes these "notable losses of volume" to SIR's increased presence in the market. The report highlighted losses in ENT, orthopedics, and general surgery. A 2010 assessment of surgical services similarly notes that "the largest loss of surgical share occurred in the Primary Service Area and the Northeast SSA [Secondary Service Area] due primarily to the opening of the Surgical Institute of Reading." In 2011, a RHS strategic plan noted that "RHS is seeing a significant decrease in elective joint replacement surgery directly due to the physician-owned Surgical Institute of Reading."

25. RHS executives were alarmed by the loss of volume to SIR. In early 2009, RHS's Director of Marketing wrote that "it is clear that anyone who is not impacted by [insurance issues] is choosing to go to SIR. Ouch." In May 2009, the same executive wrote, "Our real nemesis at this point is SIR!!" and observed that "by service line [it's] even a harder hit . . . [SIR has] 10% of the overall inpatient orthopaedic market share in Berks County." Another RHS executive, reviewing market shares for inpatient orthopedic surgical services, noted it was "not a pretty picture with SIR in the mix."

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26. SIR's ordinary-course-of-business documents also underscore the close competition between RHS and SIR for patients needing surgical services. An analysis conducted by a third party, based on information provided by SIR, describes RHS as SIR's "[p]rimary competitor." SIR's internal documents addressing the local marketplace overwhelmingly focus on competition with RHS, noting, among other things, the wide differences in rates that the two charge health plans for the same services as well as the higher patient satisfaction scores for services provided at SIR.

27. RHS responded vigorously to the loss of surgical volume to SIR. First, RHS offered discounted rates to several major health plans in exchange for excluding SIR from their provider networks. Most health plans declined the rate discounts because of the importance of SIR to their provider networks and to their members. Accordingly, due to competition between SIR and RHS, health plans in the Reading area had a choice between two beneficial options: (1) to exclude SIR from their provider network and receive a discount from the more expensive, dominant RHS; or (2) to contract with SIR at significantly lower rates than RHS, lowering costs and increasing access for their membership. After the Acquisition, both options are lost.

28. RHS also responded to competition from SIR by using its influence with BHP to steer patients to RHS and away from SIR, including excluding SIR as an in-network provider for its employees. RHS is the largest employer in the Reading area and, thus, a substantial number of individuals in the Reading area could not receive in-network coverage for services provided at SIR. Similarly, RHS's employed primary care physicians refused to refer patients to SIR specialists unless they agreed to perform the necessary surgeries at a RHS-owned facility, rather than SIR.

29. Ultimately, RHS decided that it made more sense to respond to the competition from SIR by seeking to acquire it and thereby eliminate it as a competitor. RHS's CEO admitted as much, confessing in internal company documents that the acquisition of SIR was both "defensive and offensive," believing that if SIR were acquired by another entity, even more volume would leave RHS. Elsewhere, he described the Acquisition as "a smart defensive move to protect the hospital's market share." The

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fact that RHS was willing to pay a considerable premium to purchase SIR – than the next highest bidder – indicates that the Acquisition offers significant additional value to RHS because it eliminates a close competitor, and also prevents that competitor from being acquired by a potential rival.

30. The Acquisition of SIR makes it all the more essential for Reading area employers and health plan members to have access to RHS facilities. As such, RHS will have greater leverage in negotiations with health plans – and the ability to demand higher reimbursement rates – after the Acquisition than before.

31. One of SIR's motivations for entering into the Acquisition was SIR's physician owners privately acknowledged that an affiliation with a "large Medical System" in the area (*i.e.*, RHS) would cause reimbursement rates to

32. Health plans likewise anticipate a significant increase in SIR's rates, even to RHS's current rates, for the same services as a result of the Acquisition. An increase in SIR's rates to the level of RHS's rates would cause

for services obtained at SIR. For some procedures, such as hip and knee replacements, patients with co-insurance would have to pay thousands of dollars more out-of-pocket for procedures performed at SIR.

33. SIR's current contracts with the major health plans are

As such, once the Acquisition closes, RHS will be able to terminate SIR's contracts and demand higher reimbursement rates from health plans at SIR in short order.

34. SIR does not currently have contracts with the health plans

If consummated, the Acquisition would allow RHS to extract much higher reimbursement rates from than SIR could independently.

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35. The costs of rate increases resulting from the Acquisition will be borne directly by or passed on to local employers and their employees. In the Reading area, the majority of commercial health-plan membership is comprised of self-insured employers. Self-insured employers rely on health plans only to negotiate rates and provide administrative support; the employers themselves pay the full cost of their employees' healthcare. As a result, self-insured employers immediately and directly bear the full burden of higher rates. Meanwhile, health plans pass on some or all costs of hospital rate increases to their fully-insured customers.

36. Employers, in turn, generally must pass on their increased healthcare costs to their employees, in whole or in part. Employees will bear these increased costs in the form of higher premiums, higher co-payments, reduced coverage, restricted services, or reductions in wages or other benefits. Some Reading area residents may therefore forgo or delay necessary healthcare services because of the higher costs, while others may drop their insurance coverage altogether.

B.

The Acquisition Eliminates Vital Quality Competition

37. Since SIR's entry into the Reading area in 2007, local residents have benefited from vigorous head-to-head competition between RHS and SIR to improve the quality of care offered in the Reading area. In fact, SIR entered the market because its physician owners felt that the other Reading area providers – where they were previously performing surgeries – were not “providing adequate care for [their] patients.” Thus, SIR was created as a “patient-focused hospital,” offering 24-hour visitation, quick schedule times, private rooms, and lower infection rates.

38. Currently, SIR not only offers lower rates than its acquirer, RHS, but it also provides a high quality of care and better patient service. Through its excellent service and high quality of patient care, SIR has achieved patient satisfaction rates that are above national standards. Indeed, a recent federal government report revealed that SIR had significantly higher patient satisfaction rates than RHS and St. Joseph.

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39. RHS's ownership and management threaten to diminish SIR's patient satisfaction levels and quality of care. The Acquisition will likely reduce SIR's patient satisfaction levels, or at a minimum reduce the competitive incentive to maintain and improve these levels, and thus lower the quality of care offered to Reading area residents. Much of SIR's high quality and exceptional service can be attributed to its physician-driven management that is less bureaucratic than RHS. One of the SIR owners stated

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40. The Acquisition will also dampen RHS's incentive to improve its own quality and efficiency to compete with SIR. RHS noted in an internal document that it "struggles to provide the same level of service and amenities as competing [ambulatory centers and specialty facilities]." Another RHS document describes the loss of "higher-reimbursed patients" to SIR, concluding that "[w]e must be aggressive in our response to improve our services so that patients will want to come to [Reading Hospital]." Similarly, another document states that RHS must "combat" SIR by "provid[ing] the best patient experience as well as continue to provide the best clinical outcomes."

IV.

THE RELEVANT SERVICE MARKETS

41. The direct evidence above demonstrates the vigorous head-to-head competition between RHS and SIR that will be lost if the Acquisition is consummated, leading to higher prices and lower quality for Reading area residents. It can be inferred from this evidence alone that the Acquisition will result in serious competitive harm. In this case, however, the direct evidence is consistent with, and provides strong additional support for, the presumption of harm under the case-law and Merger Guidelines that is triggered by the substantial increases in market share and market concentration that the Acquisition would create in each of the four relevant markets discussed below. Each market consists of a cluster of surgical services that both RHS and SIR offer in

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head-to-head competition with each other to commercially-insured residents of the Reading area.

A.

Inpatient Orthopedic Surgical Services

42. The first relevant service market is inpatient orthopedic surgical services contracted for by commercial health plans. The service market encompasses a cluster of basic orthopedic and spine surgical services offered by both RHS and SIR that require an overnight hospital stay, such as knee, hip, and joint replacement surgeries and spinal fusions. This market accounts for the vast majority of SIR's inpatient surgical cases. The services included in the inpatient orthopedic surgical services market are performed by board-certified orthopedic surgeons and neurosurgeons.

43. Although the Acquisition's likely effect on competition could be analyzed separately for each of the dozens of affected medical procedures, it is appropriate to evaluate the Acquisition's likely effects across this cluster of services because the group of services is offered to Reading area residents under similar competitive conditions. For example, the inpatient orthopedic services are offered by the same set of competitors. Thus, the Acquisition is likely to impact competition, and patients, in the same way for each of the services involved in the relevant cluster.

44. The inpatient orthopedic surgical services market does not include outpatient services – those not requiring an overnight hospital stay – because the competitive environment surrounding those services is different, including that they are offered by a different set of competitors in the Reading area. In addition, inpatient services must be provided in a hospital setting, unlike outpatient procedures, which may be offered in a hospital or ambulatory surgical center.

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B.**Outpatient Orthopedic Surgical Services**

45. The second relevant market in which the Acquisition threatens substantial competitive harm is outpatient orthopedic surgical services contracted for by commercial health plans. This market encompasses a cluster of orthopedic surgical services offered by both RHS and SIR that do not require an overnight hospital stay, including carpal tunnel surgery, knee and shoulder arthroscopic surgeries, rotator cuff surgery, and surgical procedures that affect the spinal column or neck. The services included in the outpatient orthopedic surgical services market are performed by board-certified orthopedic surgeons and neurosurgeons.

46. It is appropriate to evaluate the Acquisition's likely effects across this cluster of services, rather than analyzing each outpatient orthopedic service independently, because the group of services is offered to Reading area residents by a unique set of providers under similar competitive conditions.

Outpatient Ear, Nose, and Throat Surgical Services

47. The third relevant market in which the Acquisition threatens substantial competitive harm is the market for outpatient ENT surgical services contracted for by commercial health plans. This market encompasses a cluster of ENT surgical services offered by both RHS and SIR that do not require an overnight hospital stay, including tonsillectomies, nasal septum surgeries, thyroid procedures, and sinus endoscopies. The services included in the outpatient ENT surgical services market are performed by board-certified otolaryngologists.

48. It is appropriate to evaluate the Acquisition's likely effects across this cluster of services, rather than analyzing each outpatient ENT service independently, because the group of services is offered to Reading area residents by a unique set of providers under similar competitive conditions.

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C.

Outpatient General Surgical Services

49. The fourth relevant market in which the Acquisition threatens substantial competitive harm is the market for outpatient general surgical services contracted for by commercial health plans. This market encompasses a cluster of outpatient general surgery procedures offered by both RHS and SIR that do not require an overnight hospital stay, including hernia repair, cholecystectomy (*i.e.*, gall bladder removal), breast lesion removal and biopsies, and black lesion excisions. Outpatient general surgical services are performed by board-certified general surgeons.

50. It is appropriate to cluster these services together as they are offered under similar competitive conditions, including being offered by a unique set of competitors. That set of competitors differs from the set of competitors for the other two outpatient relevant service markets but is similar to the set of competitors that offers inpatient orthopedic surgical services market. However, the respective market shares of the overlapping competitors (namely, Reading Hospital, SIR, and St. Joseph) differ between outpatient general surgical services market and the inpatient orthopedic surgical services market, and RHS's SurgiCenter competes in this market, unlike the inpatient orthopedic services market. Also, outpatient general surgical services need not be performed in a hospital, unlike the services in the inpatient orthopedic surgical services market.

V.

THE RELEVANT GEOGRAPHIC MARKET

51. The relevant geographic market in which to analyze the effects of the Acquisition for each relevant service market is the area corresponding to Reading Hospital's primary service area, which is defined by RHS in the ordinary course of business as the set of zip codes from which Reading Hospital draws approximately 85 percent of its patients (the "Reading area"). This area encompasses most of Berks County.

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52. In a merger case, the appropriate geographic market is “the area in which consumers can practically turn for alternative sources of the product [or service] and in which the antitrust defendants face competition.” A relevant test to determine the boundaries of the geographic market is whether a hypothetical monopolist of the relevant services within the geographic area could profitably raise prices by a small but significant amount. If so, the boundaries of the geographic area are an appropriate geographic market. Defining the geographic market is a “pragmatic undertaking” and it should “correspond to the commercial realities of the industry.”

53. The Respondents’ own ordinary course of business documents reveal that they do not regard hospitals or ambulatory surgery centers outside of the Reading area as meaningful competitors for the relevant services at issue. Instead, Respondents focus their competitive efforts relating to these services on providers located in the Reading area, and especially each other.

54. RHS analyzes competitors and market shares for the affected services in the Reading area (*i.e.*, its primary service area) separately from other geographic areas. RHS has also used the Reading area as the basis for negotiations with health plans to exclude competitors from provider networks. Health plans, when preparing to negotiate with RHS, also analyze competition within the Reading area.

55. Reading area residents prefer to obtain surgical services that make up each of the four relevant markets locally. Health plans must therefore include hospitals and ambulatory surgery centers located in the Reading area in their provider networks in order to meet their members’ needs and desires for choice. Patients would not go to hospitals or ambulatory surgery centers outside of the Reading area in sufficient numbers to defeat a post-Acquisition anticompetitive rate increase within the Reading area in any of the four relevant service markets. As such, a hypothetical monopolist that controlled all of the relevant facilities in the Reading area could profitably raise rates by at least a small but significant amount.

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VI.

**MARKET STRUCTURE AND THE ACQUISITION'S
PRESUMPTIVE ILLEGALITY**

A.

Inpatient Orthopedic Surgical Services Market

56. The Acquisition will reduce the number of significant providers of inpatient orthopedic surgical services in the Reading area from three to two. The only additional providers are of little competitive significance, each with a market share of less than four percent.

57. Under the relevant case law and the Merger Guidelines, the Acquisition is presumptively unlawful by a wide margin as it would significantly increase concentration in a market that already is highly concentrated.

58. RHS's post-Acquisition market share in the inpatient orthopedic surgical services market will be 66.5 percent (as measured by procedures), easily surpassing levels held to be presumptively unlawful by the Supreme Court. Post-Acquisition, two competitors, RHS and St. Joseph, would control about 78 percent of the inpatient orthopedic surgical services market in the Reading area, effectively a duopoly.

59. The Merger Guidelines measure market concentration using the Herfindahl-Hirschman Index ("HHI"). A merger or acquisition is presumed likely to create or enhance market power, and thus is presumed illegal, when the post-merger HHI exceeds 2500 points and the merger or acquisition increases the HHI by more than 200 points. Here, the market concentration levels exceed these thresholds by a wide margin. The post-Acquisition HHI in the inpatient orthopedic surgical services market will be 4585, an increase of 2050 points. The HHI figures for the inpatient orthopedic surgical services market are summarized in the table below.

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INPATIENT ORTHOPEDIC SURGICAL SERVICES		
Provider	Market Share (procedures)	Post-Acquisition
Reading Hospital	42.2%	66.5%
SIR	24.3%	
St. Joseph	11.2%	11.2%
Lehigh Valley	3.9%	3.9%
Hershey	3.2%	3.2%
Thomas Jefferson	2.4%	2.4%
Pottstown Memorial	1.6%	1.6%
HHI	2535	4585
Delta	2050	

B.**Outpatient Orthopedic Surgical Services**

60. The Acquisition will reduce the number of meaningful outpatient orthopedic surgical service competitors from four to three in the Reading Area. The only other providers of outpatient orthopedic surgical services in the Reading area, which each have a market share of 2.6 percent or less, are not significant competitors.

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61. Under the relevant case law and the Merger Guidelines, the Acquisition raises significant competitive concerns in the outpatient orthopedic surgical services market. Based on outpatient orthopedic procedures, RHS’s post-Acquisition market share will be 48.5 percent.

62. Under the Merger Guidelines’ market concentration test, the Acquisition will result in a highly concentrated market, and is presumptively illegal, because the post-Acquisition HHI increases 978 points to 2856. The HHI figures for outpatient orthopedic surgical services are summarized in the table below.

OUTPATIENT ORTHOPEDIC SURGICAL SERVICES			
Provider	Market Share (procedures)	Share (by entity)	Post-Acquisition
SurgiCenter	19.9%	34.2%	48.5%
Reading Hospital	14.3%		
SIR	14.3%		
Reading Surgery Center	20.1%	20.1%	20.1%
St. Joseph	8.9%	8.9%	8.9%
Hershey	2.6%	2.6%	2.6%
Premier Podiatric	2.2%	2.2%	2.2%
Lehigh Valley	1.8%	1.8%	1.8%

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Pottstown Memorial	1.5%	1.5%	1.5%
HHI	1878		2856
Delta	978		

C.

Outpatient Ear, Nose, and Throat Surgical Services

63. The Acquisition will reduce the number of significant competing providers of outpatient ENT surgical services from three to two in the Reading area, creating an effective duopoly of RHS and Pennsylvania Eye and Ear Surgical Center, together controlling over 84 percent of the market. The only other providers of outpatient ENT surgical services in the Reading area, which each have market shares of 2.3 percent or less, are not significant competitors.

64. Based on outpatient ENT procedures, RHS's post-Acquisition market share will be 58.2 percent. Already a highly concentrated market before the Acquisition, the post-Acquisition HHI in the outpatient ENT surgical services market will be 4085, an increase of 1614 points. Thus, by a wide margin, the Acquisition is presumed illegal in this market as well as under the Merger Guidelines. The HHI figures for the outpatient ENT surgical services market are summarized in the table below.

OUTPATIENT EAR, NOSE, & THROAT SURGICAL SERVICES			
Provider	Market Share (procedures)	Share (by entity)	Post-Acquisition
SIR	35.4%	35.4%	58.2%

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SurgiCenter	11.8%	22.8%	
Reading Hospital	11.0%		
Penn. Eye & Ear	26.1%	26.1%	26.1%
Hershey	2.3%	2.3%	2.3%
University of Pennsylvania	2.1%	2.1%	2.1%
St. Joseph	2.0%	2.0%	2.0%
Pottstown Memorial	1.8%	1.8%	1.8%
HHI	2471		4085
Delta	1614		

D.

Outpatient General Surgical Services

65. The Acquisition will eliminate significant competition in the outpatient general surgical services market by reducing the number of significant competitors from three to two – again creating a virtual duopoly – with RHS and St. Joseph together controlling over 84 percent of the outpatient general surgical services market in the Reading area. The additional providers of outpatient general surgical services in the Reading area, which each have market shares of 1.4 percent or less, are not significant competitors.

66. The Acquisition is once again presumptively illegal under the relevant case law and the Merger Guidelines. RHS’s post-

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Acquisition market share in the outpatient general surgical services market will be 71.5 percent (as measured by procedures), far surpassing levels held to be presumptively unlawful by the Supreme Court. The post-Acquisition HHI also exceeds the presumption of illegality in the Merger Guidelines by a wide margin, with an increase of 2001 points to 5287. The HHI figures for the outpatient general surgical services market are summarized in the table below.

OUTPATIENT GENERAL SURGERY			
Provider	Market Share (procedures)	Share (by entity)	Post-Acquisition
Reading Hospital	35.3%	52.4%	71.5%
SurgiCenter	17.1%		
SIR	19.1%		
St. Joseph	12.9%	12.9%	12.9%
Reading Surgery Center	1.4%	1.4%	1.4%
Lehigh Valley	1.4%	1.4%	1.4%
Pottstown Memorial	1.4%	1.4%	1.4%
HHI	3286		5287
Delta	2001		

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67. In each of the four relevant markets there is a presumption of illegality because the Acquisition results in the merged entity controlling a large percentage share for each relevant market and yields a significant increase in market concentration. Plaintiffs need only meet their burden with respect to one of the relevant markets to warrant relief from this Court.

VII.**ENTRY BARRIERS**

68. Neither entry by new firms nor expansion by the few small remaining competitors will deter or counteract the Acquisition's likely serious competitive harm in the relevant service markets.

69. First, new entry or meaningful expansion into the relevant markets at issue is difficult and thus unlikely because of the foreclosure of surgical referrals from local primary care physicians. The vast majority of Reading area primary care physicians are employed by RHS or already affiliated with other existing facilities. Without adequate primary care physician referrals, it is impossible for a surgical facility to establish itself or grow an adequate patient base to become a meaningful competitor.

70. Another barrier to entry or expansion is access to the requisite surgical specialists (*e.g.*, orthopedic and neurosurgeons for the inpatient and outpatient orthopedic surgical service markets, otolaryngologists for the outpatient ENT surgical services market, and general surgeons for the outpatient general surgical services market). Most surgical specialists in the Reading area are already affiliated with a facility and contractually restricted from performing surgeries elsewhere. Even RHS attempted but failed to recruit additional surgical specialists to better compete with SIR. Similarly, St. Joseph attempted to expand its orthopedic surgery program, but was unable to find sufficient orthopedic surgeons in the area. Thus, a new entrant or a competitor expanding its service offerings in the relevant service markets likely could not recruit the necessary additional surgical specialists.

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71. RHS's ownership of BHP and control over its contracting practices creates another entry barrier. BHP offers a preferred provider organization to self-insured employers, including RHS itself, the largest employer in the Reading area. RHS has implemented a tiered BHP plan that places RHS facilities in a preferred tier, financially incentivizing RHS employees to utilize RHS providers. Thus, RHS employees pay significantly higher out-of-pocket costs to use competing facilities and therefore rarely seek services outside the RHS system. Accordingly, a new entrant or competitor attempting to expand its services would be unable to attract patients from the area's largest employer, hampering its ability to generate sufficient patient volume to be viable.

72. An additional barrier to entry or significant expansion in the inpatient orthopedic surgical services market arises from restrictions contained in the PPACA. Based on recent history, the most likely entrant into this market would be another physician-owned specialty hospital. Under PPACA, however, no new physician-owned hospitals can be built, and all physician-owned hospitals that were completed by the end of 2010, are prohibited from expanding the number of beds, operating rooms, or procedure rooms. Because most, if not all, of the ambulatory surgery centers in the Reading area are at least partially owned by physicians, they are precluded from converting their facilities into hospitals and expanding their services to offer inpatient orthopedic surgical services.

73. Even if entry into the relevant markets were likely, it could not occur in a timely manner. Construction of an ambulatory surgery center requires between two and three years from the planning stages to being able to accept commercially-insured patients. It takes even longer to construct a hospital. Significant expansion of services takes several years as well, and requires time-consuming recruitment of additional professional staff and many modifications to an existing facility.

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VIII.

EFFICIENCIES

74. Extraordinary merger-specific efficiencies are necessary to justify the Acquisition in light of its vast potential to harm competition. No court ever has found, without being reversed, that efficiencies rescue an otherwise illegal transaction. Here, Respondents did not quantify or even consider efficiencies when contemplating the Acquisition, instead acknowledging that “the acquisition is unlikely to create any significant efficiencies.” Indeed, the likely outcome of the Acquisition is that SIR will be folded into RHS’s less efficient, more bureaucratic structure.

IX.

VIOLATIONS

75. The allegations of Paragraphs 1 through 74 above are incorporated by reference as though fully set forth.

76. The Acquisition, if consummated, may substantially lessen competition in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and is an agreement constituting an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

NOTICE

Notice is hereby given to the Respondents that the sixteenth day of April, 2013, at 10:00 a.m. is hereby fixed as the time, and Federal Trade Commission offices, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580 as the place, when and where an evidentiary 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 and the Clayton 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.

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You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (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 facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission 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 and conclusions under Rule 3.46 of the 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 to contest the allegations of the complaint and shall 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 shall hold a prehearing scheduling conference not later than ten (10) days after the answer is filed by the Respondents. 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 pre-hearing scheduling conference (but in any event no later than five (5) days after the answer is filed by the Respondents). Rule 3.31(b) obligates counsel for each party, within five (5) days of receiving the Respondents' answer, to make certain initial disclosures without awaiting a discovery request.

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NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Acquisition challenged in this proceeding violates Section 5 of the Federal Trade Commission Act, as amended, and Section 7 of the Clayton Act, as amended, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. Divestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, viable and independent businesses in the relevant markets, with the ability to offer such products and services as RHS and SIR were offering and planning to offer prior to the Acquisition.
2. A prohibition against any transaction between RHS and SIR that combines their businesses in the relevant markets, except as may be approved by the Commission.
3. A requirement that, for a period of time, RHS and SIR provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the relevant markets with any other company operating in the relevant markets.
4. A requirement to file periodic compliance reports with the Commission.
5. Any other relief appropriate to correct or remedy the anticompetitive effects of the transaction or to restore SIR as a viable, independent competitor in the relevant markets.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this sixteenth day of November, 2012.

By the Commission.

Final Order

ORDER DISMISSING COMPLAINT

On November 16, 2012, the Federal Trade Commission issued the Administrative Complaint in this matter, having reason to believe that the proposed acquisition of Surgical Institute of Reading (“SIR”) by Reading Health System (“Reading”), if consummated, would violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. Complaint Counsel and Respondents have now filed a Joint Motion to Dismiss Complaint, which states that Respondents have abandoned the proposed acquisition of SIR by Reading, and have committed to provide notice to Commission staff 30 days prior to consummating any transaction between the Respondents.¹

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.² In particular, Respondents have abandoned the proposed acquisition and have bound themselves to provide prior notice in the future, rendering them unable to effect the proposed transaction without first providing 30 days’ notice to Commission staff.

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,

1 See Joint Motion To Dismiss Complaint (November 30, 2012), at <http://www.ftc.gov/os/adjpro/d9353/121130jointmodismisscplt.pdf>.

2 See, e.g., *In the Matter of Omnicare, Inc.*, Docket No. 9352, Order Dismissing Complaint (February 22, 2012), at <http://www.ftc.gov/os/adjpro/d9352/120223omnicareorder.pdf>; *In the Matter of Thoratec Corporation and HeartWare International, Inc.*, Docket No. 9339, Order Dismissing Complaint (August 11, 2009), at <http://www.ftc.gov/os/adjpro/d9339/090811thoatecorder.pdf>.

Final Order

IT IS ORDERED THAT the Administrative Complaint in this matter be, and it hereby is, dismissed without prejudice.

By the Commission, Commissioner Rosch abstaining.

Complaint

IN THE MATTER OF

**WATSON PHARMACEUTICALS INC.,
ACTAVIS INC.,
ACTAVIS PHARMA HOLDING 4 EHF.,
AND
ACTAVIS S.Á.R.L.**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SECTION 7 OF THE CLAYTON ACT*Docket No. C-4373; File No. 121 0132**Complaint, October 15, 2012 – Decision, December 13, 2012*

This consent order addresses the \$5.9 billion acquisition by Watson Pharmaceuticals, Inc. of certain assets of Actavis Inc., Actavis Pharma Holding 4 ehf., and Actavis S.à.r.l. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by lessening current and future competition in U.S. markets for the following generic pharmaceutical products: (1) extended release bupropion hydrochloride tablets; (2) extended release diltiazem hydrochloride capsules (generic Cardizem CD); (3) fentanyl transdermal system; (4) lorazepam tablets; (5) metoclopramide hydrochloride tablets; (6) extended release morphine sulfate capsules; (7) extended release nifedipine tablets; (8) extended release amphetamine salts capsules; (9) extended release diltiazem hydrochloride capsules (generic Tiazac); (10) extended release oxymorphone non-tamper resistant tablets; (11) extended release glipizide tablets; (12) isradipine capsules; (13) loxapine succinate capsules; (14) extended release methylphenidate hydrochloride tablets; (15) ursodiol tablets; (16) adapalene and benzoyl peroxide topical gel; (17) dextromethorphan hydrobromide and quinidine sulfate capsules; (18) extended release morphine sulfate and naltrexone combination capsules; (19) extended release oxycodone tamper resistant tablets; (20) extended release rivastigmine film; and (21) varenicline tartrate tablets. The consent order requires Watson and Actavis are required to divest either Watson's or Actavis's rights and assets related to eighteen of the twenty-one products (all but extended release morphine sulfate and naltrexone combination capsules, isradipine capsules, and loxapine succinate capsules).

Participants

For the *Commission*: Lisa D. DeMarchi Sleight, William Huynh, and David Von Nirschl.

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For the *Respondents: Drew L. Fabrikant, Maria Raptis, and Steven C. Sunshine, Skadden, Arps, Slate, Meagher & Flom LLP; Sarah B. Lee, Daniel Moon, and Jeffrey Schmidt, Linklaters LLP.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission (“Commission”), having reason to believe that Respondent Watson Pharmaceuticals, Inc. (“Watson”), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Actavis Inc., Actavis Pharma Holding 4 ehf., and Actavis S.à.r.l. (together, “Actavis Group” or “Actavis”), entities controlled by Björgólfur Thor Björgólfsson and subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act (“FTC Act”), as amended, 15 U.S.C. § 45, that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent Watson is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Nevada, with its corporate head office and principal place of business located at Morris Corporate Center III, 400 Interpace Parkway, Parsippany, New Jersey 07054.

2. Respondent Actavis includes three entities. Actavis Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address located at 60 Columbia Road, Building B, Morristown, New Jersey 07960. Actavis Pharma Holding 4 ehf. is a private limited liability company organized, existing, and doing business under and by virtue of the laws of the Republic of Iceland, with its headquarters address located at Reykjavíkurvegi 76-78, 220 Hafnarfirdi, Iceland. Actavis S.á.r.l. is a limited liability corporate entity organized, existing, and doing business under and by virtue of the laws of the Grand Duchy of

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Luxemburg, with its headquarters address located at 6c, Rue Gabriel Lippmann, L 5365 Munsbach, Luxembourg.

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

II. THE PROPOSED ACQUISITION

4. Pursuant to a Sale and Purchase Agreement (“Purchase Agreement”) dated as of April 25, 2012, Watson proposes to acquire 100% of the voting securities of Actavis Group for approximately \$5.9 billion (the “Acquisition”).

III. THE RELEVANT MARKETS

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

- a. extended release bupropion hydrochloride tablets (generic Zyban);
- b. extended release diltiazem hydrochloride capsules (generic Cardizem CD);
- c. fentanyl transdermal system;
- d. lorazepam tablets;
- e. metoclopramide hydrochloride tablets;
- f. extended release morphine sulfate capsules;
- g. extended release nifedipine tablets (generic Adalat CC);
- h. extended release amphetamine salts capsules;

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- i. extended release diltiazem hydrochloride capsules (generic Tiazac);
- j. extended release oxymorphone non-tamper resistant tablets;
- k. extended release glipizide tablets;
- l. isradipine capsules;
- m. loxapine succinate capsules;
- n. extended release methylphenidate hydrochloride tablets;
- o. ursodiol tablets;
- p. adapalene and benzoyl peroxide topical gel;
- q. dextromethorphan hydrobromide and quinidine sulfate capsules;
- r. extended release morphine sulfate and naltrexone combination capsules;
- s. extended release oxycodone tamper resistant tablets;
- t. extended release rivastigmine film; and
- u. varenicline tartrate tablets.

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

IV. THE STRUCTURE OF THE MARKETS

7. Extended release bupropion hydrochloride tablets, the generic of Zyban by GlaxoSmithKline plc, are designed to help people quit smoking by reducing cravings and other side effects of withdrawal. Currently, Teva Pharmaceutical Industries Ltd. (“Teva”), Mylan, Inc. (“Mylan”), Watson, and Actavis market generic Zyban. Thus, the Acquisition would reduce the number of

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suppliers from four to three. A combination of Watson and Actavis would create a firm that would supply 45% of the market and increase the Herfindahl-Hirschman Index (“HHI”) by 700 points, from 4,138 points to 4,838 points.

8. Extended release diltiazem hydrochloride capsules (generic Cardizem CD) are used to treat hypertension, angina, and certain heart rhythm disorders. The proposed transaction would result in a 55% market share for the combined entity. There are two other suppliers – Teva and Sun Pharmaceutical Industries, Ltd. (“Sun”). Thus, the Acquisition would reduce the number of suppliers from four to three and increase the HHI by 1,488 points, from 3,474 points to 4,962 points.

9. Fentanyl transdermal system is a patch that releases fentanyl to ease chronic pain. There are currently five suppliers of generic fentanyl transdermal system – Watson, Actavis, Mylan, Apotex, Inc., and Mallinckrodt, LLC (a division of Covidien plc). Thus, the Acquisition would reduce the number of competitors from five to four, give the combined entity a market share of 34%, and increase the HHI by 378 points, from 3,460 points to 3,838 points.

10. Lorazepam is used to treat anxiety disorders. Currently, there are five suppliers of generic lorazepam – Excellium Pharmaceutical, Ltd., Mylan, Ranbaxy Laboratories, Ltd., Watson, and Actavis. The proposed transaction would reduce the number of competitors from five to four and result in a market share for the combined entity of 53%. The Acquisition would increase the HHI by 1,380 points, from 2,208 points to 3,588 points.

11. Metoclopramide hydrochloride is used to treat nausea. Teva, Watson, and Actavis share approximately 61% of the market for this product. Accounting for recent exit, the proposed transaction would reduce the number of competitively significant suppliers from three to two, give the combined entity a 34% market share, and increase the HHI by 560 points, from 1,618 points to 2,178 points.

12. Extended release morphine sulfate capsules are used to treat acute pain. Actavis owns the branded product, Kadian, and

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markets the authorized generic. Watson markets the only other generic Kadian available. Thus, the proposed transaction would create a monopoly in generic extended release morphine sulfate capsules.

13. Extended release nifedipine tablets are used to treat hypertension and angina. Watson, Actavis, Mylan, and Valeant Pharmaceuticals International, Inc., whose product is sold by Teva, currently market extended release nifedipine tablets in the United States. The proposed transaction would reduce the number of suppliers from four to three and result in a combined entity with 31% market share. The Acquisition would increase the HHI by 456 points, from 4,746 points to 5,202 points.

14. Extended release amphetamine salts capsules are the generic version of Adderall XR, manufactured by Shire plc, which is a treatment for attention deficit hyperactivity disorder (“ADHD”). Actavis recently entered this market, joining Teva and Impax Laboratories, Inc., who are marketing authorized generics. Watson is one of a limited number of firms that has an extended release amphetamine salts capsule in development. The proposed transaction would reduce the number of current and likely potential suppliers of generic Adderall XR.

15. Extended release diltiazem hydrochloride capsules (generic Tiazac) are used to treat hypertension and angina. Three companies currently market generic Tiazac – Sun, Inwood Laboratories (a wholly-owned subsidiary of Forest Pharmaceuticals, Inc.), and Watson. Actavis is one of a limited number of firms that has a generic extended release diltiazem hydrochloride capsule in development. The proposed transaction would reduce the number of current and likely potential suppliers of generic Tiazac.

16. Extended release oxymorphone non-tamper resistant tablets are the generic version of Opana ER, which is used to treat chronic pain. Opana ER is marketed by Endo Health Solutions, Inc. Actavis markets the only generic version of Opana ER in two strengths and is developing additional strengths. Watson is also one of a limited number of firms developing this product. The Acquisition would reduce the number of current and likely potential suppliers of generic Opana ER.

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17. Extended release glipizide is an oral diabetes medicine that boosts insulin production to control blood sugar levels. Watson's product and Pfizer, Inc.'s ("Pfizer's") authorized generic are the only generic versions of the product currently available. Actavis is one of a limited number of firms that has extended release glipizide in development and the Acquisition would reduce the number of current and likely potential suppliers of extended release glipizide.

18. Isradipine capsules are used to treat high blood pressure and are the generic version of Dynacirc. Branded Dynacirc has been discontinued and Watson manufactures the only generic product available today. Actavis has a marketing and profit-sharing arrangement with the best-positioned entrant, which is one of a limited number of likely potential suppliers of isradipine capsules.

19. Loxapine capsules are used to treat the symptoms of schizophrenia and are the generic version of branded Loxatine, which is no longer on the market. Watson manufactures the only generic product currently on market. As with generic isradipine capsules, Actavis has a marketing and profit-sharing arrangement with the best-positioned entrant, which is one of a limited number of likely potential suppliers of generic Loxatine.

20. Extended release methylphenidate hydrochloride tablets are used in the treatment of ADHD in people over the age of six. Watson markets the only generic product as the authorized generic and Actavis is one of a limited number of firms that has an extended release methylphenidate hydrochloride tablet in development. The Acquisition would reduce the number of current and likely potential suppliers of extended release methylphenidate hydrochloride tablets.

21. Depending on the strength, generic ursodiol tablets are the generic version of Urso 250 or Urso Forte and are used to treat primary biliary cirrhosis. Watson currently markets both strengths of generic ursodiol and Actavis is one of a limited number of likely potential suppliers of each of these strengths of ursodiol tablets. The Acquisition would reduce the number of current and likely potential suppliers for a significant period of time.

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22. The combination of adapalene and benzoyl peroxide is a topical treatment for acne. It is marketed by Galderma Laboratories L.P. under the brand Epiduo. Currently, there are no AB-rated generic versions of Epiduo available in the United States, but Watson and Actavis are two of a limited number of likely potential suppliers of generic Epiduo.

23. Dextromethorphan hydrobromide and quinidine sulfate capsules are the generic version of Nuedexta and are used to treat pseudobulbar affect, i.e., uncontrolled episodes of crying and/or laughing in people with multiple sclerosis and other neurological diseases. Currently, there are no generic versions of Nuedexta available in the United States. Watson and Actavis are two of a limited number of likely potential suppliers of generic Nuedexta.

24. Extended release morphine sulfate and naltrexone combination capsules are the generic equivalent of Pfizer's Embeda, a product used to treat acute pain. Currently, there is no generic market for Embeda in the United States and Pfizer has recalled the branded product, which should return to market in the foreseeable future. Actavis and Pfizer have entered into an exclusive Development and Manufacturing Agreement to manufacture Embeda, while Watson is one of a limited number of likely potential suppliers of generic Embeda.

25. Extended release oxycodone tamper resistant tablets are the generic version of tamper resistant OxyContin, which is used to treat moderate to severe pain that is expected to last for an extended period of time. No generic versions of this product are yet available in the United States. Watson and Actavis are among a limited number of likely potential suppliers of generic OxyContin.

26. Extended release rivastigmine film is the generic equivalent of Exelon, a patch used to treat Alzheimer's disease and dementia resulting from Parkinson's disease. Novartis AG markets branded Exelon in the United States. No generic versions of this product are yet available in the United States. Watson and Actavis are among a limited number of likely potential suppliers of generic Exelon.

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27. Varenicline tartrate tablets are the generic version of Pfizer's Chantix, which is a smoking cessation medicine. No generic versions of this product are yet available in the United States. Watson and Actavis are among a limited number of likely potential suppliers of generic Chantix.

V. ENTRY CONDITIONS

28. Entry into the relevant markets described in Paragraphs 5 and 6 would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. Entry would not take place in a timely manner because of the combination of drug development times, U.S. Drug Enforcement Administration restrictions and quotas on controlled substances, and FDA approval requirements, which delay entry by at least two years.

VI. EFFECTS OF THE ACQUISITION

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

- by eliminating actual, direct, and substantial competition between Watson and Actavis and reducing the number of competitors in the markets for (1) extended release bupropion hydrochloride tablets; (2) extended release diltiazem hydrochloride capsules (generic Cardizem CD); (3) fentanyl transdermal system; (4) lorazepam tablets; (5) metoclopramide hydrochloride tablets; (6) extended release morphine sulfate capsules; and (7) extended release nifedipine tablets, and thereby: (a) increasing the likelihood that Watson will be able to unilaterally exercise market power in these markets; (b) increasing the likelihood and degree of coordinated interaction between or among the remaining competitors; and (c) increasing the likelihood that customers would be forced to pay higher prices; and

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- by eliminating future competition between Watson and Actavis and reducing the number of generic competitors in the future in the markets for (1) extended release amphetamine salts capsules; (2) extended release diltiazem hydrochloride capsules (generic Tiazac); (3) extended release oxymorphone non-tamper resistant tablets; (4) extended release glipizide tablets; (5) isradipine capsules; (6) loxapine succinate capsules; (7) extended release methylphenidate hydrochloride tablets; (8) ursodiol tablets; (9) adapalene and benzoyl peroxide topical gel; (10) dextromethorphan hydrobromide and quinidine sulfate capsules; (11) extended release morphine sulfate and naltrexone combination capsules; (12) extended release oxycodone tamper resistant tablets; (13) extended release rivastigmine film; and (14) varenicline tartrate tablets, and thereby: (a) increasing the likelihood that the combined entity would forego or delay the launch of these products, and (b) increasing the likelihood that the combined entity would delay, eliminate, or otherwise reduce the substantial additional price competition that would have resulted from an additional supplier of these products.

VII. VIOLATIONS CHARGED

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

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

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fifteenth day of October, 2012 issues its Complaint against said Respondents.

By the Commission.

Order to Maintain Assets

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Watson Pharmaceuticals Inc. (“Watson”), of Respondents Actavis Inc., Actavis Pharma Holding 4 ehf., and Actavis S.á.r.l. (collectively, “Actavis”), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

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

1. Respondent Watson is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada, with its headquarters address located at Morris Corporate Center III, 400 Interpace Parkway, Parsippany, New Jersey 07054.
2. Respondent Actavis includes three entities. Actavis Inc. is a corporation organized, existing and doing

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business under and by virtue of the laws of the State of Delaware, with its headquarters address located at 60 Columbia Road, Building B, Morristown, New Jersey 07960. Actavis Pharma Holding 4 ehf. is a private limited liability company organized, existing and doing business under and by virtue of the laws of the Republic of Iceland, with its headquarters address located at Reykjavikurvegi 76-78, 220 Hafnarfirdi, Iceland. Actavis S.á.r.l. is a limited liability corporate entity organized, existing and doing business under and by virtue of the laws of the Grand Duchy of Luxemburg, with its headquarters address located at 6c, Rue Gabriel Lippmann, L 5365 Munsbach, Luxembourg. The ultimate parent entity of Respondent Actavis is Björgólfur Thor Björgólfsson, an individual.

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

ORDER**I.**

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

- A. “Watson” means Watson Pharmaceuticals, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Watson Pharmaceuticals, Inc. (including, but not limited to, Watson S.á.r.l., Watson Laboratories, Inc. (a Florida Corporation) and Watson Laboratories, Inc. (a Nevada Corporation)) and the respective directors, officers, employees, agents,

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representatives, successors, and assigns of each. After the Acquisition, Watson shall include Actavis.

- B. “Actavis” means (i) Actavis Inc., (ii) Actavis Pharma Holding 4 ehf. and (iii) Actavis S.á.r.l., their directors, officers, employees, agents, representatives, successors, and assigns; and their joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by each of the following: (i) Actavis Inc., (ii) Actavis Pharma Holding 4 ehf. and (iii) Actavis S.á.r.l., (including, but not limited to, Actavis South Atlantic LLC, Actavis Pharma Mfg Pvt Ltd, and Actavis Elizabeth LLC) and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Respondents” means Watson and Actavis, individually and collectively.
- D. “Commission” means the Federal Trade Commission.
- E. “Decision and Order” means the:
1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final and effective Decision and Order by the Commission; and
 2. Final Decision and Order issued by the Commission following the issuance and service of a final Decision and Order by the Commission in this matter.
- F. “Divestiture Product Business(es)” means the business of Respondents within the Geographic Territory specified in the Decision and Order related to each of the Generic Products (Group One) Products and the Generic Products (Group Two) Products, including the research, Development, manufacture, distribution, marketing, and sale of each such Divestiture Product and the assets related to such business, including,

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without limitation, the Generic Products (Group One) Assets and the Generic Products (Group Two) Assets.

- G. “Interim Monitor” means any monitor appointed pursuant to Paragraph III of this Order to Maintain Assets or Paragraph V of the Decision and Order.
- H. “Orders” means the Decision and Order and this Order to Maintain Assets.

II.

