FEDERAL TRADE COMMISSION DECISIONS

FINDING, OPINIONS, AND ORDERS

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DURING THE PERIOD
JANUARY 1, 2013 TO JUNE 30, 2013

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Appointed August 28, 1988.

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FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS

JANUARY 1, 2013, TO JUNE 30, 2013

IN THE MATTER OF

POM WONDERFUL LLC, ROLL GLOBAL LLC, STEWART A. RESNICK, LYNDA RAE RESNICK

AND

MATTHEW TUPPER

OPINION OF THE COMMISSION AND FINAL ORDER

Docket No. D-9344; File No. 082 3122
Complaint, September 24, 2010 – Decision, January 10, 2013

The complaint alleged that respondent POM Wonderful LLC ("POM"), its sister company Roll Global LLC, and principals Stewart A. Resnick, Lynda Rae Resnick, and Matthew Tupper (collectively "Respondents") falsely advertised that POM-branded pomegranate juice could treat prostate cancer and erectile dysfunction or reduce the risk of heart disease. The complaint alleged that Respondents lacked a reasonable basis for making these representations. Following an administrative hearing, the Administrative Law Judge issued an Initial Decision, 153 F.T.C. ___, ruling that 19 of the challenged advertisements were false or deceptive. On appeal, the Commission upheld the Initial Decision, finding that Respondents made false or deceptive claims in 36 of the challenged advertisements and promotional materials. The Commission issued an Order barring Respondents from making any claim that a food, drug, or dietary supplement is effective in the diagnosis, treatment, or prevention of any disease, including heart disease, prostate cancer, and erectile dysfunction, without supporting evidence from two clinical trials. The Order also prohibits misrepresentations regarding any test, study, or research, and requires Respondents to provide competent and reliable scientific evidence to support any health claims regarding any food, drug, or dietary supplement.

Participants

For the *Commission: Tawana Davis, Devin Domond, Janet Evans, Heather Hippsley, Theodore Hoppock, Mary Johnson, Michael Ostheimer, Elizabeth Nach, Serena Viswanathan, Elise Whang, Andrew Wone.*

For the *Respondents: Michael C. Small, Akin Gump Strauss Hauer & Feld LLP; Bruce A. Friedman, Bingham McCutchen LLP; John Graubert* and *Skye Perryman, Covington & Burling; Bertram Fields, Greenberg Glusker;* and *Kristina W. Diaz, Brooke Hammond, Alicia D. Mew, Paul A. Rose, Johnny Traboulsi,* and *Adam P. Zaffios, Roll Law Group P.C.*

OPINION OF THE COMMISSION

By OHLHAUSEN, Commissioner, for a unanimous Commission.

I. Introduction

Respondents POM Wonderful LLC ("POM Wonderful" or "POM"), Roll Global LLC ("Roll Global"), Stewart A. Resnick, Lynda Rae Resnick, and Matthew Tupper (collectively, "Respondents") appeal from Administrative Law Judge ("ALJ")[1] D. Michael Chappell's Initial Decision and Order holding them liable for violating Sections 5(a) and 12 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45 and 52, by making false or misleading claims in multiple media fora to promote their pomegranate juice products, specifically POM Wonderful Juice, POMx Pills, and POMx Liquid (collectively,

[1] For purposes of this opinion, we use the following abbreviations in referencing the record:
ALJ: Administrative Law Judge D. Michael Chappell
Tr.: Transcript of trial testimony before the ALJ
Dep.: Transcript of deposition
ID: Initial Decision
IDF: Initial Decision Findings of Fact
CCA: Complaint Counsel's Appeal Brief
RA: Respondents' Appeal Brief
RAns: Respondents' Answering Brief
RR: Respondents' Reply Brief
CX: Complaint Counsel Exhibit
PX: Respondent Exhibit

"Challenged POM Products"). Complaint Counsel cross-appeal the ALJ's finding that some of the challenged advertisements did not make the representations alleged in the Complaint, his holding concerning the level of scientific support needed to make the alleged claims, and the injunctive relief outlined in the ALJ's Order. We conclude that the Respondents have violated Section 5(a) and Section 12 of the FTC Act, based on both the findings of the ALJ and on additional challenged advertisements, and we issue a Final Order which differs in some respects from the Order attached to the Initial Decision.

Respondents have marketed the Challenged POM Products using a variety of means since they began selling and marketing POM Wonderful Juice in 2002. Between 2002 and 2010, sales for all Challenged POM Products totaled close to $250 million.

On September 24, 2010, the Commission issued an administrative complaint alleging that Respondents engaged in deceptive acts and practices and disseminated false advertising in violation of Sections 5(a) and 12 of the FTC Act in promoting the Challenged POM Products. The Complaint alleged that Respondents disseminated advertising and promotional materials representing that consumption of certain doses of Challenged POM Products treats, prevents or reduces the risk of heart disease, prostate cancer, or erectile dysfunction ("ED"), without having a reasonable basis to substantiate these claims. The Complaint also alleged that Respondents disseminated advertising and promotional materials representing that clinical studies, research, and/or trials prove that consumption of the Challenged POM Products in certain doses treats, prevents or reduces the risk of heart disease, prostate cancer, or ED, when in fact clinical studies, research, or trials do not so prove.

At trial, Complaint Counsel challenged a total of 43 items, including print advertisements, newsletters, separate "web captures" of Respondents' websites, Internet banner advertisements, press releases, and media interviews. Respondents denied that such materials make the claims alleged and argued that the claims that were made in their advertising and promotional materials were substantiated adequately by scientific research. Some of POM's ads and marketing materials stated that

the Challenged POM Products were supported by over $30 million in medical research.

In his Initial Decision, the ALJ found that 19 of the 43 challenged advertisements and promotional materials contained implied claims that the Challenged POM Products treat, prevent or reduce the risk of heart disease, prostate cancer, or ED, and that in 14 of these ads, there were implied claims that the effects on disease were clinically proven; that those claims were false or misleading; and that the claims were material to consumers' purchasing decisions. ID at 5-6. In his opinion, the ALJ determined that in the case of a safe food that is not advertised as a substitute for medical treatment, competent and reliable scientific evidence includes clinical studies though not necessarily double-blind, randomized, placebo-controlled clinical trials. *Id.* at 328. The ALJ attached to the Initial Decision an order that would, if issued by the Commission, prohibit the Respondents from making representations that any food, drug, or dietary supplement, including but not limited to the Challenged POM Products, is effective in diagnosing, curing, treating, mitigating, or preventing any disease unless such representations are not misleading and are based on competent and reliable scientific evidence. *Id.* at 332. The order would also prohibit Respondents from misrepresenting the results of any test, study or research in connection with the advertisement or sale of any food, drug, or dietary supplement, including but not limited to the Challenged POM Products. *Id.* In addition, the order would prohibit Respondents from making any representation about the health benefits, performance, or efficacy of any food, drug, or dietary supplement, including but not limited to the Challenged POM Products, unless the representation is non-misleading and based on Respondents' reliance on competent and reliable scientific evidence. *Id*. The order would define "competent and reliable scientific evidence" as "tests, analyses, research, or studies, conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results." *Id.* at 331.

Respondents' principal claims on appeal are that the ALJ erred in (1) finding that any of the challenged advertising and promotional materials contain implied efficacy or establishment claims (*i.e.*, those asserting that the efficacy claims are established

scientifically) that the Challenged POM Products treat, prevent or reduce the risk of heart disease, prostate cancer, or ED; (2) holding that substantiation for such claims required clinical studies; and (3) finding the foregoing claims to be material. Respondents also allege that the relief ordered is impermissibly broad and runs afoul of the First and Fifth Amendments.

Complaint Counsel's principal claims on cross-appeal are (1) the ALJ should have found that all of the challenged advertisements and promotional materials (including four media interviews) made efficacy claims; (2) all but four of these materials also included establishment claims; (3) the ALJ incorrectly applied a substantiation standard requiring only clinical studies, rather than the higher standard of well-designed, well-conducted, double-blind, randomized controlled clinical trials (referred to in this opinion as "RCTs"); and (4) in his order, the ALJ should have required pre-approval by the Food and Drug Administration ("FDA") of any future disease claims made by Respondents with respect to the Challenged POM Products.

Based on our consideration of the entire record in this case and the arguments of counsel, we deny Respondents' appeal and grant in part, and deny in part, Complaint Counsel's cross-appeal. We find Respondents liable on the basis of a larger number of advertisements containing false and misleading claims than the ALJ found. The basis of Respondents' liability under the FTC Act is their lack of sufficiently reliable evidence — namely, RCTs (as described more fully below in this opinion) — to substantiate the claims that we found. Complaint Counsel's experts testified that two RCTs are necessary to substantiate the heart disease claims at issue, while the prostate cancer and ED claims can be substantiated with at least one RCT. *See* CX1291 at 15 (Sacks Expert Report) (for heart disease "most scientists and researchers . . . believe that at least two-well designed studies . . . showing strong results are needed to constitute reliable evidence"); CX1287 at 6 (Eastham Expert Report) (stating "qualified experts in the field of urology, including the prevention and treatment of prostate cancer, . . . would require that Respondents' claims be supported by at least one well-conducted, randomized, double-blind, placebo-controlled clinical trial with an appropriate endpoint"); and CX1289 at 4 (Melman Expert Report) ("[t]o constitute competent and reliable scientific evidence, experts in

the field of erectile dysfunction would require at least one clinical trial, involving several investigatory sites, that is well-designed, randomized, placebo-controlled, and double-blinded"). The Commission need not, and does not, reach the question of the number of RCTs needed to substantiate the claims made because, as discussed below, Respondents failed to proffer even one RCT that supports the challenged claims that we found they made.[2] The Final Order we issue today differs from that proposed by the ALJ and contains fencing-in relief by providing that any disease-related establishment or efficacy claims made about the Challenged POM Products or in connection with Respondents' sale of any food, drug, or dietary supplement must be supported by at least two RCTs.[3] However, we do not reach the question of liability based on the four challenged media interviews, and today's Final Order does not include a provision requiring FDA pre-approval of any future claims made by Respondents.

II. Factual Background and Proceedings Below

Respondent POM Wonderful is a limited liability company wholly owned by the Stewart and Lynda Resnick Revocable Trust dated December 27, 1988. IDF 1, 3. In 2002, POM Wonderful launched the first of the Challenged POM Products, POM Wonderful Juice, and currently sells all of the Challenged POM Products. IDF 5, 6. Respondent Roll Global is a separate corporation wholly owned by the same trust; Roll Global owns a number of companies, including POM Wonderful LLC, FIJI Water, Suterra, Paramount Farms, Paramount Citrus, Teleflora, Neptune Shipping, Paramount Farming, and Justin Winery. IDF 7, 9, 11. Roll International Corporation reorganized at the end of 2010 and is currently known as Roll Global. IDF 8. Roll Global uses an in-house advertising agency for POM and its other affiliated companies. IDF 14.

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[2] The Commission applies the same rationale throughout this opinion when it refers to a requirement of "RCTs" for Respondents' liability under the FTC Act.

[3] As explained more fully in Section X.B, Commissioner Ohlhausen supports an order provision requiring at least one RCT, viewed in light of the relevant scientific evidence, for disease-related efficacy and establishment claims made about the Challenged POM Products or in connection with the sale of any food, drug, or dietary supplement by the Respondents.

The individual Respondents in this case include Stewart Resnick, Lynda Resnick, and Matthew Tupper. Stewart Resnick is the Chairman and CEO of POM Wonderful, and Chairman and President of Roll Global. IDF 19-21.[4] His responsibilities include setting the marketing, advertising, and medical research budgets for POM Wonderful. IDF 23. Although he leaves most of the marketing decisions about POM Wonderful to his wife, Lynda Resnick, he considers himself responsible for whether advertising should or should not be published and has been involved at a high level with POM's advertising and marketing campaigns. IDF 25-26. Lynda Resnick is Vice Chairman of Roll Global and sole owner of POM Wonderful along with Stewart Resnick. IDF 15, 28. Mrs. Resnick was still the chief marketing executive at POM as of 2011, working with POM's marketing department and internal advertising agency to implement creative concepts for POM's campaigns. IDF 31, 33. Mrs. Resnick has the "final say" with respect to POM's marketing and advertising content and concepts. IDF 34. Matthew Tupper joined POM in 2003 as Chief Operating Officer and became President of POM Wonderful in 2005 before retiring from POM at the end of 2011. IDF 37-38, 40. Mr. Tupper was responsible for the day-to-day affairs of POM, including managing the operations of the marketing team. IDF 44. The head of POM's Marketing Department reported to Mr. Tupper, and one of Mr. Tupper's responsibilities was to serve as a liaison between the marketing staff and the researchers who performed the medical studies sponsored by POM. IDF 50, 52.

The Challenged POM Products are POM Juice, POMx Liquid, and POMx Pills. POM Juice is a 100% juice product produced by pressing whole pomegranates, filtering and/or enzyme-treating the juice, concentrating the juice, reconstituting it with water, pasteurizing it, and bottling it. IDF 58-60. A single serving of POM Juice is eight ounces, and it is sold in grocery stores for a price of approximately $3 for an eight-ounce bottle. IDF 64-65, 97. POM Juice contains a variety of polyphenols (including ellagitannins and gallotannins, anthocyanins, and ellagic acid). IDF 62-63. POMx Liquid "is the product of the pressed whole

[4] Another Respondent, Mark Dreher, Ph.D., agreed to an administrative consent order to resolve the claims against him. *See* http://www.ftc.gov/os/caselist/0823122/100927pomagree.pdf.

fruit after most of the juice is extracted and the polyphenols are concentrated by filtering and concentrating using juice processing." IDF 67 (quoting CX0096, *in camera*, at 0014). A single serving is one teaspoon daily. IDF 69. POMx Pills are made through a process by which POMx Liquid is extracted. IDF 70. POMx Pills do not contain anthocyanins, nor do they contain the calories or sugar found in POM Juice. IDF 73, 75. A single serving is one pill daily. IDF 76. POMx Pills and POMx Liquid are available for sale via the Respondents' website or through a telephone call center; POMx Pills are also available through some retail outlets. IDF 68, 72. If purchased from the POM website, the cost of a bottle containing 30 POMx Pills or a five ounce bottle of POMx Liquid (containing extract) was $29.95, excluding shipping. IDF 101-102.

POM Wonderful has engaged in a number of advertising campaigns to promote the Challenged POM Products, including print advertisements in magazines, freestanding inserts in newspapers, billboards, posters in bus shelters, posters in health clubs and doctors' offices, advertising on prescription drug bags, Internet websites, online banner advertisements, medical outreach, radio and television ads, and press releases. IDF 171. POM Wonderful considers health-conscious, educated, affluent consumers to be its target audience. IDF 172, 176, 178, 181.

The POM Juice print advertisements at issue were disseminated in a wide variety of publications, including but not limited to the *Chicago Tribune*, *Prevention*, *Details*, *Rolling Stone*, *Health*, *InStyle*, *Town and Country*, *Men's Health*, and *Men's Fitness*. IDF 169. The POMx Pills print advertisements challenged by Complaint Counsel were disseminated in publications including but not limited to *Fortune*, *The New York Times*, *Discover*, *Men's Health*, *Popular Science*, *Time*, and *Playboy*. IDF 170. Some of POM's challenged advertisements are creative in nature, depicting the POM Wonderful Juice bottle in a number of unusual ways (for example, as an intravenous bag; covered by medical equipment such as a blood pressure cuff or EKG sensors; anthropomorphized lying on a therapist's couch or in a bikini top; and as a superhero) and accompanied by headlines such as "[a]maze your cardiologist" and "[l]ucky I have super HEALTH POWERS." *See* CX0033; CX0034; CX0103; CX0109; CX0192; CX0274; CX0372. Many of the challenged

advertisements include statements touting the Challenged POM Products' effects on heart disease, prostate cancer, and/or ED, sometimes by quoting from or citing to various scientific studies.

At trial, Complaint Counsel challenged 43 promotional materials that Respondents disseminated. The Complaint alleges that POM's materials claim that drinking POM Juice, taking POMx Pills, or taking POMx Liquid daily (1) prevents or reduces the risk of heart disease, including by decreasing arterial plaque, lowering blood pressure, and/or improving blood flow to the heart (Compl. ¶ 12.A); (2) treats heart disease, including by decreasing arterial plaque, lowering blood pressure, and/or improving blood flow to the heart (Compl. ¶ 12.B); (3) prevents or reduces the risk of prostate cancer, including by prolonging prostate-specific antigen doubling time ("PSADT") (Compl. ¶ 14.A); (4) treats prostate cancer, including by prolonging PSADT (Compl. ¶ 14.B); (5) prevents or reduces the risk of ED (Compl. ¶ 16.A); and (6) treats ED (Compl. ¶ 16.B). In sum, the Complaint alleges that Respondents made six different claims regarding the efficacy of the Challenged POM Products.

The Complaint also alleges that Respondents have represented that "clinical studies, research, and/or trials prove that" drinking POM Juice or taking POMx Pills or Liquid treats heart disease, prostate cancer, and erectile dysfunction or prevents or reduces the risk of each of these diseases. Compl. ¶¶ 12, 14, 16. Thus, in addition to the claim that the Challenged POM Products treat, prevent or reduce the risk of disease, the Complaint alleges that some of the ads convey that there is clinical proof of the efficacy of the Challenged POM Products, *i.e.*, that they make "establishment" claims.

Following an administrative trial that began on May 24, 2011, and concluded on November 4, 2011, the ALJ filed a 335-page Initial Decision, with 1,431 findings of fact and a 108-page appendix on May 17, 2012. The ALJ found that 19 of the 43 challenged advertisements and promotional materials contained implied claims that the Challenged POM Products treat, prevent or reduce the risk of heart disease, prostate cancer, or ED, and that 14 of these ads also contained implied claims that these effects on disease were clinically proven. ID at 211-34. The ALJ also found that the claims at issue are material to consumers. *Id.* at

290-96. The ALJ further determined that the appropriate level of substantiation for such claims is competent and reliable scientific evidence, which for claims that a food or food-derived product treats, prevents or reduces the risk of disease must include adequate clinical studies, though not necessarily RCTs. *Id*. at 234-50. The ALJ determined that Respondents did not have such evidence to substantiate their claims, rendering them false or misleading under Sections 5(a) and 12 of the FTC Act. *Id.* at 250-290. According to the ALJ's cease and desist order against the corporate and individual Respondents pursuant to Section 5(b) of the FTC Act, Respondents would be prohibited from engaging in deceptive advertising practices with respect to any food, drug, or dietary supplement that may be advertised by Respondents in the future. *Id.* at 309-25. The ALJ did not require that Respondents seek FDA pre-approval for any future disease claims with respect to the Challenged Products. *See id*. at 314-23.

III. Legal Standard

The Commission reviews the record *de novo* by considering "such parts of the record as are cited or as may be necessary to resolve the issues presented and . . . exercis[ing] all the powers which [the Commission] could have exercised if it had made the initial decision." 16 C.F.R. § 3.54. In this case, the Commission adopts the ALJ's findings of fact to the extent those findings are not inconsistent with this opinion.

An advertisement is deceptive if it contains a representation or omission of fact that is likely to mislead a consumer acting reasonably under the circumstances, and that representation or omission is material to a consumer's purchasing decision.[5] *FTC Policy Statement on Deception*, 103 F.T.C. 174, 175 (1984) (appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) ("*Deception Statement*"); *see also, e.g.*, *In re Novartis Corp.*, 127 F.T.C. 580, 679 (1999), *aff'd*, 223 F.3d 783 (D.C. Cir. 2000); *In*

[5] The Complaint alleges that Respondents violated both Sections 5 and 12 of the FTC Act. Section 5 prohibits "deceptive" acts or practices in or affecting commerce, 15 U.S.C. § 45(a), while Section 12 specifically addresses the dissemination of any "false advertisement," *i.e.*, one that is "misleading in a material respect," 15 U.S.C. § 55(a)(1), for food, drugs, devices, services, or cosmetics. The deception standard is the same under both provisions. *Deception Statement*, 103 F.T.C. at 182.

re Stouffer Foods Corp., 118 F.T.C. 746, 798 (1994); *In re Kraft, Inc.*, 114 F.T.C. 40, 120 (1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992). In addition, the Commission long has held that making objective claims without a reasonable basis constitutes a deceptive practice in violation of Section 5. *FTC Policy Statement Regarding Advertising Substantiation*, 104 F.T.C. 839 (1984) (appended to *Thompson Med. Co.*, 104 F.T.C. 648 (1984)) ("*Substantiation Statement*"); *see, e.g.*, *In re Auto. Breakthrough Scis., Inc.*, 126 F.T.C. 229, 293 & 293 n.20 (1998); *In re Jay Norris, Inc.*, 91 F.T.C. 751, 854 (1978), *aff'd as modified*, 598 F.2d 1244 (2d Cir. 1979). Consequently, the determination of whether Respondents disseminated false advertisements in violation of the FTC Act requires a three-part inquiry: (1) whether Respondents disseminated advertisements conveying the claims alleged in the Complaint; (2) whether those claims were false or misleading; and (3) whether those claims are material to prospective consumers. *Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994); *FTC v. Direct Mktg. Concepts, Inc.*, 569 F. Supp. 2d 285, 297 (D. Mass. 2008), *aff'd*, 684 F.3d 1 (1st Cir. 2010).

IV. Respondents Disseminated Advertising or Promotional Material Making Disease Treatment, Prevention and Risk Reduction Claims

The Commission's approach to ad interpretation is well established, and the general framework is not disputed on appeal. The Commission "will deem an advertisement to convey a claim if consumers, acting reasonably under the circumstances, would interpret the advertisement to contain that message." *In re Thompson Med. Co.*, 104 F.T.C. 648, 788 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986); *Deception Statement*, 103 F.T.C. at 176. A reasonable interpretation is one that would be shared by at least a significant minority of reasonable consumers. *Kraft, Inc.*, 114 F.T.C. at 122; *In re Telebrands Corp*., 140 F.T.C. 278, 291 (2005) ("[a]n ad is misleading if at least a significant minority of reasonable consumers are likely to take away the misleading claim"), *aff'd*, 457 F.3d 354 (4th Cir. 2006); *Deception Statement*, 103 F.T.C. at 177 n.20 (citing *In re Kirchner*, 63 F.T.C. 1282 (1963) (explaining a reasonable interpretation is one that would be shared by more than an insignificant and unrepresentative segment of the class of persons to whom the represented is

addressed)). Where an ad conveys more than one meaning, only one of which is misleading, a seller is liable for the misleading interpretation even if non-misleading interpretations are possible. *See, e.g.*, *In re Bristol-Myers Co.*, 102 F.T.C. 21, 320 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984); *Nat'l Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157, 161 n.4 (7th Cir. 1977). The primary evidence of the representations that an advertisement conveys to reasonable consumers is the advertisement itself. *Deception Statement*, 103 F.T.C. at 176; *see also Novartis Corp.*, 127 F.T.C. at 680; *Stouffer Foods Corp.*, 118 F.T.C. at 798; *Kraft, Inc.*, 114 F.T.C. at 121. In determining what claims may reasonably be attributed to an advertisement, the Commission examines the entire advertisement and assesses the overall "net impression" it conveys. *Deception Statement*, 103 F.T.C. at 178; *see also Novartis Corp.*, 127 F.T.C. at 679; *Kraft, Inc.*, 114 F.T.C. at 122; *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 958 (N.D. Ill. 2006) ("the Court looks to the overall, net impression made by the advertisement to determine whether the net impression is such that the ads would be likely to mislead reasonable consumers"), *aff'd*, 512 F.3d 858 (7th Cir. 2008).

The Complaint alleges that Respondents' advertisements claim that consuming the Challenged POM Products daily treats, prevents or reduces the risk of heart disease, prostate cancer, or ED. These claims that the Challenged POM Products are effective without expressly or impliedly representing a particular level of support are "efficacy claims." The Complaint also alleges that Respondents have represented that "clinical studies, research, and/or trials prove that" drinking POM Juice or taking POMx Pills or Liquid treats the diseases or prevents or reduces the risk of each of the diseases. A claim that there is a certain type or level of support is considered an "establishment claim." *Thompson Med. Co.*, 791 F.2d at 194; *see also Bristol-Myers Co.*, 102 F.T.C. at 321 (noting that a claim of clinical proof can be express or implied). While "[t]here is no conceptual or practical reason to single out such claims . . . for special treatment . . . the express or implied claim that an advertiser possesses a particular level of substantiation" is an additional representation, which we also evaluate to ensure that it is not misleading. *Thompson Med. Co.*, 104 F.T.C. at 821-22 n.59.

It is well established that the Commission has the common sense and expertise to determine "what claims, including implied ones, are conveyed in a challenged advertisement, so long as those claims are reasonably clear." *Kraft, Inc.*, 970 F.2d at 319; *accord FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965); *FTC v. Nat'l Urological Grp., Inc.*, 645 F. Supp. 2d 1167, 1189-90 n.12 (N.D. Ga. 2008) (holding that facial analysis is a sufficient basis to find an alleged claim was made if it is "clear and conspicuous" or "apparent" on the face of the ad), *aff'd*, 356 Fed. Appx. 358, (11th Cir. 2009) (unpublished opinion); *Daniel Chapter One*, 2009 WL 5160000 at *14-15 (F.T.C. 2009), *aff'd*, 405 Fed. Appx. 505 (D.C. Cir. 2010) (unpublished opinion), *available at* 2011-1 Trade Cas. (CCH) ¶77,443 (D.C. Cir. 2010).

Claims may be either express or implied. The Commission reviews implied claims as if they are on a continuum: at one end claims are virtually synonymous with express claims; at the other end are claims that use language that few consumers would interpret as making a particular representation. *Novartis Corp.*, 127 F.T.C. at 680. To determine whether a particular implied claim has been made, the Commission starts with a facial analysis of the advertisement. A facial analysis of an ad considers "an evaluation of such factors as the entire document, the juxtaposition of various phrases in the document, the nature of the claim, and the nature of the transaction." *Deception Statement*, 103 F.T.C. at 176. "If, after examining the interaction of all the different elements in the ad, the Commission can conclude with confidence that an advertisement can reasonably be read to contain a particular claim, a facial analysis is sufficient basis to conclude that the advertisement conveys the claim." *Stouffer Foods Corp.*, 118 F.T.C. at 798; *accord Novartis Corp.*, 127 F.T.C. at 680; *Kraft, Inc.*, 114 F.T.C. at 121. Nonetheless, "the Commission may not inject novel meanings into ads . . . ; ads must be judged by the impression they make on reasonable members of the public." *Bristol-Myers Co.*, 102 F.T.C. at 320.

Extrinsic evidence is unnecessary to establish the impression that consumers would take away from an ad if the claims are reasonably clear from the face of the advertisement. *Kraft Inc.*, 970 F.2d at 319 (holding that "the Commission may rely on its own reasoned analysis to determine what claims, including implied ones, are conveyed in a challenged ad, so long as those

claims are reasonably clear from the face of the advertisement."); *accord Nat'l Urological Grp.*, 645 F. Supp. 2d at 1189-90 n.12 (holding that facial analysis is a sufficient basis to find an alleged claim was made if claims are "clear and conspicuous" or "apparent" on the face of the advertisement); *FTC v. QT, Inc.*, 448 F. Supp. 2d at 958 (quoting *FTC v. Febre*, No. 94 C 3625, 1996 WL 396117, at *4 (N.D. Ill. July 3, 1996), *aff'd*, 128 F.3d 530 (7th Cir. 1997)); *Kraft, Inc.*, 970 F.2d at 320) ("'There is no authority for defendants' contention that implied claims cannot be found to be deceptive absent extrinsic evidence. The courts and the FTC have consistently recognized that implied claims fall along a continuum from those which are so conspicuous as to be virtually synonymous with express claims to those which are barely discernible. It is only at the latter end of the continuum that extrinsic evidence is necessary.' Where implied claims are conspicuous and 'reasonably clear from the face of the advertisements,' extrinsic evidence is not required.") (citations omitted); *Stouffer Foods Corp.*, 118 F.T.C. at 798 ("If after examining the interaction of all the different elements in the ad, the Commission can conclude with confidence that an ad can reasonably be read to contain a particular claim, a facial analysis is sufficient basis to conclude that the ad conveys the claim."); *see also Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 652-53 (1985) ("When the possibility of deception is as self-evident as it is in this case, we need not require the State to 'conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead.'") (quoting FTC v. Colgate-Palmolive Co., 380 U.S. at 391-92).

Yet, if extrinsic evidence has been introduced, that evidence "must be considered by the Commission in reaching its conclusion" about the meaning of the advertisement. *Bristol-Myers Co.*, 102 F.T.C. at 319; *see also Thompson Med. Co.*, 104 F.T.C. at 794 (finding that the Commission was "obliged to consider" extrinsic evidence offered by the parties). In this case, extrinsic evidence includes expert testimony by Dr. Ronald Butters and Dr. David Stewart, a survey of consumer responses to billboard headlines, and evidence regarding the intent of Respondents to convey particular messages in their advertising.

We find that in the context of POM Wonderful's challenged advertisements, reasonable consumers would read claims to

"prevent" or "reduce the risk of" heart disease, prostate cancer, or ED as conveying the claim that consuming the Challenged POM Products substantially reduces the likelihood that the consumer will contract the disease or condition, not that the products would absolutely prevent the onset of these conditions. Because the development of heart disease, cancer, or ED may be influenced by many factors, in the context of the particular advertisements challenged in this matter, most reasonable consumers would not interpret the language, imagery, and other elements of the advertisements to convey claims that consuming the Challenged POM Products would eliminate all possibility that the consumer might develop these diseases at some later time. This interpretation of the implied claims in Respondents' advertisements does not affect our conclusion that Respondents disseminated advertisements or promotional materials that contained the claims alleged in the Complaint, which was phrased in the disjunctive (prevent or reduce risk) rather than the conjunctive (prevent and reduce risk).[6]

A. Facial Analysis

In the Initial Decision, Judge Chappell found claims alleged by Complaint Counsel were conveyed in 19 advertisements or promotional materials. He found that 11 of these ads conveyed efficacy claims that the Challenged POM Products treat, prevent or reduce the risk of heart disease. IDF 580, 583. He found that eight ads conveyed efficacy claims that the Challenged POM Products treat, prevent or reduce the risk of prostate cancer, IDF 581, and four ads conveyed efficacy claims that the Challenged POM Products treat, prevent or reduce the risk of ED. IDF 582.[7] In 15 of the 19 advertisements, the ALJ found that the advertisements contained establishment claims that clinical studies supported the heart disease, prostate cancer, and ED efficacy claims. IDF 580, 581, 582. In our review of the ads, the

[6] To the extent this interpretation affects the substantiation that the Respondents must possess to support their claims, we incorporate this interpretation in our analysis. *See* discussion *infra* Section V.A.

[7] The ALJ found some of the ads to make claims relating to more than one disease.

Commission finds that 36[8] ads convey the claims alleged by Complaint Counsel.[9] The attached Claims Appendix provides an analysis of each of the challenged ads in this case. We evaluate treatment claims separately from claims that the Challenged POM Products prevent or reduce the risk of disease (which, as explained above, are viewed as equivalent in the context of this matter). We also explain in the Claims Appendix the basis for our findings that Respondents made establishment claims. The Claims Appendix describes the facial analysis of each ad.

Although we find that more ads contain claims alleged by Complaint Counsel than the ALJ did, we agree with Judge Chappell's approach to the facial analysis regarding the juxtaposition of elements in the ads to find that Respondents represented that the Challenged POM Products treat heart disease and that the Challenged POM Products prevent or reduce the risk of heart disease. As Judge Chappell explained,

> Respondents made these claims indirectly and obliquely, typically presenting, through words and images, a logical syllogism that: free radicals cause or contribute to heart disease; the POM Products contain antioxidants that neutralize free radicals; and, therefore, the POM Products are effective for heart disease. IDF 294-295, 301-303, 348, 374, 394-396, 398, 407, 414, 444, 452-453, 460-462.

ID at 225. We also adopt the ALJ's reasoning regarding the basis for finding establishment claims in the ads that contain heart disease claims and incorporate his findings.

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[8] The Commission finds three of the 39 exhibits we reviewed on appeal contain none of the disease claims alleged in the Complaint and seven of those 39 exhibits contain only some of the asserted claims. As explained below, *see* discussion *infra*, the Commission did not reach the question of whether the four media interviews conveyed the challenged claims.

[9] For most of the challenged advertisements, Commissioner Ohlhausen agrees with the majority of the Commission about the claims conveyed. As explained in her Concurring Statement, for some advertisements, however, Commissioner Ohlhausen either did not find certain claims were made or believes extrinsic evidence is necessary to determine whether consumers would take away such claims.

> Against this background, many of the advertisements further state or represent that the POM Products have been shown in one or more clinical, medical, or scientific studies [sic], to reduce plaque, lower blood pressure, and/or improve blood flow to the heart, in a context where it is readily inferable that the referenced study results involve heart disease risk factors and, therefore, constitute clinical support for the effectiveness claim. IDF 295, 301, 303, 349, 373, 376, 379, 395-397, 400, 407, 414, 420.

ID at 225-26.

We similarly adopt and incorporate the ALJ's approach to the facial analysis of Respondents' ads regarding the presence of prostate cancer claims.

> These advertisements typically communicate the claim by juxtaposing statements and representations that prostate cancer is a leading cause of death in men; antioxidants, such as those provided by the POM Products, may help prevent cancer; that PSA is an indicator of prostate cancer; that PSA doubling time is an indicator of prostate cancer progression; and that the POM Products have been shown in clinical testing to slow PSA doubling time. IDF 310-318, 332, 334-336, 352-353, 371, 381, 389-392, 398, 400-405, 409, 429.

ID at 228. The ALJ further explained that he found the establishment claims because the ads "connect both POM-provided antioxidants, and the study results, to effectiveness for prostate cancer." *Id.*

We likewise adopt and incorporate the ALJ's reasoning for the facial analysis for the ads containing ED claims.

> Respondents disseminated print advertisements that stated and represented, for example, that (1) the superior antioxidants in the POM Products protect against free radicals, which can damage the body; (2) powerful antioxidants enhance the actions of nitric oxide in vascular endothelial cells, showing potential for management of "ED"; and (3) a preliminary study on "erectile function"

> showed that men who consumed POM Juice reported "a 50% greater likelihood of improved erections," as compared to a placebo. IDF 323-324. . . . Presenting a study on "erectile function" showing "improved erections" is reasonably read to imply effectiveness for erectile dysfunction, particularly when juxtaposed to an express reference to management of "ED." IDF 323-325.

ID at 229-230.

Respondents argue that this chain of reasoning to determine whether a significant minority of reasonable consumers would interpret the ads as containing the alleged claims is improper because the approach requires leaps in logic or the addition of missing elements in a chain of deduction. Respondents further argue that a facial analysis cannot provide those missing elements, but instead such analysis is strictly constrained by what actually appears in ad. We disagree. When conducting a facial analysis of an advertisement, the advertisement must be viewed as a whole "without emphasizing isolated words or phrases apart from their context[.]" *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1496 (1st Cir. 1989) (quoting *Am. Home Prods. Corp. v. FTC*, 695 F.2d 681, 687 (3d Cir. 1982)); *FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963) (explaining "[t]he entire mosaic should be viewed rather than each tile separately"). Respondents' ads drew a logical connection between the antioxidant claims and the specific disease treatment or prevention claims through the associated explanatory text, the specific findings of the study results, and references to diseases or medical conditions. Ultimately, we assess the net impression of each ad, and we find that for many of Respondents' ads, the net impression is more than any individual element of the ad.

The ALJ did not individually analyze those exhibits for which he did not find the claims alleged by Complaint Counsel. Instead, he summarized generally a variety of factors explaining why he did not find such claims, including that the "advertisements . . . do not mention heart disease, prostate cancer, or erectile dysfunction; use vague, non-specific, substantially qualified, and/or otherwise non-definitive language; use language and/or images that, in the context of the advertisement, are inconsistent with the alleged claim; and/or do not draw a connection for the reader, such as

through associated explanatory text, between health benefits, or study results, and effectiveness for heart disease, prostate cancer, or erectile dysfunction." ID at 222.

Based on a facial analysis of the ads, as well as a consideration of the relevant extrinsic evidence, we find that Respondents conveyed the efficacy claims alleged in the Complaint in more ads than the ALJ did. [10]

For example, we overrule the ALJ's with regard to Figure 7 ("Cheat Death" print ad) because we find that this ad conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily prevents heart disease. We make this finding based on the net impression of the advertisement, including the statements that drinking eight ounces of POM Juice a day "can help prevent . . . heart disease," and "[t]he sooner you drink it, the longer you will enjoy it," as well as imagery of the POM Juice bottle with a noose around the neck of the bottle.

We also overrule some of the ALJ's findings with regard to Figure 11 ("Decompress" print ad) because we find that this ad conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily prevents or reduces the risk of heart disease. The ad containing medical imagery depicts the POM Juice bottle wrapped in a blood pressure cuff. Moreover, express language in the ad establishes a link between POM Juice, which "helps guard . . . against free radicals [that] . . . contribute to disease," and the $20 million of "scientific research from leading universities, which has uncovered encouraging results in prostate and cardiovascular health." The ad also states that POM Juice will help "[k]eep your ticker ticking." In combination, these elements communicate the message that POM Juice prevents or reduces the risk of heart disease, and that those efficacy claims are scientifically established.

In addition, we reverse the findings of the ALJ with regard to Figure 22 ("Drink to Prostate Health" print ad). Based on the

[10] *See* Summary Table of Commission Findings Regarding POM Exhibits, appended to this opinion.

overall net impression, we find that this ad conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily treats prostate cancer and that this claim is scientifically established. Factors contributing to this net impression include the language "Drink to prostate health" and express language equating POM Juice to "good medicine." Furthermore, the ad describes "[a] recently published preliminary medical study [that] followed 46 men previously treated for prostate cancer" which found that "[a]fter drinking 8 ounces of POM Wonderful 100% Pomegranate Juice daily for at least two years, these men experienced significantly longer PSA doubling times."

Regarding the establishment claims, we agree with the ALJ that "[t]he majority of the Challenged Advertisements that have been found herein to have made the claims alleged in the Complaint [also] represented that clinical studies supported the claimed effectiveness of the POM Products." ID at 225. Not "every reference to a test [or study] necessarily gives rise to an establishment claim. The key, of course, is the overall impression created by the ad." *Bristol-Myers Co.*, 102 F.T.C. at 321 n.7. An establishment claim may be made by such words and phrases as "established" or "medically proven," but an establishment claim may also be made "through the use of visual aids (such as scientific texts or white-coated technicians) which clearly suggest that the claim is based upon a foundation of scientific evidence." *Id.* at 321 (citing *Am. Home Prods.*, 98 F.T.C. 136, 375 (1981), *aff'd*, 695 F.2d 681 (3d Cir. 1982)).

For four ads, Figures 4-7, the ALJ found that the ads conveyed heart disease efficacy claims but not establishment claims. *See* IDF 583. As recognized by Judge Chappell, Complaint Counsel did not allege establishment claims for two of the ads, Figures 5 and 7. For Figures 4 and 6, the ALJ explained that he did not find establishment claims when the ads "either do not reference any clinical testing or refer to clinical testing in such a way and in such context, that it cannot be concluded with confidence that a significant minority of reasonable consumers would take away the message that the efficacy claim is 'clinically proven.'" ID at 227. The ALJ found that these ads represented that the Challenged POM Products treat, prevent or reduce the risk of heart disease, but he explained that "the only reference to any scientific support

is in very small print, at an asterisk at the bottom of the page, which states 'Aviram, M. Clinical Nutrition, 2004. Based on a clinical pilot study.'" He concluded that "this small print, single reference to a study, particularly in the context of a qualified assertion that POM Juice 'can' reduce plaque, is insufficient to conclude with confidence" that reasonable consumers would interpret the ads "to be claiming that POM Juice is clinically proven to be effective for heart disease." *Id.* at 227-28 (citing IDF 446-447, 466-467).

The Commission disagrees.[11] We find that specificity of the representation in the text of the ad that drinking "eight ounces a day can reduce plaque by up to 30%!" – which is in the same size font as the rest of the ad text – would lead at least a significant minority of reasonable consumers to interpret the ad to convey that there is clinical proof of the heart disease claims. The specific percentage reduction of plaque in someone's arteries cannot be ascertained by any means other than by scientific measurement, and the statement therefore implies that the claim of plaque reduction is scientifically established. The claim of scientific proof is bolstered by the asterisk that directs the reader to the quoted citation for the "clinical pilot study," which the Commission acknowledges is in small print.

Respondents argue that none of their ads make establishment claims asserting "clinical proof" because any references to studies in the ads are only accurate descriptions of specific study findings rather than broad establishment claims. Respondents claim that it is improper to treat reports of particular study results about PSADT or reduced plaque in arteries as claimed clinical proof of treatment or prevention of prostate cancer or heart disease. We disagree. As we explain in the Claims Appendix, these ads drew a logical connection between the study results and effectiveness for the particular diseases. Reasonable consumers are unlikely to differentiate the precise medical differences after reading a headline proclaiming "Prostate Cancer Affects 1 Out of Every 6 Men," *see* Figure 17; a statement that "Prostate cancer is the most commonly diagnosed cancer in men in the United States," *see*

[11] Commissioner Ohlhausen would uphold the ALJ's findings for CX0031 and CX0034 (Figures 4 and 6). *See* Commissioner Ohlhausen's Concurring Statement.

Figures 21 and 27; or the headline "Amaze your cardiologist." *See* Figure 6.

Respondents also argue that the ads cannot reasonably be interpreted as making establishment claims asserting "clinical proof" because the ads simply report study results in a qualified manner with words such as "preliminary," "promising," "encouraging," or "hopeful." It is well established that if the disclosure of information is necessary to prevent a representation from being deceptive, the disclosure must be clear. *See, e.g.*, *Pantron I Corp*., 33 F.3d at 1088; *Thompson Med. Co*., 104 F.T.C. at 789 n.9, 842-43. Respondents' use of one or two adjectives does not alter the net impression that clinical studies prove their claims. This is especially true when the chosen adjectives – promising, encouraging, or hopeful – provide a positive spin on the studies rather than a substantive disclaimer.[12] As the ALJ explained, in the context of the particular ads, "the foregoing language fails to materially alter the overall net impression that such advertisements were claiming clinical proof." *See, e.g.*, IDF 300-301, 312, 333, 342, 349-350, 354; *see also* IDF 519 (noting that Dr. Stewart had opined that "the typical consumer would likely have little understanding of what 'initial' or 'pilot' means, particularly in the context of [a study] being referred to as having been published in a major journal").[13]

[12] Our analysis here is consistent with the Commission's experience in other situations where it has found the use of qualifiers to be inadequate to sufficiently modify an otherwise false or misleading claim to render it non-deceptive. *See, e.g.*, Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.2 (ads with endorsements will likely be interpreted as conveying that the endorser's experience is representative of what consumers will generally achieve, even when they include disclaimers such as "Results not typical" and "These testimonials are based on the experiences of a few people and you are not likely to have similar results"); FTC Staff Report, *Effects of Bristol Windows Advertisement with an "Up To" Savings Claim on Consumer Take-Away and Beliefs* (May 2012), *available at* http://www.ftc.gov/opa/2012/06/uptoclaims.shtm (when marketers use the phrase "up to" in their ads, such as making a claim that consumers will save "up to 47%" in energy costs by purchasing replacement windows, the qualifier does not affect consumers' overall takeaway that the percentage savings depicted is typical of what they can expect to achieve).

[13] In Commissioner Ohlhausen's view, the use of qualified terms such as "preliminary studies," or "initial studies" in the main text of an ad is significantly different than including a disclosure like "results not typical" in small print at the bottom of an ad. In her opinion, for some of the exhibits, the

Moreover, we note that in many instances, ads describing study results using such qualifying language include other elements that also contribute to the net impression that the claims at issue are clinically proven, such as the use of medical imagery (including the caduceus, a well-recognized symbol of the medical profession), or statements relating to the overall amount of money spent on "medical" research, ranging from $20 million to over $30 million, depending on the relevant time period. When an ad represents that tens of millions of dollars have been spent on medical research, it tends to reinforce the impression that the research supporting product claims is established and not merely preliminary.

Whether an ad conveys the implied claims alleged by Complaint Counsel is a question of fact. *See, e.g.*, *Removatron Int'l*, 884 F.2d at 1496, *Nat'l Urological Grp.*, 645 F. Supp. 2d at 1189. As we explain here, and in more detail in the Claims Appendix, based on our weighing of all of the evidence, the Commission finds that the net impression conveyed to at least a significant minority of reasonable consumers was that there is clinical proof for the disease treatment, prevention or risk reduction claims at issue. In this case, extrinsic evidence is not required because the establishment claims are in fact apparent from the overall, common-sense, net impression of the words and images of the advertisements themselves.

B. Extrinsic Evidence

Even though only a facial analysis is necessary to determine whether Respondents had indeed made the claims alleged by Complaint Counsel, both Complaint Counsel and Respondents provided extrinsic evidence in support of their arguments regarding claim interpretation. Specifically, Respondents offered the expert report and testimony of Dr. Ronald R. Butters, who was qualified as an expert in linguistics, as to the meaning of Respondents' advertisements. IDF 262, 264. In rebuttal, Complaint Counsel offered the expert report and testimony of

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qualifying language regarding studies warrants extrinsic evidence before finding implied establishment claims. *See* Commissioner Ohlhausen's Concurring Statement.

rebuttal witness Dr. David Stewart, who is accepted as an expert in advertising, marketing, consumer behavior, and survey methodology, to review Dr. Butters' report and counter his conclusions. IDF 287-89. Complaint Counsel also relied on the Bovitz Survey, a 2009 study of billboard headlines commissioned by Respondents to compare the impact of two advertising campaigns related to a number of the advertisements challenged by Complaint Counsel. ID at 222. Except where noted here and in the accompanying Claims Appendix, we agree with the ALJ's conclusions with respect to the extrinsic evidence provided in this case.

Extrinsic evidence can include results from methodologically sound surveys about the ads in question, the common usage of language, accepted principles from market research concerning consumers' response in general to ads, and the opinions of expert witnesses on how an advertisement might reasonably be interpreted. *See Kraft Inc.*, 114 F.T.C. at 121 (explaining extrinsic evidence includes "reliable results from methodologically sound consumer surveys"); *Thompson Med. Co.*, 104 F.T.C. at 790.

1. Dr. Butters' Expert Report and Dr. Stewart's Analysis

Dr. Butters examined the challenged ads and offered his opinion that none of them conveyed that scientific research proves that the use of the Challenged POM Products successfully treats, prevents or reduces the risk of heart disease, prostate cancer, or ED. IDF 264, 480-83; PX0158 (Butters Expert Report at 0003). He concluded that, at most, the ads would convey that pomegranate juice is a health beverage and that preliminary research suggests there may be health benefits. IDF 486; PX0158 (Butters Expert Report at 0003, 0043.) Additionally, Dr. Butters opined that what people might infer with respect to a food product may differ from what they might infer with respect to a drug regarding treatment claims. IDF 491-92; Butters, Tr. 2817-18. During trial, Dr. Butters testified and proffered his opinion on the interpretation of many of the challenged ads. *See* IDF 496-511. Dr. Stewart provided a useful analysis of Dr. Butters' expert report, but Dr. Stewart did not conduct his own facial analysis of the challenged ads, and because he could not opine on what the ads meant, his analysis has inherent limitations. IDF 513. He

explained that Dr. Butters' linguistic approach to ad interpretation fails to take into account the characteristics of the viewer and how consumers use information. Stewart, Tr. 3170-73.

We agree with the ALJ's conclusion that, notwithstanding Dr. Butters' opinion to the contrary, the use of qualified language such as "may" or "can" with respect to the effects of the Challenged POM Products on disease does not modify the messages being conveyed.[14] In fact, we agree that such qualifiers may create the inference of a stronger claim by garnering reader trust and that their meaning can depend on context. ID at 233; IDF 527, 589. We also agree with the ALJ's conclusion that notwithstanding Dr. Butters' opinion to the contrary, the use of humor, parody, and hyperbole in an advertisement does not block communication of a serious message. ID at 233; IDF 487-89. Indeed, it may be the humor that grabs the reader's eye but the serious message that holds the reader's interest. The Commission agrees with the ALJ's conclusion based on Dr. Stewart's testimony that qualifying language with respect to cited studies (such as "preliminary," "promising," "encouraging," or "hopeful") "fails to materially alter the overall net impression that such advertisements were claiming clinical proof." ID at 232; IDF 519. In sum, we find Dr. Butters' linguistic analysis of the advertisements in question to be of limited value in our overall assessment of the net impression of the ads at issue.

2. Bovitz Survey

In 2009, POM engaged the Bovitz Research Group to design a consumer survey to evaluate the relative effectiveness of the then-running "Super Hero" advertising campaign compared to POM's earlier "Dressed Bottle" campaign. The survey exposed survey respondents to POM's billboard advertising, which included taglines related to antioxidants but contained no additional text. Four of the billboard advertisements share headlines and imagery that appear in certain challenged ads in this case. IDF 544, 546, 547, 550, 552. We note at the outset that Complaint Counsel offered the Bovitz Survey as supporting extrinsic evidence only in

[14] Commissioner Ohlhausen believes that the qualifying language in some of the exhibits requires extrinsic evidence before finding implied claims. *See* Commissioner Ohlhausen's Concurring Statement.

the context of the testimony of its rebuttal witness, Dr. Stewart. Stewart, Tr. 3205-21; 3241-42.

In determining whether a consumer survey is methodologically sound, we consider whether the survey "draws valid samples from the appropriate population, asks appropriate questions in ways that minimize bias, and analyzes the results correctly." *Thompson Med. Co.*, 104 F.T.C. at 790. The Commission does not require methodological perfection before it will rely on a copy test or other type of consumer survey, but looks to whether such evidence is reasonably reliable and probative. *See Stouffer Foods Corp.*, 118 F.T.C. at 807; *Bristol-Myers Co.*, 85 F.T.C. at 743-44, 744 n.14. Flaws in the methodology may affect the weight that is given to the results of the survey. *See Stouffer Foods Corp.*, 118 F.T.C. at 807-08.

We agree with the ALJ's conclusion that the Bovitz study is not particularly persuasive. The ALJ concluded that the Bovitz Survey's conclusions on consumers' interpretations of billboard messages are entitled to little weight for assessing whether the print advertisements at issue in this case conveyed the alleged claims. ID at 223. The ALJ reasoned that even when the billboard headlines appeared in the challenged print ads, the billboard images did not include the additional text contained in the print ads, such as references to scientific studies, that might modify the message. *Id.*

3. Respondents' Intent

Finally, the ALJ rejected Complaint Counsel's argument that Respondents' intent to make disease claims in their advertisements should be considered in this matter as extrinsic evidence that the claims were made. *See* ID at 216 ("This Initial Decision need not, and does not, determine whether or not Respondents intended to make the disease claims alleged in the Complaint because the evidence is sufficient to conclude that Respondents disseminated advertisements containing the alleged claims, without regard to Respondents' alleged intent."). It is true that a showing of intent to make a particular claim is not required to find liability for violating Section 5. *See, e.g.*, *Chrysler Corp. v. FTC*, 561 F.2d 357, 363, 363 n.5 (D.C. Cir. 1977); *Novartis Corp.*, 127 F.T.C. at 683; *Kraft, Inc.*, 114 F.T.C. at 121. But it is

also well established that a showing that an advertiser intended to make particular claims can help demonstrate that the alleged claim was in fact conveyed to consumers. *See Telebrands Corp.*, 140 F.T.C. at 304 (concluding that "ample evidence that respondents intended to convey the challenged claims" provided further support for the conclusion that advertisements made the alleged claims); *Novartis Corp.*, 127 F.T.C. at 683 ("evidence of intent to make a claim may support a finding that the claims were indeed made"); *Thompson Med. Co.*, 104 F.T.C. at 791.

Here, we only consider whether Respondents intended to make the disease claims challenged by Complaint Counsel in their advertisements; whether Respondents intended to make claims about general health benefits in their advertisements is not relevant to our analysis.

We find that the record includes evidence of Respondents' intent to make claims in their advertisements about the Challenged POM Products' effects on heart disease, prostate cancer, and ED. For example, Mr. Resnick testified that POM communicates to consumers the company's "belief that pomegranate juice is beneficial in treating some causes of impotence, for the purpose of promoting sales of its product." IDF 1316 (citing CX1372 at 45 (S. Resnick, Tropicana Dep.)). Separate creative briefs for POMx Pills, dated September 1 and 5, 2006, respectively, stated that their "main creative focus is prostate cancer," and that other versions of the creative brief "should definitely focus on the other benefits of POM – antioxidant, anti-aging, heart health, etc." IDF 1327, 1328. Although we rely principally on a facial analysis of the challenged ads in determining their net impression, evidence of Respondents' intent to convey claims about disease treatment and prevention supports our reading of Respondents' ads.

V. Respondents' Disease Claims Are False or Deceptive

Having determined that a significant number of the advertisements at issue on their face convey the claims challenged by Complaint Counsel, we turn next to whether such claims are false or likely to mislead consumers. There are two analytical routes by which Complaint Counsel can prove that Respondents' ads are deceptive or misleading, and both arise in this case.

The first is to demonstrate that the claims in the ads are false. *See Thompson Med. Co.*, 104 F.T.C. at 818-19. In this case, the claims that Complaint Counsel alleges are false are Respondents' establishment claims. These claims may be deemed false where Respondents represent expressly or implicitly that there is clinical proof that the Challenged POM Products treat, prevent or reduce the risk of heart disease, prostate cancer, or ED but Respondents lacked such proof at the time the representations were made. If Respondents do not have such clinical proof, Respondents' establishment claims are false. *See*, *e.g.*, *Removatron Int'l Corp.*, 111 F.T.C. 206, 297-99 (1988) ("If an advertisement represents that a particular claim has been scientifically established, the advertiser must possess a level of proof sufficient to satisfy the relevant scientific community of the claim's truth."), *aff'd*, 884 F.2d 1489 (1st Cir. 1989); *Sterling Drug*, 102 F.T.C. 395, 762 (1983) ("when an advertiser represents in its ads that there is a particular level of support for a claim, the absence of that support makes the claim false").

The second approach is through the "reasonable basis" theory, which Complaint Counsel asserts with regard to the efficacy claims in Respondents' ads. This theory rests on the principle that an objective claim about a product's performance or efficacy carries with it an express or implied representation that the advertiser had a reasonable basis of support for the claim. *Thompson Med. Co.*, 104 F.T.C. at 813 n.37. "Consumers find these representations of support to be important in evaluating the reliability of the product claims. Therefore, injury is likely if the advertiser lacks support for the claims." *Id.* For that reason, "[t]he reasonable basis doctrine requires that firms have substantiation before disseminating a claim." *Substantiation Statement*, 104 F.T.C. at 840. To determine what constitutes a reasonable basis, the Commission considers the "*Pfizer* factors," which are factors relevant to the benefits and costs of developing substantiation for the claim. *See In re Pfizer Inc.*, 81 F.T.C. 23 (1972); *Substantiation Statement*, 104 F.T.C. at 840 (the "determination of what constitutes a reasonable basis depends . . . on a number of relevant factors relevant to the benefits and costs of substantiating a particular claim …[including,] the type of claim, the product, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation for the

claim, and the amount of substantiation experts in the field believe is reasonable").

In the Initial Decision, the ALJ recognized that both the falsity of the establishment claims and the lack of a reasonable basis for Respondents' efficacy claims involved questions of the level of substantiation that Respondents needed to possess. He further recognized that the experts who testified in this case explained that they would find the establishment and efficacy claims to be properly supported with the same level of evidence. *See* ID at 243. Thus, the ALJ consolidated his analysis of the establishment and efficacy claims and appears to have applied the *Pfizer* factors to both types of claims when he evaluated the expert testimony. *See id.* at 243-44. To the extent that the ALJ's approach may be interpreted as applying the *Pfizer* factors to determine the level of substantiation necessary to support the establishment claims, we do not adopt the analysis. *Removatron Int'l Corp.*, 111 F.T.C. at 297 ("[I]f the ad . . . implies a particular level of substantiation to reasonable consumers, application of the *Pfizer* factors is not required."); *Thompson Med. Co.*, 104 F.T.C. at 821-22 n.59; *Bristol-Myers*, 102 F.T.C. at 321, 331.

The ALJ also failed to differentiate the opinions and testimony of the expert witnesses regarding the particular claims that they were addressing. The ALJ correctly recognized that the level of evidence "required to support a claim depends on the claim being made." IDF 688 (citing Stampfer, Tr. 830-31; Miller, Tr. 2195, 2210). *See also* PX0206 at 11 (Miller Expert Report) ("whether clinical science is necessary to substantiate a particular claim would vary according to the strengths of the basic science and the particular claim"). Yet, the ALJ appears to have relied on expert testimony about the level of substantiation necessary for broad, generalized health and nutritional benefits when he determined the level of substantiation needed to address the specific disease treatment, prevention and risk reduction claims at issue in this case. Our review of the record leads us to conclude that, to the extent the ALJ did so, his conclusions are not properly supported.

Throughout this case, Respondents have argued that their scientific studies of the Challenged POM Products support claims about broad health benefits, which may contribute to a reduced

risk of disease.[15] Thus, within the category of claims related to disease risk reduction, Respondents would include general dietary recommendations and qualified claims regarding any health benefits of food, which they contend are equivalent to the representations made in their ads.

The starting point for Respondents' experts was the position that Respondents put forward on ad interpretation, namely that the challenged ads convey only that the Challenged POM Products generally promote good health. As a result, Respondents' experts provided opinions regarding the level of science needed to substantiate claims about general health benefits, testifying that lower levels of substantiation — for instance, the totality of the evidence, including basic science and pilot studies — are sufficient. *See* PX0025 at 5 (Ornish Expert Report) ("Taken as a whole, the scientific evidence from basic science studies, animal research, and clinical trials in humans indicates that pomegranate juice in its various forms . . . is likely to be beneficial in maintaining cardiovascular health and is likely to help reduce the risk of cardiovascular disease."); PX0192 at 9, 11 (Heber Expert Report) ("It is not appropriate to require the use of double-blind placebo-controlled studies for evaluating the health benefits of foods that have been consumed for their health benefits for thousands of years" and "the body of research on pomegranate juice and extract, revealing how they act in the body, provides support for potential health benefits for heart disease, and prostate cancer."); PX0149 at 6-7 (Burnett Expert Report) ("[T]he basic scientific and clinical evidence is sufficient to support the use of pomegranate juice as a potential benefit for vascular blood flow and the vascular health of the penis. . . . It is also my opinion that further such studies as double blinded, placebo-based tests are not required before permitting this information to be given to the public."); PX0189 at 3 (Goldstein Expert Report) ("[P]hysicians

[15] *See, e.g.*, RAns at 5 ("[T]he gist of these ads – their 'net effect' – is to convey the idea that POM's Products are natural foods high in health-enhancing antioxidants, much like other healthy foods, such as broccoli and blueberries, which may improve one's odds of staying in good health but are not medicine to prevent or treat disease."); RA at 26 ("What, then, do the statements in POM's advertisements mean? The plain reading of these messages is that the high antioxidant content of POM juice is likely a good thing, because it can help promote healthy functioning of various natural processes in the body.").

who treat patients concerned with erectile health would not hold pomegranate juice to the standards of safety and efficacy traditionally required by the FDA for approval of a pharmaceutical (including performance of large, double-blind, placebo-controlled pivotal clinical trials) before recommending pomegranate juice to their patients. The available body of scientific literature – including in vitro, in vivo, and preliminary clinical trials – strongly suggests that consuming pomegranate juice promotes erectile health.").