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

- A. Until Respondents fully transfer and deliver each of the respective Generic Products (Group One) Assets and Generic Products (Group Two) Assets to an Acquirer, Respondents shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of each of the related Divestiture Product Businesses, to minimize any risk of loss of competitive potential for such Divestiture Product Businesses, and to prevent the destruction, removal, wasting, deterioration, or impairment of such Divestiture Product Businesses except for ordinary wear and tear. Respondents shall not sell, transfer, encumber or otherwise impair such Generic Products (Group One) Assets and Generic Products (Group Two) Assets (other than in the manner prescribed in the Decision and Order) nor take any action that lessens the full economic viability, marketability or competitiveness of the related Divestiture Product Businesses.
- B. Until Respondents fully transfer and deliver each of the respective Generic Products (Group One) Assets and Generic Products (Group Two) Assets to an Acquirer, Respondents shall maintain the operations of the related Divestiture Product Businesses in the regular and ordinary course of business and in accordance with past practice (including regular repair

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and maintenance of the assets of such business) and/or as may be necessary to preserve the marketability, viability, and competitiveness of such Divestiture Product Businesses and shall use their best efforts to preserve the existing relationships with the following: suppliers; vendors and distributors; the High Volume Accounts; customers; Agencies; employees; and others having business relations with each of the respective Divestiture Product Businesses. Respondents' responsibilities shall include, but are not limited to, the following:

1. providing each of the respective Divestiture Product Businesses with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such business and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for such Divestiture Product Business;
2. continuing, at least at their scheduled pace, any additional expenditures for each of the respective Divestiture Product Businesses authorized prior to the date the Consent Agreement was signed by Respondents including, but not limited to, all research, Development, manufacturing, distribution, marketing and sales expenditures;
3. providing such resources as may be necessary to respond to competition against each of the Divestiture Products and/or to prevent any diminution in sales of each of the Divestiture Products during and after the Acquisition process and prior to the complete transfer and delivery of the related Generic Products (Group One) Assets and Generic Products (Group Two) Assets to an Acquirer;
4. providing such resources as may be necessary to maintain the competitive strength and positioning of each of the Divestiture Products at the related High Volume Accounts;

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5. making available for use by each of the respective Divestiture Product Businesses funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the assets related to such business, including without limitation, the Generic Products (Group One) Assets and Generic Products (Group Two) Assets;
 6. providing each of the respective Divestiture Product Businesses with such funds as are necessary to maintain the full economic viability, marketability and competitiveness of such Divestiture Product Business; and
 7. providing such support services to each of the respective Divestiture Product Businesses as were being provided to such business by Respondents as of the date the Consent Agreement was signed by Respondents.
- C. Until Respondents fully transfer and deliver the Generic Products (Group One) Assets and Generic Products (Group Two) Assets to an Acquirer, Respondents shall maintain a work force at least as equivalent in size, training, and expertise to what has been associated with the Divestiture Products for the relevant Divestiture Product's last fiscal year.
- D. Until the Closing Date for the Generic Products (Group One) Assets and Generic Products (Group Two) Assets, Respondents shall provide all the related Divestiture Product Core Employees with reasonable financial incentives to continue in their positions and to research, Develop, and manufacture the relevant Divestiture Products consistent with past practices and as may be necessary to preserve the marketability, viability and competitiveness of such Divestiture Products pending divestiture. Such incentives shall include a continuation of all employee benefits offered by Respondents until the Closing Date for the divestiture of the Generic Products (Group One)

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Assets and Generic Products (Group Two) Assets has occurred, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by Law), and additional incentives as may be necessary to prevent any diminution of the relevant Divestiture Product's competitiveness.

E. Respondents shall:

1. for each Divestiture Product, for a period of six (6) months from the Closing Date or until the hiring of twenty (20) Divestiture Product Core Employees by the relevant Acquirer, whichever occurs earlier, provide the relevant Acquirer with the opportunity to enter into employment contracts with the Divestiture Product Core Employees related to the Divestiture Products and assets acquired by such Acquirer. Each of these periods is hereinafter referred to as the "Divestiture Product Core Employee Access Period(s)";
2. not later than the earlier of the following dates: (i) ten (10) days after notice by staff of the Commission to Respondents to provide the Product Employee Information; or (ii) ten (10) days after written request by an Acquirer, provide such Acquirer or Proposed Acquirer(s) with the Product Employee Information related to the Divestiture Product Core Employees. Failure by Respondents to provide the Product Employee Information for any Divestiture Product Core Employee within the time provided herein shall extend the Divestiture Product Core Employee Access Period(s) with respect to that employee in an amount equal to the delay;
3. during the Divestiture Product Employee Access Period, not interfere with the hiring or employing by the Acquirer of Divestiture Product Core Employees, and shall remove any impediments within the control of Respondents that may deter these employees from accepting employment with

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such Acquirer, including, but not limited to, any noncompete provisions of employment or other contracts with Respondents that would affect the ability or incentive of those individuals to be employed by such Acquirer. In addition, Respondents shall not make any counteroffer to a Divestiture Product Core Employee who receives a written offer of employment from the Acquirer;

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

- F. Pending divestiture of the Generic Products (Group One) Assets and Generic Products (Group Two) Assets, Respondents shall:
1. not use, directly or indirectly, any such Confidential Business Information related to the research, Development, manufacturing, marketing, or sale of the Divestiture Products other than as necessary to comply with the following:
 - a. the requirements of this Order;
 - b. Respondents' obligations to the Acquirer of the particular Divestiture Product under the terms of any Remedial Agreement related to such Divestiture Product; or
 - c. applicable Law;
 2. not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person except the Acquirer or other Persons specifically authorized by such Acquirer to receive such information;

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3. not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the marketing or sales of the Divestiture Products to the employees associated with business related to those Retained Products that contain the same active pharmaceutical ingredient as the Divestiture Products; and
4. institute procedures and requirements to ensure that the above-described employees:
 - a. do not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information in contravention of this Order to Maintain Assets; and
 - b. do not solicit, access or use any Confidential Business Information that they are prohibited from receiving for any reason or purpose;

provided, however, that the restrictions contained in this Order to Maintain Assets regarding the Respondents' use, conveyance, provision, or disclosure of "Confidential Business Information" shall not apply to the following: (i) information that subsequently falls within the public domain through no violation of this Order or breach of confidentiality or non-disclosure agreement with respect to such information by the Respondents; (ii) information that is required by Law or rules of an applicable stock exchange to be publicly disclosed; (iii) information specifically excluded from the Divestiture Product Assets; and (iv) all intellectual property licensed on a non-exclusive basis to the particular Acquirer.

- G. Not later than thirty (30) days from the earlier of the Closing Date or the date that this Order to Maintain Assets becomes final and effective, Respondents shall provide to all of Respondents' employees and other personnel who may have access to Confidential

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

- H. Respondents shall monitor the implementation by its employees and other personnel of all applicable restrictions, and take corrective actions for the failure of such employees and personnel to comply with such restrictions or to furnish the written agreements and acknowledgments required by this Order to Maintain Assets. Respondents shall provide the Acquirer with copies of all certifications, notifications and reminders sent to Respondents' employees and other personnel.
- I. Respondents shall adhere to and abide by the Remedial Agreements (which agreements shall not limit or contradict, or be construed to limit or contradict, the terms of the Orders, it being understood that nothing in the Orders shall be construed to reduce any obligations of Respondents to the Acquirer under such agreement(s)), which are incorporated by reference into this Order to Maintain Assets and made a part hereof.
- J. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Divestiture Product Businesses within the Geographic Territory through their full transfer and delivery to an Acquirer, to minimize any

Order to Maintain Assets

risk of loss of competitive potential for the Divestiture Product Businesses within the Geographic Territory, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Generic Products (Group One) Assets and Generic Products (Group Two) Assets except for ordinary wear and tear.

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

- A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint a monitor (“Interim Monitor”) to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Orders and the Remedial Agreements.
- B. The Commission shall select the Interim Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondent Watson has not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent Watson of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.
- C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents’ compliance with the relevant requirements of the Orders in a manner consistent with the purposes of the Orders.
- D. If an Interim Monitor is appointed, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:

Order to Maintain Assets

1. The Interim Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission.
2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.
3. The Interim Monitor shall serve until the date of completion by the Respondents of the divestiture of all Divestiture Product Assets and the transfer and delivery of the related Product Manufacturing Technology in a manner that fully satisfies the requirements of this Order and until the earliest of:
 - a. with respect to each Divestiture Product, the date the Acquirer of such Divestiture Product (or that Acquirer's Manufacturing Designee(s)) is approved by the FDA to manufacture such Divestiture Product and able to manufacture such Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of the Respondents;
 - b. with respect to each Divestiture Product, the date the Acquirer of that Divestiture Product notifies the Commission and the Respondents of its intention to abandon its efforts to manufacture such Divestiture Product; or
 - c. with respect to each Divestiture Product, the date of written notification from staff of the Commission that the Interim Monitor, in consultation with staff of the Commission, has determined that the relevant Acquirer has abandoned its efforts to manufacture such Divestiture Product;

Order to Maintain Assets

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

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

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

Order to Maintain Assets

the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.

7. Respondents shall report to the Interim Monitor in accordance with the requirements of the Orders and as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondents, and any reports submitted by the Acquirer with respect to the performance of Respondents' obligations under the Orders or the Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Orders;

provided, however, beginning ninety (90) days after Respondents have filed their final report pursuant to Paragraph X.B. of the Decision and Order, and ninety (90) days thereafter, the Interim Monitor shall report in writing to the Commission concerning progress by the Acquirer toward obtaining FDA approval to manufacture each Divestiture Product and obtaining the ability to manufacture each Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents.

8. Respondents may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.

Order to Maintain Assets

- E. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.
- F. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.
- G. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.
- H. The Interim Monitor appointed pursuant to this Order to Maintain Assets may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

IV.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order to Maintain Assets is issued to become final and effective, and every sixty (60) days thereafter until Respondents have fully complied with the following: Paragraphs II.A , II.B., II.C., II.D., II.E., II.F.1. - II.F.3, II.G., II.J., II.K.1. - II.K.4, II.L., III.A., III.B. and IV.A. of the related Decision and Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with the Orders. Respondents shall submit at the same time a copy of their report concerning compliance with the Orders to the Interim Monitor, if any Interim Monitor has been appointed. Respondents shall include in their reports, among other things that are required from time to time, a detailed description of their efforts to comply with the relevant paragraphs of the Orders, including:

Order to Maintain Assets

- A. a detailed description of all substantive contacts, negotiations, or recommendations related to (i) the divestiture and transfer of all relevant assets and rights, (ii) transitional services being provided by the Respondents to the relevant Acquirer, and (iii) the agreement(s) to Contract Manufacture; and
- B. a detailed description the timing for the completion of such obligations.

provided, however, that, after the Decision and Order in this matter becomes final and effective, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission at the same time as, the reports required to be submitted by Respondent pursuant to Paragraph X of the Decision and Order.

V.

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

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

VI.

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

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

VII.

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

- A. Three (3) days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. The later of:
 - 1. The day after the divestiture of all of the Divestiture Product Assets, as required by and described in the Decision and Order, has been completed and the Interim Monitor, in consultation with Commission staff and the Acquirer(s), notifies the Commission that all assignments, conveyances, deliveries, grants, licenses, transactions, transfers and other transitions related to such divestitures are complete, or the Commission otherwise directs that this Order to Maintain Assets is terminated; or
 - 2. the day after the day the related Decision and Order becomes final and effective.

By the Commission.

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DECISION AND ORDER
[Redacted Public Version]

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Watson Pharmaceuticals Inc., (“Watson”) of Respondents Actavis Inc., Actavis Pharma Holding 4 ehf., and Actavis S.á.r.l. (collectively, “Actavis”), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

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

1. Respondent Watson is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada, with its headquarters

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address located at Morris Corporate Center III, 400 Interpace Parkway, Parsippany, New Jersey 07054.

2. Respondent Actavis includes three entities. Actavis Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address located at 60 Columbia Road, Building B, Morristown, New Jersey 07960. Actavis Pharma Holding 4 ehf. is a private limited liability company organized, existing and doing business under and by virtue of the laws of the Republic of Iceland, with its headquarters address located at Reykjavikurvegi 76-78, 220 Hafnarfirdi, Iceland. Actavis S.á.r.l. is a limited liability corporate entity organized, existing and doing business under and by virtue of the laws of the Grand Duchy of Luxemburg, with its headquarters address located at 6c, Rue Gabriel Lippmann, L 5365 Munsbach, Luxembourg. The ultimate parent entity of Respondent Actavis is Björgólfur Thor Björgólfsson, an individual.
3. The Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

ORDER**I.**

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

- A. “Watson” means Watson Pharmaceuticals, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Watson Pharmaceuticals, Inc. (including, but not limited to, Watson S.á.r.l., Watson Laboratories, Inc. (a Florida Corporation) and Watson Laboratories, Inc. (a Nevada Corporation)) and the respective directors, officers, employees, agents,

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representatives, successors, and assigns of each. After the Acquisition, Watson shall include Actavis.

- B. “Actavis” means (i) Actavis Inc., (ii) Actavis Pharma Holding 4 ehf. and (iii) Actavis S.á.r.l., their directors, officers, employees, agents, representatives, successors, and assigns; and their joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by each of the following: (i) Actavis Inc., (ii) Actavis Pharma Holding 4 ehf. and (iii) Actavis S.á.r.l., (including, but not limited to, Actavis South Atlantic LLC, Actavis Pharma Mfg Pvt Ltd, and Actavis Elizabeth LLC) and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Respondents” means Watson and Actavis, individually and collectively.
- D. “Commission” means the Federal Trade Commission.
- E. “Acquirer(s)” means the following:
 - 1. a Person specified by name in this Order to acquire particular assets or rights that a Respondent is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order and that has been approved by the Commission to accomplish the requirements of this Order in connection with the Commission’s determination to make this Order final and effective; or
 - 2. a Person approved by the Commission to acquire particular assets or rights that a Respondent is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.
- F. “Acquisition” means Respondent Watson’s acquisition of fifty percent (50%) or more of the voting securities of Respondent Actavis.

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- G. “Acquisition Date” means the date on which the Acquisition occurs.
- H. “Adapalene/Benzoyl Peroxide Products” means all Products in Development, manufactured, marketed or sold by Respondent Watson pursuant to ANDA No. 204067 and any supplements, amendments, or revisions thereto.
- I. “Agency(ies)” means any government regulatory authority or authorities in the world responsible for granting approval(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the research, Development, manufacture, marketing, distribution, or sale of a Product. The term “Agency” includes, without limitation, the United States Food and Drug Administration (“FDA”) and the United States Drug Enforcement Administration.
- J. “Amphetamine Salts Extended Release Products” means all Products in Development, manufactured, marketed or sold by Respondent Watson pursuant to ANDA No. 202618 and any supplements, amendments, or revisions thereto.
- K. “Application(s)” means all of the following: “New Drug Application” (“NDA”), “Abbreviated New Drug Application” (“ANDA”), “Supplemental New Drug Application” (“SNDAs”), or “Marketing Authorization Application” (“MAA”), the applications for a Product filed or to be filed with the FDA pursuant to 21 C.F.R. Part 314, and all supplements, amendments, and revisions thereto, any preparatory work, drafts and data necessary for the preparation thereof, and all correspondence between a Respondent and the FDA related thereto. The term “Application” also includes an “Investigational New Drug Application” (“IND”) filed or to be filed with the FDA pursuant to 21 C.F.R. Part 312, and all supplements, amendments, and revisions thereto, any preparatory work, drafts and data necessary for the preparation thereof, and all

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correspondence between a Respondent and the FDA related thereto.

- L. “Bupropion Hydrochloride Extended Release Products” means all Products in Development, manufactured, marketed or sold by Respondent Actavis pursuant to ANDA No. 077475 and any supplements, amendments, or revisions thereto.
- M. “Categorized Assets” means, for each specified Divestiture Product, all of the specified Respondent’s rights, title and interest in and to all assets related to the Respondent’s business within the Geographic Territory related to the Divestiture Product to the extent legally transferable, including the research, Development, manufacture, distribution, marketing, and sale of the Divestiture Product, including, without limitation, the following:
1. all rights to all of the specified Respondent’s Applications related to the specified Divestiture Product;
 2. all Product Intellectual Property related to the specified Divestiture Product that is not Product Licensed Intellectual Property;
 3. all Product Approvals related to the specified Divestiture Product;
 4. all Product Manufacturing Technology related to the specified Divestiture Product that is not Product Licensed Intellectual Property;
 5. all Product Marketing Materials related to the specified Divestiture Product;
 6. all Product Scientific and Regulatory Material;
 7. all Website(s) related exclusively to the specified Divestiture Product;

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8. the content related exclusively to the specified Divestiture Product that is displayed on any Website that is not dedicated exclusively to the specified Divestiture Product;
9. rights, to the extent permitted by Law:
 - a. to require Respondents to discontinue the use of the NDC Numbers related to each Divestiture Product in the sale or marketing of the specified Divestiture Product *except* for returns, rebates, allowances, and adjustments for such Product sold prior to the date agreed upon by the relevant Acquirer and *except* as may be required by applicable Law;
 - b. to prohibit Respondents from seeking from any customer any type of cross- referencing of those NDC Numbers with any Retained Product(s) *except* for returns, rebates, allowances, and adjustments for such Product sold prior to the date agreed upon by the relevant Acquirer and *except* as may be required by applicable Law;
 - c. to approve the timing of Respondents' discontinued use of those NDC Numbers in the sale or marketing of such Divestiture Product *except* for returns, rebates, allowances, and adjustments for such Divestiture Product sold prior to the date agreed upon by the relevant Acquirer and *except* as may be required by applicable Law; and
 - d. to approve any notification(s) from Respondents to any customer(s) regarding the use or discontinued use of such NDC numbers by the Respondents prior to such notification(s) being disseminated to the customer(s);
10. all Product Development Reports related to the specified Divestiture Product;

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11. at the option of the Acquirer of the specified Divestiture Product, all Product Assumed Contracts related to the specified Divestiture Product (copies to be provided to that Acquirer on or before the Closing Date);
12. all patient registries related to the specified Divestiture Product, and any other systematic active post-marketing surveillance program to collect patient data, laboratory data and identification information required to be maintained by the FDA to facilitate the investigation of adverse effects related to the specified Divestiture Product;
13. for any specified Divestiture Product that has been marketed or sold prior to the Closing Date, a list specifying the High Volume Accounts and including: (i) the name of the employee(s) for each High Volume Account that is or has been responsible for the purchase of the specified Divestiture Product on behalf of the High Volume Account and his or her business contact information, and (ii) net sales (in units and dollars) of the specified Divestiture Product on an annual, quarterly, and monthly basis to that High Volume Account;
14. for each specified Divestiture Product that is a Contract Manufacture Product:
 - a. a list of the inventory levels (weeks of supply) for each customer (*i.e.*, retailer, wholesaler or distributor) as of the Closing Date; and
 - b. anticipated reorder dates for each customer as of the Closing Date;
15. at the option of the Acquirer of the specified Divestiture Product and to the extent approved by the Commission in the relevant Remedial Agreement, all inventory in existence as of the

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Closing Date including, but not limited to, raw materials, packaging materials, work-in-process and finished goods related to the specified Divestiture Product;

16. copies of all unfilled customer purchase orders for the specified Divestiture Product as of the Closing Date, to be provided to the Acquirer of the specified Divestiture Product not later than five (5) days after the Closing Date;
17. at the option of the Acquirer of the specified Divestiture Product, all unfilled customer purchase orders for the specified Divestiture Product; and
18. all of the specified Respondent's books, records, and files directly related to the foregoing;

provided, however, that "Categorized Assets" *excludes:* (i) documents relating to a Respondent's general business strategies or practices relating to research, Development, manufacture, marketing or sales of generic pharmaceutical Products, where such documents do not discuss with particularity the specified Divestiture Product; (ii) administrative, financial, and accounting records; (iii) quality control records that are determined not to be material to the manufacture of the specified Divestiture Product by the Interim Monitor or the Acquirer of the specified Divestiture Product; (iv) formulas used to determine the final pricing of any Divestiture Product and/or Retained Products to customers and competitively sensitive pricing information that is exclusively related to the Retained Products; (v) any real estate and the buildings and other permanent structures located on such real estate; and (vi) all Product Licensed Intellectual Property;

provided further, however, that in cases in which documents or other materials included in the assets to be divested contain information: (i) that relates both to the specified Divestiture Product and to Retained

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

- N. “cGMP” means current Good Manufacturing Practice as set forth in the United States Federal Food, Drug, and Cosmetic Act, as amended, and includes all rules and regulations promulgated by the FDA thereunder.
- O. “Clinical Trial(s)” means a controlled study in humans of the safety or efficacy of a Product, and includes, without limitation, such clinical trials as are designed to support expanded labeling or to satisfy the requirements of an Agency in connection with any Product Approval and any other human study used in research and Development of a Product.
- P. “Closing Date” means, as to each Divestiture Product, the date on which a Respondent (or a Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey assets related to such Divestiture Product to an Acquirer pursuant to this Order.
- Q. “Confidential Business Information” means all information owned by, or in the possession or control of, a Respondent that is not in the public domain and

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that is directly related to the research, Development, manufacture, marketing, commercialization, importation, exportation, cost, supply, sales, sales support, or use of a Divestiture Product(s). The term “Confidential Business Information” *excludes* (i) information relating to the Respondents’ general business strategies or practices relating to research, Development, manufacture, marketing, or sales of Products that does not discuss with particularity the Divestiture Products, (ii) information that is protected by the attorney work product, attorney-client, joint defense or other privilege prepared in connection with the Acquisition and relating to any United States, state, or foreign antitrust or competition Laws, and (iii) information that is contained in documents, records, or books of the Respondents provided to the Acquirer by the Respondents that is unrelated to the Divestiture Products or that is exclusively related to Retained Product(s).

R. “Contract Manufacture” means:

1. to manufacture a Contract Manufacture Product by a Respondent on behalf of an Acquirer;
2. to manufacture a Product that is bioequivalent and in the identical dosage strength, formulation and presentation as a Contract Manufacture Product by a Respondent on behalf of an Acquirer; or
3. to provide any part of the manufacturing process including, without limitation, the finish, fill, and/or packaging of a Contract Manufacture Product by a Respondent on behalf of an Acquirer.

S. “Contract Manufacture Product(s)” means the following products:

1. Diltiazem Hydrochloride Extended Release (Group One) Products;

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2. Diltiazem Hydrochloride Extended Release (Group Two) Products;
3. Glipizide Extended Release Products;
4. Lorazepam Products;
5. Metoclopramide Hydrochloride Products;
6. Morphine Sulphate Extended Release Products;
7. Nifedipine Extended Release Products;
8. Ursodiol Products; and/or

any ingredient or component of any of the foregoing Divestiture Products, for which any part of the manufacturing process either: (i) was performed by the Respondents prior to the Acquisition at a facility that is not subject to divestiture to the relevant Acquirer, or (ii) is planned to be performed by a Respondent pending the transfer of the relevant Product Manufacturing Technology to the relevant Acquirer;

provided, however, that, with the consent of the Acquirer of the particular Divestiture Products, a Respondent may substitute a bioequivalent form of such Products in performance of the Respondent's agreement to Contract Manufacture.

- T. "Development" means all preclinical and clinical drug development activities (including formulation), including test method development and stability testing, toxicology, formulation, process development, manufacturing scale-up, development-stage manufacturing, quality assurance/quality control development, statistical analysis and report writing, conducting Clinical Trials for the purpose of obtaining any and all approvals, licenses, registrations or authorizations from any Agency necessary for the manufacture, use, storage, import, export, transport,

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promotion, marketing, and sale of a Product (including any government price or reimbursement approvals), Product approval and registration, and regulatory affairs related to the foregoing. “Develop” means to engage in Development.

- U. “Dextromethorphan Hydrobromide/Quinidine Sulfate Products” means all Products in Development, manufactured, marketed or sold by Respondent Watson pursuant to ANDA No. 203538 and any supplements, amendments, or revisions thereto.
- V. “Diltiazem Hydrochloride Extended Release (Group One) Products” means all Products in Development, manufactured, marketed or sold by Respondent Actavis pursuant to ANDA No. 074984 and any supplements, amendments, or revisions thereto.
- W. “Diltiazem Hydrochloride Extended Release (Group Two) Products” means all Products in Development, manufactured, marketed or sold by Respondent Actavis pursuant to ANDA No. 091022 and any supplements, amendments, or revisions thereto.
- X. “Direct Cost” means a cost not to exceed the cost of labor, material, travel and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service. “Direct Cost” to the Acquirer for its use of any of a Respondent’s employees’ labor shall not exceed the average hourly wage rate for such employee;

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

- Y. “Divestiture Products” means the following, individually and collectively:

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1. Generic Products (Group One);
 2. Generic Products (Group Two);
 3. Isradipine Products;
 4. Loxapine Products; and
 5. Morphine Sulphate Naltrexone Extended Release Products.
- Z. “Divestiture Product Assets” means the following, individually and collectively:
1. The Generic Products (Group One) Assets;
 2. The Generic Products (Group Two) Assets;
 3. The Isradipine Product Assets;
 4. The Loxapine Product Assets; and
 5. Morphine Sulphate Naltrexone Extended Release Product Assets.
- AA. “Divestiture Product Core Employee(s)” means the Product Research and Development Employees and the Product Manufacturing Employees related to each Divestiture Product that is listed in Generic Products (Group One) or Generic Products (Group Two).
- BB. “Divestiture Products License” means a perpetual, non-exclusive, fully paid-up and royalty-free license(s) with rights to sublicense to the relevant Acquirer to all Product Licensed Intellectual Property that was owned, licensed, or controlled by the Respondent named in the definition of the specified Divestiture Product in this Order exclusively for the purposes of:
1. researching and Developing the specified Divestiture Product for marketing, distribution or sale within the Geographic Territory;

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2. using, making, having made, distributing, offering for sale, promoting, advertising, or selling the specified Divestiture Product within the Geographic Territory;
3. importing or exporting the specified Divestiture Product to or from the Geographic Territory to the extent related to the marketing, distribution or sale of the specified Divestiture Product in the Geographic Territory; and
4. having the specified Divestiture Product made anywhere in the World for distribution or sale within, or import into the Geographic Territory;

provided, however, that for any Product Licensed Intellectual Property that is the subject of a license from a Third Party entered into by the Respondent named in the definition of the specified Divestiture Product in this Order, the scope of the rights granted hereunder shall only be required to be equal to the scope of the rights granted by the Third Party to that Respondent.

- CC. “Divestiture Product Releasee(s)” means the following Persons:
1. the Acquirer for the assets related to a particular Divestiture Product;
 2. any Person controlled by or under common control with that Acquirer; and
 3. any licensees, sublicensees, manufacturers, suppliers, distributors, and customers of that Acquirer, or of such Acquirer-affiliated entities.
- DD. “Divestiture Trustee” means the trustee appointed by the Commission pursuant to the relevant provisions of this Order.

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- EE. “Domain Name” means the domain name(s), URL(s) (universal resource locator(s)), and registration(s) thereof, issued by any Person or authority that issues and maintains the domain name registration. “Domain Name” *excludes* any trademark or service mark rights to such domain names other than the rights to the Product Trademarks required to be divested.
- FF. “Drug Master Files” means the information submitted to the FDA as described in 21 C.F.R. Part 314.420 related to a Product.
- GG. “Fentanyl Transdermal System Products” means all Products in Development, manufactured, marketed or sold by Respondent Actavis pursuant to ANDA No. 077062 and any supplements, amendments, or revisions thereto.
- HH. “Generic Products (Group One)” means the following Divestiture Products:
1. Adapalene/Benzoyl Peroxide Products;
 2. Amphetamine Salts Extended Release Products;
 3. Diltiazem Hydrochloride Extended Release (Group One) Products;
 4. Fentanyl Transdermal System Products;
 5. Glipizide Extended Release Products;
 6. Methylphenidate Hydrochloride Extended Release Products;
 7. Metoclopramide Hydrochloride Products;
 8. Morphine Sulphate Extended Release Products;
 9. Nifedipine Extended Release Products;
 10. Oxycodone Extended Release Products;

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11. Oxymorphone Extended Release Products;
 12. Rivastigmine Patch Film Products;
 13. Ursodiol Products; and
 14. Varenicline Tartrate Products.
- II. “Generic Products (Group One) Assets” means all of Respondents’ rights, title and interest in and to all assets related to Respondents’ business within the Geographic Territory related to each of the respective Generic Products (Group One) to the extent legally transferable, including the research, Development, manufacture, distribution, marketing, and sale of each such Generic Products (Group One), including, without limitation, the Categorized Assets related to the Generic Products (Group One).
- JJ. “Generic Products (Group One) Divestiture Agreements” means all of the following agreements:
1. *Asset Purchase Agreement* between Actavis South Atlantic LLC, and Par Pharmaceutical, Inc., dated as of September 24, 2012, and all amendments, exhibits, attachments, agreements, and schedules thereto;
 2. *Asset Purchase Agreement* between Actavis Elizabeth LLC, and Par Pharmaceutical, Inc., dated as of September 24, 2012, and all amendments, exhibits, attachments, agreements, and schedules thereto;
 3. *Asset Purchase Agreement* between Actavis Pharma Mfg Pvt Ltd and Par Pharmaceutical, Inc., dated as of September 24, 2012, and all amendments, exhibits, attachments, agreements, and schedules thereto;
 4. *Asset Purchase Agreement* between Watson Laboratories, Inc. (a Nevada Corporation), and Par

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Pharmaceutical, Inc., dated as of September 24, 2012, and all amendments, exhibits, attachments, agreements, and schedules thereto;

5. *Asset Purchase Agreement* between Watson Laboratories, Inc. (a Florida Corporation), and Par Pharmaceutical, Inc., dated as of September 24, 2012, and all amendments, exhibits, attachments, agreements, and schedules thereto
6. *Supply Agreement* between Actavis Elizabeth LLC, and Par Pharmaceutical, Inc., dated as of September 24, 2012, and all amendments, exhibits, attachments, agreements, and schedules thereto;
7. *Supply Agreement* between Watson Laboratories, Inc. (a Florida Corporation) and Par Pharmaceutical, Inc., dated as of September 24, 2012, and all amendments, exhibits, attachments, agreements, and schedules thereto; and
8. *Supply Agreement* between Watson Laboratories, Inc. (a Nevada Corporation) and Par Pharmaceutical, Inc., dated as of September 24, 2012, and all amendments, exhibits, attachments, agreements, and schedules thereto;

related to the Generic Products (Group One) Assets that have been approved by the Commission to accomplish the requirements of this Order. The Generic Products (Group One) Divestiture Agreements are attached to this Order and contained in Non-Public Appendix A.

KK. “Generic Products (Group Two)” means the following Divestiture Products:

1. Bupropion Hydrochloride Extended Release Products;
2. Diltiazem Hydrochloride Extended Release (Group Two) Products;

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3. Lorazepam Products; and
4. Dextromethorphan Hydrobromide/Quinidine Sulfate Products.

LL. “Generic Products (Group Two) Assets” means all of Respondents’ rights, title and interest in and to all assets related to Respondents’ business within the Geographic Territory related to each of the respective Generic Products (Group Two) to the extent legally transferable, including the research, Development, manufacture, distribution, marketing, and sale of each such Generic Products (Group Two), including, without limitation, the Categorized Assets related to the Generic Products (Group Two).

MM. “Generic Products (Group Two) Divestiture Agreements” means all of the following agreements:

1. *Asset Purchase Agreement* between Actavis Elizabeth LLC and Sandoz Inc., dated as of September 19, 2012, and all amendments, exhibits, attachments, agreements, and schedules thereto;
2. *Asset Purchase Agreement* between Actavis South Atlantic LLC and Sandoz Inc., dated as of September 19, 2012, and all amendments, exhibits, attachments, agreements, and schedules thereto;
3. *Asset Purchase Agreement* between Watson Laboratories, Inc. (a Nevada Corporation) and Sandoz Inc., dated as of September 19, 2012, and all amendments, exhibits, attachments, agreements, and schedules thereto; and,
4. *Supply Agreement* between Actavis Elizabeth LLC and Sandoz Inc., dated as of September 19, 2012, and all amendments, exhibits, attachments, agreements, and schedules thereto;

related to the Generic Products (Group Two) Assets that have been approved by the Commission to

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accomplish the requirements of this Order. The Generic Products (Group Two) Divestiture Agreements are attached to this Order and contained in Non-Public Appendix B.

- NN. “Geographic Territory” means the United States of America, including all of its territories and possessions, unless otherwise specified.
- OO. “Glipizide Extended Release Products” means all Products in Development, manufactured, marketed or sold by Respondent Actavis pursuant to ANDA No. 076159 and any supplements, amendments, or revisions thereto.
- PP. “Government Entity” means any Federal, state, local or non-U.S. government, or any court, legislature, government agency, or government commission, or any judicial or regulatory authority of any government.
- QQ. “High Volume Account(s)” means any retailer, wholesaler or distributor whose annual aggregate purchase volumes, in units or in dollars, of a Divestiture Product from a Respondent were among the largest customers of the Respondent for that Divestiture Product in the United States of America and which customers, when aggregated together, represent at least 80% of that Respondent’s sales of that Divestiture Product during: (i) 2011 and (ii) the first (6) months of 2012.
- RR. “Interim Monitor” means any monitor appointed pursuant to Paragraph V of this Order or Paragraph III of the related Order to Maintain Assets.
- SS. “Isradipine Products” means all Products in Development, manufactured, marketed or sold pursuant to ANDA No. 77-169 and any supplements, amendments, or revisions thereto.
- TT. “Isradipine Product Assets” means all rights, title and interest in and to all assets and rights solely and

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exclusively related to the Isradipine Products. “Isradipine Product Assets” includes, without limitation,

1. any rights to research, Develop, manufacture, distribute, promote, market, or sell the Isradipine Products in the Geographic Territory;
2. any rights to any future interest or profits in the Isradipine Products;
3. any rights to any Confidential Business Information related to the Isradipine Products;
4. any rights to consent to the offer to sell, or sale of, the Isradipine Products;
5. any rights to consent to the offer to sell, or sale of, any asset solely and exclusively related to the Isradipine Products; and
6. any other rights that are solely and exclusively related to the Isradipine Products that were either granted to, or reserved by, the Respondent Actavis pursuant to the *Asset Purchase Agreement* between Actavis Totowa LLC and Mikah Pharma LLC dated June 16, 2010. This agreement is attached to this Order and contained in Non-Public Appendix C.

UU. “Isradipine Product Divestiture Agreement” means the *Amendment and Waiver to the Asset Purchase Agreement* (referencing the Asset Purchase Agreement dated June 16, 2010 between the parties) executed by Actavis Inc. and agreed and accepted by Mikah Pharma LLC, dated August 27, 2012. The Isradipine Divestiture Agreement is attached to this Order and contained in Non-Public Appendix C.

VV. “Law” means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.

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- WW. “Lorazepam Products” means all Products in Development, manufactured, marketed or sold by Respondent Actavis pursuant to the following ANDAs:
1. ANDA No. 071403 and any supplements, amendments, or revisions thereto;
 2. ANDA No. 071404 and any supplements, amendments, or revisions thereto; and
 3. ANDA No. 071141 and any supplements, amendments, or revisions thereto.
- XX. “Loxapine Products” means all Products in Development, manufactured, marketed or sold pursuant to ANDA No. 76-868 and any supplements, amendments, or revisions thereto.
- YY. “Loxapine Product Assets” means all rights, title and interest in and to all assets and rights solely and exclusively related to the Loxapine Products. “Loxapine Product Assets, includes, without limitation,
1. any rights to research, Develop, manufacture, distribute, promote, market, or sell the Loxapine Products in the Geographic Territory;
 2. any rights to any future interest or profits in the Loxapine Products;
 3. any rights to any Confidential Business Information related to the Loxapine Products;
 4. any rights to consent to the offer to sell, or sale of, the Loxapine Products;
 5. any rights to consent to the offer to sell, or sale of, any asset solely and exclusively related to the Loxapine Products; and

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6. any other rights that are solely and exclusively related to the Loxapine Products that were either granted to, or reserved by, the Respondent Actavis pursuant to the *Asset Purchase Agreement* between Actavis Totowa LLC and Mikah Pharma LLC dated August 26, 2011. This agreement is attached to this Order and contained in Non-Public Appendix C.
- ZZ. “Loxapine Product Divestiture Agreement” means the *Amendment and Waiver to the Asset Purchase Agreement* (referencing the *Asset Purchase Agreement* dated August 26, 2011, between the parties) executed by Actavis Inc. and agreed and accepted by Mikah Pharma LLC, dated August 27, 2012. The Loxapine Divestiture Agreement is attached to this Order and contained in Non-Public Appendix C.
- AAA. “Manufacturing Designee” means any Person, other than a Respondent, that has been designated by an Acquirer to manufacture a Divestiture Product for that Acquirer.
- BBB. “Methylphenidate Hydrochloride Extended Release Products” means all Products in Development, manufactured, marketed or sold by Respondent Actavis that contain the active pharmaceutical ingredient Methylphenidate and that are in Development using an extended-release delivery system and to be indicated for the treatment of attention deficit hyperactivity disorder.
- CCC. “Metoclopramide Hydrochloride Products” means all Products in Development, manufactured, marketed or sold by Respondent Actavis pursuant to ANDA No. 070581 and any supplements, amendments, or revisions thereto.
- DDD. “Mikah Pharma” means Mikah Pharma LLC is a limited liability company organized, existing and doing business under and by virtue of the laws of the

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State of Delaware, with its headquarter address located at 20 Kilmer Drive, Hillsborough, New Jersey 08844.

- EEE. “Morphine Sulphate Extended Release Products” means all Products in Development, manufactured, marketed or sold by Respondent Watson pursuant to ANDA No. 200812 and any supplements, amendments, or revisions thereto.
- FFF. “Morphine Sulphate Naltrexone Extended Release Products” means all Products in Development, manufactured, marketed or sold pursuant to NDA No. 22-321 and any supplements, amendments, or revisions thereto.
- GGG. “Morphine Sulphate Naltrexone Extended Release Product Agreement” means the *Development and Manufacturing Services Agreement* by and between Actavis Elizabeth LLC and Alpharma Pharmaceuticals LLC, dated February 1, 2008. The Morphine Sulphate Naltrexone Extended Release Product Agreement is attached to this Order and contained in Non-Public Appendix D.
- HHH. “Morphine Sulphate Naltrexone Extended Release Product Divestiture Agreement” means the *Second Amendment to Development and Manufacturing Services Agreement* by and between Pfizer Pharmaceuticals Inc. and Actavis Elizabeth LLC, dated September 24, 2012, (referencing the Morphine Sulphate Naltrexone Extended Release Product Agreement). The Morphine Sulphate Naltrexone Extended Release Product Divestiture Agreement is attached to this Order and contained in Non-Public Appendix D.
- III. “Morphine Sulphate Naltrexone Extended Release Product Assets” means the following:
1. all Product Intellectual Property exclusively related to the Morphine Sulphate Naltrexone Extended Release Products that has been Developed for the

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purposes of the Morphine Sulphate Naltrexone Extended Release Products;

2. exclusive rights to use all equipment that has been improved or modified to manufacture the Morphine Sulphate Naltrexone Extended Release Products where such improvements or modifications to such equipment has been paid for by Pfizer; *provided, however*, that, with the prior approval of Pfizer, Respondents may use such equipment for any other purposes granted to Respondents by Pfizer;
3. rights to move or transfer the above-described equipment, at Respondents' expense, to a facility chosen by Pfizer;
4. rights to move or transfer manufacturing, at Respondents' expense, of the Morphine Sulphate Naltrexone Extended Release Products by Pfizer at any time chosen by Pfizer, during the term of the Morphine Sulphate Naltrexone Extended Release Product Agreement as amended by the Morphine Sulphate Naltrexone Extended Release Product Divestiture Agreement;
5. rights to (i) require Respondents to prepare technical transfer protocols consistent with Technology Transfer Standards, (ii) require Respondents to assist Pfizer in such tech transfer of the manufacturing of the Morphine Sulphate Naltrexone Extended Release Products at any time chosen by Pfizer and at a facility chosen by Pfizer, and (iii) receive such preparation and assistance from the Respondents at no greater than Respondents' Direct Cost, during the term of the Morphine Sulphate Naltrexone Extended Release Product Agreement as amended by the Morphine Sulphate Naltrexone Extended Release Product Divestiture Agreement;

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6. rights to extend the requirement for Respondents to supply the Morphine Sulphate Naltrexone Extended Release Product to Pfizer for term not to exceed four (4) years from the date of first commercial sale of the Morphine Sulphate Naltrexone Extended Release Product as reformulated and relaunched after the Acquisition Date; *provided, however*, that, if the relaunch of the Morphine Sulphate Naltrexone Extended Release Product does not occur within three (3) years of the date of the Morphine Sulphate Naltrexone Extended Release Product Divestiture Agreement, then this requirement for Respondents' to supply such Product to Pfizer shall expire three (3) years from the date of the Morphine Sulphate Naltrexone Extended Release Product Divestiture Agreement;
 7. rights to prohibit Respondents from terminating the Morphine Sulphate Naltrexone Extended Release Product Agreement as a result of the Acquisition;
 8. rights to terminate the Morphine Sulphate Naltrexone Extended Release Product Agreement at will; and
 9. rights to all Confidential Business Information related to the Morphine Sulphate Naltrexone Extended Release Products, and rights to control the use and dissemination thereof.
- JJJ. "NDC Numbers" means the National Drug Code numbers, including both the labeler code assigned by the FDA and the additional numbers assigned by an Application holder as a product code for a specific Product.
- KKK. "Nifedipine Extended Release Products" means all Products in Development, manufactured, marketed or sold by Respondent Actavis pursuant to ANDA No. 077899 and any supplements, amendments, or revisions thereto.

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- LLL. “Order Date” means the date on which this Decision and Order is issued by the Commission to become final and effective.
- MMM. “Order to Maintain Assets” means the Order to Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.
- NNN. “Orders” means this Decision and Order and the related Order to Maintain Assets.
- OOO. “Oxycodone Extended Release Products” means all Products in Development, manufactured, marketed or sold by Respondent Actavis pursuant to ANDA No. 202434 and any supplements, amendments, or revisions thereto.
- PPP. “Oxymorphone Extended Release Products” means all Products in Development, manufactured, marketed or sold by Respondent Watson pursuant to ANDA No. 200792 and any supplements, amendments, or revisions thereto.
- QQQ. “Par” means Par Pharmaceutical, Inc., a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its headquarters address at 300 Tice Boulevard, Woodcliff Lake, New Jersey 07677.
- RRR. “Patent(s)” means all patents, patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention and statutory invention registrations, in each case existing as of the Closing Date (*except* where this Order specifies a different time), and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions, related to any Product of or owned by a

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Respondent as of the Closing Date (*except* where this Order specifies a different time).

- SSS. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, or other business or Government Entity, and any subsidiaries, divisions, groups or affiliates thereof.
- TTT. “Pfizer” means Pfizer Pharmaceuticals Inc., a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its headquarters address at 235 E. 42nd Street, New York, New York 10017.
- UUU. “Product(s)” means any pharmaceutical, biological, or genetic composition containing any formulation or dosage of a compound referenced as its pharmaceutically, biologically, or genetically active ingredient and/or that is the subject of an Application.
- VVV. “Product Approval(s)” means any approvals, registrations, permits, licenses, consents, authorizations, and other approvals, and pending applications and requests therefor, required by applicable Agencies related to the research, Development, manufacture, distribution, finishing, packaging, marketing, sale, storage or transport of the Product within the United States of America, and includes, without limitation, all approvals, registrations, licenses or authorizations granted in connection with any Application.
- WWW. “Product Assumed Contracts” means all of the following contracts or agreements (copies of each such contract to be provided to the Acquirer on or before the Closing Date and segregated in a manner that clearly identifies the purpose(s) of each such contract):
1. that make specific reference to the specified Divestiture Product and pursuant to which any Third Party is obligated to purchase, or has the

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option to purchase without further negotiation of terms, the specified Divestiture Product from a Respondent unless such contract applies generally to the Respondent's sales of Products to that Third Party;

2. pursuant to which a Respondent purchases the active pharmaceutical ingredient(s) or other necessary ingredient(s) or component(s) or had planned to purchase the active pharmaceutical ingredient(s) or other necessary ingredient(s) or component(s) from any Third Party for use in connection with the manufacture of the specified Divestiture Product;
3. relating to any Clinical Trials involving the specified Divestiture Product;
4. with universities or other research institutions for the use of the specified Divestiture Product in scientific research;
5. relating to the particularized marketing of the specified Divestiture Product or educational matters relating solely to the specified Divestiture Product(s);
6. pursuant to which a Third Party manufactures or packages the specified Divestiture Product on behalf of a Respondent;
7. pursuant to which a Third Party provides the Product Manufacturing Technology related to the specified Divestiture Product to a Respondent;
8. pursuant to which a Third Party is licensed by a Respondent to use the Product Manufacturing Technology;
9. constituting confidentiality agreements involving the specified Divestiture Product;

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

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

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

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

YYY. "Product Development Reports" means:

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

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4. all correspondence to a Respondent from the FDA and from a Respondent to the FDA relating to the Application(s) submitted by, on behalf of, or acquired by, the Respondent related to the specified Divestiture Product;
5. annual and periodic reports related to the above-described Application(s), including any safety update reports;
6. FDA approved Product labeling related to the specified Divestiture Product;
7. currently used or planned product package inserts (including historical change of controls summaries) related to the specified Divestiture Product;
8. FDA approved patient circulars and information related to the specified Divestiture Product;
9. adverse event/serious adverse event summaries related to the specified Divestiture Product;
10. summary of Product complaints from physicians related to the specified Divestiture Product;
11. summary of Product complaints from customers related to the specified Divestiture Product;
12. Product recall reports filed with the FDA related to the specified Divestiture Product, and all reports, studies and other documents related to such recalls;
13. investigation reports and other documents related to any out of specification results for any impurities found in the specified Divestiture Product;
14. reports related to the specified Divestiture Product from any consultant or outside contractor engaged to investigate or perform testing for the purposes of resolving any product or process issues, including

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without limitation, identification and sources of impurities;

15. reports of vendors of the active pharmaceutical ingredients, excipients, packaging components and detergents used to produce the specified Divestiture Product that relate to the specifications, degradation, chemical interactions, testing and historical trends of the production of the specified Divestiture Product;
 16. analytical methods development records related to the specified Divestiture Product;
 17. manufacturing batch records related to the specified Divestiture Product;
 18. stability testing records related to the specified Divestiture Product;
 19. change in control history related to the specified Divestiture Product; and
 20. executed validation and qualification protocols and reports related to the specified Divestiture Product.
- ZZZ.* “Product Employee Information” means the following, for each Divestiture Product Core Employee, as and to the extent permitted by Law:
1. a complete and accurate list containing the name of each Divestiture Product Core Employee (including former employees who were employed by the specified Respondent within ninety (90) days of the execution date of any Remedial Agreement);
 2. with respect to each such employee, the following information:
 - a. the date of hire and effective service date;
 - b. job title or position held;

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

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

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

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bring suit against a Third Party for the past, present or future infringement, misappropriation, dilution, misuse or other violations of any of the foregoing;

provided, however, “Product Intellectual Property” *excludes* the corporate names or corporate trade dress of “Watson” or “Actavis”, or the related corporate logos thereof, or the corporate names or corporate trade dress of any other corporations or companies owned or controlled by Respondents or the related corporate logos thereof, or general registered images or symbols by which Watson or Actavis can be identified or defined.

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

1. Patents that are common to a Divestiture Product and a Retained Product;
2. Product Manufacturing Technology that is common to a Divestiture Product and a Retained Product; and
3. for any specified Divestiture Product that is the subject of a risk evaluation mitigation strategy (REMS) that is being prepared for, has been prepared for, submitted to, or approved by the FDA, rights to use such REMS and rights to access all submissions to the FDA related to that REMS.

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

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DDDD. “Product Manufacturing Technology” means:

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

EEEE. “Product Marketing Materials” means all marketing materials used specifically in the marketing or sale of the specified Divestiture Product in the Geographic Territory as of the Closing Date, including, without limitation, all advertising materials, training materials, product data, mailing lists, sales materials (*e.g.*, detailing reports, vendor lists, sales data), marketing information (*e.g.*, competitor information, research data, market intelligence reports, statistical programs (if any) used for marketing and sales research), customer information (including customer net purchase information to be provided on the basis of

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either dollars and/or units for each month, quarter or year), sales forecasting models, educational materials, and advertising and display materials, speaker lists, promotional and marketing materials, Website content and advertising and display materials, artwork for the production of packaging components, television masters and other similar materials related to the specified Divestiture Product.

- FFFF. “Product Research and Development Employees” means all salaried employees of a Respondent who directly have participated in the research, Development, or regulatory approval process, or clinical studies of the specified Divestiture Product (irrespective of the portion of working time involved, unless such participation consisted solely of oversight of legal, accounting, tax or financial compliance) within the eighteen (18) month period immediately prior to the Closing Date.
- GGGG. “Product Scientific and Regulatory Material” means all technological, scientific, chemical, biological, pharmacological, toxicological, regulatory and Clinical Trial materials and information related to the specified Divestiture Product.
- HHHH. “Product Trade Dress” means the current trade dress of the specified Divestiture Product, including, but not limited to, Product packaging, and the lettering of the Product trade name or brand name.
- III. “Product Trademark(s)” means all proprietary names or designations, trademarks, service marks, trade names, and brand names, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights, and the goodwill symbolized thereby and associated therewith, for the specified Divestiture Product(s).
- JJJJ. “Proposed Acquirer” means a Person proposed by a Respondent (or a Divestiture Trustee) to the

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Commission and submitted for the approval of the Commission as the acquirer for particular assets or rights required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed by a Respondent pursuant to this Order.

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

1. any agreement between a Respondent and an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, including without limitation, any agreement to supply specified products or components thereof, and that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission’s determination to make this Order final and effective;
2. any agreement between a Respondent and a Third Party to effect the assignment of assets or rights of the Respondent related to a Divestiture Product to the benefit of an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission’s determination to make this Order final and effective;
3. any agreement between a Respondent and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred,

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delivered, or otherwise conveyed, including without limitation, any agreement by a Respondent to supply specified products or components thereof, and that has been approved by the Commission to accomplish the requirements of this Order; and/or

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

LLLL. “Retained Product” means any Product(s) Developed, manufactured, marketed or sold by a Respondent that is not a Divestiture Product.

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

NNNN. “Rivastigmine Patch Film Products” means all Products in Development, manufactured, marketed or sold by Respondent Actavis pursuant to ANDA No. 202399 and any supplements, amendments, or revisions thereto.

OOOO. “Sandoz” means Sandoz Inc., a subsidiary of Novartis AG, that is organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its headquarters address located at 506 Carnegie Center, Princeton, New Jersey 08540.

PPPP. “Supply Cost” means a cost not to exceed the manufacturer’s average direct per unit cost in United States dollars of manufacturing the specified Divestiture Product for the twelve (12) month period

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immediately preceding the Acquisition Date. “Supply Cost” shall expressly exclude any intracompany business transfer profit; *provided, however*, that in each instance where: (i) an agreement to Contract Manufacture is specifically referenced and attached to this Order, and (ii) such agreement becomes a Remedial Agreement for a Divestiture Product, “Supply Cost” means the cost as specified in such Remedial Agreement for that Divestiture Product.

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

1. designating employees knowledgeable about the Product Manufacturing Technology (and all related intellectual property) related to each of the Divestiture Products who will be responsible for communicating directly with the Acquirer or its Manufacturing Designee, and the Interim Monitor (if one has been appointed), for the purpose of effecting such delivery;
2. preparing technology transfer protocols and transfer acceptance criteria for both the processes and analytical methods related to the specified Divestiture Product that are acceptable to the Acquirer;
3. preparing and implementing a detailed technological transfer plan that contains, *inter alia*, the transfer of all relevant information, all appropriate documentation, all other materials, and projected time lines for the delivery of all such Product Manufacturing Technology (including all related intellectual property) to the Acquirer or its Manufacturing Designee; and

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4. providing, in a timely manner, assistance and advice to enable the Acquirer or its Manufacturing Designee to:
 - a. manufacture the specified Divestiture Product in the quality and quantities achieved by the Respondent, or the manufacturer and/or developer of such Divestiture Product;
 - b. obtain any Product Approvals necessary for the Acquirer or its Manufacturing Designee, to manufacture, distribute, market, and sell the specified Divestiture Product in commercial quantities and to meet all Agency-approved specifications for such Divestiture Product; and
 - c. receive, integrate, and use all such Product Manufacturing Technology and all such intellectual property related to the specified Divestiture Product.

RRRR. “Third Party(ies)” means any non-governmental Person other than the following: a Respondent; or, the Acquirer of particular assets or rights pursuant to this Order.

SSSS. “Ursodiol Products” means all Products in Development, manufactured, marketed or sold by Respondent Actavis pursuant to ANDA No. 202540 and any supplements, amendments, or revisions thereto.

TTTT. “Varenicline Tartrate Products” means all Products in Development, manufactured, marketed or sold by Respondent Actavis pursuant to ANDA No. 201785 and any supplements, amendments, or revisions thereto.

UUUU. “Website” means the content of the Website(s) located at the Domain Names, the Domain Names, and all copyrights in such Website(s), to the extent owned by a Respondent; *provided, however*, “Website” *excludes*

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the following: (i) content owned by Third Parties and other Product Intellectual Property not owned by a Respondent that are incorporated in such Website(s), such as stock photographs used in the Website(s), *except* to the extent that a Respondent can convey its rights, if any, therein; or (ii) content unrelated to any of the Divestiture Products.

II.

IT IS FURTHER ORDERED that the provisions of this Paragraph II shall only apply to those Divestiture Products that are contained in Generic Products (Group One) or Generic Products (Group Two), and:

- A. Not later than the earlier of: (i) ten (10) days after the Acquisition Date or (ii) ten (10) days after the Order Date, Respondents shall divest the Generic Products (Group One) Assets and grant a Divestiture Product License for use in connection with the commercialization of the Generic Products (Group One), absolutely and in good faith, to Par pursuant to, and in accordance with, the Generic Products (Group One) Divestiture Agreements (which agreements shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of Par or to reduce any obligations of Respondents under such agreements), and each such agreement, if it becomes a Remedial Agreement related to the Generic Products (Group One) Assets is incorporated by reference into this Order and made a part hereof;

provided, however, that if Respondents have divested the Generic Products (Group One) Assets and granted the above-described Divestiture Product License to Par prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondents that Par is not an acceptable purchaser of the Generic Products (Group One) Assets, then Respondents shall

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immediately rescind the transaction with Par, in whole or in part, as directed by the Commission, and shall divest the Generic Products (Group One) Assets and grant the above-described Divestiture Product License within one hundred eighty (180) days from the Order Date, absolutely and in good faith, at no minimum price, to an Acquirer(s) that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission;

provided further, however, that if Respondents have divested the Generic Products (Group One) Assets and granted the above-described Divestiture Product License to Par prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondents that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Generic Products (Group One) Assets or grant of the above-described Divestiture Product License, as applicable, to Par (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

- B. Not later than the earlier of: (i) ten (10) days after the Acquisition Date or (ii) ten (10) days after the Order Date, Respondents shall divest the Generic Products (Group Two) Assets and grant a Divestiture Product License for use in connection with the commercialization of the Generic Products (Group Two), absolutely and in good faith, to Sandoz pursuant to, and in accordance with, the Generic Products (Group Two) Divestiture Agreements (which agreements shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of Sandoz or to reduce any obligations of Respondents under such agreements), and each such agreement, if it becomes a

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Remedial Agreement related to the Generic Products (Group Two) Assets is incorporated by reference into this Order and made a part hereof;

provided, however, that if Respondents have divested the Generic Products (Group Two) Assets and granted the above-described Divestiture Product License to Sandoz prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondents that Sandoz is not an acceptable purchaser of the Generic Products (Group Two) Assets, then Respondents shall immediately rescind the transaction with Sandoz, in whole or in part, as directed by the Commission, and shall divest the Generic Products (Group Two) Assets and grant the above-described Divestiture Product License within one hundred eighty (180) days from the Order Date, absolutely and in good faith, at no minimum price, to an Acquirer(s) that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission;

provided further, however, that if Respondents have divested the Generic Products (Group Two) Assets and granted the above-described Divestiture Product License to Sandoz prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondents that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Generic Products (Group Two) Assets or grant of the above-described Divestiture Product License, as applicable, to Sandoz (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

- C. Prior to the Closing Date, Respondents shall secure all consents and waivers from all Third Parties that are

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necessary to permit Respondents to divest the assets required to be divested pursuant to this Order to an Acquirer, and to permit the relevant Acquirer to continue the research, Development, manufacture, sale, marketing or distribution of the Divestiture Product(s) being acquired by that Acquirer;

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

- D. Respondents shall provide, or cause to be provided to each Acquirer in a manner consistent with the Technology Transfer Standards the following:
1. all Product Manufacturing Technology (including all related intellectual property) related to the Divestiture Product(s) being acquired by that Acquirer; and
 2. all rights to all Product Manufacturing Technology (including all related intellectual property) that is owned by a Third Party and licensed by a Respondent related to the Divestiture Products being acquired by that Acquirer.

Respondents shall obtain any consents from Third Parties required to comply with this provision.

- E. Respondents shall:
1. upon reasonable written notice and request from an Acquirer to Respondents, Contract Manufacture and deliver to the requesting Acquirer, in a timely manner and under reasonable terms and conditions, a supply of each of the Contract Manufacture Products related to the Divestiture Products acquired by that Acquirer at Respondents' Supply Cost, for a period of time sufficient to allow that Acquirer (or the Manufacturing Designee of the

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Acquirer) to obtain all of the relevant Product Approvals necessary to manufacture in commercial quantities, and in a manner consistent with cGMP, the finished drug product independently of Respondents and to secure sources of supply of the active pharmaceutical ingredients, excipients, other ingredients, and necessary components listed in the relevant Respondent's Application(s) for the Divestiture Product(s) acquired by that Acquirer from Persons other than the Respondents;

2. make representations and warranties to the Acquirer(s) that the Contract Manufacture Product(s) supplied by a Respondent pursuant to a Remedial Agreement meet the relevant Agency-approved specifications. For the Contract Manufacture Product(s) to be marketed or sold in the Geographic Territory, the Respondent shall agree to indemnify, defend and hold the Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the Contract Manufacture Product(s) supplied to the Acquirer pursuant to a Remedial Agreement by a Respondent to meet cGMP. This obligation may be made contingent upon the Acquirer giving the Respondent prompt written notice of such claim and cooperating fully in the defense of such claim. The Remedial Agreement shall be consistent with the obligations assumed by Respondents under this Order;

provided, however, that Respondents may reserve the right to control the defense of any such claim, including the right to settle the claim, so long as such settlement is consistent with Respondents' responsibilities to supply the Contract Manufacture Products in the manner required by this Order; *provided further, however,* that this obligation shall not require Respondents to be liable for any negligent act or omission of the Acquirer or for any representations and warranties, express or implied, made by the

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Acquirer that exceed the representations and warranties made by a Respondent to the Acquirer;

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

3. give priority to supplying a Contract Manufacture Product to the relevant Acquirer over manufacturing and supplying of Products for Respondents' own use or sale;
4. make representations and warranties to each Acquirer that Respondents shall hold harmless and indemnify the Acquirer for any liabilities or loss of profits resulting from the failure by Respondents to deliver the Contract Manufacture Products in a timely manner as required by the Remedial Agreement(s) unless Respondents can demonstrate that their failure was beyond the control of Respondents and not the result of negligence or willful misconduct by Respondents;

provided, however, that in each instance where: (i) an agreement to divest relevant assets or to Contract Manufacture is specifically referenced and attached to this Order and (ii) such agreement becomes a Remedial Agreement for a Divestiture Product, each such agreement may contain limits on a Respondents' aggregate liability for such a failure;

5. during the term of any agreement to Contract Manufacture between a Respondent and an Acquirer, upon written request of that Acquirer or the Interim Monitor (if any has been appointed),

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make available to the Acquirer and the Interim Monitor (if any has been appointed) all records that relate to the manufacture of the relevant Contract Manufacture Products that are generated or created after the Closing Date;

6. during the term of any agreement to Contract Manufacture between a Respondent and an Acquirer, maintain manufacturing facilities or manufacturing lines necessary to manufacture each of the relevant Contract Manufacture Products in finished form, *i.e.*, suitable for sale to the ultimate consumer/patient; and, if
 - a. the Respondents' fail to maintain such manufacturing facility or manufacturing line for the Contract Manufacture Product(s), and therefore become unable to supply the Contract Manufacture Product(s) to an Acquirer for a period of more than sixty (60) consecutive days after the delivery date requested by the Acquirer, and
 - b. the Respondents manufacture a generic equivalent of such Contract Manufacture Product(s) at a different facility or on a different line, then,

at the request of the relevant Acquirer, Respondents shall supply a generic equivalent of such Contract Manufacture Product to such Acquirer from Respondents' facility or line that manufactures such generic equivalent Product(s), unless Respondents can demonstrate that their failure to maintain the primary manufacturing facility or manufacturing line was beyond the control of Respondents and not the result of negligence or willful misconduct by Respondents; and

7. during the term of any agreement to Contract Manufacture between a Respondent and an

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Acquirer, provide consultation with knowledgeable employees of the Respondent and training, at the written request of the Acquirer and at a facility chosen by the Acquirer, for the purposes of enabling that Acquirer (or the Manufacturing Designee of that Acquirer) to obtain all Product Approvals to manufacture the relevant Divestiture Products in the same quality achieved by, or on behalf of, a Respondent and in commercial quantities, and in a manner consistent with cGMP, independently of Respondents and sufficient to satisfy management of the Acquirer that its personnel (or the Manufacturing Designee's personnel) are adequately trained in the manufacture of the relevant Divestiture Products;

The foregoing provisions, II.E.1. - 7., shall remain in effect with respect to each Divestiture Product until the earliest of: (i) the date each Acquirer (or the Manufacturing Designee(s) of that Acquirer), respectively, is approved by the FDA to manufacture and sell such Divestiture Product in the United States and able to manufacture such Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents; (ii) the date the Acquirer of a particular Divestiture Product notifies the Commission and the Respondents of its intention to abandon its efforts to manufacture such Divestiture Product; (iii) the date of written notification from staff of the Commission that the Interim Monitor, in consultation with staff of the Commission, has determined that the Acquirer of a particular Divestiture Product has abandoned its efforts to manufacture such Divestiture Product; or (iv) the date five (5) years from the Closing Date.

- F. Respondents shall:
1. submit to each Acquirer, at Respondents' expense, all Confidential Business Information related to the Divestiture Products and related assets being acquired by that Acquirer;

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2. deliver such Confidential Business Information to that Acquirer:
 - a. in good faith;
 - b. in a timely manner, *i.e.*, as soon as practicable, avoiding any delays in transmission of the respective information; and
 - c. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;
3. pending complete delivery of all such Confidential Business Information to the relevant Acquirer, provide that Acquirer and the Interim Monitor (if any has been appointed) with access at reasonable business hours to all such Confidential Business Information and Respondents' employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to the relevant Divestiture Products that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order;
4. not use, directly or indirectly, any such Confidential Business Information related to the research, Development, manufacturing, marketing, or sale of the Divestiture Products other than as necessary to comply with the following:
 - a. the requirements of this Order;
 - b. Respondents' obligations to the Acquirer of the Divestiture Product and related assets under the terms of any related Remedial Agreement; or
 - c. applicable Law;
5. not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person except the Acquirer of the Divestiture

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Product and related assets or other Persons specifically authorized by that Acquirer to receive such information; and

6. not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the marketing or sales of the Divestiture Products to Respondents' employees responsible for making pricing decisions related to those Retained Products that are prescription pharmaceuticals for the treatment of the same disease(s) as the Divestiture Products;

provided, however, that the restrictions contained in this Order regarding the Respondents' use, conveyance, provision, or disclosure of Confidential Business Information shall not apply to the following: (i) information that subsequently falls within the public domain through no violation of this Order or breach of confidentiality or non-disclosure agreement with respect to such information by the Respondents; (ii) information that is required by Law or rules of an applicable stock exchange to be publicly disclosed; (iii) information specifically excluded from the Divestiture Product Assets; and (iv) all intellectual property licensed on a non-exclusive basis to the particular Acquirer.

- G. Respondents shall require that each of Respondents' employees that has had access to Confidential Business Information within the one (1) year period prior to the Acquisition Date sign a confidentiality agreement pursuant to which that employee shall be required to maintain all Confidential Business Information related to the Divestiture Products as strictly confidential, including the nondisclosure of that information to all other employees, executives or other personnel of Respondents (other than as necessary to comply with the requirements of the Orders).

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- H. Not later than thirty (30) days after the Acquisition Date, Respondents shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information related to the Divestiture Products by Respondents' personnel to all of Respondents' employees who are covered by Paragraph II.F.6. Respondents shall give the above-described notification by e-mail with return receipt requested or similar transmission, and keep a file of those receipts for one (1) year after the date the Order to Maintain Assets is issued by the Commission to become final and effective. Respondents shall provide a copy of the notification to the relevant Acquirer. Respondents shall maintain complete records of all such notifications at Respondents' registered office within the United States and shall provide an officer's certification to the Commission stating that the acknowledgment program has been implemented and is being complied with. Respondents shall provide the relevant Acquirer with copies of all certifications, notifications and reminders sent to Respondents' personnel.
- I. Respondents shall not enforce any agreement against a Third Party or an Acquirer to the extent that such agreement may limit or otherwise impair the ability of that Acquirer to use or to acquire from the Third Party the Product Manufacturing Technology (including all related intellectual property) related to the Divestiture Products acquired by that Acquirer. Such agreements include, but are not limited to, agreements with respect to the disclosure of Confidential Business Information related to such Product Manufacturing Technology.
- J. Not later than ten (10) days after the Closing Date, Respondents shall grant a release to each Third Party that is subject to an agreement as described in Paragraph II.I. that allows the Third Party to provide the relevant Product Manufacturing Technology to that Acquirer. Within five (5) days of the execution of

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each such release, Respondents shall provide a copy of the release to that Acquirer.

K. Respondents shall:

1. for each Divestiture Product, for a period of six (6) months from the Closing Date or until the hiring of twenty (20) Divestiture Product Core Employees by an Acquirer or its Manufacturing Designee, whichever occurs earlier, provide that Acquirer with the opportunity to enter into employment contracts with the Divestiture Product Core Employees related to the Divestiture Products and assets acquired by that Acquirer. Each of these periods is hereinafter referred to as the “Divestiture Product Core Employee Access Period(s)”; and
2. not later than the earlier of the following dates: (i) ten (10) days after notice by staff of the Commission to Respondents to provide the Product Employee Information; or (ii) ten (10) days after written request by an Acquirer, provide that Acquirer or Proposed Acquirer(s) with the Product Employee Information related to the Divestiture Product Core Employees. Failure by Respondents to provide the Product Employee Information for any Divestiture Product Core Employee within the time provided herein shall extend the Divestiture Product Core Employee Access Period(s) with respect to that employee in an amount equal to the delay;
3. during the Divestiture Product Core Employee Access Period(s), not interfere with the hiring or employing by the Acquirer or its Manufacturing Designee of the Divestiture Product Core Employees, and remove any impediments within the control of Respondents that may deter these employees from accepting employment with that Acquirer or its Manufacturing Designee, including, but not limited to, any noncompete or nondisclosure provision of employment with

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respect to a Divestiture Product or other contracts with Respondents that would affect the ability or incentive of those individuals to be employed by that Acquirer or its Manufacturing Designee. In addition, Respondents shall not make any counteroffer to such a Divestiture Product Core Employee who has received a written offer of employment from that Acquirer or its Manufacturing Designee;

provided, however, that, subject to the conditions of continued employment prescribed in this Order, this Paragraph shall not prohibit Respondents from continuing to employ any Divestiture Product Core Employee under the terms of that employee's employment with Respondents prior to the date of the written offer of employment from the Acquirer or its Manufacturing Designee to that employee;

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

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

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

provided, however, Respondents may hire any former Divestiture Product Employee whose employment has been terminated by the Acquirer or its Manufacturing Designee or who independently applies for employment with Respondent, as long as that employee was not solicited in violation of the nonsolicitation requirements contained herein;

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

- L. Respondents shall not join, file, prosecute or maintain any suit, in law or equity, against an Acquirer or the Divestiture Product Releasee(s) of that Acquirer for the research, Development, manufacture, use, import, export, distribution, or sale of the Divestiture Product(s) acquired by that Acquirer under the following:
 1. any Patent owned or licensed by Respondents as of the day after the Acquisition Date (*excluding* those Patents that claim inventions conceived by and

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reduced to practice after the Acquisition Date) that claims a method of making, using, or administering, or a composition of matter, relating to the Divestiture Product(s) acquired by that Acquirer, or that claims a device relating to the use thereof;

2. any Patent owned or licensed by Respondents at any time after the Acquisition Date (*excluding* those Patents that claim inventions conceived by and reduced to practice after the Acquisition Date) that claim any aspect of the research, Development, manufacture, use, import, export, distribution, or sale of the Divestiture Product(s) acquired by that Acquirer;

if such suit would have the potential to interfere with that Acquirer's freedom to practice the following: (i) the research, Development, or manufacture of the Divestiture Product(s) anywhere in the World for the purposes of marketing or sale in the United States of America; or (ii) the use within, import into, export from, or the supply, distribution, or sale within, the United States of America of a particular Divestiture Product. Respondents shall also covenant to that Acquirer that as a condition of any assignment, transfer, or license to a Third Party of the above-described Patents, the Third Party shall agree to provide a covenant whereby the Third Party covenants not to sue that Acquirer or the related Divestiture Product Releasee(s) under such Patents, if the suit would have the potential to interfere with that Acquirer's freedom to practice the following: (i) the research, Development, or manufacture of the Divestiture Product(s) anywhere in the World for the purposes of marketing or sale in the United States of America; or (ii) the use within, import into, export from, or the supply, distribution, or sale within, the United States of America of a particular Divestiture Product;

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- M. Upon reasonable written notice and request from an Acquirer to Respondents, Respondents shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of Respondents to assist that Acquirer to defend against, respond to, or otherwise participate in any litigation brought by a Third Party related to the Product Intellectual Property related to any of the Divestiture Products acquired by that Acquirer, if such litigation would have the potential to interfere with the Acquirer's freedom to practice the following: (i) the research, Development, or manufacture of the Divestiture Product acquired by that Acquirer; or (ii) the use, import, export, supply, distribution, or sale of that Divestiture Product within the Geographic Territory.
- N. For any patent infringement suit in which a Respondent is alleged to have infringed a Patent of a Third Party prior to the Closing Date or for such suit as a Respondent has prepared or is preparing as of the Closing Date to defend against such infringement claim(s), and where such a suit would have the potential to interfere with the relevant Acquirer's freedom to practice the following: (i) the research, Development, or manufacture of the Divestiture Product(s) acquired by that Acquirer; or (ii) the use, import, export, supply, distribution, or sale of that Divestiture Product(s), Respondents shall:
1. cooperate with that Acquirer and provide any and all necessary technical and legal assistance, documentation and witnesses from Respondents in connection with obtaining resolution of any pending patent litigation involving that Divestiture Product;
 2. waive conflicts of interest, if any, to allow the Respondents' outside legal counsel to represent the relevant Acquirer in any ongoing patent litigation involving that Divestiture Product; and

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3. permit the transfer to that Acquirer of all of the litigation files and any related attorney work-product in the possession of Respondents' outside counsel relating to that Divestiture Product.
- O. Respondents shall not, in the Geographic Territory:
1. use the Product Trademarks contained in the Product Intellectual Property or any mark confusingly similar to such Product Trademarks, as a trademark, trade name, or service mark;
 2. attempt to register such Product Trademarks;
 3. attempt to register any mark confusingly similar to such Product Trademarks;
 4. challenge or interfere with the relevant Acquirer's use and registration of such Product Trademarks;
or
 5. challenge or interfere with the relevant Acquirer's efforts to enforce its trademark registrations for and trademark rights in such Product Trademarks against Third Parties;

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

- P. The purpose of the divestiture of the Generic Products (Group One) Assets and the Generic Products (Group Two) Assets and the transfer and delivery of the related Product Manufacturing Technology and the related obligations imposed on the Respondents by this Order is:
1. to ensure the continued use of such assets in the research, Development, and manufacture of the respective Divestiture Products and for the

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purposes of the business associated with such Divestiture Products within the Geographic Territory;

2. to provide for the future use of such assets for the distribution, sale and marketing of the respective Divestiture Products in the Geographic Territory;
3. to create a viable and effective competitor, that is independent of the Respondents:
 - a. in the research, Development, and manufacture of each Divestiture Product for the purposes of the business associated with the respective Divestiture Products within the Geographic Territory; and
 - b. the distribution, sale and marketing of the respective Divestiture Products in the Geographic Territory; and,
4. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

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

- A. Not later than the earlier of: (i) ten (10) days after the Acquisition Date or (ii) ten (10) days after the Order Date, Respondents shall divest the Isradipine Product Assets (to the extent that such assets are not already owned, controlled or in the possession of Mikah Pharma), absolutely and in good faith, to Mikah Pharma pursuant to, and in accordance with, the Isradipine Product Divestiture Agreement (which agreement shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of Mikah Pharma or to

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reduce any obligations of Respondents under such agreement) and the agreement, if it becomes a Remedial Agreement related to the Isradipine Product Assets is incorporated by reference into this Order and made a part hereof;

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

provided further, however, neither this Order nor any Remedial Agreement related to the divestiture of the Isradipine Product Assets shall be construed to confer any rights to Mikah Pharma to restrict the Respondents from researching, Developing, manufacturing, distributing, marketing, or selling a Product that is the generic equivalent of the Isradipine Products.

- B. Not later than the earlier of: (i) ten (10) days after the Acquisition Date or (ii) ten (10) days after the Order Date, Respondents shall divest the Loxapine Product Assets (to the extent that such assets are not already owned, controlled or in the possession of Mikah Pharma), absolutely and in good faith, to Mikah Pharma pursuant to, and in accordance with, the Loxapine Product Divestiture Agreement (which agreement shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of Mikah Pharma or to reduce any obligations of Respondents under such agreement) and the agreement, if it becomes a

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Remedial Agreement related to the Loxapine Product Assets is incorporated by reference into this Order and made a part hereof;

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

provided further, however, neither this Order nor any Remedial Agreement related to the divestiture of the Loxapine Product Assets shall be construed to confer any rights to Mikah Pharma to restrict the Respondents from researching, Developing, manufacturing, distributing, marketing, or selling a Product that is the generic equivalent of the Loxapine Products.

- C. The purpose of the divestiture of the Isradipine Product Assets and the Loxapine Product Assets is:
1. to ensure the continued use of such assets in the research, Development, and manufacture of the Isradipine Products and the Loxapine Products and for the purposes of the business associated with each of these Products within the Geographic Territory;
 2. to provide for the future use of such assets for the distribution, sale and marketing of the Isradipine Products and the Loxapine Products in the Geographic Territory;

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3. to create a viable and effective competitor, that is independent of the Respondents:
 - a. in the research, Development, and manufacture of the Isradipine Products and the Loxapine Products for the purposes of the business associated with these Products within the Geographic Territory; and
 - b. the distribution, sale and marketing of the Isradipine Products and the Loxapine Products in the Geographic Territory; and,
4. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

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

- A. Not later than the earlier of: (i) ten (10) days after the Acquisition Date or (ii) ten (10) days after the Order Date, Respondents shall divest the Morphine Sulphate Naltrexone Extended Release Product Assets and grant a Divestiture Product License for use in connection with the commercialization of the Morphine Sulphate Naltrexone Extended Release Products, absolutely and in good faith, to Pfizer pursuant to, and in accordance with, the Morphine Sulphate Naltrexone Extended Release Product Divestiture Agreement (which agreement shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of Pfizer or to reduce any obligations of Respondents under such agreement), and the agreement, if it becomes a Remedial Agreement related to the Morphine Sulphate Naltrexone Extended Release Product is incorporated by reference into this Order and made a part hereof;

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provided, however, that if Respondents have divested the Morphine Sulphate Naltrexone Extended Release Product Assets and granted the above-described Divestiture Product License to Pfizer prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondents that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Morphine Sulphate Naltrexone Extended Release Product Assets or grant of the above-described Divestiture Product License, as applicable, to Pfizer (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

provided further, however, neither this Order nor any Remedial Agreement related to the divestiture of the Morphine Sulphate Naltrexone Extended Release Product Assets shall be construed to confer any rights to Pfizer to restrict the Respondents from researching, Developing, manufacturing, distributing, marketing, or selling a Product that is the generic equivalent of the Morphine Sulphate Naltrexone Extended Release Products.

- B. Respondents shall:
1. upon request by Pfizer, submit to Pfizer, at Respondents' expense, any Confidential Business Information related to the Morphine Sulphate Naltrexone Extended Release Products;
 2. deliver such Confidential Business Information to Pfizer:
 - a. in good faith;

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- b. in a timely manner, *i.e.*, as soon as practicable, avoiding any delays in transmission of the respective information; and
 - c. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;
3. pending complete delivery of all such requested Confidential Business Information to Pfizer, provide Pfizer with access at reasonable business hours to all such Confidential Business Information and Respondents' employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to the Morphine Sulphate Naltrexone Extended Release Products that contain such requested Confidential Business Information and facilitating the delivery in a manner consistent with this Order;
4. upon request by Pfizer, destroy any and all reproductions or summaries of any Confidential Business Information related to the Morphine Sulphate Naltrexone Extended Release Products that may have been prepared, in which event such destruction shall be promptly carried out;
5. not use, directly or indirectly, any such Confidential Business Information related to the research, Development, manufacturing, marketing, or sale of the Morphine Sulphate Naltrexone Extended Release Products other than as necessary to comply with the following:
 - a. the requirements of this Order;
 - b. Respondents' obligations to Pfizer under the terms of any related Remedial Agreement or Respondents' ongoing obligations to Pfizer under the terms of the Morphine Sulphate Naltrexone Extended Release Product Agreement; or

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- c. applicable Law;
6. not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person except Pfizer or other Persons specifically authorized by Pfizer to receive such information; and
7. not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information any of Respondents' employees other than those employees specifically authorized by Pfizer to receive such information;

provided, however, that the restrictions contained in this Order regarding the Respondents' use, conveyance, provision, or disclosure of "Confidential Business Information" shall not apply to the following: (i) information that subsequently falls within the public domain through no violation of this Order or breach of confidentiality or non-disclosure agreement with respect to such information by the Respondents; (ii) information that is required by Law or rules of an applicable stock exchange to be publicly disclosed; and (iii) all intellectual property licensed on a non-exclusive basis to Pfizer.

- C. Respondents shall require that each of Respondents' employees that has had access to, and/or is authorized by Pfizer to receive, Confidential Business Information related to the Morphine Sulphate Naltrexone Extended Release Products sign a confidentiality agreement pursuant to which that employee shall be required to maintain all Confidential Business Information related to the Morphine Sulphate Naltrexone Extended Release Products as strictly confidential, including the nondisclosure of that information to all other employees, executives or other personnel of Respondents (other than as necessary to comply with the requirements of the Orders).

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- D. Not later than thirty (30) days after the Acquisition Date, Respondents shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information related to the Morphine Sulphate Naltrexone Extended Release Products by Respondents' personnel to all of Respondents' who have had access to Confidential Business Information related to the Morphine Sulphate Naltrexone Extended Release Products since February 1, 2008. Respondents shall give the above-described notification by e-mail with return receipt requested or similar transmission, and keep a file of those receipts for one (1) year after the Order Date. Respondents shall provide a copy of the notification to Pfizer. Respondents shall maintain complete records of all such notifications at Respondents' registered office within the United States and shall provide an officer's certification to the Commission stating that the acknowledgment program has been implemented and is being complied with. Respondents shall provide Pfizer with copies of all certifications, notifications and reminders sent to Respondents' personnel.
- E. The purpose of the divestiture of the Morphine Sulphate Naltrexone Extended Release Product Assets and the related obligations imposed on the Respondents by this Order is:
1. to ensure the continued use of such assets in the research, Development, and manufacture of the Morphine Sulphate Naltrexone Extended Release Products and for the purposes of the business associated with each of these Products within the Geographic Territory;
 2. to provide for the future use of such assets for the distribution, sale and marketing of the Morphine Sulphate Naltrexone Extended Release Products in the Geographic Territory;
 3. to create a viable and effective competitor, that is independent of the Respondents:

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- a. in the research, Development, and manufacture of the Morphine Sulphate Naltrexone Extended Release Products for the purposes of the business associated with these Products within the Geographic Territory; and
 - b. the distribution, sale and marketing of the Morphine Sulphate Naltrexone Extended Release Products in the Geographic Territory; and,
4. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

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

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

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

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

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

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

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

4. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with their obligations under the Order, including, but not limited to, their obligations related to the relevant assets. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Order.
5. The Interim Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The

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Interim Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.

6. Respondents shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.
7. Respondents shall report to the Interim Monitor in accordance with the requirements of the Orders and as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondent, and any reports submitted by the Acquirer with respect to the performance of Respondents' obligations under the Orders or the Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Orders;

provided, however, beginning ninety (90) days after Respondents have filed their final report pursuant to Paragraph X.B., and every ninety (90) days thereafter, the Interim Monitor shall report in writing to the Commission concerning progress by the relevant Acquirer toward obtaining FDA approval to

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manufacture each Divestiture Product and obtaining the ability to manufacture each Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents.

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

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

- A. If Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver or otherwise convey the Divestiture Product Assets as required by this Order, the Commission may appoint a trustee (“Divestiture Trustee”) to assign, grant, license, divest, transfer, deliver or otherwise convey these assets in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.
- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent Watson which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondent Watson has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent Watson of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

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- C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed.
 2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however*, the Commission may extend the divestiture period only two (2) times.
 3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents

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

4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however,* if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondents from among those approved by the Commission; *provided further, however,* that Respondents shall select such Person within five (5) days after receiving notification of the Commission's approval.
5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of 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

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as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

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

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(60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

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

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

- A. Until Respondents complete the divestitures required by this Order and fully provides, or causes to be provided, the Product Manufacturing Technology related to a particular Divestiture Product to the relevant Acquirer,
 1. Respondents shall take actions as are necessary to:
 - a. maintain the full economic viability and marketability of the businesses associated with that Divestiture Product;
 - b. minimize any risk of loss of competitive potential for that business;

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- c. prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to that Divestiture Product;
 - d. ensure the assets related to each Divestiture Product are provided to the relevant Acquirer in a manner without disruption, delay, or impairment of the regulatory approval processes related to the business associated with each Divestiture Product;
 - e. ensure the completeness of the transfer and delivery of the Product Manufacturing Technology; and
2. Respondents shall not sell, transfer, encumber or otherwise impair the assets required to be divested (other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the businesses associated with that Divestiture Product.

VIII.

IT IS FURTHER ORDERED that, in addition to any other requirements and prohibitions relating to Confidential Business Information in this Order, Respondents shall assure that Respondents' counsel (including in-house counsel under appropriate confidentiality arrangements) shall not retain unredacted copies of documents or other materials provided to an Acquirer or access original documents provided to an Acquirer, except under circumstances where copies of documents are insufficient or otherwise unavailable, and for the following purposes:

- A. To assure Respondents' compliance with any Remedial Agreement, this Order, any Law (including, without limitation, any requirement to obtain regulatory licenses or approvals, and rules promulgated by the Commission), any data retention

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requirement of any applicable Government Entity, or any taxation requirements; or

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

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

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

IX.

IT IS FURTHER ORDERED that:

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

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- D. Respondents shall also include in each Remedial Agreement a representation from the Acquirer that that Acquirer shall use commercially reasonable efforts to secure the FDA approval(s) necessary to manufacture, or to have manufactured by a Third Party, in commercial quantities, each such Divestiture Product, as applicable, and to have any such manufacture to be independent of Respondents, all as soon as reasonably practicable.
- E. Respondents shall not seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Remedial Agreement, or in any agreement related to any of the Divestiture Products a decision the result of which would be inconsistent with the terms of this Order or the remedial purposes thereof.
- F. Respondents shall not modify or amend any of the terms of any Remedial Agreement without the prior approval of the Commission.

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

- A. Within five (5) days of the Acquisition, Respondents shall submit to the Commission a letter certifying the date on which the Acquisition occurred.
- B. Within thirty (30) days after the Order Date, and every sixty (60) days thereafter until Respondents have fully complied with the following: Paragraphs II.A , II.B., II.C., II.D., II.E., II.F.1. - II.F.3, II.G., II.J., II.K.1. - II.K.4, II.L., III.A. III.B., and IV.A., 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 the Orders. Respondents shall submit at the same time a copy of their report concerning compliance with the Orders to the Interim Monitor, if any Interim Monitor has been appointed. Respondents

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shall include in their reports, among other things that are required from time to time, a detailed description of their efforts to comply with the relevant paragraphs of the Orders, including:

1. a detailed description of all substantive contacts, negotiations, or recommendations related to (i) the divestiture and transfer of all relevant assets and rights, (ii) transitional services being provided by the Respondents to the relevant Acquirer, and (iii) the agreement(s) to Contract Manufacture; and
 2. a detailed description the timing for the completion of such obligations.
- C. One (1) year after the Order Date, annually for the next five (5) years on the anniversary of the Order Date, and at other times as the Commission may require, Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with the Order.

XI.

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

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

XII.

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

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upon five (5) days notice to any Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, that Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. access, during business office hours of that 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 that Respondent related to compliance with this Order, which copying services shall be provided by that Respondent at the request of the authorized representative(s) of the Commission and at the expense of that Respondent; and
- B. to interview officers, directors, or employees of that Respondent, who may have counsel present, regarding such matters.

XIII.

IT IS FURTHER ORDERED that this Order shall terminate on December 13, 2022.

By the Commission.

NON-PUBLIC

APPENDIX A

**GENERIC PRODUCTS (GROUP ONE) DIVESTITURE
AGREEMENTS**

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

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APPENDIX B

**GENERIC PRODUCTS (GROUP TWO) DIVESTITURE
AGREEMENTS**

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

NON-PUBLIC

APPENDIX C

THE ISRADIPINE DIVESTITURE AGREEMENT

AND

THE LOXAPINE DIVESTITURE AGREEMENT

AND

RELATED AGREEMENTS

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

Analysis to Aid Public Comment

NON-PUBLIC

APPENDIX D

**THE MORPHINE SULPHATE NALTREXONE
EXTENDED RELEASE PRODUCT DIVESTITURE
AGREEMENT**

AND

RELATED AGREEMENTS

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

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

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Watson Pharmaceuticals, Inc. (“Watson”) and Actavis Inc., Actavis Pharma Holding 4 ehf., and Actavis S.à.r.l. (together, “Actavis”) that is designed to remedy the anticompetitive effects in twenty-one pharmaceutical markets resulting from Watson’s acquisition of Actavis. Under the terms of the proposed Consent Agreement, the companies would be required to divest to Par Pharmaceutical, Inc. (“Par”) all of Watson’s rights and assets relating to (1) generic adapalene and benzoyl peroxide topical gel; (2) generic extended release morphine sulfate capsules; (3) generic extended release oxymorphone non-tamper resistant tablets; and (4) generic extended release amphetamine salts capsules; as well as all of Actavis’s rights and assets relating to the following generic products: (1) extended release diltiazem hydrochloride capsules (generic Cardizem CD); (2) fentanyl transdermal system; (3) extended release glipizide tablets; (4) extended release methylphenidate hydrochloride tablets; (5) ursodiol tablets; (6) metoclopramide hydrochloride tablets; (7) extended release

Analysis to Aid Public Comment

oxycodone tamper resistant tablets; (8) extended release nifedipine tablets; (9) extended release rivastigmine film; and (10) varenicline tartrate tablets. The companies would also be required to divest to Sandoz International GmbH ("Sandoz"), a subsidiary of Novartis AG ("Novartis"), all of Watson's rights and assets relating to generic dextromethorphan hydrobromide and quinidine sulfate capsules, as well as all of Actavis's rights and assets to (1) generic extended release bupropion hydrochloride tablets; (2) generic extended release diltiazem hydrochloride capsules (generic Tiazac); and (3) generic lorazepam tablets. The companies would also be required to waive all of Actavis's rights in generic isradipine capsules and generic loxapine succinate capsules. In addition, the proposed Consent Agreement requires Watson to amend a Development and Manufacturing Agreement with Pfizer, Inc. ("Pfizer") relating to the manufacture of extended release morphine sulfate and naltrexone combination capsules.