Yet, on cross-examination these experts revealed that even they distinguish the type of evidence that would be necessary to substantiate disease treatment, prevention or risk reduction claims, which are precisely the type of the representations we conclude are made in Respondents' ads. *See, e.g.*, IDF 684 ("Dr. Burnett testified that the standard of substantiation is different for a product that is directly associated as a treatment for erectile dysfunction and for a product that claims to have helpful benefits for or improves one's erectile function."); PX0192 at 40-41 (Heber Expert Report) ("To the extent [Complaint Counsel's expert] Dr. Stampfer claims that pomegranate juice and extract have not been proven absolutely effective to treat, prevent, or reduce the risk of heart disease and prostate cancer, I agree. But . . . [i]n my expert opinion, there is credible scientific evidence that pomegranate juice and pomegranate extracts have significant health benefits for human cardiovascular systems . . . [and] the following effects on prostate biology relevant to reducing the risk of prostate cancer . . ."). Likewise, as the ALJ recognized, claims regarding general health benefits for heart, prostate, or erectile function are not the equivalent of claims to treat, prevent or reduce the risk of heart disease, prostate cancer, and erectile dysfunction. *See* ID at 282, 288, 289.[16]

Similarly, Complaint Counsel's experts, who testified that RCTs would be necessary to support Respondents' disease

[16] This key distinction between general health benefit claims and disease treatment, prevention or risk reduction claims is the basis for Commissioner Ohlhausen's Concurring Statement regarding what claims were made in a number of Respondents' advertisements. *See* Commissioner Ohlhausen's Concurring Statement Regarding Exhibit Claims.

treatment and prevention claims, have explained that less rigorous evidence may be sufficient to support some claims regarding health or nutritional benefits of food. *See* IDF 637 (Dr. Stampfer has made public health recommendations regarding diet that were not supported by RCTs), 644-45 (Dr. Sacks testified that RCTs are not necessary to test the benefit of food categories that are included in a diet already tested in an RCT for the same benefit).

In fact, the testimony of experts called by both Complaint Counsel and Respondents was consistent on this issue. They acknowledged the differences in the level of substantiation that would be necessary for general nutritional and health benefit claims compared to the level of substantiation necessary for the specific disease treatment and prevention claims at issue in this case. *See* IDF 631 (citing Stampfer, Tr. 830-31) (explaining if the claim does not imply a causal link, then evidence short of RCTs may support that claim), 649 (explaining even if a product is safe and might create a benefit, like a fruit juice, Dr. Eastham would still require an RCT to justify claims that Respondents are charged with making) (citing Eastham, Tr. 1325-31), 684 ("Dr. Burnett testified that the standard of substantiation is different for a product that is directly associated as a treatment for erectile dysfunction and for a product that claims to have helpful benefits for or improves one's erectile function."); Heber, Tr. 2145-47 (explaining that his prior testimony was that the totality of evidence showed that the Challenged POM Products likely reduced the risk in a "probabilistic sense" rather than "actual"; he did not previously testify that the Challenged POM Products treat prostate cancer, but rather they "help to treat" prostate cancer because he would not opine that the Challenged POM Products should substitute for conventional treatment); PX0206 at 11 (Miller Expert Report) ("an unqualified claim that the product has been shown to slow the progression of PSA doubling times should actually be supported by clinical evidence" whereas a "qualified claim that POM products may be effective … is reasonable" if additional conditions are met, including there is "no suggestion" that pomegranate alone can "absolutely prevent the disease").

Although there is substantial expert testimony regarding the level of support required for generalized nutritional and health benefit claims, such evidence does not address the issue before us. We need not determine the level of substantiation required to

support all health claims, and we therefore decline to make such a finding. We consider only the claims that, as found by the Commission, Respondents made in this case — that the Challenged POM Products treat, prevent or reduce the risk of heart disease, prostate cancer, and ED, and that such claims are scientifically established. The expert evidence was clear that RCTs are necessary for adequate substantiation of these representations.

Accordingly, we reject the ALJ's conclusion that "RCTs are not required to convey information about a food or nutrient supplement where . . . the safety of the product is known; the product creates no material risk of harm; and the product is not being advocated as an alternative to following medical advice." *See* ID at 243. Other than to endorse the Commission's prior statements that health claims in food advertising be supported by "competent and reliable scientific evidence,"[17] we do not reach the issue regarding the level of substantiation for other unspecified health claims involving food products. We simply reject the ALJ's findings and conclusions regarding any health benefits not specifically challenged in the Complaint.

Just as we limit our findings to the specific disease treatment and prevention claims that are before us, we also reject the ALJ's determination that the level of substantiation needed to support representations that a product treats, prevents or reduces the risk of disease varies according to whether the advertiser offers the product as a replacement for traditional medical care. *See* ID at 243. Again, we address only the level of substantiation needed to support the claims that are at issue in this case and do not address hypothetical claims.

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[17] "'[C]ompetent and reliable scientific evidence' has been more specifically defined in Commission orders addressing health claims for food products to mean: tests, analysis, research, studies or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results." *FTC Enforcement Policy Statement on Food Advertising*, (1994), *available at* http://www.ftc.gov/bcp/policystmt/ad-food.shtm (citing *Gracewood Fruit Co*., 116 F.T.C. 1262, 1272 (1993); *Pompeian, Inc.*, 115 F.T.C. 933, 942 (1992)) ("*Food Advertising Statement*").

A. Claims That Are False

We turn next with more specificity to Respondents' claims that are alleged to be false. According to the Complaint, and as we found above, Respondents have represented that "clinical studies, research, and/or trials prove" that the Challenged POM Products treat, prevent or reduce the risk of heart disease, prostate cancer, and ED. Compl. ¶¶ 12, 14, 16. When "ads contain express or implied statements regarding the amount of support the advertiser has for the product claim . . . , the advertiser must possess the amount and type of substantiation the ad actually communicates to consumers."[18] *Substantiation Statement*, 104 F.T.C. at 839. Moreover, "[i]f an advertisement represents that a particular claim has been scientifically established, the advertiser must possess a level of proof sufficient to satisfy the relevant scientific community of the claim's truth." *See Thompson Med. Co.*, 104 F.T.C. at 821-22 n.59; *Removatron Int'l Corp.*, 111 F.T.C. at 297.

Because Complaint Counsel bears the burden of showing that these claims are false, *Thompson Med. Co.*, 104 F.T.C. at 818-19, Complaint Counsel must demonstrate that Respondents did not have the amount and type of substantiation they claimed to have had. *See Sterling Drug*, 102 F.T.C. at 762; *Thompson Med. Co.*, 791 F.2d at 194. To meet this burden, Complaint Counsel must establish the standards that clinical studies, research, or trials must meet to pass muster in the view of the relevant scientific and medical communities as support for the claims Respondents were making, and then show that the studies Respondents possessed did not meet those standards. If Respondents do not possess the level of clinical studies, research, or trials demanded by those scientific and medical communities, then Respondents' claims of clinical proof are false. *See*, *e.g.*, *Sterling Drug*, 102 F.T.C. at 762

[18] As noted above, for these establishment claims, unlike efficacy claims, we need not perform an evaluation of the various factors set out in *Pfizer* to establish the appropriate level of substantiation because the ads themselves make express or implied substantiation claims. We simply hold Respondents to the level of substantiation that the ads claim. "We treat such claims like any other representations contained in the ad. We verify that it is reasonable to interpret the ad as making them, that the claims were material, and that they are false. If so, they are deceptive under Section 5(a) of the FTC Act." *Thompson Med. Co.*, 104 F.T.C. at 821-22 n.59.

("[W]hen an advertiser represents in its ads that there is a particular level of support for a claim, the absence of that support makes the claim false.").

Based on our review of the entire record, we conclude that a higher level of substantiation is necessary to support Respondents' establishment claims than what the ALJ found. The ALJ found that experts in the relevant fields would require "competent and reliable evidence [that] must include clinical studies although not necessarily RCTs" to support Respondents' claims. *See* ID at 253. We disagree. The Commission finds that experts in the relevant fields would require RCTs (*i.e.*, properly randomized and controlled human clinical trials described in more detail below) to establish a causal relationship between a food and the treatment, prevention, or reduction of risk of the serious diseases at issue in this case.

To determine the standards that the relevant scientific and medical communities would demand, we review the testimony of expert witnesses qualified in the fields of heart disease, prostate cancer, and ED. The Commission finds that the preponderance of the credible expert testimony establishes that the level of substantiation experts in the field would consider necessary to support Respondents' establishment claims – that clinical studies, research, or trials prove that the Challenged POM Products treat and prevent or reduce the risk of heart disease, prostate cancer, or ED – is RCTs. *Cf. Thompson Med. Co.*, 104 F.T.C. at 821 (finding the standard generally adhered to by the medical scientific community for testing the efficacy of a drug is well-controlled clinical tests (or RCTs)). Here, Respondents' advertisements on their face convey the net impression that clinical studies or trials show that a causal relation has been established between consumption of the Challenged POM Products and its efficacy to treat, prevent or reduce the risk of the serious diseases in question. The record testimony in this case indicates that experts in the fields of heart disease, prostate cancer, and ED would find that causation has been shown only if RCTs have been conducted and the appropriate data demonstrates that each study's hypothesis has been fully supported. *See* CX1293 at 8, 9 (Stampfer Expert Report) (observational studies "typically cannot confirm causality" and "best evidence of a causal relationship between a nutrient or drug . . . and a disease

outcome in humans is a randomized, double blind, placebo-controlled, clinical trial"); IDF 639 (stating Dr. Sacks testified that most scientists in the fields of nutrition, epidemiology and the prevention of disease believe RCTs "are needed to constitute reliable evidence that an intervention causes a result"); IDF 687 (explaining Dr. Goldstein testified that "RCTs are considered the criterion standard for determining causality"); *accord* Federal Judicial Center, *Reference Manual on Scientific Evidence* 218 (3d ed. 2011) ("[r]andomized controlled experiments are ideally suited for demonstrating causation"). That is, we find that RCTs are required to substantiate Respondents' disease claims because it is necessary to isolate the effect of consuming the Challenged POM Products on the incidence of the disease, and the expert testimony revealed that only RCTs can isolate that effect.

As discussed previously, our conclusion differs from that of the ALJ in that the ALJ relied on expert testimony describing the level of substantiation that would support general claims of "health benefits" associated with the consumption of the Challenged POM Products, rather than focusing on the expert testimony about the level of substantiation needed to support the specific disease treatment and prevention claims that are conveyed by Respondents' ads. *See* ID at 222. The ALJ recognized that "claims of efficacy can be made only when a causal relationship with human disease is established by competent and reliable scientific evidence." *Id.* at 247. Yet, the ALJ nonetheless relied on expert testimony addressing health benefit claims that do not assert a causal relationship to conclude that clinical evidence that is less than RCTs would support Respondents' claims. *See id.* at 247 (relying on IDF 631 (explaining public health recommendations that are not based on causation could be supported by evidence other than RCTs)). We find that the ALJ's conclusion that clinical evidence that is less than RCTs would substantiate Respondents' disease treatment, prevention, and risk reduction claims is not supported by the record.

Based on the expert testimony, we also find that the RCTs necessary to substantiate the serious disease claims made by Respondents share several essential attributes. First, to show the efficacy of the Challenged POM Products to treat, prevent or reduce the risk of disease, experts in the field would require the

studies or trials to show causation, which would require the trial to be well-controlled. *See, e.g.*, CX1293 at 8-10 (Stampfer Expert Report); CX1291 at 11 (Sacks Expert Report); *cf.* Burnett, Tr. 2260-62 (discussing well-controlled studies to be validated by FDA). "A controlled study is one that includes a group of patients receiving the purported treatment . . . and a control group . . . . A control group provides a standard by which results observed in the treatment group can be evaluated. A control group allows investigators to distinguish between real effects from the intervention, and other changes, including those due to the mere act of being treated ('placebo effect'), the passage of time, change in seasons, other environmental changes, and equipment changes." IDF 611 (citations omitted).

Second, subjects should be randomly assigned to the test and control groups. Randomization "increases the likelihood that the treatment and control groups are similar in relevant characteristics, so that any difference in the outcome between the two groups can be attributed to the treatment . . . [and] also prevents the investigator from . . . introduc[ing] bias into the study." IDF 612.

Third, for clinical studies or trials to prove that the Challenged POM Products treat, prevent or reduce the risk of heart disease, prostate cancer, or ED, the studies need to examine variables that are known to be predictive of or measure the incidence of the disease. That is, the studies or trials need to examine disease endpoints or validated surrogate markers that "have been shown to be so closely linked to a direct endpoint that a change in the surrogate marker is confidently predictive of a change in the disease." IDF 621. Validated measures or assessment tools are those that have been established as reliable through rigorous assessments. IDF 621. Study results affecting variables that are not confidently predictive of a change in the incidence of disease do not prove that the Challenged POM Products treat, prevent or reduce the risk of the particular diseases.

Fourth, the testimony indicates that the scientific and medical communities would require that results of the trial be statistically significant to demonstrate that clinical studies prove that the tested product treats or prevents disease. IDF 616 (citing CX1291 at 12-13 (Sacks Expert Report); Burnett, Tr. 2269) ("If the results

of the treatment group are *statistically significant* from those of the control group at the end of the trial, it can be concluded that the tested product is effective.") (emphasis added), 618 (citing CX1291 at 12 (Sacks Expert Report); Eastham, Tr. 1273; Ornish, Tr. 2368; Melman, Tr. 1102-03) (explaining statistical significance means that differences are not due to chance or other causes). Moreover, the population from which the groups draw must be appropriate for the purposes of the study. *See* CX1287 at 12, 15 (Eastham Expert Report) (explaining that in a prostate cancer prevention trial the appropriate population would involve healthy men having no sign of prostate cancer, whereas in a prostate cancer treatment trial, the appropriate sample population would depend on the stage of the disease targeted by the study).

Fifth, the clinical trials should be double-blinded when feasible. Blinding refers to steps taken to ensure that neither the study participants nor the researchers conducting the outcome measurements are aware of whether a patient is in the active group or the control group. IDF 614. Double blinding, which is the blinding of both the subjects and investigators, is optimal to prevent bias arising from actions of the subjects or investigators. IDF 615. The expert testimony revealed in some instances that it may not be possible to conduct blinded clinical trials of food products. In that regard, the experts in the field might demand different well-controlled human clinical trials of foods than they would expect in other areas. The expert testimony in this case indicated that, for clinical tests involving food, participants in the study may be able to determine the products that they are consuming.[19] *See* IDF 641; Sacks, Tr. 1435-36 (describing controlled study testing low sodium diet in which subjects were able to taste the saltiness of the diet); Ornish, Tr. 2328-29, 2356; Goldstein, Tr. 2600-01. In such cases, there may be some flexibility in the double-blind requirement when determining

[19] This testimony is consistent with the FDA's "Guidance for Industry: Evidence-Based Review System for the Scientific Evaluation of Health Claims – Final," *available at* http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/ucm073332.htm, which states: "When the substance is a food, it may not be possible to provide a placebo and therefore subjects in such a study may not be blinded. Although the study may not be blinded in this case, a control group is still needed to draw conclusions from the study."

whether a well-controlled human clinical trial satisfies the standard that experts in the field would consider support for particular claims for food. Although we note that Respondents submitted several studies with pomegranate juice that were described as double blind RCTs,[20] and we recognize that double-blinding would lend more credence to a clinical trial, we acknowledge that blinding of subjects may not always be feasible for the reasons stated above. We note, however, that clinical trials involving products such as the POMx pills should not face these types of blinding challenges.

Respondents argue that they should not be required to meet "an impossibly high and legally untenable standard of dispositive proof through the clinical studies" that their products treat, prevent or reduce the risk of disease in order to provide substantiation for their claims. RA at 30. We reject Respondents' argument. Respondents' ads convey a net impression that scientific and medical evidence support their representations. We are simply holding Respondents to their claims by requiring the standard by which the scientific and medical communities would accept their claims of efficacy. We do not impose a standard requiring "dispositive" proof; rather we require the scientific standard for proof, which demands statistically significant results on a metric that is recognized as a valid marker for the particular disease in a controlled human clinical study. According to the expert testimony, statistical significance with a p-value that is less than or equal to 0.05 is the recognized standard to show that a study's hypothesis has been proven. IDF 618. This is the level of "proof" that Respondents' must possess.

Respondents further argue that statistically significant proof requires studies that are too large and costly. The response to this argument is twofold. First the need for RCTs is driven by the claims Respondents have chosen to make (*i.e.*, establishment claims about a causal link between the Challenged POM Products and the treatment or prevention of serious diseases). Second, the requisite size of a clinical trial – the number of subjects required for an appropriately designed study – is guided by several factors, including the need to produce both clinically and statistically

[20] *See, e.g.*, IDF 808-818 (Ornish MP study), 849-859 (Ornish CIMT study), 872-883 (Davidson CIMT study), 941-943 (Heber/Hill Diabetes study).

significant results. *See, e.g.*, CX1287 at 15 (Eastham Expert Report) (explaining that clinical and statistical significance for a prostate cancer treatment trial may require a sample population that involves hundreds to thousands of men). A large number of participants is not always necessary, however. RCTs differ widely in size, depending, in part, on what the study is trying to show. If, despite a relatively small size, a well-conducted RCT produces significant results, then the study would constitute evidence of efficacy that would provide the substantiation that experts would accept. The main limitation of smaller studies is that it may prove difficult to detect real differences between the active and control substances, because sampling variance is inversely related to sample size. *Cf.* CX1338, *in camera* (Padma-Nathan, Dep. at 108-09) (larger number of participants may have helped Forest/Padma-Nathan study achieve overall statistical significance). Smaller studies may require a large difference in outcomes between the two arms of a clinical trial to produce statistically significant results. Thus, designers of clinical studies have a natural incentive to make them as large as possible.

Similarly, Respondents argue that it is improper to impose the testing standards for drugs on food products. We do not impose such standards in this case. Although the Commission does not enforce federal drug approval requirements, we note at the outset that our sister federal agency, the Food and Drug Administration, promulgates and enforces regulations regarding investigational new drug approvals, and that those regulations require multiple phases of clinical trials that collectively represent different – and considerably greater – substantiation than the RCTs required here.[21] We note too, that FDA regulations separately require FDA approval of health claims made on behalf of food products, and that approval of such claims requires the submission of well-designed scientific evidence.[22] Respondents' representations

[21] *See, e.g.*, 21 CFR §§ 312.21-23 (regarding three phases of clinical trials for investigational new drug applications for products not previously tested, where both Phase 2 and Phase 3 trials comprise clinical studies of effectiveness).

[22] *See, e.g.*, 21 CFR § 101.14(c) (validity requirement for food health claims); *see also* FDA, Guidance for Industry: Evidence-Based Review System for the Scientific Evaluation of Health Claims, *available at* http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/ucm073332.htm.

claim clinical proof of efficacy for treating, preventing, or reducing the risk of serious diseases (two of which are potentially fatal). Nonetheless, the Commission's determination that experts in the field would require RCTs to support Respondents' health claims does not require the FDA standard of proof for drugs.

1. Evidence Regarding Substantiation for Heart Disease Claims

We find that the greater weight of credible expert testimony establishes that experts in the field of heart disease would require RCTs to support Respondents' claims that clinical studies establish that the Challenged POM Products treat, prevent or reduce the risk of heart disease. Complaint Counsel's expert, Dr. Frank Sacks, testified that to show that clinical studies, research, or trials prove that a product treats, prevents or reduces the risk of heart disease, it is necessary to rely on appropriately analyzed results of "well-designed, well-conducted, randomized, double-blinded, controlled human clinical studies (RCTs)." CX1291 at 10-11 (Sacks Expert Report). Dr. Sacks also opined that the findings of the studies must be statistically significant; the results must demonstrate significant changes in valid surrogate markers of cardiovascular health that are recognized by the FDA or experts in the field, such as blood pressure, LDL cholesterol, C-reactive protein, HDL cholesterol, and triglycerides. IDF 711, 712, 761-63, 765-66. Similarly, Dr. Meir Stampfer, another expert witness for Complaint Counsel, testified that scientists in the fields of clinical trial epidemiology and the prevention of cardiovascular disease would believe that randomized, double-blind, placebo-controlled studies are needed to show that products such as POM Juice, POMx Pills, and POMx Liquid can prevent, reduce the likelihood of, or treat cardiovascular disease because a well-controlled clinical trial is necessary to establish a causal inference. Stampfer, Tr. 717-18.

Respondents' experts, Dr. David Heber and Dr. Dean Ornish, testified that the preponderance of scientific evidence from basic scientific studies, animal research, and human clinical trials reveals that pomegranates are likely to be beneficial in maintaining cardiovascular health and are likely to help reduce the risk of cardiovascular disease. IDF 954, 959. Yet, as we previously observed, Respondents' experts generally do not

address the specific heart disease claims alleged in the Complaint. For example, Dr. Ornish only addressed whether RCTs would be necessary "to test and substantiate health claims of something like pomegranate juice." Ornish, Tr. 2329. He did not specifically address whether *in vitro* and animal studies could provide support for claims that a product treats, prevents or reduces the risk of heart disease. Similarly, Dr. Heber testified about "the juice's ability to promote health" when he explained that experts would look at the totality of science rather than requiring RCTs as the only acceptable evidence. Heber, Tr. 1948-49; *see also* PX0192 at 9, 40 (Heber Expert Report) (explaining "[i]t is not appropriate to require the use of double-blind placebo-controlled studies for evaluating the *health benefits* of foods . . ." and "there is credible scientific evidence that pomegranate juice and pomegranate extracts have *significant health benefits* for human cardiovascular systems, including: 1) decreases in arterial plaque; 2) lowering of blood pressure; and 3) improvement of cardiac blood flow") (emphasis added).

Based on our evaluation of this evidence, we conclude that the expert testimony establishes that to support claims that clinical studies prove that the Challenged POM Products treat, prevent or reduce the risk of heart disease, experts in the field of heart disease would require RCTs.

Respondents have sponsored several *in vitro* and *in vivo* animal studies to examine the effect of the Challenged POM Products on cardiovascular health. The ALJ considered 13 *in vitro* and *in vivo* studies and made findings regarding the results of the studies, as well as the expert witnesses' assessments of the studies. *See* IDF 732-55. We adopt the ALJ's findings on this basic science and the preclinical studies regarding cardiovascular health. As Judge Chappell observed, experts for both Complaint Counsel and Respondents acknowledge that some of Respondents' *in vitro* studies have shown pomegranate juice's favorable effects on particular mechanisms involved in cardiovascular disease, *see* IDF 745, 746, but experts for both sides also acknowledged that *in vitro* and animal studies do not provide reliable scientific evidence of what effects a treatment will have inside the human body. IDF 752, 753. Thus, while the basic research possessed by Respondents is part of the totality of evidence that must be examined, we conclude, similar to the ALJ,

that experts in the field would agree that Respondents' *in vitro* and animal studies need to be replicated in humans to show an effect on preventing or treating a disease and therefore do not provide adequate substantiation for Respondents' heart disease claims alleged in the Complaint. IDF 755.

The Complaint alleges that Respondents claim that clinical studies, research, or trials prove that the Challenged POM Products treat, prevent or reduce the risk of heart disease by (1) lowering blood pressure; (2) decreasing arterial plaque; and/or (3) improving blood flow to the heart. The Initial Decision methodically examines in detail Respondents' ten published clinical studies and several unpublished clinical studies on humans regarding the effect of the Challenged POM Products on cardiovascular health. *See* IDF 756-947; ID at 256-69. For each study, the ALJ describes the methodology, including any shortcomings in design, as well as the results. The ALJ also describes the expert testimony regarding each study. After evaluating each study in detail, Judge Chappell concludes that these studies "do[] not provide competent and reliable scientific evidence to support claims that the Challenged POM Products treat, prevent, or reduce the risk of heart disease." IDF 786 (Aviram ACE/BP Study), 804 (Aviram CIMT/BP Study), 848 (Ornish MP Study), 868 (Ornish CIMT Study), 900 (Davidson CIMT Study), 914 (Davidson BART/FMD Study), 938 (Denver and San Diego Overweight Studies), 947 (Diabetes Studies).

For Respondents' claims that the Challenged POM Products lower blood pressure, the ALJ describes and evaluates the Aviram ACE/BP Study, *see* IDF 774-86, and the Aviram CIMT/BP Study, *see* IDF 787-804, and examines the results of five other studies that measured blood pressure as part of the protocol. The ALJ concludes that the expert testimony regarding the Aviram ACE/BP Study and Aviram CIMT/BP Study is conflicting, but "[t]he greater weight of the persuasive expert testimony on the studies sponsored by Respondents measuring blood pressure demonstrates that the scientific evidence relied upon by Respondents is not adequate to substantiate a claim that the Challenged POM Products treat, prevent, or reduce the risk of heart disease through reducing blood pressure, or that clinical studies show the same." ID at 259.

With respect to claims that the Challenged POM Products reduce arterial plaque, the ALJ describes and evaluates the Aviram CIMT/BP Study, *see* IDF 787-804, the Davidson CIMT Study, *see* IDF 869-900, and the Ornish CIMT Study, *see* IDF 849-68. Again, the ALJ concludes that "[t]he greater weight of the persuasive expert testimony on the studies sponsored by Respondents measuring CIMT demonstrates that the scientific evidence relied upon by Respondents is not adequate to substantiate a claim that the Challenged POM Products treat, prevent, or reduce the risk of heart disease through reducing arterial plaque, or that clinical studies show the same." ID at 265.

For Respondents' claims that the Challenged POM Products improve blood flow, the ALJ describes and evaluates the Ornish MP Study, *see* IDF 805-48. Here, the ALJ concludes that "[t]he greater weight of the persuasive expert testimony on the Ornish MP Study demonstrates that the scientific evidence relied upon by Respondents is not adequate to substantiate a claim that the Challenged POM Products treat, prevent, or reduce the risk of heart disease through improving blood flow, or that clinical studies show the same." ID at 269.

The ALJ also describes and evaluates additional clinical studies regarding heart disease. The ALJ considers the Denver Overweight Study, *see* IDF 915-23, 934-36; the San Diego Overweight Study, *see* IDF 924-33; the Rock Diabetes Study, *see* IDF 939-40, 944; and the Heber/Hill Diabetes Studies, *see* IDF 941-47. Again, the ALJ concludes that the studies do not provide scientific evidence to substantiate a claim that the Challenged POM Products treat, prevent or reduce the risk of heart disease.

We rely on the ALJ's detailed findings regarding each of the studies. Indeed, Respondents do little on appeal to contest the ALJ's findings regarding the particular clinical studies regarding cardiovascular health and heart disease. Instead, Respondents urge us only to overlook particular shortcomings of some of the studies in order to conclude that Respondents possess adequate substantiation for their claims. *See* RR at 7-10. We do not find Respondents' arguments persuasive and we agree with the ALJ's conclusions that each study fails to provide substantiation for Respondents' claim that clinical evidence proves that the

Challenged POM Products treat, prevent or reduce the risk of heart disease.

In particular, Respondents encourage us to focus on the improved measurements of blood pressure and arterial plaque in the Aviram ACE/BP and Aviram CIMT/BP studies rather than focus on the small size of the studies. RR at 7-8. Yet, the criticism of the studies is not limited to their size. In the Aviram ACE/BP study, ten elderly, hypertensive patients drank 50 ml of pomegranate concentrate daily for two weeks. IDF 774. The study was unblinded and had no control group. Instead, each patient's "before" measures were compared to the "after" measures. IDF 776. Expert testimony criticized the study because the sample size was too small to provide reliable evidence that the observed effects would be generally applicable to a larger population; the two-week period was too short to provide evidence that the improvements would last; one of the measured endpoints (angiotensin converting enzyme (ACE) activity) is not a validated surrogate marker of cardiovascular disease; and the lack of a control group meant that it is not possible to conclude that consumption of the pomegranate concentrate was the cause of reported improvements in blood pressure levels. IDF 780-81.

Similarly, in the Aviram CIMT/BP study, a group of ten patients with severe carotid artery stenosis drank up to 50 ml of concentrated pomegranate juice daily for one year, and five continued doing so for three years. A second group of nine patients did not consume pomegranate juice and acted as a control group. IDF 790. Respondents emphasize that the study found that members of the group that drank pomegranate juice consumption experienced, after one year, a reduction in carotid intima-media thickness (CIMT) by up to 30% and statistically significant reductions in systolic blood pressure. IDF 791, 794. Expert testimony regarding the study explained, however, that "a qualified scientist would not be able to conclude with any credibility that the Aviram CIMT/BP Study's reported improvements in the treatment group were caused by their consumption of pomegranate juice and not some other factor because of the lack of a randomized, placebo-controlled group; the fact that the patients in the active and control groups received different treatment; the small sample size, and the lack of any

between-group statistical analysis." IDF 798. Even one of Respondents' experts conceded the study was "not at all conclusive, the study suggests a benefit." IDF 802 (quoting Dr. Ornish). We find that the limitations of the Aviram ACE/BP and Aviram CIMT/BP studies go beyond the small sample size. As discussed above, there are several ways in which these two studies do not satisfy the criteria for well-controlled, well-designed clinical studies that are necessary to demonstrate that a product treats, prevents or reduces the risk of heart disease.

Regarding the specifics of the Davidson CIMT Study, Respondents argue that the Study should be recognized for the positive results for patients at the 12-month mark despite the lack of positive results for the patient group at 18 months. RR at 9. Respondents argue that "[a]lthough these results were not replicated at 18 months for the entire patient group, . . . the most likely explanation for the drop-off was the fact that patients may have stopped following the protocol of drinking POM Juice." *Id.* We reject Respondents' arguments. First, "[a]dherence to study product consumption was assessed at each visit by reviewing daily consumption diaries maintained by the subjects." IDF 876. Second, while the Study reported the 12-month results, those results were not the basis for any conclusions. *See* IDF 878 (explaining, for instance, "anterior and posterior wall CIMT values and progression rates did not differ significantly between treatment groups at any time"). Moreover, peer reviewers of the study considering the study for publication concluded "it was a negative study." IDF 880, 881-82, 883. We do not find that the 12-month results of the Davidson CIMT Study provide evidence on which experts in the field of heart disease would rely to establish that there is clinical proof that the Challenged POM Products treat, prevent or reduce the risk of heart disease.

Respondents also argue that the Ornish MP Study provides substantiation for the heart disease claims because the Ornish MP study found that POM Juice caused a statistically significant 35% improvement in blood flow to the heart. Respondents emphasize the testimony of Dr. Ornish that blood flow to the heart is the "bottom line" when it comes to heart disease, and Respondents also point out that the "[s]cientists and clinicians routinely consider biomarkers for heart disease other than the two officially recognized by the FDA." RR at 8. Respondents' argument

acknowledges that the Ornish MP Study does not provide evidence that experts in the field of heart disease would accept as support for claims that the Challenged POM Products treat, prevent or reduce the risk of heart disease because the study does not consider surrogate markers that are accepted as correlated to heart disease. IDF 825. As a result, Respondents' argument recognizes the failure of the Ornish MP Study to provide evidence of the issue that is before us. In addition, the Ornish MP Study suffered from significant problems, including that data on all patients was not reported; subjects in the placebo group did not receive a placebo treatment; a group of patients were unblinded before their test dates; the control group differed from the active group at the outset of the study; and the study was ended after three months even though it was designed to last for twelve months. *See* IDF 819-824, 835-837, 843-845. Dr. Ornish admitted many of the problems were not "optimal." IDF 819. As with the other studies, we conclude that the Ornish MP study does not provide clinical proof of the Challenged POM Products' efficacy for heart disease.

2. Evidence Regarding Substantiation for Prostate Cancer Claims

We find that the expert testimony establishes that experts in the field of prostate cancer would require RCTs to support Respondents' claims that clinical studies establish that the Challenged POM Products treat, prevent or reduce the risk of prostate cancer. Complaint Counsel's experts, Dr. James Eastham and Dr. Meir Stampfer, state that to support claims that the Challenged POM Products prevent prostate cancer, or that they have been clinically proven to do so, experts in the field of prostate cancer would require at least one well-designed, randomized, double-blind, placebo-controlled clinical trial involving an appropriate sample population and endpoint. IDF 626, 648. Drs. Eastham and Stampfer also stated that at least one well-designed, randomized, double-blind, placebo-controlled clinical trial would be necessary to support claims that the Challenged POM Products treat prostate cancer, or that they have been clinically proven to do so. IDF 626, 648. Dr. Eastham explained that the appropriate sample population for a cancer prevention trial would involve healthy men, aged 50 to 65, who have no sign of prostate cancer, and that the study must be

conducted over a long enough period to see an effect over time. IDF 1092-93. He also testified that "[t]he primary endpoint in a prostate cancer prevention trial for measuring whether a product has been effective is the prevalence or incidence of prostate cancer between the treatment and placebo groups at the conclusion of the study." IDF 1089.

Respondents' expert stated that *in vitro* and animal studies provide evidence that the Challenged POM Products promote prostate health. Dr. Jean deKernion testified that the Challenged POM Products are beneficial to prostate health. IDF 1124. For instance, Dr. deKernion testified that RCTs are not necessary to substantiate "health benefit" claims for prostate health, but he did not address the level of science needed for prostate cancer treatment or prevention claims. *See* IDF 965; *see also* IDF 1126 (explaining deKernion testified there is a high probability that the Challenged POM Products provide a special benefit to men with detectable PSA after radical prostatectomy). Dr. David Heber similarly provided an opinion that *in vitro* studies, animal studies, and clinical evidence provide a strong scientific rationale for claims that pomegranate juice promotes prostate "health." *See* PX0192 at 0027 (Heber Expert Report). Respondents' experts did not specifically address the claims alleged in the Complaint, which we found Respondents to have made. Therefore, we find that experts in the field of prostate cancer would require RCTs to support Respondents' claims that clinical studies establish that the Challenged POM Products treat, prevent or reduce the risk of prostate cancer.

Respondents had conducted four *in vitro* studies and four animal studies relating to prostate cancer by 2009. IDF 1010. As we have previously described, such studies are used to identify potential biologic mechanisms and generate hypotheses for studies in humans, IDF 594-97, and Respondents' *in vitro* and animal studies showed possible mechanism of action of pomegranates in the prostate. *See* IDF 991-1017. But, as experts for both Complaint Counsel and Respondents testified, the results from *in vitro* and animal studies cannot always be extrapolated to what the results would be in humans, so this evidence alone does not provide clinical evidence that shows that the Challenged POM Products treat, prevent or reduce the risk of prostate cancer. IDF

1019 (describing opinions of Dr. Stampfer and Dr. Eastham), 1022 (describing opinion of Dr. deKernion), 1024.

Respondents also possessed two human clinical trials at the time of the hearing before Judge Chappell. In the Initial Decision, the ALJ makes detailed findings regarding the Pantuck Study, IDF 1026-1069, 1086-1094, 1105-1127, and the Carducci Study. IDF 1064-1085, 1096-1099, 1105-1127. We do not repeat the ALJ's detailed findings regarding the human clinical studies. Based on his findings regarding each study, Judge Chappell concluded "[t]here is insufficient competent and reliable scientific evidence to support the conclusion that the Challenged POM Products treat, prevent, or reduce the risk of prostate cancer or that clinical studies, research and/or trials establish these effects." IDF at 1143.

We reach the same conclusions. We note that neither study included a placebo-control group, *see* IDF 1037, 1068-69, so that even though the studies found statistically significant results, one cannot be sure that the effects observed in each study are attributable to consuming the Challenged POM Products. IDF 1083 ("Dr. Carducci . . . testified that without a placebo, he cannot be sure that the effect on [the observed outcome] in the Carducci Study is attributable to POMx."), 1087-88 (Dr. Stampfer and Dr. Eastham testified that without a placebo control group in the Pantuck Study, it is not possible to know whether the outcome would have been observed in the patient group without receiving the Challenged POM Products), 1096 (without a placebo control group in the Carducci Study, it is not possible to conclude POMx caused the change in outcome), 1114, 1118 (Dr. deKernion testified that a control arm is not necessary for a "Phase II study that is exploratory in nature," but "without a placebo, one cannot be certain that the effect on [outcome] seen in the Carducci Study is attributable to POMx.").

Additionally, both the Pantuck Study and the Carducci Study examined men who had been diagnosed with prostate cancer and had been treated with a radical prostatectomy or other radical treatment. Both studies used prostate specific antigen (PSA) doubling time as the primary endpoint for measuring results. The presence of detectable PSA after radical prostatectomy usually indicates cancer is present. IDF 1041. There is conflicting expert

testimony regarding whether use of PSA doubling time is an appropriate measure. *See* IDF 1059 (Dr. Pantuck stated "[i]t remains controversial whether modulation of PSA levels represents an equally valid clinical endpoint"); 1060-1063 (explaining an RCT examining another product found that PSA levels changed for both the placebo and active groups, which "suggests caution is required when using changes in PSA [doubling time] as an outcome in uncontrolled trials"); 1101-1104 (describing opinions of Drs. Eastham and Stampfer); 1105-1113 (describing assessments by Drs. deKernion and Heber). Yet, experts for both Complaint Counsel and Respondents testified that PSA doubling time is not an accepted surrogate endpoint by experts in the field of prostate cancer. IDF 1100 (describing opinions of Drs. Eastham and Stampfer), 1111 (describing opinion of Dr. deKernion).

Moreover, both the Pantuck Study and the Carducci Study examined men who had been diagnosed with prostate cancer. Thus, the studies do not examine whether the Challenged POM Products prevent or reduce the risk of prostate cancer. IDF 1084 ("According to Dr. Carducci, the Carducci Study was never designed to prove, and did not prove, that POMx prevents or reduces the risk of prostate cancer."), 1091 (Pantuck Study was designed as a treatment study conducted in men with prostate cancer and does not provide any evidence that POM Juice is a prostate cancer preventative), 1099 (Carducci Study cannot provide support for prevention claims because it evaluated effect of POMx in men who already had prostate cancer).

Given these limitations of the Pantuck and Carducci Studies, like the ALJ we find that experts in the field of prostate cancer would not consider these studies to be clinical proof that the Challenged POM Products treat, prevent or reduce the risk of prostate cancer.

3. Evidence Regarding Substantiation for Erectile Dysfunction (ED) Claims

We find that the expert testimony establishes that experts in the field of ED would require RCTs to support claims that clinical evidence proves a product treats, prevents or reduces the risk of

ED. Complaint Counsel's expert, Dr. Melman,[23] opined that in order to make a claim that the Challenged POM Products have been clinically proven to treat, prevent or reduce the risk of ED, at least one well-designed human RCT involving several investigatory sites is required. IDF 654. Dr. Melman also opined that a well-designed human RCT must use a validated tool for measuring treatment outcomes and that the clinical trial must have a sample population that is large enough to produce statistically significant and clinically significant results. IDF 655.

Respondents' expert, Dr. Arthur Burnett, testified that a safe food product, which is not used as a substitute for proper medical treatment, does not require RCTs to substantiate erectile health

[23] We disagree with the ALJ's assessment that Dr. Melman's opinions are "attenuated," *see* ID at 284; we do not find Dr. Melman's opinions to lack credibility. We first note that Judge Chappell's assessment is not based on his observation of Dr. Melman's courtroom demeanor, but rather on his assessment of the breadth of Dr. Melman's knowledge about ED studies. *See id.* We disagree with the ALJ's assessment in light of the fact that Dr. Melman was part of an international consortium that defined the requirements of clinical trials in the field of ED, his prior role as an editor of *Sexuality and Disability*, and his role as an editorial reviewer for prominent medical and urological journals. Melman, Tr. 1113-1114; CX1289 at 2. The ALJ discounted Dr. Melman's testimony because Dr. Melman was unfamiliar with the Global Assessment Questionnaire (GAQ) used in Respondents' study. We do not find that Dr. Melman's unfamiliarity with the tool reduces the value of Dr. Melman's opinion because, as the ALJ and each expert recognized, the GAQ is not a validated measure for assessing erectile function. IDF 1196 (citing Melman, Burnett, Goldstein); Melman, Tr. 1100-1102 (explaining unvalidated tools have not been shown to be reliable, validated tools are commonly used and unvalidated tools would not be used alone). Moreover, Dr. Melman researched the GAQ to provide his opinion in this case. The ALJ also discounted Dr. Melman's opinion because Dr. Melman supposedly made claims about a gene transfer therapy for ED that was based on only an animal study and one preclinical study of eleven men. *See* ID at 284. Yet, the record shows that these alleged statements are not in conflict with his testimony in this case because Dr. Melman's actions were consistent with traditional scientific protocol. Dr. Melman made a presentation about the animal and preclinical study only to a scientific audience and publication. He did not state that such evidence supported marketing claims to the public. Moreover, he is continuing to test the product before it is marketed. Dr. Melman's publicly reported statements were made only in the context of an unsolicited interview with the popular press when he was approached after the scientific presentation. Melman, Tr. 1149-1157. We find Dr. Melman's testimony to be credible.

claims. *See* IDF 683, 684. He testified that a combination of basic science and clinical evidence can support a conclusion that a product improves erectile health and function. *See* IDF 242. Similarly, Respondents' expert, Dr. Goldstein, opined that RCT studies are not required to substantiate claims that pomegranate juice can aid in erectile health and that *in vitro* and animal studies demonstrated a likelihood that pomegranate juice improves erectile health. *See* IDF 686. Yet, Dr. Burnett also testified that "experts in the field of erectile dysfunction would require that a product be scientifically evaluated through rigorous scientific and clinical studies, and believe that animal and *in vitro* studies alone are not sufficient, before concluding that pomegranate juice treats erectile dysfunction in a clinical sense." IDF 1148 (citing Burnett, Tr. 2261-64; 2285-86; 2303). *See also* Burnett, Tr. 2284-85 (explaining that the "erectile dysfunction" testimony of Respondents' nutrition expert, Dr. Heber, addressed the idea that the Challenged POM Products are beneficial to erectile health rather than the clinical condition). Because Respondents' experts testified about the support necessary for general claims regarding erectile function or erectile health rather than claims that a product treats, prevents or reduces the risk of ED, we conclude that, on the basis of the record in this case, experts in the field of ED would require RCTs to substantiate the ED claims alleged in the Complaint.

As the ALJ determined, Respondents did not possess the scientific evidence to substantiate their claims that clinical studies prove that the Challenged POM Products treat, prevent or reduce the risk of ED. *See* ID at 285-89. The ALJ systematically examined Respondents' scientific evidence. The ALJ analyzed Respondents' six preclinical *in vitro* and *in vivo* studies, and that analysis is not appealed. *See* IDF 1260-1302. Similar to the basic science evidence for heart disease and prostate cancer, preclinical studies "are used to identify potential biologic mechanisms and generate hypotheses." IDF 594. These results, however, often are not replicated in humans. *Id.* Here, the basic science describes a possible mechanism by which pomegranate juice may affect human penile erections, but the expert testimony indicated that the studies demonstrated only a "benefit to erectile function," *see, e.g.*, IDF 1299, 1298 ("potential benefit . . . to likely improve one's erection physiology"), 1300, but "cannot alone prove that

POM Juice treats, prevents, or reduces the risk of erectile dysfunction in humans." IDF 1301.

Respondents relied on one human clinical trial regarding ED, the Forest/Padma-Nathan study.[24] That study was an RCT examining 53 men with mild to moderate ED, using the Global Assessment Questionnaire (GAQ) as the primary outcome measure. The GAQ is not a validated instrument for erectile function. In addition, the GAQ results for the Forest/Padma-Nathan study came close to statistical significance but failed to actually reach statistical significance. IDF 1210-25. The study also used the International Index of Erectile Function (IIEF), which is a validated tool; the IIEF results were "nowhere near approaching statistical significance." IDF 1226. Dr. Padma-Nathan testified that the study concluded there was a potential for beneficial effects on ED, but further studies were needed to confirm such a claim. IDF 1229. Moreover, a peer reviewer considering the study for publication stated that it was "a negative study" and the results should be presented that way, and a published review stated that the study had negative results.[25] IDF 1231, 1232. Thus, we conclude that Respondents' human clinical trial does not provide substantiation for the claim that clinical studies prove that the Challenged POM Products treat, prevent or reduce the risk of ED. *See* IDF 1253. In addition, we note that the Forest/Padma-Nathan study examined men with mild to moderate ED; Respondents do not possess any clinical studies examining the effects of consuming the Challenged POM Products on men without ED to substantiate the claims that the Challenged POM Products prevent or reduce the risk of ED.

[24] One cardiovascular study, the Davidson BART/FMD study, also asked a subset of participants to complete an ED questionnaire, but, as the ALJ found, the International Index of Erectile Function (IIEF) results of that study do not support the conclusion that consuming the Challenged POM Products treats, prevents or reduces the risk of ED. *See* IDF 1254-59.

[25] To the extent that the ALJ concluded that the expert testimony regarding the Forest/Padma-Nathan study demonstrates that pomegranate juice provides a positive benefit to erectile health and erectile function, *see* ID at 288, IDF 1250-52, we reject those conclusions because such benefits were not challenged and tried by Complaint Counsel.

Having fully considered and weighed all of the evidence and the expert testimony on Respondents' basic science and clinical trials, the greater weight of the persuasive expert testimony demonstrates that there is insufficient competent and reliable scientific evidence to substantiate a claim that clinical studies, research or trials prove that the Challenged POM Products treat heart disease, prostate cancer, or ED. Similarly, we find that the greater weight of the persuasive expert testimony demonstrates that there is insufficient competent and reliable scientific evidence to substantiate a claim that clinical studies, research or trials prove that the Challenged POM Products prevent or reduce the risk of heart disease, prostate cancer, or ED. Consequently, such claims are false.

Our conclusion is consistent with the ALJ's finding that Respondents' substantiation was inadequate to meet even the lower substantiation standard that he found was necessary to support Respondents' claims. It naturally follows that Respondents' substantiation for the establishment claims is inadequate to satisfy the higher standard we find is demanded by the record.

B. Claims Lacking A Reasonable Basis

We now turn to whether Respondents had a reasonable basis for the product claims at issue in this case. The theory underlying the analysis is that claims about a product's attributes, performance, or efficacy carry with them the express or implied representation that the advertiser had a reasonable basis of support for the claim. *See, e.g.*, *Daniel Chapter One*, 2009 WL 5160000 at *16; *Thompson Med. Co.*, 104 F.T.C. at 813 n.37; *Direct Mktg. Concepts, Inc.*, 569 F. Supp. 2d at 298. "Consumers find these representations of support to be important in evaluating the reliability of the product claims. Therefore, injury is likely if the advertiser lacks support for the claims." *Thompson Med. Co.*, 104 F.T.C. at 813 n. 37.

For each of the ads for which there is an establishment claim that clinical studies or trials prove that the Challenged POM Products treat, prevent or reduce the risk of disease, Respondents also make a corresponding efficacy claim. In addition, for two ads, Figures 5 and 7, we find that Respondents make efficacy

claims without also representing that there is clinical proof of the Challenged POM Products' efficacy to treat, prevent or reduce the risk of disease. *See* discussion *infra* Claims Appendix.

We must first determine the level of substantiation the advertiser is required to have before we can determine whether Respondents had a reasonable basis to make their claims. Then, we determine whether Respondents possessed that level of substantiation. *See*, *e.g.*, *Pantron I Corp.*, 33 F.3d at 1096; *Removatron Int'l Corp.*, 884 F.2d at 1498. Respondents "have the burden of establishing what substantiation they relied on for their product claims. [Complaint Counsel] has the burden of proving that [Respondents'] purported substantiation is inadequate." *QT, Inc.*, 448 F. Supp. 2d at 959. If Respondents cannot meet that substantiation burden, then the ads will be found deceptive.

Starting with *Pfizer Inc.*, 81 F.T.C. 23, our reasonable basis cases have identified several factors that we will weigh in determining the appropriate level of substantiation the advertiser is required to have for objective advertising claims: (1) the type of claim; (2) the type of product; (3) the benefits of a truthful claim; (4) the ease of developing substantiation for the claim; (5) the consequences of a false claim; and (6) the amount of substantiation experts in the field would agree is reasonable. *See Substantiation Statement*, 104 F.T.C. at 840; *Removatron Int'l Corp.*, 111 F.T.C. at 306-07; *Thompson Med. Co.*, 104 F.T.C. at 821; *Daniel Chapter One*, 2009 WL 2584873 at *84 (FTC Aug. 5, 2009) (Initial Decision). As we explained in *Pfizer*, the analysis to determine the level of substantiation necessary to support the claims in an ad is not a simple tallying of the number of factors that demand higher or lower levels of substantiation; the analysis is a flexible application that considers the interplay of the *Pfizer* factors. *See Pfizer*, 81 F.T.C. at 64 ("The question of what constitutes a reasonable basis is essentially a factual issue which will be affected by the interplay of overlapping considerations such as (1) the type and specificity of the claim made . . . ; (2) the type of product . . .").

Applying those factors in this case leads us to conclude that Respondents' efficacy claims that POM products treat, prevent or reduce the risk of heart disease, prostate cancer, and ED must be substantiated with RCTs.

The first factor that we consider is the type of claim. Respondents made claims regarding serious diseases. The Commission has previously stated in general terms that the substantiation standard for health claims, including structure/function claims, for food products is "competent and reliable scientific evidence."[26] For such claims, competent and reliable scientific evidence means tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.[27]

Such a standard is consistent with prior cases that have determined that "claims whose truth or falsity would be difficult or impossible for consumers to evaluate by themselves" require a high level of substantiation. *See Removatron Int'l Corp.*, 111 F.T.C. at 306 n.20 (citing *Thompson Med. Co.*, 104 F.T.C. at 822) (discussion of this *Pfizer* factor explained that consumers' limited ability to evaluate claims that hair removal device's results were permanent "militates in favor of a one-clinical [test] requirement").

But our consideration of the type of claim goes beyond merely identifying Respondents' claims broadly as health claims. Here, the evidence in the record shows that many of Respondents' claims went beyond structure/function claims to represent that the Challenged POM Products treat, prevent or reduce the risk of serious diseases. As previously discussed, Respondents' specific disease claims require proof of causation. As the Commission has found in other cases (*see, e.g.*, *Thompson Med. Co.*, 104 F.T.C. at 321), and as demonstrated by the weight of expert testimony in

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[26] *Food Advertising Statement*. Health claims in food labeling are those that "characterize the relationship of a substance in a food to a disease or health-related condition" and "structure/function" claims are those that represent the "effect on the structure or function of the body for maintenance of good health and nutrition." *Id.* at n.2.

[27] *Id.* (citing *Gracewood Fruit Co.*, 116 F.T.C. 1262, 1272 (1993); *Pompeian, Inc.*, 115 F.T.C. 933, 942 (1992)).

this case, proof of causation requires RCTs. *See* discussion *supra*, Section V.A.[28]

The second *Pfizer* factor we consider is the type of product. In this case, the products are foods and dietary supplements derived from a fruit that is known to be safe. Therefore, Respondents argue, and the ALJ concurred, that the level of substantiation for a food product should be set at a lower level than for other products such as drugs. However, as previously discussed, the particular claims made by Respondents assert a causal relationship between the Challenged POM Products and the treatment, prevention or reduction of risk of disease. *See, e.g.*, CX1291 at 10-11 (Sacks Expert Report) (explaining controlled studies are necessary to show a product, "including a conventional food or dietary supplement" treats, prevents, or reduces the risk of heart disease). The relative safety of the product does not alter the requirement that the scientific evidence establish causality.

In other cases we have considered the third and fourth *Pfizer* factors in tandem. The third factor is the benefit of a truthful claim. The fourth factor is the ease of developing substantiation for the claim. Our concern in analyzing these factors is to ensure that the level of substantiation we require is not likely to prevent consumers from receiving potentially valuable information about product characteristics. *Thompson Med. Co.*, 104 F.T.C. at 823.

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[28] See also *Food Advertising Statement* (explaining the level of substantiation required for claims about a diet-disease relationship: "The NLEA directed FDA to apply [a] 'significant scientific agreement' standard in determining whether there was adequate substantiation to permit health claims for ten specific diet-disease relationships. . . . In evaluating health claims, the Commission looks to a number of factors to determine the specific level of scientific support necessary to substantiate the claim. Central to this analysis is an assessment of the amount of substantiation that experts in the field would consider to be adequate. The Commission regards the 'significant scientific agreement' standard, as set forth in the NLEA and FDA's regulations, to be the principal guide to what experts in the field of diet-disease relationships would consider reasonable substantiation for an unqualified health claim. Thus, it is likely that the Commission will reach the same conclusion as FDA as to whether an unqualified claim about the relationship between a nutrient or substance in a food and a disease or health-related condition is adequately supported by the scientific evidence.").

In the discussion of these factors and based on the rationale for their consideration, the ALJ found that in a nutritional context, RCTs can be prohibitively expensive and may not be feasible. ID at 247-48. Thus, in order to prevent limiting information about product characteristics that might provide benefits to consumers, he concluded that where the product is safe and where the advertisement does not suggest that the product be used as a substitute for conventional medical care or treatment, it is appropriate to favor disclosure. *Id*. at 248. But the ALJ's failure to distinguish Respondents' particular disease treatment and prevention claims from those asserting some general health benefits led him to an incorrect conclusion. A determination that RCTs are necessary to support Respondents' specific claims that the Challenged POM Products treat, prevent or reduce the risk of particular diseases will not erect a barrier that will prevent the disclosure to the public of useful nutritional information. We have not determined the level of substantiation that is required to support all health and nutritional claims.[29] Thus, while our reasoning may be informative about our likely approach to evaluate other health claims, our ruling in this case should address only the substantiation of claims regarding the efficacy of particular foods to treat, prevent or reduce the risk of serious diseases.

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[29] Regarding support for structure/function claims, the Commission has previously indicated its desire for consistency with the Dietary Supplement Health and Education Act of 1994 (DSHEA)**:** "DSHEA … requires that structure/function claims in labeling be substantiated and be truthful and not misleading. This requirement is fully consistent with the FTC's standard that advertising claims be truthful, not misleading and substantiated." Dietary Supplements: An Advertising Guide for Industry (2001), *available at* http://business.ftc.gov/documents/bus09-dietary-supplements-advertising-guide-industry. The FDA has also signaled its intent to be consistent with the FTC in the application of a standard for such claims: "The FTC has typically applied a substantiation standard of 'competent and reliable scientific evidence' to claims about the benefits and safety of dietary supplements and other health-related products. FDA intends to apply a standard for the substantiation of dietary supplement claims that is consistent with the FTC approach." Guidance for Industry: Substantiation for Dietary Supplement Claims Made Under Section 403(r) (6) of the Federal Food, Drug, and Cosmetic Act (2008), *available at* http://www.fda.gov/food/guidancecomplianceregulatoryinformation/guidancedocuments/dietarysupplements/ucm073200.htm.

Moreover, we do not interpret these two *Pfizer* factors to give an advertiser license to make particular claims that go beyond the substantiation it possesses and then ask the Commission to excuse the inadequacy of its support by asserting that advertiser did the best it could because the proper substantiation for the actual claim would be too expensive. *See* Eastham, Tr. 1328-29 (explaining cost does not change scientific burden). As we have previously explained, "[w]here the demands of the purse require such compromises [in methodology], the advertiser must generally limit the claims it makes for its data or make appropriate disclosures to insure proper consumer understanding of the survey's results." *Kroger Co.*, 98 F.T.C. 639, 737 (1981).

We also observe that among the studies that Respondents present as support for their claims are several clinical trials that were designed as RCTs. *See, e.g.*, IDF 808-818 (describing Ornish MP study), 849-859 (describing Ornish CIMT study), 872-883 (describing Davidson CIMT study), 941-943 (describing Heber/Hill Diabetes study). Among the limitations of these studies was that the results were not statistically significant. As discussed above, we determined that these well-controlled human clinical trials do not provide substantiation for Respondents' claims. In our evaluation of the evidence, we interpret the failure of these RCTs to provide support for Respondents' claims as evidence that there is insufficient scientific and clinical evidence of the efficacy of the Challenged POM Products; we do not interpret the results of the particular studies as an indication that the appropriate standard here – that Respondents possess RCTs with statistically significant results – is set too high.

The fifth factor that we weigh is the consequences of a false claim. In this regard, the ALJ stated that he found no evidence that Respondents urged individuals to consume the Challenged POM Products in place of medical treatment. Thus, he concluded the injury is limited to consumers paying a premium for an ineffective product and that such economic injury is not a significant factor in determining the required level of substantiation in this case. ID at 248-49. [30] We disagree with the

[30] The ALJ noted that although these costs may not be insignificant at least for the POM Juice, consumers are at a minimum buying what is considered to be a premium fruit juice. ID at 249.

ALJ that the economic injury from unsubstantiated health benefits is immaterial under *Pfizer*. *See Thompson Med. Co.*, 104 F.T.C. at 824 (significant economic harm "result[s] from the repeated purchase of an ineffective product by consumers who are unable to evaluate" the efficacy claims, even where "there is little potential for the product to cause serious injury to consumers' health"); *FTC v. Pantron I Corp.*, 33 F.3d at 1102 ("[A] major purpose of the Federal Trade Commission Act is to prevent consumers from economic injuries."). Consumers pay a higher price for POM products at least in part because of their ostensible health benefits.[31]

The sixth and final factor that we consider is the amount of substantiation experts in the field would agree is reasonable. As the prior detailed discussion indicated, experts in the fields of heart disease, prostate cancer, and ED would expect RCTs to support Respondents' particular disease claims.

Therefore, based upon our review of the six *Pfizer* factors, the Commission concludes that the proper level of substantiation for Respondents' disease efficacy claims is RCTs. "The inability of consumers to evaluate" the treatment and prevention effects of the Challenged POM Products "by themselves in an uncontrolled environment is a persuasive reason for consumers to expect (and us to require) appropriate scientific testing before efficacy claims are made." *Thompson Med. Co.*, 104 F.T.C. at 826. We note that under this analysis we would expect the same attributes in RCTs as we discussed in Section V.A., *supra* (*i.e.*, randomized controls, valid endpoints, and statistically significant results).

Having determined that Respondents are required to have RCTs to support their claims that the Challenged POM Products treat, prevent or reduce the risk of heart disease, prostate cancer, and ED, and based upon our prior review of the substantiation that

[31] As the ALJ noted, a one-year supply of POM Juice cost at least $780 and a one-year supply of POMx cost approximately $315, amounts that the ALJ acknowledged were "not insignificant." ID at 249. There is record evidence that consumers paid a premium for POM Products, at least in part because of the ostensible disease-fighting capability of the Challenged POM Products. *See* CX0221 at 0009 ("POM Juice's 16 oz skus are $4+/bottle, roughly a 30% premium to our pomegranate competitors."); CX0283 at 002 ("Health benefits – this is why they put up with the price").

Respondents possess, we conclude they lack support for each of their claims.[32] We therefore hold that Respondents' advertising is deceptive for failure to have a reasonable basis. Thus, Respondents' advertising violates Sections 5(a) and 12 of the FTC Act. *See Removatron Int'l Corp.*, 884 F.2d at 1498 (finding that where advertisers lack a reasonable basis, their ads are deceptive as a matter of law).