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

Pursuant to a Sale and Purchase Agreement dated as of April 25, 2012, Watson proposes to acquire Actavis in a transaction valued at approximately \$5.9 billion ("Proposed Acquisition"). The Commission's Complaint alleges that the Proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening current and future competition in U.S. markets for the following generic pharmaceutical products: (1) extended release bupropion hydrochloride tablets; (2) extended release diltiazem hydrochloride capsules (generic Cardizem CD); (3) fentanyl transdermal system; (4) lorazepam tablets; (5) metoclopramide hydrochloride tablets; (6) extended release morphine sulfate capsules; (7) extended release nifedipine tablets; (8) extended release amphetamine salts capsules; (9) extended release diltiazem

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hydrochloride capsules (generic Tiazac); (10) extended release oxymorphone non-tamper resistant tablets; (11) extended release glipizide tablets; (12) isradipine capsules; (13) loxapine succinate capsules; (14) extended release methylphenidate hydrochloride tablets; (15) ursodiol tablets; (16) adapalene and benzoyl peroxide topical gel; (17) dextromethorphan hydrobromide and quinidine sulfate capsules; (18) extended release morphine sulfate and naltrexone combination capsules; (19) extended release oxycodone tamper resistant tablets; (20) extended release rivastigmine film; and (21) varenicline tartrate tablets (collectively, the “Products”). The proposed Consent Agreement will remedy the alleged violations by replacing the competition that would otherwise be eliminated by the acquisition.

The Products and Structure of the Markets

The Proposed Acquisition would reduce the number of suppliers in each of the relevant markets. In human pharmaceutical product markets with generic competition, price generally decreases as the number of generic competitors increases. Accordingly, the reduction in the number of suppliers within each relevant market has a direct and substantial effect on pricing.

The Proposed Acquisition would reduce current competition in the markets for each of the following generic products: (1) extended release bupropion hydrochloride tablets; (2) extended release diltiazem hydrochloride capsules (generic Cardizem CD); (3) fentanyl transdermal system; (4) lorazepam tablets; (5) metoclopramide hydrochloride tablets; (6) extended release morphine sulfate capsules; and (7) extended release nifedipine tablets. The structure of these markets is as follows:

- Extended release bupropion hydrochloride tablets, the generic of Zyban by GlaxoSmithKline plc, are designed to help people quit smoking by reducing cravings and other side effects of withdrawal. Currently, four firms market generic Zyban – Watson, Actavis, Teva Pharmaceutical Industries Ltd. (“Teva”), and Mylan, Inc. (“Mylan”). Thus, the Proposed Acquisition would reduce the number of competitors for generic Zyban from four to three and result in a 45% market share for the combined entity based

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on 2011 sales. Teva and Mylan had 2011 shares of 53% and 2%, respectively.

- Extended release diltiazem hydrochloride capsules (generic Cardizem CD) are used to treat hypertension, angina, and certain heart rhythm disorders. Currently, four firms market generic Cardizem CD – Watson, Actavis, Teva and Sun Pharmaceutical Industries, Ltd. (“Sun”), which entered in late 2011. Thus, the Proposed Acquisition would reduce the number of competitors for generic Cardizem CD from four to three and result in a 55% market share for the combined entity.
- Fentanyl transdermal system is a patch that releases fentanyl to ease chronic pain and is the generic equivalent of Janssen Pharmaceuticals, Inc.’s (“Janssen’s”) branded product, Duragesic. Currently, five firms market generic fentanyl transdermal system – Watson, Actavis, Mylan, Apotex, Inc., and Mallinckrodt, LLC (a division of Covidien plc). Thus, the Proposed Acquisition would reduce the number of competitors for generic Duragesic from five to four and give the combined entity a market share of 34%. Mylan is the market leader with 51% and the remaining two suppliers combined had slightly more than a 10% share.
- Lorazepam, the generic of Ativan by Valeant Pharmaceuticals International, Inc. (“Valeant”), is used to treat anxiety disorders. Currently, five firms market generic lorazepam – Watson, Actavis, Excellium Pharmaceutical, Ltd. (“Excellium”), Mylan, and Ranbaxy Laboratories, Ltd. (“Ranbaxy”). The proposed transaction would reduce the number of competitors for lorazepam from five to four and result in a market share for the combined entity of 53%. Mylan and Ranbaxy had 21% and 16% market shares, respectively, while Excellium had a 1% market share. The remainder of the market is split by repackagers of these competitors’ product.
- Metoclopramide hydrochloride is the generic version of Reglan, which is used to treat nausea and is marketed by

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Ani Pharmaceuticals, Inc. In 2011, Watson, Actavis, and Teva shared approximately 61% of sales. While other suppliers have U.S. Food and Drug Administration (“FDA”) approval to market the drug, they have been exiting the market over the last several years for a variety of reasons, including product liability issues associated with the branded product. Accounting for recent exit, the proposed transaction would reduce the number of competitively significant suppliers of metoclopramide hydrochloride from three to two and give the combined entity a 34% market share.

- Extended release morphine sulfate capsules are the generic equivalent of Actavis’s Kadian, which is used to treat acute pain. In addition to owning the branded Kadian product, Actavis also markets an authorized generic version of Kadian. Watson markets the only other generic Kadian available. Thus, absent a remedy, the proposed transaction would create a monopoly in generic extended release morphine sulfate capsules.
- Extended release nifedipine tablets are the generic version of Adalat CC, which is marketed by Bayer AG, and used to treat hypertension and angina. Currently, there are four suppliers of extended release nifedipine tablets in the United States – Watson, Actavis, Mylan, and Valeant, whose product is sold by Teva. Thus, the proposed transaction would reduce the number of suppliers of extended release nifedipine tablets from four to three and result in a combined entity with 31% market share.

In addition to reducing current competition in the seven above-identified markets, the Proposed Acquisition would significantly reduce competition in the markets for each of the following generic products: (1) extended release amphetamine salts capsules; (2) extended release diltiazem hydrochloride capsules (generic Tiazac); (3) extended release oxymorphone non-tamper resistant tablets; (4) extended release glipizide tablets; (5) isradipine capsules; (6) loxapine succinate capsules; (7) extended release methylphenidate hydrochloride tablets; and (8) ursodiol tablets. Either Watson or Actavis currently markets each of these products, and the other is likely to enter, significantly

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increasing competition and likely causing price reductions when entry occurs. The structure of each of these markets is as follows:

- Extended release amphetamine salts capsules are the generic version of Adderall XR, manufactured by Shire plc, which is a treatment for attention deficit hyperactivity disorder (“ADHD”). Actavis recently entered this market, joining Teva and Impax Laboratories, Inc., who are marketing authorized generics. Watson is one of a limited number of firms that has an extended release amphetamine salts capsule in development. The proposed transaction would eliminate a likely potential supplier in the concentrated market for generic Adderall XR.
- Extended release diltiazem hydrochloride capsules (generic Tiazac) are used to treat hypertension and angina. Three companies currently market generic Tiazac – Sun, Inwood Laboratories (a wholly-owned subsidiary of Forest Pharmaceuticals, Inc.), and Watson. Actavis is one of a limited number of firms that has a generic extended release diltiazem hydrochloride capsule in development. The proposed transaction would eliminate a likely potential supplier in the concentrated market for generic Tiazac.
- Extended release oxymorphone non-tamper resistant tablets are the generic version of Opana ER, which is used to treat chronic pain. Opana ER is marketed by Endo Health Solutions, Inc. Actavis markets the only generic version of Opana ER in two strengths and is developing additional strengths. Watson is also one of a limited number of firms developing this product. The proposed transaction would eliminate a likely potential supplier in the concentrated market for generic Opana ER.
- Extended release glipizide is an oral diabetes medicine that boosts insulin production to control blood sugar levels. Watson’s product and Pfizer, Inc.’s (“Pfizer’s”) authorized generic are the only generic versions of the product currently available. Actavis is one of a limited number of firms that has extended release glipizide in

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development and the proposed transaction would eliminate a likely potential supplier in the concentrated market for extended release glipizide.

- Isradipine capsules are used to treat high blood pressure and are the generic version of Dynacirc. Branded Dynacirc has been discontinued and Watson manufactures the only generic product available today. Actavis has a marketing and profit-sharing arrangement with the best-positioned entrant, which is a likely potential supplier in the concentrated market for isradipine capsules.
- Loxapine capsules are used to treat the symptoms of schizophrenia and are the generic version of branded Loxatine, which is no longer on the market. Watson manufactures the only generic product available today. Actavis has a profit-sharing arrangement with a best-positioned entrant for this product, which is a likely potential supplier in the concentrated market for generic Loxatine.
- Extended release methylphenidate hydrochloride tablets are the generic equivalent of Concerta, which is manufactured by Janssen and used in the treatment of ADHD in people over the age of six. Watson markets the only generic product as the authorized generic and Actavis is one of a limited number of firms that has an extended release methylphenidate hydrochloride tablet in development. The proposed transaction would eliminate a likely potential supplier in the concentrated market for extended release methylphenidate hydrochloride tablets.
- Depending on the strength, generic ursodiol tablets are the generic version of Urso 250 or Urso Forte and are used to treat primary biliary cirrhosis. Watson currently markets both strengths of generic ursodiol and Actavis is one of a limited number of likely potential suppliers of each of these strengths of ursodiol tablets. The proposed transaction would eliminate a likely potential supplier in the concentrated market for ursodiol tablets for a significant period of time.

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The transaction will also reduce future competition in generic markets that do not yet exist, but will be highly concentrated when Watson and Actavis enter. These markets include: (1) adapalene and benzoyl peroxide topical gel; (2) dextromethorphan hydrobromide and quinidine sulfate capsules; (3) extended release morphine sulfate and naltrexone combination capsules; (4) extended release oxycodone tamper resistant tablets; (5) extended release rivastigmine film; and (6) varenicline tartrate tablets. The structure of each of these markets is as follows:

- The combination of adapalene and benzoyl peroxide is a topical treatment for acne. It is marketed by Galderma Laboratories L.P. under the brand Epiduo. Currently, there are no AB-rated generic versions of Epiduo available in the United States, but Watson and Actavis are two of a limited number of likely potential suppliers of generic Epiduo. The proposed transaction would eliminate a likely entrant into what will be a concentrated market for generic Epiduo.
- Dextromethorphan hydrobromide and quinidine sulfate capsules are the generic version of Nuedexta and are used to treat pseudobulbar affect, i.e., uncontrolled episodes of crying and/or laughing in people with multiple sclerosis and other neurological diseases. Currently, there are no generic versions of Nuedexta available in the United States. Watson and Actavis are two of a limited number of likely potential suppliers of generic Nuedexta. The proposed transaction would eliminate a likely entrant into what will be a concentrated market for generic Nuedexta.
- Extended release morphine sulfate and naltrexone combination capsules are the generic equivalent of Pfizer's Embeda, a product used to treat acute pain. Currently, there are no generic versions of Embeda available in the United States. Pfizer recalled the branded product, but plans to return it to market in the near future. Actavis and Pfizer have entered into an exclusive Development and Manufacturing Agreement to manufacture Embeda, and that agreement grants Actavis competitively significant rights (including authorized generic marketing rights).

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Watson is one of a limited number of likely potential suppliers of generic Embeda. The proposed transaction would eliminate a likely entrant into what will be a concentrated market for generic Embeda.

- Extended release oxycodone tamper resistant tablets are the generic version of tamper resistant OxyContin, which is used to treat moderate to severe pain that is expected to last for an extended period of time. No generic versions of this product are yet available in the United States. Watson and Actavis are among a limited number of likely potential suppliers of generic OxyContin. The proposed transaction would eliminate a likely entrant into what will be a concentrated market for generic OxyContin.
- Extended release rivastigmine film is the generic equivalent of Exelon, a patch used to treat Alzheimer's disease and dementia resulting from Parkinson's disease. Novartis markets branded Exelon in the United States. Currently, there are no generic versions of this product in the United States. Watson and Actavis are among a limited number of likely potential suppliers of generic Exelon. The proposed transaction would eliminate a likely entrant into what will be a concentrated market for generic Exelon.
- Varenicline tartrate tablets are the generic version of Pfizer's Chantix, which is a smoking cessation medicine. Currently, no generic versions of this product are available in the United States. Watson and Actavis are among a limited number of likely potential suppliers of generic Chantix. The proposed transaction would eliminate a likely entrant into what will be a concentrated market for generic Chantix.

Entry

Entry into the markets for the Products would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the acquisition. The combination of drug development times and regulatory requirements, including FDA approval, takes well in excess of

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two years. And even companies for whom the FDA approval process is well underway face other regulatory barriers, including Hatch-Waxman regulatory exclusivity and pending patent litigation, that limit their ability to enter these markets in a timely manner.

Effects

The Proposed Acquisition would cause significant anticompetitive harm to consumers in the U.S. markets for the Products, either by eliminating significant current or potential competition in concentrated existing markets, or by eliminating significant potential competition among a limited number of competitors in future markets. In pharmaceutical markets with generic competition, price generally decreases as the second, third, fourth, and frequently fifth competitors enter. Although in certain of the markets, neither Watson nor Actavis yet have a marketed product, and in other of the markets, all generic products have yet to be approved, the FDA approval process provides extensive information about the timeliness and likeliness of entry by firms that market generic pharmaceuticals. In addition, substantial experience and empirical evidence of the impact of multiple generic suppliers on prices for other drugs demonstrate that the likely effects of the Proposed Acquisition in the markets for these products would be substantial. The Proposed Acquisition, by reducing an already limited number of competitors or likely potential competitors in each of these markets, would cause anticompetitive harm to U.S. consumers by increasing the likelihood of higher post-acquisition prices.

The Consent Agreement

The proposed Consent Agreement effectively remedies the Proposed Acquisition's anticompetitive effects in the relevant markets. Pursuant to the Consent Agreement, Watson and Actavis are required to divest either Watson's or Actavis's rights and assets related to eighteen of the twenty-one Products (all but extended release morphine sulfate and naltrexone combination capsules, isradipine capsules, and loxapine succinate capsules) to a Commission-approved acquirer no later than ten days after the acquisition. To remedy the concerns with the three remaining products, the combined entity would also be required to amend

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Actavis's existing Development and Manufacturing Agreement with Pfizer to eliminate Actavis' right of first refusal to market a potential authorized generic, to allow the relationship to end, and to transfer manufacturing rights back to Pfizer. In addition, the companies are required to waive Actavis's rights related to isradipine capsules and loxapine succinate capsules.

The proposed Consent Agreement requires Watson or Actavis to divest assets related to four of the markets (generic extended release bupropion hydrochloride tablets, generic extended release diltiazem hydrochloride capsules, generic lorazepam tablets, and generic dextromethorphan hydrobromide and quinidine sulfate capsules) to Sandoz, and the rest of the Products (all but extended release morphine sulfate and naltrexone combination capsules, isradipine capsules, and loxapine succinate capsules) to Par. Par is a New Jersey-based generic pharmaceutical company selling over 60 prescription drug product families and has an active product development pipeline. Sandoz is based in Germany and has approximately 200 generic product families in the United States and an active product development pipeline. With their experience in generic markets, Par and Sandoz are expected to replicate the competition that would otherwise be lost with the Proposed Acquisition. Further, the amended supply agreement with Pfizer concerning Embeda will ensure that Pfizer's plans to re-launch Embeda and the ensuing generic competition for that product will remain intact after the Proposed Acquisition. The renunciations of the combined entity's interest in the isradipine and loxapine succinate agreements will similarly preserve competition in each of those markets.

The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the acquisition. If the Commission determines that Par and/or Sandoz are not acceptable acquirers of the assets to be divested, or that the manner of the divestitures is not acceptable, the parties must unwind the sale to Par and/or Sandoz and divest the products to a Commission-approved acquirer within six months of the date the Order becomes final. In that circumstance, the Commission may appoint a trustee to divest the products if the parties fail to divest the products as required.

Analysis to Aid Public Comment

The proposed Consent Agreement contains several provisions to help ensure that the divestitures are successful. The Order requires Watson and Actavis to take all action to maintain the economic viability, marketability, and competitiveness of the products to be divested until such time as they are transferred to a Commission-approved acquirer. Watson and Actavis must transfer the manufacturing technology for generic (1) adapalene and benzoyl peroxide topical gel; (2) extended release morphine sulfate capsules; (3) generic extended release oxymorphone non-tamper resistant tablets; (4) extended release amphetamine salts capsules; (5) extended release diltiazem hydrochloride capsules (generic Cardizem CD); (6) fentanyl transdermal system; (7) extended release glipizide tablets; (8) extended release methylphenidate hydrochloride tablets; (9) ursodiol tablets; (10) metoclopramide hydrochloride tablets; (11) extended release oxycodone tamper resistant tablets; (12) extended release nifedipine tablets; (13) extended release rivastigmine film; and (14) varenicline tartrate tablets to Par and must supply Par with extended release morphine sulphate capsules, extended release nifedipine tablets, ursodiol tablets, extended release glipizide tablets, metoclopramide hydrochloride tablets, and extended release diltiazem hydrochloride capsules (generic Cardizem CD). Watson and Actavis must also transfer to Sandoz the manufacturing technology for generic (1) dextromethorphan hydrobromide and quinidine sulfate capsules; (2) extended release bupropion hydrochloride tablets; (3) extended release diltiazem hydrochloride capsules (generic Tiazac); and (4) lorazepam tablets and must supply Sandoz with extended release diltiazem hydrochloride capsules (generic Tiazac) and lorazepam tablets during the transition period.

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

Complaint

IN THE MATTER OF

CORNING INCORPORATEDCONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SECTION 7 OF THE CLAYTON ACT*Docket No. C-4380; File No. 121 0133**Complaint, December 20, 2012 – Decision, December 20, 2012*

This consent order addresses the \$730 million acquisition by Corning Incorporated of certain assets of Becton, Dickinson and Company's Discovery Labware Division. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by lessening competition in the North American markets for tissue culture treated ("TCT") multi-well plates, dishes, and flasks used in cell culture applications. The consent order requires Corning to supply Sigma-Aldrich Co., LLC with TCT dishes, multi-well plates, and flasks on an interim basis, and in the future and at Sigma Aldrich's request, provide Sigma Aldrich with the assets and assistance necessary to independently manufacture these products.

Participants

For the *Commission*: Stephanie C. Bovee, David Gonen, Brian O'Dea, Catherine Sanchez, and Aylin Skrojer.

For the *Respondents*: Steven Albertson and Steven Sunshine, Skadden Arps, Slate, Meagher & Flom, LLP.

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act ("FTC Act"), and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Corning Incorporated ("Corning"), a corporation subject to the jurisdiction of the Commission, has entered into an agreement to acquire substantially all of the assets of Becton, Dickinson & Company's Discovery Labware ("BDDL") division, a company subject to the jurisdiction of the Commission, in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as

Complaint

amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent Corning is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of New York, with its office and principal place of business located at One Riverfront Plaza, Corning, New York, 14831. Respondent Corning is engaged in the research, development and production of tissue culture treated (“TCT”) flasks, plates, and dishes used in cell culture.

2. Respondent Corning is, and at all times relevant herein has been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a company whose business is in or affects commerce, as “commerce” is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. THE ACQUIRED COMPANY

3. Becton, Dickinson & Company is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of New Jersey, with its office and principal place of business located at 1 Becton Drive, Franklin Lakes, New Jersey. BDDL’s office and principal place of business is Two Oak Park Drive, Bedford, Massachusetts. Becton, Dickinson & Company through its Discovery Labware division is engaged in the research, development and production of TCT flasks, plates, and dishes used in cell culture.

4. Becton, Dickinson & Company is, and at all times relevant herein has been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a company whose business is in or affects commerce, as “commerce” is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

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III. THE PROPOSED ACQUISITION

5. Pursuant to an Asset Purchase Agreement (“Acquisition Agreement”) dated April 10, 2012, Corning proposes to acquire all nearly all of the assets of BDDL (the “Acquisition”).

IV. THE RELEVANT MARKETS

6. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are the production and sale of:

- a. TCT cell culture multi-well plates;
- b. TCT cell culture flasks; and
- c. TCT cell culture dishes.

7. For the purposes of this complaint, North America is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant lines of commerce.

V. THE STRUCTURE OF THE MARKETS

8. TCT cell culture multi-well plates, flasks and dishes are plastic containers that have been specially treated to promote cell growth. Scientific researchers use these products as surfaces or containers upon which to cultivate cells. Each type of cell culture vessel has a distinct application, and purchasers would not switch between types of cell culture vessels, or to any other product, if faced with a small but significant and non-transitory increase in the price of TCT cell culture multi-well plates, flasks or dishes.

9. The markets for TCT cell culture multi-well plates, flasks and dishes are highly concentrated. Corning and BDDL are the two leading suppliers in each of these markets. Although other firms such as Thermo Fisher and Greiner Bio-One participate in this market, their market shares are substantially smaller than those of either Corning or BDDL. The proposed acquisition would significantly increase concentration in the markets for TCT cell culture multi-well plates, flasks and dishes.

Complaint

VI. ENTRY CONDITIONS

10. Entry into the relevant markets would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. Entry would not take place in a timely manner because of the significant time and expense required to develop manufacturing capabilities and develop a reputation for product quality among research scientists.

VII. EFFECTS OF THE ACQUISITION

11. The effects of the Acquisition, if consummated, may be to substantially lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by eliminating actual, direct, and substantial competition between Corning and BDDL in the markets for TCT cell culture multi-well plates, flasks, and dishes, thereby: (1) increasing the likelihood that Corning would unilaterally exercise market power in these markets; and (2) increasing the likelihood that consumers would be forced to pay higher prices for these products.

VIII. VIOLATIONS CHARGED

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

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twentieth day of December, 2012, issues its Complaint against said Respondent.

By the Commission.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of the proposed acquisition by Respondent Corning Incorporated of certain assets of Becton, Dickinson and Company, and Respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon issued its complaint and having accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days (and having duly considered the comments received), now in further conformity with the procedure described in § 2.34 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following Decision and Order (“Order”):

1. Respondent Corning Incorporated is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of New York, with its office and principal place of business located at One Riverfront Plaza, Corning, New York 14831.

Decision and Order

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

ORDER**I.**

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

- A. “Corning” means Corning Incorporated, its directors, officers, employees, agents, representatives, successors, and assigns; and the subsidiaries, partnerships, divisions, groups, joint ventures, and affiliates in each case controlled by Corning, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Commission” means the Federal Trade Commission.
- C. “Acquisition” means the proposed acquisition described in the Asset Purchase Agreement by and between Corning Incorporated and Becton, Dickinson and Company, dated as of April 10, 2012.
- D. “Confidential Information” means any competitively sensitive, proprietary and all other business information of any kind disclosed by Sigma to Respondent, except that Confidential Information shall not include information that (i) was, is or becomes generally available to the public other than as a result of a breach of this Order; (ii) was or is developed independently of and without reference to any Confidential Information; or (iii) was available, or becomes available, on a non-confidential basis from a third party not bound by a confidentiality agreement or any legal, fiduciary or other obligation restricting disclosure.

Decision and Order

- E. “Direct Cost” means the cost of direct material and labor used to provide the relevant assistance, including any reasonable out-of-pocket expenses.
- F. “Global Agreement” means the Global Supply Agreement between Corning Incorporated and Sigma-Aldrich International GmbH, dated October 16, 2012.
- G. “Intellectual Property” means any and all of the following intellectual property owned or licensed (as licensor or licensee) by Respondent in which Respondent has a proprietary interest: (i) all patents, patent applications and inventions and discoveries that may be patentable; and (ii) all know-how, trade secrets, confidential or proprietary information, software, technical information, data, process technology, plans, drawings, and blue prints.
- H. “Lab Products” means the standard tissue culture treated plastic labware products listed in Schedule 3 of the Supply Agreement.
- I. “Person” means any individual, partnership, corporation, business trust, limited liability company, limited liability partnership, joint stock company, trust, unincorporated association, joint venture or other entity or a governmental body.
- J. “Product Price” has the meaning set forth in the Supply Agreement, as the same may be modified pursuant to Section 3.3(b) of the Supply Agreement.
- K. “Sigma” means Sigma-Aldrich Corporation, 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 3050 Spruce Street, St. Louis, Missouri 63103.
- L. “Supply Agreement” means the Asset Sale and Supply Agreement by and between Corning Incorporated and Sigma-Aldrich Corporation, dated October 16, 2012.

Decision and Order

- M. “Technical Assistance” means advice, assistance, and training relating to the manufacture of the Lab Products, as set forth in the Supply Agreement.

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

- A. For a period of up to sixty (60) months from the date this Order is issued, Respondent shall provide to Sigma:
1. Quantities of Lab Products as Sigma may order to supply customers located in the United States and Canada (i) in substantially the same quality as such products are manufactured and sold by Respondent, and (ii) at a cost to Sigma that does not exceed Respondent’s Product Price for the Lab Products; and
 2. Technical Assistance as Sigma may request (i) sufficient to enable Sigma to manufacture the Lab Products in substantially the same manner as Respondent, and (ii) at a cost to Sigma that does not exceed Respondent’s Direct Cost to provide such assistance; *provided, however,* that Respondent shall not impede the ability of Sigma to obtain labor and services from any third party.
- B. Respondents shall provide the assistance required by Paragraph II.A. of this Order pursuant to the Supply Agreement:
1. The Supply Agreement shall be incorporated by reference into this Order and made a part hereof. Respondent shall comply with all terms of the Supply Agreement and failure to comply shall constitute a violation of this Order;
 2. In the event there is a conflict between the terms of this Order and the Supply Agreement, or any ambiguity in the language used in the Supply

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Agreement, then to the extent that Respondent cannot fully comply with both terms, the terms of this Order shall govern to resolve such conflict or ambiguity; and

3. Respondent shall not modify the terms of the Supply Agreement without the prior approval of the Commission, except as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5).
- C. No later than ten (10) days after the date this Order is issued, Respondent shall grant to Sigma an irrevocable, worldwide, perpetual covenant not to sue conferring immunity from suit by Respondent based on claims of infringement under all of Respondent's Intellectual Property for the developing, making, having made, using, having used, selling, offering for sale, having sold, and importing of any Lab Product; *provided, however,* that such immunity shall not extend to sales made using misappropriated trade secrets of Respondent. Such immunity shall extend to any third-party manufacturer deriving its authority from Sigma with respect to the Lab Products and shall not be assignable to any other Person without prior written consent of Respondent (which consent shall not be unreasonably withheld).
- D. Respondent shall allow Sigma-Aldrich International GmbH the right to terminate the Global Agreement (without penalty of any kind) at the same time Sigma exercises any right to terminate the Supply Agreement.
- E. The purpose of this Order is to establish Sigma as an independent provider of Lab Products and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

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

- A. Respondent shall (i) keep confidential (including as to Respondent's employees) and (ii) not use for any reason or purpose, any Confidential Information pertaining to any assistance that Respondent provides to Sigma pursuant to this Order; *provided, however*, that Respondent may disclose or use such Confidential Information in the course of performing its obligations under this Order or the Supply Agreement, complying with financial reporting requirements, or as required by law.
- B. If disclosure or use of any Confidential Information is permitted to Respondent's employees or to any other Person under Paragraph III.A. of this Order, Respondent shall limit such disclosure or use (i) only to the extent such information is required, (ii) only to those employees or Persons who require such information for the purposes permitted under Paragraph III.A., and (iii) only after such employees or Persons have signed an agreement in writing to maintain the confidentiality of such information.
- C. Respondent shall enforce the terms of this Paragraph III. as to its employees or any Person, and take such action as is necessary to cause each of its employees and any other Person to comply with the terms of this Paragraph III., including implementation of access and data controls, training of its employees, and all other actions that Respondent would take to protect its own trade secrets and proprietary information.

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

- A. At any time after Respondent signs the Consent Agreement, the Commission may appoint a Person ("Monitor") to monitor Respondent's compliance with

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its obligations as required by this Order including implementation of the controls and training required by Paragraph III.C. of this Order:

1. The Commission shall select the Monitor, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed in writing, including the reasons for opposing, the selection of any proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Monitor, Respondent shall be deemed to have consented to the selection of the proposed Monitor.
 2. Respondent shall enter into an agreement with the Monitor, subject to the prior approval of the Commission, that (i) shall become effective no later than one (1) day after the date the Commission appoints the Monitor, and (ii) confers upon the Monitor all rights, powers, and authority necessary to permit the Monitor to perform his duties and responsibilities on the terms set forth in this Order and in consultation with the Commission.
 3. Respondent shall indemnify the Monitor and hold him or her harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of his 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 the Monitor's gross negligence or willful misconduct.
- B. The Monitor shall (i) serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions as the Commission may set, and (ii) employ, at the cost and

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expense of Respondent, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.

- C. The Monitor shall report in writing to the Commission (i) every sixty (60) days from the date of his or her appointment, (ii) no later than thirty (30) days before the date that Respondent's obligations set forth in Paragraph II. terminate ("Final Report"), and (iii) at any other time as requested by the staff of the Commission, concerning Respondent's compliance with this Order.
- D. The Monitor shall act in a fiduciary capacity for the benefit of the Commission. Respondent shall (i) cooperate with, and take no action to interfere with or impede the ability of, the Monitor to perform his duties pursuant to this Order and (ii) insure that the Monitor has full and complete access to all Respondent's personnel, books, records, documents, and facilities relating to compliance with this Order, or to any other relevant information as the Monitor may reasonably request.
- E. The Monitor's power and duties shall terminate three business days after the Monitor has completed his final report pursuant to Paragraph IV.C.(ii) of this Order, or at such other time as directed by the Commission.
- F. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph IV.
- G. The Commission may on its own initiative or at the request of the Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

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V.

IT IS FURTHER ORDERED that Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order:

- A. No later than sixty days (60) from the date this Order is issued, and every sixty (60) days thereafter (measured from the due date of the first report filed under this Order) until one year from the date this Order is issued (for a total of six reports during the first year); and
- B. No later than two (2) years after the date this Order is issued and annually thereafter until this Order terminates, and at such other times as the Commission staff may request.

VI.

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

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

VII.

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

Analysis to Aid Public Comment

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

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on December 20, 2022.

By the Commission.

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

The Federal Trade Commission (“Commission”) has accepted from Corning Incorporated (“Corning”), subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”), which is designed to remedy the anticompetitive effects of Corning’s proposed acquisition of substantially all of the assets of Becton, Dickinson and Company’s Discovery Labware Division (“BDDL”). Under the terms of the proposed Consent Agreement, Corning would be required to supply Sigma-Aldrich Co., LLC (“Sigma Aldrich”) with tissue culture treated (“TCT”) dishes, multi-well plates, and flasks on an interim basis, and in the future and at Sigma Aldrich’s request, provide Sigma

Analysis to Aid Public Comment

Aldrich with the assets and assistance necessary to independently manufacture these products.

The proposed Consent Agreement has been placed on the public record for thirty days for receipt of comments; any comments received will also become part of the public record. After thirty days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the proposed Consent Agreement, modify it, or make it final.

Pursuant to an agreement dated April 12, 2012, Corning proposes to acquire substantially all of the assets of BDDL. The Commission's Complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening competition in the North American markets for TCT multi-well plates, dishes, and flasks used in cell culture applications. The proposed Consent Agreement will remedy the alleged violations by replacing the competition that would otherwise be eliminated by the acquisition.

II. The Parties

Headquartered in Corning, New York, Corning is a leading manufacturer of specialty glass, plastics, and ceramics for a variety of applications. Corning's Life Sciences division is a leading manufacturer of consumable plastic labware including TCT cell culture multi-well plates, dishes, and flasks.

Discovery Labware, Inc., a division of Becton, Dickinson and Company, is headquartered in Bedford, Massachusetts. Becton, Dickinson and Company is a global medical technology company that supplies consumable plastic labware through its Discovery Labware division including TCT cell culture multi-well plates, dishes, and flasks.

Analysis to Aid Public Comment

III. The Products and Structure of the Markets

TCT cell culture vessels are plastic containers that are essentially surfaces upon which researchers cultivate cells. These products are purchased primarily by pharmaceutical companies, bio-technology companies, and academic institutions and used by cell culture laboratories. Tissue culture treatment alters the intrinsic qualities of the plastic to promote cell adhesion so that cells are more likely to grow and spread. Other advanced coatings and treatments exist, but these alternatives typically are used only in specialized applications, and are not viable substitutes for standard TCT cell culture vessels.

North America is the relevant geographic area in which to analyze the effects of the proposed acquisition in the TCT cell culture markets.

Each TCT cell culture market is highly concentrated. Corning and BDDL are the leading suppliers in each market. Other suppliers such as Thermo Fisher and Greiner Bio-One participate in each market, but no other suppliers are the size of Corning or BDDL.

IV. Effects of the Acquisition

The Proposed Acquisition would eliminate actual, direct, and substantial competition between Corning and BDDL in the markets for TCT cell culture vessels. By increasing Corning's share in each market, while at the same time eliminating its most significant competitor, an acquisition of BDDL likely would allow Corning to unilaterally charge significantly higher prices for TCT cell culture vessels.

V. Entry

Entry into the relevant markets would not be timely, likely, or sufficient in magnitude, character, and scope to prevent the anticompetitive effects of the proposed acquisition. Entry would not take place in a timely manner because of the significant time required to gain a reputation among research scientists as a supplier of quality products. Given the time needed to enter the relevant markets, relative to the sizes of those markets, it is

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unlikely that an entrant could obtain sufficient sales to make the investment profitable. As a result, new entry or repositioning by other firms sufficient to ameliorate the competitive harm from the proposed acquisition is not likely to occur.

VI. The Consent Agreement

The proposed Consent Agreement remedies the acquisition's likely anticompetitive effects in the TCT cell culture markets. The Consent Agreement requires Corning to supply Sigma Aldrich, on an interim basis, with Corning-manufactured TCT cell culture products until Sigma Aldrich has developed independent manufacturing capabilities. This supply agreement will enable Sigma Aldrich to immediately sell TCT cell culture products under its own brand name. The Consent Agreement also requires that Corning provide in the future, at Sigma Aldrich's request, technical assistance necessary to begin manufacturing TCT cell culture multi-well plates, flasks, and dishes in a manner substantially similar to the manner in which Corning manufactures these products today.

Headquartered in St. Louis, Missouri, Sigma Aldrich is a leading life sciences company that sells a variety of products used in pharmaceutical research. TCT cell culture multi-well plates, flasks, and dishes will complement Sigma Aldrich's leading position in adjacent markets, including media and reagents used in the cell culture process. Sigma Aldrich has an existing infrastructure for the marketing and sales of its laboratory products, and therefore is well-positioned to replace the competition that will be lost as a result of the proposed transaction.

The Commission may appoint an interim monitor to oversee the supply of products and the future transfer of assets at any time after the Consent Agreement has been signed. In order to ensure that the Commission remains informed about the status of the proposed remedy, the proposed Consent Agreement requires the parties to file periodic reports with the Commission until the Decision and Order terminates.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement, and it is not intended to

Analysis to Aid Public Comment

constitute an official interpretation of the proposed Consent Agreement or to modify its terms in any way.

Complaint

IN THE MATTER OF

**MAGNESIUM ELEKTRON NORTH AMERICA,
INC.**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SECTION 7 OF THE CLAYTON ACT*Docket No. C-4381; File No. 091 0094**Complaint, December 21, 2012 – Decision, December 21, 2012*

This consent order addresses the \$15 million acquisition by Magnesium Elektron North America, Inc. of certain assets of Revere Graphics Worldwide, Inc. The complaint alleges that the acquisition violates Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by significantly reducing competition in the market for magnesium plates for photoengraving. The consent order requires Magnesium Elektron to sell assets used in the development, manufacture, and sale of magnesium plates for photoengraving to Universal Engraving, Inc.

Participants

For the *Commission*: Sebastian Lorigo and David Von Nirschl.

For the *Respondent*: Peter Guryan, Fried, Frank, Harris, Shriver & Jacobsen LLP.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested by said Acts, the Federal Trade Commission (the “Commission”), having reason to believe that respondent Magnesium Elektron North America, Inc. (“MEL”), acquired Revere Graphics Worldwide, Inc. (“Revere”), 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:

Complaint

I. RESPONDENT MAGNESIUM ELEKTRON

1. MEL is a division of the Luxfer Group, which is an international group of businesses specializing in the design, manufacture, and supply of high performance materials. MEL is a company organized and existing under the laws of the State of Delaware, with its principal place of business at 1001 College Street, Madison, Illinois, 62060. MEL specializes in the development, manufacture, and supply of magnesium products, including magnesium plates for photoengraving.

II. REVERE GRAPHICS WORLDWIDE

2. Prior to its acquisition by Respondent, Revere was engaged in the manufacture and sale of metal plates used for photoengraving, with its principal place of business located at 5 Boundary Street, Plymouth, Massachusetts, 02366. Revere rolled and coated zinc, copper, brass, and magnesium plates which were used by customers for photoengraving.

III. JURISDICTION

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

IV. THE ACQUISITION

4. In September 2007, MEL acquired the worldwide assets of Revere for approximately \$15 million. At the time of the acquisition, both MEL and Revere manufactured magnesium plates for photoengraving. While Revere also manufactured and sold zinc, copper, and brass plates for photoengraving, prior to its acquisition of Revere, MEL only sold magnesium plates for photoengraving applications.

Complaint

V. THE RELEVANT PRODUCT MARKET

5. For purposes of this Complaint, the relevant line of commerce within which to analyze the effects of the transaction is the market for magnesium plates for photoengraving.

VI. THE RELEVANT GEOGRAPHIC MARKET

6. For purposes of this Complaint, the relevant geographic market within which to analyze the effects of the transaction is the world.

VII. MARKET STRUCTURE

7. The market for photoengraving magnesium plates is highly concentrated. Prior to the transaction, MEL and Revere were the only suppliers of magnesium plates for photoengraving in the world, and thus, the acquisition resulted in a merger-to-monopoly in the relevant market.

VIII. CONDITIONS OF ENTRY

8. Entry into the relevant market has not been, and would not be, timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the acquisition. Magnesium alloy must be rolled to precise specifications in order to be used for photoengraving applications, and thus, substantial expertise is necessary for entry into this market. Further, the relevant market is small, which deters potential entrants from investing in the skill and expertise required for entry.

IX. EFFECTS OF THE ACQUISITION

9. The effects of the acquisition have been a substantial lessening of competition, and the creation of a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45. Specifically, the acquisition has:

- a. Eliminated actual, direct, and substantial competition between MEL and Revere in the relevant market;

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- b. Substantially increased the level of concentration in the relevant market; and
- c. Increased MEL's ability to exercise market power unilaterally in the relevant market.

X. VIOLATIONS CHARGED

10. The allegations contained in Paragraphs 1 through 9 above are hereby incorporated by reference as though fully set forth here.

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

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

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-first day of December, 2012, issues its Complaint against said Respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the acquisition by Magnesium Elektron North America, Inc. ("Magnesium Elektron" or "Respondent") of the assets of Revere Graphics Worldwide, Inc. ("Revere"), and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and that, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C.

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§ 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

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

1. Respondent Magnesium Elektron North America, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of State of Delaware, with its headquarters address located at 1001 College Street, Madison, Illinois 62060. Luxfer Holdings PLC (the ultimate parent entity of Magnesium Elektron, North America, Inc.) has its headquarters address at Anchorage Gateway, 5 Anchorage Quay, Salford, M50 3XE, England. Magnesium Elektron Ltd., a division of Luxfer Holdings PLC, has its mailing address as P.O. Box 23, Swinton, Manchester, M27 8DD.
2. Revere Graphics Worldwide, Inc., as of the date of the above-described acquisition, was a United States

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corporation with its headquarters address located at 5 Boundary Street, Plymouth Massachusetts 02366.

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

ORDER**I.**

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

- A. “Magnesium Elektron” or “Respondent” means Magnesium Elektron North America, Inc. , its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Magnesium Elektron, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. The term “Magnesium Elektron” also includes Luxfer Holdings PLC (the ultimate parent entity of Magnesium Elektron North America, Inc., Inc.), its directors, officers, employees, agents, representatives, successors, and assigns; and their joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Luxfer Holdings PLC, (including, without limitation, Magnesium Elektron Ltd. and the assets of Revere Graphics Worldwide, Inc. acquired pursuant to the Acquisition).
- B. “Commission” means the Federal Trade Commission.
- C. “Acquirer” means the following:
 1. a Person specified by name in this Order to acquire particular assets or rights that Respondent is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order and that has been approved by the Commission to

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accomplish the requirements of this Order in connection with the Commission's determination to make this Order final and effective; or

2. a Person approved by the Commission to acquire particular assets or rights that Respondent is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.

- D. "Acquisition" means Respondent's acquisition of the assets of Revere Graphics Worldwide, Inc.
- E. "Acquisition Date" means September 6, 2007, the date Respondent consummated the Acquisition.
- F. "Agency(ies)" means any government regulatory authority or authorities in the world responsible for granting approval(s), specifications(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the research, Development, manufacture, marketing, distribution, or sale of a Revere Photoengraving Product.
- G. "Closing Date" means the date on which Respondent(s) (or a Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey the Revere Photoengraving Product Assets and grants the Revere Photoengraving Product License to an Acquirer pursuant to this Order.
- H. "Confidential Business Information" means all information owned by, or in the possession or control of, Respondent acquired from Revere that is not in the public domain and that is directly related to the research, Development, manufacture, marketing, commercialization, importation, exportation, cost, supply, sales, sales support, or use of the Revere Photoengraving Product(s). The term "Confidential Business Information" *excludes* (i) information that is protected by the attorney work product, attorney-client, joint defense or other privilege prepared in

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connection with the Acquisition and relating to any United States, state, or foreign antitrust or competition Laws and (ii) information relating to Respondent's general business strategies or practices relating to research, Development, manufacture, marketing or sales of products that does not discuss with particularity the Revere Photoengraving Product(s).

- I. "Contract Manufacture" means:
1. to manufacture, or to cause to be manufactured, a Contract Manufacture Product on behalf of an Acquirer; and/or
 2. to provide, or to cause to be provided, any part of the manufacturing process of a Contract Manufacture Product on behalf of an Acquirer.
- J. "Contract Manufacture Product(s)" means Revere Photoengraving Products or equivalent photoresist magnesium photoengraving products, including finished and unfinished products; *provided, however*, in each instance where: (1) an agreement to divest relevant assets is specifically referenced and attached to this Order, and (2) such agreement becomes a Remedial Agreement for a Revere Photoengraving Product, "Contract Manufacture Product(s)" means:
1. the finished magnesium photoengraving products listed in the MENA Products Supply Agreement; and
 2. the uncoated semi-finished magnesium photoengraving products listed in the MENA Products Supply Agreement.
- K. "Development" means all research and development activities, including, without limitation, the following: test method development; formulation, including without limitation, customized formulation for a particular customer(s); mechanical properties testing; performance testing; safety testing; composition

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measurements; process development; manufacturing scale-up; development-stage manufacturing; quality assurance/quality control development; statistical analysis and report writing; and conducting experiments and other activities for the purpose of obtaining or achieving any and all Product Approvals and Specifications. “Develop” means to engage in Development.

- L. “Direct Cost” means a cost not to exceed the cost of labor, material, travel and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service. The term “Direct Cost” *excludes* any allocation or absorption of excess or idle capacity. “Direct Cost” to the Acquirer for its use of any of Respondent’s employees’ labor shall not exceed the average hourly wage rate for such employee; *provided, however*, in each instance where: (1) an agreement to divest relevant assets is specifically referenced and attached to this Order, and (2) such agreement becomes a Remedial Agreement for a Revere Photoengraving Product, “Direct Cost” means such cost as is provided in such Remedial Agreement for that Revere Photoengraving Product.
- M. “Divestiture Trustee” means the trustee appointed by the Commission pursuant to the relevant provisions of this Order.
- N. “Employee Information” means a complete and accurate list containing the following, for each Revere Photoengraving Product Employee (as and to the extent permitted by the Law):
1. the name of each former employee of Revere;
 2. with respect to each such employee, the following information:
 - a. the last job title or position held;

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- b. the facility where the employee was last employed; and
 - c. employment status (*i.e.*, active, no longer employed, or on leave or disability; full-time or part-time) with Respondent.
- O. “Government Entity” means any Federal, state, local or non-U.S. government, or any court, legislature, government agency, or government commission, or any judicial or regulatory authority of any government.
- P. “High Volume Account(s)” means any customer of Respondent or Revere within the United States whose annual gross purchase amounts (on a company-wide level), in units or in dollars, of magnesium photoengraving products from Respondent or Revere was among the top twenty (20) highest of such purchase amounts during the period from January 1, 2008 through the Closing Date.
- Q. “Interim Monitor” means any monitor appointed pursuant to Paragraph III of this Order.
- R. “Law” means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.
- S. “Manufacturing Technology” means all technology, trade secrets, know-how, and proprietary information (whether patented, patentable or otherwise) acquired by Respondent pursuant to the Acquisition to manufacture each Revere Photoengraving Product, including, but not limited to, the following:
- 1. product specifications, including without limitation, the exact combination and proportion of metals, other agents, reactive diluents and other components that achieves a particular set of application and end-use characteristics necessary for photoengraving;

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2. processes, including without limitation, hot reversing mill rolling, warm mill rolling, shearing to weight flatten, weight flattening, back coat painting, grinding, final shearing after grinding, pretreatment, photoresist coating and protective film applications;
3. processing equipment specifications;
4. standard operating procedures;
5. product designs and design protocols;
6. plans, ideas, and concepts;
7. operating manuals for photoresist magnesium coated magnesium photoengraving machines acquired by Respondent pursuant to the Acquisition;
8. specifications for purchasing magnesium slabs suitable for use in the Revere Photoengraving Products;
9. safety procedures for handling of materials and substances;
10. flow diagrams;
11. quality assurance and control procedures, including, without limitation, goods inwards testing and polyethylene release testing;
12. research records;
13. annual product reviews;
14. manuals and technical information provided to employees, customers, suppliers, agents or licensees including, without limitation, manufacturing, equipment, and engineering manuals and drawings;

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15. audits of manufacturing methods for Revere Photoengraving Products conducted by all of the following:
 - a. applicable United States' Agencies;
 - b. non-governmental Persons that provide audits and certifications of management systems and/or manufacturing processes and product assessments and certifications related to the use of metals or metal alloys for applications in particular industries, including the engraving industry (*e.g.*, International Organization for Standardization); and
 - c. direct purchasers of Revere Photoengraving Products that use the Revere Photoengraving Products to manufacture products.
 16. control history;
 17. labeling;
 18. supplier lists;
 19. chemical descriptions and specifications of, all raw materials inputs, components, and ingredients related to the Revere Photoengraving Products; and
 20. all other information related to the manufacturing process.
- T. "Order Date" means the date on which this Decision and Order becomes final and effective.
- U. "Patents" means all patents, patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention and statutory invention registrations, in each case existing as of the Closing Date (*except* where this Order specifies a different time), and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary

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protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions, related to any product of or owned by Respondent as of the Closing Date (*except* where this Order specifies a different time).

- V. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, or other business or Government Entity, and any subsidiaries, divisions, groups or affiliates thereof.
- W. “Product Approval(s) and Specification(s)” means the approvals, specifications, certifications, registrations, permits, licenses, consents, authorizations, and other approvals, and pending applications and requests therefor, related to the research, Development, manufacture, distribution, finishing, packaging, marketing, sale, storage or transport of the Revere Photoengraving Products that have been adopted or required as of the Closing Date by the following:
1. applicable U.S. Agencies;
 2. non-governmental Persons that provide audits and certifications of management systems and/or manufacturing processes and product assessments and certifications related to the use of metals or metal alloys for applications in particular industries, including the engraving industry (*e.g.*, International Organization for Standardization), and
 3. direct purchasers of Revere Photoengraving Products that use the Revere Photoengraving Products to manufacture products.
- X. “Product Assumed Contracts” means all of the following contracts or agreements (copies of each such contract to be provided to the Acquirer on or before

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the Closing Date and segregated in a manner that clearly identifies the purpose(s) of each such contract):

1. that make specific reference to any Revere Photoengraving Product and pursuant to which any Third Party purchases, or has the option to purchase, any Revere Photoengraving Product from Respondent;
2. pursuant to which Respondent purchases raw materials, inputs, components, or other necessary ingredient(s) or had planned to purchase the raw materials(s), inputs, components or other necessary ingredient(s) from any Third Party for use in connection with the manufacture of any Revere Photoengraving Product;
3. relating to any experiments, audits, or scientific studies involving any Revere Photoengraving Product;
4. with universities or other research institutions for the use of any Revere Photoengraving Product in scientific research;
5. relating to the particularized marketing of any Revere Photoengraving Product or educational matters relating solely to any Revere Photoengraving Product;
6. pursuant to which a Third Party provides the Manufacturing Technology related to any Revere Photoengraving Product to Respondent;
7. pursuant to which a Third Party is licensed by Respondent to use the Manufacturing Technology;
8. constituting confidentiality agreements involving any Revere Photoengraving Product;

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

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

- Y. “Product Intellectual Property” means all of the following related to each Revere Photoengraving Product:
1. Patents;
 2. Software;
 3. trade secrets, know-how, utility models, design rights, techniques, data, inventions, practices, recipes, raw material specifications, process descriptions, quality control methods in process and in final Revere Photoengraving Products, protocols, methods of production and other confidential or proprietary technical, business, research, Development and other information, and

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all rights in any jurisdiction to limit the use or disclosure thereof;

4. rights to obtain and file for patents and copyrights and registrations thereof; and
5. rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach of any of the foregoing;

provided, however, Product Intellectual Property expressly includes all customer specific product formulations for Revere Photoengraving Products that were acquired by the Respondent pursuant to the Acquisition, licenses from customers related to the manufacture of products for that specific customer, and all proprietary and/or trade secret information related to a particular customer that were acquired by the Respondent pursuant to the Acquisition.

- Z. “Proposed Acquirer” means an entity proposed by Respondent (or a Divestiture Trustee) to the Commission and submitted for the approval of the Commission to become the Acquirer of particular assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed by Respondent pursuant to this Order.
- AA. “Remedial Agreement(s)” means the following:
1. any agreement between Respondent and an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission’s determination to make this Order final and effective;

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2. any agreement between Respondent and a Third Party to effect the assignment of assets or rights of Respondent related to a Revere Photoengraving Product to the benefit of an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission's determination to make this Order final and effective;
 3. any agreement between Respondent and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of this Order; and/or
 4. any agreement between Respondent and a Third Party to effect the assignment of assets or rights of Respondent related to a Revere Photoengraving Product to the benefit of an Acquirer that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto.
- BB. "Research and Development Records" means all research and development records relating to Revere Photoengraving Products acquired by Respondent pursuant to the Acquisition including, but not limited to:
1. inventory of research and development records, research history, research efforts, research notebooks, research reports, technical service

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reports, testing methods, invention disclosures, and know how related to the Revere Photoengraving Products;

2. all correspondence, submissions, notifications, communications, registrations or other filings made to, received from or otherwise conducted with (i) Agencies and (ii) non-governmental Persons that provide audits and certifications of management systems and/or manufacturing processes and product assessments and certifications (*e.g.*, International Organization for Standardization) relating to Product Approval(s) and Specification(s) submitted by, on behalf of, or acquired by, Respondent or Revere related to the Revere Photoengraving Products;
3. designs of experiments, and the results of successful and unsuccessful designs and experiments;
4. annual and periodic reports (both internal and external) related to the above-described Product Approval(s) and Specification(s);
5. currently used product usage instructions related to the Revere Photoengraving Products;
6. reports relating to the protection of human safety and health related to the manufacture or use of the Revere Photoengraving Products;
7. reports relating to the protection of the environment related to the manufacture or use of the Revere Photoengraving Products;
8. summary of performance reports, safety reports, and product complaints from customers related to the Revere Photoengraving Products; and
9. product recall reports filed with any Agency related to the Revere Photoengraving Products.

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- CC. “Retained Product(s)” means any product(s) that is not a Revere Photoengraving Product.
- DD. “Revere” means Revere Graphics Worldwide, Inc. as was in existence prior to the Acquisition.
- EE. “Revere Photoengraving Product(s)” means photoresist magnesium photoengraving products Developed, in Development, researched, manufactured, marketed or sold prior to the Acquisition by Revere and that were acquired by the Respondent pursuant to the Acquisition and any photoresist magnesium photoengraving product Developed, in Development, researched, manufactured, marketed or sold by Respondent using the Product Intellectual Property or Manufacturing Technology acquired by the Respondent pursuant to the Acquisition.
- FF. “Revere Photoengraving Product Assets” means all of Respondent’s rights, title and interest in and to: (i) all assets related to the Revere Photoengraving Products acquired by the Respondent pursuant to the Acquisition, and (ii) any and all improvements or changes made thereto, to the extent legally transferable, including the research, Development, manufacture, distribution, marketing, and sale of each Revere Photoengraving Product, including, without limitation, the following:
1. all Product Intellectual Property related to the Revere Photoengraving Product(s);
 2. all Product Approvals and Specifications related to the Revere Photoengraving Product(s);
 3. all Manufacturing Technology related to the Revere Photoengraving Product(s); and
 4. all Product Development Reports related to the Revere Photoengraving Product(s)

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5. all Research and Development Records;
6. at the Acquirer's option, all Product Assumed Contracts related to the Revere Photoengraving Product(s) (copies to be provided to the Acquirer on or before the Closing Date);
7. a list of all customers that have purchased any magnesium photoengraving product within the United States from Respondent or Revere from the period beginning January 1, 2008 through the Closing Date and High Volume Accounts including the name of the employee(s) of the customer for each High Volume Account that was responsible for the purchase of the Revere Photoengraving Products on behalf of the High Volume Account and his or her business contact information; and
8. all of the Respondent's operating manuals, books and records, customer files, customer lists and records, vendor files, vendor lists and records, cost files and records, credit information, distribution records, business records and plans, studies, surveys, and files related to the foregoing or to the Revere Photoengraving Product(s);

provided however, "Revere Photoengraving Product Assets" *excludes* (1) documents relating to the Respondent's general business strategies or practices relating to research, Development, manufacture, marketing or sales of photoengraving plates, where such documents do not discuss with particularity the Revere Photoengraving Products; (2) administrative, financial, and accounting records; (3) quality control records that are determined not to be material to the manufacture of the Revere Photoengraving Products by the Interim Monitor or the Acquirer of the Revere Photoengraving Products; (4) manufacturing equipment; and (5) any real estate and the buildings and other permanent structures located on such real estate.

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GG. “Revere Photoengraving Product Divestiture Agreements” means the following agreements:

1. “Technology Purchase and Sale Agreement” by and between Magnesium Elektron North America, Inc. and Universal Engraving, Inc., dated as of August 17, 2012, and all amendments, exhibits, attachments, agreements, and schedules thereto;
2. “MENA Products Supply Agreement” by and between Universal Engraving, Inc. and Magnesium Elektron North America, Inc., dated as of August 17, 2012, and all amendments, exhibits, attachments, agreements, and schedules thereto; and
3. “PSI Product Supply Agreement” by and between Universal Engraving, Inc. and Magnesium Elektron North America, Inc., dated as of August 17, 2012, and all amendments, exhibits, attachments, agreements, and schedules thereto;

each related to the Revere Photoengraving Product Assets that have been approved by the Commission to accomplish the requirements of this Order. The Revere Photoengraving Product Divestiture Agreements are attached to this Order and contained in non-public Appendix A.

HH. “Revere Photoengraving Product Employees” means all persons employed by Revere as of the day before the Acquisition Date who participated in the research, Development, manufacture, marketing or sales of the Revere Photoengraving Products, including such persons as are employed by the Respondent as of the Closing Date; *provided, however*, in each instance where: (i) an agreement to divest relevant assets is specifically referenced and attached to this Order, and (ii) such agreement becomes a Remedial Agreement for the Revere Photoengraving Products, “Revere Photoengraving Product Employees” means the specific individuals identified as “Revere

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Photoengraving Product Employees” in such Remedial Agreement.

- II. “Revere Photoengraving Product Releasee(s)” means the Acquirer or any entity controlled by or under common control with the Acquirer, or any licensees, sublicensees, manufacturers, suppliers, distributors, and customers of the Acquirer, or of the Acquirer-affiliated entities.
- JJ. “Software” means computer programs related to the Revere Photoengraving Product(s), including all software implementations of algorithms, models, and methodologies whether in source code or object code form, databases and compilations, including any and all data and collections of data, all documentation, including user manuals and training materials, related to any of the foregoing and the content and information contained on any Website; *provided, however*, that the term “Software” *excludes* software that is readily purchasable or licensable from sources other than the Respondent and which has not been modified in a manner material to the use or function thereof (other than through user preference settings).
- KK. “Supply Cost” means a cost not to exceed the manufacturer’s average direct per unit cost in United States dollars of manufacturing the Revere Photoengraving Product, or raw material or ingredients related to a Revere Photoengraving Product, for the twelve (12) month period immediately preceding the Acquisition Date. “Supply Cost” shall expressly exclude any intracompany business transfer profit; *provided, however*, that in each instance where: (1) an agreement to Contract Manufacture is specifically referenced and attached to this Order, and (2) such agreement becomes a Remedial Agreement for a Revere Photoengraving Product, “Supply Cost” means the cost as specified in such Remedial Agreement for that Revere Photoengraving Product.

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- LL. “Third Party(ies)” means any non-governmental Person other than the following: the Respondent; or, the Acquirer of particular assets or rights pursuant to this Order.
- MM. “Universal” means, Universal Engraving, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Kansas, with its headquarters address located at 9090 Nieman Road, Overland Park, Kansas 66214.

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

- A. Not later than ten (10) days after the Order Date, Respondent shall divest the Revere Photoengraving Product Assets, absolutely and in good faith, to Universal pursuant to, and in accordance with, the Revere Photoengraving Product Divestiture Agreements (which agreements shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of Universal or to reduce any obligations of Respondent under such agreements), and each such agreement, if it becomes a Remedial Agreement related to the Revere Photoengraving Product Assets, is incorporated by reference into this Order and made a part hereof;

provided, however, that if Respondent has divested the Revere Photoengraving Product Assets prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondent that Universal is not an acceptable purchaser of the Revere Photoengraving Product Assets then Respondent shall immediately rescind the transaction with Universal, in whole or in part, as directed by the Commission, and shall divest the Revere Photoengraving Product Assets within one hundred eighty (180) days from the Order Date,

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absolutely and in good faith, at no minimum price, to an Acquirer and only in a manner that receives the prior approval of the Commission;

provided further, that if Respondent has divested the Revere Photoengraving Product Assets to Universal prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondent that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondent, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Revere Photoengraving Product Assets to Universal (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

- B. Respondent shall secure all consents and waivers from all Third Parties that are necessary to permit Respondent to divest the Revere Photoengraving Product Assets to the Acquirer, and/or to permit the Acquirer to continue the research, Development, manufacture, sale, marketing or distribution of the Revere Photoengraving Products;

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

- C. Respondent shall provide the Manufacturing Technology to the Acquirer in an organized, comprehensive, complete, useful, timely, and meaningful manner. Respondent shall, *inter alia*:
1. designate employees of Respondent knowledgeable with respect to such Manufacturing Technology to a committee for the purposes of communicating directly with the Acquirer and the

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Interim Monitor (if any has been appointed) for the purposes of effecting such delivery;

2. prepare technology transfer protocols and transfer acceptance criteria for both the processes and analytical methods related to the Revere Photoengraving Products, such protocols and acceptance criteria to be subject to the approval of the Acquirer;
3. prepare and implement a detailed technological transfer plan that contains, *inter alia*, the delivery of all relevant information, all appropriate documentation, all other materials, and projected time lines for the delivery of all Manufacturing Technology to the Acquirer; and
4. upon reasonable written notice and request from the Acquirer to Respondent and pursuant to a Remedial Agreement, provide in a timely manner, at no greater than Direct Cost, assistance and advice to enable the Acquirer to:
 - a. manufacture the Revere Photoengraving Products or an equivalent photoresist magnesium photoengraving in the same quality achieved by Respondent and/or Revere and in commercial quantities; and
 - b. receive, integrate, and use such Manufacturing Technology.

D. Respondent shall:

1. Contract Manufacture and deliver to the Acquirer, in a timely manner and under reasonable terms and conditions pursuant to a Remedial Agreement, a supply of each of the Contract Manufacture Products at Respondent's Supply Cost, for a period of time sufficient to allow the Acquirer to:

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- a. manufacture and sell in commercial quantities, the Revere Photoengraving Products or equivalent photoresist magnesium photoengraving products independently of Respondent; and
 - b. secure sources of supply of the raw materials, inputs and components for the Contract Manufacture Products from entities other than Respondent;
2. make representations and warranties to the Acquirer that the Contract Manufacture Product(s) supplied through Contract Manufacture pursuant to a Remedial Agreement meet the specifications and quality for their intended use;
3. for the Contract Manufacture Products supplied by Respondent, Respondent shall agree to indemnify, defend and hold the Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the Contract Manufacture Products supplied by Respondent to the Acquirer to meet relevant customer specifications. This obligation may be made contingent upon the Acquirer giving Respondent prompt, adequate notice of such claim and cooperating fully in the defense of such claim. The Remedial Agreement to Contract Manufacture shall be consistent with the obligations assumed by Respondent under this Order; *provided, however*, that Respondent may reserve the right to control the defense of any such litigation, including the right to settle the litigation, so long as such settlement is consistent with Respondent's responsibilities to supply the Contract Manufacture Products in the manner required by this Order; *provided further*, that this obligation shall not require Respondent to be liable for any negligent act or omission of the Acquirer or for any representations and warranties, express or implied, made by the Acquirer that exceed the

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representations and warranties made by Respondent to the Acquirer;

4. make representations and warranties to the Acquirer that Respondent shall hold harmless and indemnify the Acquirer for any liabilities or loss of profits resulting from the failure by Respondent to deliver the Contract Manufacture Products in a timely manner as required by the Remedial Agreement to Contract Manufacture unless Respondent can demonstrate that its failure was entirely beyond the control of Respondent and in no part the result of negligence or willful misconduct by Respondent;
5. during the term of the Remedial Agreement to Contract Manufacture, upon request of the Acquirer or Interim Monitor (if any has been appointed), make available to the Acquirer and the Interim Monitor (if any has been appointed) all records that relate to the manufacture, storage, or transport of the Contract Manufacture Products that are generated or created after the Closing Date;
6. during the term of the Remedial Agreement to Contract Manufacture, maintain or cause to be maintained manufacturing facilities necessary to manufacture each of the Contract Manufacture Products; and
7. pursuant to a Remedial Agreement, provide consultation with knowledgeable employees of Respondent and training, at the request of the Acquirer and at a facility in the United States chosen by the Acquirer, for the purposes of enabling the Acquirer to manufacture Revere Photoengraving Products or equivalent photoresist magnesium photoengraving products in the same quality achieved by the Respondent and in commercial quantities, and in a manner consistent with the relevant customer specifications for

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photoengraving use, independently of Respondent, and sufficient to satisfy management of the Acquirer that its personnel are adequately trained in the manufacture of Revere Photoengraving Products.

- E. Respondent shall:
1. submit to the Acquirer, at Respondent's expense, copies of all Confidential Business Information;
 2. deliver copies of the Confidential Business Information as follows:
 - a. in good faith;
 - b. in a timely manner, *i.e.*, as soon as practicable, avoiding any delays in transmission of the respective information; and
 - c. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness; and
 3. pending complete delivery of copies of all Confidential Business Information to the Acquirer, provide the Acquirer and the Interim Monitor (if any has been appointed) with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to the Revere Photoengraving Products that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order.
- F. Respondent shall not enforce any agreement against a Third Party or the Acquirer to the extent that such agreement may limit or otherwise impair the ability of the Acquirer to acquire the Manufacturing Technology, the Product Intellectual Property, or the raw materials, inputs, or components, related to the

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relevant Revere Photoengraving Product(s) from the Third Party. Such agreements include, but are not limited to, agreements with respect to the disclosure of Confidential Business Information related to such Manufacturing Technology or Product Intellectual Property.

- G. Not later than ten (10) days after the Closing Date, Respondent shall grant a release to each Third Party that is subject to an agreement as described in Paragraph II.F. that allows the Third Party to provide the relevant Manufacturing Technology, Product Intellectual Property, raw materials, inputs, or components to the Acquirer. Within five (5) days of the execution of each such release, Respondent shall provide a copy of the release to the Acquirer.
- H. Respondent shall:
1. for a period of at least eighteen (18) months from the Closing Date, provide the Acquirer with the opportunity to enter into employment contracts with the Revere Photoengraving Product Employees. Each of these periods is hereinafter referred to as the "Revere Photoengraving Product Employee Access Period(s)";
 2. not later than the earlier of the following dates: (1) ten (10) days after notice by staff of the Commission to Respondent to provide the Employee Information; or (2) ten (10) days after the Closing Date, provide the Acquirer or the Proposed Acquirer with the Employee Information related to the Revere Photoengraving Product Employees. Failure by Respondent to provide the Employee Information for any Revere Photoengraving Product Employee within the time provided herein shall extend the Revere Photoengraving Product Employee Access Period(s) with respect to that employee in an amount equal to the delay; and

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

provided, however, that, this Paragraph II.H.3. shall not prohibit Respondent from continuing to employ any Revere Photoengraving Product Employee under the terms of such person's employment with Respondent prior to the date of the written offer of employment from the Acquirer to such person.

- I. Until Respondent completes delivery of all of the Revere Photoengraving Product Assets to the Acquirer and provides the Manufacturing Technology to the Acquirer,
 1. Respondent shall take such actions as are necessary to:
 - a. maintain the full economic viability and marketability of the businesses associated with each Revere Photoengraving Product;
 - b. minimize any risk of loss of competitive potential for such business;
 - c. prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to each Revere Photoengraving Product;

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- d. ensure the Revere Photoengraving Product Assets are delivered to the Acquirer in a manner without disruption, delay, or impairment of the Product Approval and Specification processes related to the business associated with each Revere Photoengraving Product;
 - e. ensure the completeness of the delivery of the Manufacturing Technology; and
2. Respondent shall not sell, transfer, encumber or otherwise impair the Revere Photoengraving Product Assets (other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the businesses associated with each Revere Photoengraving Product.
- J. Respondent shall not join, file, prosecute or maintain any suit, in law or equity, against the Acquirer or the Revere Photoengraving Product Releasee(s) for the research, Development, manufacture, use, import, export, distribution, or sale of the Revere Photoengraving Product(s) under the following:
1. any Patent owned or licensed by Respondent as of the Acquisition Date that claims a method of making, using, or a composition of matter, relating to a Revere Photoengraving Product;
 2. any Patent owned or licensed at any time after the Acquisition Date by Respondent that claim any aspect of the research, Development, manufacture, use, import, export, distribution, or sale of a Revere Photoengraving Product, other than such Patents that claim inventions conceived by and reduced to practice after the Closing Date;

if such suit would have the potential to interfere with the Acquirer's freedom to practice the following: (1) the research, Development, or manufacture of a

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

- K. For any patent infringement suit in which the Respondent is alleged to have infringed a Patent of a Third Party prior to the Closing Date or for such suit as the Respondent has prepared or is preparing as of the Closing Date to defend against such infringement claim(s), and where such a suit would have the potential to interfere with the relevant Acquirer's freedom to practice the following: (1) the research, Development, or manufacture of the Revere Photoengraving Product(s); or (2) the use, import, export, supply, distribution, or sale of that Revere Photoengraving Product(s), Respondent shall:
1. cooperate with that Acquirer and provide any and all necessary technical and legal assistance, documentation and witnesses from Respondent in connection with obtaining resolution of any pending patent litigation involving that Revere Photoengraving Product;
 2. waive conflicts of interest, if any, to allow the Respondent's outside legal counsel to represent the

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relevant Acquirer in any ongoing patent litigation involving that Revere Photoengraving Product; and

3. permit the transfer to that Acquirer of all of the litigation files and any related attorney work-product in the possession of Respondent's outside counsel relating to that Revere Photoengraving Product.
- L. Upon reasonable written notice and request from an Acquirer to Respondent, Respondent shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of Respondent to assist that Acquirer to defend against, respond to, or otherwise participate in any litigation related to the Product Intellectual Property related to any of the Revere Photoengraving Products, if such litigation would have the potential to interfere with the Acquirer's freedom to practice the following: (1) the research, Development, or manufacture of the Revere Photoengraving Products; or (2) the use within, import into, export from, or the supply, distribution, or sale within the United States.
- M. Within eighteen (18) months of the Closing Date, Respondent shall either license or assign any and all intellectual property to the Acquirer that constitutes Product Intellectual Property that the Acquirer, with the concurrence of the Interim Monitor, identifies as being necessary to the conduct of the business associated with the Revere Photoengraving Product (as such business had been conducted by Revere prior to the Acquisition Date) and that was not listed and/or included in the intellectual property that was divested to the Acquirer pursuant to the Remedial Agreements previously submitted by Respondent to the Commission.
- N. Respondent shall not seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Remedial Agreement, or in any agreement related to any of the Revere Photoengraving

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Products a decision the result of which would be inconsistent with the terms of this Order and/or the remedial purposes thereof.

- O. The purpose of the divestiture of the Revere Photoengraving Product Assets and the provision of the Manufacturing Technology and the related obligations imposed on the Respondent by this Order is:
1. to ensure the continued use of the Revere Photoengraving Product Assets in the research, Development, manufacture, use, import, export, distribution, and sale of each of the respective Revere Photoengraving Products;
 2. to provide for the future use of the Revere Photoengraving Product Assets for the research, Development, manufacture, use, import, export, distribution, and sale of each of the respective Revere Photoengraving Products;
 3. to create a viable and effective competitor, who is independent of the Respondent in the research, Development, manufacture, use, import, export, distribution, or sale of each of the respective Revere Photoengraving Products; and
 4. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

III.

IT IS FURTHER ORDERED that:

- A. At any time after Respondent signs the Consent Agreement in this matter, the Commission may appoint a monitor ("Interim Monitor") to assure that Respondent expeditiously complies with all of its

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obligations and performs all of its responsibilities as required by this Order and the Remedial Agreements.

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

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3. the Interim Monitor shall serve until, the latter of:
 - a. the date of completion by Respondent of the divestiture of all Revere Photoengraving Product Assets and the delivery of the Manufacturing Technology and Product Intellectual Property in a manner that fully satisfies the requirements of this Order; and
 - b. with respect to each Revere Photoengraving Product, the date the Acquirer is able to manufacture, market, import, export, and sell such Revere Photoengraving Product or an equivalent photoresist magnesium photoengraving product for use for photoengraving applications and able to manufacture such Revere Photoengraving Product or an equivalent photoresist magnesium photoengraving product in commercial quantities independently of Respondent;

provided, however, that the Interim Monitor's service shall not exceed five (5) years from the Order Date;

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

- E. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondent's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondent's compliance with its obligations under the Order, including, but not limited to, its obligations related to the relevant assets. Respondent shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the

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Interim Monitor's ability to monitor Respondent's compliance with the Order.

- F. The Interim Monitor shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.
- G. Respondent shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.
- H. Respondent shall report to the Interim Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondent, and any reports submitted by the Acquirer with respect to the performance of Respondent's obligations under the Order or the Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondent of its obligations under the Order; *provided, however*, beginning ninety (90) days after Respondent has filed its final report pursuant to Paragraph V.A., and every ninety (90) days thereafter, the Interim Monitor shall

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report in writing to the Commission concerning progress by the Acquirer toward:

1. the Acquirer's ability to manufacture in commercial quantities, the Revere Photoengraving Products or equivalent photoresist magnesium photoengraving products independently of Respondent; and
 2. securing sources of supply of the raw materials, inputs and components for the Revere Photoengraving Products or equivalent photoresist magnesium photoengraving products from entities other than Respondent.
- I. Respondent may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.
 - J. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.
 - K. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.
 - L. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Order.

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

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

- A. If Respondent has not fully complied with the obligations to assign, grant, license, divest, transfer, deliver or otherwise convey the Revere Photoengraving Product Assets as required by this Order, the Commission may appoint a trustee (“Divestiture Trustee”) to assign, grant, license, divest, transfer, deliver or otherwise convey these assets in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondent shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent to comply with this Order.
- B. The Commission shall select the Divestiture Trustee, subject to the consent of the Respondent, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If the Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by

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the staff of the Commission to Respondent of the identity of any proposed Divestiture Trustee, Respondent shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

- C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondent shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed.
 2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however*, the Commission may extend the divestiture period only two (2) times.
 3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books,

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records and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondent shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

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

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Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondent, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

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

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(60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

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

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

- A. Within thirty (30) days after the date this Order is issued, and every sixty (60) days thereafter until Respondent has fully complied with the following:
1. Paragraphs II.A , II.B., II.C., II.D., II.E., and II.G.; and
 2. all of its responsibilities to render transitional services to the Acquirer as provided by this Order and the Remedial Agreement(s);

Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and

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has complied with this Order. Respondent shall submit at the same time a copy of its report concerning compliance with this Order to the Interim Monitor, if any Interim Monitor has been appointed. Respondent shall include in its reports, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant Paragraphs of the Order, including a full description of all substantive contacts or negotiations related to the divestiture of the Revere Photoengraving Product Assets and the identity of all Persons contacted, including copies of all written communications to and from such Persons, all internal memoranda, and all reports and recommendations concerning completing the obligations.

- B. One (1) year after the date this Order is issued, annually for the next four (4) years on the anniversary of the date this Order is issued, and at other times as the Commission may require, Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with the Order.

VI.

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

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

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VII.

IT IS FURTHER ORDERED that, in addition to any other requirements and prohibitions relating to Confidential Business Information in this Order, Respondent shall assure that Respondent's counsel (including in-house counsel under appropriate confidentiality arrangements) shall not retain unredacted copies of documents or other materials provided to an Acquirer or access original documents provided to an Acquirer, except under circumstances where copies of documents are insufficient or otherwise unavailable, and for the following purposes:

- A. To assure Respondent's compliance with any Remedial Agreement, this Order, any Law (including, without limitation, any requirement to obtain regulatory licenses or approvals, and rules promulgated by the Commission), any data retention requirement of any applicable Government Entity, or any taxation requirements; or
- B. To defend against, respond to, or otherwise participate in any litigation, investigation, audit, process, subpoena or other proceeding relating to the divestiture or the Revere Photoengraving Product Assets;

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

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

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

- A. Any Remedial Agreement shall be deemed incorporated into this Order.
- B. Any failure by Respondent to comply with any term of such Remedial Agreement shall constitute a failure to comply with this Order.
- C. Respondent shall include in each Remedial Agreement related to each of the Revere Photoengraving Products a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of Respondent's obligations to the Acquirer pursuant to this Order.
- D. Respondent shall not modify or amend any of the terms of any Remedial Agreement without the prior approval of the Commission.

IX.

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

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

Analysis to Aid Public Comment

representative(s) of the Commission and at the expense of the Respondent; and

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

X.

IT IS FURTHER ORDERED that this Order shall terminate on December 21, 2022.

By the Commission.

NON-PUBLIC APPENDIX A
REVERE PHOTOENGRAVING PRODUCT
DIVESTITURE AGREEMENTS

[REDACTED]

ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT

I. Introduction

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Magnesium Elektron North America, Inc. (“MEL”) to remedy the anticompetitive effects

Analysis to Aid Public Comment

stemming from MEL's acquisition of Revere Graphics Worldwide, Inc. ("Revere"). Under the terms of the proposed Consent Agreement, MEL is required to sell assets used in the development, manufacture, and sale of magnesium plates for photoengraving to Universal Engraving, Inc. ("Universal Engraving").

In September 2007, MEL acquired the worldwide assets of Revere for approximately \$15 million. At the time of the acquisition, both parties manufactured and sold magnesium plates for photoengraving. The Commission's Complaint alleges that the acquisition violates Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the market for magnesium plates for photoengraving.

The proposed Consent Agreement remedies the alleged violation by requiring MEL to provide Universal Engraving with the intellectual property and know-how used to roll and coat magnesium plates for photoengraving applications. In addition, MEL will enter into a supply agreement with Universal Engraving that requires MEL to provide Universal Engraving with magnesium plates for photoengraving until Universal Engraving is able to produce and sell these products on its own. Finally, MEL will enter into a supply agreement with Universal Engraving for chemicals that are used in the magnesium photoengraving process, which Universal Engraving will be able to sell in conjunction with its magnesium plates.

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

II. The Relevant Market and Market Structure

The relevant market within which to analyze the competitive effects of the acquisition is the worldwide market for magnesium

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plates for photoengraving. At the time of the acquisition, MEL and Revere were the only manufacturers and sellers of magnesium plate for photoengraving, combining to account for 100 percent of the relevant market.

III. Entry

Entry is not likely to deter or counteract the anticompetitive effects of the acquisition. In order to be suitable for photoengraving applications, magnesium must be rolled and coated to exact and precise specifications. Accordingly, a new entrant would require substantial expertise in order to enter the market. In addition, the market is relatively small, which deters potential entrants from investing in the skill and expertise required for entry.

IV. Effects of the Acquisition

Absent the proposed Consent Agreement, the acquisition would result in further and ongoing competitive harm in the worldwide market for magnesium plates for photoengraving. Prior to the acquisition, MEL and Revere were the only providers of the relevant product. As a result, the acquisition eliminated actual, direct, and substantial competition between MEL and Revere, and resulted in a merger-to-monopoly in the market for magnesium plates for photoengraving.

V. The Consent Agreement

The proposed Consent Agreement remedies the competitive concerns raised by the acquisition by requiring MEL to sell the technology and know-how for manufacturing magnesium plates for photoengraving to Universal Engraving. This divestiture replaces competition that was eliminated as a result of MEL's acquisition of Revere.

Universal Engraving, based in Overland Park, Kansas, is a global leader in the manufacture and sale of products used in the photoengraving process, including brass and copper plates for photoengraving applications. Currently, Universal Engraving does not sell magnesium plates for the photoengraving process. However, under the terms of the proposed Consent Agreement,

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Universal Engraving will acquire the assets required to compete effectively in that market.

The proposed Consent Agreement also contains several provisions designed to ensure that the divestiture is successful. First, MEL must supply Universal Engraving with magnesium plate now, thereby allowing Universal Engraving to enter the relevant market immediately in competition with MEL. In addition, MEL must provide Universal Engraving with technical assistance related to the manufacture and sale of magnesium plates for photoengraving. Finally, MEL will supply Universal Engraving with chemicals that are used in the photoengraving process, particularly, chemicals that are used to engrave magnesium plates.

If, after the public comment period the Commission determines that Universal Engraving is not an acceptable acquirer of the assets to be divested, or that the manner of the divestitures is not acceptable, MEL must unwind the divestiture and divest the assets within 180 days of the date the Order becomes final to another Commission-approved acquirer. If MEL fails to divest the assets within the 180 days, the Commission may appoint a trustee to divest the relevant assets.

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

**INTERLOCUTORY, MODIFYING,
VACATING, AND MISCELLANEOUS
ORDERS**

IN THE MATTER OF

**POM WONDERFUL LLC,
ROLL INTERNATIONAL CORP.,
STEWART A. RESNICK,
LYNDA RAE RESNICK,
AND
MATTHEW TUPPER**

Docket No. 9344. Order, July 25, 2012

Order denying Complaint Counsel's motions to reopen the record and for leave to reply.

**ORDER RULING ON MOTION TO REOPEN THE RECORD AND MOTION
FOR LEAVE TO FILE A REPLY**

On June 13, 2012, Counsel for the Complaint filed a Motion To Reopen the Record in this matter ("June 13 Motion"), and to admit into the record "(1) certain POM product advertisements that Respondents created after the issuance of the Initial Decision; and (2) the Declaration of William Ducklow authenticating these advertisements." On June 25, 2012, Respondent Matthew Tupper and the other Respondents respectively filed Oppositions to the June 13 Motion. On July 2, 2012, Counsel for the Complaint filed a Motion For Leave To File Reply in support of the June 13 Motion.

The evidence that Complaint Counsel attempt to introduce into the record includes (1) advertisements disseminated by Respondents that include quotes from the ALJ's Initial Decision; and (2) other advertisements, some of which are already in the record, and the meaning of which Complaint Counsel are already in the process of appealing to the Commission.

Under Commission Rules 3.51(e)(1) and 3.54(a), 16 C.F.R. §§ 3.51(e)(1), 3.54(a), a party may move to "reopen the proceeding

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for the reception of further evidence" at any time before the Commission issues its decision. *Brake Guard Products* sets forth the applicable standard for reopening the record. Under that test, "the Commission considers: (1) whether the moving party can demonstrate due diligence (that is, whether there is a bona fide explanation for the failure to introduce the evidence at trial); (2) the extent to which the proffered evidence is probative; (3) whether the proffered evidence is cumulative; and (4) whether reopening the record would prejudice the non-moving party. *Brake Guard Products, Inc.*, 125 F.T.C. 138, 248 n.38 (1998).

We find that Complaint Counsel has acted with diligence, as the facts regarding publication of these claims and advertisements were not available until after the issuance of the Initial Decision. Based on our analysis of the remaining three factors, however, we do not find that Complaint Counsel's arguments warrant reopening the record in this matter to introduce the proposed new exhibits.

Accordingly,

IT IS ORDERED THAT Complaint Counsel's Motion to Reopen the Record is denied; and

IT IS FURTHER ORDERED THAT Complaint Counsel's Motion for Leave to File a Reply is denied.

By the Commission.

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IN THE MATTER OF

RENOWN HEALTH

Docket No. C-4366. Order, August 3, 2012

Order directing Renown Health to suspend enforcement of the non-compete provisions against Renown's cardiologist employees.

ORDER TO SUSPEND ENFORCEMENT OF RENOWN NON-COMPETE

The Federal Trade Commission ("Commission"), having initiated an investigation of the acquisition by Renown Health of Reno Heart Physicians ("RHP"), and Renown Health (hereafter referred to as "Renown Health" or "Respondent Renown") having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent Renown with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18; and

Respondent Renown, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by Respondent Renown 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 Renown 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 Renown has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its

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Complaint, makes the following jurisdictional findings, and issues the following Order Suspending Enforcement of the Renown Non-Compete (“Order to Suspend Enforcement”):

1. Respondent Renown is a not-for-profit corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada with its office and principal place of business located at 1155 Mill Street, Reno, Nevada 89502.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent Renown, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, all the capitalized terms used in this Order to Suspend Enforcement, but not defined herein, shall have the meanings attributed to such terms in the Decision and Order contained in the Consent Agreement. In addition to the definitions in Paragraph I of the Decision and Order attached to the Agreement Containing Consent Orders, the following definitions shall apply:

- A. “Decision and Order” means:
 1. the Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final Decision and Order by the Commission; and
 2. the Final Decision and Order issued and served by the Commission.
- B. “Monitor” means any monitor appointed pursuant to Paragraph III of the Order to Suspend Enforcement.
- C. “Termination Date” means the date on which the Decision and Order becomes final, or on the date Renown Health receives notice from the Commission

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that a final Decision and Order will not be issued in this matter.

II.

IT IS FURTHER ORDERED that Renown Health shall:

- A. From the date this Order to Suspend Enforcement becomes final until the Termination Date (“Suspension Period”), not enforce any Renown Non-Compete Provisions against any Cardiologist Employee for any activity that Cardiologist Employee engages in that Relates To providing Termination Notification; *provided, however*, that this Paragraph II.A does not prohibit Renown Health from enforcing any Renown Non-Compete Provisions against any Cardiologist Employee who terminates Contract Services prior to the date the Decision and Order becomes final.
- B. Within three (3) days from the date this Order to Suspend Enforcement becomes final, certify that Renown Health has sent by first-class mail, return receipt requested to each Cardiologist Employee the letter attached as Appendix A to this Order within two (2) days of the Agreement Containing Consent Order in this matter being placed on the public record.
- C. For any activity Related To this Paragraph II, waive all rights to seek or obtain legal or equitable relief for breach of contract or for violation by any Cardiologist Employee of any Renown Non-Compete Provisions.
- D. Not take any other action to discourage, impede, or otherwise prevent any Cardiologist Employee from seeking to terminate Contract Services, pursuant to this Paragraph II.
- E. The purpose of this Paragraph is to ensure that those Cardiologist Employees who seek to terminate their Contract Services can offer Cardiology Services in a Reno Cardiology Practice in competition with Renown

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Health and to remedy the lessening of competition alleged in the Commission's Complaint.

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

- A. Judge Charles McGee shall be appointed Monitor to assure that Renown Health expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order.
- B. No later than one (1) day after the Commission accepts the Order to Suspend Enforcement issues, Renown Health shall, pursuant to the Monitor Agreement, attached as Appendix B and Confidential Appendix B-1 to this Order, transfer to the Monitor all the rights, powers, and authorities necessary to permit the Monitor to perform its duties and responsibilities in a manner consistent with the purposes of this Order.
- C. In the event a substitute Monitor is required, the Commission shall select the Monitor, subject to the consent of Renown Health, which consent shall not be unreasonably withheld. If Renown Health has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Renown Health of the identity of any proposed Monitor, Renown Health shall be deemed to have consented to the selection of the proposed Monitor. Not later than ten (10) days after appointment of a substitute Monitor, Renown Health 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 Renown Health's compliance with the terms of this Order and the Order to Suspend Enforcement in a manner consistent with the purposes of this Order.

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- D. In the event a substitute Monitor is required, the Commission shall select the Monitor, subject to the consent of Renown Health, which consent shall not be unreasonably withheld.
- E. Renown Health 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 Renown Health's compliance with the terms of this Order to Suspend Enforcement, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of this Order to Suspend Enforcement and in consultation with the Commission, including, but not limited to:
 - a. receiving Termination Notification from Cardiologist Employees;
 - b. notifying each Cardiologist Employee that submitted a Termination Notification whether or not such notification will be an Acceptable Notification; and
 - c. assuring that Renown Health expeditiously complies with all of its obligations and performs all of its responsibilities as required by the this Order.
 2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
 3. The Monitor shall serve for such time as is necessary to monitor Renown Health's compliance with the Paragraph II.
 4. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Renown Health's personnel, books, documents, records kept in the ordinary course of

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business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Renown Health's compliance with its obligations under this Order to Suspend Enforcement. Renown Health 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 Renown Health's compliance with this Order to Suspend Enforcement.

5. The Monitor shall serve, without bond or other security, at the expense of Renown Health on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Renown Health, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.
6. Renown Health 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 malfeasance, gross negligence, willful or wanton acts, or bad faith by the Monitor.
7. Renown Health shall report to the Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by

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Renown Health with respect to the performance of Renown Health's obligations under this Order to Suspend Enforcement.

8. Within one (1) month from the date the Monitor is appointed pursuant to this paragraph, every sixty (60) days thereafter, until the termination of this Order to Suspend Enforcement, and otherwise as requested by the Commission, the Monitor shall report in writing to the Commission concerning performance by Renown Health of its obligations under this Order to Suspend Enforcement.
 9. Renown Health 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*, that such agreement shall not restrict the Monitor from providing any information to the Commission.
- F. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement Relating To Commission materials and information received in connection with the performance of the Monitor's duties.
- G. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph III.
- H. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order to Suspend Enforcement.
- I. The Monitor appointed pursuant to Paragraph III of this Order to Suspend Enforcement may be the same

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Person appointed as Monitor under the Decision and Order.

IV.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order to Suspend Enforcement becomes final, and every sixty (60) days thereafter until this Order to Suspend Enforcement terminates, Renown Health shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order to Suspend Enforcement

V.

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

- A. Any proposed dissolution of Renown Health,
- B. Any proposed acquisition, merger or consolidation of Renown Health, or
- C. Any other change in Renown Health, 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 to Suspend Enforcement.

VI.

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

- A. Access, during office hours of Renown Health 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

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Renown Health related to compliance with this Order to Suspend Enforcement, which copying services shall be provided by Renown Health at the request of the authorized representative(s) of the Commission and at the expense of Renown Health; and

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

VII.

IT IS FURTHER ORDERED that this Order to Suspend Enforcement shall terminate on the Termination Date.

By the Commission.

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Appendix A - Letter to Cardiologist Employees

Dear Physician:

Renown Health (“Renown”) has entered into an agreement with the Federal Trade Commission to resolve allegations that its acquisitions of certain cardiology medical practices and employment of the associated physicians has or will restrict competition in violation of Section 7 of the Clayton Act. Although Renown has not admitted liability or admitted that the facts alleged in the Commission’s complaint (other than jurisdictional facts) are true, it has agreed to two FTC orders containing certain terms which the Commission believes will ameliorate the competitive effects of the acquisitions.