VI. Respondents' False and Misleading Claims are Material

The ALJ found that a preponderance of the evidence demonstrated that the challenged claims that he determined were false and misleading are material to consumers' decisions to purchase the Challenged POM Products. ID at 292. On appeal, Respondents argue that any false or misleading claims are not material and accordingly that such claims cannot form the basis for liability under the FTC Act. Respondents argue that the lack of materiality is demonstrated by the results of the Reibstein Survey and the fact that none of the challenged advertisements had more than a single run such that consumers were not repeatedly exposed to them. RA at 36-37. Respondents further argue that the Commission should discount their creative advertisement briefs because they were written by junior employees and only demonstrated an intent to communicate generalized benefits, and that other surveys relied upon by the ALJ as evidence of materiality were methodologically flawed. RA at 37-39. Although we find that the challenged advertisements contain more false and misleading claims than found by the ALJ (as set forth in Section IV), we agree with the ALJ's ultimate conclusion that such claims are material and accordingly run afoul of Section 5 and Section 12 of the FTC Act.

"A misleading claim or omission in advertising will violate Section 5 or Section 12, however, only if the omitted information

[32] We separately find that Respondents lack support for their claims that (1) the Challenged POM Products treat heart disease, (2) the Challenged POM Products prevent or reduce the risk of heart disease, (3) the Challenged POM Products treat prostate cancer, (4) the Challenged POM Products prevent or reduce the risk of prostate cancer, (5) the Challenged POM Products treat erectile dysfunction, and (6) the Challenged POM Products prevent or reduce the risk of erectile dysfunction.

would be a material factor in the consumer's decision to purchase the product." *Am. Home Prods. Corp.*, 98 F.T.C. at 368. A "material" misrepresentation is defined as one that is likely to affect a consumer's conduct with respect to the product or service. *Deception Statement*, 103 F.T.C. at 182. In determining whether false or misleading claims in an advertisement are "material" to consumers, the Commission may first consider whether a claim is presumptively material, including "express claims, claims significantly involving health or safety, and claims pertaining to the central characteristic of the product." *Novartis Corp.*, 127 F.T.C. at 686 (citing *Deception Statement*, 103 F.T.C. at 182). A respondent may rebut a presumption of materiality by providing evidence that the claim is not material: "Respondent can present evidence that tends to disprove the predicate fact from which the presumption springs (*e.g.*, that the claim did *not* involve a health issue) or evidence directly contradicting the initial presumption of materiality. This is not a high hurdle." *Id.* at 686. If Respondent rebuts the presumption of materiality, then the Commission examines the facts that gave rise to the presumption, any rebuttal evidence, and any other evidence on materiality provided by Complaint Counsel. *Id.* at 686-87. The Commission should also consider an advertiser's intent to make a claim, which, in the case of implied claims like the ones at issue in this case, requires consideration of (though not reliance on) extrinsic evidence. *Id*. at 687-88.

The claims made in the challenged advertisements are health-related claims, which are presumptively material as set forth in *Novartis Corp*. ID at 292; IDF 580-83. Respondents do not refute this. However, the ALJ determined that he need not rely on a presumption of materiality given Respondents' presentation of rebuttal evidence because "the preponderance of the evidence shows that the challenged claims are material." ID at 292. After considering the fact that the claims in the challenged advertisements are health-related, Respondents' own statements and creative briefs, and the three surveys relied upon by Complaint Counsel and Respondents as either evidence of materiality or lack thereof, we agree that the preponderance of the evidence demonstrates that the challenged claims are material.

As set forth above, Respondents do not refute that the claims made in the challenged advertisements are health-related. In fact,

their main argument with respect to what kind of claims are made in the advertisements is that the advertisements make claims about the Challenged POM Products' health benefits rather than disease claims. Respondents' own statements and creative briefs provide further evidence of materiality, as set forth in the ALJ's opinion and detailed findings of fact. ID at 292-95; IDF 113, 128, 131, 145-51, 154, 181, 1316-21, 1323-35, 1340-43. For example, Mrs. Resnick testified that POM juice is "health in a bottle," which is its "unique selling proposition." IDF 112; CX1375 at 41-42 (L. Resnick, Tropicana Dep.). Mr. Resnick similarly stated his belief that a large number of POM Juice consumers purchase the product because they believe "that we've proven that . . . [POM Juice] really does prolong people's lives if they are getting the onset of prostate cancer." IDF 1318 (quoting CX1376 at 218-19 (S. Resnick Ocean Spray Dep.)).

The focus of the ads challenged by Complaint Counsel were POM's disease claims, not the products' taste, price, or other attributes. The products' central characteristic, as depicted in the challenged ads, was their impact on heart disease, prostate cancer or ED. Respondents thought their products impact on health was such a strong selling point that they invested over $35 million to develop supporting evidence that they could use in marketing. ID at 295. As the ALJ explained, under these circumstances, "particularly that POM was aware that among those purchasing the Challenged POM Products were 'people that have heart disease or prostate cancer in their family, or have a fear of having it themselves,' [IDF] 1320, it defies credulity to suggest that Respondents would advertise study results related to these conditions if such advertising did not affect consumer behavior." We agree with the ALJ that it is "no great leap," *Novartis Corp.*, 127 F.T.C. at 687, to find that consumer purchasing decisions would likely be influenced by claims that the Challenged POM Products treat, prevent, or reduce the risk of these diseases.

In support of their contention that the claims were not material, Respondents rely on the Reibstein Survey. The ALJ rejected this argument, citing methodological and other flaws in that survey, including that "it only assessed consumer motivations generally; it did not actually assess whether any of the challenged claims . . . would be important to the survey respondent's decision to purchase the products," and "the survey did not ask any follow-

up questions, including of the 35.2% of POM Juice purchasers who stated that they bought or would repurchase POM Juice because it was 'healthy.'" ID at 295-96; IDF 1354, 1361, 1373, 1375. We agree with the ALJ's assessment of the Reibstein Survey.

Accordingly, the Commission holds that Respondents' misleading claims were material.[33]

VII. First Amendment Analysis

Respondents contend that a finding of liability would violate the First Amendment. They argue that the ALJ ignored Supreme Court case law that defines what it means for commercial speech to be false or misleading. We disagree. As Respondents acknowledge, *see* RA at 19, commercial speech must at least "concern lawful activity and not be misleading" to qualify for constitutional protection. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980); *see also, e.g.*, *In re R.M.J.*, 455 U.S. 191, 200 (1982) ("False, deceptive or misleading advertising remains subject to restraint.").

Respondents first contend that the Commission cannot determine that ads are "actually misleading" unless there is empirical or extrinsic evidence that consumers were deceived. Next, Respondents contend that the FTC cannot judge an advertisement to be "inherently misleading" on its face when the ad states accurate and verifiable facts. Respondents then argue that based on the evidence the Commission may only determine that Respondents' ads are "potentially misleading." If the ads are only potentially misleading, according to Respondents' logic, then precedent establishes that, at most, the FTC could require limited disclaimers that are tailored to satisfy the test in *Central Hudson*, because a disagreement about the meaning of scientific evidence cannot justify a bar of Respondents' health claims. We address Respondents' arguments in turn.

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[33] In light of this conclusion based on the foregoing considerations that Respondents' claims were important to consumers in making purchasing decisions, the Commission need not decide whether the OTX A&U Study or the Zoomerang study, on which Complaint Counsel relies, offer further evidence of materiality.

A. Actually Misleading

Contrary to Respondents' claim, empirical or extrinsic evidence is not necessarily required for the Commission to conclude that Respondents' ads are actually misleading. Respondents mischaracterize the law in arguing that the Commission is limited to finding an advertisement is actually misleading only in instances where extrinsic or empirical evidence exists of actual deception. In terms of First Amendment jurisprudence, the Commission's determination of whether particular ads establish that the ads are "actually misleading" does not require extrinsic or empirical evidence. *See Kraft, Inc.*, 970 F.2d at 319, 325 (in a case where "the Commission found implied claims based solely on its own intuitive reading of the ads (although it did reinforce that conclusion by examining the proffered extrinsic evidence)," explaining "[t]o begin with, the Commission determined that the ads were *actually* misleading, not potentially misleading, thus justifying" the Commission's remedy); *Daniel Chapter One*, 2009 WL 5160000 at *20, n.2 (explaining "implied claims . . . have been specifically adjudicated in the present case to be actually misleading" in a case where Complaint Counsel did not introduce extrinsic evidence).

Just as in *Kraft* and *Daniel Chapter One*, in this case, the Commission's findings based on its own expertise – Respondents disseminated advertising or promotional material that contained implied claims, Respondents lacked substantiation to support those claims, and the claims are material – legally establish that Respondents' advertising is actually misleading. Here, in 34 ads, Respondents represented to consumers that clinical studies proved that the Challenged POM Products treat, prevent or reduce the risk of heart disease, prostate cancer, or ED when, in fact, well-controlled clinical studies did not establish such efficacy for the particular diseases; these claims that clinical research or studies proved the efficacy of the Challenged POM Products were false. Therefore, Respondents' ads were deceptive and actually misleading. In addition, in 36 ads, Respondents represented that the Challenged POM Products treat, prevent or reduce the risk of heart disease, prostate cancer, or ED when Respondents did not possess a reasonable basis to support such claims. Again, Respondents' ads are deceptive as a matter of law. *See FTC v.*

Direct Mktg. Concepts, Inc., 624 F.3d 1, 8 (1st Cir. 2010) ("Where the advertisers lack adequate substantiation evidence, they necessarily lack any reasonable basis for their claims. And where the advertisers so lack a reasonable basis, their ads are deceptive as a matter of law.") (citation omitted).

The proposition that the First Amendment requires extrinsic evidence in every case has been raised and rejected by the Supreme Court and courts of appeals. *See, e.g.*, *Zauderer*, 471 U.S. at 652-53 (stating that no First Amendment concerns are raised when facially apparent claims are found without "conduct[ing] a survey of the . . . public" to determine that an ad is misleading); *Kraft, Inc.*, 970 F.2d at 321 ("Kraft's first amendment challenge is doomed by the Supreme Court's holding in *Zauderer*, which established that no first amendment concerns are raised when facially apparent implied claims are found without resort to extrinsic evidence."); *Daniel Chapter One*, 2009 WL 5160000 at *14-15 ("Respondents repeatedly assert . . . the ALJ was obliged by the Due Process Clause and the First Amendment of the Constitution to consider 'extrinsic' evidence. More specifically, Respondents claim that 'Complaint Counsel should have been required to produce evidence that consumers were actually misled by Respondents' promotional efforts and representations[.]' . . . That is not the law. Federal courts have long held that the Commission has the common sense and expertise to determine 'what claims, including implied ones, are conveyed in a challenged advertisement, so long as those claims are reasonably clear.'") (citation omitted). Indeed, even the case which Respondents cite for their claim that empirical evidence is necessary, *Peel v. Att'y Registration & Disciplinary Comm'n*, 496 U.S. 91 (1990), relied on a facial analysis of the ads – not empirical evidence – to find that the ads were not actually misleading. *Id.* at 105-06 (describing evaluations and explaining "two state courts that have evaluated lawyers' advertisements of their certifications as civil trial specialists by NBTA have concluded that the statements were not misleading or deceptive *on their face*, and that, under our recent decisions, they were protected by the First Amendment") (emphasis added).

Once the Commission has determined that Respondents' ads are actually misleading, no further analysis is necessary because misleading commercial speech is not protected by the First

Amendment. Each of the cases cited by Respondents acknowledges that '[t]he Federal Government [is] free to prevent the dissemination of commercial speech that is false, deceptive, or misleading." *Zauderer*, 471 U.S. at 638. The three-part analysis for determining whether regulation of commercial speech is constitutional under *Central Hudson* – whether the regulation is based on a substantial governmental interest, whether the regulation directly advances the governmental interest asserted, and whether the regulation is not more extensive than necessary to serve that interest – is applicable only if a threshold inquiry determines that the speech in question is not false or misleading. *See Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566; *Edenfield v. Fane*, 507 U.S. 761, 768 (1993); *Daniel Chapter One*, 2009 WL 5160000 at *19-20. We nonetheless address Respondents' additional First Amendment arguments.

B. Inherently Misleading

Respondents contend that "an advertisement cannot be inherently misleading on its face when it states objectively accurate and verifiable facts," but also admit "[a]n advertisement that states accurate and verifiable facts may, in some instances, be potentially misleading." RA at 20. Indeed, Respondents' admission is the more accurate description of the law. Courts have regularly found "that even literally true statements can have misleading implications" and challenging such deception does not violate the First Amendment. *Kraft Inc.*, 970 F.2d at 322 (citing *Zauderer*, 471 U.S. at 652; *Thompson Med. Co.*, 791 F.2d at 197; *Removatron Int'l Corp.*, 111 F.T.C. at 292-95; *Am. Home Prods. Corp.*, 695 F.2d at 687).

It appears that Respondents' argument is that when addressing advertising that is considered inherently misleading on its face, each element of the ad is to be evaluated in isolation for its accuracy. The cases that Respondents cite – *R.M.J.*, 455 U.S. at 205, *Zauderer*, 471 U.S. at 645; *Peel*, 496 U.S. at 100; *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 144 (1994) – addressed bans on statements in professional advertising where the regulatory bodies found advertising to be misleading based on simple affirmative representations, such as stating the jurisdictions where the attorney was licensed or certifications that the attorney held. The

Court struck down the regulations because it found that, for example, so long as the attorney was still licensed in the jurisdiction, providing the information to the public was not misleading because consumers could easily confirm the licensing or certification.

Respondents assert that the statements in their ads also are objectively accurate and verifiable facts. Respondents point to statements in their ads that the Challenged POM Products are high in antioxidants and to the citations of their studies to explain that the studies were conducted by world-renowned researchers, the results were published in peer-reviewed journals, and the statements about the disease-specific findings as proof the statements, like those in *R.M.J.*, are objectively are accurate and verifiable. We agree that many of the facts in Respondents' ads are verifiable. However, there are many omissions of material facts in Respondents' ads that consumers cannot verify independently. For example, consumers cannot verify that one of the five studies referenced in the ads, IDF 126, was rejected as an abstract by the American Heart Association and was rejected by the Journal of the American Medical Association because of shortcomings of the research, and was only accepted for publication in the American Journal of Cardiology without peer review. IDF 816-818. Similarly, consumers could not verify that the results of a much larger, well-designed, well-controlled study – the Davidson CIMT Study, which was completed in 2006 and showed, at most, a 5% decrease in arterial plaque in some patients measured at an interim point – were inconsistent with the statement in ads running through 2009 (*e.g.*, CX0029, CX0280, CX0328/CX0331/CX0337, CX0473) that asserted "Pomegranate juice consumption resulted in significant reduction in IMT (thickness of arterial plaque) by up to 30% after one year" based on the unblinded Aviram CIMT/BP study because Respondents delayed publication of the negative results. *See* CX0716 at 0033 (under study protocol, Respondents' approval was needed to present results of the study); S. Resnick, Tr. 1685-96 (explaining that Davidson was denied authorization to submit study results to the American Heart Association meeting in 2007 because of the study's inconsistent findings, but later allowing Davidson to submit the study for publication in 2008); CX1336 at 144, 165-68, 180-81 (Davidson Dep.). We conclude that many of Respondents' representations are qualitatively different from the

verifiable statements in the professional advertising cases that Respondents cite.

C. Potentially Misleading

Finally, Respondents argue that, because their ads are not actually misleading or inherently misleading, a position that this opinion has already rejected, then their ads can only be evaluated as potentially misleading, and potentially misleading commercial speech cannot be prohibited. Respondents assert that the D.C. Circuit's holding in *Pearson v. Shalala*, 164 F.3d 650 (D.C. Cir. 1999), leads to the conclusion that Respondents' representations cannot be banned on the basis of a genuine dispute about the level or meaning of scientific evidence. We do not interpret *Pearson v. Shalala* to preclude us from finding that Respondents' claims are misleading because they lack substantiation, even if the Commission's conclusion were evaluated as a finding that Respondents' ads are potentially misleading, rather than actually misleading.

In *Pearson*, manufacturers of dietary supplements sought pre-approval from the FDA for four health claims that the manufacturers wanted to make in labeling for their products. The FDA refused to approve the claims on the grounds that they were not supported by the "significant scientific agreement" standard of evidence under that agency's regulatory scheme. The FDA, consistent with agency practice, refused to consider the manufacturers' argument that the use of disclaimers could prevent these four health claims from being misleading. On appeal from a district court decision upholding the constitutionality of the FDA's determination, the D.C. Circuit reversed. When considering the government's argument that health claims for dietary supplements are potentially misleading to consumers if significant scientific agreement does not support the claims, the D.C. Circuit recognized that the government has a substantial interest in ensuring the accuracy of consumer information in the marketplace and that banning potentially misleading health claims would appear to directly advance that interest. *Id.* at 655-56. The court, however, went on to hold that the government did not meet its burden of proving that there was a reasonable fit between banning these claims and the government's interest in preventing fraud. *Id.* at 657. The D.C. Circuit concluded that potentially

misleading claims could be remedied by "prominent" disclaimers. *Id.* at 658, 659.

In this case, we reviewed Respondents' claims in light of any disclaimers or disclosures that Respondents actually made in their ads. Respondents' disclaimers, disclosures, or qualifications to their claims are much less that what the D.C. Circuit hypothesized would be sufficient to prevent health claims with disputed scientific support from being misleading.[34] If Respondents' had made disclaimers such as those described in *Pearson* (*i.e.*, "the evidence in support of this claim is inconclusive," *id.* at 659), the Commission would have considered the representations in the ads in light of such statements. Without such disclaimers, Respondents' ads are deceptive and misleading.

In addition, the Commission's approach to address misleading advertising, which is a case-by-case adjudication *after* ads have been disseminated, differs from regulatory efforts that prohibit categories of speech or rely on *prior* approval of the language to be used. The latter serve as illustrations of "bars" on commercial speech and are inapplicable to the detailed *ex post* analysis we engage in here, based on a full record about the ads in question. *See Kraft Inc.*, 970 F.2d at 317 (explaining that "a prophylactic regulation applicable to all lawyers, completely prohibiting an entire category of potentially misleading commercial speech" at issue in *Peel*, is sufficiently distinct for constitutional purposes from "an individualized FTC cease and desist order prohibiting a particular set of deceptive ads") (citation omitted); *Daniel Chapter One*, 2009 WL 5160000 at *15 (citing *Kraft, Inc.* to explain that FTC finding that ads are misleading in administrative adjudication does not violate First Amendment). As the ALJ explained in this case, "Respondents' generalized assertion that none of its commercial speech should be 'barred' is without merit. Requiring adequate substantiation for advertising claims does not 'bar' commercial speech, but serves to prevent dissemination of misleading claims." ID at 323 n.32 (internal citation omitted). The FTC's case-by-case adjudication, which examines whether an

[34] Commissioner Ohlhausen's view is that, with regard to some exhibits, the Respondents included sufficient qualifying language to at least raise the need for extrinsic evidence before finding implied misleading claims. *See* Commissioner Ohlhausen's Concurring Statement.

advertiser made limited claims or provided appropriate disclaimers, neither bars nor discourages the free flow of commercial speech that would expand consumer knowledge regarding the goods and services available in the market.

VIII. Fifth Amendment Analysis

In Respondents' Answering Brief, Respondents argue for the first time that a finding that RCTs are required to substantiate Respondents' claims violates constitutional due process principles because the Commission would be retroactively applying a standard that deviates from the Commission's current approach articulated in both FTC policy statements and case law. RAns at 24-28. As set forth above, the Commission finds that the required substantiation for Respondents' disease claims about the Challenged POM Products is RCTs. Given that this substantiation finding is a fact-based determination based on the experts' opinion of what constitutes competent and reliable scientific evidence for the claims at issue, and that basing this factual determination on expert testimony follows clearly established legal precedent, we reject Respondents' claim that such a finding raises due process concerns.

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (citations omitted). A number of the Commission's policy statements provide support for the principle that determining what constitutes sufficient substantiation for particular claims is a fact-based analysis that rests in large part on scientific expert opinion. The *Substantiation Statement* discusses the fact that extrinsic evidence may be useful to determine the proper level of substantiation (including expert testimony or consumer surveys) regarding substantiation of implied efficacy claims: "Extrinsic evidence, such as expert testimony or consumer surveys, is useful to determine what level of substantiation consumers expect to support a particular product claim and the adequacy of evidence an advertiser possesses." *Substantiation Statement*, 104 F.T.C. at 840. The *Food Advertising Statement* provides additional (and more detailed)

support for the Commission's reliance on competent and reliable scientific evidence and expert determination of what constitutes such evidence for particular claims:

Like FDA, the Commission imposes a rigorous substantiation standard for claims relating to the health or safety of a product, including health claims for food products. The Commission's standard that such claims be supported by "competent and reliable scientific evidence" has been more specifically defined in Commission orders addressing health claims for food products to mean:

> tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.
> Thus, both the Commission and FDA look to well-designed studies, including clinical research and other forms of reliable and probative scientific evidence, in evaluating health claims for foods. (footnotes omitted).
> . . .
> In evaluating health claims, the Commission looks to a number of factors to determine the specific level of scientific support necessary to substantiate the claim. Central to this analysis is an assessment of the amount of substantiation that experts in the field would consider to be adequate. The Commission regards the "significant scientific agreement" standard, as set forth in the NLEA and FDA's regulations, to be the principal guide to what experts in the field of diet-disease relationships would consider reasonable substantiation for an unqualified health claim.

Food Advertising Statement at § IV.A; *see also id*. at n.79 ("This approach is consistent with the Commission's approach to evaluating the substantiation for claims made for drug products and medical devices regulated by FDA.").

A number of cases and Commission decisions reiterate the principle that the proper level of substantiation is a factual

determination which is rooted in a reliance on expert testimony. *See, e.g.*, *Bristol-Myers Co.*, 102 F.T.C. at 332-38; *QT, Inc.*, 448 F. Supp. 2d at 961-62. Of particular relevance to this case is *Thompson Medical Company*, where the Commission applied the *Pfizer* factors to determine that well-controlled clinical tests (or RCTs) were required as a reasonable basis for efficacy claims regarding a topical analgesic. *Thompson Med. Co.*, 104 F.T.C. at 826. In addition to determining that the type of claim made, as in this matter, was one "whose truth or falsity would be difficult or impossible for consumers to evaluate by themselves," the Commission determined that experts in the field would require well-controlled clinical trials as reasonable substantiation for the efficacy of an analgesic. *Id.* at 822.

In sum, the Commission's determination that RCTs are required to substantiate Respondents' disease claims is founded on the well-established principle that determining the proper level of substantiation is a fact-based and case-specific analysis based on expert testimony as to what constitutes competent and reliable scientific evidence for the claims at issue. Respondents were on notice of this long-standing standard. Therefore, our decision in this case does not raise due process concerns.

IX. Media Interviews

The four media interviews in question on appeal include appearances by Mrs. Resnick on *The Martha Stewart Show* and *The Early Show*, sharing recipes and marketing ideas related in part to POM; a magazine interview with Mrs. Resnick in *Newsweek,* in part promoting the sale of her book about the POM business; and a television interview with Mr. Tupper on FOX Business discussing the current relevance of the pomegranate and pomegranate juice. ID at 208.

The ALJ found that the four media interviews challenged by Complaint Counsel do not constitute advertisements within the meaning of the FTC Act so that the Initial Decision does not evaluate whether any claims made during the interviews are deceptive or misleading. ID at 210. We do not adopt the predicate for the ALJ's ruling – that the media interviews must be advertisements (rather than deceptive commercial speech more broadly) in order to form the basis for liability under Section 5 of

the FTC Act. Instead, given the limited evidence regarding the circumstances surrounding the context of these interviews and the numerous other deceptive claims made by Respondents, the Commission declines to base liability on the four media interviews in question.

In focusing solely on whether or not an advertisement must be paid for in order to fall within the scope of Section 12 as "advertisements," the ALJ did not consider whether statements made during the media interviews violate Section 5 of the FTC Act as deceptive commercial speech.[35] Section 5(a)(2) of the FTC Act states, "[t]he Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive act or practices in or affecting commerce." In order to determine as a preliminary matter whether respondents are engaging in commercial speech, we consider a number of factors.

In *In re R.J. Reynolds Tobacco Company*, 111 F.T.C. 539, 547 (1988), the Commission held that respondents' advertisement discussing a "scientific study" that allegedly assessed the hazards of cigarette smoking constituted deceptive commercial speech, reversing the ALJ's ruling granting respondents' motion to dismiss on the grounds that the advertisement did not constitute commercial speech. In considering whether the advertisement constituted commercial speech, the Commission considered (1) the content of the speech, *i.e.*, whether it contained a message promoting the demand for a product or service; (2) whether the speech referred to a specific product or service; (3) whether the

[35] Notwithstanding Respondents' claims to the contrary, deceptive commercial speech is not constitutionally protected. *See Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566 ("For commercial speech [to be protected by the First Amendment], it at least must concern lawful activity and not be misleading."). Where the Commission finds that claims disseminated through commercial speech lack proper substantiation, such findings establish as a matter of law that such claims are deceptive and thus not protected by the First Amendment. *See Direct Mktg. Concepts, Inc.*, 624 F.3d at 8 ("Where the advertisers lack adequate substantiation evidence, they necessarily lack any reasonable basis for their claims. And where the advertisers so lack a reasonable basis, their ads are deceptive as a matter of law.") (citation omitted).

speech included information about attributes of a product or service, such as type, price, or quality, including information about health effects associated with the use of a product; (4) the means used to publish the speech, including whether it is paid-for advertising; and (5) the speaker's economic or commercial motivation. *Id.* at 544-46. The Commission stated:

> Evidence that may be relevant to deciding whether the Reynolds advertisement is commercial speech includes facts concerning the publication or dissemination of the advertisement, such as whether it was paid-for, where and in which publications it was disseminated, whether it was placed in editorial space (such as an op-ed page) or advertising space in the publication, whether it was prepared as a letter to the editor, whether it was sent to representatives of the media for selection on merit by editorial boards, and to whom it was disseminated outside the media.
>
> Evidence about the promotional nature of the advertisement also may be relevant. Therefore, it might be useful to consider the circumstances surrounding the development of the advertisement, such as whether it was targeted to consumers or legislators; whether it was intended to affect demand for Reynolds' cigarettes or brands or to affect particular legislative or regulatory proposals; whether the advertisement was subjected to copy testing or to review by focus groups and, if so, the nature of the questions used in the copy tests or focus group sessions; and the results of those procedures both in terms of what they showed and what changes, if any, Reynolds made in response to those showings. Evidence relating to the message(s) Reynolds itself intended to convey through the advertisement also may be relevant. In addition, Reynolds' share of the cigarette market may be relevant to deciding whether including a brand name reference is a prerequisite to a determination that the advertisement constitutes commercial speech.

Id. at 550. In other words, the evidence considered by the Commission in *R.J. Reynolds Tobacco Company* focuses in large part on the "means" used to publish the speech, as well as where

and in which publications it was disseminated and where it was placed within such publications. These factors may apply differently when determining whether statements fall within the definition of commercial speech outside of the advertising context. *Compare Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 562-563 ("'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech") *with id.* at 546 (discussing case decided by Court on the same day, *Consol. Edison Co. v. Public Serv. Comm'n*, 447, U.S. 530, 544 (1980), holding that "[PSC]'s suppression of bill inserts that discuss controversial issues of public policy directly infringes the freedom of speech protected by the First and Fourteenth Amendments."); *see also Oxycal Labs. v. Jeffers*, 909 F. Supp. 719, 724 (S.D. Cal. 1995) (denying request for injunction pursuant to the Lanham Act after determining that statements in a book about the carcinogenic effects of plaintiffs' vitamins did not constitute commercial speech even though the book also promoted defendants' products: "The Court finds that the main purpose of [defendant's] Book is not to propose a commercial transaction, and [defendant's] writing is not solely related to the economic interests of the speaker and its audience.").

The factual record in this case, however, lacks evidence about several of the commercial speech factors described in *R.J. Reynolds Tobacco Company.* Specifically, in considering the "means" by which such statements were made, we consider that these statements were made in the context of much longer interviews with the media, that the interviewer rather than the interviewee may have a certain amount of control over the content of the speech based on the content of the questions, and that the interviewer may have his or her own agenda that does not focus on advancing the commercial interests of Respondents. Here, the record is devoid of answers to key questions. The record does not reveal, for example, whether and how each of these interviews came to pass or any understanding between the media organizations and Respondents regarding the content of the interviews. Also lacking in the record is evidence about how the media interviews were arranged or procured, and whether Respondents paid for them. These factors are not necessarily all required or dispositive, and may be considered on a sliding scale. However, absent answers to these questions, we cannot make an

informed determination with respect to the media interviews at issue.

Moreover, in light of the number of deceptive claims made in the other challenged exhibits by Respondents, we need not base Respondents' liability in this case on these four media appearances. We follow a precedent of restraint exhibited in other decisions where liability has been found on other grounds. *In re Rubbermaid*, 87 F.T.C. 676, 1976 WL 179998 at *20 (F.T.C. Apr. 13, 1976) ("Because we have found the contracts to be generally violative of Section 5 [as alleged in Count I's charge of illegal price maintenance], there is no need to reach Count II's charge of violations with regard to transactions between certain States, and we decline to do so.").

X. Remedy

A. Cease and Desist Order

The ALJ determined that a cease and desist order is warranted against all Respondents, finding that Respondents' conduct is transferable, serious, and deliberate. ID at 309-13. On appeal, Respondents argue that injunctive relief is not warranted with respect to the Challenged POM products because POM has already stopped running the ads found to contain claims. In addition, Respondents argue that the remedy is not necessary because they began implementing a new review process for POM ads in 2006 and only a handful of ads and web captures of offending claims were made after that implementation. RA at 39-40. At the outset, the Commission rejects Respondents' argument that a cease and desist order is not warranted because some of the advertisements, representing a small subset of the advertisements that the Commission finds to contain false or misleading claims, were issued in or prior to 2006. The Commission also agrees with the ALJ's conclusion that a cease and desist order is appropriate with respect to all Respondents and adopts the ALJ's findings with respect thereto.

In considering whether a cease and desist order is appropriate, the Commission must determine that an order is both sufficiently clear and reasonably related to the unlawful practices at issue. *See Colgate-Palmolive Co.*, 380 U.S. at 392, 394-95.

Specifically, when determining whether an order is reasonably related to the unlawful practices, the Commission should consider "(1) the seriousness and deliberateness of the violation; (2) the ease with which the violative claim may be transferred to other products; and (3) whether the respondent has a history of prior violations." *Stouffer Foods Corp.*, 118 F.T.C. at 811; *see also Telebrands Corp.*, 457 F.3d 354, 358 (4th Cir. 2006); *Kraft, Inc.*, 970 F.2d at 326. "The reasonable relationship analysis operates on a sliding scale — any one factor's importance varies depending on the extent to which the others are found. . . . All three factors need not be present for a reasonable relationship to exist." *Telebrands Corp.*, 457 F.3d at 358-59.

We agree with the ALJ's conclusion that Respondents' actions were serious and deliberate. Respondents claimed the Challenged POM Products treat, prevent or reduce the risk of heart disease, prostate cancer, or ED. Respondents made serious yet unsupported claims about three diseases, some of which can be life-threatening. Respondents also made numerous deceptive representations and were aware that they were making such representations despite the inconsistency between the results of some of their later studies and the results of earlier studies to which Respondents refer in their ads. *See supra* Section V; *see also Standard Oil Co. v. FTC*, 577 F.2d 653, 662 (9th Cir. 1978) ("Among the circumstances which should be considered in evaluating the relation between the order and the unlawful practice are whether the respondents acted in blatant and utter disregard of the law.").

The Commission finds that a greater number of ads than those identified by the ALJ convey the claims alleged by Complaint Counsel. Nevertheless, injunctive relief, such as that ordered by Judge Chappell, is justified even if based only on the smaller number of ads where the ALJ found Respondents conveyed the claims. Thus, whether based on the ALJ's findings or our findings, Complaint Counsel has demonstrated that Respondents disseminated numerous advertisements making the claims alleged in the Complaint. It is unnecessary to find that all of the challenged ads made the alleged claims in order to warrant injunctive relief for deceptive advertising. *Bristol-Myers Co.*, 102 F.T.C. at 321 n.5 ("Although we find a smaller number of violative ads than did the ALJ, there is certainly an adequate

number to support the order . . . ."); *Fedders Corp.* 85 F.T.C. 38, 71-72 (1975) ("The Commission has previously issued orders in cases involving no more than one or a few deceptive advertisements.").

We also agree with the ALJ's conclusion that the kind of claims made by Respondents in this case would be transferable to other products. A violation is transferrable where other products could be sold utilizing similar techniques. *Colgate-Palmolive Co.*, 380 U.S. at 394-95; *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 392, 394-95 (9th Cir. 1982). Here, Respondents could use similar marketing techniques to make disease claims about other food products, including the other food products Respondents currently sell. By way of analogy, in the context of drug products, "misrepresenting that doctors prefer a product, or that tests prove the product's superiority, is a form of deception that could readily be employed for any non-prescription drug product." *Am. Home Prods. Corp.*, 695 F.2d at 708; *see also Daniel Chapter One*, 2009 WL 2584873 at *104 ("In this case, the claims that the Challenged Products prevent, treat, or cure cancer, and the use of testimonials by doctors and consumers to make such claims, could readily be employed for any dietary supplement."). Although, as set forth by the ALJ, Respondents do not have a history of prior violations, ID at 314, the other factors strongly weigh in favor of restraining Respondents' conduct in the future.

B. Fencing-In Provisions

It is well established that the Commission may issue orders containing fencing-in provisions, that is, "provisions that are broader than the conduct that is declared unlawful." *Telebrands Corp.*, 457 F.3d at 357 n.5; *see also*, *e.g.*, *Colgate-Palmolive Co.*, 380 U.S. at 394-95; *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952). As the Supreme Court recognized in *Ruberoid*, the Commission's orders need not be restricted to the "narrow lane" of a respondent's past actions; the Commission may effectively "close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *Ruberoid Co.*, 343 U.S. at 473.

Consequently, the Order we impose applies to the Challenged POM Products as well as to any other food, drug, or dietary supplement products sold by POM and the other Roll entities. *See*

Order, Definitions, ¶ 4 ("Covered Product" means any food, drug, or dietary supplement, including, but not limited to the POM Products."). Courts have agreed that fencing-in provisions that extend to products beyond those involved in the violations are appropriate. *See, e.g.*, *Colgate-Palmolive Co.*, 380 U.S. at 394-95; *Telebrands Corp.*, 457 F.3d at 361-62; *Kraft, Inc.*, 970 F.2d at 326-27; *Am. Home Prods. Corp.*, 695 F.2d at 704-10. As our prior analysis indicated, and as the ALJ recognized, the kind of claims made by Respondents in this case would easily be transferable to other products. *See* discussion *supra*, Section X.A; ID at 310-12. As the ALJ explained, it is not material that the Challenged POM Products are only a small portion of the products sold by Respondents when the advertising claims made for the Challenged POM Products are readily transferable to the other categories of products covered by the Order, particularly when Respondents have acknowledged that they have sponsored research of the health benefits of other products they sell, such as Wonderful Pistachios and FIJI Water. *See* ID at 311.

In addition, we hold that the Respondents must have at least two RCTs before making any representation regarding a product's effectiveness in the diagnosis, treatment, or prevention of any disease.[36] *See* Order, Part I. Although we did not need to decide

[36] Commissioner Ohlhausen disagrees with the majority's view that two RCTs are warranted in the order as fencing-in relief. She would require only one RCT and would regard that study in view of other available scientific evidence. Requiring a second RCT is not reasonably related to the violations at issue in this case because a second study would not cure any particular statistical or methodological problems. As stated in Section I of this opinion, the Commission did not reach the question of the number of trials that are needed to establish liability. Repetition or replication of poorly designed studies does not make those studies sound. Moreover, although it might provide the Commission with some subjective comfort, requiring two RCTs does so at the expense of limiting consumer access to potentially useful information. The product at issue is an admittedly safe food product – a type of fruit juice. To set an unnecessarily high bar for such a product is in tension with the balanced approach to substantiation set forth in the Commission's own *Pfizer* factors and with our policy commitment to avoid imposing "unduly burdensome restrictions that might chill information useful to consumers in making purchasing decisions." FTC Staff Comment Before the Food and Drug Administration In the Matter of Assessing Consumer Perceptions of Health Claims, Docket No. 2005N-0413 (2006), *available at* http://www.ftc.gov/be/V060005.pdf. To set an especially high bar without an adequate rationale also raises First Amendment concerns. As the court in

how many RCTs are necessary to substantiate Respondents' disease claims in order to establish liability, we specify a two RCT requirement in the Order for two reasons.

First, such a requirement is consistent with Commission precedent, *see Thompson Med. Co.,* 104 F.T.C. at 831-32 ("no lesser standard than two well-controlled clinical tests is appropriate as a general rule for any analgesic product"), and expert testimony in the record before us recognized the need for consistent results in independently-replicated studies. As one expert explained, "[e]ven with the safeguards contained in an RCT, the results contained in any one study may be due to chance or may not be generalizable due to the uniqueness of the study sample." *See* CX1291 at 14-15 (Sacks Expert Report); Sacks, Tr. 1446-47.

Second, Respondents have a demonstrated propensity to misrepresent to their advantage the strength and outcomes of scientific research, as reflected by our conclusion that they made false and misleading claims about serious diseases, including cancer, in a number of the advertisements before us. Like the ALJ, *see* ID at 312, the Commission finds that Respondents have engaged in a deliberate and consistent course of conduct – no mere isolated incident or mistake – in deceptively touting the Challenged POM Products' purported ability to affect diseases and the scientific studies ostensibly showing such effects. To ensure that Respondents do not bypass our order, we therefore require that they have two substantiating RCTs before they again advertise that one of their products prevents, reduces the risk, or treats any disease.

In imposing a requirement of two RCTs, we reject Complaint Counsel's argument that our Order should prohibit Respondents from making disease-related establishment and efficacy claims about the Challenged POM Products unless such claims are pre-approved by the FDA. According to Complaint Counsel, FDA pre-approval would be reasonably related to the challenged acts

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Pearson noted, "[t]he government insists that . . . the commercial speech doctrine does not embody a preference for disclosure over outright suppression. Our understanding of the doctrine is otherwise." *Pearson*, 164 F.3d at 657 (citing *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)).

"[b]ecause the level of evidence required to support disease treatment, prevention, and reduction of risk claims found in this matter are similar to FDA's evidentiary standards[.]" CCA at 37-38. We agree with the ALJ's conclusion, *see* ID at 317, that FDA pre-approval is not warranted as part of the remedy in this case.

Complaint Counsel argues that requiring FDA pre-clearance before Respondents may again advertise that their products treat, prevent, or reduce the risk of a disease would offer a number of benefits, including a clear, bright-line standard that would be easy to enforce and, at the same time, provide certainty for Respondents. CCA at 41. The order we issue today sufficiently accomplishes those goals by requiring at least two RCTs.[37]

The requirement for two RCTs in Part I of the Order applies only to claims for disease prevention, risk reduction, and treatment; future representations relating to efficacy or health benefits of covered products that fall short of disease claims are covered by Part III of the Order. That provision requires substantiation consisting of competent and reliable scientific evidence (as defined in that Part), that must be sufficient in quality and quantity when considered in the light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true.

C. Appropriateness of Applying the Final Order to Matthew Tupper

Respondent Matthew Tupper argues that he should not be held individually liable or subject to any order in this case. We agree with the ALJ's legal conclusions and factual findings holding Matthew Tupper individually liable and determining that he should be subject to a Final Order along with the other Respondents.

Courts and the Commission consistently have held that to find an individual liable for deceptive acts or practices, the individual

[37] In exercising its substantial discretion to fashion relief appropriate to the circumstances of a particular case, the Commission has in several settlements of false advertising claims imposed a FDA pre-approval requirement. Our ruling today does not foreclose that we may again conclude, in an appropriate case, that FDA pre-approval would be an appropriate remedy.

must either have participated directly in or had the authority to control the acts or practices at issue; both participation and control are not required. *See QT*, 512 F.3d at 864 ("[The individual respondent] not only participated in the false promotional activities but also had the authority to control them. Either participation or control suffices."); *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1204 (10th Cir. 2005) ("To justify the imposition of injunctive relief against [an] individual, the FTC is required to show the individual participated directly in the business entity's deceptive acts or practices, *or had the authority to control* such acts or practices."); *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997); *FTC v. Amy Travel Serv. Inc.*, 875 F.2d 564, 573 (7th Cir. 1989); *FTC v. Consumer Alliance, Inc.*, 2003 WL 22287364 at *5 (N.D. Ill. Sept. 30, 2003).

Even though participation and control are not both required, the record shows that Mr. Tupper both participated directly in and had the authority to control the acts or practices at issue.

With respect to his participation in the acts at issue, Mr. Tupper "implement[ed] POM's direction with regard to health benefit advertising and the use of science in connection with the advertising." ID at 305; IDF 51. Mr. Tupper participated in meetings reviewing advertising concepts and content, and reviewed, edited, and in some cases had the final say on advertising concepts and advertising copy. ID at 305; IDF 156, 160, 162, 1410, 1416, 1419-20. Mr. Tupper also participated in reviewing creative briefs, providing specific medical language for use in advertisements, drafting magazine cover wraps found by the ALJ (and here by the Commission) to have made the claims alleged by Complaint Counsel, and reviewing press releases. ID at 305; IDF 306-10, 581, 1417, 1421, 1430-31. Mr. Tupper was heavily involved in the direction of POM's medical research. ID at 305; IDF 53, 119, 142, 144, 1412, 1424-29. Mr. Tupper, in his capacity as an officer of POM, also had the authority to control its challenged practices. ID at 306-07 ("in his capacity as an officer [of POM], Mr. Tupper, together with others, formulated, directed, or controlled the policies, acts, or practices of POM."); IDF 37-38, 42. Mr. Tupper managed the day-to-day affairs of POM, including its marketing team, oversaw and administered its budget, signed checks and contracts on behalf of the company, and had the authority to determine which advertisements should

run. ID at 306; IDF 25, 44, 45, 1406. He also had numerous employees report to him directly and had the authority to hire and fire POM employees, including the head of POM's marketing department. ID at 306-07; IDF 46-50.

In sum, the ordered relief is reasonably related to the deceptive acts and practices of all the Respondents, including Mr. Tupper.

Conclusion

For all the foregoing reasons, we conclude that the Respondents have violated Sections 5(a) and 12 of the FTC Act and we affirm the ALJ's finding as to liability. Consequently, we issue a Final Order to address Respondents' conduct.

APPENDIX A
POM Claims Appendix[1]

Below we examine each of the advertisements and other promotional materials challenged by Complaint Counsel and explain our analysis of the net impression conveyed. We begin with a discussion of recurring elements[2] found in a number of these exhibits and then turn to our review of each challenged ad.

A. Recurring Elements

Medical Imagery, Symbols, and Terminology. Many of the challenged ads include images and symbols strongly associated with medicine, physicians, and equipment, among them the caduceus symbol of the medical profession or the "x" in POMx resembling the R_x abbreviation. These images and symbols contribute to a net impression that certain ads conveyed the disease-related claims challenged by Complaint Counsel. As discussed below, even the use of medical imagery in a humorous manner can buttress this message, such as a POM bottle turned upside down appearing as an intravenous drip bag (Figure 5), a POM bottle connected to electrocardiogram leads (Figure 6), and a POM bottle inside a blood pressure cuff (Figure 11). Medical terminology also contributes to a net impression that the ads conveyed the challenged claims. In several challenged exhibits, the use of the word "disease" as well as references to specific diseases and disease symptoms (*e.g.*, "cancer," "prostate cancer," "erectile dysfunction," "coronary heart disease," "atherosclerosis," "high blood pressure," "hardening of the arteries," and "stroke") conveyed that the Challenged POM Products treat, prevent or reduce the risk of disease.

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[1] For most of the challenged advertisements, Commissioner Ohlhausen agrees with the majority of the Commission about the claims conveyed. However, as explained in her Concurring Statement, for some advertisements, Commissioner Ohlhausen either did not find certain claims were made or believes extrinsic evidence is necessary to determine whether consumers would take away such claims.

[2] The Commission reviewed each ad separately, however, and no individual element should be necessarily construed as sufficient to convey a claim. Instead, each element may contribute to an ad's net impression in combination with other elements as described for each ad in this Claims Appendix.

References to Medical Professionals, Scientific Studies, and Medical Journals. References to physicians by name or to FDA approval or review also contribute to the net impression that the ads conveyed the challenged claims. Moreover, references to medical studies, particular medical journals, or other types of scientific evaluation helped convey the asserted efficacy and establishment claims, as did the use of statements quantifying the amount of money spent on research (*e.g.*, "backed by $25 million in vigilant medical research"). Further, the characterization of the research specifically as "medical" (as opposed to simply Aresearch" or even "nutritional research") contributes to the net impression that the ads conveyed the challenged claims.

Performance Results Requiring Scientific Measurement. Several ads contain references to quantifiable results (*e.g.*, "eight ounces of POM a day can reduce plaque in the arteries by up to 30%!"). Such references tend to communicate that the product's attributes are supported by scientific research because a reduction in the amount of plaque in an individual=s arteries cannot be known through casual observation, *i.e.*, it must be measured by a medical professional.

Use of Humor. Contrary to Respondents' assertion, the use of lighthearted or humorous elements does not detract from the substance of the claims conveyed by the challenged ads. For instance, Figure 6 shows a bottle of POM Wonderful connected to leads for an EKG, along with the title, "Amaze your cardiologist." The ad text further reads, "Ace your EKG . . . . A glass a day can reduce plaque by up to 30%! Trust us, your cardiologist will be amazed." While the depiction of the bottle of pomegranate juice undergoing a medical test is meant to be humorous, the humorous element includes medical imagery that reinforces the claims conveyed by the text. Thus, the ad conveyed the net impression that drinking POM will reduce plaque by up to 30% and produce improvements measurable by an EKG that will be great enough in magnitude to impress a cardiologist. Likewise, Figure 7 depicts a bottle of POM in a noose, along with the headline "Cheat death" and additional text that says "Dying is so dead … POM Wonderful … has more antioxidants than any other drink and can help prevent premature aging, heart disease, stroke, Alzheimer=s,

even cancer . . . ." Again, while the depiction of the bottle in a noose is meant to be humorous, it does not undercut the net impression that drinking POM extends your life to the extent that the drinker will "Cheat death."

Qualifying Language. Many of the ads also include adjectives attached to scientific claims (*e.g.*, "*emerging* science suggests," "*promising* results," "*preliminary* studies, " "*initial* scientific research") (emphasis added). However, the Commission does not find that these adjectives effectively qualify the claims conveyed in the challenged ads, when viewed in the context of each ad in its entirety.[3] For example, Figure 20 states in part: "POM Wonderful 100% pomegranate Juice is supported by $23 million of initial scientific research from leading universities, which has uncovered encouraging results . . . ." While the ad literally states that the research is "initial" and has produced "encouraging results," the references to the fact that the research has taken place at "leading universities" and that it cost $23 million overwhelm these qualifiers. Moreover, in ads specifically discussing the results of scientific studies, simply stating that the studies are "initial" or "hopeful" or "promising" does not neutralize the claims made when the specific results are otherwise described in unequivocally positive terms. For instance, Figures 25 and 28-32 state that "an initial UCLA study on our juice found hopeful results for prostate health, reporting 'statistically significant prolongation of PSA doubling times,' according to Dr. Allen J. Pantuck in *Clinical Cancer Research*, 2006." In these examples, the words "initial" and "hopeful" do not undercut the message that the results of the study were statistically significant and positive for PSA doubling times. The application of these principles regarding qualifiers is consistent with the Commission's experience in other advertising contexts. *See, e.g.*, Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. ' 255.2 (ads with consumer endorsements will likely be interpreted as conveying that the endorser=s experience is representative of what

[3] Commissioner Ohlhausen's view is that, in the context of certain challenged ads, the use of these qualifiers warrant the introduction of extrinsic evidence before the Commission can find that an advertisement conveys establishment claims. *See* Commissioner Ohlhausen's Concurring Statement.

consumers will generally achieve, even when they include disclaimers such as "Results not typical" and "These testimonials are based on the experiences of a few people and you are not likely to have similar results");[4] and FTC Staff Report, *Effects of Bristol Windows Advertisement with an "Up To" Savings Claim on Consumer Take-Away and Beliefs*, (May 2012) *available at* http://www.ftc.gov/opa/2012/06/uptoclaims.shtm (when marketers use the phrase "up to" in their ads, such as making a claim that consumers will save "up to 47%" in energy costs by purchasing replacement windows, the qualifier does not affect consumers' overall takeaway that the percentage savings depicted is typical of what they can expect to achieve).

B. Facial Analysis of Individual Exhibits

Figure 1. CX0013: 2003 press release

The Commission adopts the findings and conclusions of the ALJ with regard to CX0013. *See* ID at ¶¶ 416-420. Accordingly, we conclude that this press release conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily treats, prevents or reduces the risk of heart disease and that these claims have been scientifically established.

Figure 2. CX0016: "Drink and be healthy" print advertisement

The Commission adopts the findings and conclusions of the ALJ with regard to CX0016. *See* ID at ¶¶ 290-296. Accordingly, we conclude that CX0016 conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily prevents or reduces the risk of heart disease and that these claims have been scientifically established.

Figure 3. CX0029: "10 out of 10 People" print advertisement

The Commission adopts the findings and conclusions of the ALJ with regard to CX0029. *See* ID at ¶¶ 297-299, 301-305. Accordingly, we conclude that CX0029 conveyed to at least a significant minority of reasonable consumers that drinking eight

[4] In Commissioner Ohlhausen's view, the use of qualified terms such as "preliminary studies," or "initial studies" in the main text of an ad is significantly different than including a disclosure like "results not typical" in small print at the bottom of an ad.

ounces of POM Juice daily treats, prevents or reduces the risk of heart disease and that these claims have been scientifically established.

Figure 4. CX0031: "Floss Your Arteries" print advertisement
The Commission adopts the conclusions of the ALJ that CX0031 conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily treats, prevents or reduces the risk of heart disease. *See* ID at ¶¶ 440-445. The statement that just drinking eight ounces a day "can reduce plaque by up to 30%" contributes to the treatment, prevention, and risk reduction messages, because an elevated level of plaque in the arteries is associated with the heart disease.

Additionally, the Commission reverses the ALJ's conclusion that the ad did not convey that the efficacy claims are clinically proven. *See* ID at ¶ 448. The Commission concludes that the precise language that "[j]ust eight ounces a day can reduce plaque by up to 30%," within the context of the advertisement's headline and imagery of the POM bottle on a medicine cabinet shelf, conveyed to at least a significant minority of reasonable consumers that the efficacy claims made in this advertisement have been scientifically established. A reduction in the amount of plaque in an individual's arteries cannot be known through casual observation; it must be measured by a medical professional. Thus, the use of language communicating this specific quantified result conveyed that the results were gauged through scientific measurement and that the claim is therefore scientifically established.

Figure 5. CX0033: "Life Support" print advertisement
The Commission adopts the findings and conclusions of the ALJ with regard to CX0033. *See* ID at ¶¶ 449-455. Accordingly, we conclude that this ad conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily prevents or reduces the risk of heart disease.

Figure 6. CX0034: "Amaze Your Cardiologist" print advertisement
The Commission adopts the findings and conclusions of the ALJ that CX0034 conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice

daily, treats, prevents or reduces the risk of heart disease. *See* ID at ¶¶ 456-464.

The statement that the antioxidants in POM fight free radicals that "can cause sticky, artery clogging plaque" helped convey that POM prevents or reduces the risk of heart disease. The statement that a glass a day "can reduce plaque by up to 30%" bolsters this prevention and risk reduction message and also contributes to a claim that POM treats existing heart disease, as an elevated level of plaque in the arteries is associated with heart disease. Further, the ad makes two references to being able to "amaze[]" a cardiologist, a physician specializing in heart disorders such as coronary disease. Most consumers would not have any reason to visit a cardiologist except for diagnosis or treatment of heart disease. Thus, the statement "amaze your cardiologist" along with the remaining text implies that drinking POM will produce significant results for a consumer with reason to visit a cardiologist, *i.e.*, with heart disease.

The Commission reverses the ALJ's finding that this advertisement did not include an establishment claim. *See* ID at ¶¶ 465-468. The Commission concludes that the precise language that a "glass a day can reduce plaque by up to 30%," within the context of the advertisement's headline, medical imagery, and text conveyed to at least a significant minority of reasonable consumers that the efficacy claims made in this advertisement have been scientifically established. A reduction in the amount of plaque in an individual's arteries cannot be known through casual observation; it must be measured by a medical professional. Thus, the use of language communicating this specific quantified result conveyed that the results were gauged through scientific measurement, and that the claim is therefore scientifically established.

Figure 7. CX0036: "Cheat Death" print advertisement

The Commission adopts the findings and conclusions of the ALJ that CX0036 conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily reduces the risk of heart disease. *See* ID at ¶¶ 469-476. We also find that the advertisement conveyed to a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily prevents heart disease. The Commission reverses the ALJ to

the extent that he did not make this finding. ID at ¶ 474. We make this finding based on the net impression of the advertisement, including the statements that drinking eight ounces of POM Juice a day "can help prevent … heart disease," and "[t]he sooner you drink it, the longer you will enjoy it," as well as imagery of the POM Juice bottle with a noose around the neck of the bottle.

Figure 8. CX0044: September 2005 press release

The Commission adopts the findings and conclusions of the ALJ with regard to CX0044. Accordingly, we conclude that this exhibit conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily, treats, prevents or reduces the risk of heart disease, and that these claims have been scientifically established. *See* ID at ¶¶ 421-427.

Figure 9. CX0065: July 2006 press release

The Commission adopts the findings and conclusions of the ALJ that CX0065 conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice or taking one POMx Pill daily treats prostate cancer, and that this claim has been scientifically established. *See* ID at ¶¶ 428-431. We also conclude that the press release conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice or taking one POMx Pill daily prevents or reduces the risk of heart disease, and that these claims are scientifically established. In this regard, the decision of the ALJ is reversed. *See* ID at ¶¶ 585-586. Several factors contribute to this overriding message regarding the impact of POMx Pills and POM Juice on heart disease and prostate cancer. First, the press release references scientific research specifically indicating that POMx and POM Juice "may protect against cardiovascular … disease[]." Likewise, the press release refers specifically to published research from the American Association for Cancer Research, which claimed that daily consumption of pomegranate juice significantly prolonged PSA doubling time, which is a protein marker for prostate cancer. In addition, the press release quoted comments by a "Professor of Medicine" and "Director, UCLA Center for Human Nutrition" about "the effects" of POMx and POM Juice on prostate cancer.

Figure 10. CX1426 Ex. I: Antioxidant Superpill Brochure

The Commission adopts the findings and conclusions of the ALJ with regard to CX1426 Ex. I. Accordingly, we conclude that this exhibit conveyed to least a significant minority of reasonable consumers that drinking eight ounces of POM Juice or taking one POMx Pill daily treats, prevents or reduces the risk of heart disease and prostate cancer, and that these claims have been scientifically established. *See* ID at ¶¶ 328-342.

The efficacy and establishment claims for treatment of prostate cancer and heart disease are conveyed through language describing scientific studies purportedly showing that drinking POM slows PSA doubling time by 350% and causes a significant decrease in cancer regrowth rate for men with advanced prostate cancer, and that drinking POM caused a 30% decrease in arterial plaque for patients with atherosclerosis and a 17% improvement in blood flow for patients with impaired blood flow to the heart.

The ad also conveyed prevention and risk reduction claims for these two diseases. The ad underscores the importance of taking an antioxidant supplement by identifying the underlying problem of free radicals, which may be linked to "serious health threats like cancer and heart disease. In fact, scientists have already linked free radicals to as many as 60 different types of diseases." The ad also states that: "Science tells us that pomegranate antioxidants neutralize free radicals, helping to prevent the damage that can lead to disease," and that POM "promotes heart and prostate health" and "guards your body against free radicals." These statements contributed to the net impression that the POMx Pill or POM Juice will prevent or reduce the risk of heart disease and prostate cancer in addition to treating these diseases.

Figure 11. CX0103: "Decompress" print advertisement

The Commission adopts the findings and conclusions of the ALJ that the evidence fails to show that CX0103 conveyed to a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily treats heart disease. *See* ID at ¶ 587. However, we find that this exhibit conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily prevents or reduces the risk of heart disease and that these claims have been scientifically established. In this regard, the decision of the ALJ is reversed. The ad

containing medical imagery depicts the POM Juice bottle wrapped in a blood pressure cuff. Moreover, express language in the ad establishes a link between POM Juice, which "helps guard … against free radicals [that] … contribute to disease," and the $20 million of "scientific research from leading universities, which has uncovered encouraging results in prostate and cardiovascular health." The ad also states that POM Juice will help "[k]eep your ticker ticking." In combination, these elements communicate the message that POM Juice prevents or reduces the risk of heart disease, and that those efficacy claims are scientifically established.

Figure 12. CX0109: "Heart Therapy" print advertisement

The Commission finds that CX0109 conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily prevents or reduces the risk of heart disease. This exhibit is analogous to CX0103 (Figure 11 above) in that the text of the advertisement states that drinking eight ounces of POM Juice will "[k]eep your heart healthy," and that scientific evidence "has uncovered encouraging results in . . . cardiovascular health." We also note the bold headline touting "Heart Therapy." In this regard, the decision of the ALJ is reversed. ID at ¶ 587. Additionally, the Commission finds that this advertisement conveyed to at least a significant minority of reasonable consumers that the efficacy claims have been scientifically established. The text stating that POM Juice "is supported by $20 million of initial scientific research from leading universities, which has uncovered encouraging results in prostate and cardiovascular health" contributes to this net impression. In this regard, the decision of the ALJ is also reversed.

Figures 13-14. CX0120: "One small pill for mankind;" and CX0122: "Science Not Fiction" print advertisements

The Commission adopts the findings and conclusions of the ALJ with regard to CX0120 and CX0122 that the evidence fails to demonstrate that these exhibits conveyed to a significant minority of reasonable consumers that drinking eight ounces of POM Juice or taking one POMx Pill daily prevents or reduces the risk of prostate cancer. *See* ID at ¶ 587.

However, the Commission finds that these exhibits conveyed to at least a significant minority of consumers that drinking eight

ounces of POM Juice or taking one POMx Pill daily treats prostate cancer. The text in CX0120 and CX0122 specifically states that a study showed "hopeful results for men with prostate cancer." Further, in CX0120, the advertising copy, indicating that it is a quote from the *New York Times*, states that "[f]indings from a small study suggest that pomegranate juice may one day prove an effective weapon against prostate cancer." While the ads include language that attempts to qualify the claims conveyed, the Commission finds that these attempts to qualify fail to counteract the net impression conveyed through the use of strong descriptive language such as "incredibly powerful," "astonishing levels of antioxidants," and "so extraordinary, it's patent pending." In this regard, the decision of the ALJ is reversed.