For your convenience, Renown’s obligations under the FTC’s Orders, including the terms under which you may terminate your employment, are summarized below. These obligations are described more fully in the FTC’s Orders and its Analysis to Aid Public Comment which are both attached to this letter. **Nothing in this summary is intended to modify any of the terms of the Commission’s Orders or to provide legal advice.**

Description of the Orders: The first order (“Order to Suspend Enforcement of Renown Non-Compete” or “Order to Suspend”) establishes a period of time during which you, as a cardiologist currently employed by Renown, may explore all employment and professional opportunities in the Reno/Sparks area, whether as an employee, a member of a medical group, or in private practice. Renown cannot enforce any non-compete or non-solicitation provisions in your employment contract to interfere with your discussions during this time period. If you actually terminate your employment with Renown during this period, however, the Order to Suspend does not prohibit Renown from pursuing its contract rights.

The second order (“Decision and Order”), if accepted by the Commission after a period allowing for public comment, will allow you to terminate your employment with Renown without penalty so long as the following conditions are met:

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- (1) You must submit written notice of your intention to terminate your employment with Renown to the special monitor who has been appointed for the purpose of assuring confidentiality. Contact information for the monitor is provided at the conclusion of this letter;
- (2) You must intend to continue to practice in the Reno/Sparks area for at least one year;
- (3) You must be among the first 10 physicians to submit your notice to terminate employment. Renown is not required to terminate more than 10 employment contracts. To protect the confidentiality of the doctors who want to leave, the monitor will submit to Renown no more than the first 10 notices he receives; and
- (4) You must leave employment with Renown within 60 days of Renown receiving your notice from the monitor, but you may not leave prior to the monitor delivering your notice to Renown.

Timing of the Orders: The Order to Suspend begins on August 6, 2012, and continues for at least 30 days while the Commission receives public comment on the Decision and Order and considers those comments. You may enter into discussions and negotiations for new employment during this period. If you decide during this period to terminate your employment, you may notify the special monitor so that your name will be included in the event that the Decision and Order is accepted as final. Because the Order to Suspend will continue in effect until the Commission votes to accept (or reject) the Decision and Order, the conclusion of this time period cannot be determined at this time. It will, however, not end before September 5, 2012.

If the Commission accepts and issues the Decision and Order as final, a second 30-day period (Release Period) will begin. During this period, you may begin or continue discussions and negotiations for new employment. If you decide to terminate your employment, you should notify the monitor of your intention. The monitor will forward to Renown the names of the first ten physicians who have provided notice of their desire to terminate their employment. Renown is not required to allow

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more than 10 physicians who have given notice to the monitor and satisfied all of the conditions described above to terminate their employment without any penalty. On the other hand, if at the end of this 30-day Release Period fewer than six doctors have notified the monitor of their intent to terminate employment, the period in which cardiologists may continue to explore other employment opportunities and leave Renown's employment without penalty will remain open. This period will continue to remain open until six (rather than 10) cardiologists have terminated their employment with Renown.

PLEASE NOTE:

- The Orders do not *require* any doctor to terminate employment with Renown or to work for any other entity.
- The Orders do not *require* Renown to fire any doctors. However, the Orders also do not prohibit Renown from negotiating with a doctor regarding a mutual agreement for that physician's employment to be terminated.
- The Orders prohibit Renown from enforcing any non-compete or non-solicitation provisions in any contract, pursuing any breach of contract action, or taking any retaliatory action against any physician who either terminated his or her employment under the terms of the Orders or who sought new employment as allowed by the Orders but decided not to leave.
- If you terminate your employment at times or under terms not described in the Decision and Order, the Decision and Order does not prohibit Renown from pursuing its contract rights.
- Renown may be required to provide you with transitional assistance if you terminate employment to practice as an independent physician (rather than as an employee of another entity) in the Reno/Sparks area. Please review the proposed Decision and Order and your employment agreement with Renown (or contact the monitor) to determine whether these transitional services are available to you.

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- If six or more physicians have terminated their employment with Renown by the end of the Release Period, Renown may pursue its legal remedies against any employee who *subsequently* terminates employment with Renown in violation of that employee's contract.

If you have questions about the information contained in this letter or in the Analysis to Aid Public Comment, including questions regarding timing or implementation of the Orders, please contact the monitor, Judge Charles McGee at (775) 823-9975, or FTC's Bureau of Competition's Compliance Division at (202) 326-2031.

Written notifications of intent to terminate employment should be provided to:

Judge Charles McGee
1575 Delucchi Lane, Suite 115-1
Reno, NV 89502
Facsimile: (775) 823-9973
Email: judgemcgee@msn.com

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**Appendix B – Monitor Agreement
[Redacted Public Version]**

MONITOR AGREEMENT

This Monitor Agreement (“Monitor Agreement”) entered into this 18th day of July, 2012 by Renown Health and Judge Charles McGee provides as follows:

WHEREAS, the United States Federal Trade Commission (the “Commission”), *In the Matter of Renown Health*, has accepted for public comment an Agreement Containing Consent Order (“Consent Agreement”), incorporating an Order to Suspend Enforcement of Renown Non-Compete (“Order to Suspend Enforcement”) and a Decision and Order (“Decision and Order”), collectively referred to as the “Commission Orders,” with Renown Health, and the State of Nevada, through its Attorney General (“Nevada Attorney General”), has filed in the United States District Court for the District of Nevada, a Final Judgment (“Nevada Order”) with Renown Health (collectively, the Commission Orders and the Nevada Order are referred to as the “Orders”). The Orders, among other things, require Renown Health to waive enforcement of certain contractual terms with its Cardiologist Employees so that a certain number of those employees can leave Renown Health’s employment to practice cardiology in the Reno area, and provides for the appointment of one or more Monitors to ensure that Renown Health complies with its obligations under the Orders;

WHEREAS, the staff of the Commission and the Nevada Attorney General have appointed Charles McGee as such monitor (the “Monitor”) pursuant to the Orders to monitor Renown Health’s compliance with the terms of the Consent Agreement and Orders, and Charles McGee has consented to such appointment;

WHEREAS, the staff of the Commission and the Nevada Attorney General on July 17, 2012 notified Renown Health of the selection of Judge Charles McGee as the Monitor, and Renown Health on July 18, 2012 agreed to the selection of Judge Charles McGee, and is executing this agreement that, subject to the prior approval of the Commission and the Nevada Attorney General, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Renown Health’s compliance with the relevant requirements of the Orders in a manner consistent with the purpose of the Orders;

WHEREAS, this Monitor Agreement, although executed by the Monitor and Renown Health is not effective for any purpose, including but not limited to imposing rights and responsibilities on Renown Health or the Monitor under the Orders, until it has been approved by the Commission and the Nevada Attorney General; and

WHEREAS, the parties to this Monitor Agreement intend to be legally bound;

NOW, THEREFORE, the parties agree as follows:

1. Capitalized terms used herein and not specifically defined herein shall have the respective definitions given to them in the Orders.
2. The Monitor shall have all of the powers and responsibilities conferred upon the Monitor by the Orders.

Interlocutory Orders, Etc.

3. Renown Health hereby agrees that it will fully comply with all terms of the Orders requiring it to confer all rights, powers, authority and privileges upon the Monitor, or to impose upon itself any duties or obligations with respect to the Monitor, to enable the Monitor to perform the duties and responsibilities of the Monitor thereunder.
4. The Monitor shall have the power and authority to monitor Renown Health's compliance with the terms of the Orders, and shall carry out the duties of the Monitor in consultation with the Commission and the Nevada Attorney General, including but limited to:
 - a. receiving Termination Notifications from Cardiologist Employees;
 - b. receiving from Renown Health notification that it has terminated the employment of a Cardiologist Employee;
 - c. notifying each Cardiologist Employee that submitted a Termination Notification whether or not such notification will be an Acceptable Termination;
 - d. forwarding all Acceptable Terminations to Renown Health pursuant to the Order; and
 - e. assuring Renown Health's expeditious compliance with all of its obligations and performance of all of its responsibilities as required by the Orders.
5. Renown Health further agrees that:
 - a. it will provide the Monitor with copies of all reports submitted to the Commission and the Nevada Attorney General pursuant to the Orders, simultaneous with the submission of such reports to the Commission and the Nevada Attorney General, for the duration of the Monitor's term under this Agreement;
 - b. it will, subject to any demonstrated legally recognized privilege, grant the Monitor full and complete access to Renown Health's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Renown Health's compliance with their obligations under the Orders; and
 - c. it will cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Renown Health's compliance with the Orders.
6. Renown Health shall promptly notify the Monitor of any significant written or oral communication that occurs after the date of this Monitor Agreement between Renown Health, the Commission, and the Nevada Attorney General related to the Orders, together with copies of such communications.

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7. The Monitor shall serve, without bond or other security, at the expense of Renown Health on such reasonable and customary terms and conditions as the Commission and the Nevada Attorney General may set. The Monitor shall have authority to employ, at the expense of Renown Health, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.
8. Renown Health shall pay the Monitor, in accordance with the fee schedule attached hereto as Confidential Appendix A, for all reasonable time spent in the performance of the Monitor's duties and responsibilities, including all monitoring activities, all work in connection with the negotiation and preparation of this Monitor Agreement, all work in the nature of final reporting and file closure, and all reasonable and necessary travel time.
 - a. In addition, Renown Health will pay (i) all out-of-pocket expenses reasonably incurred by the Monitor in the performance of the Monitor's duties and responsibilities, including any international telephone calls and any auto, train or air travel in the performance of the Monitor's duties, and (ii) all fees and disbursements reasonably incurred by such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.
 - b. The Monitor shall have full and direct responsibility for compliance with all applicable laws, regulations and requirements pertaining to work permits, income and social security taxes, unemployment insurance, worker's compensation, disability insurance, and the like.
9. The Monitor shall maintain the confidentiality of all information provided to the Monitor by Renown Health. Such information shall be used by the Monitor only in connection with the performance of the Monitor's duties pursuant to this Monitor Agreement. Such information shall not be disclosed by the Monitor to any third party other than:
 - a. persons employed by, or working with, the Monitor under this Monitor Agreement, in which case such persons shall be informed of, and agree in writing to abide by, the confidentiality obligations applicable to the Monitor, in accordance with Paragraph 12 below, or
 - b. persons employed at or retained by the Commission or the Nevada Attorney General who are working on this matter.
10. The Monitor shall maintain a record and inform the Commission and the Nevada Attorney General of all persons (other than representatives of the Commission and the Nevada Attorney General) to whom confidential information related to this Monitor Agreement has been disclosed.

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11. The Monitor shall act in a fiduciary capacity for the benefit of the Commission and the Nevada Attorney General.
12. Upon termination of the Monitor's duties under this Monitor Agreement, the Monitor shall promptly return to Renown Health all material provided to the Monitor by Renown Health and shall destroy any material prepared by the Monitor that contains or reflects any confidential information of Renown Health. Nothing herein shall abrogate the Monitor's duty of confidentiality.
13. To the extent that the Monitor wishes to retain any employee, agent, consultant or any other third party to assist the Monitor in accordance with the Orders, the Monitor shall ensure that, prior to being retained, such persons execute a confidentiality agreement in a form agreed upon by the Monitor and Renown Health.
14. Nothing in this Monitor Agreement shall require Renown Health to disclose any material or information that is subject to a legally recognized privilege or that Renown Health is prohibited from disclosing by reason of law or an agreement with a third party.
15. Each party shall be reasonably available to the other to discuss any questions or issues that either party may have concerning compliance with the Orders as they relate to Renown Health.
16. Renown Health hereby confirms its obligation to indemnify the Monitor and hold the Monitor harmless in accordance with and to the extent required by the Orders. Renown Health 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.
17. In the event of a disagreement or dispute between Renown Health and the Monitor concerning Renown Health's obligations under the Orders, and in the event that such disagreement or dispute cannot be resolved by the parties, either party may seek the assistance of the Commission's Compliance Division or the staff of the Nevada Attorney General to resolve this issue.
18. This Monitor Agreement shall be subject to the substantive law of the State of Nevada (regardless of the choice of law principles of Nevada or those of any other jurisdiction).
19. This Monitor Agreement shall terminate when the last obligation under Paragraphs II, III, IV.A.1-4, and V of the Decision and Order and Paragraphs 33, 34, 35(a)-(d), and 36 of the Nevada Order have been fully performed; provided, however, that the Commission and the Nevada Attorney General may extend this Monitor Agreement as may be necessary or appropriate to accomplish the purposes of the Orders.

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20. In the event that, during the term of this Monitor Agreement, the Monitor becomes aware that he has or may have a conflict of interest that may affect or could have the appearance of affecting the performance by the Monitor of any of his duties under this Monitor Agreement, the Monitor shall promptly inform Renown Health, the Commission, and the Nevada Attorney General of such conflict or potential conflict.
21. In the performance of his functions and duties under this Monitor Agreement, the Monitor shall exercise the standard of care and diligence that would be expected of a reasonable person in the conduct of his or her own business affairs.
22. It is understood that the Monitor will be serving under this Monitor Agreement as an independent contractor and that the relationship of employer and employee shall not exist between Monitor and Renown Health.
23. This Monitor Agreement is for the sole benefit of the parties hereto and their permitted assigns, the Commission, and the Nevada Attorney General, and nothing herein express or implied shall give or be construed to give any other person any legal or equitable rights hereunder.
24. This Monitor Agreement contains the entire agreement between the parties hereto with respect to the matters described herein and replaces any and all prior agreements or understandings, whether written or oral.
25. Any notices or other communication required to be given hereunder shall be deemed to have been properly given if sent by mail, facsimile (with acknowledgment of receipt of such facsimile having been received), or electronic mail, to the applicable party at its address below (or to such other address as to which such party shall hereafter notify the other party):

If to the Monitor, to:

Judge Charles McGee
1575 Delucchi Lane, Suite 115-1
Reno, NV 89502

Telephone: (775) 823-9975
Facsimile: (775) 823-9973
Email: [judgemcgee@msn.com](mailto:judgetcmcgee@msn.com)

If to Renown Health, to:

Renown Health
Attention: Kelly Testolin, General Counsel
1155 Mill Street, Z-7

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Reno, NV 89502

Telephone: (775) 982-6054
Facsimile: (775) 982-5754
Email: ktestolin@renown.com

With copy to:

William Berlin
Ober Kaler
1401 H Street, N.W., Suite 500
Washington, DC. 20005

Telephone: (202) 326-5011
Facsimile: (202) 408-0640
Email: weberlin@ober.com

If to the Commission, to:

Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580
Attention: Secretary
Telephone: (202) 326-2514
Facsimile: (202) 326-2496

With copy to:

Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20001
Attention: Assistant Director for Compliance
Telephone: (202) 326-2526
Facsimile: (202) 326-3396

If to the Nevada Attorney General, to:

State of Nevada Office of the Attorney General
Bureau of Consumer Protection
Attention: Antitrust Unit
10791 W. Twain Avenue, Suite 100
Las Vegas, NV 89135
Telephone: (702) 486-3420
Facsimile: (702) 486-3283

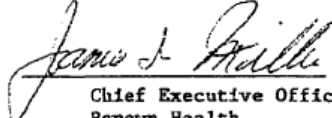
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26. This Monitor Agreement shall not become binding until it has been approved by the Commission and the Nevada Attorney General.

27. This Monitor Agreement may be signed in counterparts.

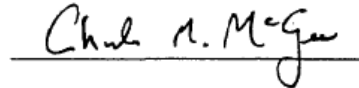
IN WITNESS WHEREOF, the parties hereto have executed this Monitor Agreement as of the date first above written.

Renown Health



Chief Executive Officer
Renown Health

MONITOR



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Confidential Appendix B-1

**[Redacted From the Public Version, But Incorporated By
Reference]**

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IN THE MATTER OF

MCWANE, INC.

AND

STAR PIPE PRODUCTS, LTD.

Docket No. 9351. Order, August 6, 2012

Order denying respondent's motion requesting the Commission conduct an oral argument on motions for summary disposition.

ORDER DENYING REQUEST FOR ORAL ARGUMENT

On June 8, 2012, Respondent McWane, Inc. (hereinafter "Respondent") filed a Motion For Summary Decision, and Complaint Counsel filed a Motion For Partial Summary Decision. On July 3, 2012, Respondent filed a Notice of Request For Oral Argument (hereinafter "Motion") in which Respondent requested "oral argument on the pending motions for summary disposition." Although the filing is styled as a Notice of Request, the Commission has determined to treat the filing as a Motion which Complaint Counsel have not opposed.¹

Commission Rule 3.52(h), 16 C.F.R. § 3.52(h), provides in relevant part that "oral argument will be held in all cases on appeal or review to the Commission, unless the Commission otherwise orders . . ." There is no equivalent rule addressing oral argument relating to motions for summary disposition. Moreover, Respondent's Motion does not provide an explanation as to why oral argument is necessary.² The parties have filed extensive briefs covering the issues presented by the motions for summary disposition, and oral argument is not likely to provide any additional information not already thoroughly addressed in those

¹ Commission Rule 3.22(d), 16 C.F.R. § 3.22(d), provides that if a party opposing a given Motion does not file an Answer, the party will be deemed to have consented to granting the relief requested in the Motion.

² Indeed, although Commission Rule 3.22(c), 16 C.F.R. § 3.22(c), provides in relevant part that all Motions must state "the grounds" for the action requested, Respondent's Motion states only that "McWane respectfully requests oral argument on the pending motions for summary disposition."

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briefs and the related materials.³ The Commission has therefore determined that oral argument is not necessary to determine the issues currently pending before the Commission. Accordingly,

IT IS ORDERED that Respondent's Motion requesting that the Commission conduct an oral argument be, and it hereby is, **DENIED**.

By the Commission.

³ The Commission relied on these same principles to determine not to conduct an oral argument in *In the Matter of Gemtronics, Inc., and William H. Isely*, Docket No. 9330 (addressing the Respondents' appeal from the Initial Decision on their application for attorney fees and other expenses). See Order Dispensing With Oral Argument (October 7, 2010), available at <http://www.ftc.gov/os/adjpro/d9330/101007gemtronicsorder.pdf>.

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IN THE MATTER OF

**MCWANE, INC.
AND
STAR PIPE PRODUCTS, LTD.**

Docket No. 9351. Order, August 9, 2012

Order denying respondent's Motion for Summary Decision and Complaint Counsel's Motion for Partial Summary Decision.

**ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY
DECISION AND COMPLAINT COUNSEL'S MOTION FOR PARTIAL
SUMMARY DECISION**

On June 8, 2012, Respondent McWane, Inc. filed a Motion For Summary Decision, and Complaint Counsel filed a Motion For Partial Summary Decision. The Commission has considered both Motions, as well as both parties' memoranda of law in support of and in opposition to these Motions. For the reasons set forth in the accompanying Opinion, the Commission has determined to deny both Motions. Accordingly,

I.

IT IS ORDERED THAT Respondent's Motion For Summary Decision be, and it hereby is, **DENIED**; and

II.

IT IS FURTHER ORDERED THAT Complaint Counsel's Motion for Partial Summary Decision be, and it hereby is, **DENIED**.

By the Commission.

Opinion of the Commission

OPINION OF THE COMMISSION

By Commissioner Edith Ramirez,

In this case we address allegations of anticompetitive conduct relating to the sale of ductile iron pipe fittings. Pipe fittings are used in water distribution systems for the installation of valves, water meters, and hydrants and to change the flow of water. Three companies— Respondent McWane, Inc., Sigma Corporation, and Star Pipe Products, Ltd.—account for the overwhelming majority of pipe fitting sales in the United States. Complaint Counsel alleges that these three companies entered into an agreement beginning in 2008 to fix prices. Complaint Counsel also alleges that McWane, the largest of the three suppliers, has a monopoly in the market for U.S.-made pipe fittings and that it illegally sought to maintain its monopoly after Sigma and Star tried to enter in 2009.

Before us are cross-motions for summary decision by Respondent McWane and Complaint Counsel. McWane seeks summary decision in its favor on all seven counts of the Complaint. Complaint Counsel moves for summary decision only on a narrow price fixing claim arising out of a brief telephone conversation between two McWane and Star executives in April 2009.

The allegations of price fixing have been met with strenuous denials, with McWane insisting that, at most, the suppliers engaged in consciously parallel conduct. Pointing to such denials and other claimed exculpatory evidence, McWane contends that its innocence can be established as a matter of law with respect to all the price-fixing charges. McWane also challenges the basis for Complaint Counsel's claims of monopolization and attempted monopolization, arguing that those claims should also be summarily dismissed. As discussed below, we find that genuine issues of material fact exist as to all of the counts in the Complaint, thereby precluding summary decision.

For its part, Complaint Counsel focuses its limited request for summary decision on a conversation between McWane's fittings division general manager and Star's head of sales. But while the substance of the communication is not disputed, its significance is

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vigorously contested by McWane. We conclude that this issue too must await trial.

We therefore deny the summary decision motions of both McWane and Complaint Counsel in their entirety.

I. COMPLAINT ALLEGATIONS

On January 4, 2012, the Commission issued a seven count administrative complaint against McWane¹ and Star.² The first three counts, charging violations of Section 5 of the Federal Trade Commission Act, are based on allegations that, beginning in January 2008, McWane, Sigma, and Star conspired to increase the prices at which imported and domestic pipe fittings were sold in the United States. Specifically, Complaint Counsel alleges that in early 2008 McWane devised a plan to raise and fix industry prices and invited Sigma and Star to collude with it. Compl. ¶¶ 29-30.³

McWane publicly announced a pipe fittings price increase on January 11, 2008, and Sigma and Star followed suit. *Id.* ¶ 31. McWane's actions leading up to the price increase included an invitation to Sigma and Star to curtail price discounting in exchange for higher future prices. *Id.* ¶ 32.a-c. According to Complaint Counsel, Sigma and Star accepted McWane's offer by "publicly taking steps to limit their discounting from published price levels" and centralizing pricing authority. *Id.* ¶ 32.c.

1 McWane's ductile iron fittings business is known as "TylerUnion," named after McWane's now-closed Tyler, Texas facility and Union Foundry in Anniston, Alabama. R's SOF at 5, n.2.

2 At the same time that the Commission issued its complaint against McWane and Star, it also issued a proposed complaint and consent order against Sigma. Final approval of the Sigma consent order was granted on February 27, 2012. *In re Sigma Corp.*, Decision and Order, Docket No. C-4347 (Feb. 27, 2012). The Commission accepted for public comment a proposed consent order against Star on March 20, 2012, and approved the final order on May 8. *In re McWane, Inc. & Star Pipe Prods., Ltd.*, Star Decision and Order, Docket No. C-9351 (May 8, 2012).

3 An index of the abbreviations used to refer to the parties' documents cited herein is attached at the end of this opinion.

Opinion of the Commission

A second round of collusive price increases allegedly took place in June 2008. *Id.* ¶ 34. Before announcing this round of increases, McWane allegedly decided to trade its support for higher prices in exchange for monthly sales information from Sigma and Star disseminated by an industry association called the Ductile Iron Fittings Research Association (“DIFRA”). *Id.* ¶ 34.a. According to Complaint Counsel, Sigma and Star accepted McWane’s offer by submitting their shipment data to DIFRA, following which McWane announced its second price increase on June 17, 2008. *Id.* ¶¶ 33, 34.c-d. Sigma and Star later matched McWane’s June price increase. *Id.* ¶ 34.d.

The remaining counts relate to the domestic pipe fittings market, in which McWane, as the only major supplier with domestic production capability, is alleged to be a monopolist. Complaint Counsel contends that the passage of the American Recovery and Reinvestment Act of 2009 (“ARRA”) in February 2009, which set aside more than \$6 billion for potential use in water infrastructure projects, “significantly altered the competitive dynamics of the [fittings] industry, and upset the terms of coordination” among McWane, Sigma, and Star. *Id.* ¶ 3. Because ARRA funding was conditioned on the use of domestically-produced fittings, it spurred Sigma and Star to seek to enter the domestic fittings market. *Id.* ¶¶ 3, 18, 44. Counts four through seven are based on McWane’s alleged efforts to exclude competitors from this market. In counts four and five, Complaint Counsel alleges that McWane induced Sigma to become a distributor of McWane’s domestic fittings to prevent it from becoming an independent competitor, in violation of Section 5 of the FTC Act. *Id.* ¶ 48. In counts 6 and 7, Complaint Counsel claims that McWane adopted restrictive and exclusive distribution policies to impede or delay the ability of Star and others to enter the domestic fittings market in violation of Section 5 of the FTC Act. *Id.* ¶¶ 57, 61.

McWane denies the substantive allegations of the Complaint.

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II. BACKGROUND AND UNDISPUTED FACTS**A. The Ductile Iron Pipe Fittings Industry**

Ductile iron pipe fittings (“pipe fittings” or “fittings”) are used to join pipes, valves, and hydrants and to change or direct the flow of water in the pipeline systems used in municipal, state, and federal drinking and waste water distribution systems. R’s Ans. ¶ 14. Although there are more than 4,000 individual fittings of different diameters (ranging from 3 inches to 48 inches or larger), configurations (*e.g.*, elbows, tees, and sleeves), joints, coatings, and finishes (R’s SOF ¶ 11), approximately 80% of demand may be serviced with fewer than 100 commonly- used sizes and configurations (R’s Ans. ¶ 15).

There are three primary pipe fittings sellers in the United States: Respondent McWane, Sigma, and Star. McWane is a full-line supplier of fittings, selling more than 4,000 individual fittings that are both imported and domestically produced. As of 2008, Sigma and Star only sold fittings that were manufactured outside the United States. Compl. ¶ 18; R.’s SOF ¶ 12. In 2009, Star began selling fittings produced by U.S. foundries. Star Ans. ¶ 18; R’s Ans. ¶ 18.

Some waterworks infrastructure projects specify whether the end user prefers or mandates the use of domestic pipe fittings. R’s Ans. ¶ 19. While a majority of end users currently issue “open source” specifications that do not indicate a preference for domestic or imported fittings, some government projects require the use of domestic fittings, often a result of a legal mandate requiring domestic sourcing. *Id.* Domestic fittings sold for use in jobs specified as “domestic only” are generally sold at prices higher than imported or domestic fittings sold for use in projects that are not designated as such. R’s Ans. ¶ 20.

Fittings suppliers publish list prices for each unique item they carry. *Id.* ¶ 27.e. They then periodically publish multiplier discounts on a state-by-state basis. *Id.* At times, suppliers also offer further special “job price discounts,” which are below the multiplier discounts. These discounts are negotiated individually by customers for particular projects. R’s SOF ¶¶ 30-33.

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Pipe fittings are sold primarily through independent wholesale distributors specializing in distributing products for waterworks infrastructure projects. Compl. ¶ 16. The two largest national distributors represent 50% of the waterworks distribution market. Thees IH 87-88; Tatman IH 83; R's SOF ¶ 111. The third largest distributor has a network in 22 states. Gibbs Dep. 8, 12. There are also a number of regional players (CC's SOF ¶ 170) and hundreds of small distributors, many with only a single location (McCutcheon IH 50, 204; Tatman IH 83-85).

B. The January and June 2008 Price Increases

McWane, the largest of the three main fittings suppliers, was most often the industry price leader. McCutcheon IH 421, 458; McCutcheon Dep. 182-83. In late 2007, however, Sigma and Star both announced they would be increasing list prices in early 2008. CC's SOF ¶¶ 23-24; R's SOF ¶ 54. McWane elected not to follow the price increases announced by Sigma and Star. CC's SOF ¶ 25. Instead, on January 11, 2008, McWane issued a pricing letter to its customers ("January pricing letter") announcing a 10% to 12% increase on the multiplier applicable to imported fittings and a 3% to 5% increase on domestic fittings, effective February 18, 2008. CX 1178-001. The letter noted that McWane anticipated the need to raise prices again within the next six months "as conditions require." *Id.* Sigma and Star soon matched McWane's announced pricing. CC's SOF ¶¶ 35-36; R's SOF ¶ 57.

In February, soon after these price increases, McWane, Sigma, and Star began discussing the possibility of creating an industry trade association, DIFRA, which would include a forum for exchanging their aggregated sales information. Discussions about creating such an exchange had taken place since at least 2005, but the effort had always stalled. CC's SOF ¶ 46. Led by Rick Tatman, general manager of McWane's fittings division, the initiative gained renewed momentum in Spring 2008. CX 0179-1.

By April 2008, the members of DIFRA had agreed to share monthly fittings shipment data for 2006, 2007, and the first four months of 2008 by May 15, 2008.⁴ CX 1479-001; CX 1186. Each

⁴ In addition to McWane, Sigma, and Star, a fourth company, U.S. Pipe, agreed to participate in DIFRA. (CX 1479-001.) Although by 2008 U.S. Pipe was no

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company agreed to report this data to DIFRA on a monthly basis thereafter. CX 1479-001. They provided the information to a third-party accounting firm, which aggregated the information and disseminated it to the members. *Id.*

On April 24, Sigma sent a letter to its customers announcing a large multiplier price increase, effective May 19. CX 0137. Star announced similar multiplier price increases on May 7, also to take effect on May 19. CX 0816.

In a customer letter dated May 7 (referred to as the “June pricing letter”), McWane indicated it would not be following the price increases announced by its competitors. CX 0138. McWane stated it would instead perform a pricing analysis by the end of May before deciding how to proceed. *Id.* As a result, both Sigma and Star retracted their previously announced price increases. CX 0527-001; Tatman Dep. 142.

On June 5, Star submitted its data to DIFRA. CX 0049. McWane received the DIFRA report on June 17 and later that same day announced an eight percent price increase. CX 0366-001; CX 1576. Sigma and Star soon announced they were following McWane’s price increases. CX 1851; CX 1734; CX 2254-001; CX 2255. Sigma and Star stopped submitting data to DIFRA by February 2009. CX 1278-001; Brakebill Dep. 124-125.

C. ARRA and the Domestic Fittings Market

With passage of ARRA in February 2009, Congress set aside more than \$6 billion in stimulus funds for water and other infrastructure projects. This funding, however, was conditioned on the use of domestically produced materials, including pipe fittings (the “Buy American” requirement). Following ARRA’s enactment, Sigma publicly announced its intention to supply its customers with domestic fittings. Rona IH 99-100, 105-07; Box Dep. 62.

longer a significant fittings provider (CX 0313-004; Brakefield Dep. 128-29), the others chose to invite it to participate because counsel had advised that having a fourth member would reduce legal risk (CX 0048-001).

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Lacking its own domestic manufacturing capability, Sigma approached McWane in Spring 2009 regarding the possibility of having Sigma purchase McWane domestic fittings and sell them under a private label. CC's SOF ¶ 116; R's SOF ¶ 115. These initial discussions proved unsuccessful. CX 908. Later, during the summer, Sigma renewed negotiations with McWane. CC's SOF ¶ 123. Ultimately, in September, McWane and Sigma entered into a master distribution agreement ("MDA") pursuant to which Sigma would purchase domestic fittings from McWane at 20% off McWane's published prices. CX 1194-001.

Like Sigma, Star began to explore the possibility of entering the domestic fittings market following the passage of ARRA. Bhargava Dep. 8. By Spring 2009, Star had decided to enter the domestic market (*id.* at 22) and publicly announced it was doing so in June (R's Ans. ¶ 56; CX 2330; CX 2331). Rather than operating its own foundry, it chose to purchase fittings from existing independent foundries in the United States. Bhargava Dep. 22-23, 118-19. By the close of 2009, Star had sold domestic fittings to 29 customers. R's Ex. 21 ¶ 2. In 2010 and 2011, Star sold approximately \$6.5 million worth of domestic fittings each year. *Id.* ¶ 9.

On September 22, 2009, McWane issued a letter to its distributors announcing that, pursuant to the MDA, McWane domestic fittings would be available through Sigma. CX 559-002. The letter also notified customers that McWane was adopting a program requiring that customers purchase domestic fittings exclusively from McWane or risk losing unpaid rebates for domestic fittings and experiencing delays in product shipments of up to 12 weeks. *Id.* The policy contained an exception if McWane domestic fittings were unavailable or if fittings were purchased from a competitor along with pipe. *Id.*

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III. STANDARD FOR SUMMARY DECISION

We review the parties' cross motions for summary decision pursuant to Rule 3.24 of our Rules of Practice, which is virtually identical to Federal Rule of Civil Procedure 56. *Polygram Holding, Inc.*, 136 F.T.C. 310, 2002 WL 31433923, at *1 (FTC Feb. 26, 2002). Accordingly, we treat a motion for summary decision analogously to a motion for summary judgment. As with a summary judgment motion, the party seeking summary decision "bears the initial responsibility of . . . identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal quotations omitted). The "party opposing the motion may not rest upon the mere allegations or denials of his or her pleading" and must instead "set forth specific facts showing that there is a genuine issue of material fact for trial." 16 C.F.R. §3.24(a)(3); *Celotex*, 477 U.S. at 323. We are required to resolve all factual ambiguities and draw all justifiable inferences in the light most favorable to the party opposing the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

We turn first to McWane's request that we summarily decide in its favor on all counts of the Complaint and then address Complaint Counsel's more limited motion.

IV. MCWANE'S MOTION FOR SUMMARY DECISION**A. Count One: Conspiracy to Fix Prices**

Section 1 of the Sherman Act prohibits contracts, combinations, and conspiracies that unreasonably restrain trade.⁵ 15 U.S.C. § 1; *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 356 (3rd Cir. 2004). Because of their "pernicious effect on

⁵ Violations of Sherman Act Sections 1 and 2 also constitute violations of Section 5 of the FTC Act, 15 U.S.C. § 45, as unfair methods of competition. See *California Dental Ass'n v. FTC*, 526 U.S. 756, 762 & n.3 (1999), *FTC v. Motion Picture Adver. Serv. Co.*, 344 U.S. 392, 394-95 (1953). We will therefore only reference the Sherman Act for our analysis of the relevant claims.

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competition and lack of any redeeming virtue,” *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958), price-fixing agreements are *per se* illegal. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007). Accordingly, to establish a horizontal price-fixing scheme, a plaintiff need only demonstrate the existence of an agreement, combination, or conspiracy among actual competitors with the purpose or effect of “raising, depressing, fixing, pegging or stabilizing” the price of a commodity. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223-224 (1940).

“The existence of an agreement is ‘[t]he very essence of a section 1 claim.’” *In re Flat Glass*, 385 F.3d at 356 (quoting *Alvord-Polk, Inc. v. Shumacher & Co.*, 37 F.3d 996, 999 (3d Cir. 1994)). The crucial question then is “whether the challenged anticompetitive conduct stems from independent decision or from an agreement.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007). Evidence of parallel behavior or even conscious parallelism alone, without more, is insufficient to establish a Section 1 violation. *Id.* at 553-54. Thus, to survive a motion for summary judgment, a plaintiff alleging a violation of Section 1 “must present evidence ‘that tends to exclude the possibility’ that the alleged conspirators acted independently.” *Matsushita*, 475 U.S. at 588 (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984)).⁶ Put differently, there must be evidence “that reasonably tends to prove . . . a conscious commitment to a common scheme designed to achieve an unlawful objective.” *Monsanto*, 465 U.S. at 768.

More often than not, a plaintiff lacks direct evidence of a conspiracy. Indeed, “[i]t is only in rare cases that a plaintiff can establish the existence of a conspiracy by showing an explicit agreement; most conspiracies are inferred from the behavior of

⁶ As the Supreme Court has explained, *Matsushita* does not “introduce a special burden on plaintiffs facing summary judgment in antitrust cases.” *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 468-69 (1992). Rather, it only requires that “the nonmoving party’s inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision.” *Id.*; see also *In re Flat Glass*, 385 F.3d at 357 (recognizing that in a price fixing case, the summary judgment standard is no different than that applied generally).

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the alleged conspirators . . . and from other circumstantial evidence.” *City of Tuscaloosa v. Harcos Chems.*, 158 F.3d 548, 569 (11th Cir. 1998); *see also ES Dev., Inc. v. RWM Enters., Inc.*, 939 F.2d 547, 553 (8th Cir. 1991) (“[I]t is axiomatic that the typical conspiracy is rarely evinced by explicit agreements, but must always be proven by inferences that may be drawn from the behavior of the alleged conspirators.”) (internal quotations omitted); VI PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1410c, at 63 (2d ed. 2003) (an agreement “can exist without any documentary trail and without any admission by the participants”).⁷ This circumstantial evidence of a conspiracy, when considered as a whole, must tend to rule out the possibility of independent action. *Matsushita*, 475 U.S. at 764; *Toys ‘R’ Us, Inc. v. FTC*, 221 F.3d 928, 934 (7th Cir. 2000).

1. Parallel Behavior

In support of its claim of conspiracy, Complaint Counsel first points to parallel pricing behavior in the pipe fittings market in 2008. Specifically, Complaint Counsel cites to two identical industry-wide multiplier price increases in 2008—one in January and another in June—as well as alleged efforts during this time period by the three claimed conspirators to centralize pricing authority and reduce price discounting on individual jobs. CC’s SOF ¶¶ 30, 35, 37, 77-78. But although probative of an agreement, “[parallel pricing behavior] falls short of conclusively establishing an agreement.”⁸ *Cosmetic Gallery Inc. v. Schoeneman Corp.*, 495 F.3d 46, 51-52 (3d Cir. 2007); *see also In re Baby Food Antitrust Litig.*, 166 F.3d 112, 122 (3d Cir. 1999) (noting that when competitors act individually, but in a parallel

⁷ Unless otherwise noted, citations to Areeda and Hovenkamp’s ANTITRUST LAW treatise refer to volume VI of the second edition.

⁸ In an oligopolistic market, “conscious parallelism” to raise or maintain prices is not necessarily unlawful because it could stem from independent conduct. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993). In dicta, the Supreme Court has described “conscious parallelism” as “the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.” *Id.*

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manner, “this may provide probative evidence of an understanding by the competitors to fix prices,” but is insufficient alone to prove a conspiracy) (internal quotations omitted).

McWane does not dispute that Star and Sigma announced they were matching McWane’s multiplier increases in both January and June 2008 (R’s SOF ¶¶ 57, 66), but maintains that this conduct reflects nothing more than parallel conduct (R’s SD Br. at 12-17). According to McWane, the price increases were merely necessary responses to rising costs. R’s SOF ¶ 53. Not surprisingly, the four McWane employees who testified all consistently stated that they made their pricing decisions independently. R’s SOF ¶¶ 22, 25-26, 30-31. Employees from Sigma and Star also all testified that they unilaterally decided to follow McWane’s announced prices. R’s SOF ¶¶ 50-51, 57-58.

McWane is correct that evidence of parallel pricing alone would be insufficient to show a conspiracy. In a market dominated by a small number of firms, “any single firm’s ‘price and output decisions will have a noticeable impact on the market and its rivals.’” *In re Flat Glass*, 385 F.3d at 359 (quoting AREEDA ¶ 1429, at 206-07). It follows, according to the theory of interdependence, that a rational oligopolist “must take into account the anticipated reaction” of its rivals when making decisions about price and other issues. *Id.* The result is that “firms in a concentrated market may maintain their prices at supracompetitive levels, or even raise them to those levels, without engaging in any overt concerted action.” *In re Flat Glass*, 385 F.3d at 359.

Because this conduct, referred to as “conscious parallelism,” may stem from independent conduct, it is well established that the Sherman Act does not prohibit it. *See, e.g., Brooke Group*, 509 U.S. at 227 (describing “conscious parallelism” as “the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power”). Accordingly, to distinguish between lawful behavior and an illegal price-fixing scheme, a plaintiff is required to show evidence of certain other factors known as “plus factors.” *In re Flat Glass*, 385 F.3d. at 360; *Williamson Oil Co. v. Philip Morris USA, Inc.*, 346 F.3d 1287, 1301 (11th Cir. 2003).

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It is undisputed that there is conscious parallelism in this industry. McWane acknowledges that market participants regularly track each other's pricing, obtained from their customers, and that Sigma and Star routinely follow McWane's announced pricing changes. R's SOF ¶¶ 50, 57-58. We now turn to whether Complaint Counsel has pointed to sufficient evidence of "plus factors" to defeat McWane's motion for summary decision.

2. Plus Factors

The existence of plus factors "tends to ensure that courts punish 'concerted action'—an actual agreement—instead of the unilateral, independent conduct of competitors." *In re Flat Glass*, 385 F.3d at 360 (internal quotations omitted); *see also Blomkest Fertilizer, Inc. v. Potash Corp. of Sask.*, 203 F.3d 1028, 1032-33 (8th Cir. 2000); *City of Tuscaloosa*, 158 F.3d at 570. There is no exhaustive list of plus factors (AREEDA ¶ 1434a, at 241-42), but the main types of relevant evidence can be grouped into the following three categories: "(1) evidence that the alleged conspirator had a motive to enter into the price fixing conspiracy; (2) evidence that it acted contrary to its self-interest; and (3) evidence implying a traditional conspiracy." *In re Flat Glass*, 385 F.3d at 360 (internal quotations omitted); *see also Re/Max Int'l v. Realty One*, 173 F.3d 995, 1009 (6th Cir. 1999) (listing plus factors); *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 254 (2d Cir. 1987) (same).

It has been pointed out, however, that "in the context of parallel pricing, the first two factors largely restate the phenomenon of interdependence." *In re Flat Glass*, 385 F.3d at 360; AREEDA ¶ 1429, at 207. Evidence that the alleged price-fixer had reason to enter into a conspiracy, for instance, may merely show "that the industry is conducive to oligopolistic price fixing, either interdependently or through a more express form of collusion." *In re Flat Glass*, 385 F.3d at 360. Similarly, evidence that it acted contrary to its interests may only mean that the conduct would be irrational in the context of a fully competitive market. *Id.* Accordingly, while important because they help distinguish between competitive market conduct and oligopolistic behavior, these first two factors alone do not suffice to defeat summary judgment. Here, as in most price-fixing cases, the third

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factor, “customary indications of traditional conspiracy,” will be the most important.⁹ *Id.* As shown below, Complaint Counsel has pointed to sufficient evidence of all three plus factors to defeat summary judgment.

a) Motive

To show that McWane and its alleged co-conspirators had a motive to enter into a price fixing conspiracy, Complaint Counsel emphasizes that the structure of the pipe fittings market is conducive to secret price fixing. Market structure can facilitate collusion when it: (1) involves a commodity product with few substitutes; (2) is concentrated on the supply side; (3) reflects a lack of concentration on the buying side; (4) has excess capacity; and (5) features published prices. *Cf. In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 656-58 (7th Cir. 2002) (noting that the high fructose corn syrup market exhibited these characteristics, making price fixing feasible and providing parties with a motive to engage in such conduct). The parties do not dispute that pipe fittings are a commodity product designed to industry-wide specifications, that they have no substitutes, and that suppliers publish list prices. R’s Ans. ¶¶ 23, 27(a) & (e). There is also evidence that McWane, Sigma, and Star together account for about 95% of sales in the fittings market (CX 1163-006), and that buyers, primarily distributors, are far less concentrated (CC’s SOF ¶¶ 168-171). And during the relevant time period, the market had excess capacity. CX 1287-007; CX 0627-001; CX 2145-006. McWane does not offer evidence to the contrary.

b) Actions Against Interest

Actions against interest by a participant in a conspiracy are actions that would have been economically irrational for a firm acting in a competitive market. *In re Flat Glass*, 385 F.3d at 360-61; *Williamson Oil*, 346 F.3d at 1310. Complaint Counsel focuses on Star, the industry’s claimed pricing maverick, arguing Star

⁹ Customary indications of a traditional conspiracy include information exchanges, ambiguous participant admissions, solicitations of agreement, communications between parties, and parallelism that it is difficult to explain absent an agreement. AREEDA ¶ 1434b, at 243.

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behaved contrary to its economic self-interest throughout the period of the alleged conspiracy. Complaint Counsel points to two acts in particular: Star's decision to curtail discounting throughout much of 2008, and its decision to participate in the DIFRA information exchange. Read in the light most favorable to Complaint Counsel, a plausible interpretation of the evidence could be that Star's conduct only made sense in the context of a conspiracy.