Additionally, the Commission finds that the claims made in these exhibits conveyed to at least a significant minority of reasonable consumers that the prostate cancer treatment claims have been scientifically established. Both exhibits state that "an initial UCLA medical study … showed hopeful results for men with prostate cancer." Further, the subtitle in CX0122 states that the product is "backed by $20 million in medical research." In this regard, the decision of the ALJ is also reversed.

Figure 15. CX0128: June 2007 press release

The Commission adopts the findings and conclusions of the ALJ with regard to CX0128. Accordingly, we conclude that this exhibit conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice or taking one POMx Pill daily treats erectile dysfunction and that this claim has been scientifically established. *See* ID at ¶¶ 432-439.

Figure 16. CX1426 Ex. M: POMx Heart Newsletter

The Commission adopts the findings and conclusions of the ALJ with regard to CX1426 Ex. M. Accordingly, we conclude that this exhibit conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice or taking one POMx Pill daily treats, prevents or reduces the risk of heart disease, and that these claims have been scientifically established. *See* ID at ¶¶ 346-350.

Figure 17. CX1426 Ex. N: POMx Prostate Newsletter

The Commission adopts the findings and conclusions of the ALJ with regard to CX1426 Ex. N. Accordingly, we conclude that this exhibit conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice or taking one POMx Pill daily treats, prevents or reduces the risk of prostate cancer, and that these claims have been scientifically established. *See* ID at ¶¶ 351-354. The Commission finds, as the ALJ did, that this newsletter draws a clear link between antioxidants and a reduction in the risk of prostate cancer. After noting that prostate cancer is "the second leading cause of cancer related to death in the United States," the newsletter addresses "risk factors" for prostate cancer, including "diet," and advises a diet that is rich in antioxidants. The newsletter also expressly informs readers of medical research in "top peer-reviewed medical journals that document the pomegranate's antioxidant health benefits such as heart and prostate health."

Figure 18. CX0169/CX1426 Ex. L: "The Power of POM" print advertisement

Based on the overall net impression of CX0169/CX1426 Ex. L, the Commission finds that this exhibit conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice or taking a POMx Pill daily treats, prevents or reduces the risk of heart disease and prostate cancer, and that these claims are scientifically established. This ad includes a discussion of the effects of antioxidants on "free radicals [that] aggressively destroy healthy cells in your body – contributing to premature aging and even disease. The good news is POM Wonderful pomegranate antioxidants neutralize free radicals." The ad also describes $23 million in medical research including a study published in *Clinical Cancer Research*, in which pomegranate juice "delays PSA doubling time in humans." In addition, the ad discusses two studies showing "promising results for heart health," including improvement in "myocardial perfusion in coronary heart patients," and the beneficial effect of pomegranate juice on atherosclerosis. Although the ad attempts to qualify the discussion of the medical research by using the words "promising," "hopeful," and "preliminary," the Commission finds that these adjectives are ineffective, especially where the references to the studies are introduced with a bolded "**Backed by Science**" statement. We also find that the "results"

of the studies are made especially notable by being presented in red text.

In addition, the medical imagery of the prominent caduceus symbol and the use of the subscript "x" in POMx, as well as the reference to $23 million dollars in medical research published in named medical journals all combine to convey to at least a significant minority of reasonable consumers that the claims have been scientifically established. Finally, we note that the text and imagery indicate equivalence between eight ounces of POM Juice and one POMx Pill. Therefore, we reverse the findings of the ALJ with regard to this exhibit.

Figures 19 and 24. CX0180/CX1426 Ex. K: "The antioxidant Superpill;" and CX0279: "Science, Not Fiction" print advertisements

Based on the overall net impression of CX0180/CX1426 Ex. K and CX0279, the Commission finds that these exhibits conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice or taking a POMx Pill daily treats, prevents or reduces the risk of heart disease and prostate cancer, and that these claims are scientifically established. These ads include references to $23 million and $25 million in medical research including a study published in *Clinical Cancer Research* that reports "statistically significant prolongation of PSA doubling times." The ads also describe two studies showing a decrease in "stress-induced ischemia," and "[p]omegranate juice consumption resulted in a significant IMT reduction by up to 30% ," referring to arterial plaque.

In addition, the medical imagery of the caduceus symbol and the use of the subscript "x" in POMx, the references to millions of dollars in medical research published in named medical journals, and the attribution of results to three specific named doctors, all combine to convey to at least a significant minority of reasonable consumers that the claims have been scientifically established. Finally, we note that the text and imagery indicate equivalence between eight ounces of POM Juice and one POMx Pill. Therefore, we reverse the findings of the ALJ with regard to these exhibits.

Figure 20. CX0192: "What Gets Your Heart Pumping" print advertisement

The Commission concludes that the express language of this ad referring to "healthy arteries," the fact that pomegranate juice "helps guard your body against free radicals" that "aggressively destroy healthy cells in your body and contribute to disease," and that "[e]ight ounces a day is enough to keep your heart pumping," created the net impression to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily prevents or reduces the risk of heart disease. In addition, we find the specific reference to "$23 million of initial scientific research from leading universities, which has uncovered encouraging results in prostate and cardiovascular health," signals that this beneficial effect has been scientifically established. We therefore reverse the findings of the ALJ with regard to this exhibit.

Figures 21 and 27. CX0314: "Drink to Prostate Health;" and CX0372, CX0379, CX0380: Super Health Powers series, magazine wraps

The Commission adopts the findings and conclusions of the ALJ with regard to CX0314, CX0372, CX0379, CX0380. *See* ID at ¶¶ 306-320. Accordingly, we conclude that these exhibits conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily treats, prevents or reduces the risk of prostate cancer, and that these claims have been scientifically established.

Figure 22. CX0260/CX1426 Ex. B: "Drink to Prostate Health" print advertisement

The Commission finds that this exhibit conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily treats prostate cancer and that this claim is scientifically established. Factors contributing to this net impression include the language "Drink to prostate health," and express language equating POM Juice to "good medicine." Furthermore, the ad describes a "recently published preliminary medical study [that] followed 46 men previously treated for prostate cancer" which found that "[a]fter drinking 8 ounces of POM Wonderful 100% Pomegranate Juice daily for at least two years, these men experienced significantly longer PSA doubling

times." Therefore, we reverse the findings of the ALJ with regard to this exhibit.

Figure 23. CX0274/CX1426 Ex. C: "I'm Off to Save Prostates" print advertisement

Based on the overall net impression, the Commission finds that this exhibit conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily prevents or reduces the risk of prostate cancer, and that these claims are scientifically established. The headline "I'm off to save PROSTATES" when read in conjunction with the text that POM Juice "is committed to defending healthy prostates" and will "improve prostate health," implies that POM Juice protects men from prostate cancer. In particular, the word "defend[]" in conjunction with "save" gives the impression that the ad is conveying information about a serious threat to prostates — prostate cancer. The message of "defense" is one of warding off this danger, *i.e.*, preventing or reducing the risk of prostate cancer. In addition, the language that POM Juice is "backed by $25 million in vigilant medical research" communicates that these claims are scientifically established. Therefore, we reverse the findings of the ALJ with regard to this advertisement.

Figures 25 and 28-32. CX0280: "Live Long Enough;" CX0331/CX1426 Ex. J: "Healthy Wealthy;" CX0328: "Your New Health Care Plan;" CX0337: "First Bottle You Should Open;" CX0342/CX0353: "Life Insurance Supplement;" and CX0348/CX0350: "24 Scientific Studies" print advertisements

The Commission concludes that these exhibits conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice or taking one POMx Pill daily treats, prevents or reduces the risk of heart disease and prostate cancer and that these claims have been scientifically established. These ads begin with the general proposition that "antioxidants are critically important to maintaining good health because they protect you from free radicals, which can damage your body," and that POMx is an "ultra-potent antioxidant extract," that will "help protect you from free radicals." Further, the ads state that research has "revealed promising results for prostate and cardiovascular health." In combination, these statements contribute to the net impression that POM prevents and reduces the risk of prostate cancer and heart disease.

Each of these ads describe a UCLA study on POM juice in *Clinical Cancer Research* that found "statistically significant prolongation of PSA doubling times." Because PSA doubling time is associated with prostate cancer, this statement implies that POM juice treats prostate cancer. In addition, the ads cite a medical study in the *American Journal of Cardiology* that showed a reduction in stress-induced ischemia, which the ad explains means restricted blood flow to the heart. Four of the six ads (CX0280, CX0331, CX0328, and CX0337) also discuss a study that showed consumption of pomegranate juice "resulted in significant reduction in IMT (thickness of arterial plaque) by up to 30% after one year."

Several elements create the net impression that the above claims are scientifically established, including: the express references to $25 million and $32 million in "medical research at the world's leading universities;" the findings of studies regarding POM Juice's impact on PSA doubling times and stress-induced ischemia published in *Clinical Cancer Research* and the *American Journal of Cardiology*, respectively; and the attribution of these test results to several specifically-named doctors. We note that the text and imagery indicate equivalence between eight ounces of POM Juice and one POMx Pill.

Accordingly, we reverse the ALJ's findings with regard to these ads.

Figure 26. CX0475/CX1426 Ex. A: Juice Bottle Hang Tag

The Commission adopts the findings and conclusions of the ALJ with regard to CX0475/CX1426 Ex. A that the evidence fails to establish that the juice bottle hang tag conveyed to a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily treats, prevents or reduces the risk of heart disease, prostate cancer, or ED, or that such claims are clinically established.

Figure 33. CX0351/CX0355: "Only Antioxidant Supplement Rated X" print advertisement

The Commission adopts the ALJ's findings and conclusions that these exhibits conveyed to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice or

taking one POMx Pill daily treats, prevents or reduces the risk of, erectile dysfunction, and that these claims are clinically proven. *See* ID at ¶¶ 321-327.

The Commission also concludes that these nearly identical advertisements convey to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice or taking one POMx Pill daily treats, prevents or reduces the risk of heart disease and prostate cancer, and that these claims have been scientifically established. These ads begin with the general proposition that "antioxidants are critically important to maintaining good health because they protect you from free radicals, which can damage your body," and that POMx is an "ultra-potent antioxidant extract," that will "help protect you from free radicals." Further, the ads state that research has "revealed promising results for . . . prostate and cardiovascular health." In combination, these statements contribute to the net impression that POM prevents and reduces the risk of prostate cancer and heart disease.

Each ad describes a UCLA study on POM juice in *Clinical Cancer Research* that found "statistically significant prolongation of PSA doubling times." Because PSA doubling time is associated with prostate cancer, this statement implies that POM juice treats prostate cancer. In addition, the ads cite a medical study on POM Juice in the *American Journal of Cardiology* showing a reduction in stress-induced ischemia, which the ad explains means restricted blood flow to the heart. We note that the text and imagery indicate equivalence between eight ounces of POM Juice and one POMx Pill.

Several elements create the net impression that the prostate cancer and heart disease claims are scientifically established. Each ad explicitly references $32 million or $34 million in "medical research at the world's leading universities" and then goes on to elaborate on the findings of studies regarding the impact of POM Juice on PSA doubling times, as published in *Clinical Cancer Research*, and POM Juice's impact on stress-induced ischemia, as published in the *American Journal of Cardiology*.

Accordingly, we reverse the ALJ's findings insofar as we find the ads convey efficacy and establishment claims of prostate cancer and heart disease treatment, risk reduction, and prevention.

Figure 34. CX0463: "Heart Therapy" Animated Online Ad

The Commission adopts the findings and conclusions of the ALJ with regard to CX0463 that the evidence fails to establish that this online advertisement conveyed to a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily prevents or reduces the risk of heart disease. *See* ID at ¶ 587.

Figure 35. CX0466/CX1426 Ex. H "Off to Save Prostates" Animated Online Ad

The Commission adopts the findings and conclusions of the ALJ with regard to CX0466/CX1426 Ex. H that the evidence fails to establish that this advertisement conveyed to a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily prevents or reduces the risk of prostate cancer. *See* ID at ¶ 587.

Figures 36 and 37. CX0473: Video Captures of POMWonderful.com Website, including the "Community" Section of the Site; CX0336: Printout of portions of POMWonderful.com "Community" Section of the Site

CX0473 contains video captures of the POMWonderful.com website, including the "Community" section the site, on various dates in 2009 and 2010. CX0336 is a printout of several pages from the "Community" section of the POMWonderful.com website from December 2010. It is unclear whether the ALJ considered the Community section of the POMWonderful.com site separately from the rest of the site. *See* IDF ¶¶ 368-85. Here, we address the site in its entirety.

In the video captures, textual references, graphs, medical imagery, commentary from POM executives and "POM experts" with medical backgrounds, and citations to scientific studies in combination convey the following claims:

Prevention and Risk Reduction Claims. Some examples of the elements that contribute to the message that POM prevents or reduces the risk of heart disease and prostate cancer are:

- One video on the site opens with a voiceover stating that "Pomegranate contains powerful antioxidants needed to prevent cancer and diseases" Videotape: PomWonderful Ads at 00:23-1:03 (Apr.-May 2009). A page on the site titled "Cancer – Emerging Science" states that: "Emerging science has shown that diets rich in fruits and vegetables that contain antioxidants, along with regular exercise, might slow or prevent the development of cancer. [A] great source[] of antioxidants [is] POM Wonderful Pomegranate Juice … ." Videotape: PomWonderful Ad Health Benefits at 03:44 (April-May 2009). The one specific type of cancer highlighted on the website is prostate cancer. For example, the website features a video nearly seven minutes in length titled "Let's Talk About Prostate Cancer with David Heber, MD" Videotape: PomWonderful Ad at 00:14-07:07 (Dec. 2009). A portion of the "Community" portion of the website titled "POM's Health Benefits: Fact or Fiction" quotes Dr. Bradley Gillespie, identified as POM's Vice President of Clinical Development, as stating: "Some of our research areas are beginning to accumulate quite impressive clinical data. For example, I think the human evidence in prostate health is one of the strongest areas, and we continue to fund more research here." CX0336 at 1.

- The site states that the antioxidant activity in POM Juice decreases inflammation, and that along with oxidative stress, inflammation has been implicated in a number of identified diseases, including atherosclerosis, heart failure, hypertension, and cancer. Videotape: PomWonderful Ad at 02:22-02:32 (Oct. 2009).

- In addition, on a page of the website titled "Other protective effects," it states that "Pomegranate juice has a superior ability to prevent LDL cholesterol from being oxidized by free radicals," and that LDL oxidation "may be a precursor to atherosclerosis or arterial plaque." Videotape: PomWonderful Ad at 01:45-02:02 (Oct. 2009).

Treatment Claims. The site describes in detail studies of patients with heart disease, prostate cancer, and erectile dysfunction who

experienced positive effects from drinking POM juice, thereby conveying that POM products treat these three diseases.

Establishment Claims. Through a variety of means the site conveys that all of these disease prevention, risk reduction, and treatment claims are clinically proven, such as citation to clinical studies, reference to specific named physicians – including one identified as a winner of the Nobel Prize in medicine – and statements that POM is backed by tens of millions of dollars in scientific research and "backed by science." We also note the statement from Defendant Tupper that: "When you look at the medical research that has been conducted on POM and compare it to research that's been done on other foods and beverages, what's been done on POM is way, way more extensive. It's almost more akin to research being done on pharmaceutical drugs." CX0336 at 0001.

Figure 38. CX0473: Video Capture of PomegranateTruth.com Website

CX0473 contains a video capture of the PomegranateTruth.com website from April-May 2009.

The Commission adopts the findings and conclusions of the ALJ that the PomegranateTruth.com website conveys to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice or taking one POMx Pill daily treats, prevents or reduces the risk of heart disease and that these claims have been scientifically proven. *See* ID at ¶¶ 411-414. The Commission also adopts the findings and conclusions of the ALJ that the PomegranateTruth.com website fails to establish that a significant minority of reasonable consumers would interpret the website to claim that drinking eight ounces of POM Juice or taking one POMx Pill daily prevents or reduces the risk of prostate cancer or erectile dysfunction. *See* ID at ¶ 591.

However, the Commission also finds that the PomegranateTruth.com website conveys to a significant minority of reasonable consumers that drinking eight ounces of POM Juice or taking one POMx Pill daily treats prostate cancer and erectile dysfunction and that these claims have been scientifically proven. In this regard, the decision of the ALJ is reversed.

With regard to the prostate cancer treatment claim, the Commission notes the description of the UCLA study of men with prostate cancer who drank POM Juice and experienced an increase in PSA doubling time from 15 to 54 months. The site states, "PSA is a protein marker for prostate cancer, and slower PSA doubling time indicates slower disease progression." This description of the study constitutes both an efficacy and an establishment claim for prostate cancer treatment, although the establishment claim is bolstered through other elements, such as the statement that POM products are "Backed by science" and $25 million in medical research, alongside the prominent depiction of a caduceus.

With regard to the erectile dysfunction treatment claim, the Commission notes the description of a study published in the *International Journal of Impotence Research* regarding 61 subjects with mild to moderate erectile dysfunction who drank POM Juice and were 50% more likely to experience improved erections. This description constitutes both an efficacy and an establishment claim, although the establishment claim is bolstered by the same elements described above.

Figure 39. CX0473: Video Captures of POMPills.com Websites

CX0473 contains video captures of the POMPills.com website from April-May 2009 and January 2010.

The Commission adopts the findings and conclusions of the ALJ that the POMPills.com website conveys to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice or taking one POMx Pill daily treats, prevents or reduces the risk of heart disease and prostate cancer, and that these claims have been scientifically proven. See ID at ¶¶ 386-410. The Commission also adopts the findings and conclusions of the ALJ that the POMPills.com website conveys to at least a significant minority of reasonable consumers that drinking eight ounces of POM Juice or taking one POMx Pill daily treats erectile dysfunction and that this claim have been scientifically proven.

See also ID at ¶¶ 387, 408. To the extent that the ALJ's decision can be read to state that the ALJ found that the website conveyed claims that POMx prevents and reduces of risk for erectile dysfunction, *see* ID ¶ 387, that finding is reversed.

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Figures Appendix

Tab	Exhibit Number	Date	Description
1	CX0013	01/09/2003	January 2003 POM Juice Press Release
2	CX0016	10/12/2003	"Drink and be healthy." Ad
3	CX0029	11/01/2004	"10 Out of 10 People Don't Want to Die" Ad
4	CX0031	12/01/2004	"Floss your arteries. Daily." Ad
5	CX0033	12/30/2004	"Life support." Ad
6	CX0034	02/01/2005	"Amaze your cardiologist." Ad
7	CX0036	03/10/2005	"Cheat death." Ad
8	CX0044	09/16/2005	September 2005 POM Juice Press Release
9	CX0065	07/10/2006	July 2006 POMx Press Release
10	CX1426 at 0038-42 Ex. I	2007	"Antioxidant Superpill." Brochure
11	CX0103	03/01/2007	"Decompress." Ad
12	CX0109	04/01/2007	"Heart therapy." Ad
13	CX0120	05/28/2007	"One small pill for mankind." Ad
14	CX0122	06/01/2007	"Science, not fiction." Ad
15	CX0128	06/27/2007	June 2007 POM Juice Press Release
16	CX1426 Ex. M	Summer 2007	POMx Heart Newsletter
17	CX1426 Ex. N	Fall 2007	POMx Prostate Newsletter
18	CX0169/ CX1426 Ex. L	01/06/2008	"The power of POM" Ad
19	CX 0180/ CX1426 Ex. K	02/03/2008	"The antioxidant superpill." Ad
20	CX0192	05/01/2008	"What gets your heart pumping?" Ad
21	CX0314	08/25/2008	"Drink to prostate health." Magazine Wrap
22	CX0260/ CX1426 Ex. B	12/01/2008	"Drink to prostate health." Ad
23	CX0274/ CX1426 Ex. C	02/01/2009	"I'm off to save PROSTATES!" Ad
24	CX0279	03/01/2009	"Science, not fiction." Ad
25	CX0280	03/12/2009	"Love Long Enough." Ad
26	CX0475/CX1426 Ex. A	September 2009	"Super Health Powers" Juice Bottle Hang Tag

Tab	Exhibit Number	Date	Description
27	CX0372/ CX0379/ CX0380	09/02/2009	"Lucky I have super Health Powers" Magazine Wrap
28	CX0331/ CX1426 Ex. J	09/27/2009	"Healthy. ~~Wealthy.~~ And Wise." Ad
29	CX0328	11/08/2009	"Your New Health Care Plan." Ad
30	CX0337	01/03/2010	"The First Bottle You Should Open in 2010" Ad
31	CX0342/ CX0353	02/22/2010	"Take Out a Life Insurance Supplement" Ad
32	CX0348/ CX0350	04/01/2010	"24 Scientific Studies" Ad
33	CX0351/ CX0355	06/01/2010	"The Only Antioxidant Supplement Rated X" Ad

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FOR IMMEDIATE RELEASE

Editor's Note: Copies of the medical research, digital photos, interviews and juice samples are available upon request.

CONSUMER DEMAND FOR POM WONDERFUL'S REFRIGERATED ALL-NATURAL POMEGRANATE JUICE GROWS AS THE HEALTH BENEFITS OF POMEGRANATE JUICE BECOME RECOGNIZED.

Scientific support indicates that drinking pomegranate juice provides the body with an active source of antioxidants and shows promise against cardiovascular disease.

LOS ANGELES (January 9 - 2003) - POM Wonderful®, the first company to sell a refrigerated super-premium pomegranate juice, today released information from published medical research regarding the important health benefits associated with its pomegranate juice. It was announced that the antioxidant activity of POM Wonderful pomegranate juice exceeds that of other popular beverages known for their antioxidant properties including red wine, cranberry juice, blueberry juice, orange juice, white wine, red grape juice, white grape juice, apple juice, and grapefruit juice. The antioxidant activity of pomegranate juice is high due to the polyphenols it contains. Polyphenols are powerful, natural antioxidants. Antioxidants may be useful in counteracting premature aging, Alzheimer's, and cancer.

The research shows that the antioxidants found in pomegranate juice may also be more important than previously thought in promoting optimum cardiovascular health. Medical research shows that daily consumption of just 1.5 mmol of polyphenols from pomegranate juice (the equivalent of an 8 fl oz serving of POM Wonderful pomegranate juice) confers heart health benefits by lessening factors that contribute to atherosclerosis (plaque in the arteries).[1] According to the American Heart Association, cardiovascular diseases rank as America's No. 1 killer. In addition, 61.8 million Americans have some form of cardiovascular disease such as diseases of the heart, high blood pressure, and hardening of the arteries.[2]

General Antioxidant Effects

Free radicals are produced as a result of normal metabolic processes, pollution and chemicals in the foods we eat. They attack and damage molecules in the body so that their function is altered. One molecule that is particularly susceptible to attack is LDL (low-density

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lipoprotein) cholesterol. Once attacked and damaged, LDL is said to be oxidized. LDL oxidation is a key factor in the formation of plaque in the arteries, also called atherosclerosis. One of the best ways to defend against the damaging effects of free radicals is to consume foods and beverages that are rich in antioxidants.

Two studies have shown the superior potency of pomegranate antioxidants compared to other popular beverages. In the first study, which used four well-established tests of antioxidant activity, pomegranate juice squeezed from the Wonderful variety of pomegranates had twice the antioxidant activity of both red wine and green tea. Furthermore, pomegranate juice was shown to contain antioxidant compounds not present in either of the other beverages.[3] In a second study, ten beverages known for their antioxidant capacity were tested for their total polyphenol content and their ability to prevent the oxidation of LDL cholesterol (a factor in atherosclerosis). Beverages tested included pomegranate juice (from the Wonderful variety), red wine, apple juice, orange juice, white wine, red grape juice, white grape juice, cranberry juice, blueberry juice, and grapefruit juice. Pomegranate juice surpassed all the other juices in total polyphenol content. It was also the best inhibitor of LDL oxidation.[2]

Effects on Heart Health

The heart is one of the most susceptible of all the organs to premature aging and free radical oxidative stress. Though vulnerable to the effects of oxidative stress, the heart is also receptive to the benefits of antioxidants.[4] New research is showing that antioxidants can play a highly beneficial role in reducing one of the major risk factors in heart disease: atherosclerosis (plaque in the arteries). The progression of atherosclerosis depends on several steps including the oxidation of LDL cholesterol, the uptake of oxidized cholesterol into macrophage cells, clumping of LDL molecules together, and the adhesion of LDL molecules to the inner walls of the blood vessel. In one human study, drinking pomegranate juice containing 1.5 mmol of polyphenols daily for two weeks lowered the susceptibility of LDL cholesterol to oxidation, clumping and adhesion. Furthermore, it increased blood levels of an enzyme, paraoxonase, which protects against oxidation. An additional human study showed that consuming pomegranate juice reduces another enzyme: ACE (angiotensin converting enzyme). Inhibition of ACE lessens the progression of atherosclerosis and it is this enzyme that is targeted by blood pressure medications. Pomegranate juice inhibited ACE by 36% after two weeks of juice consumption. It also caused a 5% decrease in systolic blood pressure, and high blood pressure is a known risk factor for atherosclerosis.[5]

Studies in mice have revealed additional exciting results. When mice predisposed to

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atherosclerosis were given pomegranate juice for 11-14 weeks, the level of LDL oxidation and the uptake of LDL cholesterol into macrophage cells was reduced. Remarkably, the production of atherosclerotic lesions and foam cells (indicators of advanced atherosclerosis) was also reduced by almost half compared to controls.[6] A subsequent study showed that pomegranate juice could actually reduce the size of existing atherosclerotic lesions after two months of pomegranate juice consumption, in effect, reversing atherosclerosis.[7]

About POM Wonderful

POM Wonderful, a subsidiary of Roll International Corporation, cultivates the Wonderful variety of pomegranates in orchards located in the sunny San Joaquin Valley, southwest of Kettleman City, in Central California. The Wonderful variety of pomegranate is renowned for its exquisite sweet flavor, beautiful color, and bountiful juice. In addition to selling fresh pomegranates throughout the United States, **POM** Wonderful has also created a unique, healthy, refreshing super-premium pomegranate juice that is now on sale in the refrigerated produce section of over 900 grocery stores and supermarkets in Southern California, including Von's, Ralph's, Stater Brothers, Bristol Farms, and Gelson's. **POM** Wonderful uses the juice from its fresh pomegranates to make its juice. Pomegranate juice can be enjoyed as a beverage, a drink mixer and in recipes. Each 8 fl oz serving of pomegranate juice contains the juice from approximately two pomegranates. **POM** Wonderful's pomegranate juice is currently available in four flavors, Pure **POM**, **POM** Mango, **POM** Tangerine and **POM** Blueberry and two sizes - 15.2 fl oz and 24 fl oz. The 15.2 fl oz size retails for approximately $3.49, and the 24 fl oz size retails for approximately $5.79. **POM** Wonderful pomegranates and **POM** Wonderful pomegranate juice products promise consistent quality and superb taste. Only fruit and juice that meet the company's strict quality standards appear in store produce sections. **POM** Wonderful prides itself on the quality of its farming operation the sensitivity with which the fruit is hand picked and carried to its sorting and modern juicing facilities, and ultimately delivered to your table. **POM** Wonderful's mission is to educate consumers about the splendor and versatility of this luscious fruit, as well as its refreshing taste and health benefits. To learn more, visit www.pomwonderful.com.

POM Wonderful is a registered trademark of POM Wonderful LLC.

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APPENDIX B
Figure 1

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APPENDIX B
Figure 2

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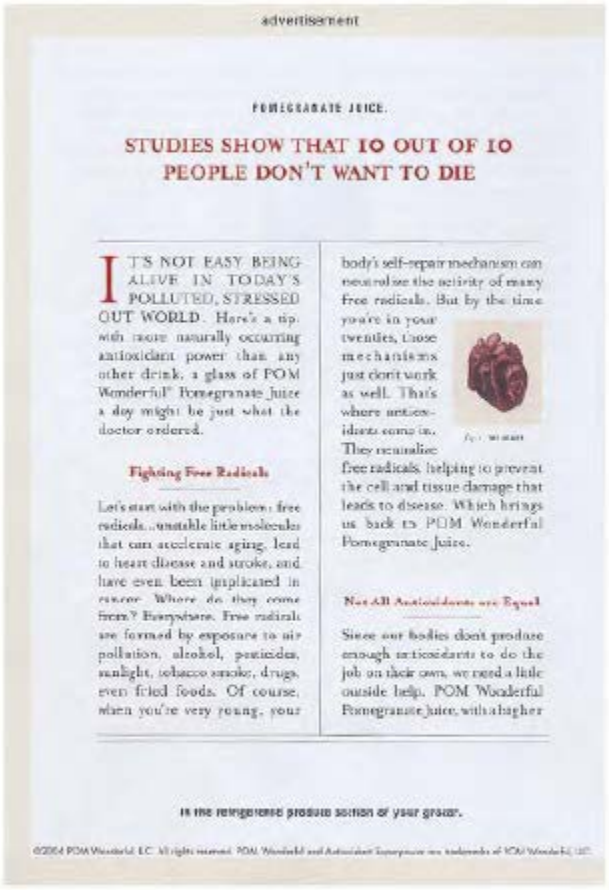
Opinion of the Commission

APPENDIX B
Figure 3

VMS ID: 041120201
RUN DATE: 11/01/2004



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POMEGRANATE JUICE.

STUDIES SHOW THAT 10 OUT OF 10 PEOPLE DON'T WANT TO DIE

IT'S NOT EASY BEING ALIVE IN TODAY'S POLLUTED, STRESSED OUT WORLD. Here's a tip with more naturally occurring antioxidant power than any other drink, a glass of POM Wonderful® Pomegranate Juice a day might be just what the doctor ordered.

Fighting Free Radicals

Let's start with the problem: free radicals...unstable little molecules that can accelerate aging, lead to heart disease and stroke, and have even been implicated in cancer. Where do they come from? Everywhere. Free radicals are formed by exposure to air pollution, alcohol, pesticides, sunlight, tobacco smoke, drugs, even fried foods. Of course, when you're very young, your body's self-repair mechanism can neutralize the activity of many free radicals. But by the time you're in your twenties, those mechanisms just don't work as well. That's where antioxidants come in. They neutralize free radicals, helping to prevent the cell and tissue damage that leads to disease. Which brings us back to POM Wonderful Pomegranate Juice.

Not All Antioxidants are Equal

Since our bodies don't produce enough antioxidants to do the job on their own, we need a little outside help. POM Wonderful Pomegranate Juice, with a higher

In the refrigerated produce section of your grocer.

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APPENDIX B
Figure 3

VMS ID: 04112020I
RUN DATE: 11/01/2004

advertisement

level of antioxidants than any other drink, is a real Antioxidant Superpower!*

Our Research: Heartening

We've been working with a number of top scientists, including a Nobel Laureate, for 6 years now and our seven published, peer-reviewed papers reveal heartening results. Here's the story: Free radicals are the culprits that turn LDL – or "bad" cholesterol – into that sticky stuff that becomes the plaque that clogs your arteries. Our scientific research shows that pomegranate juice is 3 times better than green tea at preventing formation of oxidized (sticky) LDL.* And a clinical pilot study shows that an 8 oz. glass of POM Wonderful 100% Pomegranate Juice, consumed daily, reduces plaque in the arteries up to 30%.*

The Heart Stopping Truth

Remember: heart disease is America's number one killer. For women as well as men. 58% of heart attacks are due to atherosclerosis, or too much plaque in the arteries. That same plaque increases your chance of stroke. One fina scary statistic: half of patients who have a severe heart attack have normal cholesterol levels. In other words, we're all at risk.

Just a Glass a Day

To keep your heart healthy: exercise regularly. Eat a healthy diet. And drink 8 ounces of POM Wonderful Pomegranate Juice. Make every day a good day to be alive.

POM

POM Wonderful Pomegranate Juice
is the Antioxidant Superpower! Drink a glass a day!

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Opinion of the Commission

APPENDIX B
Figure 4

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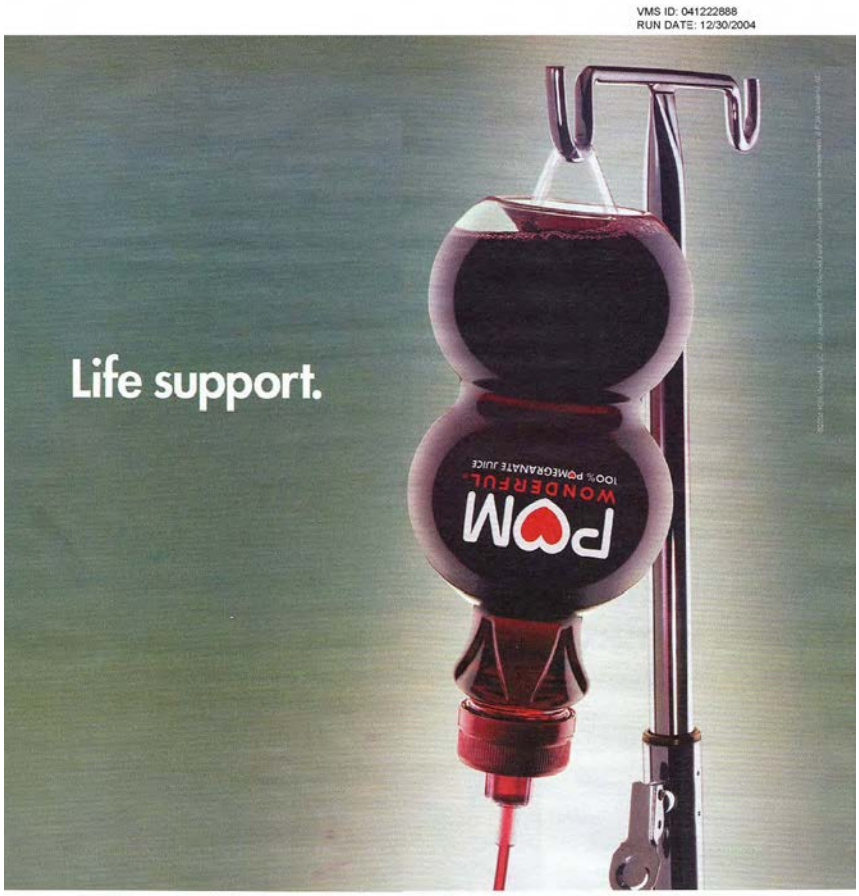
APPENDIX B
Figure 5



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Opinion of the Commission

APPENDIX B
Figure 6

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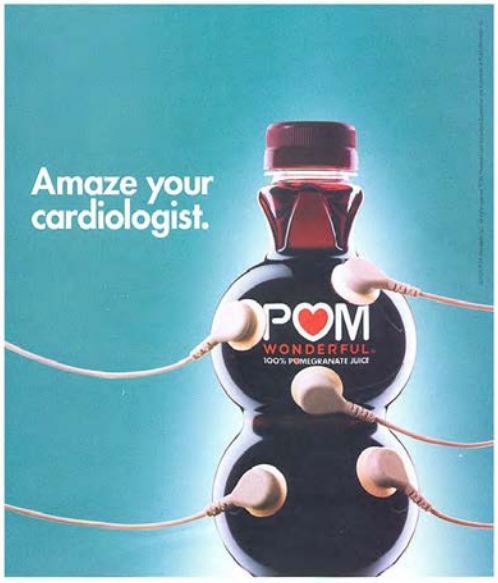
RUN DATE: 02/01/2005



Ace your EKG: just drink 8 ounces of delicious POM Wonderful Pomegranate Juice a day. It has more naturally occurring antioxidants than any other drink. Antioxidants fight free radicals... nasty little molecules that can cause sticky, artery clogging plaque. A glass a day can reduce plaque by up to 30%†. Trust us, your cardiologist will be amazed.

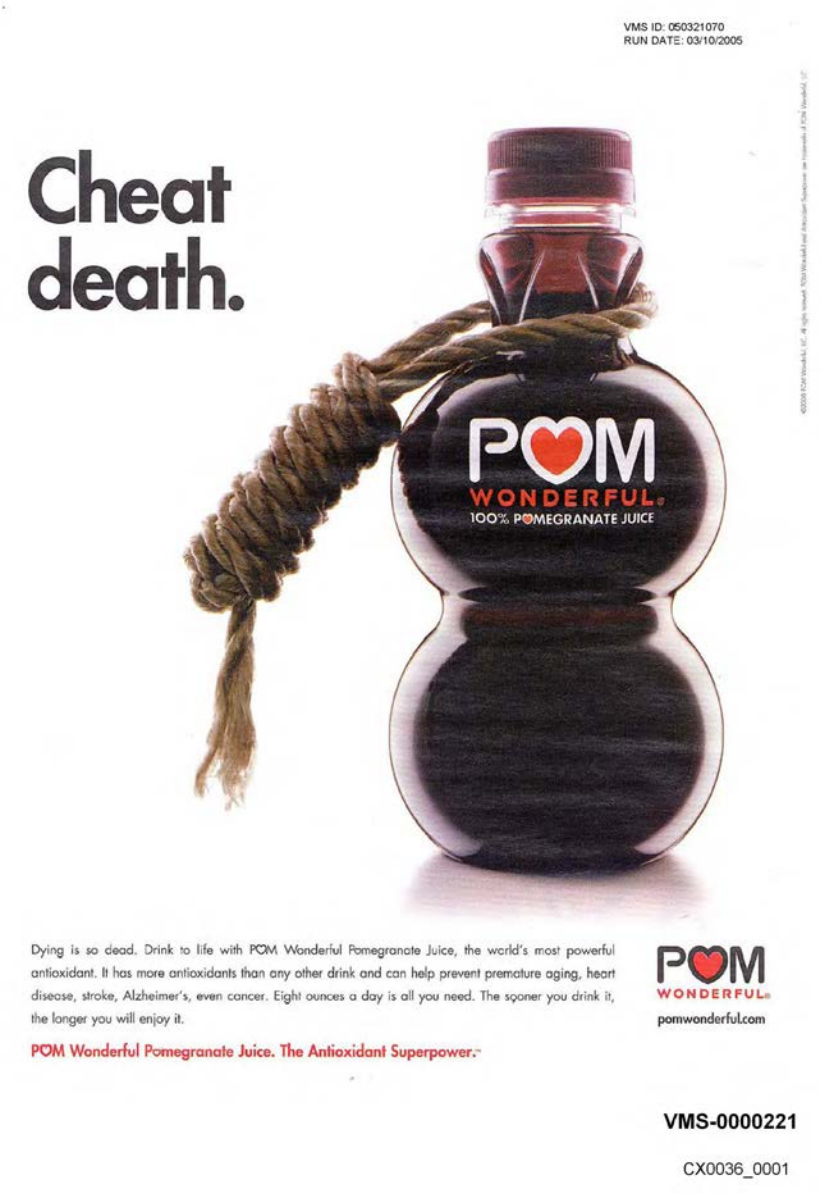
POM Wonderful Pomegranate Juice. The Antioxidant Superpower.*

POM WONDERFUL
pomwonderful.com

VMS-0000219

CX0034_0001

APPENDIX B
Figure 7



Opinion of the Commission

APPENDIX B
Figure 8

Pomegranate Juice May Affect the Progression of Coronary Heart Disease

LOS ANGELES--(BUSINESS WIRE)--Sept. 16, 2005--Men and women with coronary heart disease who drink one glass of pomegranate juice daily may improve blood flow to their heart, according to a new study.

This research is the first randomized, double-blind, placebo-controlled trial showing that pomegranate juice may affect the progression of coronary heart disease, which is the #1 cause of death in the U.S. and in most of the world. Promising results from this research will be published in the September 16th issue of the American Journal of Cardiology, one of the leading peer-reviewed cardiology journals (www.ajconline.org).

Researchers from the non-profit Preventive Medicine Research Institute, University of California, San Francisco, and California Pacific Medical Center studied patients with coronary heart disease who had reduced blood flow to the heart. These 45 patients were randomly assigned into one of two groups: one group who drank a glass of pomegranate juice each day (240 ml/day, which is approximately 8.5 oz/day) or to a placebo group, who drank a beverage of similar caloric content, amount, flavor and color.

After only three months, blood flow to the heart improved approximately 17% in the pomegranate juice group but worsened approximately 18% in the comparison group (i.e., a 35% relative between-group difference). These differences were statistically significant. This benefit was observed without changes in cardiac medications or revascularization in either group. Also, there were no negative

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effects on lipids, blood glucose, hemoglobin A1c, body weight or blood pressure.

Pomegranate juice is rich in polyphenols and other naturally-occurring antioxidants. It demonstrates high capability in scavenging free radicals and inhibiting low-density lipoprotein oxidation in vitro and in vivo. Other studies have shown that pomegranate juice has a number of important health benefits.

"Although the sample in this study was relatively small, the strength of the design and the significant improvements in blood flow to the heart observed after only three months suggest that pomegranate juice may have important clinical benefits in those with coronary heart disease," said senior author, Dean Ornish, M.D., who is founder of the Preventive Medicine Research Institute and clinical professor of medicine at UCSF. "Also, it may help to prevent it."

Pomegranate juice from POM Wonderful was used in this study.

About POM Wonderful

POM Wonderful is the largest producer of California Wonderful pomegranates, and the company exclusively grows and sells this variety. POM Wonderful's pomegranates are grown in Central California, in the sunny San Joaquin Valley. Known for its exquisite sweet flavor, health benefits, large size and plentiful juice, the Wonderful variety is popular with consumers throughout the country. POM Wonderful's pomegranates promise consistent quality. POM Wonderful prides itself on the quality of its farming operation, the sensitivity with which the fruit is hand picked and carried to their sorting and modern juicing facilities, and ultimately delivered to your table. Only fruit that meets the company's strict quality standards appears in store produce sections.

The company also juices its fresh pomegranates to make its delicious, all-natural, POM Wonderful pomegranate juice. POM Wonderful pomegranate juice is available year-round at retail and is found in the refrigerated section of supermarkets and grocery stores nationwide. POM Wonderful pomegranate juice is available in five flavors: POM 100% Pomegranate, POM Cherry, POM Blueberry, POM Tangerine and POM Mango. Each flavor of POM Wonderful pomegranate juice is all-natural, preservative-free and has no added sugar.

POM Wonderful's mission is to educate consumers about the pomegranate's splendor and versatility as well as its refreshing taste and health benefits. To learn more, visit http://www.pomwonderful.com.

POM Wonderful is a registered trademark of POM Wonderful LLC.

Note to Editors: Interviews with Dr. Dean Ornish, Senior Author, are available upon request.

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Opinion of the Commission

APPENDIX B
Figure 9

POM WONDERFUL.

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***Note to Editors**: Interviews with medical researchers quoted are available upon request.*

POMx, a Highly Concentrated Form of Healthy Pomegranate Antioxidants, Becomes Available to Consumers for the First Time

LOS ANGELES (July 10 - 2006) – Three years after introducing consumers to the health benefits and delicious taste of the world's first refrigerated, super-premium pomegranate juice, POM Wonderful® announced today that it has developed a concentrated form of pomegranate antioxidants known as POMx. POMx, already being noted by medical researchers as an important natural ingredient, is so concentrated that only a small amount is needed to obtain an optimal level of daily antioxidants. For consumers who are not seeking additional calories and sugars, this is an important product benefit. POMx comes from the same Wonderful variety of pomegranates that are used to make POM Wonderful's healthy pomegranate juices. It also has a similar biochemical profile to pomegranate juice since both contain a diverse range of phytochemicals, of which polyphenols make up a large proportion. POMx is currently an active ingredient in POM Tea (http://pomtea.com), a refreshing, healthy, ready-to-drink iced tea that is available in retail stores nationally.

According to Michael Aviram, DSc, Professor of Biochemistry and Head Lipid Research Laboratory, Technion Faculty of Medicine and Rambam Medical Center, Haifa, Israel, who was at the forefront of the initial research on pomegranates, the research on POMx looks very promising. In 2006, Aviram led a study on POMx which was recently published (*Journal of Agriculture and Food Chemistry*, 2006 54:1928-1935). Commenting on this research, Professor Aviram remarks, "The results showed that POMx is as potent an antioxidant as pomegranate juice and just like pomegranate juice may protect against cardiovascular as well as other diseases."

1 of 4 pgs

The POMx research comes as the benefits derived from the Wonderful variety of pomegranate are, once again, being noted by the worldwide medical community. Recently, the American Association for Cancer Research published research that indicates that a daily pomegranate regimen has a positive effect for men with prostate cancer. Specifically, drinking 8 ounces of POM Wonderful pomegranate juice daily prolonged post-prostate surgery PSA doubling time from 15 to 54 months (*Clinical Cancer Research,* July 1, 2006). PSA is a protein marker for prostate cancer and the faster PSA levels increase in the blood of men after treatment, the greater their potential for dying of prostate cancer.

David Heber, MD, PhD, Professor of Medicine and Director, UCLA Center for Human Nutrition, provided additional commentary on POMx as it relates to prostate cancer. "Basic studies indicate that the effects of POMx and POM Wonderful pomegranate juice on prostate cancer are the same. The most abundant and most active ingredients in pomegranate juice are also found in POMx."

The Wonderful variety of pomegranate is a type of pomegranate rather than a brand. Just as there are different varieties of apples, oranges and grapes, there are several different varieties of pomegranates grown in the United States and in other countries. POM Wonderful's products only use extractions from the Wonderful variety of pomegranate. Of the many published peer-reviewed medical papers that speak to the health benefits of the pomegranate, most were conducted using juice or pomegranate extract from this variety of pomegranate.

About POM Wonderful

POM Wonderful is the largest grower of the Wonderful variety of pomegranate. The company exclusively grows and sells this variety because of its exquisite sweet flavor, health benefits, large size and plentiful juice. POM Wonderful's pomegranates are grown in Central California, in the sunny San Joaquin Valley. Fresh pomegranates are in season from October through January and November is National Pomegranate Month. In addition to selling the fresh fruit, the company also juices its fresh pomegranates to make POM Wonderful pomegranate juice and POMx. To learn more, visit http://www.pomwonderful.com.

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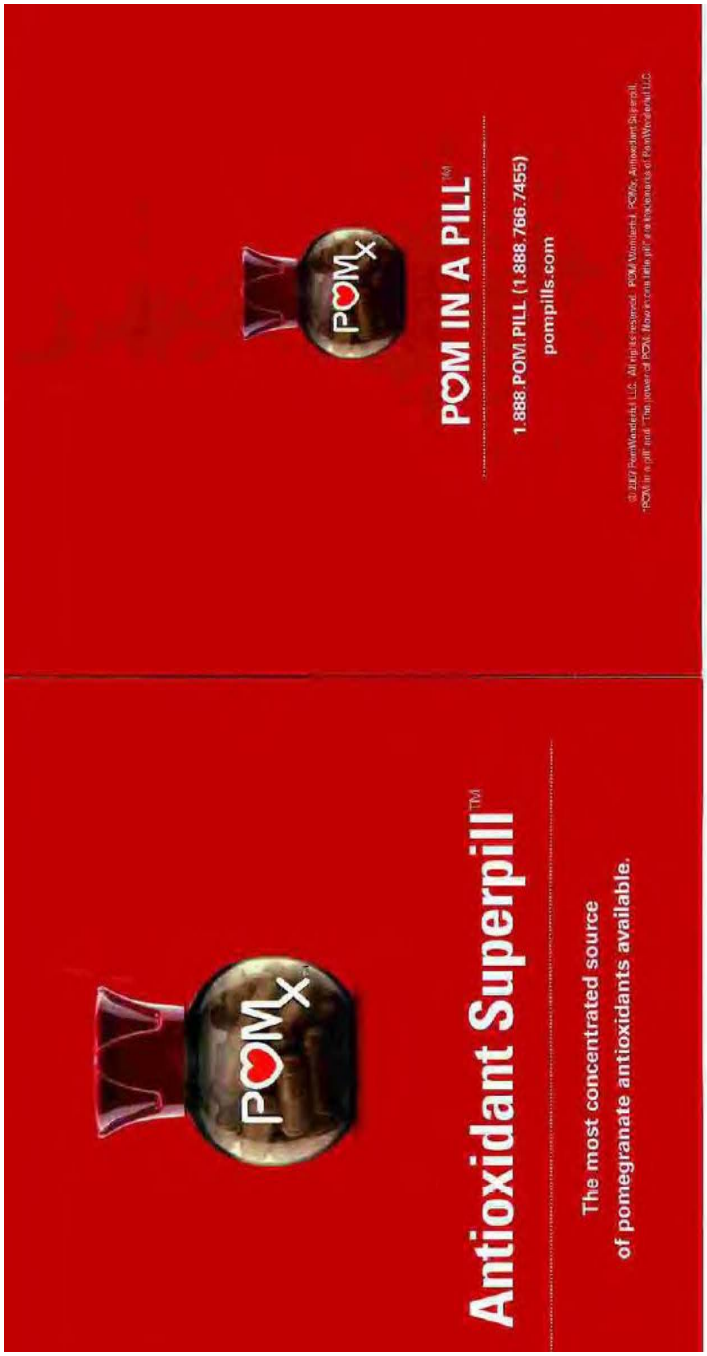
Opinion of the Commission

APPENDIX B
Figure 10



POMx™ is the first and only pomegranate antioxidant supplement reviewed for safety by the FDA.
POMx™ is a highly concentrated, incredibly powerful blend of all-natural polyphenol antioxidants made from the very same pomegranates in POM Wonderful 100% Pomegranate Juice. In fact, our method of harnessing astonishing levels of antioxidants is so extraordinary, it's patent-pending.
The power of POM. Now in one little pill.™
All of the antioxidant power of an 8oz glass of POM Wonderful 100% Pomegranate Juice is now available in the convenience of a single calorie-free pill. Take one daily.
Each bottle contains a one-month supply of 30 pills.
8oz =
POM

Opinion of the Commission

"Findings from a small study suggest that pomegranate juice may one day prove an effective weapon against prostate cancer."
The New York Times (July 4, 2006)
Prostate health.
Prostate cancer is the most commonly diagnosed cancer among men in the United States and the second-leading cause of cancer death in men after lung cancer.[1]
Time pill.
Stable levels of prostate-specific antigens (or PSA levels) are critical for men with prostate cancer. Patients with quick PSA doubling times are more likely to die from their cancer.[2] According to a UCLA study of 46 men age 65 to 70 with advanced prostate cancer, drinking an 8oz glass of POM Wonderful 100% Pomegranate Juice every day slowed their PSA doubling time by nearly 350%.[3]
83% of those who participated in the study showed a significant decrease in their cancer regrowth rate.[3]
One small pill for mankind.
New studies are under way to fu
investigate the possibilities of PO
Wonderful pomegranate antioxi
and their potential ability to slov
rise of PSA levels in patients wit
prostate cancer.
To learn more, visit pompills.com/resear
"The most abundant and most active ingredient in pomegranate juice are also found in POMx. Basic studies indicate that POMx and POM Wonderful Pomegranate Juice may have the same effects on prostate health."
David Heber, MD, PhD, Professor of Medicine and Director, UCLA Center for Human Nutrition
These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure or prevent any disease.
[1]American Cancer Society [2]vitl/Signer Newsletter, UCLA Healthcare, April 2007 [3]pompills.com/research [4]Data on file
POM WONDERFUL
100% POMEGRANATE JUICE
POMx

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has been proven to promote cardiovascular health, and we believe that POMx may have the same health benefits."

Dr. Michael Aviram, Lipid Research Laboratory, Technion Faculty of Medicine, Haifa, Israel

t health.

groundbreaking preliminary
s, patients who drank POM
rful 100% Pomegranate Juice
enced impressive
vascular results. A pilot study
Rambam Medical Center in
included 19 patients with
sclerosis (clogged arteries).
year, arterial plaque
ased 30% for those patients
onsumed 8oz of POM
rful 100% Pomegranate
daily.[2]

An additional study at the University of California, San Francisco included 45 patients with impaired blood flow to the heart. Patients who consumed 8oz of POM Wonderful 100% Pomegranate Juice daily for three months experienced a 17% improvement in blood flow.[3] Initial studies on POMx share similar promise for heart health, and our research continues.

Fig. 1 THE HEART

The POMx Difference

Ultra-Potent:

- 1000mg of natural pomegranate polyphenol extract in every pill
- More antioxidants than any other pomegranate supplement
- One POMx pill = the antioxidant power of 8oz of POM Wonderful 100% Pomegranate Juice
- Your daily antioxidants in a single pill
- A full spectrum of pomegranate polyphenol antioxidants

Natural:

- Made from pomegranates and nothing else
- No synthetic or other antioxidants added
- No sugar, artificial colors or preservatives
- Calorie-free, vegan, kosho

Science, Not Fiction

- Made from the only pomegranates backed by 1 million in medical researd the POM Wonderful brand
- Promotes heart and prostate health
- Guards your body against free radicals[4]
- Proven to be easily absorb
- Clinically tested on adults[5]

To access the original published studies mentioned, visit pomwills.com/research.

APPENDIX B
Figure 11

VMS ID: 070320792
RUN DATE: 03/01/2007

Amaze your cardiologist. Drink POM Wonderful Pomegranate Juice. It helps guard your body against free radicals, unstable molecules that emerging science suggests aggressively destroy and weaken healthy cells in your body and contribute to disease. POM Wonderful Pomegranate Juice is supported by $20 million of initial scientific research from leading universities, which has uncovered encouraging results in prostate and cardiovascular health. Keep your ticker ticking and drink 8 ounces a day.

POM Wonderful Pomegranate Juice. The Antioxidant Superpower.™

POM WONDERFUL
pomwonderful.com

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APPENDIX B
Figure 12

APPENDIX B
Figure 13

VMS-0000246

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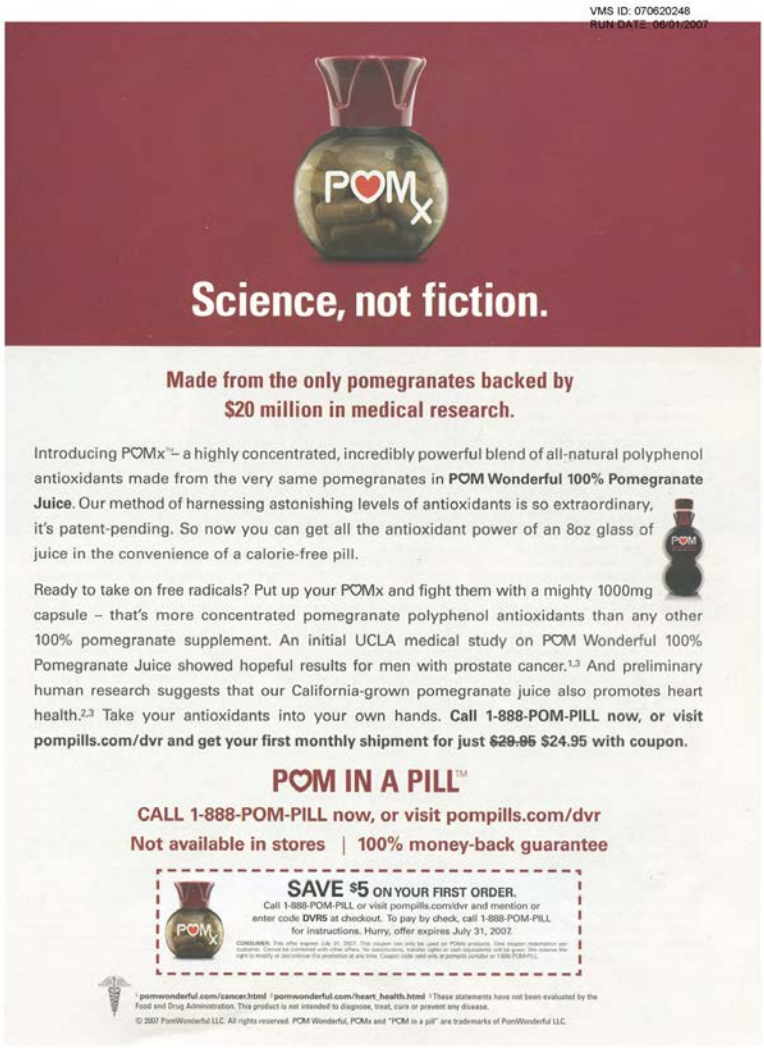
APPENDIX B
Figure 14



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APPENDIX B
Figure 15

POM WONDERFUL

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***Note to Editors**: Interviews with medical researcher quoted are available upon request.*

POM Wonderful 100% Pomegranate Juice May Improve Mild to Moderate Cases of Erectile Dysfunction, Study Finds

Research shows 8 ounces a day of POM Wonderful 100% Pomegranate Juice may help the management of erectile dysfunction

LOS ANGELES (June 27 - 2007) – According to a pilot study released in the *International Journal of Impotence Research* (http://www.nature.com/ijir), POM Wonderful 100% Pomegranate Juice was found to have beneficial effects on erectile dysfunction (ED), a disorder that affects 1 in 10 men worldwide and 10 to 30 million men in the United States alone [1, 2] ED can be caused by several factors, including arterial plaque, high blood pressure, heart disease, diabetes, nerve damage, endocrine imbalance or depression. Ultimately, ED is a condition that affects the blood flow to the penis during sexual stimulation.

This randomized, placebo-controlled, double-blind, crossover pilot study examined the efficacy of pomegranate juice versus placebo in improving erections in 61 male subjects. To qualify, participants had to experience mild to moderate ED for at least 3 months; be in a stable, monogamous relationship with a consenting female partner; and be willing to attempt sexual intercourse on at least one occasion per week during each study period.

Mild ED is defined as the mildly decreased ability to get and keep an erection, while moderate ED is the moderately decreased ability to get and keep an erection. The majority of men with ED have moderate ED.

For the first four weeks of the study, the subjects were assigned to drink either 8 oz. of POM Wonderful Pomegranate Juice or 8 oz. of placebo beverage daily with their evening

Opinion of the Commission

meal or shortly after. After a two-week washout period during which the subjects did not consume any study beverage nor utilize any ED treatment, they were assigned to drink 8 oz. of the opposite study beverage every evening for another four weeks. At the end of the each four week period, efficacy was assessed using the International Index of Erectile Function (IIEF) and Global Assessment Questionnaires (GAQ). The IIEF is a validated questionnaire that has been demonstrated to correlate with ED intensity. The GAQ elicits the patient's self-evaluation of the study beverages' effect on erectile activity.

Forty seven percent of the subjects reported that their erections improved with POM Wonderful Pomegranate Juice, while only 32% reported improved erections with the placebo ($p=0.058$). These results compare favorably to a recent 24-week study using a PDE5 inhibitor (such as Cialis), in which roughly 73% of subjects reported a benefit from the PDE5 inhibitor and 26% reported a "placebo effect" (i.e. experiencing improvement while on the placebo).[3]

Although the study did not achieve overall statistical significance, the authors conclude that additional studies with more patients and longer treatment periods may in fact reach statistical significance. The strong directional results of this pilot study are encouraging because almost half of the test subjects experienced a benefit simply by adding pomegranate juice to their daily diet, without the use of ED drugs.

Researchers believe that the results might be due to the potent antioxidant content of pomegranate juice, which can prevent free radical molecules from disrupting proper circulatory function. In several previously published medical studies, pomegranate juice has been shown to enhance blood flow and to slow or reverse arterial plaque growth.[4,5,6] Because an erection requires significant blood flow, these potent pomegranate antioxidants may provide benefit by mitigating arterial plaque and promoting blood vessel dilation.

According to study co-author Harin Padma-Nathan, MD, FACS, FRCS, Clinical Professor of Urology at the Keck School of Medicine, University of Southern California, "These findings are very encouraging as they suggest there is a non-invasive, non-drug way to potentially alleviate this quality of life issue that affects so many men. For men with ED, it is important to

maintain a healthy diet and exercise. Drinking pomegranate juice daily could be an important addition to the diet in the management of this condition."

About POM Wonderful

POM Wonderful is the largest producer of California Wonderful pomegranates and the company exclusively grows and sells this variety. POM Wonderful's pomegranates grow in central California, in the sunny San Joaquin Valley. Fresh pomegranates are in season from October through January and November is National Pomegranate Month.

The company also uses its fresh pomegranates to make its delicious, all-natural, POM Wonderful Pomegranate Juice and POMx, a highly-concentrated blend of all-natural polyphenol antioxidants harnessed from the pomegranate by a patent-pending process. POMx is found exclusively in POM Tea, POMx Pills and POMx Liquid.

POM Wonderful Pomegranate Juice and POM Tea are available year-round at retail and are found in the refrigerated section of supermarkets nationwide. POMx Pills and POMx liquid are available at http://www.pompills.com. To learn more, visit http://www.pomwonderful.com.

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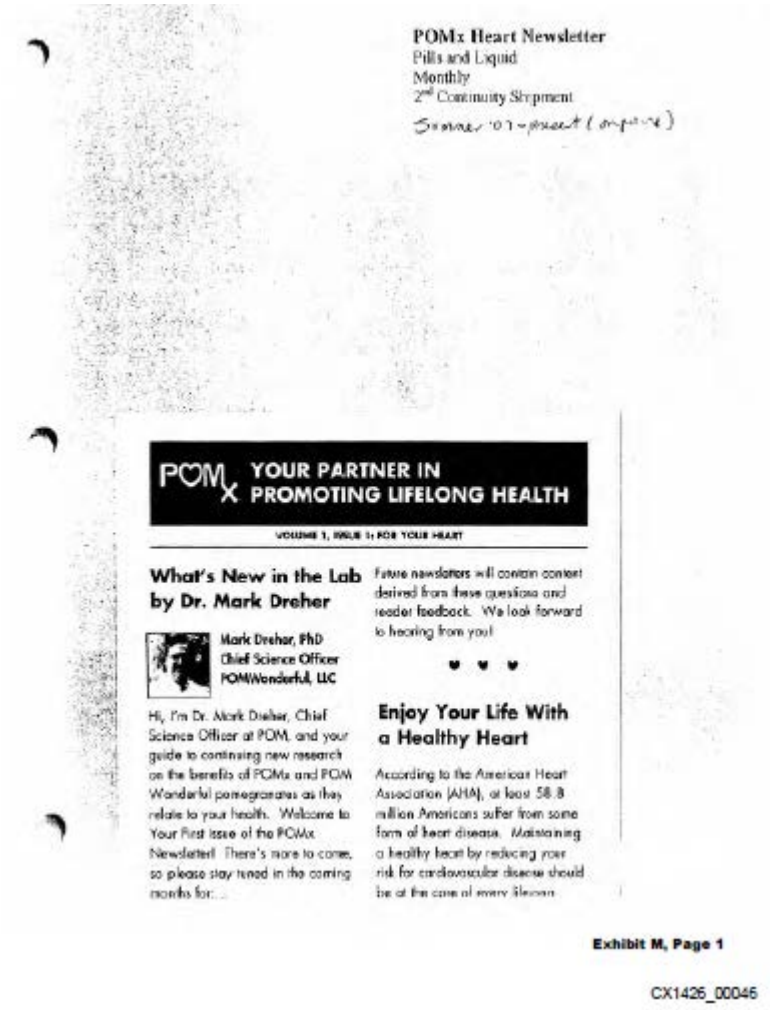
APPENDIX B
Figure 16



POMx Heart Newsletter
Pills and Liquid
Monthly
2nd Continuity Shipment
Summer '01 - present (on-going)

POMx YOUR PARTNER IN PROMOTING LIFELONG HEALTH

VOLUME 1, ISSUE 1: FOR YOUR HEART

What's New in the Lab by Dr. Mark Dreher

Mark Dreher, PhD
Chief Science Officer
POMWonderful, LLC

Hi, I'm Dr. Mark Dreher, Chief Science Officer at POM, and your guide to continuing new research on the benefits of POMx and POM Wonderful pomegranates as they relate to your health. Welcome to Your First issue of the POMx Newsletter! There's more to come, so please stay tuned in the coming months for: ...

Future newsletters will contain content derived from these questions and reader feedback. We look forward to hearing from you!

♥ ♥ ♥

Enjoy Your Life With a Healthy Heart

According to the American Heart Association (AHA), at least 58.8 million Americans suffer from some form of heart disease. Maintaining a healthy heart by reducing your risk for cardiovascular disease should be at the core of every lifestyle ...

Exhibit M, Page 1

CX1426_00046

POM YOUR PARTNER IN PROMOTING LIFELONG HEALTH

What's New in the Lab by Dr. Mark Dreher

Enjoy Your Life With a Healthy Heart

Did You Know?

Exhibit M, Page 2

CX1426_0004

Opinion of the Commission

The antioxidants in POMx are supported by $20 million in initial scientific research

POMx supplements your diet without adding calories, allowing you to more easily maintain a healthy weight while still getting the necessary antioxidants

Exhibit M, Page 3

CX1426_00048

APPENDIX B
Figure 17

POMx Prostate Newsletter
Pills and Liquid
Monthly
3rd Continuity Shipment
Fall '07 - present (approx.)

POMx YOUR PARTNER IN PROMOTING LIFELONG HEALTH

VOLUME 1, ISSUE 2: PROSTATE HEALTH

Prostate Cancer Affects 1 Out of Every 6 Men

Prostate cancer is the second leading cause of cancer related death in men in the United States according to the National Cancer Institute. Prostate cancer incidence rates rose dramatically in the late1980's with improved detection and diagnosis through widespread use of prostate-specific antigen (PSA) testing.

Prostate cancer is the second leading cause of

fruits and vegetables. Doctors are not sure which of these factors causes the risk to go up but the best advice is to consume daily the equivalent of five or

(continued on back)

What's New in the Lab by Dr. Mark Dreher

Mark Dreher, PhD
Chief Science Officer
POMWonderful, LLC

Research studies like the ones discussed in this newsletter and

Exhibit N, Page 1

CX1426_00049

Opinion of the Commission

POM YOUR PARTNER IN PROMOTING LIFELONG HEALTH

Prostate Cancer Affects 1 Out of Every 6 Men

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Prostate cancer is the second leading cause of cancer related to death in men in the United States according to the National Cancer Institute

Since the early 1990's, prostate cancer incidence and deaths have been declining, but the American Cancer Society estimates that there will still be about 219,000 new cases of prostate cancer and 27,000 deaths in the United States in 2007.

According to the American Cancer Society, some of the risk factors for prostate cancer include:

Age – Growing older raises a man's risk of prostate cancer. About two of every three prostate cancers are found in men over the age of 65.

Family History – Men with close family members (father or brother) who have had prostate cancer are more likely to get it themselves, especially if their relatives were young when they got the disease.

Diet – One risk factor that can be changed is diet. The National Cancer Institute's research suggest that obesity and weight gain is linked to increased prostate cancer mortality.

Men who eat a lot of red meat or high-fat dairy products seem to have a greater chance of getting prostate cancer. These men also tend to eat fewer fruits and vegetables. Doctors are not sure which of these factors causes the risk to go up but the best advice is to consume daily the equivalent of five or

(continued on back)

What's New in the Lab by Dr. Mark Dreher

Mark Dreher, PhD
Chief Science Officer
POMWonderful, LLC

Research studies like the ones discussed in this newsletter and conducted by UCLA (my alma mater) serve to validate the many reasons I am proud to be affiliated with POM Wonderful and POMx.

POM Wonderful 100% Pomegranate Juice and POMx are backed by a $13 million dollar investment in world-class scientific research. This includes ten clinical studies published in top, peer-reviewed medical journals that document the pomegranate's antioxidant health benefits such as heart and prostate health.

Working at POM Wonderful gives me the unique opportunity to really make a difference in the world. That's what gets me up every morning! I get to work with renowned scientist, including a Nobel laureate, at leading

Studies funded by POM represent the vast majority of medical research ever conducted on pomegranates.

universities around the world. In fact, studies funded by POM represent the vast majority of human medical research ever conducted on pomegranates. No other company that I know of is as dedicated as POM in pursuing the truth and keeping our customers informed.

At POM Wonderful, we aim to be your partner in the promotion of good health that lasts a lifetime. It is our commitment to you, our mission in a summary.

Exhibit N, Page 2

CX1426_00050

Patients with prostate cancer showed a prolongation of PSA doubling time, coupled with corresponding lab effects on reduced prostate cancer as well as reduced oxidated stress.

According to Dr. Dr. Dr. Director of UCLA's Center for Human Nutrition, "The most abundant and most active ingredients in pomegranate juice are also found in POMx. Basic studies in our laboratory as far indicate that POMx and pomegranate juice may have the same effects."

SEND US YOUR QUESTIONS AND COMMENTS

HOW DOES POMWONDERFUL COMPARE WITH OTHER POMEGRANATE SUPPLEMENTS AND COMMERCIALS?

How does POMx compare with other pomegranate supplements for antioxidant potency?

1.888.POMPOMS
WWW.POMPOMS.COM

Exhibit N, Page 3

CX1426_00051

Opinion of the Commission

APPENDIX B
Figure 18

VMS-0000255

CX0169_0001

New York Times Magazine
Issue: January 6th, 2008
In Home: 1/6/08

The power of POM, in one little pill.

POMx

The easy, portable, calorie-free way to get your daily antioxidants.

Antioxidant Superpill® Not all antioxidants are created equal. POMx™ fights free radicals with a mighty, knocking in every pill. That's more concentrated antioxidants than are in other pomegranate antioxidant supplement. There are antioxidants, and then there are POMx antioxidants.

Power of Mind in a Pill. POMx is a highly concentrated, powerful blend of polyphenol antioxidants made from the very same pomegranates as POM Wonderful® 100% Pomegranate Juice. The same pomegranates are grown exclusively in California, where they're harsh-pollution skin.

[illegible] pomegranates. So there are no added sugars, preservatives or any other ingredients – just 100% pomegranate polyphenol antioxidants. So naturally, POMx is absorbed safely into your body. In fact, POMx is the first and only antioxidant supplement reviewed for safety by the FDA.

Backed by Science. POMx is made from the only pomegranate supported by clinical research. Emerging science suggests that free radicals aggressively destroy healthy cells in your body – contributing to premature aging and even disease. The good news is POM Wonderful pomegranate antioxidants neutralize free radicals. An initial UCLA MEDICAL STUDY on POM Wonderful 100% Pomegranate Juice found hopeful results for prostate health. "Pomegranate juice delays PSA doubling time in humans," according to AJ Pantuck, et al, in Clinical Cancer Research, 2006.[1] Two additional preliminary studies on our juice showed promising results for heart health. "Pomegranate juice improves myocardial perfusion in coronary heart patients," per D. Dirinck, et al, in the American Journal of Cardiology, 2005.[2] "Pomegranate extract also reverses suggests anti-atherosclerotic benefits," according to M. Aviram, et al, in Clinical Nutrition, 2004.[3]

One a Day For Life. Ready to take on free radicals? A daily POMx pill is all you need. Invest in your health and order your 30-day supply today. Call now to get your first monthly shipment.

Call 1-888-POM-PILL (766-7455) or visit pompills.com/nb and enter NB30 at checkout.

Try POMx for one month – FREE!

We'll even pay for the shipping. Visit pompills.com/nb or call 1-888-POM-PILL. Use discount code: NB30

POM WONDERFUL

Exhibit L

CX1426_00045

Opinion of the Commission

APPENDIX B
Figure 19

VMS-0000261

CX0180_0001

Exhibit K

CX1426_00044

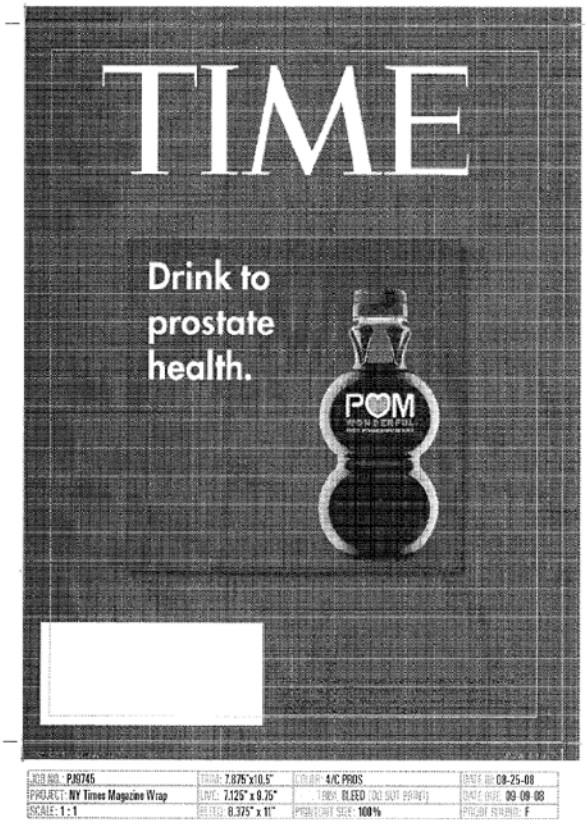
Opinion of the Commission

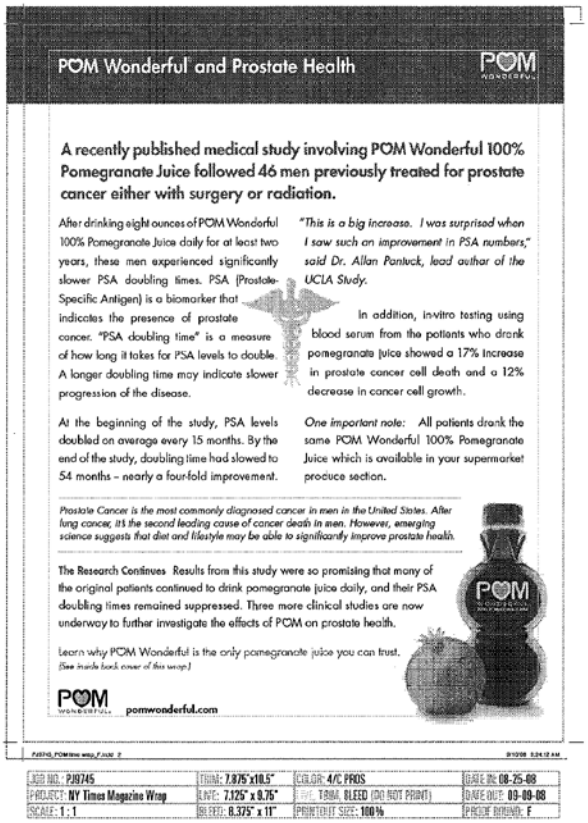
APPENDIX B
Figure 20

VMS-0000266

CX0192_0001

APPENDIX B
Figure 21





POM Wonderful and Prostate Health

POM WONDERFUL

A recently published medical study involving POM Wonderful 100% Pomegranate Juice followed 46 men previously treated for prostate cancer either with surgery or radiation.

After drinking eight ounces of POM Wonderful 100% Pomegranate Juice daily for at least two years, these men experienced significantly slower PSA doubling times. PSA (Prostate-Specific Antigen) is a biomarker that indicates the presence of prostate cancer. "PSA doubling time" is a measure of how long it takes for PSA levels to double. A longer doubling time may indicate slower progression of the disease.

At the beginning of the study, PSA levels doubled on average every 15 months. By the end of the study, doubling time had slowed to 54 months – nearly a four-fold improvement.

"This is a big increase. I was surprised when I saw such an improvement in PSA numbers," said Dr. Allan Pantuck, lead author of the UCLA Study.

In addition, in-vitro testing using blood serum from the patients who drank pomegranate juice showed a 17% increase in prostate cancer cell death and a 12% decrease in cancer cell growth.

One important note: All patients drank the same POM Wonderful 100% Pomegranate Juice which is available in your supermarket produce section.

Prostate Cancer is the most commonly diagnosed cancer in men in the United States. After lung cancer, it's the second leading cause of cancer death in men. However, emerging science suggests that diet and lifestyle may be able to significantly improve prostate health.

The Research Continues Results from this study were so promising that many of the original patients continued to drink pomegranate juice daily, and their PSA doubling times remained suppressed. Three more clinical studies are now underway to further investigate the effects of POM on prostate health.

Learn why POM Wonderful is the only pomegranate juice you can trust.
(See inside back cover of this wrap.)

POM WONDERFUL pomwonderful.com

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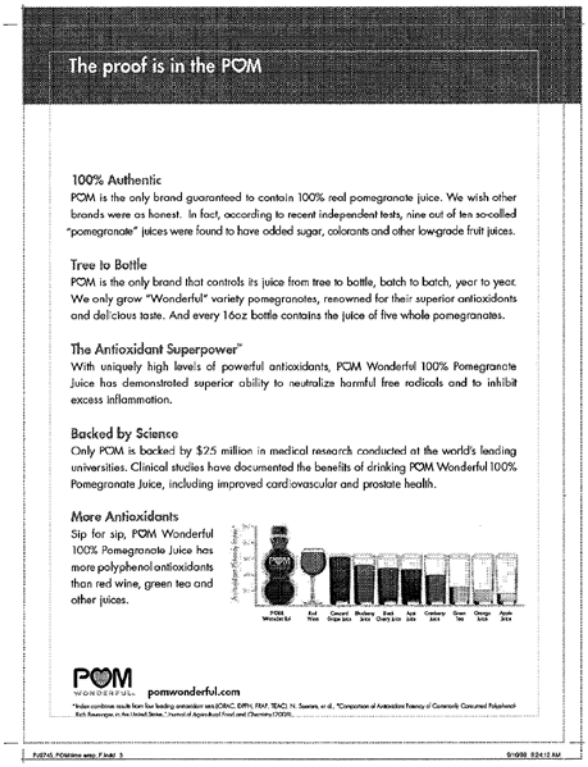

The proof is in the POM

100% Authentic
POM is the only brand guaranteed to contain 100% real pomegranate juice. We wish other brands were as honest. In fact, according to recent independent tests, nine out of ten so-called "pomegranate" juices were found to have added sugar, colorants and other low-grade fruit juices.

Tree to Bottle
POM is the only brand that controls its juice from tree to bottle, batch to batch, year to year. We only grow "Wonderful" variety pomegranates, renowned for their superior antioxidants and delicious taste. And every 16oz bottle contains the juice of five whole pomegranates.

The Antioxidant Superpower*
With uniquely high levels of powerful antioxidants, POM Wonderful 100% Pomegranate Juice has demonstrated superior ability to neutralize harmful free radicals and to inhibit excess inflammation.

Backed by Science
Only POM is backed by $25 million in medical research conducted at the world's leading universities. Clinical studies have documented the benefits of drinking POM Wonderful 100% Pomegranate Juice, including improved cardiovascular and prostate health.

More Antioxidants
Sip for sip, POM Wonderful 100% Pomegranate Juice has more polyphenol antioxidants than red wine, green tea and other juices.

POM WONDERFUL pomwonderful.com

*Index combines results from four leading antioxidant tests (ORAC, FRAP, TEAC) N. Seeram, et al., "Comparison of Antioxidant Potency of Commonly Consumed Polyphenol-Rich Beverages in the United States," Journal of Agricultural Food and Chemistry (2008).

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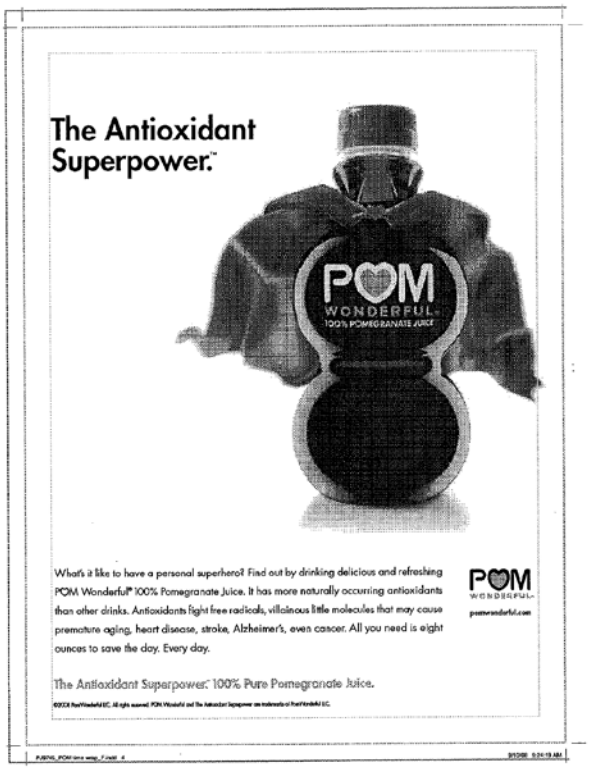

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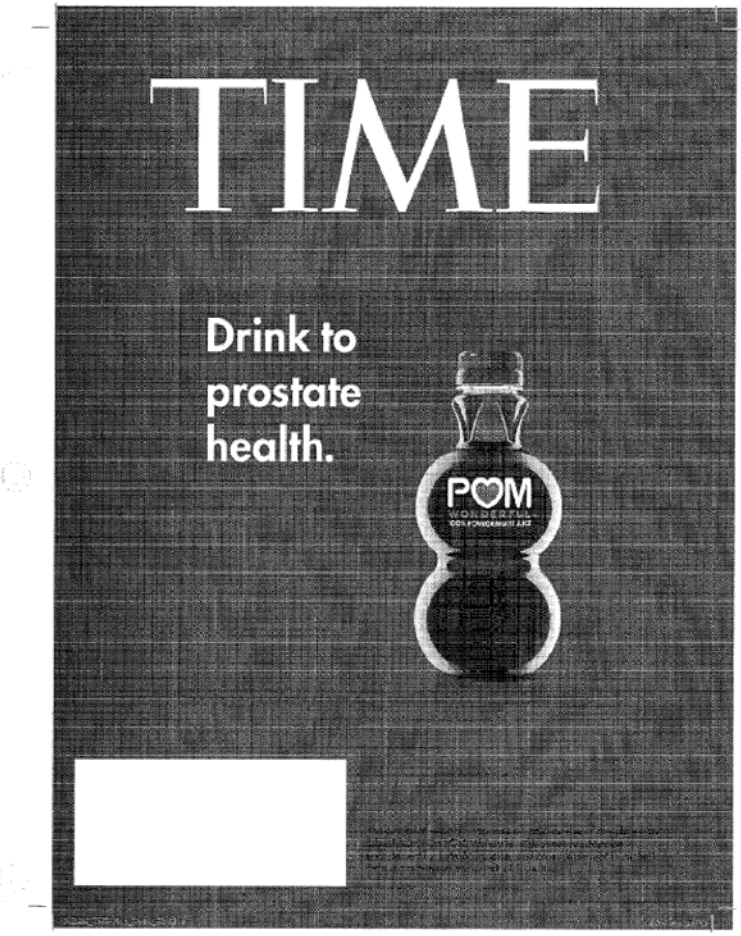

CONFIDENTIAL, SUBJECT TO A PROTECTIVE ORDER POM-OS00001570

CONFIDENTIAL-FTC Docket NO. 9344 **RESP024725**

CX0314_0007

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Learn why POM Wonderful is the only pomegranate juice you can trust.
(See inside back cover of this wrap.)

POM WONDERFUL pomwonderful.com

PJ0225_TIME-Wrap_Dec08_F.indd 2 13:03:08 5:33:02 PM

CONFIDENTIAL, SUBJECT TO A PROTECTIVE ORDER POM-OS00001571

CONFIDENTIAL-FTC Docket NO. 9344 **RESP024726**

CX0314_0008

The proof is in the POM

100% Authentic
POM is the only brand guaranteed to contain 100% real pomegranate juice. We wish other brands were as honest. In fact, according to recent independent tests, nine out of ten so-called "pomegranate" juices were found to have added sugar, colorants and other low-grade fruit juices.

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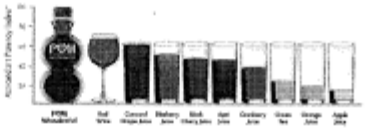

POM WONDERFUL pomwonderful.com

CONFIDENTIAL, SUBJECT TO A PROTECTIVE ORDER

POM-0S00001572

CONFIDENTIAL-FTC Docket NO. 9344

RESP024727

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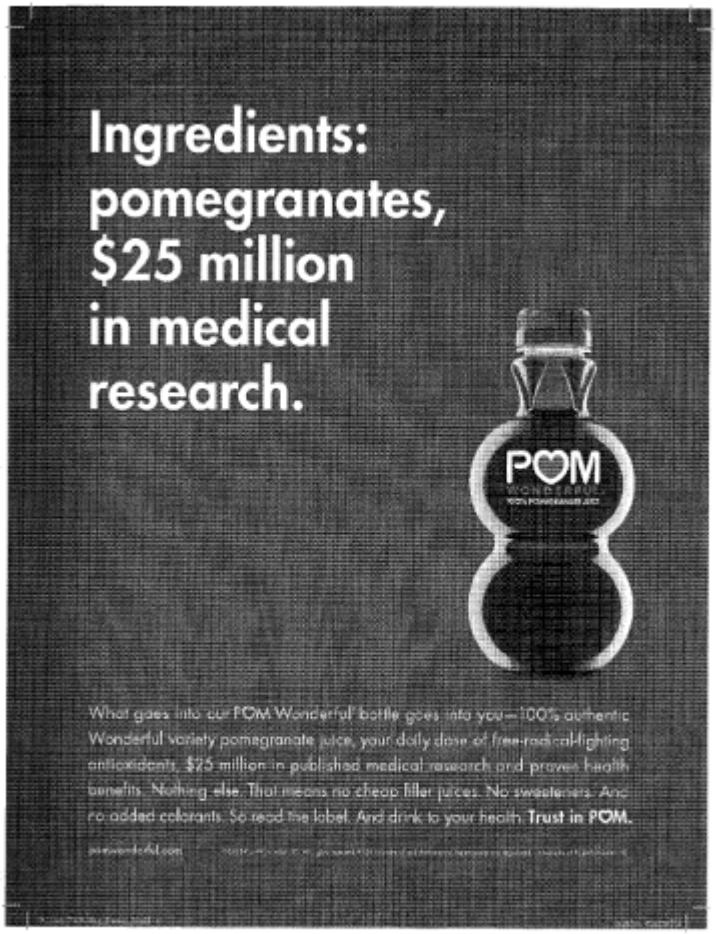
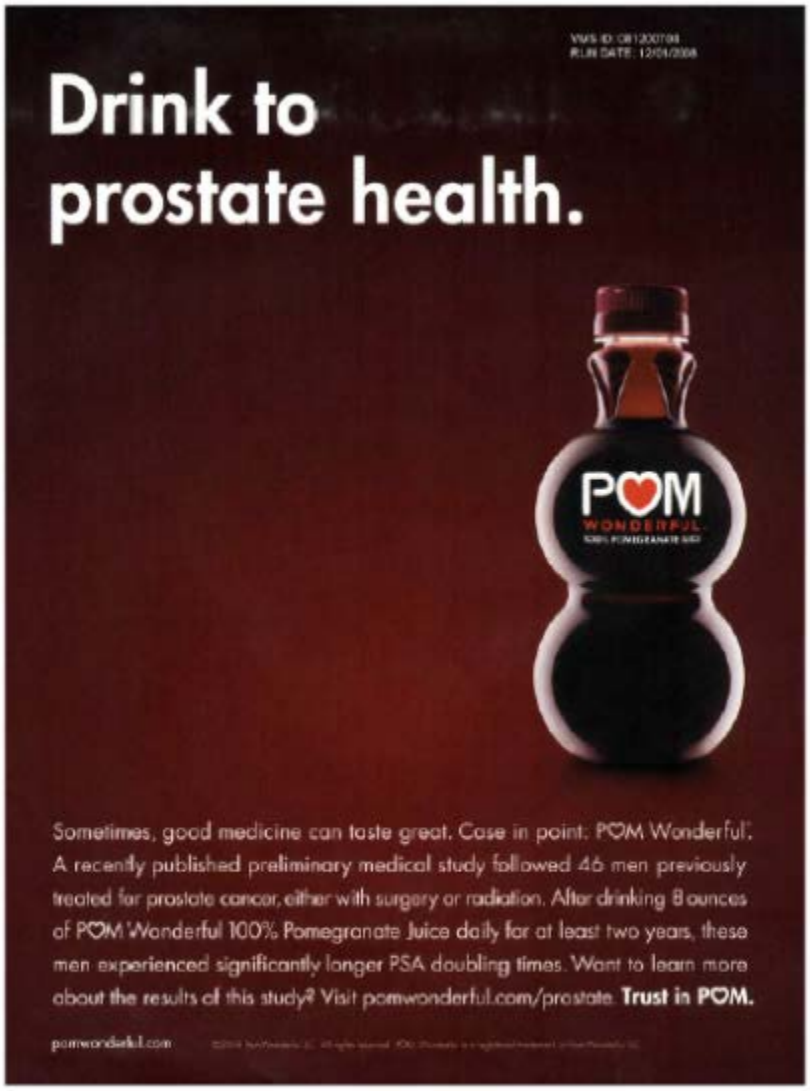


APPENDIX B
Figure 22



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CX0260_0001

Opinion of the Commission

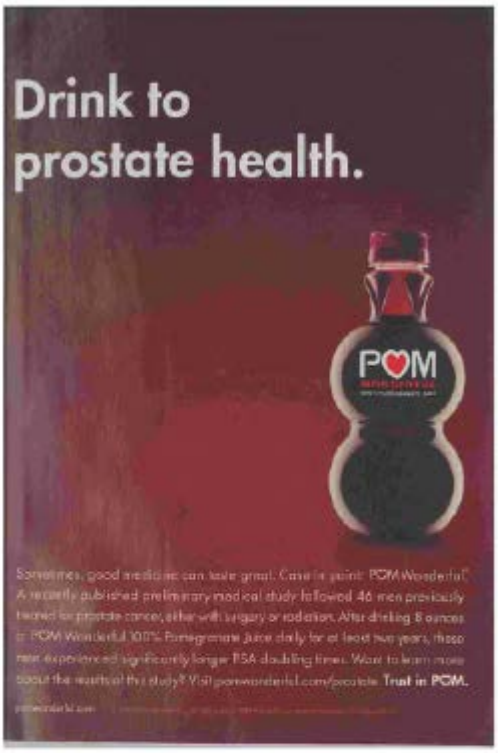
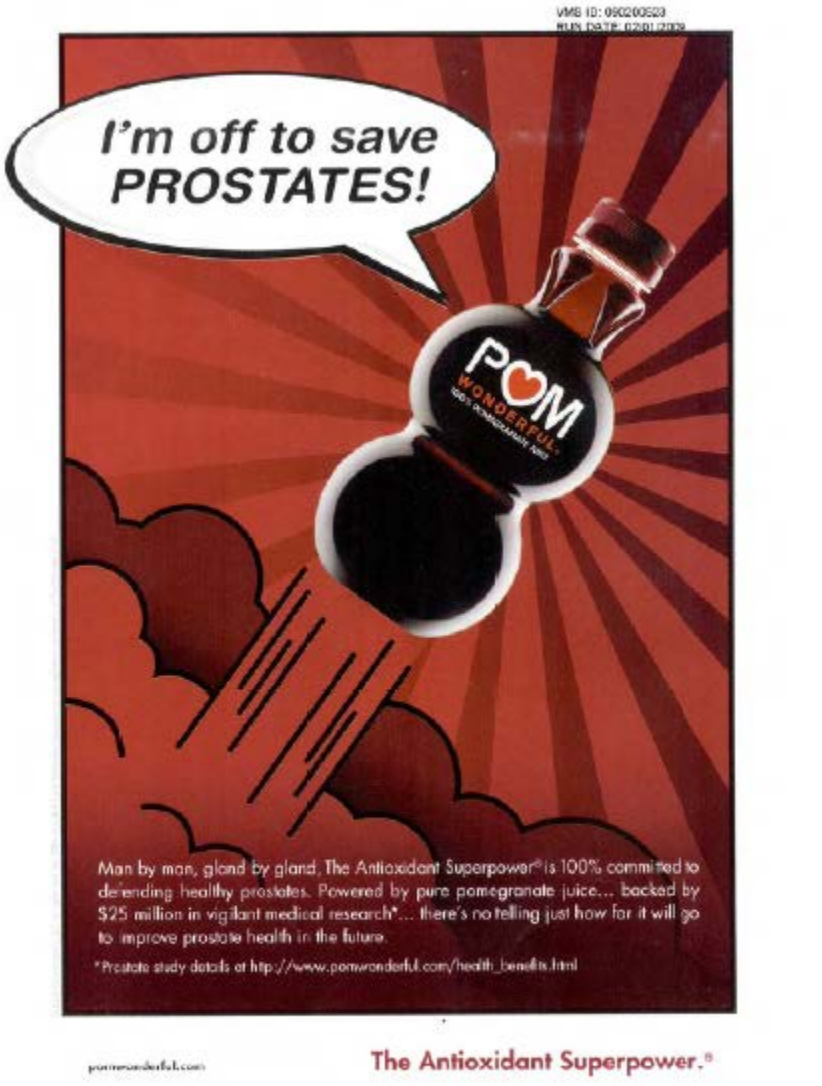


Exhibit B

CX1426_00028

APPENDIX B
Figure 23



VMS-0000281

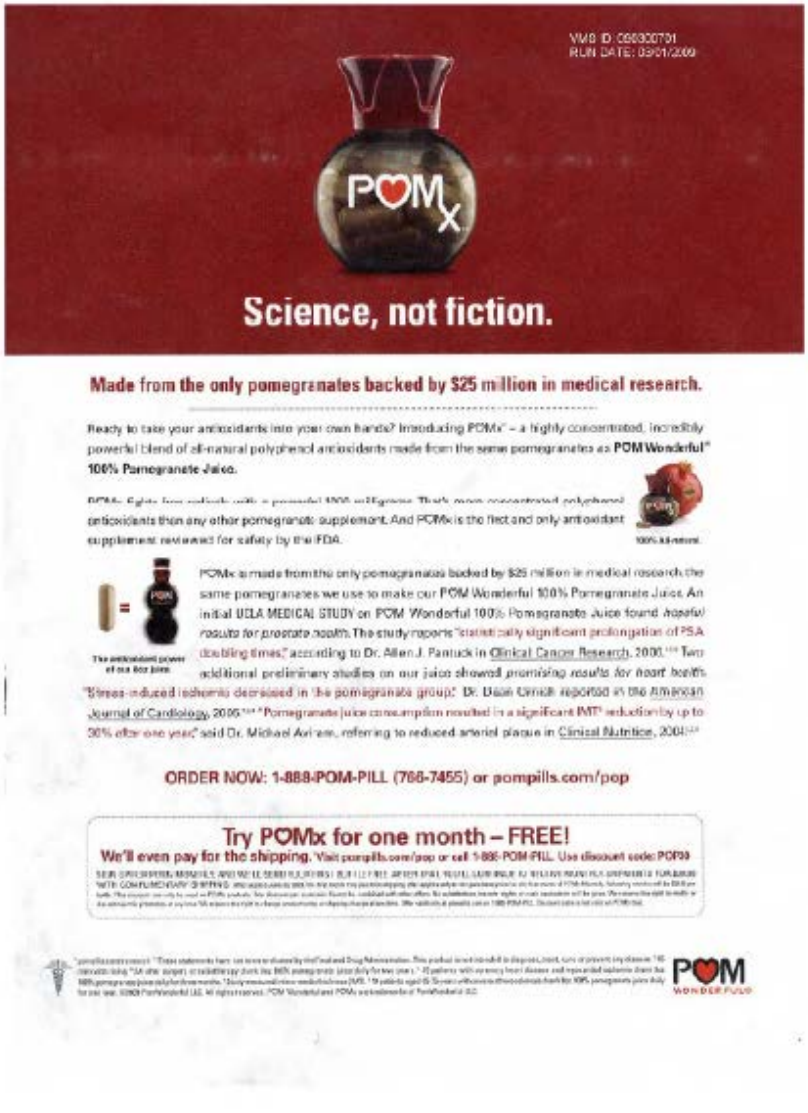
CX0274_0001

Opinion of the Commission

Exhibit C

CX1426_00029

APPENDIX B
Figure 24



VMS-0000291

CX0279_0001

Opinion of the Commission

APPENDIX B
Figure 25

VMS-0000293

CX0280_0001

APPENDIX B
Figure 26

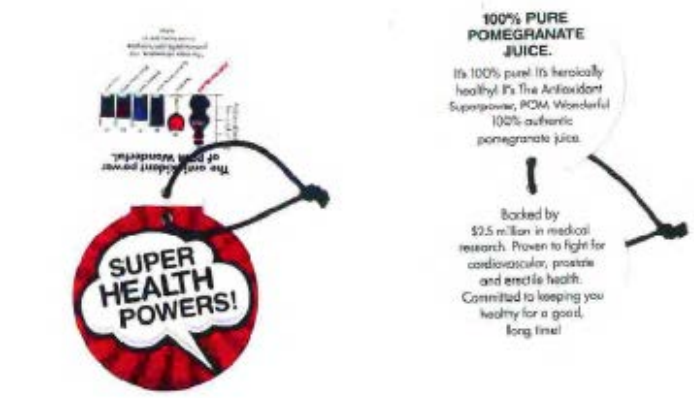
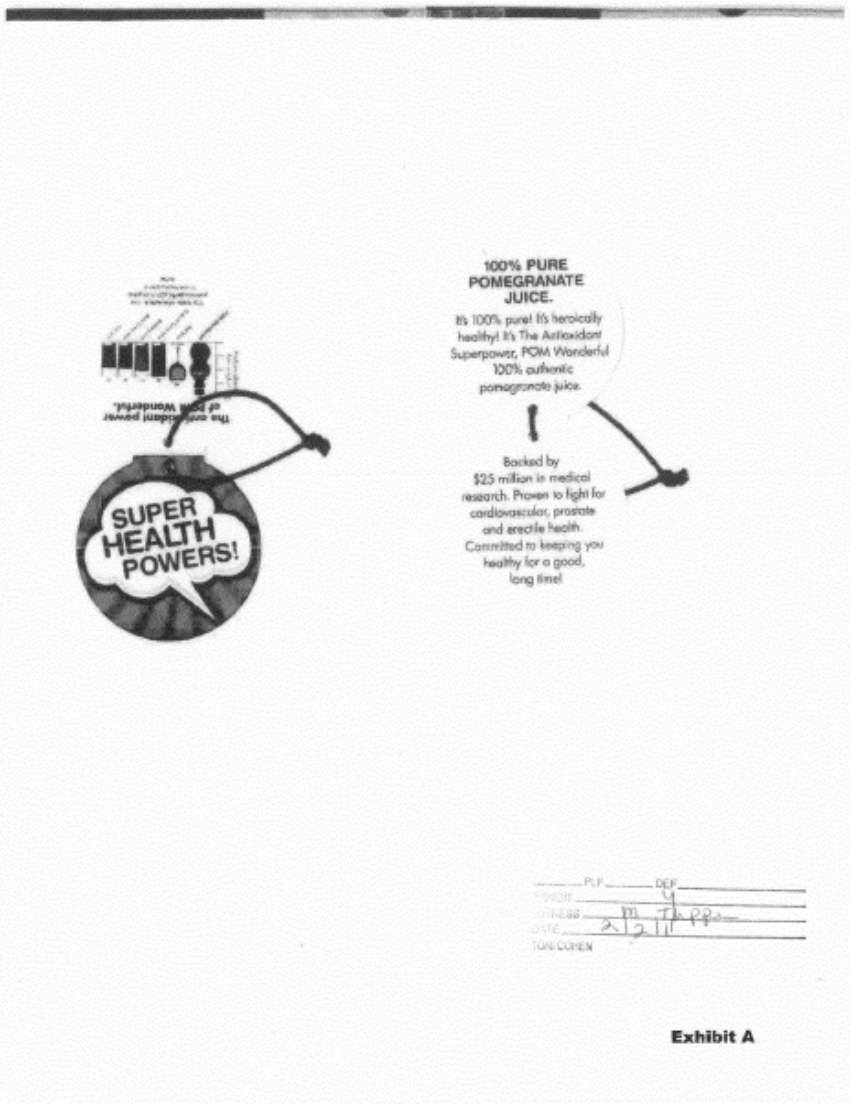


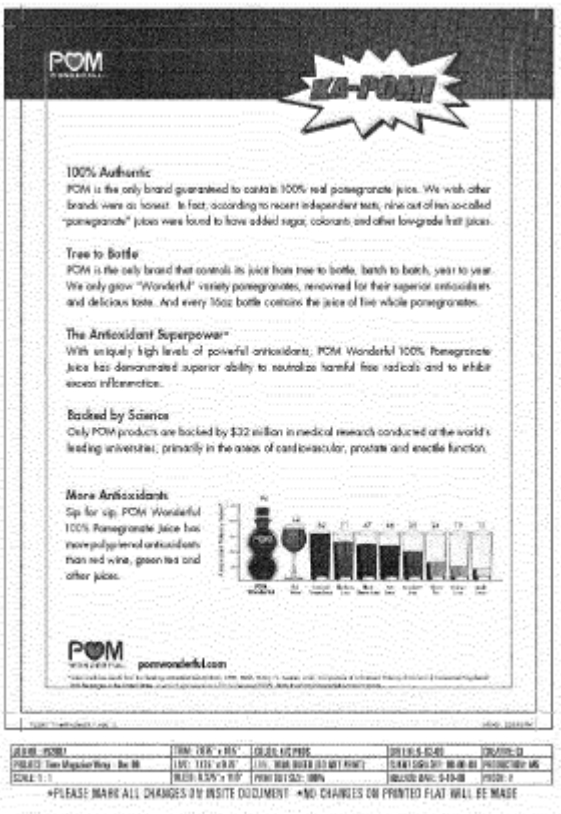
Exhibit A

CX1426_00027


SUPER HEALTH POWERS!
100% PURE POMEGRANATE JUICE.
It's 100% pure! It's heroically healthy! It's The Antioxidant Superpower, POM Wonderful 100% authentic pomegranate juice.
Backed by $25 million in medical research. Proven to fight for cardiovascular, prostate and erectile health. Committed to keeping you healthy for a good, long time!
PLF
DEF
Exhibit A
CX0475_0001

APPENDIX B
Figure 27

Opinion of the Commission


POM
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Backed by Science
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More Antioxidants
Sip for sip, POM Wonderful 100% Pomegranate Juice has more polyphenol antioxidants than red wine, green tea and other juices.
POM
pomwonderful.com
*PLEASE MARK ALL CHANGES ON INSITE DOCUMENT *NO CHANGES ON PRINTED FLAT WILL BE MADE

Opinion of the Commission

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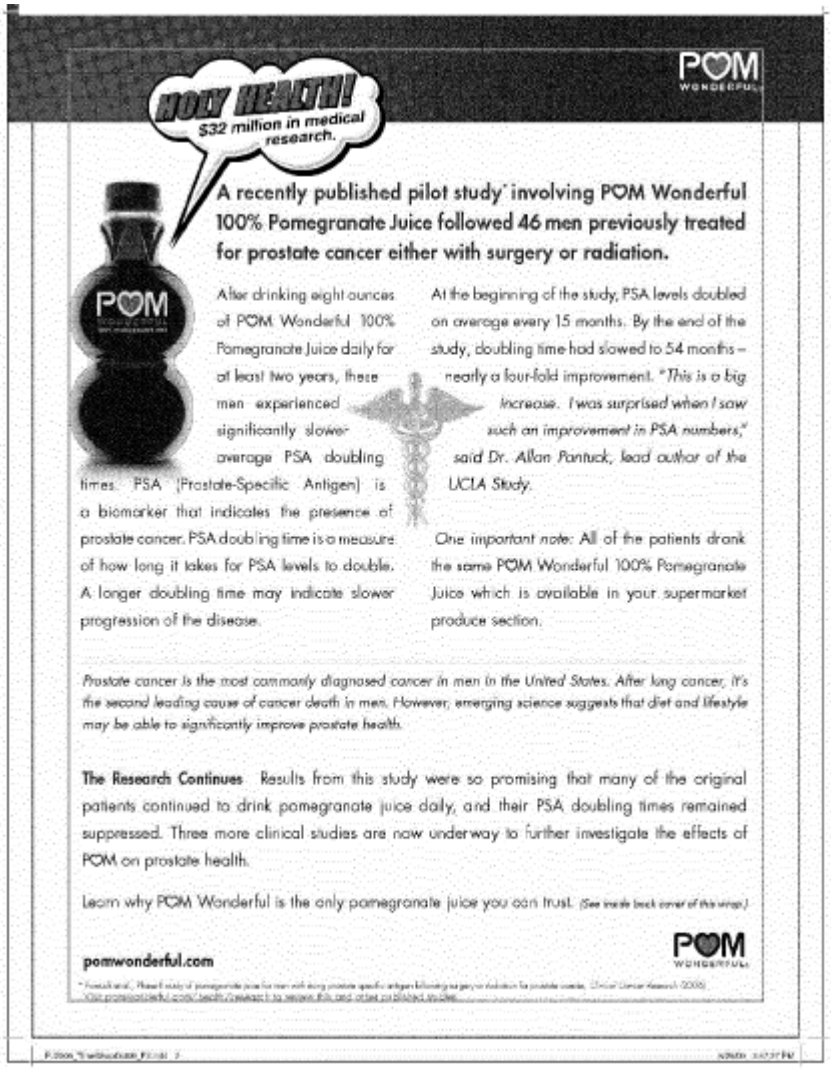
Opinion of the Commission



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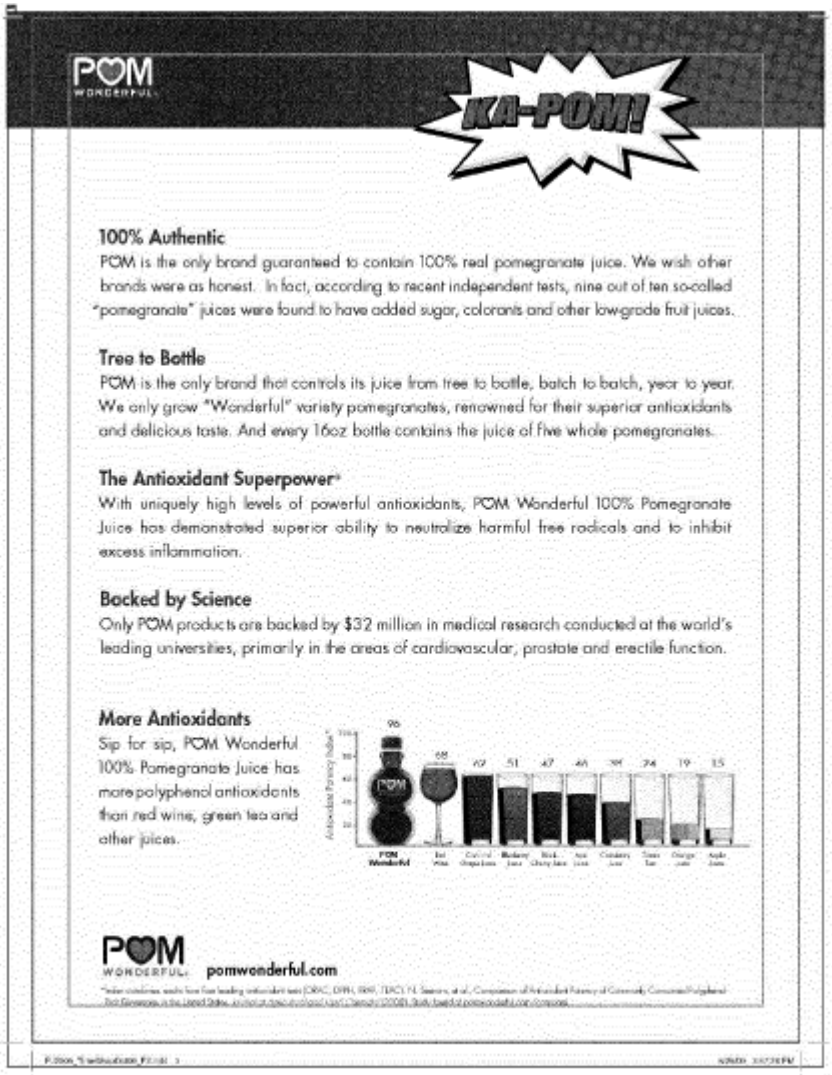

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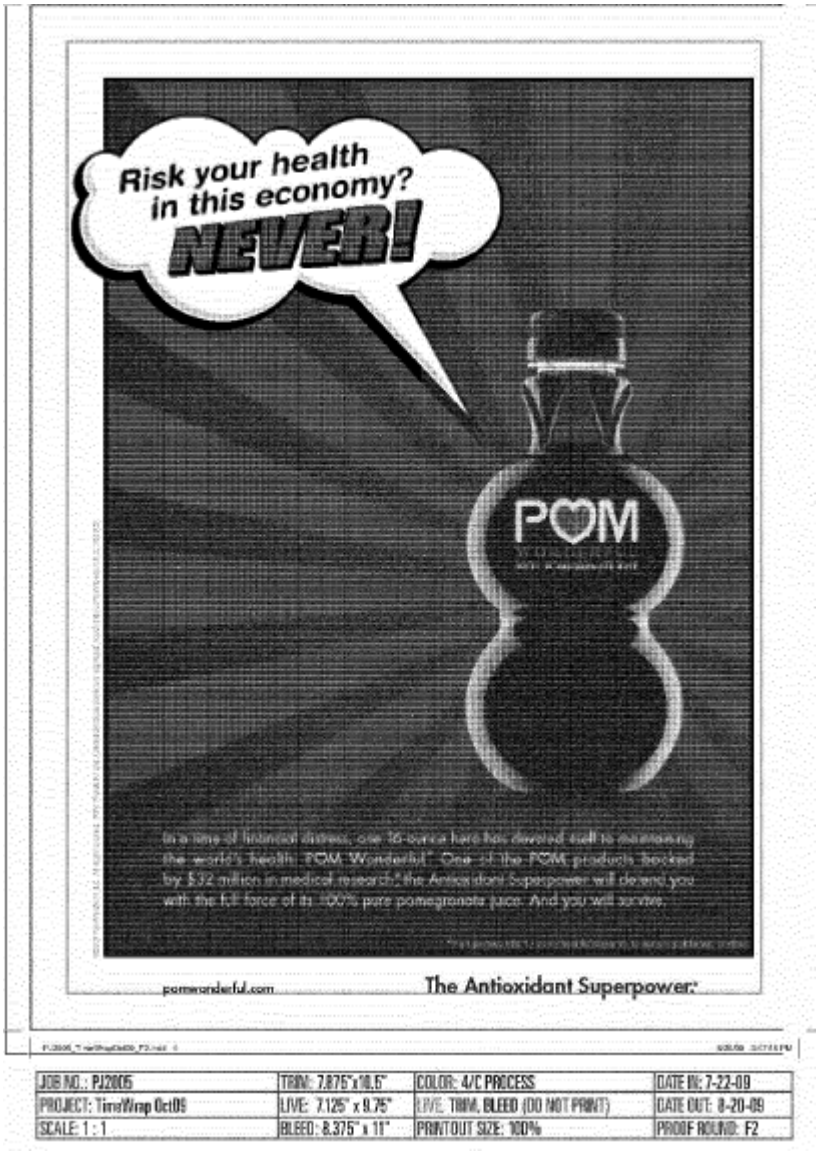
Opinion of the Commission



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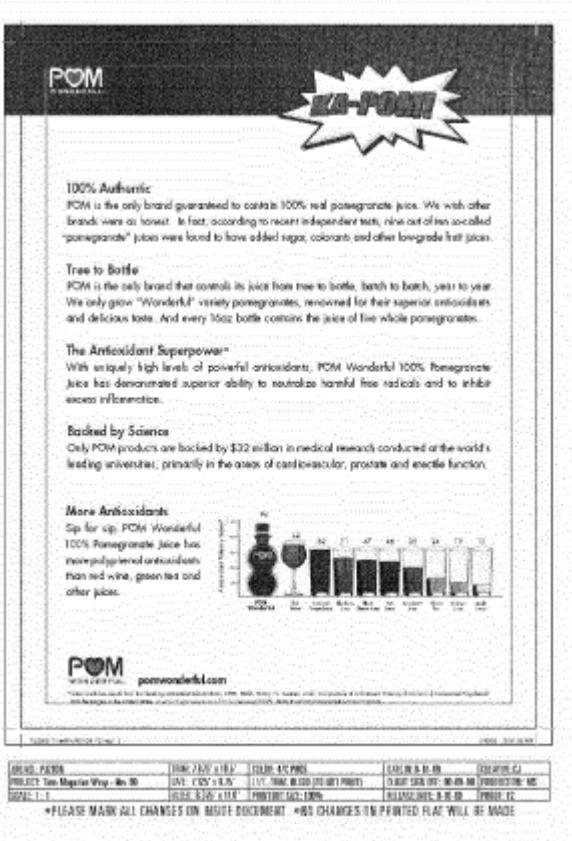
PROJECT: TimWrap Oct09	LIVE: 7.125" x 9.75"	LIVE, TRIM, BLEED (DO NOT PRINT)	DATE OUT: 8-20-09
SCALE: 1 : 1	BLEED: 8.375" x 11"	PRINTOUT SIZE: 100%	PROOF ROUND: F2

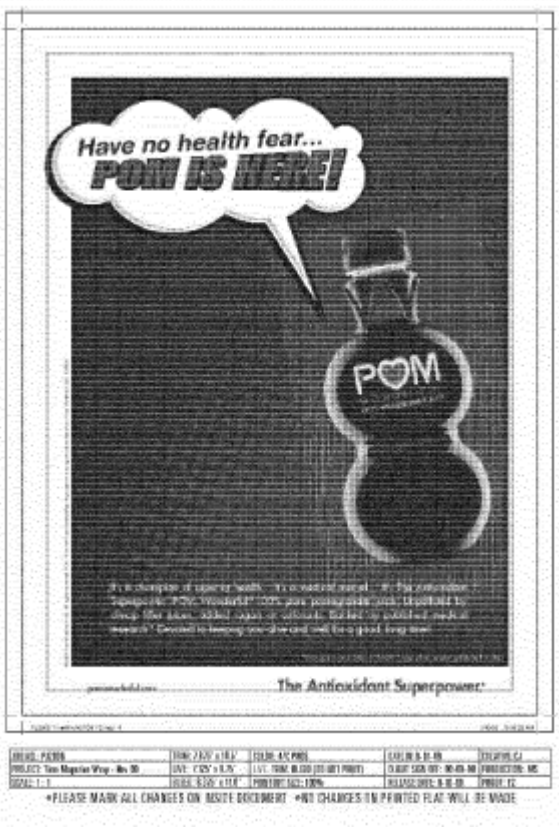

TIME
Lucky I have super
HEALTH POWERS!
POM
*PLEASE MARK ALL CHANGES ON WASTE DOCUMENT *NO CHANGES ON PRINTED PLAT WILL BE MADE

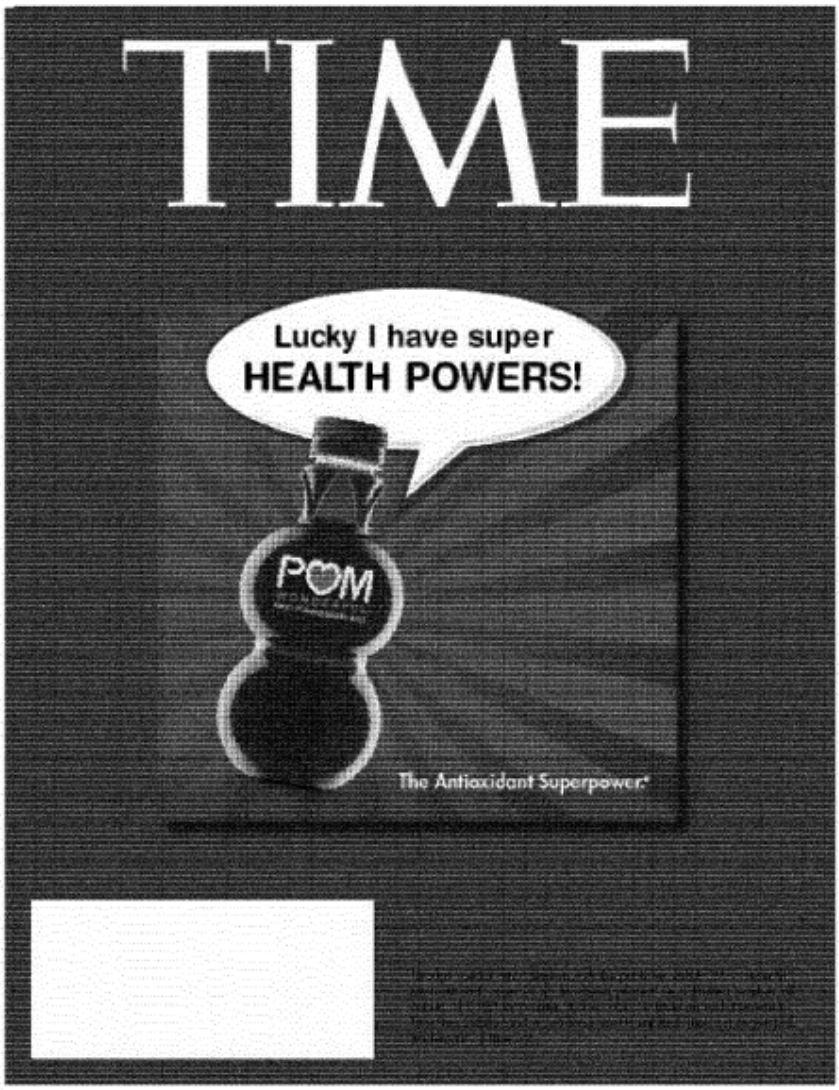
Opinion of the Commission

*PLEASE MARK ALL CHANGES ON INSIDE DOCUMENT *NO CHANGES ON PRINTED PLATE WILL BE MADE


POM
EX-POM!
100% Authentic
POM is the only brand guaranteed to contain 100% real pomegranate juice. We wish other brands were as honest. In fact, according to recent independent tests, nine out of ten so-called "pomegranate" juices were found to have added sugar, colorants and other low-grade fruit juices.
Tree to Bottle
POM is the only brand that controls its juice from tree to bottle, batch to batch, year to year. We only grow "Wonderful" variety pomegranates, renowned for their superior antioxidants and delicious taste. And every 16oz bottle contains the juice of five whole pomegranates.
The Antioxidant Superpower*
With uniquely high levels of powerful antioxidants, POM Wonderful 100% Pomegranate Juice has demonstrated superior ability to neutralize harmful free radicals and to inhibit excess inflammation.
Backed by Science
Only POM products are backed by $32 million in medical research conducted at the world's leading universities, primarily in the areas of cardiovascular, prostate and erectile function.
More Antioxidants
Sip for sip, POM Wonderful 100% Pomegranate Juice has more polyphenol antioxidants than red wine, green tea and other juices.
POM
pomwonderful.com
*PLEASE MARK ALL CHANGES ON WASTE DOCUMENT. *NO CHANGES ON PRINTED PLATE WILL BE MADE.