Star had long relied on discounting off list prices to gain market share. McCutcheon Dep. 152-53. In fact, competitors frequently complained about Star's "reckless, irresponsible, and undisciplined" pricing. CX 1076-003; *see also* Tatman IH 232-34; Rybacki Dep. 114. Yet, beginning in January 2008, following the release of the McWane January pricing letter, which Complaint Counsel posits included a veiled message to its competitors to stop discounting in exchange for future price increases (CC's SOF ¶¶ 27-29), Star abruptly announced it was curtailing discounting (CX 1170-3).¹⁰ To ensure that this occurred, Star removed pricing authority from its sales force and centralized it with its National Sales Manager, Matt Minamyner. *Id.*

Ultimately, this shift in policy appeared to have backfired. By late November 2008, Star had "lost too much revenue" and resumed project pricing. CX 0746. Nonetheless, one reasonable interpretation of the decision to centralize its pricing authority and reduce job discounting beginning in early 2008 supports Complaint Counsel's view that Star was not acting independently. *Cf. United States v. Andreas*, 216 F.3d 645, 652 (7th Cir. 2000) (noting that the ringleaders of the lysine cartel had urged competitors to centralize pricing to minimize cheating on the cartel agreement).

¹⁰ In fact, when announcing Star's new approach, Mr. Minamyner wrote to Star's district sales managers that "[d]on't think we need the price increases. . . . The truth is that we would come out of a price war stronger than ever and with a bigger market share, but we don't think the industry needs that right now." CX 1170-3.

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Star's agreement to exchange company sales information through DIFRA can also be seen as an action against self-interest. Mr. McCutcheon declared that he had long been reluctant to join DIFRA because he feared that the data would only be used by McWane and Sigma to gain insight into Star's pricing and sales information to undermine Star in the future. CX 0807. Yet in Spring 2008, after significant pressure from McWane and Sigma, Star agreed to participate in DIFRA (CX 0807), thereby arguably making its pricing decisions more transparent to its competitors (CC's SOF ¶¶ 46-47). Star stopped providing DIFRA data shortly after resuming its practice of job discounting. CC's SOF ¶¶ 95-97. Star's participation in the DIFRA exchange, even though short-lived, plausibly fits with Complaint Counsel's claim that it was driven primarily by an understanding with its competitors, rather than the company's economic self-interest.

Although Complaint Counsel focuses on Star because it had been the industry's most aggressive discounter, the evidence also shows that McWane and Sigma may have taken actions contrary to their self-interest. First, as with Star, their decisions to curtail job discounting would be against their interest absent an understanding that their competitors were going to do the same. Otherwise, they risked losing sales to competitors who discounted. Second, McWane's decision to curtail discounting and raise prices in 2008, particularly in the face of excess capacity, lower demand, and declining market share (CX 1287-005-007), could also be read as contrary to the company's interests.

c) The Alleged Conspiracy

As described by Complaint Counsel, in 2007 the fittings industry was suffering from declining demand and excess capacity, leading to pricing that trailed inflation. CX 1287; CX 0627-001; CX 1088-003. Star was placing additional pressure on prices. CC's SOF ¶ 13. McWane had answered by matching Star's pricing, but its profitability had suffered. CC's SOF ¶¶ 14, 18. McWane's senior management decided to shake up its fittings business, appointing Rick Tatman as Vice President and General Manager in an effort to turn the struggling business around. CC's SOF ¶ 16.

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Against this backdrop, Complaint Counsel contends that McWane, led by Mr. Tatman, developed a strategy in December 2007 to stabilize and increase industry-wide prices for fittings in 2008. CX 0627; CC's SOF ¶¶ 26-31. As described in a presentation that appears to have been shared with various McWane senior executives,

According to Complaint Counsel, McWane viewed the centralization of pricing authority at the management level and reduction of individual job pricing as key to the plan. *Id.* at 005.

As the first step in the plan, McWane issued the January pricing letter in early 2008, announcing a 10% to 12% increase on the multiplier applicable to imported fittings and a 3% to 5% increase on domestic fittings, effective February 18. CX 1178-001. The letter noted that McWane anticipated the need to raise prices again within the next six months "as conditions require" (*id.*), which Complaint Counsel contends was an offer from McWane to Sigma and Star. McWane would consider a larger price increase if its two competitors limited their discounts off of list prices. CC's SOF ¶ 34. By early February, both Sigma and Star had indicated they would match the previously-announced McWane pricing. CC's SOF ¶¶ 35-36.

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Complaint Counsel alleges that following the first round of industry-wide price increases in early 2008, McWane moved on to the next stage of its plan—an increase in industry transparency. CX 0627-004. Sigma supported McWane’s interest in creating an industry association, ultimately known as DIFRA, for the purpose of exchanging industry data, believing it would “create trust and respect among [DIPF] suppliers, which could lead to mature and disciplined decision making.” CX 1088-001. Star was initially reluctant to participate in DIFRA, but later gave in to pressure from McWane and Sigma and agreed to join. CX 0807.

During Spring 2008, both in-person and telephonic negotiations to set up DIFRA were underway. CX 1479. The parties reached an agreement in April 2008 that they would share monthly fittings shipment data for 2006, 2007, and the first four months of 2008 by May 15. CX 1479-001; CX 1186. Going forward, each company would continue to provide their sales data to DIFRA on a monthly basis. CX 1479-001.

According to Complaint Counsel, Sigma viewed the successful implementation of DIFRA as the time to again raise prices. CC’s SOF ¶¶ 57-58. Sigma announced a large multiplier price increase on April 24, which would be effective May 19, shortly after the DIFRA data was due. CX 0137. On May 7, Star announced similar multiplier price increases. CX 0816. McWane considered its competitors actions, but chose not to support such large price increases because they “would lead to instability.” CX 0137.

In the June pricing letter, McWane indicated it would not be following the price increases announced by its competitors. CX 0138. Instead, McWane indicated that before making any pricing decision, it would “carefully analyze all factors including: domestic and global inflation, market and competitive conditions within each region, as well as our own performance against our own internal metrics.” *Id.* McWane also noted that it would complete its pricing analysis by the end of May. *Id.*

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Following McWane's statement, both Sigma and Star retracted their previously announced price increases. CX 0527-001; Tatman Dep. 142.

On June 5, 2008, Star submitted its data to DIFRA. CX 0049. That same day, Dan McCutcheon, then Star's Vice President of Sales, notified Sigma by e-mail that Star had submitted its data. He recited language from the June pricing letter:

McWane received the DIFRA data on June 17. Later that day, McWane announced an eight percent price increase for fittings, effective July 14. CX 0366-001; CX 1576. Sigma and Star quickly followed McWane's price increases. CC's SOF ¶ 78.

By August 2008, the declining U.S. housing market put significant pressure on the fittings businesses. Rybacki Dep. 134-35. Complaint Counsel contends that this pressure led to increased complaints from McWane, Sigma, and Star, each claiming the others were failing to abide by the agreement not to deviate from published pricing. CC's SOF ¶ 85. For example, on August 22, Mr. Tatman at McWane complained to Mitchell Rona, Vice President of Operations at Sigma, that he was "upset" by Sigma

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and Star's pricing in California and Florida. CX 1149- 001; Rona Dep. 194-98.

Similarly, according to Complaint Counsel, Star became increasingly concerned about its competitors' pricing, asserting that they were not living up to their commitments to minimize discounting off of list prices. In a number of e-mails, Star employees complained that its competitors, particularly Sigma, were "cheating." By October 2008, Star was "catching Sigma cheating more and more." CX 1698. In an October 22 e-mail, Mr. Minamy, then Star's National Sales Manager, wrote that "Sigma is silently bringing the markets down and acting as if they are being good stewards." CX 0827-001. According to Complaint Counsel, McWane also viewed Sigma as responsible for the decline in prices. CX 0456.

Complaint Counsel alleges that by late November 2008, Star had decided to resume discounting. CC's SOF ¶¶ 95-96. On November 25, Mr. Minamy wrote to Star sales managers to announce that, having lost substantial revenue, Star would return to matching competitor pricing, albeit stealthily. CX 0746-001. He noted that while Star had been "extremely diligent in protecting the stability" of fittings pricing, the competition had not been as diligent. *Id.* By February 2009, Star and Sigma no longer participated in DIFRA. CC's SOF ¶ 97.

d) Analysis

Complaint Counsel maintains this evidence supports an inference of conspiracy. For its part, McWane insists that there was no conspiratorial plan at all. According to McWane, the strategy described by Mr. Tatman in the documents was nothing more than his "personal . . . brainstorming"—ideas that were never communicated to Sigma or Star. Moreover, it argues that the sequence of price increases shows at most conscious parallelism, not concerted action. We disagree.

As an initial matter, the strategy laid out in Mr. Tatman's presentation is both suggestive of possible collusion and provides a context for interpreting the events that followed. *See, e.g., In re Sulfuric Acid Antitrust Litig.*, 743 F. Supp. 2d 827, 858 (N.D. Ill. 2010) (noting that the "most damaging piece of evidence" for the

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defendants was a document laying out a plan to stabilize the market); *In re Linerboard Antitrust Litig.*, 504 F. Supp. 2d 38, 59 (E.D. Pa. 2007) (indicating that all of the evidence supporting allegations of a conspiracy were “contextualized within” a document discussing a strategy to encourage competitors to reduce inventory).

While McWane denies that it ever intended to convey any plan to its competitors, there is evidence suggesting otherwise. The slide laying out the elements of the plan is titled the

Id. Both versions contained language that Complaint Counsel contends was aimed at competitors and would have been meaningless to customers. Thus, a reasonable inference could be that McWane intended to use its pricing letters to communicate a plan to its competitors.

Moreover, both the January and June pricing letters could reasonably be read as veiled communications to Sigma and Star.

While not explicitly referring to “job discounts,” a plausible reading is that McWane’s intent going forward was to adhere to the published multipliers and not engage in job discounting. McWane makes much of Mr. Jansen’s denial—mild though it is—of any such message, (Jansen Dep. 253 (“I don’t think I’m announcing that we’re not going to do job pricing”)), as well as denials by others, but these are precisely the type of disputed facts that preclude summary decision.

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Additionally, internal communications at both Sigma and Star as well as their behavior show that both firms interpreted McWane's January pricing letter as an offer to support higher prices, particularly if each curtailed job discounting. In a January 24 e-mail, Sigma CEO, Victor Pais, wrote to Sigma's regional managers that

Mr. Pais then notes that he "urged" Larry Rybacki, Sigma's former Vice President of Sales and Marketing, to match McWane's new pricing, which it did on January 29, 2008, and

Complaint Counsel contends that Mr. Pais is referring to curtailing project pricing. Shortly thereafter, Sigma informed its customers that as of May 5, it was eliminating project pricing. CX 1138-004 (announcing that Sigma would "cease to use any varying 'special' pricing" and that orders would instead be processed using the prevailing list prices).

Like Sigma, Star responded to the January pricing letter by announcing in a customer letter that it would match McWane's multiplier price increases. CX 2336; CX 2315-001. Star also decided to curb project pricing, *i.e.*, discounting. In a January 22 e-mail discussing McWane's pricing letter, Mr. Minamyer, Star's National Sales Manager, ordered Star employees to "*stop project pricing.*" CX 1170-2-3 (emphasis in original); *see* CX 0034-1. Mr. Minamyer noted that the elimination of project pricing "is best for the industry and that [Star] need[s] to be part of the effort to help [the fittings] industry. We will not [be] part of damaging the industry due to lack of discipline." CX 1170-3. Shortly after receiving the McWane letter, Star notified customers that there would be "no utility project pricing nationwide." CX 2315-001. To ensure compliance with the restrictions on project pricing, Star decided to centralize pricing authority with Mr. Minamyer. CX 1170-3.

McWane also argues that the June pricing letter on its face "says nothing at all about DIFRA . . . [or] about any willingness to support higher prices in exchange for submissions of tons-

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shipped data to DIFRA.” R’s Reply Br. at 4. That may very well be, but, at a minimum, Sigma and Star’s reactions to the June pricing letter raise disputed questions of fact about whether it also contained veiled communications to Sigma and Star.

Specifically, Complaint Counsel interprets the June letter, particularly its references to McWane needing until the end of May to determine whether a further price increase was warranted, as conveying a message to Sigma and Star that McWane would only support higher pricing after it received and analyzed the DIFRA data. CC’s SOF ¶¶ 62-64. It contends that only Sigma and Star knew that the companies had agreed to submit DIFRA data “by the end of May.” CC’s SOF ¶ 64. Prior to receiving the pricing letter, Star had not yet confirmed it would share its sales data with DIFRA, but within hours of receipt, Dan McCutcheon, then Star’s Vice President for Sales, e-mailed the other DIFRA members confirming that Star would submit its data. CX 1085-001; CX 0863. Further, Complaint Counsel contends that Mr. McCutcheon’s quoting of select language from McWane’s June letter in his e-mail to Sigma demonstrates that Star understood McWane was offering to raise prices contingent on its competitors providing their sales data to DIFRA. CC’s SOF ¶ 74. Complaint Counsel further contends that Star accepted the offered price increase by submitting the requested data. *Id.* Whether that is or is not an accurate account of what happened is a matter that will have to be resolved at trial, not on summary decision.¹¹

McWane also takes issue with Complaint Counsel’s assertion that the DIFRA information exchange serves as evidence of a conspiracy. In particular, McWane stresses that the DIFRA data

¹¹ In addition to the January and June pricing letters, Complaint Counsel also points to other examples of pricing-related communications among the alleged conspirators. Many of these communications involve complaints about a rival’s low pricing. CC’s SOF ¶¶ 15-21, 41-42. While the evidence surrounding the pricing letters is more than sufficient to conclude that summary decision would be inappropriate here, these additional communications lend further support to an inference of a conspiracy. *See AREEDA* ¶ 1419a, at 122-23 (“[W]hen a competitor merely complains to its rival about the latter’s ‘low price’ . . . the ‘objective’ meaning of such a statement to the reasonable observer seems clear: the only business rationale for complaining is to induce a higher price.”); *In re Plywood Antitrust Litig.*, 655 F.2d 627, 633 (5th Cir. 1981) (recognizing a high level of inter-firm communication as a plus factor).

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was limited to aggregated sales volume numbers and provided no insight into pricing. But where there is evidence suggesting that the exchange of information may have been closely intertwined with the alleged conspiracy, an inference of conspiracy is plausible.¹² *In re Flat Glass*, 385 F.3d at 369 (finding that exchanges of information among competitors supported an inference of a conspiracy where they were “tightly linked” with the alleged concerted behavior); *In re Petroleum Prods. Antitrust Litig.*, 906 F.2d at 462 (“an inference of conspiracy drawn from the appellants’ evidence of supply data exchanges is plausible”).

Here, there is evidence that McWane delayed a price increase until receipt of the DIFRA data. In a May 24 e-mail from Mr. Tatman to other McWane executives, he wrote that

McWane finally announced a price increase on June 17, hours after it received, and quickly analyzed, the DIFRA data. CC’s SOF ¶¶ 75-77. This evidence shows a plausible link between the DIFRA information exchange and the alleged conspiracy.¹³ See *In re Currency Conversion Fee*

¹² It is uncontested that the DIFRA data lacked specific pricing information (R’s SOF ¶¶ 87-91; CC’s SOF ¶ 56), but this fact is not dispositive. See *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 461-62 (9th Cir. 1990) (holding that an agreement to exchange non-price information with competitors can serve as circumstantial evidence of an agreement to raise prices); see also *Am. Column & Lumber Co. v. United States*, 257 U.S. 377, 398 (1921) (recognizing that disseminating production and supply data cannot be treated categorically different than the exchange of price information).

¹³ Although McWane concedes that it announced a price increase hours after receiving the DIFRA data, it responds that rather than match its competitors’ previously announced—and subsequently suspended—price increases, it instead announced smaller price increases. R’s Reply Br. at 10. This does not disprove a conspiracy, however. Indeed, some evidence suggests that McWane actually preferred smaller increases because they reduced the likelihood of cheating, thereby promoting price stability. For example, a December 31, 2007 e-mail to Mr. Tatman from Thomas Walton, McWane Senior Vice President, responding to Mr. Tatman’s proposed strategy, praised the recommendation to only raise prices half as much as McWane’s competitors as part of an effort

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Antitrust Litig., 773 F. Supp. 2d 351, 370 (S.D.N.Y. 2011) (holding that timing of defendants' decisions to raise prices—within days of an exchange of information—supported a finding that the information had an impact on the pricing decision).

Moreover, as discussed at greater length below, there is also evidence that all three suppliers believed that the DIFRA data allowed monitoring of the market and their competitors' behavior. Specifically, Complaint Counsel presents evidence that the data provided sufficient insight into the market, much of which the alleged conspirators could not access previously, to allow them to determine whether they were losing sales due to a downturn in the market (shown by a steady market share) or discounting by competitors (evidenced by a declining share). CX 1092. As a result, it seems the recipients believed the information would help maintain pricing stability. *Id.*; CX 1287.

Finally, Complaint Counsel also points to a number of statements by the parties suggestive of a conspiracy. Various Star documents refer directly to “cheating” in the fittings marketplace, implying the existence of an agreement that Star believed a coconspirator had breached. In a number of e-mails, Star's regional division managers complained to Mr. Minamyer that their competitors were cheating.

There are similar references by McWane employees. For example, in a May 18, 2009 e-mail to Ruffner Page, CEO of McWane, in anticipation of his meeting with Mr. Pais, former CEO of Sigma, Mr. Tatman wrote that

These references to “cheating” and “agreements” clearly support the possibility of a conspiracy. *See Blomkest Fertilizer*, 203 F.3d at 1050 (Gibbons, J. dissenting) (noting that “the use of the word ‘cheating’ denotes the breach of an agreement or convention, not

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independent action”); *see also In re High Fructose Corn Syrup*, 295 F.3d at 662 (recognizing that statements suggestive of an agreement among competitors serve as circumstantial evidence of a conspiracy).

We close this discussion by addressing one overarching argument made by McWane— that a price-fixing conspiracy could not have existed here because individual job discounting continued throughout 2008. McWane’s argument is flawed for several reasons. First, courts have consistently held that “[a]n agreement to fix list price . . . is a per se violation of the Sherman Act even if most or for that matter all transactions occur at lower prices.” *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d at 656. As Judge Posner has explained, that is because “the list price is usually the starting point for the bargaining and the higher it is, the higher the ultimately bargained price is going to be.” *Id.*; *see also Plymouth Dealers’ Ass’n v. United States*, 279 F.2d 128, 132 (9th Cir. 1960) (holding that an agreement among competitors on common list prices as the starting point for bargaining with customers violated the Sherman Act). That the claimed conspiracy here allegedly involved a reduction in discounting off of list prices (Compl. ¶ 32) only heightens the concern that raising list prices may have resulted in higher prices for customers.

Second, evidence that job pricing continued, at least to some degree, in 2008 does not preclude a finding of conspiracy. In evaluating a claim of price fixing, one must distinguish “between the existence of a conspiracy and its efficacy.” *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d at 656. The fact that not all of the claimed conspirators complied fully with the conspiracy does not mean there was no conspiracy.¹⁴ *See United States v. Beaver*, 515 F.3d 730, 739 (7th Cir. 2008) (holding that evidence of cartel “cheating” did not undermine the government’s case that a cartel existed); *Andreas*, 216 F.3d at 679 (same).

¹⁴ Moreover, Complaint Counsel does not argue that McWane and its rivals intended to or would “stop” all job discounting; rather, Complaint Counsel argue and offer evidence that McWane intended to “curtail” job discounting, and that it was soliciting its rivals to do the same in part through its January pricing letter. *See, e.g.*, CC’s SOF ¶¶ 28-30, 33-34. Accordingly, that at least some job pricing continued is not inconsistent with the conspiracy allegations.

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Finally, there is also evidence belying McWane's contention that job pricing continued unabated following the dissemination of the January pricing letter.

Similarly, in its Second Quarter 2008 Executive Report, McWane continued to observe a decrease in discounting and job pricing. CX 1562-004.

Considered as a whole, the evidence presented by Complaint Counsel more than suffices to defeat summary decision as to count one. *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) (emphasizing that “the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but [rather] by looking at it as a whole”); *InterVest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 160 (3d Cir. 2003) (“a court should not tightly compartmentalize the evidence put forward by the nonmovant, but instead analyze it as a whole to see if together, it supports an inference of concerted action.”).

B. Count Two: Conspiracy to Exchange Sales Information

In addition to arguing that the DIFRA information exchange is a plus factor supporting the inference of a price-fixing agreement, Complaint Counsel also alleges that it constitutes an independent violation of Sherman Act Section 1 as a facilitating practice. Compl. ¶¶ 35-38, 65. McWane seeks summary dismissal of this claim on the ground that McWane, Star, and Sigma witnesses uniformly testified that the DIFRA shipping data they received provided them with no insight into competitor pricing, and therefore, could not facilitate a price fixing agreement. This argument does not hold up under the facts before us.

A facilitating practice is one that “makes it easier for parties to coordinate price or other anticompetitive behavior in an anticompetitive way. It increases the likelihood of a consequence that is offensive to antitrust policy.” AREEDA ¶ 1407b, at 29-30;

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see also In re Brand Name Prescription Drugs Antitrust Litig., 288 F.3d 1028, 1033 (7th Cir. 2002) (recognizing that “there is authority for prohibiting as a violation of the Sherman Act or of section 5 of the Federal Trade Commission Act an agreement that facilitates collusive activity”). As an initial matter here, the fact that the traded information was non-price data does not necessarily absolve McWane and its rivals. *See In re Petroleum Prods. Antitrust Litig.*, 906 F.2d at 462 (holding that the exchange of non-price information can facilitate collusion). Whether an agreement to exchange competitive information constitutes an unreasonable restraint of trade is analyzed under the rule of reason. Therefore, the question is whether the anticompetitive effect of the agreement outweighs its beneficial effects. *United States v. United States Gypsum*, 438 U.S. 422, 441 n.16 (1978); *Todd v. Exxon*, 275 F.3d 191, 199 (2d Cir. 2001); *In re Petroleum Prods. Antitrust Litig.*, 906 F.2d at 447 n.13; *Ipenne v. Greater Minneapolis Area Bd. of Realtors*, 604 F.2d 1143, 1148 (8th Cir. 1979). In assessing the competitive effects of the information exchange, the susceptibility of the industry to collusion and the nature of the information exchanged are the most important factors in determining likely effects. *United States Gypsum*, 438 U.S. at 441 n.16; *Todd*, 438 F.3d at 207-08.

As discussed above, the fittings industry has characteristics arguably making it susceptible to collusion: fittings are fungible; demand is largely inelastic; and the market is concentrated. In evaluating the nature of the information exchanged, courts look to the timeliness and specificity of the data to determine its anticompetitive potential. *Todd*, 438 F.3d at 211-13. Here, the DIFRA members agreed to share data regarding monthly fittings shipments. Although the data was not prospective, which would be particularly troubling, it was nonetheless very recent, sometimes reflecting sales data less than two weeks old. CX 2334. The parties also apparently believed it provided them with a much more accurate picture of sales in the industry than prior sources of data. CX 1706; CX 2337. Moreover, it was sufficiently detailed that with some manipulation, the parties could calculate their market share down to at least the state level. CX 2335. Perhaps most importantly, it allowed the parties to monitor competitor discounting. CC’s SOF ¶¶ 80-82. There are also a number of documents explaining that the DIFRA data allowed the members

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to determine whether sales losses resulted from overall market decline or from competitor discounting.¹⁵ See CX 0313-004; CX 1077-002. Based on this evidence, Complaint Counsel reasonably argues that the DIFRA exchange allowed the parties to monitor their competitors and thereby promoted the conspiracy. See *In re Corn Syrup Antitrust Litig.*, 295 F.3d at 656 (recognizing that the ability to detect cheating “tends to shore up a cartel”).

Relying on *Williamson Oil*, McWane argues that the exchange of sales information, as opposed to price data itself, is far less indicative of a price fixing conspiracy. It is certainly true that the exchange of sales information does not in and of itself suggest a conspiracy, but the inquiry does not end there. Importantly, in *Williamson Oil*, not only was there a lack of evidence tying the exchange of information to the claimed conspiracy, but the parties also had evidence of a procompetitive justification for the exchange. 346 F.3d at 1313. Here, by contrast, McWane fails to identify a single procompetitive purpose for the DIFRA exchange.¹⁶ Additionally, the fact that the data exchange began during the alleged conspiracy period (CC’s SOF ¶ 46), and stopped shortly after Complaint Counsel alleges that Star withdrew from the conspiracy (CC’s SOF ¶ 97), raises doubt about whether the exchange of data served any procompetitive objective. Tellingly, when Sigma attempted to revive DIFRA reporting in May 2009, it did not provide a procompetitive reason, but rather said

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16 Although McWane presents evidence that one of DIFRA’s primary purposes was to address technical specifications of fittings (R’s SOF ¶ 85), it provides no evidence demonstrating that this goal was related to the exchange of the sales volume data.

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In sum, Complaint Counsel presents evidence plausibly showing that the agreement among McWane, Sigma, and Star to exchange sales data may have facilitated their alleged collusion. This, coupled with McWane's failure at this stage to provide evidence of any procompetitive justification to offset the potential anticompetitive harm, requires that we deny McWane's motion for summary decision on count two.

C. Count Three: Invitations to Collude

McWane also moves for summary decision on Complaint Counsel's allegations that McWane's January and June pricing letters constitute unlawful invitations to collude in violation of Section 5 of the FTC Act. Compl. ¶ 66. McWane acknowledges that the FTC has previously asserted that invitations to collude are an unfair method of competition but argues that summary decision is warranted because the issue has not been litigated and no court has held that an invitation to collude violates Section 5. As discussed above, McWane also disputes as a factual matter that its January and June 2008 pricing letters were invitations to collude. Neither argument provides a basis for summary decision.

For more than twenty years, the Commission has held that an invitation to collude is "the quintessential example of the kind of conduct that should be . . . challenged as a violation of Section 5." Statement of Chairman Leibowitz and Commissioners Kovacic and Rosch, *In re U-Haul Int'l, Inc.*, Docket No. C-4294 (June 9, 2010), at 1 (identifying cases). This conclusion is based on the longstanding principle that the scope of Section 5 of the FTC Act is broader than the Sherman Act. As the Supreme Court has explained, Section 5 empowers the Commission to challenge anticompetitive practices in their incipiency:

The unfair methods of competition which are condemned by §5 of the Act are not confined to those that were illegal at common law or that were condemned by the Sherman Act. . . . [T]he FTCA was designed to supplement and bolster the

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Sherman Act and the Clayton Act, to stop in their incipency acts and practices, which, when full-blown, would violate those Acts, as well as to condemn as unfair methods of competition existing violations of them.

FTC v. Motion Picture Adver. Serv. Co., 344 U.S. 392 (1953).¹⁷

McWane ignores this well-established authority and instead directs us to Sherman Act Section 1 conspiracy cases. But these cases do not relate to Section 5 and are therefore inapposite. Even *Liu v. Amerco*, upon which McWane principally relies, makes clear the distinction between the requirements of Section 1 of the Sherman Act and Section 5. 677 F.3d 489, 494 (1st Cir. 2012).

Liu was a follow-on private action to the Commission's complaint and consent decree in *In re U-Haul International*, the most recent case in which the Commission has challenged an invitation to collude under Section 5. In *Liu*, the First Circuit held that Liu's complaint stated a cognizable claim under the Massachusetts consumer protection statute, which, like Section 5, prohibits "unfair methods of competition." *Id.* at 494-95. The First Circuit endorsed the Commission's position, noting that "while . . . an unsuccessful attempt [to conspire] is not a violation of Section 1 of the Sherman Act," the FTC has concluded under Section 5 of the FTC Act that a "proposal to engage in horizontal price fixing is dangerous merely because of its potential to cause harm to consumers if the invitation is accepted." *Id.* at 493-94.

McWane also ignores leading antitrust scholars who have endorsed the Commission's use of Section 5 to challenge invitations to collude. *See, e.g.*, AREEDA ¶ 1419e, at 129-38; Stephen Calkins, *Counterpoint: The Legal Foundation of the Commission's Use of Section 5 to Challenge Invitations to Collude is Secure*, 14 *Antitrust* 69 (Spring 2000) ("intercepting attempted price fixing would seem the quintessential example of restraining a practice that otherwise would ripen into a Sherman Act violation, and of banning a practice that conflicts with the

¹⁷ *Accord* *FTC v. Texaco*, 393 U.S. 223, 225 (1969); *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966); *FTC v. Cement Inst.*, 333 U.S. 683, 708 (1948); *Fashion Originators' Guild, Inc. v. FTC*, 312 U.S. 457, 466 (1941).

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Sherman Act's basic policies"). While there may be some debate about the precise contours of Section 5, there is widespread agreement that invitations to collude are, and should be, an unfair method of competition. After all, "an unsuccessful attempt to fix prices is pernicious conduct with a clear potential for harm and no redeeming value whatever." *Liu*, 677 F.3d at 494; *see also In re Valassis*, 141 F.T.C. 279, 282-86 (2006) (delineating the legal and economic justifications for imposing liability on invitations to collude under Section 5).

Equally unpersuasive is McWane's argument that there is no factual support for this count. As discussed above, whether McWane's January and June pricing letters are invitations to collude present genuine issues of fact to be resolved at trial.

D. Counts Four and Five: McWane's Efforts to Exclude Sigma from the Domestic Fittings Market

Complaint Counsel also alleges that McWane induced Sigma to abandon its plan to enter the domestic fittings market as an independent competitor and instead distribute product manufactured by McWane. Complaint Counsel charges that the resulting distribution arrangement, embodied in a master distribution agreement ("MDA"), violates Sherman Act Sections 1 and 2 by excluding Sigma and maintaining McWane's alleged monopoly in the domestic fittings market. McWane challenges these allegations on a single ground, arguing that Sigma was not in a position to enter the domestic fittings market at the time it entered into the MDA with McWane. In other words, McWane contends Sigma was not an actual potential competitor in that market. R's SD Br. at 11, 32-33; R's Reply Br. at 6-7. The question for us is whether the uncontroverted evidence supports McWane's contention. We conclude that it does not.

The parties dispute whether Sigma was an actual potential competitor in the domestic fittings market. Complaint Counsel, for the purposes of this motion, agrees with McWane that a firm is an actual potential entrant when it can be shown that it has taken "affirmative steps to enter the business" and has an "intention"

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Meanwhile, although Mr. Bhattacharji estimated that it would take at least 18-24 months for Sigma to have a full line of fittings available across the country even using a virtual manufacturing model, he also explained that Sigma would have been able to operate successfully earlier than that with less than a full range of fittings. Bhattacharji Dep. 247-48.

Star's entry into the domestic market is also instructive. Star, like Sigma, employs a virtual manufacturer model for fittings. *See* Bhutada Dep. 6-9. And it began selling domestic fittings manufactured by third-party foundries within a few months of its June 2009 announcement that it was entering the market and less than nine months after passage of the ARRA. R's SOF ¶ 98.

There is also evidence that Sigma's owners and board supported Sigma's domestic entry even absent ARRA, based on the belief that "Buy American" requirements as well as end-user preferences could lead to the domestic market increasing to 25% to 30% of the overall fittings market. *See* CX 0081-004; CX 0225-001; CX 0978-001.

As for Sigma's financial condition, it appears that Sigma had sufficient capital to invest into entering the domestic market. A July 27, 2009 e-mail from Sigma's equity owner to Sigma's executive management, for instance, indicates that Sigma's liquidity was "fine" and that investors and shareholders were prepared to invest up to \$7.5 million "to fund [the] domestic sourcing initiative" as well as other strategic additions to "help Sigma grow." CX 0099-007. Sigma's CEO also testified that if no deal had been struck with McWane, Sigma "would have brought in the finances" necessary to fund domestic production. Pais IH 180-81.

Complaint Counsel also points to other evidence showing that Sigma had the intent to enter the domestic market. Sigma executives testified that absent an agreement with McWane, Sigma would have entered the domestic market. Pais IH 179-80; Rona IH 102-04. Contemporaneous business documents confirm this. In a June 5, 2009 e-mail following receipt of McWane's initial low offer, Mr. Pais wrote that "it's time [Sigma] seriously went ahead with [its] SDP [Sigma Domestic Plan] plans." CX 0225-001. Similarly, in a board of directors update from the same

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day, Sigma management wrote that the company

CX 0086-005; *see In re B.A.T. Indus.*, 104 F.T.C. 852, 922 (1984) (noting that the “best evidence that a firm is an actual potential entrant . . . will ordinarily consist of internal, non-public information”).

In fact, Sigma had taken a number of affirmative steps to enter the market. These included visiting domestic foundries and securing offers to produce domestic fittings; purchasing tooling equipment; acquiring patterns; ordering production drawings; and conducting test manufacturing. Bhattacharji Dep. 55-56; Box Dep. 27-28; CX 0282; R’s Ex. 27 at 6165-66. According to Mr. Bhattacharji, Sigma’s domestic plan was “ready with what was needed once the switch was flipped.” Bhattacharji Dep. 54-55.

The record also suggests that McWane itself believed that Sigma could soon begin selling domestic fittings. R’s RFA Resp. No. 35; CX 1179-002; CX 0329.

And McWane clearly recognized that Sigma’s entry posed a threat to McWane’s domestic fittings sales.

This evidence suffices to raise a factual dispute about whether Sigma was an actual potential entrant into the domestic fittings market at the time it entered into the MDA with McWane. Accordingly, we deny McWane’s motion for summary decision on counts four and five.

E. Counts Six and Seven: Exclusive Dealing

McWane also seeks summary decision with respect to the final two counts, in which Complaint Counsel alleges that McWane adopted exclusive dealing policies to monopolize or attempt to monopolize the domestic pipe fittings market. Compl. ¶¶ 69-70. In particular, Complaint Counsel alleges that McWane

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threatened to withhold rebates, delay deliveries, and refuse to deal with waterworks distributors that purchased domestic fittings from Star. Compl ¶ 57; CC's SOF ¶¶ 175-77. According to Complaint Counsel, McWane's exclusionary distribution policies are "the primary barriers to effective entry and expansion" in this market for domestic fittings for suppliers like Star that have established "reputations for quality and service" in the broader fittings market. Compl. ¶ 42.

McWane argues that Star's "successful expansion" into the domestic fittings market compels summary decision in its favor on these two claims. As described by McWane, the undisputed evidence shows that Star announced its decision to sell domestic fittings in June 2009 and was able to sell to 126 customers, including some of the largest U.S. distributors, by the end of 2011. R's SOF ¶¶ 97-98, 101. McWane also points to the fact that Star sold nearly \$300,000 of domestic fittings in 2009, and approximately \$6.5 million per year in 2010 and 2011. R's SOF ¶¶ 102, 104, 107. In McWane's view, Star's sales numbers, which are uncontroverted, do not permit a trier of fact to conclude that McWane had monopoly power or that its distribution policies were exclusionary. We disagree.

The offense of monopolization has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Attempted monopolization, in turn, requires proof "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports v. McQuillan*, 506 U.S. 447, 456 (1993). Monopoly power is defined as "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). But "having a monopoly does not itself violate [Section] 2." *United States v. Microsoft*, 253 F.3d 34, 58 (D.C. Cir. 2001). There must also be a showing that the challenged conduct is "exclusionary." In other words, to be condemned, the act must have an anticompetitive effect. As the *Microsoft* court explained, this means "it must harm the competitive *process* and thereby harm consumers. . . . [H]arm

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to one or more *competitors* will not suffice.” *Id.* (emphasis in original).

An exclusive dealing arrangement is not unlawful under the antitrust laws unless it is likely to “foreclose competition in a substantial share of the line of commerce affected.” *Microsoft*, 253 F.3d at 68 (citing *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961)). Under Section 2, however, a plaintiff is not required to show that the claimed monopolist excluded all entry by rivals. As explained in *United States v. Dentsply International*, “[t]he test is not total foreclosure, but whether the challenged practices bar a substantial number of rivals or severely restrict the market’s ambit.” 399 F.3d 181, 191 (3d Cir. 2005). Accordingly, the question here is whether McWane’s conduct foreclosed a substantial portion of the effective channels of distribution, and whether the conduct had a significant effect in preserving McWane’s monopoly. *See Microsoft*, 253 F.3d at 70 (noting that “a monopolist’s use of exclusive contracts . . . may give rise to a § 2 violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation”).

The undisputed facts that provide the basis for McWane’s motion are not dispositive of Complaint Counsel’s monopolization claims. Complaint Counsel disputes the competitive significance of Star’s sales, characterizing Star’s purported success as mere “toehold entry,” and has provided evidence that could lead a fact finder to conclude that McWane’s policies deterred distributors from dealing with Star and had a significant effect on McWane’s ability to monopolize the domestic market. Significantly, it appears that at least 85% of domestic fittings are sold through distributors. CC’s SOF ¶ 8. And the two largest national distributors, HD Supply and Ferguson Enterprises, which are responsible for 50% of all waterworks sales, each testified that they directed their regional managers to purchase domestic fittings exclusively from McWane. *Id.* at 168, 182, 185, 189-93. The evidence also plausibly shows that McWane’s policies did in fact cause Star to lose business with at least Ferguson. A Star sales manager testified that Ferguson regional managers refused to do business with Star as a direct result of McWane’s policies. CC SOF ¶¶ 188-93, Berry Dep. 131-

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44. This testimony is confirmed by Star's internal bidding records. CX 2294-012 ("All Ferguson are lost-they only get quotes from us for reference.")

Similarly, McWane's policies seemingly led the third largest distributor, WinWholesale, to add Star's domestic fittings to its "Not Approved" list, preventing its branches from purchasing Star domestic fittings. CC's SOF ¶¶ 169, 194. Although Complaint Counsel does not dispute that these three large distributors purchased a small share of their supply of domestic fittings from Star, McWane's distribution policies did permit sales where it could not readily fill a customer's order. CX 0059-002. Material factual disputes remain as to whether Star's sales to these customers fell within this exception, and whether McWane's distribution policies prevented Star from competing more broadly for the business of these large distributors.

Moreover, Star testified that

Bhutada Dep. 74-75.

Id. 74-75, 128. Indeed, Ramesh Bhutada, Star's CEO testified that

Id. at 84. This suggests that Star could arguably have been a more effective competitor absent McWane's allegedly exclusionary policies.

In light of this evidence, and drawing as we must all reasonable inferences in favor of the nonmoving party, we conclude that a fact finder could find in favor of Complaint Counsel on these claims. Moreover, because the power to exclude competition provides direct evidence of monopoly power, triable issues also remain as to whether McWane possessed monopoly power. *Dentsply*, 399 F.3d at 190 (finding that Dentsply's power over a dealer network provided direct evidence of monopoly power).

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The authority McWane relies on does not hold differently or otherwise support summary decision on the narrow ground McWane advances here. For instance, the court in *Omega Environmental v. Gilbarco* correctly held that an exclusive dealing claim cannot succeed without proof of likely competitive harm. 127 F.3d 1157, 1165 (9th Cir. 1997). But the court also recognized that in determining whether there is competitive harm, one must examine a broad range of evidence. While the court took account of the fact that a competitor was able to enter and grow its market share from 6% to 8% in affirming judgment for the defendant, that evidence did not provide the sole basis for its decision. It also considered a variety of other industry evidence, including the volume of direct sales to end users, ease of entry into distribution, prices, output, and fluctuations in market shares, all of which suggested that the defendant's policy harmed competition. *Id.* at 1162-65. Moreover, the court in *Omega* concluded that the plaintiffs had not produced any credible evidence that the defendant's policy had actually deterred entry. 127 F.3d at 1164. In contrast, Complaint Counsel has identified evidence that could lead a fact finder to conclude that McWane's alleged exclusive dealing policies had an anticompetitive effect. CC's SOF ¶¶ 8, 168, 180-82, 185, 187-94, 202.

McWane's reliance on *Tops Market v. Quality Markets*, 142 F.3d 90 (2d. Cir. 1998), is similarly unavailing. In *Tops*, the court rejected the plaintiff's effort to provide evidence of market power solely through a conclusory affidavit. *Id.* at 98. The court also held that the plaintiff could not prove market power in light of evidence of meaningful entry by a large competitor, as well as the plaintiff's own contemporaneous market studies showing that competitors (including the plaintiff) could readily enter the defendant's market and compete effectively. *Id.* at 99. We do not understand *Tops* to hold that evidence of *some* entry on its own provides conclusive proof that the defendant lacks monopoly power as a matter of law. As the Ninth Circuit explained in *Rebel Oil Co. v. Atlantic Richfield Co.*, “[i]f the output or capacity of the new entrant is insufficient to take significant business away” from the accused, the entrant is “unlikely to represent a challenge to the [defendant's] market power.” 51 F.3d 1421, 1440 (9th Cir.

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1995).¹⁹ Nothing in *Tops* suggests that Complaint Counsel would be precluded from establishing monopoly power at trial on the facts here.

Whether Complaint Counsel can ultimately prove that McWane's distribution policies constitute monopoly maintenance remains to be seen. But Star's sales numbers standing alone do not rule out that possibility. And, because we find there are genuine issues of fact on the question whether McWane has monopolized the domestic market, we also find triable issues remain on Complaint Counsel's attempted monopolization claim, which requires a lesser showing. See *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1505 (11th Cir. 1988) ("Determining whether a defendant possesses sufficient market power to be dangerously close to achieving a monopoly requires analysis and proof of the same character, but not the same quantum, as would be necessary to establish monopoly power for an actual monopolization claim."). Accordingly, we also deny McWane's request for summary decision on Complaint Counsel's attempted monopolization claim.²⁰

19 McWane fares no better with its citation to *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), a predatory pricing case brought under the Robinson Patman Act. In *Brooke Group*, the Supreme Court affirmed judgment as a matter of law in favor of the defendant because the plaintiff failed to show the defendant had a reasonable prospect of recovering its losses and thus later harming competition. *Id.* at 243. There is nothing in *Brooke Group* that would suggest that Star's sales numbers, isolated from a broader factual picture, compel summary decision here. To the contrary, *Brooke Group* specifically rejects a formulaic approach in favor of a more fact-specific analysis of competitive effects. *Id.* at 230 ("We decline to create a *per se* rule of nonliability—when recoupment is alleged to take place through supracompetitive oligopoly pricing.").

20 While we agree with Commissioner Rosch's dissent that Complaint Counsel must ultimately prove that McWane's distribution policy harmed competition in the domestic fittings market, we disagree that Star's entry alone is dispositive of that question, or that Complaint Counsel is necessarily required to quantify the additional sales Star would have made absent McWane's policy. Instead, as detailed above, we find that Complaint Counsel comes forward with evidence sufficient to permit a fact finder to conclude that McWane substantially constrained Star's entry into the market, and harmed competition.

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V. Complaint Counsel's Motion for Partial Summary Decision

For its part, Complaint Counsel moves for partial summary decision on one discrete claim: that McWane and Star unlawfully restrained price competition in the fittings market in April 2009. On April 15, 2009, McWane announced a new price list, effective May 1, which contained lower prices for some fittings and higher prices for others. CX 1873 ¶ 14, CX 0569; Tatman Dep. 167-69. After McWane announced the new price list but before it became effective, Sigma announced it would not follow McWane. CX 0807 ¶ 5; CX 1873 ¶ 15; CX 2350 ¶ 1. Star, on the other hand, apparently intended to follow McWane, but was uncertain whether McWane would actually implement its new price list. CX 1873 ¶ 16; McCutcheon Dep. 43, 227-28. In an attempt to resolve the uncertainty, Star's Vice President of Sales, Mr. McCutcheon, called McWane's general manager, Mr. Tatman, to determine whether McWane was in fact going to implement its new price list. He received assurances from Mr. Tatman that McWane intended to do so. CX 1873 ¶ 17; McCutcheon Dep. 227-28.

Complaint Counsel bases its claim primarily on Mr. McCutcheon's testimony describing the conversation:

McCutcheon IH 258. Arguing that this "bargained-for exchange of express assurances firmly establishes an agreement" (CC's SD Br. at 7), Complaint Counsel asks us to find that this discussion violates Section 1 as a matter of law.