Opinion of the Commission

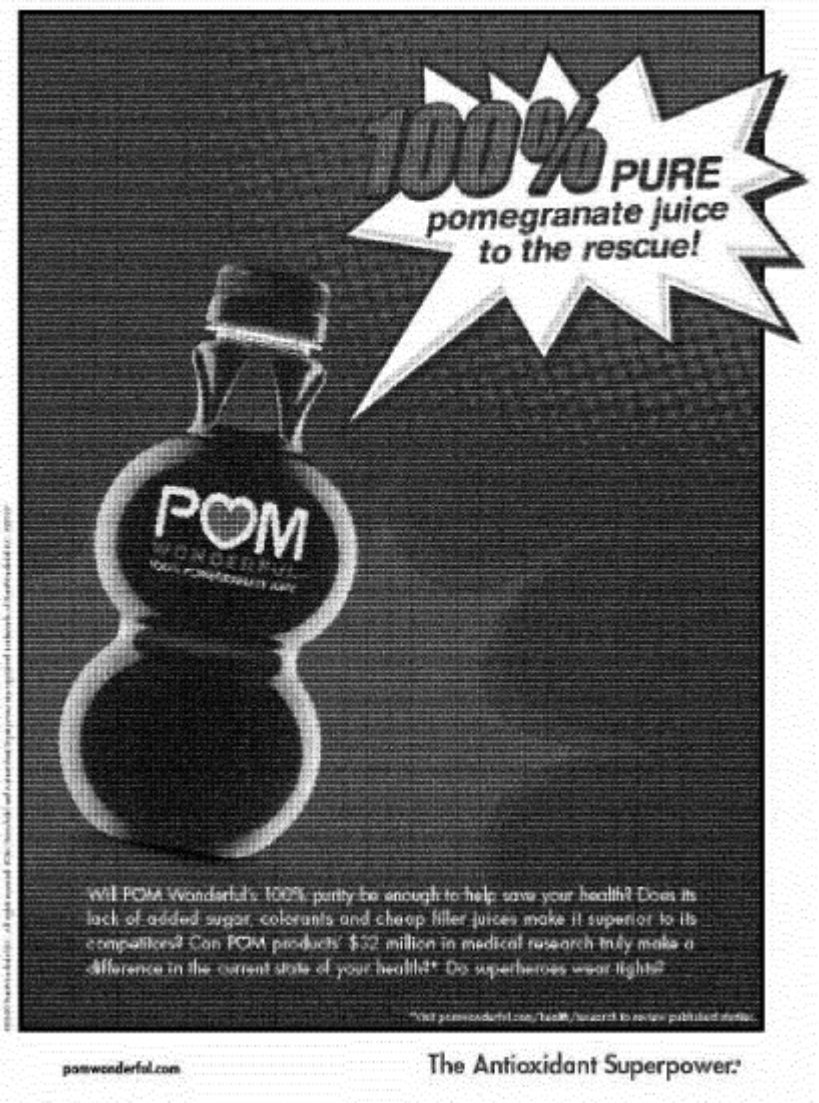


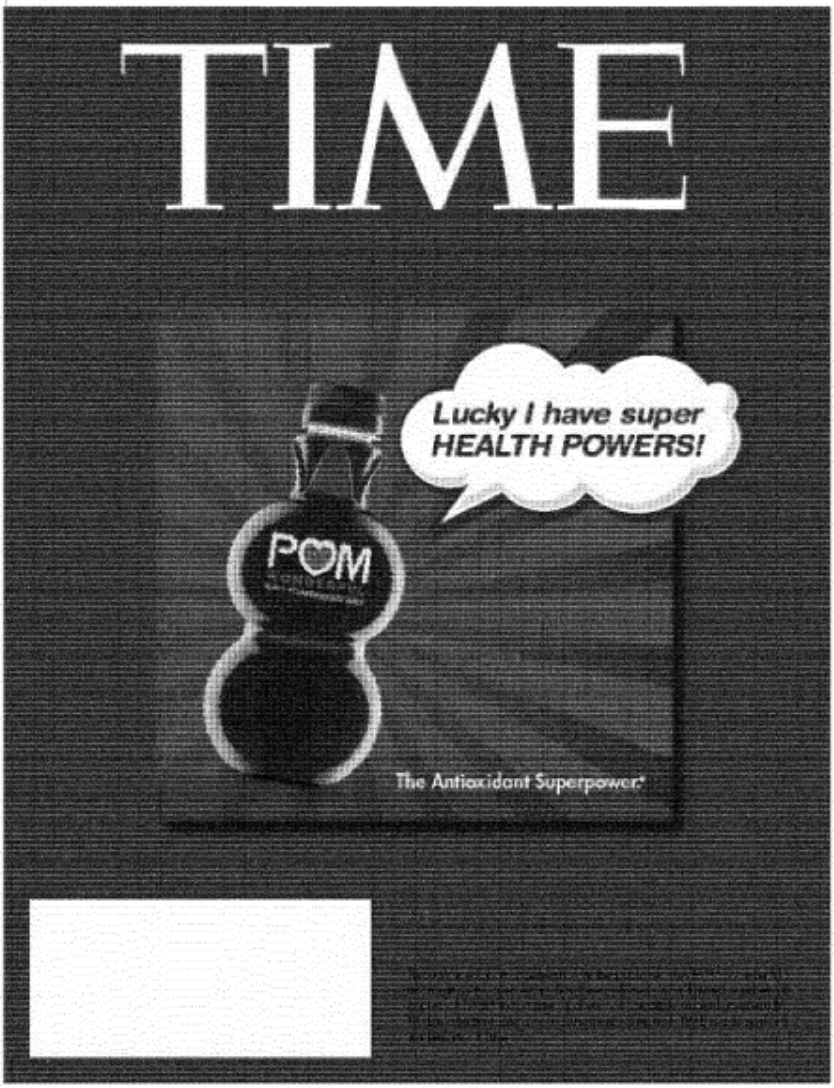


CONFIDENTIAL-FTC Docket NO. 9344 RESP023825

CX0380_0005

Opinion of the Commission

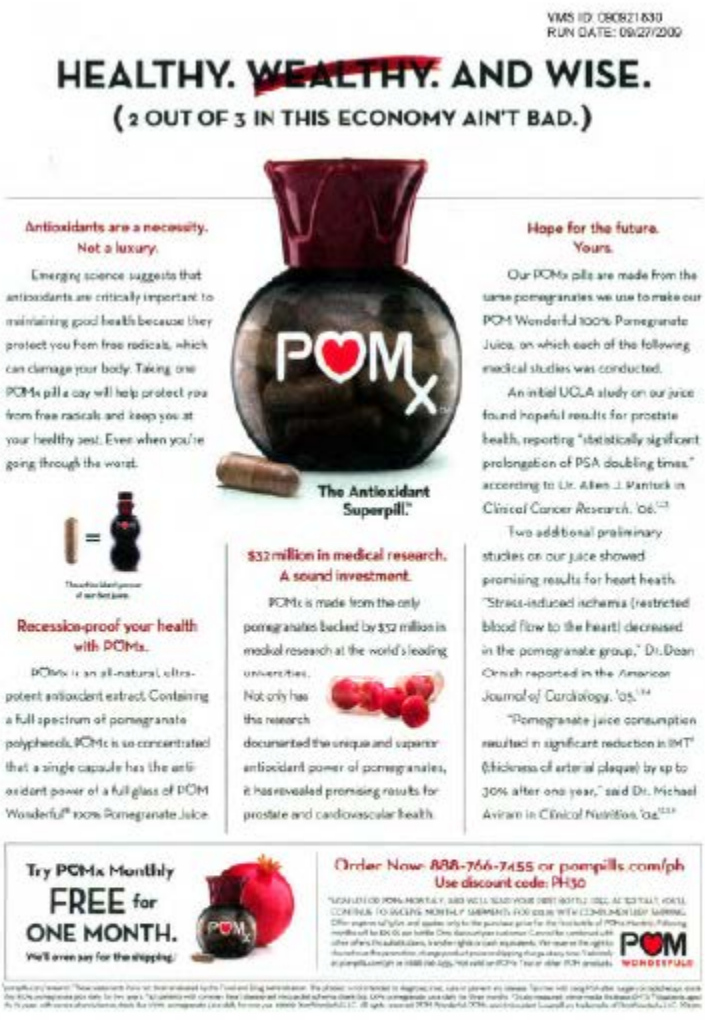




CONFIDENTIAL-FTC Docket NO. 9344 RESP023827

CX0380_0007

APPENDIX B
Figure 28



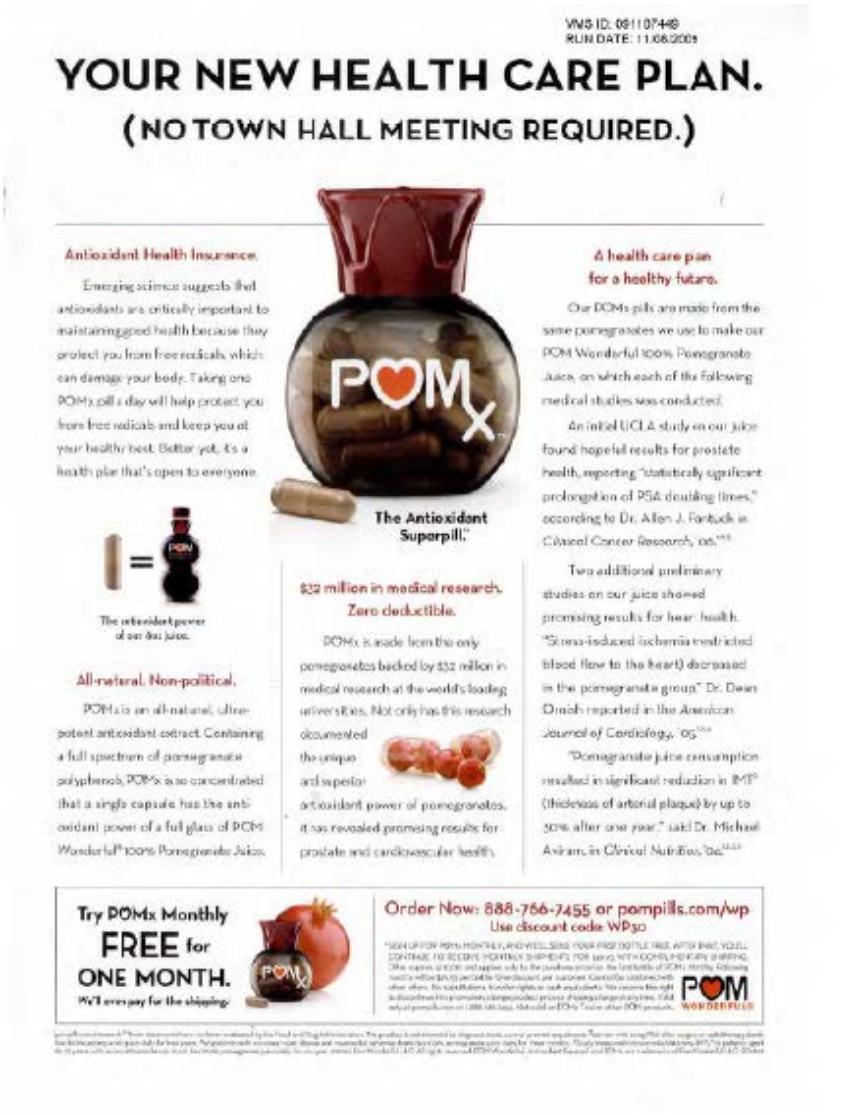
VMS-0000299

CX0331_0001

Exhibit J

CX1426_00043

APPENDIX B
Figure 29



VMS-0000303

CX0328_0001

APPENDIX B
Figure 30

VMS-0000304

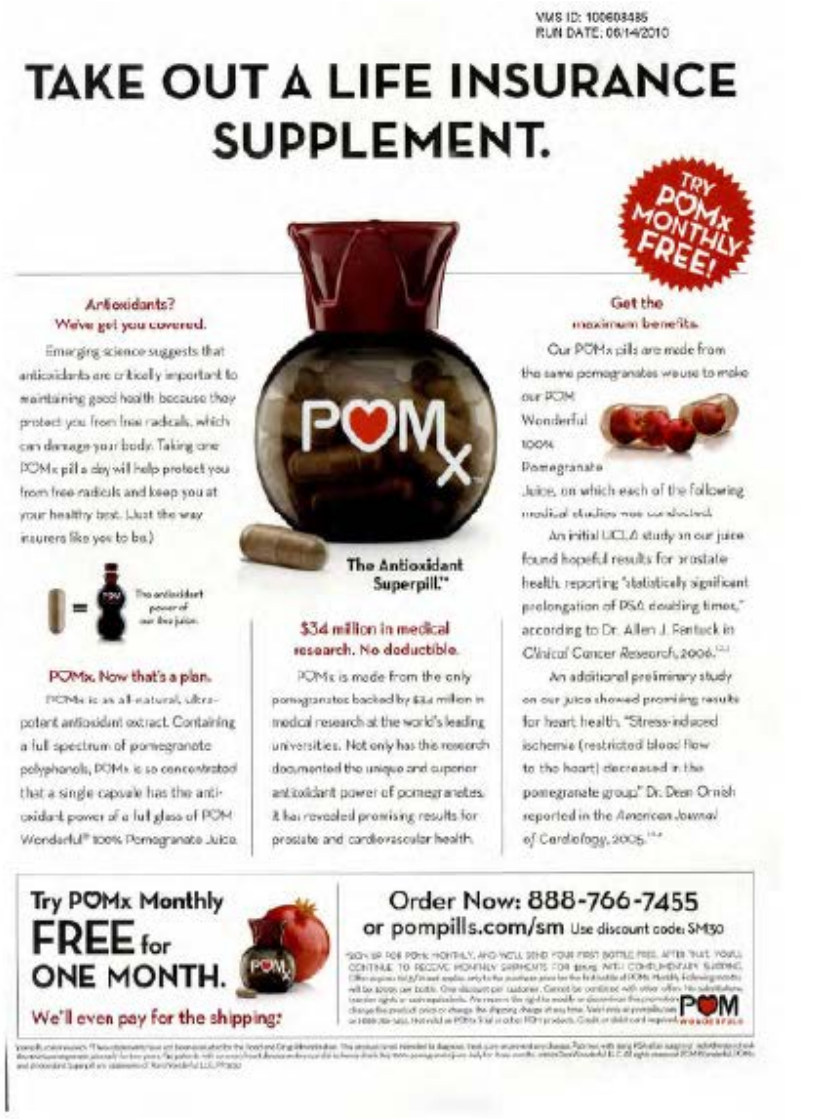
CX0337_0001

Opinion of the Commission

APPENDIX B
Figure 31

VMS-0000306

CX0342_0001



VMS-0000320

CX0353_0001

APPENDIX B
Figure 32

VMS-0000312

CX0348_0001

VMS-0000313

CX0350_0001

Opinion of the Commission

APPENDIX B
Figure 33

VMS-0000319

CX0351_0001

VMS-0000323

CX0355_0001

APPENDIX C
Summary Table of Commission Findings
Regarding POM Exhibits

Note:
- "y" means that the Commission finds an exhibit to make a challenged claim.
- "n" means that the Commission does not have sufficient evidence to find an exhibit to make a challenged claim.
- "(y)" or "(n)" means the Commission overrules a specific finding by the ALJ.
- Shaded box means the claim was not challenged by Complaint Counsel.

Exhibit	Heart Disease			Prostate Cancer			Erectile Dysfunction			Estab.
	Treat	Prevent	Reduce Risk	Treat	Prevent	Reduce Risk	Treat	Prevent	Reduce Risk	
1. CX0013 2003 Press Release	y	y	y							y
2. CX0016 Drink and Be Healthy		y	y							y
3. CX0029 10 Out of 10 People	y	y	y							y
4. CX0031 Floss Your Arteries	y	y	y							(y)
5. CX0033 Life Support		y	y							
6. CX0034 Amaze Your Cardiologist	y	y	y							(y)
7. CX0036 Cheat Death		(y)	y							
8. CX0044 2005 Press Release	y	y	y							y

9. CX0065 2006 Press Release		(y)	(y)	y						y
10. CX1426 Ex. I Antioxidant Superpill Brochure	y	y	y	y	y	y				y
11. CX0103 Decompress	n	(y)	(y)							(y)
12. CX0109 Heart Therapy		(y)	(y)							(y)
13. CX0120 One Small Pill				(y)	n	n				(y)
14. CX0122 Science, Not Fiction				(y)	n	n				(y)
15. CX0128 2007 Press Release							y			y
16. CX1426 Ex. M POMx Heart	y	y	y							y
Exhibit	Heart Disease			Prostate Cancer			Erectile Dysfunction			Estab.
	Treat	Prevent	Reduce Risk	Treat	Prevent	Reduce Risk	Treat	Prevent	Reduce Risk	
17. CX1426 Ex. N POMx Prostate				y	y	y				y
18. CX0169/ CX1426 Ex. L Power of POM	(y)	(y)	(y)	(y)	(y)	(y)				(y)
19. CX0180/ CX1426 Ex. K Antioxidant Superpill	(y)	(y)	(y)	(y)	(y)	(y)				(y)
20. CX0192 Heart Pumping		(y)	(y)							(y)
21. CX0314 Drink to Prostate Health				y	y	y				y
22. CX0260/ CX1426 Ex. B Prostate Health				(y)						(y)

Opinion of the Commission

23. CX0274/ CX1426 Ex. C Off to Save Prostates					(y)	(y)				(y)
24. CX0279 Science, Not Fiction	(y)	(y)	(y)	(y)	(y)	(y)				(y)
25. CX0280 Live Long Enough	(y)	(y)	(y)	(y)	(y)	(y)				(y)
26. CX0475/ CX1425 Ex. A Juice Bottle Hang Tag	n	n	n	n	n	n	n	n	n	n
27. CX0372/ CX0379/ CX0380 Super Health				y	y	y				y
28. CX0331/ CX1426 Ex. J Healthy Wealthy	(y)	(y)	(y)	(y)	(y)	(y)				(y)
29. CX0328 Your New Health Care Plan	(y)	(y)	(y)	(y)	(y)	(y)				(y)
30. CX0337 First Bottle You Should Open	(y)	(y)	(y)	(y)	(y)	(y)				(y)
31. CX0342/CX0353 Life Insurance Supplement	(y)	(y)	(y)	(y)	(y)	(y)				(y)

Exhibit	Heart Disease			Prostate Cancer			Erectile Dysfunction			Estab.
	Treat	Prevent	Reduce Risk	Treat	Prevent	Reduce Risk	Treat	Prevent	Reduce Risk	
32. CX0348/CX0350 24 Scientific Studies	(y)	(y)	(y)	(y)	(y)	(y)				(y)
33. CX0351/CX0355 Only Antioxidant Pill Rated X	(y)	(y)	(y)	(y)	(y)	(y)	y	y	y	(y)
34. CX0463 Heart Therapy		n	n							
35. CX0466/ CX1426 Ex. H Off to Save Prostates					n	n				
36. CX0473 Capture of POMWonderful .com Community Website	(y)	(y)	(y)	(y)	(y)	(y)	(y)	(n)	(n)	(y)
37. CX0473 Capture of POMWonderful .com Website	y	y	y	y	y	y	y	**(n)**	(n)	y
38. CX0473 Capture of PomegranateTruth .com Website	y	y	y	(y)	n	n	(y)	n	n	y
39. CX0473 Capture of POMPills.com Website	y	y	y	y	y	y	y	(n)	(n)	y
40-43. CX0473 Media Interviews	The Commission does not reach the challenged media interviews. See section IX. of the Commission's Opinion.									

FINAL ORDER

DEFINITIONS

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

1. Unless otherwise specified, "Individual Respondents" means Stewart A. Resnick, Lynda Rae Resnick, and Matthew Tupper, individually and as officers of POM Wonderful LLC ("POM Wonderful") and Roll Global LLC ("Roll").

2. Unless otherwise specified, "Respondents" means POM Wonderful and Roll, their successors and assigns; the Individual Respondents; and each of the above's officers, agents, representatives, and employees.

3. "Commerce" means as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

4. "Covered Product" means any food, drug, or dietary supplement, including, but not limited to the POM Products.

5. "Food" and "drug" means as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55.

6. "Endorsement" means as defined in 16 C.F.R. § 255.0(b).

7. "POM Product" means any food, drug, or dietary supplement containing pomegranate or its components, including, but not limited to, POM Wonderful 100% Pomegranate Juice and pomegranate juice blends, POMx Pills, POMx Liquid, POMx Tea, POMx Iced Coffee, POMx Bars, and POMx Shots.

8. The term "including" in this Order means "without limitation."

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

I.

IT IS ORDERED that Respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Covered Product, in or affecting commerce, shall not make any representation in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, illustration, trademark, or trade name, that such product is effective in the diagnosis, cure, mitigation, treatment, or prevention of any disease, including, but not limited to, any representation that the product will treat, prevent or reduce the risk of heart disease, including by decreasing arterial plaque, lowering blood pressure, or improving blood flow to the heart; treat, prevent or reduce the risk of prostate cancer; or treat, prevent or reduce the risk of erectile dysfunction; unless the representation is non-misleading and, at the time of making such representation, Respondents possess and rely upon competent and reliable scientific evidence that, when considered in light of the entire body of relevant and reliable scientific evidence, is sufficient to substantiate that the representation is true. For purposes of this Part I, competent and reliable scientific evidence shall consist of at least two randomized and controlled human clinical trials (RCTs) of the Covered Product that are randomized, well controlled, based on valid end points, and conducted by persons qualified by training and experience to conduct such studies. Such studies shall also yield statistically significant results, and shall be double-blinded unless Respondents can demonstrate that blinding cannot be effectively implemented given the nature of the intervention.

II.

IT IS FURTHER ORDERED that Respondents, directly or through any corporation, partnership, subsidiary, division, trade

name, or other device, in connection with the manufacturing, 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, including through the use of a product name, endorsement, depiction, or illustration, trademark, or trade name, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

III.

IT IS FURTHER ORDERED that Respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Covered Product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, illustration, trademark, or trade name, about the health benefits, performance, or efficacy of any Covered Product, unless the representation is 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. For purposes of this Part III, competent and reliable scientific evidence means 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.

IV.

IT IS FURTHER ORDERED that:

A. Nothing in Parts I through III of the Order shall prohibit Respondents from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990; and

B. Nothing in Parts I through III of the Order shall prohibit Respondents from making any representation for any drug that is permitted in the labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

V.

IT IS FURTHER ORDERED that POM Wonderful, Roll, and their successors and assigns, and Individual Respondents shall, for five (5) years after the last date of dissemination of any representation covered by this Order, maintain and upon request make available to the Commission for inspection and copying:

A. All advertisements, labeling, packaging, and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation;

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations; and

D. All acknowledgments of receipt of this Order, obtained pursuant to Part VI.

VI.

IT IS FURTHER ORDERED that POM Wonderful, Roll, and their successors and assigns, and Individual Respondents shall deliver a copy of this Order to all of their current and future principals, officers, directors, and managers, and to all of their current and future employees, agents, and representatives having managerial 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. POM Wonderful, Roll, and their successors and assigns, and Individual Respondents shall deliver this Order to such current personnel within thirty (30) days after the effective date of this Order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

VII.

IT IS FURTHER ORDERED that POM Wonderful, Roll, and their successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporations or any business entity that POM Wonderful, Roll, and their successors and assigns, and Individual Respondents directly or indirectly control, or have an ownership interest in, that may affect compliance obligations arising under this Order, including but not limited to formation of a new business entity; a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor entity; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order; the proposed filing of a bankruptcy petition; or a change in the business or corporate name or address. Provided, however, that, with respect to any proposed change about which POM Wonderful, Roll, and their successors and assigns, and Individual Respondents learn less than thirty (30) days prior to the date such action is to take place, POM Wonderful, Roll, and their successors and assigns, and Individual Respondents 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 to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line FTC v. POM Wonderful. *Provided, however*, that, in lieu of overnight courier, notices may be sent by first class mail, but only if electronic versions of such notices are contemporaneously sent to the Commission at DEbrief@ftc.gov.

VIII.

IT IS FURTHER ORDERED that each Individual Respondent, for a period of ten (10) years after the date of issuance of this Order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include the Individual Respondent's new business address and telephone number and a description of the nature of the business or employment and his or her duties and responsibilities. Unless otherwise directed by a representative of the Commission, all notices required by this Part shall be sent by overnight courier to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line FTC v. POM Wonderful. Provided, however, that, in lieu of overnight courier, notices may be sent by first-class mail, but only if electronic versions of such notices are contemporaneously sent to the Commission at DEbrief@ftc.gov.

IX.

IT IS FURTHER ORDERED that POM Wonderful, Roll, and their successors and assigns, and Individual Respondents within sixty (60) days after the effective date 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 compliance with this Order. Within ten (10) days of receipt of written notice from a representative of the Commission, they shall submit additional true and accurate written reports.

X.

This Order will terminate on January 10, 2033, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the Order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this Order that terminates in less than twenty (20) years;

B. This Order's application to any proposed 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 Respondents did not violate any provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order will terminate according to this Part as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

CONCURRING STATEMENT OF COMMISSIONER MAUREEN K. OHLHAUSEN

I disagree with the majority's findings of implied disease efficacy and establishment claims with regard to the exhibits detailed below for several reasons. First, several of these exhibits contain claims about the general effects of the POM products on the continued healthy functioning of the body but do not make references to diseases or health-related conditions.[1] Despite the absence of such references or of other suggestive indicators (*e.g.*, strong medical imagery), the majority finds that these exhibits contain *implied* disease-related claims without extrinsic evidence that consumers viewing the exhibits would actually perceive such stronger claims and not simply perceive healthy functioning claims (akin to "structure/function" or "S/F" claims under Food

[1] *See* Figs. 4, 12, 18-20, 23-25, and 28-33.

and Drug Administration regulations).[2] I am concerned that, if the Commission too easily finds implied disease efficacy or establishment claims in advertisements for foods, absent extrinsic evidence, then it may tend to undermine an important balance that is struck in the regulation of food, supplement, and drug advertising under the FTC Act and other federal laws.[3]

Second, for a number of advertisements, I believe the majority conflates disease treatment claims with prevention/risk reduction claims. In one instance, they find implied disease treatment claims where the exhibit appears only to claim or suggest that the risk of disease is, or may be, reduced by POM products.[4] Conversely, in several others, they find implied prevention/risk reduction claims (not solely disease treatment claims) for exhibits that describe studies of subjects already suffering from prostate cancer or ED.[5] For all of these exhibits, we lack extrinsic evidence that consumers would perceive all the various claims that the majority finds are implied by the exhibits. Because it seems unlikely that a consumer would assume that any food or food product that lowers the risk of disease is also a viable treatment for that disease, I disagree with the majority's conclusions that such claims are facially present in certain exhibits. Likewise, because it seems unlikely that a consumer would assume that a treatment for existing cancer or heart disease would necessarily prevent the onset of these conditions, I disagree with the majority's conclusion that such claims are facially present in certain other exhibits.

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[2] The fact that I find these claims more akin to structure/function claims does not mean I take a position on whether Respondents possessed adequate substantiation or otherwise met the requirements to make structure/function claims.

[3] The FTC has long recognized "the importance of consistent treatment of nutrient content and health claims in food advertising and labeling and [sought] to harmonize its advertising enforcement program with FDA's food labeling regulations to the fullest extent possible under the statutory authority of the FTC Act." FTC Enforcement Policy Statement on Food Advertising, (1994), *available at* http://www.ftc.gov/bcp/policystmt/ad-food.shtm.

[4] *See* Fig. 6.

[5] *See* Figs. 10, 17, and 36-39.

Finally, because a number of exhibits contain descriptions of studies that are highly qualified with terms such as "small study," "initial scientific research," and "promising," "hopeful" or "encouraging" results, I disagree with the conclusion that these exhibits make establishment claims in the absence of extrinsic evidence supporting such a conclusion.[6] Moreover, the majority argues that the challenged ads reinforce the disease-related establishment claims by mentioning that POM spent millions on research.[7] However, the references to the money spent on research appear to be significantly related to demonstrating the amount of antioxidants in the POM products and the general effects of those antioxidants on the human body. Therefore, we need extrinsic evidence to show that consumers would also take away the impression that the research supporting the disease claims is established and not merely preliminary.

Virtually none of the claims found by the Commission in the challenged exhibits is express – they are deemed to be implied. The Commission may undertake a net impression analysis and find implied claims when it can "conclude with confidence after examining the interaction of all the different elements in [an advertisement] that they contain a particular implied claim." *In re Thompson Med. Co.,* 104 F.T.C. 648, 788-89 (1984); *Telebrands Corp.,* 140 F.T.C. 278, 290 (2004) (citing *Thompson Medical*). When such confidence is lacking (*e.g.,* due to well-qualified claims or contradicting statements), however, "we will not find the ad to make the implied claim unless extrinsic evidence allows us to conclude that such a reading of the ad is reasonable." *Thompson Med. Co.*, 104 F.T.C at 789; *Telebrands,* 140 F.T.C. at 291 (citing *Thompson Med. Co.*).

With respect to the claims described below, such extrinsic evidence is unavailable or inadequate. Although Complaint Counsel offered the expert testimony of Dr. Stewart, he did not conduct his own facial analysis of the challenged advertisements and could not opine on what they meant. IDF 513. Also, unlike in

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[6] *See* Figs. 4, 6, 12-14, 18-20, 24, 25, and 28-33.

[7] "When an ad represents that tens of millions of dollars have been spent on medical research, it tends to reinforce the impression that the research supporting product claims is established and not merely preliminary." *See* Section IV.A. of the opinion.

cases such as *Thompson Medical* and *Telebrands*, Complaint Counsel did not introduce copy testing evidence to demonstrate what claims consumers may perceive from well-qualified or contradictory statements in advertisements. Because a number of exhibits contain references to the continued healthy functioning of the body without mentioning disease or health-related conditions, discuss only treatments for patients already suffering certain diseases, discuss risk reduction without mentioning treatment of certain diseases, or contain extensive qualifying language, I do not share the majority's ability to "conclude with confidence," that no extrinsic evidence is needed to read stronger claims between the lines. I am concerned with, and thus disagree with, these particular majority findings.[8]

As our opinion today observes, the Commission has paid particular attention to the balancing of pertinent consumer interests in describing the *Pfizer* factors applicable to the question of what constitutes a reasonable basis for a claim.[9] The Commission also has been clear that our substantiation standards and claims interpretation are inextricably linked. Hence, in delineating standards for prior substantiation, we state "[t]he Commission will take care to assure that it *only* challenges *reasonable interpretations* of advertising claims."[10] As a procedural matter, we may begin by asking what particular claims – and categories of claims – are being made, and then ask what evidence should be required to substantiate such claims. We must keep in mind, however, that if we are too quick to find stronger claims than the ones reasonable consumers actually perceive, then we will inadvertently, but categorically, require an undue level of substantiation for those claims.

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[8] Engaging in broad claim interpretation also raises questions about whether this approach qualifies as a case-by- case analysis or is more like a broad prohibition on certain categories of speech, which has implications for First Amendment review of our actions.

[9] *See In re Pfizer Inc.*, 81 F.T.C. 23, 91-2 (1972); *see FTC Policy Statement Regarding Advertising Substantiation*, 104 F.T.C. 839 (1984) (appended to *Thompson Med. Co.*, 104 F.T.C. 648 (1984)) ("*Substantiation Statement*").

[10] *Substantiation Statement* at 840 n. 3 (emphasis added) ("Notwithstanding … variations in approach, the focus of all Commissioners on reasonable interpretations of claims is intended to ensure that advertisers are not required to substantiate claims that were not made.")

In particular, Congress and the Food and Drug Administration have created carefully drawn boundaries between different types of claims regarding the effect of food and dietary supplement products on nutrition and health. FDA regulations distinguish between various categories of claims that may be associated with food products and dietary supplements – including "qualified health claims," "health claims," and "structure/function" claims – and the level of substantiation required for each category of claim.[11] According to FDA guidance, health claims and qualified health claims expressly or by implication characterize the relationship of a substance to a disease (*e.g.*, heart disease) or health-related condition (*e.g.*, high blood pressure).[12] By contrast, structure/function claims describe the effect that a substance has on the structure or function of the body for maintenance of good health and nutrition but do not make reference to a disease.[13] The FDA imposes different and more stringent requirements on health claims than it does on structure/function claims.[14]

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[11] *See generally* FDA, Guidance for Industry: A Food Labeling Guide (September 1994; Revised April 2008; Revised October 2009), *available at* http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/FoodLabelingGuide/default.htm; FDA, Guidance for Industry: Evidence-Based Review System for the Scientific Evaluation of Health Claims – Final (2009), *available at* http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/ucm073332.htm; FDA Guidance for Industry: FDA's Implementation of "Qualified Health Claims": Questions and Answers; Final Guidance (May 12, 2006), *available at* http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/ucm053843.htm.

[12] FDA, Guidance for Industry: A Food Labeling Guide, at 8.Claims H1, Q1.

[13] *Id.* at 8.Claims S1, S7.

[14] "Health claims are required to be reviewed and evaluated by FDA prior to use." FDA, Guidance for Industry: A Food Labeling Guide, at 8.Claims H1. FDA also distinguishes "health claims that meet the Significant Scientific Agreement (SSA) standard," from "S/F claims [that] must be truthful and not misleading and are not pre-reviewed or authorized by FDA."). *id.* at 8.Claims H3. In addition, "FDA does not require conventional food manufacturers to notify FDA about their S/F claims and disclaimers are not required for conventional foods." FDA, Structure/Function Claims, *available at* http://www.fda.gov/Food/LabelingNutrition/LabelClaims/StructureFunctionClaims/ucm2006881.htm. Structure/function claims were specifically authorized by the Dietary Supplement Health and Education Act of 1994, 108 Stat. 4325

I am concerned that the majority's interpretation of certain exhibits blurs these boundaries and creates an inconsistency between FTC advertising requirements and FDA food labeling and advertising requirements by concluding that the mere mention of "health" or healthy functioning can imply a disease-related efficacy (*i.e.,* a health claim in FDA terms) and that the mere mention of scientific evidence can imply a related establishment claim. For instance, Figures 12, 20, and 23 seem limited to addressing the product's general health benefits by providing antioxidants and fighting free radicals, and thus potentially reducing the risk of disease, while claiming that these benefits are backed by significant scientific or medical research about prostate or cardiovascular health. Based on the majority's views about these exhibits, it is difficult to imagine any structure/function claims that POM could associate with its products in the marketplace without such claims being interpreted, under the FTC precedent set in this case, as disease-related claims.[15]

(codified as amended in scattered sections of 21 U.S.C.); *see also* Dep't Health & Human Servs., Food & Drug Admin., Regulations on Statements Made for Dietary Supplements Concerning the Effect of the Product on the Structure or Function of the Body, Final Rule, 65 Fed. Reg. 1000 at 1034-35 (Jan. 6, 2000).

[15] I am concerned that, for these exhibits, the majority readings are in conspicuous tension with the express findings and intent of Congress in enacting the Dietary Supplement Health and Education Act of 1994 (DSHEA), wherein Congress provides for structure/function claims that may be made on behalf of dietary supplements. In the statute itself are express findings that healthful diets may reduce the risk of disease and the need for medical intervention; that "consumers should be empowered to make choices about preventive health care programs," *id.* at § 2(8), based on available scientific evidence; and that, "although the Federal Government should take swift action against products that are unsafe or adulterated, the Federal Government should not take any actions to impose unreasonable regulatory barriers limiting or slowing the flow of safe products and accurate information to consumers." *Id.* at § 2(13). Moreover, although the DSHEA regards dietary supplements in particular, FDA has concluded that "structure/function claims may be made on a conventional food provided the effects are derived from the nutritive value of the food." FDA, Guidance for Industry: A Food Labeling Guide, at 8.Claims S1. Hence, "[o]n December 20, 2002, the agency announced its intention to extend its approach to implementing the *Pearson* decision to include health claims for conventional foods (67 Fed. Reg. 78002)." FDA, Guidance for Industry: Evidence-Based Review System for the Scientific Evaluation of Health Claims – Final, at § II (background).

A possible (though not plausible) argument for the majority's position is that these exhibits are somehow infused with messages from other ads included in some of POM's advertising campaigns that mentioned specific diseases or health conditions. However, we should not reach such a conclusion in the absence of extrinsic evidence in the record. *Thompson Med. Co.*, 104 F.T.C. at 789; *Telebrands*, 140 F.T.C. 379, 436 (2004) (ALJ Decision), *adopted by* the Commission in *Telebrands*, 140 F.T.C. 278, 281 (2004) (requiring extrinsic evidence even though the ads at issue contained express references to other ads). More generally, we should be careful not to interpret claims so broadly that we undermine distinctions between types of claims, and the substantiation appropriate to them, that Congress and our sister agency have found important to the public's health and wellbeing.

In sum, the majority's findings with regard to the exhibits detailed below in the absence of extrinsic evidence leave questionable room for marketers to make well-qualified and substantiated structure/function type efficacy or establishment claims because of the high risk that such claims will be found to imply the treatment, prevention, or risk-reduction of a disease, or that they are clinically proven.

I incorporate these arguments by reference to my views for specific exhibits in my comments below.

Figure 4. CX0031: "Floss Your Arteries" print advertisement

I disagree with the majority view that this print ad conveyed to a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily treats – rather than prevents or reduces the risk of – heart disease. I also disagree with the majority and would uphold the ALJ's finding that the evidence fails to show that this print ad conveys to a significant minority of reasonable consumers that the claims contained in the advertisement are clinically proven. The advertisement's language qualifies that drinking POM Juice "*can* reduce plaque by up to 30%" (emphasis added) and the citation to a study appears in a footnote too small to be clear and conspicuous under our own standards.[16] *See* ID at

[16] Advertisers cannot use fine print to contradict other statements in an ad or to clear up misimpressions the ad would otherwise leave. *FTC Deception Policy Statement*, appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 180-

¶ 447. Further, the imagery in the advertisement is that of regular hygiene, such as tooth brushing and flossing, not medical imagery related to heart disease that appears in other challenged advertisements where the Commission unanimously found an implied establishment claim.

Figure 6. CX0034: Amaze Your Cardiologist

I disagree with the majority view that this print ad conveys to a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily treats – rather than prevents or reduces the risk of – heart disease. I also disagree with the majority and would uphold the ALJ's finding that the evidence fails to show that this exhibit conveys to a significant minority of reasonable consumers that the claims contained in the advertisement are clinically proven because the statement regarding plaque reduction is well-qualified ("*can* reduce plaque by up to 30%" (emphasis added)) and the reference to a study appears in a footnote too small to be clear and conspicuous under our own standards. *See* ID at ¶¶ 465-468.

Figures 10 and 17. CX1426 Ex. I: Antioxidant Superpill Brochure; CX1426 Ex. N: POMx Prostate Newsletter

I disagree with the majority's view that these exhibits convey to a significant minority of reasonable consumers that daily consumption of POM products prevents or reduces the risk of prostate cancer, as opposed to treating prostate cancer. All references to that disease in the exhibit appear rooted in a study of 46 men age 65 to 70 who had been treated for prostate cancer. Further, CX1426 Ex. I specifically references "new studies are under way … in patients *with* prostate cancer" (emphasis added).

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81 (1984). To be effective, Commission orders require such disclosures to be clear and conspicuous. *E.g., Thompson Med. Co.,* 104 F.T.C. at 842-43. For print ads, for instance, past Commission orders have defined "clear and conspicuous" to mean in a type size and location sufficiently noticeable for an ordinary consumer to read and understand it and in print that contrasts with the background against which it appears. *See, e.g.*, *FTC v. Green Millionaire, LLC,* No. 1:12-cv-01102-BEL (D. Md. filed Apr. 12, 2012) (proposed order granting stipulated permanent injunction), *available at* http://www.ftc.gov/os/caselist/1023204/120416greenmillstip.pdf.

Figure 12. CX0109: Heart Therapy

I disagree with the majority and would uphold the ALJ's findings that the evidence fails to show that this print ad conveys to a significant minority of consumers that drinking eight ounces of POM Juice daily prevents or reduces the risk of heart disease or that such claims are clinically proven. The imagery in this ad, which is a POM bottle reclining on a couch, suggests psychotherapy, not treatment for heart disease. The text is qualified with references such as "emerging science," "initial scientific research," and "encouraging results in prostate and cardiovascular health." There is also an exhortation to "keep your heart healthy," without mention of or linkage to a specific disease, which seems more indicative of general structure/function type claims rather than health claims involving disease prevention or risk reduction.

Figures 13-14. CX0120: One small pill for mankind; CX0122: Science Not Fiction

I disagree with the majority and would uphold the ALJ's conclusion that the record does not support a finding that these exhibits convey to a significant minority of reasonable consumers that drinking eight ounces of POM Juice or taking one POMx Pill daily treats prostate cancer or that such claim is clinically proven. The exhibits contain conflicting elements and heavily qualified descriptions of studies, thus suggesting the need for extrinsic evidence to determine what consumers take away. For instance, the exhibits state that "[f]indings from *a small study suggest* … pomegranate juice *may one day prove* an effective weapon" or "[a]n *initial* UCLA medical study … showed *hopeful results* for men with prostate cancer" (emphasis added).

Figures 18-19 and 24. CX0169/CX1426 Ex. L: "The Power of POM;" CX0180/CX1426 Ex. K: "The antioxidant Superpill;" and CX0279: "Science, Not Fiction" print advertisement

I disagree with the majority and would uphold the ALJ's conclusion that the evidence fails to show that these print ads convey to a significant minority of reasonable consumers that taking a POMx Pill daily treats, prevents, or reduces the risk of heart disease and prostate cancer or that these claims are clinically proven. The ads mention the potential benefits for "prostate health" and "heart health," and exhort the consumer to "invest in your health," which are statements likely more correlated to

structure/function type claims than to health/disease claims. Moreover, the exhibits discuss the available science with qualifiers such as "preliminary studies," "hopeful results," or "suggests anti-atherosclerosis benefits." In addition, the caduceus symbol in CX0169 is next to the tag line "Reviewed for Safety by the FDA." Further, the text of any statements at the bottom of these exhibits is too small to qualify any claims adequately. Thus, extrinsic evidence would be necessary to conclude that consumers would take away health/disease claims or establishment claims from these ads.

Figure 20. CX0192: What Gets Your Heart Pumping print advertisement

I disagree with the majority and would uphold the ALJ's conclusion that the evidence fails to show that this print ad conveys to a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily prevents or reduces the risk of heart disease or that these claims are clinically proven. In contrast to certain other exhibits, this ad's imagery, a POM bottle in a bikini top, does not include medical imagery but rather invokes sexual attraction. Moreover, the ad contains statements such as "healthy arteries" and "cardiovascular health," which seem similar to structure/function type claims rather than health/disease claims. Further, the ad's references to science are qualified as "initial" scientific research that has uncovered "encouraging" results. Thus, extrinsic evidence would be necessary to conclude that consumers would take away health/disease claims or establishment claims from this ad.

Figure 23. CX0274/CX1426 Ex. C: "I'm Off to Save Prostates" print advertisement

I disagree with the majority and would uphold the ALJ's conclusion that the evidence fails to show that this print ad conveys to a significant minority of reasonable consumers that drinking eight ounces of POM Juice daily prevents or reduces the risk of prostate cancer or that these claims are clinically proven. Statements such as "defending healthy prostates" and "improve prostate health" are more akin to structure/function type claims than to health/disease claims. Moreover, the mention of research in this ad is not tied to any disease generally or cancer specifically. Further, the ad lacks any medical imagery. Thus, the

Commission should require extrinsic evidence to find implied health/disease or establishment claims.

Figures 25 and 28-33. CX0280: Live Long Enough; CX0331/CX1426 Ex. J: Healthy Wealthy; CX0328: Your New Health Care Plan; CX0337: First Bottle You Should Open; CX0342/CX0353: Life Insurance Supplement; CX0348/CX0350: 24 Scientific Studies; CX0351/CX0355: Only Antioxidant Supplement Rated X

I disagree with the majority and would uphold the ALJ's conclusion that the evidence in the record fails to show that these print ads convey to a significant minority of reasonable consumers that drinking eight ounces of POM Juice or taking one POMx Pill daily treats, prevents or reduces the risk of heart disease or prostate cancer or that these claims are clinically proven. These ads state "keep you at your healthy best" and "prostate and cardiovascular health" and do not refer to any disease, making the claims akin to structure/function type claims. The imagery regarding pills is linked to the antioxidant power of the product. The studies referenced are strongly qualified, stating that "*preliminary* studies … showed *promising* results for heart health" or that an "*initial* UCLA study … found *hopeful* results for prostate health" (emphasis added). Moreover, any disclaimers at the bottom of the ad are too small to be interpreted in conjunction with other messages. For similar reasons, I also disagree with the majority's view that exhibits CX0351 and CX0355 convey to a significant minority of reasonable consumers that drinking eight ounces of POM Juice or taking one POMx Pill daily treats, prevents, or reduces the risk of erectile dysfunction or that those claims are clinically proven. The statements about the studies referenced are qualified; for instance, the ad refers to a "*preliminary* study on erectile function" (emphasis added) and notes that "further studies are warranted." Thus, the Commission should require extrinsic evidence to find implied health/disease or establishment claims.

Figures 36 and 39. CX0473: Capture of POMWonderful.com Community Website; CX0473: Capture of POMPills.com Websites

I disagree with the majority's view that these exhibits convey to a significant minority of reasonable consumers that taking eight ounces of POM Juice or one POMx Pill daily prevents or reduces

the risk of – rather than treats – prostate cancer. Because the science referenced in these exhibits consists of subjects who had already been diagnosed with that disease, I would require extrinsic evidence before finding implied claims of disease prevention or risk reduction.

Figure 37. CX0473: Capture of POMWonderful.com Website
For the same reasons noted for exhibits 36 and 39, I disagree with the majority's view that this exhibit conveys to a significant minority of reasonable consumers that taking eight ounces of POM Juice or one POMx Pill daily prevents or reduces the risk of – rather than treats – prostate cancer. Because the science referenced in this exhibit consists of subjects who had already been diagnosed with cancer, I would require extrinsic evidence before finding such implied claims.

CONCURRING STATEMENT OF COMMISSIONER J. THOMAS ROSCH

The Commission Opinion states that "[t]here are two analytical routes by which Complaint Counsel can prove that Respondents' ads are deceptive or misleading and both arise in this case." Commission Opn. at 17. The first is to demonstrate that the claims in the ads are false. The second approach relies on the "reasonable basis" theory; that is, that an objective claim about a product's performance or efficacy carries with it a representation that the advertiser had a reasonable basis of support for the claim. *Id.* I agree with these assertions.

Using this framework, the Commission Opinion separately analyzes the efficacy claims and the level of substantiation claimed by those advertisements. More specifically, the Commission first determines for itself whether and to what extent the ads make efficacy claims (*see, e.g.*, *id.* at 9); but the Commission relies on extrinsic evidence (the testimony of experts) to determine the level of substantiation required to support the claims made by the ads in that respect. The

Commission ends up concluding on the basis of the testimony of those experts that the highest level of well-controlled studies (the "gold standard" of RCTs) is required to support the latter claims. *Id*. at 20, 22-23, 25-26, 30, 32, 35, and 38.

I agree with the Commission's conclusion. Moreover, I agree that the Commission reached that conclusion by using the most traditional (that is to say the safest) analytical route. However, that route entails a discussion of both the expert testimony and how the *Pfizer* factors should apply in this case. *Id.* at 20-38. I consider that lengthy discussion to be unnecessary. Beyond that, having served as a Commissioner for seven years and having been a trial lawyer for nearly 40 years before that, I am somewhat skeptical of relying so heavily on the opinions of experts who are paid by both Complaint Counsel and Respondents. Fortunately, I do not have to do so.

Instead, I would decide that the "net impression" left by the ads includes claims about what level of substantiation the advertiser is purporting to have; that a net impression may be conveyed both expressly and by implication; and that the substantiation claims in these ads are false.

First, let me emphasize that I, like my colleagues, have examined the ads myself. There can be no dispute that the net impression of the ads is what counts in determining what impression is conveyed to consumers. The case law has long held that. *See, e.g., American Home Prods. v. FTC*, 695 F.2d 681, 687 (3d Cir. 1982); *FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963). Moreover, there can be no quarrel with the proposition that the net impression conveyed by an ad includes implied claims, as well as express claims. The Commission itself has repeatedly been held to have the common sense and expertise to determine the net impression conveyed, "so long as those claims are reasonably clear." *Kraft, Inc. v. FTC*, 970 F.2d 311, 319 (7th Cir. 1992);[1] *accord FTC v. Nat'l Urological Group, Inc.*, 645 F. Supp. 2d 1167, 1189-90 n.12 (N.D. Ga. 2008); *see also FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965).

[1] It is worth noting that all of the appellate authority respecting the need for the Commission to consider expert opinions *predates* the *Kraft* case.

Second, neither *Kraft* nor *Colgate-Palmolive* contains any suggestion that the Commission itself lacks the common sense and expertise to determine whether any false substantiation claims are conveyed by the ads, as part of its examination of the ads' net impression. Nor do other cases require that there ordinarily be any form of extrinsic evidence in that inquiry. *See, e.g.*, *FTC v. Nat'l Urological Group, Inc.*, 645 F. Supp. 2d 1167, 1189 (extrinsic evidence "is only necessary when the asserted claims fall on the 'barely discernible' side of the continuum"); *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 958 (N.D. Ill. 2006), *aff'd*, 512 F.3d 858 (7th Cir. 2008). Indeed, as the Commission Opinion acknowledges, *Sterling Drug*, 102 F.T.C. 395, 436 (1983), stands for the straightforward notion that "when an advertiser represents in its ad that there is a particular level of support for a claim, the absence of that support makes the claim false." Commission Opn. at 16, 20. Thus, I would hold that claims about the level of substantiation, no less than any other net impression conveyed by the ads, can be false, and that the Commission itself can make that determination.

Third, I would agree that if POM's ads simply made health claims, standing alone, they could not properly be challenged as false or deceptive. But they do not stand alone. In some instances the alleged health claim is expressly linked to a claim that the POM products treat, prevent or reduce the risk of heart disease or prostate cancer. The link between POM and the treatment, prevention or reduction of risk of those very serious diseases is at least implicit in many other instances. Those express and implicit links create a net impression that the highest possible level of substantiation exists for the POM product being advertised, and that claim is false.

More specifically, many of the advertisements expressly link POM to the treatment, prevention or reduction of the risk of heart disease or prostate cancer. *See, e.g.,* POM Claims Appendix, ads numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 14, 16, 19, 20, 28, 29, 30, 31, 32, and 33. Other ads at least implicitly link POM or POMx to the treatment, prevention, or the reduction of risk of those very serious diseases by liberally quoting physicians. *See id.*, ads numbered 16, 18, 19, 21, 24, 25, 27, 28, 29, 30, 31, 32, and 33 in the Claims Appendix. Another set of ads implicitly link POM to

the treatment, prevention, or the reduction of risk of heart disease or prostate cancer by equating POM with POMx (which is depicted as a prescription drug), or by depicting POM itself as a medicine. *See id.*, ads numbered 10, 13, 14, 16, 17, 18, 19, 22, 25, 28, 29, 30, 31, and 32. Furthermore, ads implicitly link POM to the treatment, prevention, or reduction of risk of these life-threatening diseases by describing POM as a life insurance supplement or a healthcare plan. *See id.*, ads numbered 29 and 31. Each of these claims creates the net impression that the highest form of substantiation exists to support the claims linking POM to the treatment, prevention or reduction of risk from these serious diseases.

Fourth, I do not consider erectile dysfunction to be as serious as heart disease or prostate cancer. For example, while erectile dysfunction afflicts many men, it is generally not life-threatening. Thus, I do not think that linking POM with the treatment, prevention or reduction of risk of erectile dysfunction, standing alone, creates a net impression that claims respecting that malady are supported by the highest level of substantiation. But that does not mean the Commission Opinion is wrong in requiring that level of substantiation for erectile dysfunction as well. The Commission has long considered so-called "establishment" claims to be binding on the advertisers that make them. *See FTC Policy Statement Regarding Advertising Substantiation*, appended to *Thompson Med. Co.*, 104 F.T.C. 648, 839 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986) (for ads that "contain express or implied statements regarding the amount of support the advertiser has for the product claim . . ., the advertiser must possess the amount and type of substantiation the ad actually communicates to consumers"). In this case, those associated with POM have made such claims. *See, e.g.,* POM Claims Appendix, ad numbered 33.

Complaint

IN THE MATTER OF

PHUSION PROJECTS, LLC, JAISEN FREEMAN, CHRISTOPHER HUNTER AND JEFFREY WRIGHT

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECS. 5(A) AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4382; File No. 112 3084
Complaint, February 6, 2013 – Decision, February 6, 2013

This consent order addresses allegations that Respondents labeled, advertised, promoted, offered for sale, sold and distributed a fruit-flavored, carbonated alcoholic beverage, Four Loko, to consumers. The complaint alleges that Respondents' made false and misleading representations that a 23.5-ounce can of Four Loko contains the alcohol equivalent to one or two beers and could safely be consumed in its entirety on a single occasion. In fact, a 23.5-ounce can of Four Loko contained alcohol equal to more than four regular beers. The consent order prohibits the respondents from offering for sale, selling, or distributing Four Loko or any other flavored malt beverage in a container that provides more than 1.5 ounces of ethanol unless the label clearly and conspicuously discloses the equivalent number of beers that such alcoholic content represents. The consent order further prohibits the respondents from misrepresenting the alcohol content of any alcohol beverage prpoduct, and requires respondents to keep copies of any relevant advertisements and substantiation for any advertising claims.

Participants

For the *Commission: Janet Evans* and *Carolyn Hann.*

For the *Respondents: Megan E. Alvarez, Alan P. Bielawski, Matthew R. Dornauer,* and *Andrew J. Strenio, Jr., Sidley Austin LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Phusion Projects, LLC, a limited liability company, and Jaisen Freeman, Christopher Hunter, and Jeffrey Wright, individually and as officers of the company ("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:

Complaint

1. Respondent Phusion Projects, LLC ("Phusion Projects") is a Delaware corporation with its principal office or place of business at 1658 North Milwaukee Avenue, #424, Chicago, Illinois 60647.

2. Respondent Jaisen Freeman is a Co-Founder and Managing Partner of Phusion Projects. Freeman oversees the company's daily operations. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of Phusion Projects, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Phusion Projects.

3. Respondent Christopher Hunter is a Co-Founder and Managing Partner of Phusion Projects. Hunter oversees all marketing and promotional materials for the company. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of Phusion Projects, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Phusion Projects.

4. Respondent Jeffrey Wright is a Co-Founder and Managing Partner of Phusion Projects. Wright oversees the company's manufacturing and production functions. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of Phusion Projects, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Phusion Projects.

5. Respondents have labeled, advertised, promoted, offered for sale, sold, and distributed Four Loko to consumers.

6. Four Loko is an 11% or 12% alcohol by volume ("ABV"), fruit-flavored, carbonated malt beverage sold in 23.5 ounce ("oz") cans that are not resealable. Four Loko is a "food" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act ("FTC Act"). Until approximately November 2010, Four Loko also included added stimulants such as caffeine, taurine, and guarana.

7. The acts and practices of respondents, as alleged herein, have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

8. Respondents have disseminated or caused to be disseminated advertisements, packaging, and promotional material for Four Loko including, but not limited to, the attached Exhibits A through D. These materials contain the following statements and depictions:

A. **Four Loko Packaging** (Exhibits A1 and A2)

[image of Four Loko XXX Limited Edition can]

[image of Four Loko Lemon-Lime can]

B. **DrinkFour Website**: "Photo Contest" (Exhibits B1 through B4)

". . . Here at Four, we like it when you guys and girls flip out, get weird, and go all crazy. We like it even more if you have a camera around to capture your most ridiculous, out of control, sexy, fun, cuddly, zany, spicy, demented, screwball moments while drinking Four. If you're daring enough to submit a photo so provocative, absurd, uncivilized, titillating, uninhibited, or fierce that we deem it the 'Photo Contest Winner,' we'll send you your pick of one of our hot new T-Shirts!"

* * *

[photo depicting two young men holding cans of 23.5 oz Four Loko, one drinking from the can]

* * *

[photo depicting young woman in a straw hat consuming Four Loko directly from a 23.5 oz can]

* * *

[photo of three young men, one of whom is holding a can of Four Loko]

"first guy drank 1 [can], second guy drank 2, third guy drank 3, fourth guy was on the ground."

C. **Retail Instructions and Display**

"**The CRUSHING the Competition LOKO and**
Earthquake rollout Incentive

Salesman
Four LOKO Placements
May 24th - June 30th

. . .

must be placed in singles door
Must be merchandised with proper pricing"

* * *

– (Exhibit C1)

[Photo of Actual Display in Retail Store in Washington, D.C.]

– (Exhibit C2)

D. **Promotional Material**: "Four Loko" (Exhibits D1 through D3)

[Four Loko Block Party photo]
* * *

[Marketing Sheet]

Four Loko is a crazy fruit punch flavored blend . . . packed into a HUGE 23.5 oz CAN.

. . .

· 23.5 oz can singles are experiencing exponential growth" (emphasis added)

* * *

> [Email Solicitation to a Potential Distributor: "FOUR LOKO AND EARTHQUAKE"]
>
> ". . . Four loko [sic] is one of the fastest growing products in the country. . . . Watermelon is the top selling single serve in the SE region of 7-11. . . . " (emphasis added)

9. Through the means described in Paragraph 8 including, but not limited to, the statements and depictions contained in the materials attached as Exhibits A through D, among others, respondents have represented, expressly or by implication, that a 23.5 oz can of 11% or 12% ABV Four Loko contains alcohol equivalent to one or two regular, 12 oz beers.

10. In truth and in fact, a 23.5 oz can of 11% or 12% ABV Four Loko does not contain alcohol equivalent to one or two regular, 12 oz beers. A 23.5 oz can of 11% ABV Four Loko contains 2.6 oz of ethanol, that is, alcohol equivalent to 4.3 regular beers, and a 23.5 oz can of 12% ABV Four Loko contains 2.8 oz of ethanol, that is, alcohol equivalent to 4.7 regular beers. Therefore, the representation set forth in Paragraph 9 was, and is, false or misleading.

11. Through the means described in Paragraph 8 including, but not limited to, the statements and depictions contained in the materials attached as Exhibits A through D, among others, respondents have represented, expressly or by implication, that an individual can safely consume a 23.5 oz can of 11% or 12% ABV Four Loko on a single occasion.

12. In truth and in fact, an individual cannot safely consume a 23.5 oz can of 11% or 12% ABV Four Loko on a single occasion. A 23.5 oz can of 11% ABV Four Loko contains 2.6 oz of ethanol, that is, alcohol equivalent to 4.3 regular beers, and a 23.5 oz can of 12% ABV Four Loko contains 2.8 oz of ethanol, that is, alcohol equivalent to 4.7 regular beers. As a result, consuming a single can of Four Loko on a single occasion constitutes "binge drinking," which is defined by health officials as men drinking five (and women drinking four) or more standard drinks in about

two hours. Such excessive drinking typically raises a person's blood alcohol concentration to 0.08 percent or more. It also typically results in acute intoxication that can be harmful for a variety of reasons, including impaired brain function resulting in poor judgment, reduced reaction time, loss of balance and motor skills, and slurred speech. Therefore, the representation set forth in Paragraph 11 was, and is, false or misleading.

13. Through the means described in Paragraph 8, including, but not limited to, the statements and depictions contained in the materials attached as Exhibits A through D, among others, respondents have represented, expressly or by implication, that a 23.5 oz can of 11% or 12% ABV Four Loko is a single serving. Respondents have failed to disclose, or failed to disclose adequately, that a 23.5 oz can of 11% ABV Four Loko contains 2.6 oz of ethanol, that is, alcohol equivalent to 4.3 regular beers, and a 23.5 oz can of 12% ABV Four Loko contains 2.8 oz of ethanol, that is, alcohol equivalent to 4.7 regular beers. These facts would be material to consumers in their purchase or consumption of Four Loko. The failure to disclose these facts, in light of the representation made, was, and is, a deceptive practice.

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

THEREFORE, the Federal Trade Commission this sixth day of February, 2013, has issued this Complaint against respondents.

By the Commission, Chairman Leibowitz and Commissioner Wright not participating.

EXHIBIT A1


CONTAINS ALCOHOL
LIMITED EDITION
12.0%
ALC/VOL
FOUR LOKO
GREEN APPLE FLAVOR
LIMITED EDITION
PREMIUM MALT BEVERAGE WITH ARTIFICIAL FLAVORS

Complaint

EXHIBIT A2

Complaint

EXHIBIT B1

EXHIBIT B2

Complaint

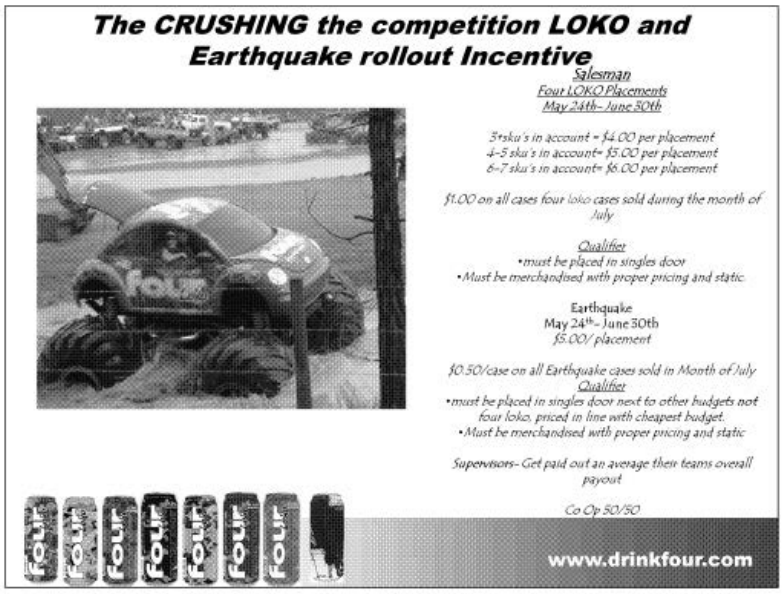
EXHIBIT B3

CONFIDENTIAL PPFTC0005925

EXHIBIT B4

CONFIDENTIAL PPFTC0006055

EXHIBIT C1



CONFIDENTIAL PPFTC0005045

FTC-0005045

Complaint

EXHIBIT C2

Complaint

EXHIBIT D1

Complaint

EXHIBIT D2

EXHIBIT D3

From: Jaisen Freeman [redacted]
Sent: Wednesday, October 21, 2009 12:22 PM
To: [redacted]
Cc: [redacted]
Subject: FOUR LOKO AND EARTHQUAKE
Attachments: FourLoko All Sellsheet 12% web[2].pdf; Earthquake_SS.pdf; FOUR LOKO Nielson in Convenience-Virginia YTD 2009.xls; Report - 7 11.pdf

Hi [redacted],

We have some new packages that I wanted to see if we could get approved in your system as all our Wisconsin Wholesalers are selling these new products.

Four loko is one of the fastest growing products in the country. I have attached a sell sheet and some competitive data from other areas. Four loko is approved and recommended for many national chains such as 7-11, Circle K, Speedway, Kroger, Hess, Sonoco, etc. All of our Wisconsin wholesalers do very well with this product set and are asking about the approval for Kwik Trip. I believe we have the loko fruit punch set up in your system but I wanted to get our watermelon and other flavors approved. Watermelon is the top selling single serve in the SE region of 7-11. Please see the attached.

Earthquake High Gravity Lager:
This product competes with Steel Reserve but has 12% alc/vol. We are seeing a great response from this product as the budget beer category is very popular and profitable right now.

Please let me know if I need to set up a meeting with you at your office or on the phone to discuss.

Thanks for your time and effort and I look forward to your response.

Jaisen Freeman
Phusion Projects
www.drinkfour.com

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondents with violation of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments received from interested persons pursuant to Section 2.34 of its Rules, and having modified the Decision and Order in certain respects, now in further conformity 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 Phusion Projects, LLC is a Delaware limited liability company with its principal office or place of business at 1658 North Milwaukee Avenue, #424, Chicago, Illinois 60647.

2. Respondent Jaisen Freeman is an officer and owner of the corporate respondent. His principal office or place of business is the same as that of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporate respondent.

3. Respondent Christopher Hunter is an officer and owner of the corporate respondent. His principal office or place of business is the same as that of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporate respondent.

4. Respondent Jeffrey Wright is an officer and owner of the corporate respondent. His principal office or place of business is the same as that of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporate respondent.

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified:

   a. "Respondents" shall mean Phusion Projects, LLC, its successors and assigns and their officers; Jaisen Freeman, individually and as an officer of the company; Christopher Hunter, individually and as an officer of the company; Jeffrey Wright, individually and as an officer of the company; and each of the above's agents, representatives, and

employees, or other persons directly or indirectly under the control of any respondent.

b. "Corporate respondent" shall mean Phusion Projects, LLC, its successors and assigns and their officers, and each of the above's agents, representatives, and employees.

c. "Controlling respondent(s)" shall mean Jaisen Freeman, Christopher Hunter, and Jeffrey Wright, when such individual(s) is, or collectively are, a significant shareholder (5% or more equity owner) of, or when such individual(s) directly or indirectly manage(s) or control(s), any entity, and its agents, representatives, employees, and other persons directly or indirectly under its control.

2. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

3. "Flavored malt beverage" shall mean Four Loko and any other beverage:

a. made by the alcoholic fermentation, in potable brewing water, of malted barley with hops, or their parts, or their products, and with or without other malted cereals, and with or without the addition of unmalted or prepared cereals, other carbohydrates or products prepared therefrom, and with or without other wholesome products suitable for human food consumption; and

b. to which flavors containing alcohol and/or nonbeverage ingredients containing alcohol have been added; provided that, such flavors and nonbeverage ingredients may contribute no more than 49% of the overall alcohol content of the finished product unless the alcohol content is more than 6% by volume, in which case no more than 1.5% of the volume of the finished product may consist of alcohol derived from added flavors

containing alcohol and non-beverage ingredients containing alcohol; and

c. which may be filtered or otherwise processed in order to remove color, taste, aroma, bitterness, or other characteristics derived from fermentation.

4. "Covered product" shall mean any beverage product containing alcohol.

5. "Endorsement" shall mean as defined in 16 C.F.R. § 255.0.

6. "Food" shall mean as defined in Section 15 of the FTC Act, 15 U.S.C. § 55.

7. "TTB" shall mean the Alcohol and Tobacco Tax and Trade Bureau of the U.S. Department of Treasury, or any successor agency responsible for granting approval for beverage alcohol labels.

8. "TTB Approval Date'' shall mean the date that TTB approves the display of the Alcohol Facts disclosure set forth in Part I.B, below, on a particular label.

9. The term "including" in this order shall mean "without limitation."

10. The terms "and" and "or" in this order shall be construed conjunctively or disjunctively as necessary, to make the applicable phrase or sentence inclusive rather than exclusive.

I.

IT IS ORDERED that corporate respondent and controlling respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any flavored malt beverage in a container that provides 1.2 or more fluid ounces of ethanol, in or affecting commerce:

A. Shall request TTB approval to display the "Alcohol Facts" disclosure set forth in Part I.B, below, on such containers and shall use all commercially reasonable efforts to obtain such TTB approval expeditiously and in good faith.

B. Commencing no later than ninety (90) days after the TTB Approval Date, shall not offer for sale, sell, or distribute such product unless the label for such product includes an accurate "Alcohol Facts" disclosure as depicted on Attachment A1-A3 to this order; *provided that*:

i. The disclosure shall be boxed with all black type printed on a white ground, and shall use the format, including fonts, justification, border, lines, and spacing, depicted on Attachment A1-A3 for the various container sizes there identified, and the dimensions of the disclosure shall be no smaller than the sizes identified for those container sizes;

ii. The disclosure shall appear on the back of the container, perpendicular to the top of the container, and its outside border shall be at least 2.5 centimeters from the top and bottom of the container;

iii. The serving size shall be rounded to the nearest quarter ounce and reflected as a decimal value (i.e., ".25," ".5", ".75," or a whole number); and

iv. The disclosure of alcohol by volume will be considered to be accurate if it complies with 27 C.F.R. § 7.71.

II.

IT IS FURTHER ORDERED that, commencing on August 6, 2013, corporate respondent and controlling respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the

manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Four Loko or any other flavored malt beverage, in or affecting commerce, shall not offer for sale, sell, or distribute such product in a container that provides more than 1.5 fluid ounces of ethanol unless the container is resealable.

III.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product, in or affecting commerce:

A. Shall not misrepresent, in any manner, expressly or by implication, including through the use of a product name or endorsement, the alcohol content of any covered product; and

B. Shall not depict any covered product containing 1.2 or more fluid ounces of ethanol being consumed directly from the container.

IV.

IT IS FURTHER ORDERED that nothing in this Order shall prohibit respondents from making any representation about any covered product that is specifically required by regulation or order promulgated by the U.S. Department of Treasury Alcohol and Tobacco Tax and Trade Bureau pursuant to the Federal Alcohol Administration Act.

V.

IT IS FURTHER ORDERED that respondent Phusion Projects, LLC, its successors and assigns, and respondents Jaisen Freeman, Christopher Hunter, and Jeffrey Wright 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 Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VI.

IT IS FURTHER ORDERED that respondent Phusion Projects, LLC, its successors and assigns, and respondents Jaisen Freeman, Christopher Hunter, and Jeffrey Wright shall deliver a copy of this Order to all current and future principals, officers, directors, and other employees having primary responsibilities with respect to the subject matter of this Order, and shall secure from each such person a signed and dated statement acknowledging receipt of the Order. Respondents shall deliver this Order to such current personnel within thirty (30) days after the date of service of this Order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

VII.

IT IS FURTHER ORDERED that respondent Phusion Projects, LLC, 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 Phusion Projects, LLC, learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

VIII.

IT IS FURTHER ORDERED that respondents Jaisen Freeman, Christopher Hunter, and Jeffrey Wright, for a period of five (5) years after the date of issuance of this Order, shall each notify the Commission of the discontinuance of his current business or employment. This notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

IX.

IT IS FURTHER ORDERED that respondent Phusion Projects, LLC, its successors and assigns, and respondents Jaisen Freeman, Christopher Hunter, and Jeffrey Wright shall, within sixty (60) days after the date of service of this Order, file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which they have complied with this Order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondents shall submit additional true and accurate written reports.

X.

This Order will terminate on February 6, 2033, 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

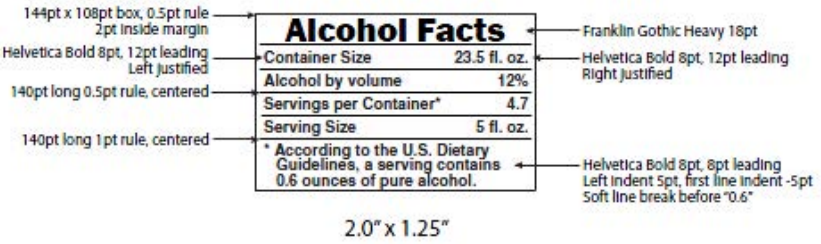
C. This Order if such complaint is filed after the Order has terminated pursuant to this Part.

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

By the Commission, Chairman Leibowitz and Commissioner Wright not participating.

ATTACHMENT A1

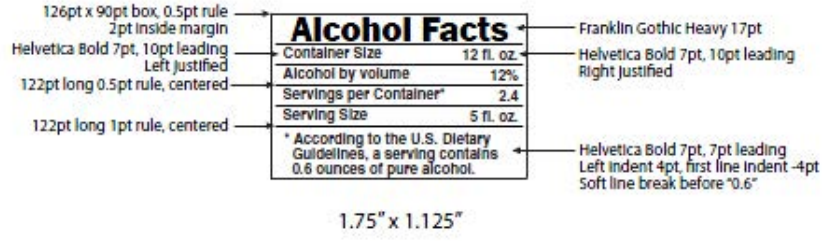
For containers with more than 20 fluid ounces



2.0″ x 1.25″

ATTACHMENT A2

For containers with 12 to 20 fluid ounces

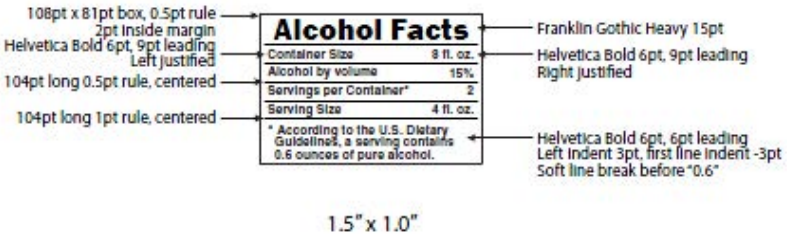


1.75″ x 1.125″

Decision and Order

ATTACHMENT A3

For containers with less than 12 fluid ounces



1.5" x 1.0"

ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Phusion Projects, LLC, Jaisen Freeman, Christopher Hunter, and Jeffrey Wright (the "respondents"). The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw the agreement or make final the agreement's proposed order.

This matter involves the marketing for Four Loko, a fruit-flavored malt beverage product. Four Loko contains 11% to 12% alcohol by volume ("ABV") and is sold in a 23.5 oz can. The respondents promoted Four Loko through product packaging, Internet advertising including fan photo contests, and print solicitations to potential distributors.

According to the FTC complaint, the respondents represented in its marketing materials that a 23.5 oz can of 11% or 12% ABV Four Loko: (a) contains the alcohol equivalent to one or two regular, 12 oz beers, and (b) could safely be consumed in its entirety on a single occasion. The complaint alleges that both claims are false or misleading because a 23.5 oz can of 11% ABV Four Loko contains alcohol equivalent to 4.3 regular beers and a 23.5 oz can of 12% ABV Four Loko contains alcohol equivalent to 4.7 regular beers. In addition, the complaint alleges that the respondents' failure to disclose these facts was deceptive, in light of their representation that a can of Four Loko contained a single serving.

The proposed consent order contains provisions designed to prevent the respondents from engaging in similar acts and practices in the future. Parts I and II apply to the defined term, "covered flavored malt beverages." Part I prohibits the corporate respondent and controlling respondents (generally defined as the individual respondents, when such individual(s) is, or collectively are, a significant shareholder or directly or indirectly manage or control any entity) from offering for sale, selling, or distributing

Analysis to Aid Public Comment

Four Loko or any other covered flavored malt beverage in a container that provides more than 1.5 oz of ethanol (approximately two and one half (2 1/2) regular beers) unless the label discloses, clearly and conspicuously, the following statement:

> "This can [or bottle] has as much alcohol as [ ] regular (12 oz, 5% alc/vol) beers."

Part I sets forth specific approved fonts and font sizes, placement requirements (for both cans and bottles larger and smaller than 12 oz), and a formula for calculating the number of regular beers in the container. This part also provides that the second set of brackets shall be replaced by the number of 0.6 oz servings of ethanol in the product. Part I is designed to address the allegedly false representation that Four Loko contains the alcohol equivalent to one or two regular, 12 oz beers. The disclosure requirement is designed to alert consumers to the actual number of servings of alcohol in the container.

Part II of the proposed order further prohibits, commencing six (6) months after date of issuance of the order, the corporate respondent and controlling respondents from offering for sale, selling, or distributing Four Loko or any other covered flavored malt beverage in a container that provides more than 1.5 oz of ethanol unless the container is resealable. Together, Parts I and II of the proposed order are designed to address the allegedly false representation that Four Loko can safely be consumed on a single occasion. The disclosure requirement is designed to alert consumers to the number of servings of alcohol in the container, and the resealability requirement makes it possible for consumers to drink a portion of the container's content and to save some for later.

Part III of the proposed order prohibits the respondents from misrepresenting the alcohol content of any alcohol beverage product. Part III also prohibits the respondents from depicting in advertising any alcohol beverage product containing more than 1.5 oz of ethanol being consumed directly from the container. This provision also addresses the respondents' representation that a can of Four Loko can be safely consumed on a single occasion.

This prohibition provides a clear standard for compliance by the respondents and for enforceability by the FTC.

Part IV of the proposed order states that the order does not prohibit the respondents from making any representation about any alcohol beverage product that is specifically required by regulation or order by the U.S. Department of Treasury Alcohol and Tobacco Tax and Trade Bureau pursuant to the Federal Alcohol Administration Act.

Parts V through IX of the proposed order require the respondents to keep copies of relevant advertisements and materials substantiating claims made in the advertisements; to provide copies of the order to its 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 any of the individual respondents' business or employment that might affect compliance obligations under the order; and to file compliance reports with the Commission. Part X provides that the order will terminate after twenty (20) years, 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

IDEXX LABORATORIES, INC.

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

Docket No. C-4383; File No. 101 0023
Complaint, February 11, 2013 – Decision, February 11, 2013

This consent order addresses allegations that Respondent IDEXX Laboratories, Inc. ("IDEXX") entered into exclusive dealing arrangements in violation of Section 5 of the FTC Act. IDEXX develops, manufactures, and sells diagnostic products to veterinarians. The complaint alleges that IDEXX has monopoly power in the market for point-of-care ("POC") diagnostic testing products, which includes equipment and supplies that allow veterans for small animals to test, diagnose, and treat conditions such as heart worm in a single visit. More than three-quarters of veterinarians in the United States use POC diagnostic products , and more than 85 percent of all products and supplies that small animal veterinarians purchase are sourced through one of IDEXX's top five distributors. The complaint further alleges that IDEXX used its monopoly power to reduce competition by threatening to terminate those distributors unless they sold IDEXX's products exclusively. The order prohibits IDEXX from maintaining concurrent exclusive distribution agreements with the three top tier distributors for the next 10 years. Further, IDEXX is prohibited from retaliating against non-exclusive distributors, withholding products, or using other means to limit the distributor's sales of other manufacturer's products. The order also outlines the requirements for all future non-exclusive agreements between IDEXX and any national distributor.

Participants

For the *Commission: Dana Abrahamsen, Joel Christie, David Conn, Peggy Bayer Femenella, Patricia Galvan,* and *Lisa Kopchik.*

For the *Respondent: Craig Seebald and William Vigdor, Vinson & Elkins LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 et seq., and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that IDEXX Laboratories, Inc. ("IDEXX" or "Respondent") has violated

Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges as follows:

NATURE OF THE CASE

1. IDEXX has maintained a monopoly in the market for point-of-care ("POC") diagnostic products used by veterinarians who treat companion animals ("POC Diagnostic Products") through the use of exclusive contracts with its distributors. POC Diagnostic Products include rapid assay tests, equipment and supplies that permit a companion animal veterinarian ("Veterinarian") to test, diagnose and treat certain conditions such as heart worm during a single office visit. POC Diagnostic Products provide real-time results that cannot be obtained through other testing alternatives, such as services offered by outside reference labs.

2. Nearly all Veterinarians buy their supplies, including POC Diagnostic Products, from distributors who specialize in supplying veterinary clinics, and most of their purchases are made from a small number of "top tier" distributors. IDEXX has used its monopoly power, the threat of termination, and explicit agreements to prevent those top tier distributors from selling rival POC Diagnostic Products that the distributors would otherwise choose to sell. As a result, IDEXX has foreclosed its competitors from distributors that sell over 85% of all products purchased through distribution by companion animal veterinary clinics in the United States.

3. Veterinarians prefer to buy diagnostic products, equipment and supplies through top tier distributors because other purchasing options are less efficient and more costly. As a result, IDEXX's competitors are impeded from effectively and efficiently marketing competing POC Diagnostic Products to Veterinarians.

4. IDEXX's exclusionary practices have blocked rivals from the most efficient sales channel. IDEXX has used its exclusionary practices to successfully diminish, marginalize or force its competitors from the U.S. market.

5. IDEXX intentionally engages more distribution than it needs, causing it to suffer certain inefficiencies. Nevertheless, IDEXX continues its exclusionary conduct because that conduct insulates IDEXX from competition from its rivals. Thus, IDEXX maintains its monopoly at the expense of distributors who would prefer to offer a greater variety of POC Diagnostic Products, and Veterinarians who could buy cheaper, superior, and more convenient POC Diagnostic Products.

RESPONDENT

6. Respondent IDEXX is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at One IDEXX Drive, Westbrook, Maine. IDEXX develops, manufactures and sells diagnostic products and services to Veterinarians. It has worldwide operations with 2011 revenues in excess of $1.2 billion, of which $700 million were from sales in the United States. IDEXX's United States companion animal diagnostics business produced 2011 revenues of approximately $644 million.

7. IDEXX's core business is companion animal diagnostics, including POC instruments and their related consumables, rapid assay test kits (SNAP© tests), digital radiography equipment, practice management software, and diagnostic services through wholly owned and operated reference laboratories.

JURISDICTION

8. At all times relevant herein, IDEXX has been, and is now, a corporation as "corporation" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

9. The acts and practices of IDEXX, including the acts and practices alleged herein, are in commerce or affect commerce in the United States, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

RELEVANT MARKET

10. The relevant product market in which to evaluate IDEXX's conduct is the development, manufacture and sale of POC Diagnostic Products, and narrower relevant markets as contained therein (collectively, the "Relevant POC Markets"), including:

a. rapid assay single-use test kits; and

b. diagnostic instruments and their associated single-use products ("consumables") designed for in-clinic testing of biological samples.

11. The relevant geographic market is the 48 states of the continental United States.

12. Veterinarians are the primary consumers of POC Diagnostic Products. Veterinarians use POC Diagnostic Products to assess the general health of animals and to identify pathologies. Veterinarians perform diagnostic testing at veterinary clinics with instruments or test kits manufactured and sold by IDEXX and its competitors. POC testing provides Veterinarians and pet owners the medical advantage and convenience of almost-immediate results.

13. As of 2009, more than 75% of Veterinarians used POC diagnostic testing. Each year, Veterinarians in the United States purchase approximately $500 million worth of POC Diagnostic Products.

14. There are no close substitutes for POC Diagnostic Products. Although Veterinarians can purchase some diagnostic services by sending specimens to outside laboratories, POC testing provides state-of-the-art diagnostics. Veterinarians value faster results, particularly when testing is associated with emergencies, pre-surgery, and for diagnoses of conditions that may require the Veterinarians to perform follow-up testing or dispense or prescribe medicine as soon as possible after the results have been received.

IDEXX HOLDS MONOPOLY POWER IN THE RELEVANT MARKET

15. IDEXX has monopoly power in the POC Diagnostic Products market. IDEXX has the most comprehensive set of offerings in the relevant market. IDEXX's share of the relevant market has been at least 70% during each of the past five years (2006-2011). No other firm had more than a 20% share of the relevant market in those same five years.

16. IDEXX directly demonstrates its monopoly power in the Relevant POC Markets by forbidding its distributors from carrying any competing products, thereby excluding IDEXX's competitors from sales of those products to any IDEXX distributor. Because IDEXX has a dominant position in the Relevant POC Market, distributors have no practical choice but to agree to carry IDEXX's line of products exclusively. Distributors would prefer to sell competing products as well as IDEXX products.

17. IDEXX's control of distributors means that it forecloses its competition from effectively and efficiently reaching large segments of the Veterinarian market, thereby forcing Veterinarians to incur greater costs to obtain non-IDEXX products, or to use only IDEXX products.

DISTRIBUTORS

18. Nearly all Veterinarians purchase equipment and supplies from Veterinary products distributors. Veterinarians overwhelmingly prefer to buy through distributors because of the efficiency and customer service they offer.

19. Most Veterinarians buy a majority of their equipment and supplies from a preferred distributor. More than 75% of Veterinarians name Butler Schein Animal Health ("Butler"), Webster Veterinary Supply, Inc. ("Webster"), MWI Veterinary Supply Co. ("MWI"), Midwest Veterinary Supply, Inc. ("Midwest"), or Victor Medical Company ("Victor") as their preferred distributor. Combined, these distributors sell more than

85%, by revenue, of the products sold to Veterinarians in the United States.

20. IDEXX and other POC Diagnostic Product manufacturers use distributors because distributors provide important services to the manufacturer and are the most efficient way for the manufacturer to channel their products to Veterinarians. Manufacturers who do not use distributors face more significant obstacles to sales, marketing and delivery than manufacturers who use distributors.

21. IDEXX's distributors provide better services to their manufacturer clients than other distributors. Those better services can include, but are not limited to, higher sales volume, better sales and inventory data transfer, more experienced sales representatives, better market forecasting, more timely payments, and more frequent visits to Veterinarian clients.

22. Butler, Webster and MWI are recognized by manufacturers, distributors and Veterinarians as the pre-eminent companion animal veterinary supply distributors in the United States. There are no other distributors that provide equivalent levels of service to manufacturers and regularly visit Veterinarians in as wide a geographic area as Butler, Webster or MWI.

IDEXX'S CONCERTED ACTION AND EXCLUSIVE DEALING

23. IDEXX has contracted with its distributors to sell IDEXX products to Veterinarians and other users. Each firm's contract states that IDEXX may discontinue providing a category of products to the distributor if the distributor sells any product, with small exceptions, that competes with an IDEXX product within the category.

24. IDEXX's distributors have a clear and well-founded understanding that IDEXX will cut off the supply of all categories of IDEXX products and terminate its contract with the distributor if the distributor sells or promotes any competing product in the Relevant POC Market.

25. IDEXX's dominant market position, its practice of demanding exclusivity, and its imposition of an "all-or-nothing" policy give distributors of veterinary products powerful economic incentives that require them to deal with IDEXX on an exclusive basis.

26. IDEXX's exclusionary acts and practices require competing manufacturers to settle for less efficient means to sell their products to Veterinarians.

ANTICOMPETITIVE EFFECTS OF IDEXX'S CONDUCT

27. IDEXX's concerted action and exclusionary acts and practices erect significant barriers to entry for those manufacturers that have developed, would otherwise have developed, or offered for sale POC Diagnostic Products that would compete with IDEXX products.

28. The acts and practices of IDEXX as alleged herein have the purpose, capacity, tendency, and effect of impairing the competitive effectiveness of IDEXX's competitors in the relevant market.

29. The acts and practices of IDEXX as alleged herein reasonably appear capable of making a significant contribution to the enhancement or maintenance of IDEXX's monopoly power.

30. IDEXX's conduct adversely affects competition and consumers by:

a. reducing the output of POC Diagnostic Products;

b. deterring, delaying and impeding the ability of IDEXX's actual or potential competitors to enter or to expand their sales in the market for POC Diagnostic Products;

c. reducing innovation; and

d. reducing consumer choice among users of POC Diagnostic Products.

31. IDEXX's acts and practices as alleged herein were intended to, and have, restrained competition unfairly and unreasonably, and enhanced or maintained IDEXX's monopoly power.

32. There are no legitimate procompetitive efficiencies that justify IDEXX's conduct or outweigh its substantial anticompetitive effects.

VIOLATION ALLEGED

33. The acts and practices of IDEXX, as alleged herein, contribute to the enhancement or maintenance of IDEXX's monopoly power, and constitute unfair methods of competition in or affecting commerce, all in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

34. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eleventh day of February, 2013, issues its complaint against Respondent.

By the Commission, Commissioner Ohlhausen abstaining and Commissioner Wright not participating.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of IDEXX Laboratories, Inc., hereafter referred to as "Respondent IDEXX," and Respondent IDEXX 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 IDEXX with violating Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent IDEXX, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing an admission by Respondent IDEXX 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 IDEXX 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 IDEXX 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, and having duly considered the comments filed 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 IDEXX is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place

of business located at One IDEXX Drive, Westbrook, Maine.

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

ORDER

I.

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

A. "Respondent" or "Respondent IDEXX" means IDEXX Laboratories, Inc.; its directors, officers, employees, agents, and representatives; its successors and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by IDEXX Laboratories (including, but not limited to IDEXX Distribution, Inc.), and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

B. "Butler" means Butler Schein Animal Health, which is controlled by Henry Schein, Inc., a Delaware corporation, with its principal place of business located at 135 Duryea Road, Melville, NY 11747 and any successors to Butler's business related to the distribution of Products.

C. "MWI" means MWI Veterinary Supply, Inc., a Delaware corporation, with its principal place of business located at 3041 W. Pasadena Drive, Boise, Idaho 83705 and any successors to MWI's business related to the distribution of Products.

D. "Webster" means Webster Veterinary, a subsidiary of Patterson Companies, Inc., a Minnesota corporation, with its principal place of business located at 1031 Mendota Heights Road, St. Paul, MN 55120 and any successors to Webster's business related to the distribution of Products.

E. "Commission" means the Federal Trade Commission.

F. "Distributor" means MWI, Webster, Butler, or any other Person who has entered into an agreement with Respondent IDEXX to distribute any Products to end-user veterinary customers regardless of whether that agreement is based on Exclusivity with regard to such Products.

G. "Exclusivity" or "Exclusive" means any requirement, whether formal or informal, or direct or indirect, by Respondent IDEXX that a Distributor refuse to distribute or limit its distribution, marketing, promotion, sales, or purchases of any Person's Products other than IDEXX products.

H. "MWI Distribution Agreement" means the September 28, 2012, Distribution Agreement entered into between Respondent IDEXX and MWI and which is attached as Confidential Appendix A to this Order.

I. "National Distributor" means MWI, Webster, and Butler so long as each respectively is a Distributor of Products.

J. "Distribution Agreement" means any agreement between Respondent IDEXX and any Distributor to distribute any Products to end-user veterinary customers.

K. "Exclusive Distribution Agreement" means any agreement between Respondent IDEXX and any Distributor that contains terms requiring that Distributor to act as an Exclusive distributor of Respondent IDEXX's Products.

L. "Non-Exclusive Distribution Agreement" means any agreement between Respondent IDEXX and any National Distributor that does not contain terms requiring that National Distributor to act as an

Exclusive distributor of Respondent IDEXX's Products.

M. "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.

N. "Products" means any in-house diagnostic testing products sold to and used by companion animal veterinarians.

O. "Product Pricing" means Respondent IDEXX's standard list prices, less a margin discount, the amount of which is negotiated between Respondent IDEXX and the National Distributor.

P. "Renewal Date" means each date upon which the Non-Exclusive Distribution Agreement automatically renews.

II.

IT IS FURTHER ORDERED that, except as otherwise provided herein, if Respondent IDEXX has an Exclusive Distribution Agreement with any National Distributor, Respondent IDEXX:

A. Shall cease and desist from having concurrent Exclusive Distribution Agreements with all of the National Distributors;

B. With regard to any Non-Exclusive Distribution Agreement with a National Distributor, such agreement:

1. Shall provide an initial term of no less than two (2) years;

2. Shall provide renewal for one or more additional one (1) year terms on or before each Renewal Date;

3. Shall provide Distribution of IDEXX Products on a fully non-Exclusive basis;

4. Shall not include any term or understanding that the National Distributor refuse or limit the purchase or sale of Products of any Person other than IDEXX;

5. Shall not withhold the sale of Products to the National Distributor based on that National Distributor's sale, or intention to sell, Products of any Person other than IDEXX;

6. Shall not urge, induce coerce, threaten, or pressure, or attempt thereto, the National Distributor to refuse to sell Products of any Person other than IDEXX, or to limit its sales of Products of any Person other than IDEXX; and

7. Shall not penalize, or otherwise retaliate against the National Distributor because that National Distributor sells or intends to sell Products of any Person other than IDEXX.

Provided, however, that IDEXX may charge different prices to any Non-Exclusive Distributor;

Provided, further, however, that the MWI Distribution Agreement is a Non-Exclusive Distribution Agreement that satisfies this Paragraph II.B;

Provided further, however, that for all notifications received or sent by Respondent IDEXX regarding a termination, election not to renew, or material breach of a Non-Exclusive Distribution Agreement, Respondent IDEXX shall provide a copy of each such notification to the Federal Trade Commission at the

same time it provides such notice to the National Distributor, or within five (5) days of receiving such notice from the National Distributor;

Provided further, however, that, if the Non-Exclusive National Distributor merges with, acquires, or is acquired by a Distributor whose distribution agreement with Respondent IDEXX is Exclusive, Respondent IDEXX shall continue to honor the Non-Exclusive Distribution Agreement in accordance with the terms of this Order.

C. Shall submit any Non-Exclusive Distribution Agreement that is not the MWI Distribution Agreement to the Commission at least thirty (30) days prior to entering into such Distribution Agreement.

III.

IT IS FURTHER ORDERED that:

A. Sixty (60) days after the date this Order is issued, Respondent IDEXX shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with the terms of this Order.

B. Beginning twelve (12) months after the date this Order is issued, and annually thereafter on the anniversary of the date this Order is issued, for the next four (4) years, and at such other times as the Commission requests, Respondent IDEXX shall submit to the Commission verified written reports setting forth in detail the manner and form in which it is complying and has complied with this Order.

IV.

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

A. Any proposed dissolution of Respondent IDEXX;

B. Any proposed acquisition, merger or consolidation of Respondent IDEXX; or

C. Any other change in Respondent IDEXX, 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.

V.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent IDEXX, Respondent IDEXX shall permit any duly authorized representative of the Commission:

A. Access, during office hours of Respondent IDEXX 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 IDEXX related to compliance with this Order, which copying services shall be provided by Respondent IDEXX at the request of the authorized representative(s) of the Commission and at the expense of Respondent IDEXX; and

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

VI.

IT IS FURTHER ORDERED that this Order shall terminate on February 11, 2023.

By the Commission, Commissioner Ohlhausen abstaining and Commissioner Wright not participating.

ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted for public comment an Agreement Containing Consent Order to Cease and Desist ("Agreement") with IDEXX Laboratories, Inc. ("IDEXX"). The Agreement seeks to resolve charges that IDEXX engaged in exclusionary conduct to maintain its monopoly power in the companion animal diagnostic testing equipment and supplies industry in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

Specifically, the proposed Complaint that accompanies the Agreement ("Complaint") alleges that IDEXX has used its monopoly power to impose exclusive deals with its distributors. As a result, IDEXX has foreclosed rivals from key distribution channels and limited competition in the relevant market, leading to higher prices, lower output, reduced innovation and diminished consumer choice.

The Commission anticipates that the competitive issues described in the Complaint will be resolved by accepting the proposed Order, subject to final approval, contained in the Agreement. The Agreement has been placed on the public record for 30 days for receipt of comments from interested members of the public. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the Agreement and comments received, and will

decide whether it should withdraw from the Agreement or make final the Order contained in the Agreement. IDEXX has already entered into a non-exclusive distribution agreement with MWI Veterinarian Supply Co., Inc. ("MWI"), and that distribution agreement has been incorporated into the terms of the proposed Order.

The purpose of this Analysis to Aid Public Comment is to invite and facilitate public comment concerning the proposed Order. It is not intended to constitute an official interpretation of the Agreement and proposed Order or in any way to modify their terms.

The Agreement is for settlement purposes only and does not constitute an admission by IDEXX that the law has been violated as alleged in the Complaint or that the facts alleged in the Complaint, other than jurisdictional facts, are true.

I. The Complaint

The Complaint makes the following allegations.

A. Industry Background

Point of care ("POC") diagnostic products include rapid assay tests, equipment and supplies that permit a companion animal veterinarian to test, diagnose and treat certain conditions such as heartworm during a single office visit. POC diagnostic products provide real-time results that cannot be obtained through other testing alternatives, such as services offered by outside reference labs.

Veterinarians are the primary consumers of POC diagnostic products. Veterinarians use POC diagnostic products to assess the general health of animals and to identify pathologies. Veterinarians perform diagnostic testing at veterinary clinics with instruments or test kits manufactured and sold by IDEXX and its competitors. POC testing provides veterinarians and pet owners the medical advantage and convenience of almost-immediate results.

As of 2009, more than 75% of veterinarians used POC diagnostic testing. Each year, veterinarians in the United States purchase approximately $500 million worth of POC diagnostic products.

There are no close substitutes for POC diagnostic products. Although veterinarians can purchase some diagnostic services by sending specimens to outside laboratories, POC testing allows veterinarians to provide timely, state-of-the-art care. Veterinarians value faster results, particularly when testing is associated with emergencies, pre-surgery, and for diagnoses of conditions that may require the veterinarians to perform follow-up testing or dispense or prescribe medicine as soon as possible.

Nearly all veterinarians buy their supplies, including POC diagnostic products, from distributors who specialize in supplying companion animal veterinary clinics. Veterinarians overwhelmingly prefer to buy through distributors because of the efficiency and customer service they offer. Other purchasing options are less efficient and more costly.

Most veterinarians buy a majority of their equipment and supplies from a preferred distributor. More than 75% of veterinarians name Butler Schein Animal Health ("Butler"), Webster Veterinary Supply, Inc. ("Webster"), MWI, Midwest Veterinary Supply, Inc. ("Midwest"), or Victor Medical Company ("Victor"), as their preferred distributor. Combined, these top tier distributors sell more than 85%, by revenue, of the products sold to companion animal veterinarians in the United States.

Butler, Webster and MWI are recognized by manufacturers, distributors and veterinarians as the pre-eminent national companion animal veterinary supply distributors in the United States. There are no other distributors that provide equivalent levels of service to manufacturers and regularly visit veterinarians in as wide a geographic area as Butler, Webster or MWI. Midwest and Victor are large, regional distributors, also with strong reputations for high-quality service.

IDEXX and other POC diagnostic product manufacturers use distributors because distributors provide important services to the manufacturer and are the most efficient way for the manufacturer

to channel their products to veterinarians. Manufacturers who do not use distributors face more significant obstacles to sales, marketing and delivery than manufacturers who use distributors.

The top tier distributors provide better services to their manufacturer clients than other distributors. Those better services can include, but are not limited to, more sales, better sales and inventory data transfer, more experienced sales representatives, better market forecasting, more timely payments, and more frequent visits to veterinarian clients.

B. The Respondent

IDEXX Laboratories, Inc. is a corporation with its principal place of business located in Westbrook, Maine. IDEXX develops, manufactures and sells diagnostic products to veterinarians through distributors. IDEXX has monopoly power in the POC diagnostic products market.

IDEXX's core business is companion animal diagnostics, including POC instruments and their related consumables, rapid assay test kits (SNAP8 tests), digital radiography equipment, practice management software, and diagnostic services through wholly owned and operated reference laboratories. IDEXX's share of the POC diagnostic products market has been at least 70% during each of the past five years (2006-2011). No other firm had more than a 20% share of the relevant market in those same five years.

C. IDEXX's Conduct

IDEXX bars its distributors from carrying any competing POC diagnostic testing products. IDEXX distributors include all three of the major, national distributors of these products and the two large, regional distributors named above. As noted previously, these distributors sell 85% of equipment and supplies that companion animal veterinarians buy through distributors.

D. Competitive Impact of IDEXX's Conduct

Because IDEXX has a broad line of products and a dominant position in the POC market, large distributors need to carry the IDEXX line. While distributors need to carry the IDEXX line, they would prefer to carry competing products as well. However, by insisting that distributors make an "all-or-nothing" choice, IDEXX compels distributors to forgo competitors' products. The features of the market that make anticompetitive exclusion possible – IDEXX's status as a "must carry" supplier coupled with its insistence on exclusivity – have endured for many years, and thus the relatively short nominal duration of IDEXX's distribution contracts has not mitigated the anticompetitive effects of the exclusive deals.

IDEXX's control of distributors means that it forecloses its competition from effectively and efficiently reaching large segments of the veterinarian market, and forces veterinarians to incur greater costs to obtain non-IDEXX products.

IDEXX has used its monopoly power, the threat of termination, and explicit agreements to prevent those top tier distributors from selling rival POC diagnostic products that the distributors would otherwise choose to sell. As a result, IDEXX has foreclosed its competitors from distributors that sell over 85% of all products purchased through distribution by companion animal veterinary clinics in the United States, and those competitors are impeded from effectively and efficiently marketing their POC diagnostic products to veterinarians.

IDEXX's exclusionary practices have blocked rivals from the most efficient sales channel. IDEXX has used its exclusionary practices to successfully diminish, marginalize or force its competitors from the U.S. market.

IDEXX intentionally engages more distribution than it needs, even though that excess distribution is costly and inefficient for IDEXX. Nevertheless, IDEXX continues to engage the excess distribution because it allows IDEXX to block its rivals from using those distributors and insulates IDEXX from competition from its rivals. Thus, IDEXX maintains its monopoly and harms both distributors who would prefer to offer a greater variety of

POC diagnostic products, and veterinarians who could buy cheaper, superior, and more convenient POC diagnostic products. IDEXX's exclusionary acts and practices require competing manufacturers to settle for less efficient means to sell their products to veterinarians.

IDEXX's exclusionary acts and practices erect significant barriers to entry for those manufacturers that have developed, would otherwise have developed, or offered for sale POC diagnostic products that would compete with IDEXX products, thereby resulting in reduced choice for veterinarians.

II. Legal Analysis

The offense of monopolization under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition, enhancement or maintenance of that power through exclusionary conduct. Exclusive dealing by a monopolist is condemned when the challenged conduct significantly impairs the ability of rivals to compete effectively with the respondent and thus limits the ability of those rivals to constrain the exercise of monopoly power.

The Complaint alleges that IDEXX has monopoly power and used it to create competitive harm. IDEXX's policy of requiring exclusivity from its distributors has foreclosed its rivals from over 85 percent of available sales opportunities at this level of the distribution chain. This foreclosure is particularly significant because nearly all POC diagnostics are sold to veterinarians through distributors, and other channels to the veterinarians are inconvenient, impractical and more expensive for both the veterinarians and IDEXX's competitors.

A monopolist may rebut a showing of competitive harm by demonstrating that the challenged conduct is reasonably necessary to achieve a pro-competitive benefit. Any proffered justification, if proven, must be balanced against the harm caused by the challenged conduct.

In this case, however, no pro-competitive efficiency justifies IDEXX's exclusionary and anticompetitive conduct. Further,

IDEXX cannot show that the exclusive arrangements were reasonably necessary to achieve a procompetitive benefit.

A concern about interbrand free-riding also does not justify the substantial anticompetitive effects found here. Free-riding might occur if, for example, IDEXX provided a great deal of training or services to its distributors, and if the training or services help promote the product category as a whole rather than just IDEXX's product. In such an instance, promotion of the competitors' products would "free-ride" on IDEXX's activities. In this case, however, the vast majority of IDEXX's promotional efforts are relevant to IDEXX's products only, thereby reducing the risk of free-riding by IDEXX's competitors. While IDEXX's marketing efforts may generate some consumer interest in the product category as a whole – and not just in IDEXX's own products – this is a part of the natural competitive process. This type of consumer response does not raise a free-riding concern sufficient to justify the substantial anticompetitive effects found here.

III. The Order

Together with the distribution agreement between IDEXX and MWI Veterinary Supply, Inc., signed in September 2012, the proposed Consent Order is designed to make the market for POC diagnostic testing products more competitive. Generally, the Order prohibits IDEXX from maintaining exclusive distribution arrangements with all three national distributors. Specifically, Part II of the Order addresses this core provision. Part III imposes reporting requirements for four years. Parts IV and V impose other reporting and compliance requirements. Unless otherwise indicated, the Order will expire in ten years.

The Order defines the "national distributors" as Butler, MWI and Webster, so long as they continue to distribute companion animal POC diagnostic equipment and supplies. Starting in January, 2013, MWI can distribute both IDEXX products and competitive products. Either IDEXX or MWI can terminate the agreement. If the parties agree that MWI will return to an exclusive arrangement with IDEXX, IDEXX must have a non-exclusive agreement with one of the two other national distributors.

All future non-exclusive agreements between IDEXX and a national distributor must meet the requirements of the Order. Paragraph II.B requires that such an agreement begin with a two year term, and provide for additional renewal terms of at least one year; that IDEXX shall not urge, induce, coerce, threaten, pressure, penalize, withhold the sale of product, or otherwise retaliate against the non-exclusive national distributor in order to limit its sales of other manufacturers' products.

Paragraph II.B also requires IDEXX to notify the Federal Trade Commission about the termination of any non-exclusive distribution agreement. Paragraph II.C orders that IDEXX show any future non-exclusive distribution agreement to the Commission at least thirty (30) days before it is signed.

Further, if the non-exclusive national distributor merges with, acquires, or is acquired by a distributor that has an exclusive distribution arrangement with IDEXX, the non-exclusive distribution agreement stays in effect.

Complaint

IN THE MATTER OF

COMPETE, INC.

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

Docket No. C-4384; File No. 102 3155
Complaint, February 20, 2013 – Decision, February 20, 2013

This consent order addresses allegations that Respondent Compete, Inc. utilized its web-tracking software to collect personal data in violation Section 5(a) of the Federal Trade Commission Act. Compete is a market research company that collects data from consumers through two products: (1) the Compete Toolbar, which consumers install to gain "instant access" to information about websites as they browse the Internet; and (2) the Consumer Input Panel, which allows the consumers to win rewards from sharing their opinions regarding products and services. Compete represented to consumers that the information it collected would be anonymous and would be limited to browsing behavior and web page addresses. The complaint alleges that Compete misrepresented the extent of its data collection efforts. In fact, Compete captured personal consumer data, including credit card numbers, financial account numbers, security codes, usernames, passwords, and Social Security numbers. The complaint further alleges that Compete failed to implement reasonable and appropriate measures to protect consumer information, and this failure was likely to cause substantial injury to consumers. The consent order requires Compete to disclose fully the information it collects and obtain consumers' express consent before collecting any personal data. The order further requires that the company delete or anonymize the consumer data it has collected; and that it provide directions to consumers for uninstalling the software. Finally, the order bars Compete from misrepresenting its privacy and data security practices, and requires that it implement a comprehensive information security program with biannual independent third-party audits for the next 20 years.

Participants

For the *Commission*: *Jamie Hine* and *Ruth Yodaiken.*

For the *Respondent*: *Stuart Friedel* and *Gary Kibel, Davis & Gilbert LLP*; *Michelle A. Kisloff* and *Christopher Wolf, Hogan Lovells US LLP*.

COMPLAINT

The Federal Trade Commission, having reason to believe that Compete, Inc. ("Compete" or "respondent"), a corporation, has

violated the Federal Trade Commission Act ("FTC Act"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Compete is a Delaware corporation, with its principal place of business at 501 Boylston Street, Suite 6101, Boston, Massachusetts.

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

RESPONDENT'S BUSINESS PRACTICES AND REPRESENTATIONS TO CONSUMERS

3. Compete is a market research company that collects data from consumers so that it can, among other things, develop and sell analytical reports about consumer behavior on the Internet.

4. Starting in January 2006, Compete collected data about consumers through two products. The first was the Compete Toolbar ("Toolbar"), which consumers installed to get "instant access" to information about websites as they surfed the Internet, such as the popularity of the websites they visited. (See Compete Toolbar, Exhibit 1, formerly available from www.compete.com). The second product was the Consumer Input Panel, which allowed consumers to win rewards while expressing their opinions to companies about products and services. (See Consumer Input Panel, Exhibit 2, formerly available from www.consumerinput.com).

5. In addition, Compete licensed its data collection software for third parties for their use, including incorporating into their own toolbars or rewards programs. In all cases the data gathered through Compete's data collection software was sent to Compete.

6. As of the end of October 2011, Compete had collected data from more than 4 million consumers.

Compete's Tracking of Consumers' Activities

7. When consumers installed the Toolbar, they were prompted to either leave enabled or to disable a feature the company referred to as "Community Share." (See Exhibit 3). Compete provided the following description of the "Community Share" option:

> By joining Community Share, the web pages you visit will be anonymously pooled with the Compete community to provide site trust rankings and analytics.
>
> See Compete Toolbar Setup, Exhibit 3.
>
> Enabling "Community Share" activated Compete's ability to collect data about the consumer.

8. When consumers signed up for the Consumer Input Panel, Compete made statements such as the following:

> [W]e measure your behavior as well as your opinions. Consumer Input utilizes a piece of software stored on your computer that anonymously transmits aspects of your Internet browsing behavior so that we can understand the sites, products and services you interact with.
>
> See, e.g., Consumer Input Panel Registration, Exhibit 4.

Compete always collected data about consumers who participated in the Consumer Input Panel.

9. In addition, in its general privacy policy, Compete made the following statement about "click-sharing," which refers to the consumers' sharing of data with Compete:

> When you download Compete software, including the Compete Toolbar, you will be given the option of enabling click-sharing. Should you opt-in to

> click-sharing you will begin to anonymously share the addresses of the web pages you visit online.

See General Compete Privacy Policy, Exhibit 5.

10. In fact, Compete collected more than browsing behavior or addresses of web pages. It collected extensive information about consumers' online activities and transmitted the information in clear readable text to Compete's servers. The data collected included information about all websites visited, all links followed, and the advertisements displayed when the consumer was on a given web page. The captured data included details about consumers' online behavior to the extent that, for example, Compete knew whether a consumer abandoned or completed a purchase after placing an item in an online shopping cart.

11. Moreover, as far back as January 2006, Compete also captured some information consumers communicated on secure web pages (e.g., https), such as credit card numbers, financial account numbers, security codes and expiration dates, usernames, passwords, search terms, or Social Security numbers.

12. Compete's data capture occurred in the background as a consumer used the Internet; there was no way for consumers – without special software and technical expertise – to discover the extent of the data collection.

Compete's Filtering of Consumer Data

13. Compete made statements in its general privacy policy about filtering of personal information such as the following:

> All data is stripped of personally identifiable information before it is transmitted to our servers. Our data collection techniques have been designed to purge personally identifiable information wherever we find it. In addition, as a member of Compete you are assigned a randomly generated user ID ensuring your anonymity.
>
> See General Compete Privacy Policy, Exhibit 5.

14. Similarly, Compete made statements in its Consumer Input Panel privacy policy and Frequently Asked Questions such as the following:

> Inadvertently, the URL information we collect and license sometimes contains personal information about Internet users. Potentially, a name, address, email address, or similar information that an Internet user enters into a Web page can become part of the URL that is transmitted to us and stored in our databases. While we have no control over what information third party websites put into their URLs or where they put it, we make every commercially viable effort to purge our databases of any personally identifiable information. The data collection software uses a proprietary rules engine to search through all URLs, before transmitting them to its database, to strip out any such personally identifiable information. We do not disclose the contents of individual URLs stored in our databases so we will not release or use this information. Further, we aggregate data on hundreds of thousands of users before supplying data to our clients, thereby ensuring that an individual's privacy remains intact at all times.
>
> See Consumer Input Privacy Policy, Exhibit 6.
>
> In addition, the data collection software uses a proprietary rules engine to search through all URLs, before transmitting them directly to its database, to strip out any such personally identifiable information, thus ensuring your privacy.
>
> See Consumer Input Panel, Frequently Asked Questions, Exhibit 7.

15. Compete used data filters to prevent the collection and use of some sensitive data. However, those filters were too narrow and improperly structured to avoid collecting such data. For instance, a filter was designed to prevent the collection of

personal identification numbers for financial accounts, and would have prevented collection of that data if a website used the field name "PIN." However, the filter would not have prevented such collection if a website used similar field names such as "personal ID" or "security code." In addition, Compete failed to implement a simple, commonly used, algorithm to screen out credit card numbers, and Compete filtered some types of information only after that information had been transmitted in clear text via the Internet to its servers.

Compete's Data Security Practices

16. In addition to the representations made about the collection of data, Compete made statements about the security of user data such as the following:

> We take reasonable security measures to protect against unauthorized access to or unauthorized alteration, disclosure or destruction of personal information. These measures include internal reviews of our data collection, storage and processing practices and security practices.
>
> See General Compete Privacy Policy, Exhibit 5.

17. Respondent engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for consumer information collected and transmitted by Compete. Among other things, respondent:

a. created unnecessary risks of unauthorized access to consumer information by transmitting sensitive information from secure web pages, such as financial account numbers and security codes, in clear readable text over the Internet;

b. failed to design and implement reasonable information safeguards to control the risks to customer information; and

c. failed to use readily available, low-cost measures to assess and address the risk that the data collection software would collect sensitive consumer information that it was not authorized to collect.

18. These security failures resulted in the creation of unnecessary risk to consumers' personal information. Compete transmitted the information it gathered – including sensitive information – over the Internet in clear readable text. Tools for capturing data in transit over unsecured wireless networks, such as those often provided in coffee shops and other public spaces, are commonly available, making such clear-text data vulnerable to interception. The misuse of such information, particularly financial account information and Social Security numbers, can facilitate identity theft and related consumer harms.

19. After flaws in Compete's data collection practices were revealed publicly in January 2010, Compete upgraded its filters, added new algorithms to screen out information such as credit card numbers, and began encrypting data in transit. The company stopped distributing the Compete Toolbar to new customers, and began to distribute its Consumer Input Panel software to new customers through third parties rather than directly. It continued to collect and use consumer data, however.

VIOLATIONS OF THE FTC ACT

COUNT 1

20. Through the means described in Paragraphs 7-9, respondent has represented, expressly or by implication, that its products would collect and transmit information about the websites consumers visited.

21. Respondent failed to disclose that its products would also collect and transmit much more extensive information about the Internet behavior that occurs on consumers' computers, and information consumers provided in secure sessions when interacting with third-party websites, shopping carts, and online accounts – such as credit card and financial account numbers, security codes and expiration dates, and Social Security numbers consumers entered into such web pages. These facts would be

material to consumers. Respondent's failure to disclose these facts, in light of the representations made, was, and is, a deceptive act or practice.

COUNT 2

22. Through the means described in Paragraphs 13-14, respondent has represented, expressly or by implication, that it stripped all personal information out of the data it collected before transmitting it from consumers' computers.

23. In truth and in fact, Compete did not strip all personal information out of the data before transmitting it from consumers' computers. As described in Paragraph 15 the consumer-side filters were too narrow and improperly structured to effectively scrub personal data before transmission to Compete's servers. Therefore, the representation set forth in Paragraph 22 was, and is, false or misleading and constitutes a deceptive act or practice.

COUNT 3

24. Through the means described in Paragraph 16, respondent has represented, expressly or by implication, that it employs reasonable and appropriate measures to protect data obtained from consumers from unauthorized access.

25. In truth and in fact, as described in Paragraphs 10-11, 15 and 17-18, respondent did not implement reasonable and appropriate measures to protect data obtained from consumers from unauthorized access. Therefore, the representation set forth in Paragraph 24 was, and is, false or misleading and constitutes a deceptive act or practice.

COUNT 4

26. As described in Paragraphs 10-12, 15 and 17-18, respondent's failure to employ reasonable and appropriate measures to protect consumer information – including credit card and financial account numbers, security codes and expiration dates, and Social Security numbers – caused or was likely to cause substantial injury to consumers that was not offset by

countervailing benefits to consumers or competition and was not reasonably avoidable by consumers. This practice was, and is, an unfair act or practice.

27. 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 twentieth day of February, 2013, has issued this complaint against respondent.

By the Commission.

Complaint

EXHIBIT 1

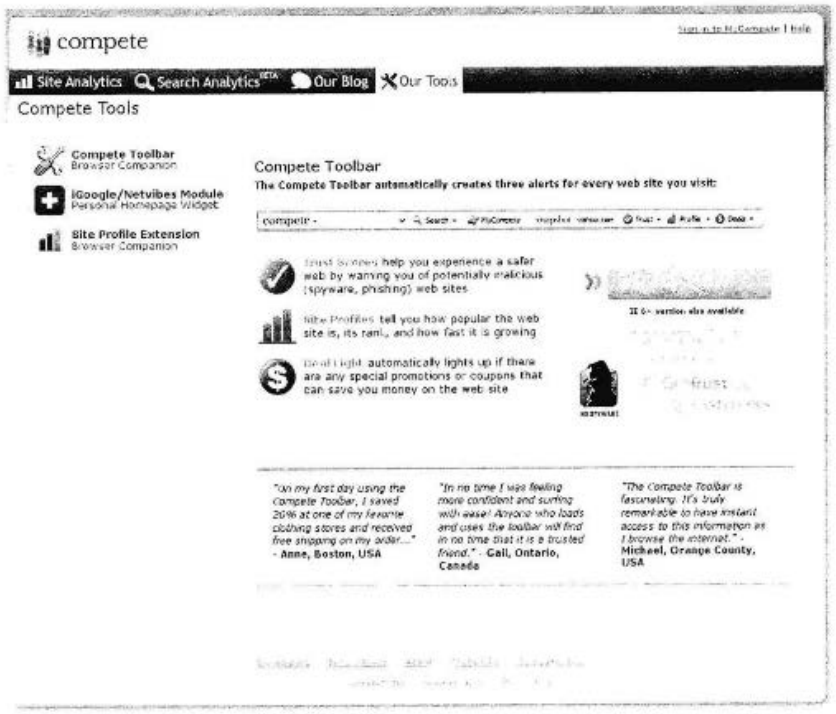


EXHIBIT 2

- Home
- My Account
- Log In

- Home
- Join the Panel
- Member Services
- FAQ
- Benefits of Joining

Benefits of Joiningregistration form

Make your opinions count

Corporations across the United States rely on feedback from their customers and prospective customers to enhance their products and services, make sure their messaging is effective and to stay ahead of their competitors. Information from Consumer Input provides companies with a unique vantage point into consumers and what matters most to them.

By participating in Consumer Input, you'll not only have the opportunity to express yourself about the products and services that are part of your day-to-day life, you'll also influence decisions that may affect millions of other consumers.

Earn rewards and cash

To show our thanks for your support and participation you'll receive a reward, or be entered into a drawing for cash prizes, for each survey you complete. We conduct hundreds of studies each year, so you'll have plenty of chances to earn!

Join Now!

Community Feedback

Member Login

Your E-mail Address:

Password:

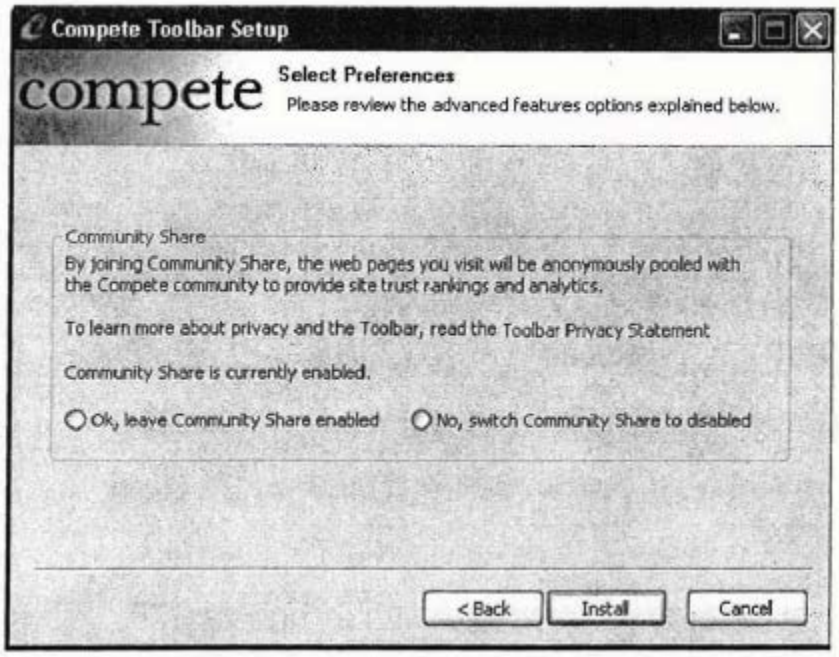
Submit forgot your password?