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McWane does not dispute that the communication occurred. Instead, in addition to disputing the significance of the communication, it argues that we should strike the motion because the Complaint does not include specific allegations regarding the exchange. In particular, McWane argues it did not receive adequate notice of the claims in violation of procedural due process, and further that the FTC Act prohibits the Commission from addressing allegations not contained in the Complaint. In the alternative, McWane urges us to deny Complaint Counsel's motion on the ground that the evidence shows "that McWane independently decided its April 2009 price list reduction and that Star independently decided to follow." R's Opp'n Br. at 5-11, 23.

We first address McWane's request to strike Complaint Counsel's motion. Complaint Counsel argues that the conversation and the circumstances surrounding it, although not specifically set out in the Complaint, are well within its reasonable scope; that McWane had actual notice that the communication was at issue in the case; and that the Commission may, under its rules, conform the pleadings to the evidence at the summary judgment stage.

It is true that the Complaint does not describe this specific communication, and that the discussion involved price lists rather than multipliers or job discounting. R's Opp'n Br. at 5. But the Complaint is not necessarily limited to collusion on multipliers and job discounts. As detailed in the Complaint, standardized price lists and multipliers are alleged to enhance the ability of the sellers here to collude. Compl. ¶ 27(e). Moreover, the Complaint nowhere states that the conspiracy was "disbanded" in early 2009 (before the communication), despite McWane's repeated assertions to the contrary. Rather, the Complaint alleges that McWane, Star, and Sigma *began* fixing prices of fittings in January 2008 (Compl. ¶¶ 2, 29), but contains no allegation as to the end date of the conspiracy, or, for that matter, any allegation of the conspiracy ending at all (*see id.* ¶¶ 3, 36). Indeed, the closest the Complaint comes to alleging an ending date are allegations that the DIFRA sales data exchange ended in January 2009, and that the enactment of ARRA in February 2009 "upset the terms of coordination" among McWane and its rivals. Compl. ¶ 3.

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The Commission's rules require only that complaints contain "[a] clear and concise statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be in violation of the law." 16 C.F.R. § 3.11(b)(2). The Complaint here is clear that the conduct at issue is price-fixing by McWane and its rivals, Star and Sigma. We do not read our rule to require Complaint Counsel to set out explicitly in the Complaint each and every episode of the allegedly unlawful conduct. *See In re Basic Research, LLC*, 2004 WL 1942068 (F.T.C.), at *3 (Aug. 17, 2004) (recognizing that FTC complaints need only satisfy the requirements of notice pleading); *cf. Ericson v. Pardus*, 551 U.S. 89, 94 (2007) (holding that "[s]pecific facts are not necessary" to satisfy the notice pleading requirement); *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008) (holding that federal notice pleading does not require the plaintiff to allege all facts raised by a claim). Accordingly, we conclude that the communication and its surrounding circumstances are "reasonably within the scope of the original complaint." 16 C.F.R. § 3.15(a)(2).

Nor are we persuaded that McWane lacked sufficient notice that the communication was also in contention. McWane had actual notice of the claim arising out of the communication, and, in fact, actively engaged in discovery on the issue. The conversation first emerged in Mr. McCutcheon's investigational hearing on May 4, 2011. McCutcheon IH 257-58. It was also a topic of a declaration by Mr. McCutcheon. CX 1873-003-004. In subsequent discovery, after the Complaint issued, McWane's counsel appeared at the deposition of ten different individuals, including both Mr. Tatman and Mr. McCutcheon, where testimony about the events of April and May 2009 surrounding McWane's change in list prices, and/or the communication itself, was elicited and given. *See, e.g.*, Bhutada Dep. 97-98; Jansen Dep. 255-57; McCullough Dep. 231-38; McCutcheon Dep. 42-45; 221-36; Minamyler Dep. 229-39; Page Dep. 244-47; Pais Dep. 149-50, 325-36; Rybacki Dep. 193-201, 284-88; Tatman Dep. 167-81; Walton Dep. 151-60. Indeed, McWane's counsel questioned Mr. McCutcheon about the communication before Complaint Counsel even raised the issue in his deposition. McCutcheon Dep. 42-43, 227-31. Thus, there can be little question that McWane had actual notice and ample opportunity to

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conduct its own discovery on the issue. Accordingly, we deny McWane's request to strike Complaint Counsel's motion.²¹

We turn next to the merits of Complaint Counsel's motion. McWane argues that "after the fact" assurances about price are not unlawful and that, at most, the evidence shows that "McWane made its own decision to announce a radical list price decrease (on April 14) and that Star subsequently learned about the decrease from its customers and decided to follow (before Mr. McCutcheon called Mr. Tatman)." R's Opp'n Br. at 19-21. According to McWane, "follow-the-leader behavior is entirely lawful." *Id.* at 21. In reply, Complaint Counsel urges us to conclude that the communication here is essentially the same as the agreement to adhere to previously announced prices at issue in *Sugar Institute v. United States*, 297 U.S. 553 (1936), and that it is therefore *per se* unlawful.

We deny Complaint Counsel's motion for two reasons. First, we disagree that the facts in *Sugar Institute* are "indistinguishable" from those here. In *Sugar Institute*, 15 refiners that collectively processed nearly all of the sugar refined in the United States and supplied 70 to 80 percent of the sugar consumed formed an association that adopted numerous rules governing pricing practices of the refiners. *Id.* at 572. Among the adopted rules, the firms agreed to publicly announce prices and conditions of sale in advance, to abolish all price discrimination between customers, and to strictly adhere to their publicly announced prices. *Id.* at 573-74. The Court found the rule requiring pre-announced prices to be reasonable, but condemned the combination of rules in which the refiners agreed not to grant

21 Although there appears to be no Commission precedent for conforming the pleadings to the evidence on a motion for summary decision, we note that many courts have interpreted Rule 15(b)(2) of the Federal Rules of Civil Procedure, which is analogous to our Rule 3.15(a)(2), to permit such action in appropriate cases. *See, e.g., McCree v. SEPTA*, No. 07-4908, 2009 U.S. Dist. LEXIS 4803, at *33 (E.D. Pa. Jan. 23, 2009) (noting that "the vast majority of the Circuit Courts of Appeals" apply Rule 15(b) at summary judgment); *but see Ahmad v. Furlong*, 435 F.3d 1196, 1203 n.1 (10th Cir. 2006) (noting circuit split). However, in light of our finding that the claim is reasonably within the scope of the Complaint, we need not decide at this time whether Commission Rule 3.15(a)(2) should be construed to apply on a motion for summary decision under the circumstances here.

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price concessions or variations in prices, *i.e.*, discounting off of the pre-announced list prices. *Id.* at 601. Here, Complaint Counsel insists that the communication constitutes an agreement to adhere to previously announced prices just like that in *Sugar Institute*. However, the uncontroverted evidence adduced thus far does not support the contention that there was any agreement to adhere to posted prices.

Second, viewing the evidence in the light most favorable to McWane, there is a genuine issue of disputed fact as to whether there was an “agreement” to fix prices. Mr. McCutcheon testified that the exchange about paying Star \$25,000—which Complaint Counsel argues was part of the “bargained-for exchange of assurances about future pricing”—was only a joke. McCutcheon Dep. 43. Mr. Tatman testified that he not only had no recollection of the call, but also that he never had any conversations with anyone at Star about what they were going to do in response to the revised McWane pricing. Tatman Dep. 177-80.

As discussed above, to establish an unlawful agreement under Section 1, there must be evidence “that reasonably tends to prove that [the parties] had a conscious commitment to a common scheme designed to achieve an unlawful objective.” *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984). Complaint Counsel points to McWane’s guarantee as a key part of the agreement to adhere to the previously announced list price. But the testimony contains no mention of any “guarantee” by McWane, and Mr. McCutcheon characterized the whole exchange as a joke. To be sure, Mr. McCutcheon testified that he called Mr. Tatman to assure himself that McWane was actually going to “come out with” or “stay with” the new price list, and Mr. Tatman said “yes” rather than hanging up the phone. McCutcheon IH 257-58; McCutcheon Dep. 43-44. Evidence that Mr. Tatman may have confirmed that McWane was “staying with” its new price list does not necessarily equate to a commitment to *adhere* to the previously announced list price, as had been the case in *Sugar Institute*. Although Complaint Counsel relies on an April 28, 2009 e-mail from Mr. Tatman stating,

, McWane points to later communications in which Mr. Tatman continued to express uncertainty about Star’s plans as evidence of the lack of

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understanding or agreement. *See* R's Ex. 4. In addition, there is evidence that McWane independently determined its new pricing list after months of internal analysis, and that Star independently decided to follow McWane's new pricing before ever contacting Mr. Tatman. McCutcheon Dep. 226-27; Tatman Dep. 168-71. In short, there are disputed facts about the existence of an agreement, an essential element of the claim, thereby precluding summary decision.

VI. Conclusion

For all of the reasons stated above, we deny McWane's Motion for Summary Decision and Complaint Counsel's Motion for Partial Summary Decision.

Index of Abbreviations

CC's Opp'n Br. – Complaint Counsel's Opposition to Respondent McWane's Motion for Summary Decision

CC's Reply Br. – Complaint Counsel's Reply Memorandum in Support of its Motion for Partial Summary Decision

CC's Resp. to R's SOF – Complaint Counsel's Response to Respondent's Statement of Undisputed Facts

CC's SD Br. – Complaint Counsel's Memorandum in Support of its Motion for Partial Summary Decision

CC's SOF – Complaint Counsel's Concise Statement of Material Facts as to Which There is a Genuine Issue for Trial

Compl. – Complaint

CX – Complaint Counsel's Exhibit

Dep. – Deposition Transcript

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IH – Investigational Hearing Transcript

R's Ans. – Respondent's Answer

R's Ex. – Respondent's Exhibit

R's Opp'n Br. – Memorandum of Law in Support of Respondent
McWane, Inc.'s Opposition To and Motion to Strike
Complaint Counsel's Motion for Partial Summary
Decision

R's Reply Br. – Reply Brief in Support of Respondent McWane,
Inc.'s Motion for Summary Decision

R's RFA Resp. – Respondent McWane, Inc.'s Response to
Complaint Counsel's Request for Admission

R's SD Br. – Memorandum of Law in Support of Respondent
McWane, Inc.'s Motion for Summary Decision

R's SOF – Statement of Material Facts as to Which There is no
Genuine Dispute in Support of Respondent McWane,
Inc.'s Motion for Summary Decision

Star Ans. – Star's Answer

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**STATEMENT OF COMMISSIONER J. THOMAS
ROSCH, CONCURRING IN PART AND DISSENTING IN
PART IN THE MATTER OF MCWANE, INC. AND STAR
PIPE PRODUCTS, LTD.**

This matter, which has been in Part 3 adjudicative proceedings before Chief Administrative Law Judge D. Michael Chappell, comes before the Commission on Complaint Counsel's motion for partial summary decision and Respondent McWane, Inc.'s ("McWane") cross-motion for summary decision on all counts of the Administrative Complaint.¹ The trial of this matter is currently scheduled to begin on September 4, 2012. While I join my colleagues in denying parts of McWane's cross-motion based on the existence of genuine issues of material fact for trial, I would grant McWane's cross-motion as it relates to the sixth and seventh counts of the Complaint for monopolization and attempted monopolization. Those counts relate to McWane's alleged exclusion of its rival, Respondent Star Pipe Products, Ltd. ("Star"), from the relevant market for domestically produced, small- and medium-size, ductile iron pipe fittings ("DIPFs") for use in water infrastructure projects that are specified as domestic only (hereinafter, "domestic-only DIPF market"). *See* Compl. ¶¶ 22, 56–63, 69–70. Additionally, although I join my colleagues in denying Complaint Counsel's motion, I do so for slightly different reasons. Below are my reasons for deciding these two issues differently.

I.

In its cross-motion, McWane has argued that Star's entry into the domestic-only DIPF market—with more than 130 customers and \$6.5 million in sales in its first full year of business—conclusively demonstrates as a matter of law that McWane did not engage in any alleged "exclusive dealing" that blocked or deterred Star's entry. Resp't McWane's Mem. Supp. Mot. for Summ. Decision 31–32. In my view, the basic facts and figures concerning Star's

¹ Under the Commission's Rules of Practice for Adjudicative Proceedings ("Part 3 Rules"), motions for summary decision made under Rule 3.24(a)(1) are directly referred to and ruled on by the Commission, unless the Commission chooses to refer them back to the Administrative Law Judge for disposition. 16 C.F.R. § 3.22(a) (2012).

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entry, which are not seriously controverted by Complaint Counsel, warrant the grant of partial summary decision to McWane on this issue.

Supreme Court case law² provides that a party may move for summary decision either by affirmatively producing evidence that negates an essential element of the opposing party's claim, or by demonstrating that the opposing party's evidence is insufficient to establish an essential element of its claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153–56 (1970). But these two options are not necessarily binary and mutually exclusive. “Courts are rightfully cautious about requiring a defendant to effectively ‘prove a negative’ in order to avoid trial on a specious claim. . . . Thus, if the summary judgment record satisfactorily demonstrates that the plaintiff's case is, and may be expected to remain, deficient in vital evidentiary support, this may suffice to show that the movant has met its initial burden.” *Carmona v. Toledo*, 215 F.3d 124, 133 (1st Cir. 2000) (citations omitted).

In this case, by raising the undisputed fact and extent of Star's entry, McWane challenges Complaint Counsel's ability to prove at trial that McWane's alleged “exclusive dealing” practices have caused a “significant” degree of foreclosure. *United States v. Microsoft Corp.*, 253 F.3d 34, 69 (D.C. Cir. 2001) (“Though what is ‘significant’ may vary depending upon the antitrust provision under which an exclusive deal is challenged, it is clear that in all cases the plaintiff must both define the relevant market and prove the degree of foreclosure.”); *see also id.* (“Because an exclusive deal affecting a small fraction of a market clearly cannot have the requisite harmful effect upon competition, the requirement of a significant degree of foreclosure serves a useful screening function.”). Importantly, at least two circuit courts have held that the standard for proving “significant” foreclosure should be

² Supreme Court case law governing summary judgment motions under Rule 56 of the Federal Rules of Civil Procedure applies to summary decision motions under Commission Rule 3.24 as well. *See, e.g., Realcomp II Ltd.*, No. 9320, 2007 FTC LEXIS 67, at *10 (F.T.C. May 21, 2007); *Basic Research, LLC*, No. 9318, 2005 FTC LEXIS 100, at *2–3 (F.T.C. June 27, 2005).

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higher “[w]here the exclusive dealing restraint operates at the distributor level, rather than at the consumer level, . . . because it is less clear that a restraint involving a distributor will have a corresponding impact on the level of competition in the consumer market.” *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1235 (8th Cir. 1987). *Accord Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162–63 (9th Cir. 1997).

Furthermore, it bears repeating here that the standard of proving “significant” foreclosure is necessary because “[v]irtually every contract to buy ‘forecloses’ or ‘excludes’ alternative sellers from *some* portion of the market, namely the portion consisting of what was bought.” *Microsoft*, 253 F.3d at 69 (quoting *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 236 (1st Cir. 1983) (Breyer, J.)). For this very reason, antitrust law requires exclusionary conduct that is the predicate for a monopolization claim actually to impair a rival from entering and competing effectively. *See* IIB PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 422e3, at 100 (3d ed. 2007) (“Entry while alleged exclusionary conduct is underway may suggest both that entry is easy and that the defendant’s conduct is not really predatory at all.”); III PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 651d, at 116 (3d ed. 2008) (“Exclusionary behavior must be conduct that prevents actual or potential rivals from competing or that impairs their opportunities to do so effectively.”).

Against the backdrop of the above recited law, Complaint Counsel’s case rests on establishing the following counterfactual—in the domestic-only DIPF market in which Star was a new entrant, how much more market share should Star have obtained within a specified period of time but for McWane’s alleged “exclusive dealing” practices? And was this extra market share significant or substantial? In my view, Complaint Counsel has not pointed to any evidence in the record that would allow a rational trier of fact to answer these questions at trial.

As a threshold matter, it cannot be seriously disputed that if McWane possessed putative monopoly power in a domestic-only DIPF market, as Complaint Counsel alleges, then it acquired that power “from growth or development as a consequence of . . . historic accident[.]” *United States v. Grinnell Corp.*, 384 U.S.

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563, 571 (1966)—namely, the passage of the American Recovery and Reinvestment Act of 2009 (“ARRA”), with its “Buy American” requirement, and the fact that McWane happened to be, at that time, the sole supplier of a full line of domestically produced DIPF in the most commonly used size ranges. Compl. ¶¶ 3–4, 39–40; Resp’t McWane’s Answer to Compl. ¶ 40. Put differently, Star had zero market share in the domestic-only DIPF market when it announced its intent to enter that market in June 2009. Compl. ¶ 56; Resp’t McWane’s Answer to Compl. ¶ 56; Compl. Counsel’s Stmt. of Undisputed Facts ¶ 7; Compl. Counsel’s Resp. to Resp’t’s Stmt. of Undisputed Facts ¶ 97.

Yet, Star was able to enter the domestic-only DIPF market within a few months of its announcement without building or buying a domestic foundry. Compl. Counsel’s Resp. to Resp’t’s Stmt. of Undisputed Facts ¶ 98. During that fall of 2009, Star made sales to 29 customers, ending up with almost \$300,000 in sales, despite having projected no sales of domestic-only DIPF for that year. *Id.* ¶¶ 100, 102. Complaint Counsel does not dispute Star’s volume of sales for 2009. *Id.* ¶ 103.

Nor does Complaint Counsel dispute that in 2010, Star sold approximately \$6.5 million in domestic fittings to 132 customers, that 20 customers had increased their purchases from 2009 levels, and that Star made sales to 106 new customers that year. Compl. Counsel’s Stmt. of Undisputed Facts ¶ 204; Compl. Counsel’s Resp. to Resp’t’s Stmt. of Undisputed Facts ¶ 104. Similarly, there is no dispute that in 2011, Star sold approximately \$6.5 million in domestic fittings to 126 customers, that 65 customers had increased their purchases from 2010 levels, and that Star made sales to 28 new customers that year. Compl. Counsel’s Stmt. of Undisputed Facts ¶ 204; Compl. Counsel’s Resp. to Resp’t’s Stmt. of Undisputed Facts ¶¶ 107–08. Or that Star’s sales of domestic fittings for the first quarter of 2012 totaled \$1.7 million. Compl. Counsel’s Stmt. of Undisputed Facts ¶ 204.

Instead, Complaint Counsel’s principal argument is to assert that some of Star’s largest customers of domestic fittings had been threatened by McWane with repercussions or had internal corporate policies, out of fear of McWane, not to do business with Star unless they were unable to procure the domestic fittings from McWane. That may be true but it does not change the fact that

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these customers still accounted for a significant percentage of Star's 2009–12 sales, and many of them have increased their total purchases of domestic fittings from Star year over year since 2009. *See* Compl. Counsel's Stmt. of Undisputed Facts ¶¶ 182, 185, 195–96; Compl. Counsel's Resp. to Resp't's Stmt. of Undisputed Facts ¶¶ 103, 105–06, 109, 111.

It is not enough for Complaint Counsel simply to raise the question whether large waterworks distributors like Ferguson, HD Supply, and WinWholesale might have purchased more domestic fittings from Star but for McWane's alleged "exclusive dealing" practices. The triable issue of material fact is not whether—but how much more—and Complaint Counsel has not pointed to any evidence in the record that would allow a rational trier of fact to answer the latter question at trial. It would be one thing if the record demonstrated that particular distributors made no purchases from Star because of McWane's alleged "exclusive dealing" practices; at least that would be probative of the extent of foreclosure. But even large distributors that supposedly had company-wide policies against doing business with Star still purchased nontrivial amounts of domestic fittings and increased the amounts of those purchases year over year (e.g., HD Supply), and other distributors ignored McWane's threat altogether and chose to do business with Star anyway (e.g., Hajoca).

This is therefore not a case where Complaint Counsel would be able to prove that Star did not have access to any critical channel of distribution. *Cf. LePage's Inc. v. 3M*, 324 F.3d 141, 159–60 (3d Cir. 2003) (describing how 3M cut LePage's off from key retail pipelines, namely, superstores like Kmart and Wal-Mart that provide as cheap, high-volume supply lines to consumers); *Microsoft*, 253 F.3d at 70–71 (describing Microsoft's exclusive deals with 14 of the top 15 Internet access providers in North America, which comprise one of two major channels of distribution for browsers).

Evaluated under any objective standard, and viewing all inferences in a light most favorable to Complaint Counsel (as we must), the undisputed facts demonstrate that Star's entry was not de minimis or trivial. As Complaint Counsel itself points out, Star was the smallest of the three major DIPF sellers, with only a 20 percent share of the DIPF market overall, compared to McWane's

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45 percent share. Compl. Counsel's Stmt. of Undisputed Facts ¶¶ 6, 40. Thus, the fact that Star attained a 10 percent share of the domestic-only DIPF market—from zero share—in less than three years, *id.* ¶ 206, undermines Complaint Counsel's basic theory that McWane's alleged "exclusive dealing" practices made entry difficult or ineffective.

McWane is therefore entitled to partial summary decision under the case law. Where a complainant has failed to show that the alleged exclusionary practices have actually created a barrier to entry or expansion into the relevant market, summary judgment dismissing a monopolization claim is appropriate. *See Western Parcel Express v. United Parcel Serv., Inc.*, 65 F. Supp. 2d 1052, 1062–63 (N.D. Cal. 1998), *aff'd*, 190 F.3d 974, 976 (9th Cir. 1999); *CDC Techs., Inc. v. Idexx Labs., Inc.*, 7 F. Supp. 2d 119, 121 (D. Conn. 1998), *aff'd*, 186 F.3d 74, 77 (2d Cir. 1999).

Complaint Counsel's other arguments are unavailing. First, Complaint Counsel argues that Star's entry could have been "better" because Star has thus far not attained the volume of business necessary to justify an investment in its own, low-cost, domestic production facility, which would make it a "fully efficient" competitor. Compl. Counsel's Opp. at 28. But that argument improperly turns the Section 2 question from one about the extent of foreclosure caused by McWane's alleged "exclusive dealing" practices to one about the extent to which Star has been able to realize its own dreams of expansion in the domestic-only DIPF market. *See* Compl. Counsel's Stmt. of Undisputed Facts ¶ 205. That is the wrong inquiry because the 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).

Complaint Counsel's other argument is to aver that McWane continues to account for over 90% of all domestic-only DIPF sales, and prices for domestic-only DIPFs are 30%–50% higher than prices for identical fittings in open source projects. Compl. Counsel's Opp. at 26. Neither of those facts is sufficient to create a triable issue concerning the extent of foreclosure.³ As I pointed

³ I should note that Complaint Counsel's Statement of Undisputed Facts fails to cite to any support in the record for McWane's 90% market share. *See*

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out earlier, McWane's high market share is to be expected since it came by its putative monopoly status by historic accident when ARRA imposed a "Buy American" requirement, and McWane happened to be the only DIPF seller with domestic production. But as circuit courts have held, a high market share does not necessarily equate to durable monopoly power if entry is easy or successful. *See Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 99 (2d Cir. 1997); *United States v. Syufy Enters.*, 903 F.2d 659, 664 & n.6 (9th Cir. 1990).

The fact that prices for domestic fittings are markedly higher than those for open source parts does not create a genuine issue of fact for trial either. One would expect to see higher prices for domestic fittings in what is essentially a price discrimination submarket created by the "Buy American" program. Also, one cannot necessarily expect prices for domestic fittings to go down substantially as a result of Star's entry; after all, Star was entering to get a share of the monopoly profits created by the "Buy American" program. Using a pharmaceutical analogy, Star was entering to compete as another branded company, not as a generic company.

For all of the above reasons, the record taken as a whole, including the undisputed facts concerning Star's entry, would not lead a rational trier of fact to find for Complaint Counsel on the question of significant foreclosure. Accordingly, there is no genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

II.

Complaint Counsel has moved for partial summary decision on the issue whether an April 28, 2009 telephone call between Dan McCutcheon, Vice President of Sales of Star, and Rick Tatman, Vice President & General Manager of Tyler/Union (McWane), violated Section 1 of the Sherman Act, which was interpreted by

Compl. Counsel's Stmt. of Undisputed Facts ¶ 206. But I assume for the purposes of this opinion that Complaint Counsel could prove the market shares of McWane and Star for sales of domestic-only DIPFs.

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the Supreme Court in *Sugar Institute, Inc. v. United States*, 297 U.S. 553, 601 (1936), to prohibit as unreasonable restraints “steps taken to secure adherence, without deviation, to prices and terms . . . announced [in advance unilaterally by each competitor].” I would deny Complaint Counsel’s motion for the following two reasons.

First, although *Sugar Institute* may support Complaint Counsel’s theory of liability regarding that telephone call, *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979), arguably does not. In *Broadcast Music*, the Supreme Court cautioned, when applying the per se rule, against the use of “easy labels [that] do not always supply ready answers.” *Id.* at 8. The Court explained that price-fixing “is not a question simply of determining whether two or more potential competitors have literally ‘fixed’ a ‘price.’” *Id.* at 9. Rather, “[a]s generally used in the antitrust field, ‘price fixing’ is a shorthand way of describing certain categories of business behavior to which the per se rule has been held applicable.” *Id.*

Here, while the April 2009 telephone call may have involved McWane confirming its issuance of a previously announced price list to Star, that confirmation—which perhaps might be literally interpreted as the “fixing” of a price—does not necessarily mean that McWane and Star engaged in a type of business behavior that has been subject to the per se rule. To apply *Sugar Institute* to this situation is arguably to use “easy labels” that *Broadcast Music* eschews. That makes this a close case in my mind.

Second, even if *Broadcast Music* does not call into question the continuing vitality of *Sugar Institute*, Complaint Counsel has not explicitly relied on this theory of liability in its Complaint. The April 2009 telephone call has not been raised in the Complaint as an overt act of the alleged price-fixing conspiracy. McWane has therefore moved to strike Complaint Counsel’s motion for partial summary decision on the ground that the issue of the legality of the April 28, 2009 telephone call is not one that is “being adjudicated.” See 16 C.F.R. § 3.24(a)(1) (2012) (permitting motions for summary decision only as to “the issues being adjudicated”); see also *N. Am. Philips Corp.*, No. 9209, 1988 FTC LEXIS 161 (F.T.C. Mar. 4, 1988) (order denying respondents’ motion for summary decision because complaint

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counsel was not challenging their advertising of second-generation, replacement filters for the Norelco Clean Water Machine).

In response, Complaint Counsel has argued that although the legality of the April 2009 telephone call is not specifically raised in its Complaint, the issue is reasonably within the scope of the Complaint, and is to be treated in all respects as if it had been raised in the Complaint, as long as it is tried by the express or implied consent of the parties. *See* 16 C.F.R. § 3.15(a)(2) (2012). Commission Rule 3.15(a)(2), invoked by Complaint Counsel, is based on Rule 15(b)(2) of the Federal Rules of Civil Procedure, which makes clear that such amendments to the pleadings relate to issues that have been through trial. FED. R. CIV. P. 15(b) (entitled “Amendments During and After Trial”). Although there has been a split among the circuit courts as to whether Rule 15(b) also applies at the summary judgment stage, *see Ahmad v. Furlong*, 435 F.3d 1196, 1203 n.1 (10th Cir. 2006) (citing circuit court cases going either way), as a matter of practicality, I would follow the plain language of Rule 15(b) and remand this issue to be tried based on Complaint Counsel’s reliance on Commission Rule 3.15(a)(2).

Interlocutory Orders, Etc.

IN THE MATTER OF

KINDER MORGAN, INC.

Docket No. C-4355. Order, November 8, 2012

Letter approving the divestiture of certain assets to Tallgrass Energy Partners LP.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Laura A. Wilkinson, Esq.
Weil, Gotshal & Manges LLP

Re: In the Matter of Kinder Morgan, Inc., Docket No. C-4355

Dear Ms. Wilkinson:

This is in reference to the Application For Approval of Proposed Divestiture filed by Kinder Morgan, Inc. (“Kinder Morgan”) and received on September 28, 2012 (“Application”). Pursuant to the Decision and Order in Docket No. C-4355, Kinder Morgan requests prior Commission approval of its proposal to divest certain assets to Tallgrass Energy Partners LP (“Tallgrass”).

After consideration of Kinder Morgan’s Application and other available information, the Commission has determined to approve the proposed divestiture as set forth in the Application. In according its approval, the Commission has relied upon the information submitted and the representations made by Kinder Morgan and Tallgrass in connection with Kinder Morgan’s Application and has assumed them to be accurate and complete.

By direction of the Commission, Commissioner Ramirez recused.

Interlocutory Orders, Etc.

IN THE MATTER OF

**POM WONDERFUL LLC,
ROLL INTERNATIONAL CORP.,
STEWART A. RESNICK,
LYNDA RAE RESNICK,
AND
MATTHEW TUPPER**

Docket No. 9344. Order, November 27, 2012

Order extending the timetable to issue the Decision of the Commission and Final Order until January 18, 2013.

ORDER EXTENDING THE TIMETABLE FOR ISSUING FINAL DECISION
AND ORDER

In order to ensure that it can give full consideration to the many issues presented by the cross-appeals in this matter, the Commission has determined, pursuant to Rule 4.3(b), 16 C.F.R. § 4.3(b), to extend until January 18, 2013 the timetable for issuing a final decision and order.

IT IS SO ORDERED.

By the Commission.

RESPONSES TO PETITIONS TO QUASH OR LIMIT COMPULSORY PROCESS

GOOGLE, INC.

FTC File No. 111 0163 – Decision, September 7, 2012

RESPONSE TO SAMSUNG TELECOMMUNICATIONS AMERICA, LLC'S REQUEST FOR FULL COMMISSION REVIEW OF ITS PETITION TO LIMIT SUBPOENA *DUCES TECUM* DATED FEBRUARY 9, 2012

Dear Messrs. Huffman and Stoltz and Ms. Williams:

This letter advises you of the Commission's disposition of Samsung Telecommunications America, LLC's ("STA's") request dated June 26, 2012, for full Commission review of the denial of its petition to limit a subpoena *duces tecum* ("subpoena").

The Commission issued the subpoena to STA on February 9, 2012. STA filed its petition to limit the subpoena on April 21, 2012. On June 18, 2012, Commissioner Brill directed the issuance of a letter denying the petition in its entirety and directing STA to comply by July 2, 2012. This ruling was delivered to STA by mail on June 22, 2012. STA timely filed this request for full review by the Commission on June 27, 2012.

The Commission has considered STA's request for full review, STA's initial petition to limit, and Commissioner Brill's letter ruling dated June 18, 2012. For the following reasons, the Commission hereby affirms Commissioner Brill's letter ruling and directs STA to comply with the subpoena no later than September 14, 2012.

I. Background

The Commission issued the subpoena to STA as part of an ongoing investigation of Google, Inc. The purpose of this investigation is to determine whether Google has engaged in unfair methods of competition "by monopolizing, attempting to monopolize, or restraining competition in online or mobile search,

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search advertising, or Internet-related goods or services.”¹ STA is a manufacturer of devices, including smartphones and tablet computers that are used by consumers for online or mobile searching and Internet-related goods and services. Many of these devices are installed with Google’s Android operating systems, as well as other software and applications developed by Google and its competitors.

The Commission issued the subpoena on February 9, 2012. STA did not respond by the initial return date of March 9, 2012. Instead, STA requested two extensions and requested that staff modify the subpoena in several respects.

STA also asked staff to limit the number of custodians whose records would be searched using this method, forego the production of informal agreements as required by specification 8, and extend the return date.

² Staff further agreed to limit the searches for these specifications to a list of six custodians. Finally, staff agreed to extend the return date to April 23, 2012.

On April 20, 2012, STA requested a third extension of the return date. Because STA had produced only 31 documents at that point, staff did not agree to a further extension and STA filed its petition to limit.

As of June 26, 2012, STA had not responded to specification 4, and had only partially responded to specifications 5, 6, 7, 8, 9,

1 Resolution Authorizing Use of Compulsory Process in Nonpublic Investigation, File No. 111-0163 (June 13, 2011) [hereinafter “Resolution”].

2 Staff later agreed that STA could use the same methodology to search for documents responsive to specification 12.

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10, and 12.³ Some of these productions were extremely limited. For instance, STA produced a total of seven contracts in response to specifications 6, 7, and 12.⁴ In discussions with staff occurring since the filing of this request for review by the full Commission, STA indicated that it has collected approximately 361,000 documents responsive to the keywords, but it has not reviewed or produced these documents.

II. Analysis

A. The materials requested by the subpoena are reasonably related to the Google investigation.

In support of its petition, STA argues that the scope of the investigation is narrower than the description in the authorizing resolution—limited to decisions to install (or not install) programs from Google or Google’s competitors on STA’s mobile devices—and that as a result, it does not possess responsive materials. STA claims that such decisions are made by mobile wireless carriers like Verizon and AT&T and that STA is generally not involved.⁵ Thus, STA appears to claim it lacks the types of documents relevant to the FTC’s investigation, as STA characterizes it.

It is well-established that the scope of an administrative investigation is determined by the authorizing resolution.⁶ Moreover, when determining the relevance of the information requested by an agency, courts look to the scope of the investigation with broad deference to the requesting agency, and

³ Samsung Telecommunications America, LLC’s Request for Full Commission Review of its Petition to Limit Subpoena *Duces Tecum*, and Request for Hearing, at 2 (June 26, 2012) [hereinafter “Request”]. We understand that staff and STA have continued to discuss STA’s compliance and that STA has produced additional materials since the filing of this petition, but has not certified that its compliance with the subpoena is complete.

⁴ *Id.*

⁵ Request, at 1 (“In short, for purposes of the FTC’s investigation the relevant internal considerations and external discussions would seem to be those between the carrier and Google or Google’s competitors . . . generally not involving STA.”).

⁶ *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1088 (D.C. Cir. 1992).

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place the burden on subpoena recipients to show that the requests are irrelevant.⁷ Here, a review of the Commission process resolution plainly shows that the scope of the investigation is broader than STA asserts – whether Google is or was “monopolizing, attempting to monopolize, or restraining competition in online or mobile search, search advertising, or Internet-related goods or services.”⁸ By its very terms, the investigation is not confined to software installation, but includes other types of conduct as well. STA has not sufficiently shown that the documents requested in the subpoena are beyond the scope of this investigation.

B. The subpoena requests are sufficiently specific to enable STA to comply.

STA further claims that specifications 5, 9, and 10 are vague and overly broad because they use “complex and ambiguous terms” such as “relating to Samsung’s business strategy,” or “relating to Samsung’s consideration, development, or use of any product or service that competes with a Google Product or Service on any mobile device or smart phone.”⁹

A subpoena request may be vague where it lacks reasonable specificity,¹⁰ or is too indefinite to enable a responding party to comply.¹¹ It may be overbroad where it is “[o]ut of proportion to the ends sought,” and “[o]f such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power.”¹²

⁷ *Id.* at 1090.

⁸ Resolution.

⁹ Request, at 2-3, 4.

¹⁰ See, e.g., *United States v. Fitch Oil Co.*, 676 F.2d 673, 679 (Temp. Emer. Ct. App. 1982).

¹¹ See, e.g., *United States v. Medic House, Inc.*, 736 F. Supp. 1531 (W.D. Mo. 1989).

¹² *United States v. Wyatt*, 637 F.2d 293, 302 (5th Cir. 1981) (quoting, among others, *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950)).

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We do not agree that these specifications are vague, or that, as STA claims, “there is no clear way to identify responsive documents[.]”¹³ Contrary to STA’s representations about the breadth of specification 5, the specification provides sufficient information to identify responsive documents.¹⁴ The specification does not call for documents related to *any* business strategy of STA, as STA suggests, but rather is limited to documents about two strategies relating to Google and Google products in particular, the precise subject of the Commission’s investigation. Further, the specification itself provides examples of the types of documents that would be responsive.

For many of the same reasons, we find that specification 9 is sufficiently defined. The specification identifies the documents at issue clearly and specifically, calling for documents relating to “any policy, practice, contract, or technological mechanism that restrains or restricts any person from licensing, removing, replacing, or modifying any Google Products or Services on Samsung’s mobile devices or smart phones.”¹⁵ We find this specification sufficiently detailed to enable STA to locate responsive information particularly because, like specification 5, specification 9 also provides examples of types of responsive documents.

Specification 10 too is sufficiently specific. It calls for documents relating to STA’s “consideration, development, or use of any product or service that competes with a Google Product or

¹³ Request, at 4.

¹⁴ Specification 5 reads in full:

All documents relating to Samsung’s business strategy for (i) placing the Android operating system on its mobile devices or smart phones, or (ii) pre-loading any Google Products or Services on its mobile devices or smart phones, including but not limited to: all strategic plans; business plans; marketing plans; advertising plans; pricing plans; technology plans; forecasts, strategies, and decisions; market studies; and presentations to management committees, executive committees, and boards of directors.

¹⁵ Request, Ex. A.

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Service on any mobile device or smart phone employing the Android operating system.”¹⁶ This specification does not call for documents about the consideration, use or development of *any* product, but only those products that (1) compete with Google products or services on (2) devices employing the Android operating system. Given these qualifications, we find this specification sufficiently detailed to enable STA to identify responsive documents.

STA’s claims also overlook the modifications staff made at STA’s request. Specifically, staff agreed to allow STA to use a keyword search process to narrow the universe of potentially-responsive documents and to limit the number of custodians to only six individuals. Thus, rather than a broad search involving “the vast majority” of STA employees, as STA suggests could be required,¹⁷ these specifications, as modified, only require STA to search the documents of a small number of custodians.

STA claims the subpoena is overbroad because it calls for information not reasonably related to staff’s inquiry. This claim is akin to the relevance argument we addressed and rejected above and we reject it here for the same reasons. STA also claims that the subpoena specifications are overbroad because they could potentially sweep up a large number of documents.¹⁸ But as Commissioner Brill observed in her letter ruling, a subpoena may properly call for many documents and this fact alone does not provide a basis for limiting a subpoena’s scope.¹⁹ And, given staff’s modifications to accommodate STA, the number of responsive documents should be substantially smaller than STA suggests.

¹⁶ *Id.*

¹⁷ Request, at 6.

¹⁸ Request, Ex. D, ¶ 5.

¹⁹ Letter ruling, at 8 n.36 (citing *NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507, 513-14 (4th Cir. 1996)).

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C. STA fails to show that the subpoena is unduly burdensome.

STA also argues the challenged specifications are unduly burdensome. In support of its claim, STA submits a declaration from Tim Sheppard, its Vice President, Finance and Operations.²⁰ Mr. Sheppard claims that the “undefined” and “impossibly vague” requests in specifications 5, 9, and 10 could be read to require production of a “massively broad swath of the documents that STA routinely generates in the course of its day-to-day business.”²¹ Similarly, he states that specifications 6, 7, and 8, which call for “agreements,” would likewise require another “massively broad swath” of documents if “agreements” were interpreted to include understandings outside of those in written formal contracts.²²

According to STA, compliance with the subpoena would seriously impair and unduly disrupt its normal operations because STA only has two employees in its legal department.²³

But these conclusory accusations by Mr. Sheppard, most of which merely repeat STA’s legal arguments, fail to provide the factual detail needed to satisfy a claim of undue burden.²⁴ Furthermore, Mr. Sheppard also ignores the significant accommodations that staff have made to limit the specifications in an effort to address STA’s concerns about burden.

In addition, STA overlooks that specifications 6, 7, and 8 call for agreements with specific entities, including Google and

20 Request, Ex. D. STA’s request for full review also refers to the declaration of Justin Denison that was attached to the initial petition to limit. Request, at 5. However, Denison’s declaration indicates that it was executed on April 10, 2012, on or before staff modified the subpoena at STA’s request. *See* Request, Ex. A, Att. 1. Accordingly, Denison’s testimony does not relate to the most current, modified version of the subpoena and is not relevant to this analysis.

21 Request, Ex. D, ¶ 5.

22 *Id.*, Ex. D, ¶ 7.

23 *Id.*, Ex. D, ¶ 8.

24 *See, e.g., FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977).

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wireless service providers. Thus STA should know which of its employees are communicating with these entities and what the most effective way would be to locate these documents, whether they be formal agreements or informal understandings.²⁵ Thus STA's claim that those specifications would require search and review of an extremely large number of documents is unavailing.

STA's final argument is that by calling for "all documents," the specifications are inherently overboard and unduly burdensome. But, as noted above, the specifications are reasonably defined and tailored to the specific subjects related to the investigation. And staff has made modifications to the specifications, and permitted STA to use keywords for some specifications. Yet STA has not produced the more limited set of documents which should result from these accommodations.

To summarize, STA's claims of burden arise from STA's own misperceptions of the subpoena requests and staff's modifications, and are compounded by STA's failure to engage collaboratively with staff to define the terms of the document production.²⁶ Therefore, we find that STA's claims of undue burden are without merit.

D. The Commission and its staff have acted reasonably.

STA also alleges that staff has not responded its claims of vagueness or burden reasonably, and that staff should identify for STA "searches which are specific enough to focus on a finite, reasonable volume of documents"²⁷

25 STA's argument that it should only have to produce formal agreements also fails because it would thwart the investigation. If Google were engaging in anticompetitive behavior, and if STA was involved to some degree, it would be odd for these parties to enter into a formal agreement reflecting that.

26 For cases describing the requisite level of collaboration, *see, e.g., William A. Gross Constr. Assocs. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 135-36 (S.D.N.Y. 2009); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 259-262 (D. Md. 2008).

27 Request, at 3.

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STA's argument disregards both the modifications to the subpoena that staff made at STA's request and STA's own obligations as a subpoena recipient.

Consequently, STA must now either produce the documents that it has collected based on the proposed key word searches, or justify why the proposed key words are not working and offer alternatives based on a reasoned analysis of the documents it has collected. STA has done neither. Instead, STA has insisted that staff further modify the subpoena without providing any substantive information about the universe of documents it has collected.²⁸ In essence, STA's insistence that staff narrow the subpoena without information about the documents generated thus far from the key word search is merely a demand that staff engage in a guessing game.²⁹ This is not a proper way to respond to an administrative subpoena. We recognize that STA is a third party to this investigation. However, even third parties are obliged to respond to government compulsory process.³⁰

E. STA's other requests are also denied.

STA has requested full Commission review of every issue raised in its petition to limit. After review of that petition and Commissioner Brill's letter ruling, we affirm Commissioner Brill's rulings on all issues not specifically addressed in this ruling by the full Commission.

28 We acknowledge that STA has been forthcoming with some information, as shown in Exhibit C to the Request. Yet while STA provided information about numbers of hits to search terms, it provided no substantive information about the quality of those hits and whether the documents identified were actually responsive to the terms of the subpoena specifications. Thus, while STA again complains in Exhibit C that the FTC's search terms are overbroad, STA provides no further information that the FTC could use to narrow the terms, assuming of course that the FTC – as the requesting party – had any obligation to do so.

29 See *Da Silva Moore v. Publicis Groupe*, No.11 Civ. 1279 (ALC) (AJP), 2012 WL 607412, *10 (S.D.N.Y. Feb. 24, 2012) (comparing this process to the child's game of "Go Fish").

30 See, e.g., *FTC v. Rockefeller*, 441 F. Supp. 234, 240-42 (S.D.N.Y. 1977).

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STA has asked for a hearing on the matter raised in the petition and request for full Commission review. The Commission's Rules of Practice do not provide for such a hearing, and we see no reason to hold one based on the arguments presented by STA. Accordingly, this request will be denied.

STA has also requested a stay of the compliance date. The FTC issued the subpoena to STA in February 9, 2012 and, five months later, STA has yet to provide more than a token production of responsive materials. STA's approach has delayed this investigation substantially. Accordingly, STA's request for a stay of compliance is denied, and STA must produce responses to all the specifications in the subpoena no later than September 14, 2012.

IV. Conclusion and Order

For the forgoing reasons,

IT IS ORDERED THAT the June 18, 2012, letter ruling is **AFFIRMED**;

IT IS FURTHER ORDERED THAT STA must produce responses to all the specifications in the Subpoena *Duces Tecum*, as modified on April 10, 2012, no later than 5 p.m. Eastern Daylight Time on September 14, 2012;

IT IS FURTHER ORDERED THAT STA's request for a hearing is **DENIED**; and

IT IS FURTHER ORDERED THAT STA's request for a stay of the compliance date is **DENIED**.

By direction of the Commission, Commissioner Ohlhausen recused.

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