Copyright © 2008 Consumer Input | Privacy | Contact Us

The Consumer Input℠ is owned and operated by Compete, Inc.

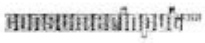
Complaint

EXHIBIT 3



Complaint

EXHIBIT 4



- Home
- My Account
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- Member Services
- FAQ
- Benefits of Joining

Register Today

Thank you for your interest in joining! This is your forum to express your opinion on a variety of topics. By sharing your thoughts as a member of the panel, you will have the opportunity to influence leading companies while earning cash rewards, gift cards, or entries into valuable sweepstakes. And remember, your participation is anonymous, so your privacy is always protected.

Please provide the following information, then click Submit to download your software.

Concerned about privacy?

Registration Form

E-mail Address
Verify E-mail Address
Gender Female
Birth Year
Income Select a range
Ethnicity Choose an ethnicity
City
State Alabama
Zip
Submit

Click the submit button to complete registration and initiate your software installation

Consumer Input is different from other online communities – we measure your behavior as well as your opinions. Consumer Input

utilizes a piece of software stored on your computer that anonymously transmits aspects of your Internet browsing behavior so we can understand the sites, products and services you interact with. Consumer Input will only contact you regarding research -- we will NEVER send you SPAM or pop-up advertising.

Note that by clicking the Submit button you are agreeing to the terms and conditions set forth in the End User License agreement located here.

Community Feedback

Copyright © 2008 Consumer Input | Privacy | Contact Us
The Consumer Input(TM) is owned and operated by Compete, Inc.

EXHIBIT 5

Privacy Policy

Effective on: August 20, 2007

Your privacy is of the highest concern to Compete. This Privacy Policy (the "policy") outlines the types of personally-identifiable information ("personal information") we receive and collect when you use Compete's services available through the Compete web site located at www.compete.com (the "Services"), as well as some of the steps we take to safeguard your personal information.

Compete uses personal information collected through the Services for the purposes of:

- Providing our products and services to users, including the display of customized content, identification and authentication, and contact;
- Auditing, research and analysis in order to maintain, protect and improve our services;
- Ensuring the technical functioning of our network; and
- Developing new services.

EXHIBIT 5

Compete's services are designed to be anonymous and safe for all users. We make commercially reasonable efforts to ensure that your anonymity is protected.

Information security

We take reasonable security measures to protect against unauthorized access to or unauthorized alteration, disclosure or destruction of personal information. These measures include internal reviews of our data collection, storage and processing practices and security practices.

We restrict access to personal information to Compete employees, contractors and agents who need to know that information in order to operate, develop or improve our services. We take reasonable efforts to ensure all parties comply with confidentiality obligations.

We store all personal information on our servers in the United States of America.

Data integrity

Compete processes personal information only for the purposes for which it was collected and in accordance with this Policy. We take reasonable steps to ensure that the personal information we process is accurate, complete, and current, but we depend on our users to update or correct their personal information whenever necessary.

Information we collect and how we use it:

We offer a number of services that do not require you to register for an account or provide any personal information to us, such as Compete Site Profiles and Comparison. However, some of our Services will require the provision of certain personal information. In order to provide our full range of services, we may collect the following types of information:

- **Information you provide**

  When you sign up for a MyCompete account or other Compete services or promotions that requires registration, we sometimes ask you for personal information (such as your e-mail address and an account password). For certain services, such as our premium offerings, we also request credit card or other payment account information which will be maintained by third party merchant(s) or payment processor(s) in encrypted form on secure servers. We may combine the information you submit under your account with information from other Compete services or third parties in order to provide you with a better experience and to improve the quality of our services. For certain services, we may give you the opportunity to opt out of combining such information.

  - MyCompete member e-mail addresses are used to contact members regarding service updates, confirmations, opt-in surveys and select partner offers. If you would like to opt-out of these e-mails, please see the Opt-out section within e-mails you receive from us or manage your e-mail subscriptions by signing into MyCompete by clicking here. You may also contact us using the contact information listed below. If you elect to opt-out of further communications, such opt-out will apply only to marketing messages and not to communications regarding service updates and similar matters.
  - Compete Blog e-mail updates are administered by a 3rd party service provider. E-mail addresses provided to them via the automated form on the blog are used solely for the purpose of sending you blog alerts.
  - If you choose to use our referral service to tell a friend that you think Compete.com might be of interest to them, we will ask you for your friend's name and e-mail address. We will automatically send your friend a one-time e-mail inviting him or her to visit the site. We store this information for the sole purpose of sending this one-time e-mail. We have no intention of annoying you or your friends. Your friend may contact us to request that we remove this information from our database. Please be judicious when providing friends' contact information to our service and do not provide us with such information unless you have your friends' consent to do so.
  - When you contact us via our Contact form, send e-mail or other communication to Compete, we may retain those communications in order to process your inquiries, respond to your requests and improve our services.

Complaint

EXHIBIT 5

- Third-Party Web Beacons: We use third-party web beacons from Yahoo! to help analyze where visitors go and what they do while visiting our website. Yahoo! may also use anonymous information about your visits to this and other websites in order to improve its products and services and provide advertisements about goods and services of interest to you. If you would like more information about this practice and to know your choices about not having this information used by Yahoo!, click here.

- **Cookies and IP Addresses**

To serve you faster and with better quality, we use "cookies" technology. Cookies are small bits of code, usually stored on a user's computer hard drive, which enable a Website to "personalize" itself for each user. We generally use cookies to reduce the time it takes for pages to load on your computer and to assist with customer tracking. Customer tracking (or "click-stream") data collected by us is used to optimize your experience by learning whether or not you successfully used Compete.com. Cookies are not tied to your personal information.

- **Clear Gifs**

We employ a software technology called clear gifs (a.k.a. Web Beacons) that help us better manage content on our site by informing us what content is effective. Clear gifs are tiny graphics with a unique identifier, similar in function to cookies, and are used to track the online movement of Web users. Clear gifs are not tied to users' personally identifiable information. We also use clear gifs in our HTML-based e-mails to let us know which e-mails the recipients have opened. This allows us to gauge the effectiveness of certain communications.

- **Log information**

When you use Compete services, our servers automatically record information that your browser sends whenever you visit a website. These server logs may include information such as your web request, Internet Protocol address, browser type, browser language, the date and time of your request and one or more cookies that may uniquely identify your browser.

- **Click-sharing**

When you download Compete software, including the Compete Toolbar, you will be given the option of enabling click-sharing. Should you opt-in to click-sharing you will begin to anonymously share the addresses of the web pages you visit online. All data is stripped of personally identifiable information before it is transmitted to our servers. Our data collection techniques have been designed to purge personally identifiable information wherever we find it. In addition, as a member of Compete you are assigned a randomly generated user ID ensuring your anonymity. The only contact information associated with your user ID is your registration e-mail, which we only use to send you service updates and other requested communications that you have signed up to receive from us.

We do not control what information third party websites put into their URLs or where they put it. The URL information we collect and license may sometimes contain personal information about users. However, we make every commercially viable effort to purge personally identifiable information wherever we find it. Compete's software application uses a proprietary rules engine to search through all URLs to strip out any such personally identifiable information before transmitting the data to our databases. To protect your privacy, it's our policy never to disclose or release the contents of individual URLs stored on our servers. Further, all our services aggregate data across all users thereby ensuring that your privacy is protected at all times as such information does not identify you individually.

To calculate more robust metrics for our users, we also license URL and demographic data (age, gender, household income, geographical location, etc.) from multiple sources including ISPs and ASPs. We honor the privacy of our Members and the privacy policies of our licensors and do not knowingly collect or license personally identifiable information from members or licensors. Again, Compete aggregates data on multiple users before supplying any data, thereby ensuring an individual's privacy.

EXHIBIT 5

- **Links**

  Compete may present links in a format that enables us to keep track of whether these links have been followed. We use this information to improve the quality of our services.

Third Party Links

This Policy applies to all information that you provide to Compete.com. However, when you visit websites to which Compete.com links, keep in mind you will be interacting with a third party that operates under its own privacy and security policy. If you choose to obtain certain services through a third party site, the data collected by the third party is governed by that third party's privacy policy. A third party site will also have its own policy regarding the use of cookies and clear gifs. We encourage you to review the privacy policies of any other service provider from whom you request services.

Information sharing

Compete only shares personal information with individuals outside of Compete as disclosed in this Privacy Policy and in the following limited circumstances:

- We have a good faith belief that access, use, preservation or disclosure of information is reasonably necessary to (a) satisfy any applicable law, regulation, legal process or enforceable governmental request, (b) enforce applicable Terms of Service, including investigation of potential violations thereof, (c) detect, prevent, or otherwise address fraud, security or technical issues, (d) protect against imminent harm to the rights, property or safety of Compete, its users or the public as required or permitted by law, (e) allow service providers and/or vendors to fulfill Services for you on behalf of Compete or (f) pursuant to an acquisition, merger, sale of assets or other business transfer.

A Special Note about Children's Privacy

You must be at least 13 years old to use the Compete services. We do not knowingly collect or use personal information about visitors under 13 years of age. If you are under 13 years of age, you can use the services offered on our website only in conjunction with your parents or guardians.

Changes to this Policy

Please note that this policy may change from time to time. We will post any policy changes on this page and, if the changes are significant, we will provide a more prominent notice (including, for certain services, e-mail notification of policy changes). By using our services, you signify your assent to the Compete's Privacy Statement. Our Privacy Statement will indicate the date it was last updated. Your continued use of our site will signify your acceptance of the changes to our policy.

Questions and Suggestions

If you have additional questions or suggestions, please contact us anytime or write to us at:

Compete Inc.
Four Copley Place, Suite 700
Boston, MA 02116 USA
Attention: Member Services

Complaint

EXHIBIT 6

consumerinput.com

- Home
- My Account
- Log In

- Home
- Member Services
- FAQ
- Benefits of Joining

Privacy Statementregistration form

Effective date: October 7, 2008

Protecting your privacy is our highest priority. Consumer Input is designed to be an anonymous research forum. As such, we go to great lengths to ensure that your anonymity will remain intact. Our data collection techniques have been designed to purge personally identifiable information from our databases.

Your email address will be used to contact you if you've won a prize or to alert you to additional research opportunities. We will never sell your email address to a third party, nor will we ever solicit you for sales purposes of any kind.

Other than your email address, we will not collect information that can be tied to you as an individual. In fact, we will only require your name if you are selected as a winner in one of our cash drawings.

We will not license, publish, or sell any information collected from our panelists that can be tied to an individual user. Nor will we use such information as part of a targeted marketing program. We offer our clients aggregate data concerning online consumer behavior by collecting information from the panel and, also, by licensing URL and demographic data (age, gender, household income, geographical location, etc.) from sources such as ISPs and browser companions. We honor the privacy of our panelists and the privacy policies of our licensors and do not knowingly collect or license personally identifiable information from our panelists or licensors.

Inadvertently, the URL information we collect and license sometimes contains personal information about Internet users. Potentially, a name, address, email address, or similar information that an Internet user enters into a Web page can become part of the URL that is transmitted to us and stored in our databases. While we have no control over what information third party websites put into their URLs or where they put it, we make every commercially viable effort to purge our databases of any personally identifiable information. The data collection software uses a proprietary rules engine to search through all URLs, before transmitting them to its

EXHIBIT 6

database, to strip out any such personally identifiable information. We do not disclose the contents of individual URLs stored in our databases so we will not release or use this information. Further, we aggregate data on hundreds of thousands of users before supplying data to our clients, thereby ensuring that an individual's privacy remains intact at all times.

Third-Party Web Beacons: We use third-party web beacons from Yahoo! to help analyze where visitors go and what they do while visiting our website. Yahoo! may also use anonymous information about your visits to this and other websites in order to improve its products and services and provide advertisements about goods and services of interest to you. If you would like more information about this practice and to know your choices about not having this information used by Yahoo!, click here."

If you have questions related to privacy, please contact privacy@consumerinput.com.

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Complaint

EXHIBIT 7

Consumer Input

* What are the system requirements for the Consumer Input Software?

* How can I be removed from your mailing list?

* How can I remove the Consumer Input Software from my machine?

* How do I address any technical problems I encounter during a survey?

How do I change my e-mail address or update my profile?

To update your profile, change your e-mail address, or be removed from our mailing list, Click Here

top

Why am I having trouble logging in?

The most common issue with logging in relates to web browser cookies. Consumer Input site requires that your browser accept cookies. Please enable cookies in your browser and attempt to log in again. If you still cannot log in, you can e-mail Consumer Input at panelsupport@consumerinput.com.

top

How does the panel work?

In conjunction with traditional opinion and research surveys, Consumer Input uses proprietary software to anonymously record web browsing patterns. These patterns are merged with the patterns of thousands of Internet users and analyzed in aggregate to understand the trends that will influence major marketing decisions in a variety of industries. We will not license, publish, or sell any information collected from our panelists that can be tied to an individual user. In addition, the data collection software uses a proprietary rules engine to search through all URLs, before transmitting them to its database, to strip out any such personally identifiable information, thus ensuring your privacy. For more information, please consult the privacy statement.

top

Complaint

EXHIBIT 7

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To update your profile, change your e-mail address, or be removed from our mailing list, Click Here

top

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top

Complaint

EXHIBIT 7

Consumer Input

Consumer Input allows participation by those in the United States who are 18 years of age or older. Our registration process denies membership to underage panelists.

top

What are the system requirements for the Consumer Input Software?

Windows:

* Windows XP Service Pack 2 or Windows Vista

* Internet Explorer Version 6.0 or greater, or Mozilla Firefox Version 2.0 or greater

Macintosh:

* Mac OS X Version 10.2 or greater

* Mozilla Firefox Version 2.0 or greater.

top

How can I be removed from your mailing list?

To update your profile, change your e-mail address, or be removed from our mailing list, Click Here

top

How can I remove the Consumer Input Software from my machine?

Microsoft Internet Explorer:

1. From the Windows control panel, select "Add / Remove Programs"
2. Select the "Consumer Input Software" entry.
3. Select the "Remove" button.

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 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. Compete, Inc., is a Delaware corporation with its principal place of business at 501 Boylston Street, Suite 6101, Boston, Massachusetts.

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:

1. "Affected Consumers" shall mean persons who, prior to the date of issuance of this order, downloaded and installed any Data Collection Agent, including but not limited to the Compete Toolbar and Consumer Input Panel software.

2. "Clearly and prominently" shall mean as follows:

   a. In textual communications (e.g., printed publications or words displayed on the screen of a computer or a 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;

   b. 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;

   c. In communications disseminated through video means (e.g., television or streaming video), the required disclosures are in writing in a form consistent with subparagraph (A) of this definition and shall appear on the screen for a duration sufficient for an ordinary consumer to read and comprehend them;

   d. In communications made through interactive media, such as the Internet, online services, and software, the required disclosures are unavoidable and presented in a form consistent with

subparagraph (A) of this definition, in addition to any audio or video presentation of them; and

e. In all instances, the required disclosures are presented in an understandable language and syntax; in the same language as the predominant language that is used in the communication; and with nothing contrary to, inconsistent with, or in mitigation of the disclosures used in any communication of them.

3. "Collected Information" shall mean any information transmitted, on or before the date of issuance of this order, from a computer by a Data Collection Agent to any computer server owned by, operated by, or operated for the benefit of respondent.

4. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

5. "Computer" shall mean any desktop, laptop computer, tablet, handheld device, telephone, or other electronic product or device that has a platform on which to download, install, or run any software program, code, script, or other content and to play any digital audio, visual, or audiovisual content.

6. "Data Collection Agent" shall mean any software program, including any application; created, licensed or distributed, directly or through a Third Party, by respondent; installed on consumers' computers, whether as a standalone product or as a feature of another product; and used to record, or transmit information about any activity occurring on that computer, unless: (a) the activity involves transmission of information related to the configuration of the software program or application itself; (b) the transmission is limited to information about whether the program is functioning as intended; or (c) the activity involves a consumer's interactions with respondent's websites and/or forms. The Compete

Toolbar and the Consumer Input Panel software, for example, are both Data Collection Agents.

7. "Personal Information" shall mean individually identifiable information from or about an individual consumer including, but not limited to: (a) a first and last name; (b) a home or other physical address, including street name and name of city or town; (c) an email address or other online contact information, such as an instant messaging user identifier or a screen name; (d) a telephone number; (e) a Social Security number; (f) a driver's license number or other government-issued identification number; (g) a bank account, debit card, or credit card account number; (h) a persistent identifier, such as a customer number held in a "cookie" or static IP address; or (i) a biometric record.

8. "Third Party" shall mean any individual or entity other than respondent, except that a third party shall not include a service provider of respondent that:

   a. Only uses or receives information collected by or on behalf of respondent for and at the direction of the respondent and no other individual or entity;

   b. Does not disclose the information, or any individually identifiable information derived from it, to any individual or entity other than respondent; and

   c. Does not use the information for any other purpose.

9. Unless otherwise indicated, "respondent" shall mean Compete, Inc., and its successors and assigns, and its officers, agents, representatives, and employees.

I.

IT IS ORDERED that respondent, directly or indirectly, including through any contract, agreement, license, sale, or arrangement with any Third Party, is prohibited from:

A. Collecting any information from any Data Collection Agent made available to consumers directly by respondent after the date of service of this order, unless prior to such collection respondent has:

1. Disclosed to the consumer clearly and prominently, and prior to the display of and on a separate screen from, any "end user license agreement," "privacy policy," "terms of use" page, or similar document:

a. all the types of information that will be collected, including, but not limited to, if applicable, a statement that the information includes consumer transactions (both completed and incomplete) or communications in forms, online accounts, web-based email accounts, or search engine pages, and whether the information includes personal, financial or health information; and

b. how the information is to be used, including if it is shared with any Third Party; and

2. Obtained express affirmative consent from the consumer to the collection, use or sharing of the information.

B. Collecting any information from any Data Collection Agent made available to consumers by a Third Party after the date of service of this order, unless prior to such collection respondent has provided the disclosures and obtained the consent described in subpart A(1-2), or has both required the Third Party by contract to do so, and monitored compliance with such contractual provisions.

C. Collecting any information from any Data Collection Agent that was made available to consumers before the date of service of this order, unless it has made the disclosures and obtained the express affirmative consent described in subpart A(1-2) or:

1. It has made the disclosure required by Part II(A)(3); and

2. It does not use information collected from an Affected Consumer by a Data Collection Agent, except in an aggregate and/or anonymous form that does not disclose, report, or otherwise share any individually identifiable information.

D. Using any Collected Information gathered on or after February 1, 2010, unless it has obtained express affirmative consent from the consumer to the use of the Collected Information, or

1. It does not use the Collected Information, except in an aggregate and/or anonymous form that does not disclose, report, or otherwise share any individually identifiable information; and

2. It does not otherwise access any Affected Consumer's personal information that was collected by a Data Collection Agent.

E. Making any material change from stated practices about collection, use or sharing of such information, unless it has obtained express affirmative consent from the consumer.

Provided, however, this Part will not apply to the collection, use or sharing of information as reasonably necessary: 1) to comply with applicable law, regulation, or legal process; 2) to enforce respondent's terms of use; 3) to detect, prevent, or mitigate fraud or security vulnerabilities; 4) for configuration of the software program or application itself; or 5) to determine whether the program is functioning as intended.

II.

IT IS FURTHER ORDERED that Compete, Inc., and its successors and assigns, shall:

A. Notify Affected Consumers: 1) that they have or had a Data Collection Agent installed on their Computers, and that this software collected and transmitted information to or on behalf of respondent, listing the categories of personal information that were, or could have been, transmitted by a Data Collection Agent; and 2) how to permanently disable and/or uninstall the Data Collection Agent. Notification shall be by each of the following means:

1. On or before thirty (30) days after the date of service of this order and for two (2) years after the date of service of this order, posting of a clear and prominent notice on the websites of Compete, Inc., and its successors and assigns;

2. On or before thirty (30) days after the date of service of this order and for three (3) years after the date of service of this order, informing Affected Consumers who complain or inquire about the privacy or security of a Data Collection Agent; and

3. Beginning only once notification described in both subparts II(A)(1) and (2) above have commenced, and completed on or before sixty (60) days after the date of service of this order, providing clear and prominent notice to consumers via Affected Consumers' computers on which a Data Collection Agent is operating, through the browser, software upgrade or similar technology, that:

   a. is visible until the consumer has taken action in response to the notice;

   b. includes a hyperlink and/or the address for a website of Compete, Inc., and its successors or assigns; and

c. includes the name of the company from whom the consumer obtained the Data Collection Agent, or the brand name (as marketed to the consumer) of the software or application containing the Data Collection Agent, and an explanation that Compete provides technology for the specific Data Collection Agent.

B. Provide prompt and free support with clear and prominent contact information to help consumers disable and/or uninstall a Data Collection Agent. For two (2) years after the date of service of this order, this support shall include toll-free, telephonic and electronic mail support.

III.

IT IS FURTHER ORDERED that before entering into any contract, agreement, license, sale, or arrangement with any Third Party in connection with any Data Collection Agent made available to consumers by such Third Party, Compete, Inc., and its successors and assigns, shall serve the Third Party with a copy of this order. For any existing contract, agreement, license, sale, or arrangement with any Third Party in connection with any Data Collection Agent made available to consumers by such Third Party, respondent shall serve the Third Party with a copy of this order within 30 days of service of this order.

IV.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, website, or other device, in connection with the offering of any service or product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the extent to which respondent collects, maintains and protects the security, privacy, confidentiality, or integrity of any information collected from or about consumers, unless the representation is true, and non-misleading.

V.

IT IS FURTHER ORDERED that Compete, Inc., and its successors and assigns; directly or through any corporation, subsidiary, division, website, or other device; in connection with its advertising, marketing, promotion, or offering 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, privacy, 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 and the nature and scope of respondent's activities, and the sensitivity of the personal information collected from or about consumers, including:

A. The designation of an employee or employees to coordinate and be accountable for the information security program;

B. The identification of material internal and external risks that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of personal information and an 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, account takeovers, 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 such service providers receive from respondent or obtain on respondent's behalf, and the requirement, by contract, that such service providers implement and maintain appropriate safeguards; and

E. The evaluation and adjustment of respondent's information security program in light of the results of the testing and monitoring required by 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 information security program.

VI.

IT IS FURTHER ORDERED that, in connection with its compliance with Part V of this order, Compete, Inc., and its successors and assigns, 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, and 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 Part V of this order; and

D. Certify that respondent's security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of personal information is protected and has so operated throughout the reporting period.

Each Assessment shall be prepared and completed within sixty (60) days after the end of the reporting period to which the Assessment applies. 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.

VII.

IT IS FURTHER ORDERED that Compete, Inc., and its successors and assigns, shall, within fourteen (14) days after the date of service of this order, delete or destroy, Collected Information in respondent’s custody or control that was collected prior to February 1, 2010, unless otherwise directed by a representative of the Commission.

VIII.

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

A. All advertisements, labeling, packaging and promotional material containing the representation;

B. All materials relied upon in disseminating the representation;

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

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

E. All notices related to service of the order on Third Parties, pursuant to Part III.

F. All materials demonstrating compliance with Part I(B), including all contracts and measures to monitor compliance.

Moreover, for a period of three (3) years after the date of preparation of each Assessment required under Part VI of this order, respondent shall maintain and upon request make available to the Commission for inspection and copying all materials relied upon to prepare the Assessment, whether prepared by or on behalf of the respondent, including but not limited to all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, for the compliance period covered by such Assessment.

IX.

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

X.

IT IS FURTHER ORDERED that Compete, Inc., and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in respondent that may affect compliance obligations arising under this order, including but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor company; the creation or dissolution of a subsidiary (including an LLC), parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in respondent's name or address. *Provided, however*, that with respect to any proposed change 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 of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line FTC v. Compete. *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.

XI.

IT IS FURTHER ORDERED that Compete, Inc., and its successors and assigns, shall, within sixty (60) days after service of this order, and at such other times as the FTC may require, file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which respondent has complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondent shall submit additional true and accurate written reports.

XII.

This order will terminate on February 20, 2033, 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 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 this order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ANALYSIS OF THE CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order applicable to Compete, Inc. ("Compete").

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.

Compete develops software for tracking consumers as they shop, browse and interact with different websites across the Internet. As alleged in the Commission's complaint, Compete offered one version of its tracking software as the Compete Toolbar, which would provide consumers with information about websites as they surfed the web, such as information about the popularity of the websites they visited. Separately, Compete offered consumers membership in its Consumer Input Panel: consumers could win rewards while participating in surveys about products and services. As part of the registration process for the Consumer Input Panel, consumers would install tracking software. In addition, Compete licensed its tracking software to third parties, such as Upromise, Inc., which was the subject of a recent FTC enforcement action. (*See* Upromise, Inc., at http://www.ftc.gov/os/caselist/1023116/index.shtm.)

The Commission's complaint involves the advertising, marketing and operation of tracking software. According to the FTC complaint, while Compete represented to consumers that the various forms of software would collect information about the web sites consumers visited, its failure to disclose the full extent of data collected through tracking software was deceptive. The complaint alleges that Compete's tracking software collected the names of all websites visited; all links followed; advertisements displayed when websites were visited; and information that consumers entered into some web pages (*e.g.*, credit card and

financial account numbers, usernames, passwords, and search terms), including secure web pages.

According to the FTC complaint, Compete misrepresented its privacy and security practices, including that: 1) it stripped all personal information out of the data it collected before transmitting it from consumers' computers; and 2) it employed reasonable and appropriate measures to protect data gathered from consumers from unauthorized access. The complaint alleges that these claims were false and thus violate Section 5 of the FTC Act.

In addition, the FTC complaint alleges that Compete engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for the personal information it collected and maintained. The complaint alleges that, among other things, Compete: 1) transmitted sensitive information from secure web pages, such as financial account numbers and security codes, in clear readable text; 2) did not design and implement reasonable safeguards to control risks to consumer information; and 3) did not use readily available, low-cost measures to assess and address the risk that its software would collect sensitive consumer information it was not authorized to collect.

The complaint alleges that Compete's failure to employ reasonable and appropriate measures to protect consumer information – including credit card and financial account numbers, security codes and expiration dates, and Social Security numbers – was unfair. Tools for capturing data in transit, for example over unsecured wireless networks such as those often provided in coffee shops and other public spaces, are commonly available, making such clear-text data vulnerable to interception. The misuse of such information – particularly financial account information and Social Security numbers – can facilitate identity theft and related consumer harms.

The complaint alleges that after flaws in Compete's data collection practices were revealed publicly in January 2010, Compete upgraded its filters, added new algorithms to screen out information such as credit card numbers, and began encrypting data in transit.

The proposed order contains provisions designed to prevent Compete from engaging in future practices similar to those alleged in the complaint. For purposes of the proposed consent order, we call such tracking software a "Data Collection Agent."

Part I applies to collection and use of data from any Data Collection Agent, whether already downloaded or to be downloaded in the future, and is tailored to address distribution by both Compete and third parties. Specifically Parts I.A. and B. of the proposed order apply to Data Collection Agents installed after the date of service of the order. Part I.A. prohibits Compete from collecting data through a Data Collection Agent unless a consumer has given express affirmative consent to such collection, after being provided with a separate, clear and prominent notice about all the types of information that will be collected, as well as a description of how the information is to be used, including any sharing with third parties. Part I.B. ensures these same protections apply when a Data Collection Agent is made available by a third party, and requires that Compete must either provide notice and obtain consent, or require the third party to do so and monitor the third party's compliance. In addition, Parts I.C. and D. of the proposed order limit the collection and use of data from consumers who already have downloaded a Data Collection Agent (*i.e.*, before the date of service of the order) to aggregate and anonymous data, absent notice and affirmative express consent. Part I.E. requires Compete to obtain express affirmative consent before it can make any material changes to its practices for collection or sharing of personal information.

Part II.A. of the proposed order requires Compete to provide corrective notice to consumers who had previously installed a Data Collection Agent. Compete must inform consumers about the categories of personal information collected and transmitted by the software, and how to uninstall it. Part II.B. requires the company to provide for two years phone and e-mail support to assist consumers who seek to disable or uninstall a Data Collection Agent.

Part III of the proposed order requires Compete to provide a copy of the order to third parties with whom it has now, or will have in the future, any agreement in connection with any Data Collection Agent made available by the third party.

Analysis to Aid Public Comment

Part IV of the proposed order prohibits the company from making any misrepresentations about the extent to which it maintains and protects the security, privacy, confidentiality, or integrity of any information collected from or about consumers.

Part V of the proposed order requires Compete to maintain a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of information (whether in paper or electronic format) about consumers. The security program must contain administrative, technical, and physical safeguards appropriate to Compete's size and complexity, the nature and scope of its activities, and the sensitivity of the information. Specifically, the proposed order requires Compete to:

- designate an employee or employees to coordinate and be accountable for the information security program;

- identify material internal and external risks to the security, confidentiality, and integrity of personal information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, and assess the sufficiency of any safeguards in place to control these risks;

- design and implement reasonable safeguards to control the risks identified through risk assessment, and regularly test or monitor the effectiveness of the safeguards' key controls, systems, and procedures;

- develop and use reasonable steps to select and retain service providers capable of appropriately safeguarding personal information they receive from Compete or obtain on behalf of Compete, and require service providers by contract to implement and maintain appropriate safeguards; and

- evaluate and adjust its information security programs in light of the results of testing and monitoring, any material changes to operations or business arrangements, or any other circumstances that it knows or has reason to know

may have a material impact on its information security program.

Part VI of the proposed order requires Compete to obtain within 180 days after service of the order, and biennially thereafter for 20 years, an assessment and report from a qualified, objective, independent third-party professional, certifying, among other things, that: 1) it has in place a security program that provides protections that meet or exceed the protections required by the proposed order; and 2) its 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.

Part VII requires Compete to destroy all consumer data collected by a Data Collection Agent before February 2010.

Part VIII requires Compete to retain documents relating to its compliance with the order. Part IX requires that it deliver copies of the order to persons with responsibilities relating to the subject matter of the order. Parts X, XI, and XII of the proposed order are further reporting and compliance provisions. Part X ensures notification to the FTC of changes in corporate status. Part XI mandates that Compete submit a compliance report to the FTC within 60 days, and periodically thereafter as requested. Part XII provides that the order will terminate after 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 proposed complaint or order or to modify the proposed order's terms in any way.

Complaint

IN THE MATTER OF

PPG ARCHITECTURAL FINISHES, INC.

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

Docket No. C-4385; File No. 112 3160
Complaint, March 5, 2013 – Decision, March 5, 2013

This consent order addresses allegations of deceptive business practices by PPG Architectural Finishes, Inc. ("PPG"). The complaint alleges that PPG misled consumers by claiming its Pure Performance interior paints are free of potentially harmful chemicals known as volatile organic compounds, or VOCs. The order prohibits PPG from claiming that its paints contain "zero" VOCs unless the representation is true and can be substantiated by competent and reliable scientific evidence. It also bars respondent from providing others with any advertising, labeling, or promotional materials for any product alleging to contain "zero" VOCs. Additionally, the order requires PPG to send a letter to its retailers, specifically directing such retailers to remove all *Pure Performance* ads containing "zero VOC" claims and to affix Commission-approved labels to existing *Pure Performance* paint cans. The order further requires PPG to keep copies of all advertisements and other materials relating to its "zero VOC" claims for the next five years and to make these materials available for inspection by the Commission.

Participants

For the *Commission*: *Sandhya Brown* and *Zachary Hunter.*

For the *Respondent*: *John P. Feldman, Reed Smith LLP*.

COMPLAINT

The Federal Trade Commission, having reason to believe that PPG Architectural Finishes, Inc. ("PPG" 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 Delaware corporation with its principal office or place of business at 1 PPG Place, Pittsburgh, PA 15272. Respondent is a subsidiary of PPG Industries, Inc., a Pennsylvania corporation with its principal office or place of business at the same address. Respondent does business under its own name as

well as the names "PPG," "Pittsburgh Paints," "Porter Paints," and "Olympic."

2. Respondent manufactures, advertises, offers for sale, sells, and distributes paint products, including PPG Pure Performance paints. Respondent distributes these paint products to its own stores, independent distributors, and retailers.

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. Typically, a paint retailer will tint a base paint with colorant in order to produce the paint color desired by the customer. Retailers of Pure Performance paints typically provide customers with the option of tinting the base paint to a PPG-formulated color prior to purchase and at no additional charge.

5. Both base paints and colorants may contain volatile organic compounds ("VOCs"). Tinting can significantly increase the VOC level of a paint.

6. Respondent has disseminated or has caused the dissemination of promotional materials for its Pure Performance paints, including print advertisements, website advertisements, and point-of-sale materials to its own stores, independent distributors, and retailers. See, e.g., Exhibits A through E. Respondent, as well as its stores, independent distributors, and retailers, have disseminated or have caused the dissemination of these promotional materials to consumers.

7. In numerous instances, respondent has represented that Pure Performance paints contain "Zero VOCs," including but not limited to the following statements or depictions:

A. PPG Printed Promotional Material:

ENVIRONMENTALLY PREFERRED PAINT

- ZERO VOC

- VERY LOW ODOR–PAINT TODAY, OCCUPY TONIGHT
- DURABLE, WASHABLE, BEAUTIFUL
- PAINT “GREEN” IN ANY COLOR

Exhibit A.

B. PPG Printed Promotional Material:

pure performance®

ENVIRONMENTALLY GENTLE

. . . .

ZERO VOCs
Contains no volatile organic compounds (VOC), eliminating detrimental impact on air quality

. . . .

SUPERIOR PERFORMANCE

PAINT "GREEN" IN ANY COLOR
Available in over 1,800 clean, vibrant colors from the Voice of Color® design system

Exhibit B.

C. PPG’s Website:

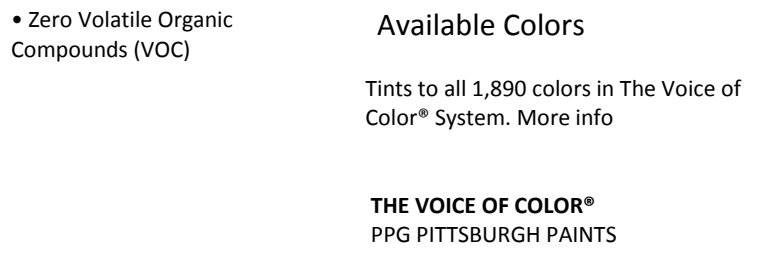
pure performance®

It’s a concept that few manufacturers have managed to pull off. We, however, managed it beautifully. A paint that’s environmentally gentle yet still offers superior performance. Pure Performance®, with zero VOC and low odor, its exceptional quality transforms any interior space.

. . . .

Description

Certified as a top quality paint by the Master Painters® Institute (MPI), Pure Performance® is safe for all painting projects and guarantees professional results every time you use it.



. . . .

Exhibit C (www.ppgpittsburghpaints.com).

D. Script of 60-Second Radio Advertisement:

Did you know it's possible to paint your room today and occupy it tonight – with no unpleasant or lingering odors? It is possible when you choose Pure Performance by PPG. Pure Performance is THE environmentally preferred paint – with very low odor and ZERO VOCs. And it offers superior hiding, washability, and stain removal. With Pure Performance you don't have to sacrifice being "green" for premium quality… which is why so many hospitals, schools and healthcare facilities demand Pure Performance for their jobs. And Pure Performance is available in nearly 2000 colors in the Voice of Color palette, not just the handful of colors offered by some other environmental paints. For better products, better service, better color tools and better results, head to your PPG Pittsburgh Paints dealer today and ask for the environmentally preferred paint that doesn't sacrifice quality – ask for Pure Performance by PPG. Available at… 10- second tag (customizable by dealer).

Exhibit D (emphasis and ellipses in original).

E. *Pure Performance* Paint Can Label:

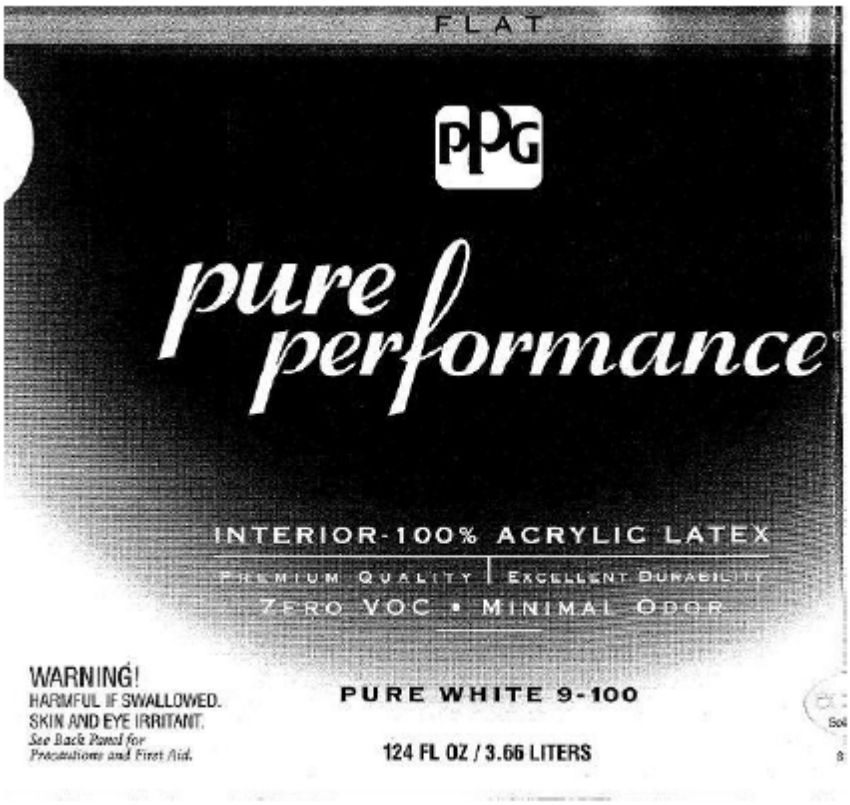


Exhibit E.

8. Consumers likely interpret a representation that a paint contains "Zero VOCs" to mean that the quantitative measure of the VOC level is zero grams per liter, or that the VOC level is "trace" (or effectively zero) where: (a) VOCs have not been intentionally added to the paint; (b) the presence of VOCs at that level does not cause material harm that consumers typically associate with VOCs; and (c) the presence of VOCs at that level does not result in concentrations higher than would be found at background levels in the ambient air.

9. In numerous instances, Pure Performance paints contain more than a trace level of VOCs after tinting.

COUNT I (False or Misleading Representation)

10. Through the means described in Paragraphs 6 and 7, respondent has represented, expressly or by implication, that all Pure Performance paints, including paints with color added, contain zero VOCs.

11. In truth and in fact, in numerous instances, Pure Performance paints do not contain zero VOCs after color is added. Therefore, the representation set forth in Paragraph 10 is false or misleading.

COUNT II (Unsubstantiated Representation)

12. Through the means described in Paragraphs 6 and 7, in numerous instances, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representation set forth in Paragraph 10, at the time the representation was made.

13. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representation set forth in Paragraph 10, at the time the representation was made. Therefore, the representation set forth in Paragraph 12 is false or misleading.

COUNT III (Means and Instrumentalities)

14. Respondent has distributed the promotional materials described in Paragraphs 6 and 7 to independent distributors and retailers. In so doing, respondent has provided them with the means and instrumentalities for the commission of deceptive acts or practices.

15. 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.

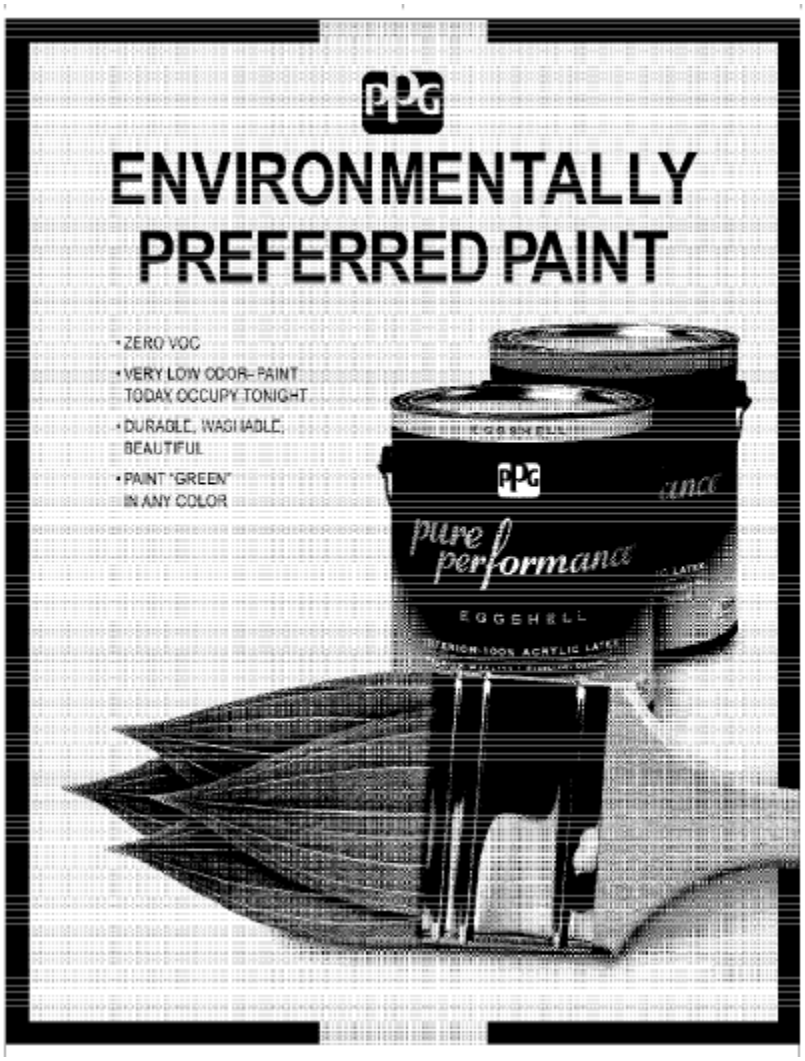
THEREFORE, the Federal Trade Commission, this fifth day of March 2013, has issued this complaint against respondent.

Complaint

By the Commission, Commissioners Leibowitz and Wright not participating.

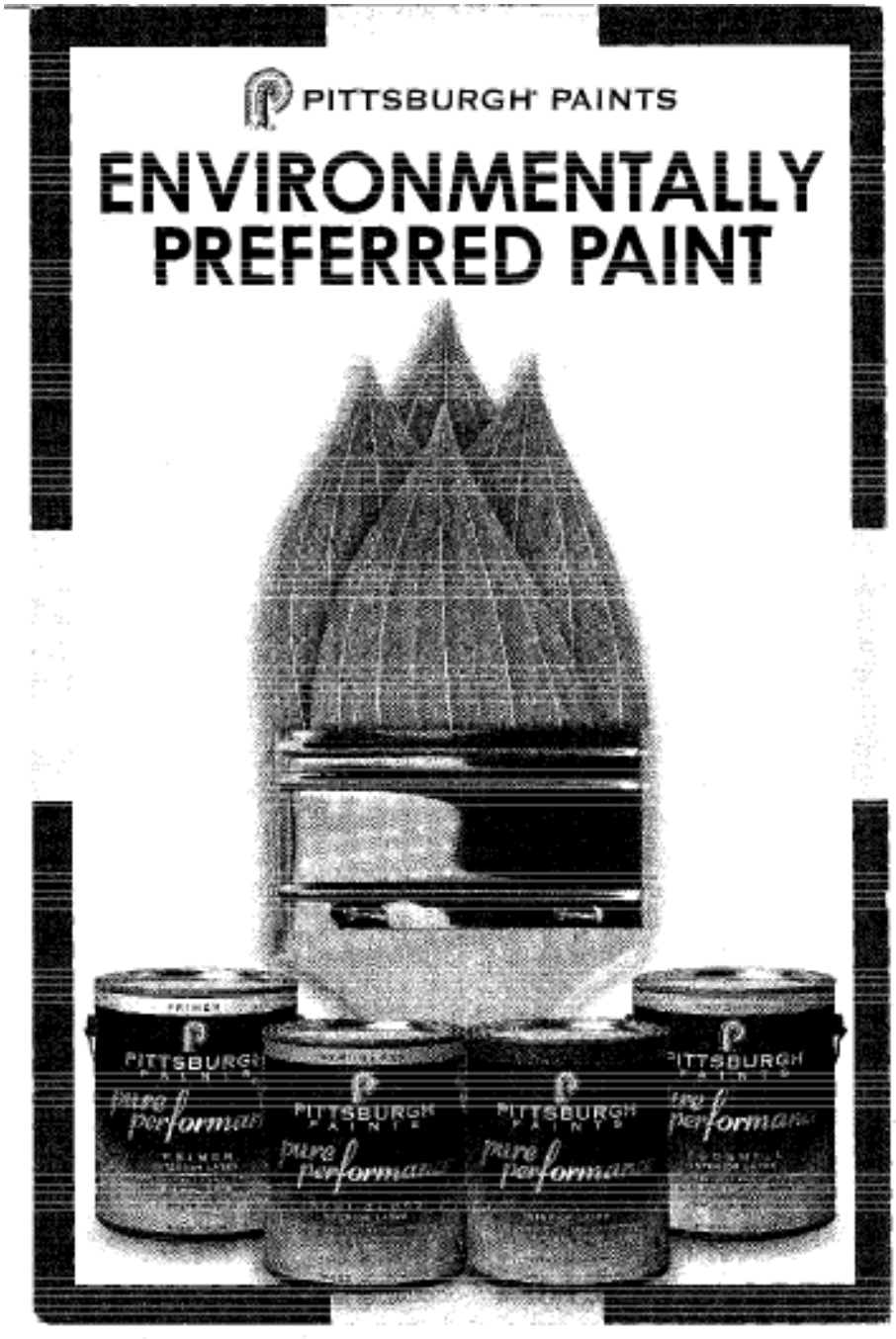
Complaint

EXHIBIT A



Complaint

EXHIBIT B



Complaint

EXHIBIT B

Complaint

EXHIBIT B

4 GREAT FINISHES TO CHOOSE FROM

Pure Performance® is certified as a top quality paint by the Master Painters® Institute, an independent coatings testing organization recognized across North America.

FLAT

A durable, flat finish with excellent hiding and washability. Will help hide minor imperfections and irregular surfaces.

MPI certified in Category 143 (Gloss 1)

EGGSHELL

A rich and elegant, yet durable, finish that provides excellent hiding and washability.

MPI certified in Category 144 (Gloss 2)

SEMI-GLOSS

Ideal for use in areas where a tough, durable and scrubbable finish is desired. Good for use in kitchens and bathrooms.

MPI certified in Category 147 (Gloss 5)

PRIMER/SEALER

The best possible start to your project. Provides excellent surface sealing and adhesion.

SATISFACTION GUARANTEED

Our tradition of quality and performance since 1900 guarantees your satisfaction with Pittsburgh® Paints products. If at any point you are not completely satisfied with this product's performance, Pittsburgh Paints will furnish a replacement product or refund the purchase price - your choice. See label for complete warranty information.

Pittsburgh® Paints uses 100% recycled plastic in its Pure Performance cans.

PITTSBURGH® PAINTS

PPG Architectural Finishes, Inc.
One PPG Place • Pittsburgh, PA 15272
PPG Canada, Inc. Architectural Finishes
4 Kenview Blvd. • Brampton, ON L6T 5E4
www.pittsburghpaints.com

Complaint

EXHIBIT C

http://www.ppgpittsburghpaints.com/our_products/interior_paints/pure_performance/index.htm

Complaint

EXHIBIT D

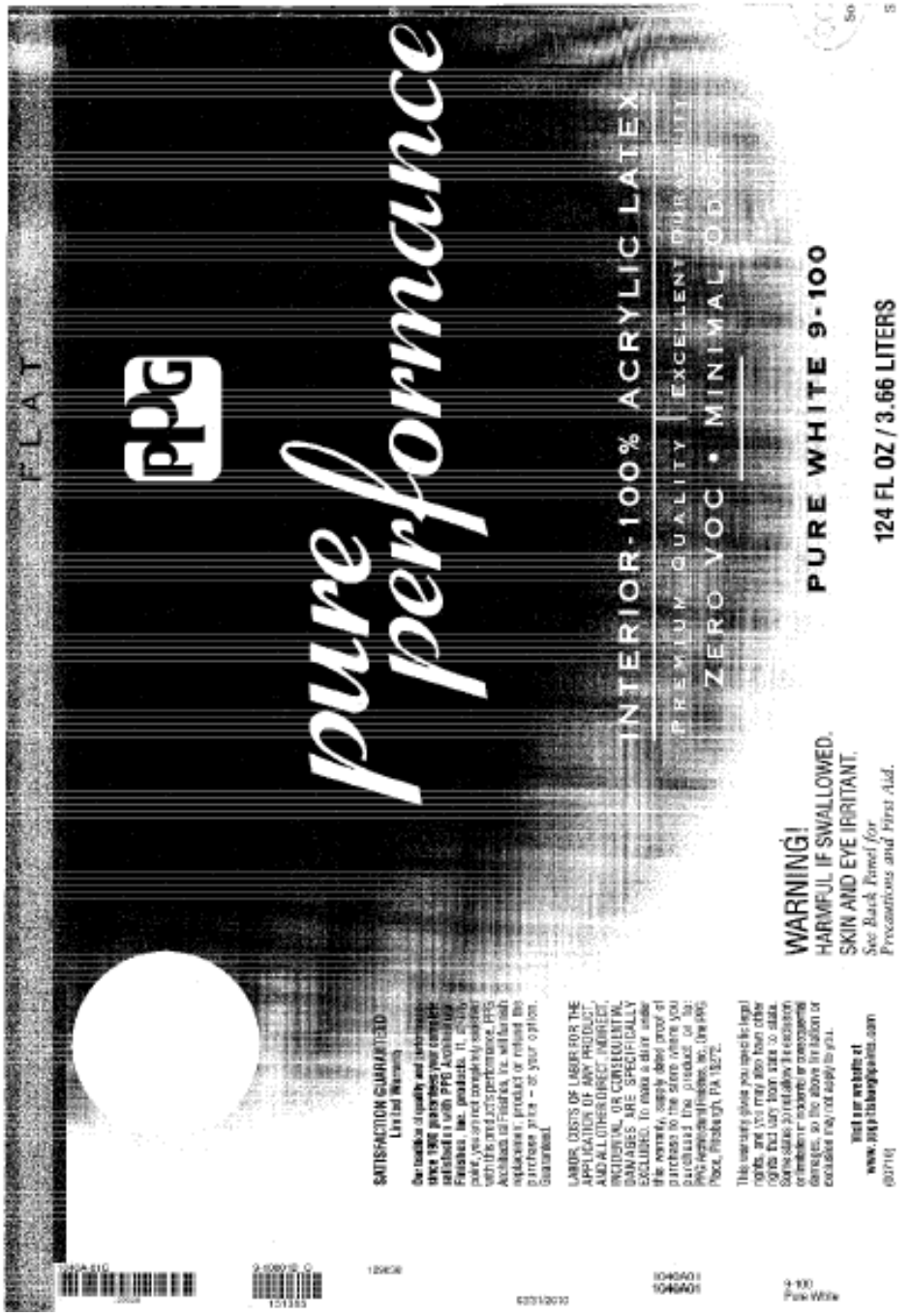
PURE PERFORMANCE® BY PPG
60-SECOND SPOT

ANNOUNCER:

Did you know it's possible to paint your room today and occupy it tonight – with no unpleasant or lingering odors? It is possible when you choose *Pure Performance* by PPG. *Pure Performance* is THE environmentally preferred paint – with very low odor and ZERO VOCs. And it offers superior hiding, washability, and stain removal. With *Pure Performance* you don't have to sacrifice being "green" for premium quality… which is why so many hospitals, schools and healthcare facilities demand *Pure Performance* for their jobs. And *Pure Performance* is available in nearly 2000 colors in the *Voice of Color* palette, not just the handful of colors offered by some other environmental paints. For better products, better service, better color tools and better results, head to your PPG *Pittsburgh* Paints dealer today and ask for the environmentally preferred paint that doesn't sacrifice quality – ask for *Pure Performance* by PPG. Available at… 10-second tag (customizable by dealer)

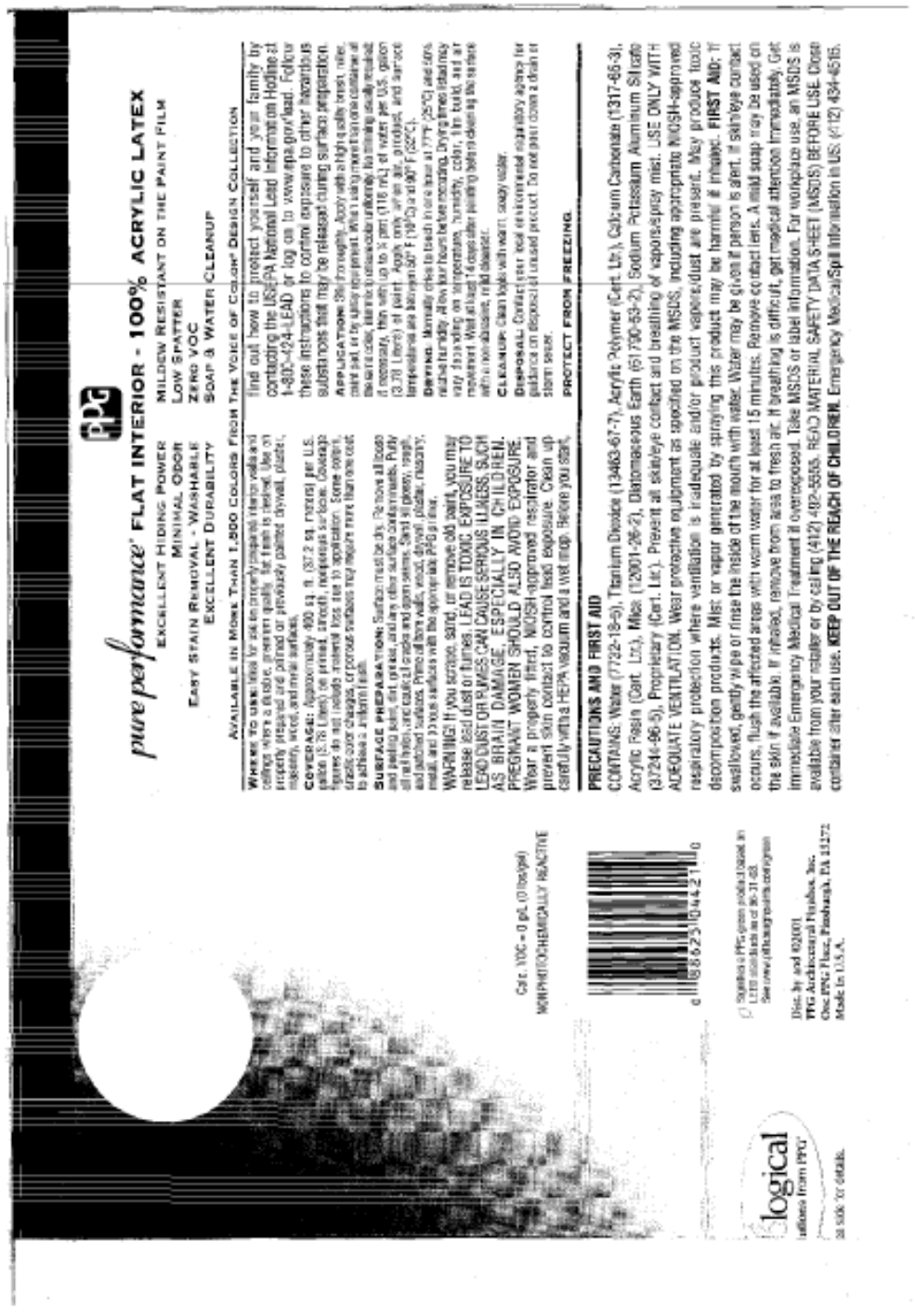
Complaint

EXHIBIT E



Complaint

EXHIBIT E



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, its counsel, 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 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, 16 C.F.R. § 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent PPG Architectural Finishes, Inc. ("PPG") is a Delaware corporation with its principal office or place of business at 1 PPG Place, Pittsburgh, PA 15272. Respondent is a subsidiary of PPG Industries, Inc., a Pennsylvania corporation with its principal office or place of business at the same address.

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, "respondent" shall mean PPG Architectural Finishes, Inc., also doing business as PPG, Pittsburgh Paints, Porter Paints, and Olympic, its successors and assigns, and its officers, agents, representatives, and employees.

2. "Clearly and prominently" shall mean as follows:

   A. In print communications, the disclosure shall be presented in a manner that stands out from the accompanying text, so that it is sufficiently prominent, because of its type size, contrast, location, or other characteristics, for an ordinary consumer to notice, read and comprehend it;

   B. In communications made through an electronic medium (such as television, video, radio, and interactive media such as the Internet, online services, and software), the disclosure shall be presented simultaneously in both the audio and visual portions of the communication. In any communication presented solely through visual or audio means, the disclosure shall be made through the same means through which the communication is presented. In any communication disseminated by means of an interactive electronic medium such as software, the Internet, or online services, the disclosure must be unavoidable. Any audio disclosure shall be delivered in a volume and

cadence sufficient for an ordinary consumer to hear and comprehend it. Any visual disclosure shall be presented in a manner that stands out in the context in which it is presented, so that it is sufficiently prominent, due to its size and shade, contrast to the background against which it appears, the length of time it appears on the screen, and its location, for an ordinary consumer to notice, read and comprehend it; and

C. Regardless of the medium used to disseminate it, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any communication.

3. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

4. "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, that are generally accepted in the profession to yield accurate and reliable results, and that are 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 a representation is true.

5. "Covered product" shall mean any architectural coating applied to stationary structures, portable structures, and their appurtenances.

6. "Tinting" shall mean achieving a particular color through the use of any foreseeably available colorant. Provided however, that if respondent clearly and prominently discloses that a representation regarding a covered product applies only if the product is tinted with specified colorant(s), the definition of "tinting" shall be limited to the use of those colorants.

7. "Trace" level of VOCs shall mean:

   A. VOCs have not been intentionally added to the product;

   B. The presence of VOCs at that level does not cause material harm that consumers typically associate with VOCs, including but not limited to, harm to the environment or human health; and

   C. The presence of VOCs at that level does not result in concentrations higher than would be found at background levels in the ambient air.

8. "Volatile Organic Compound" ("VOC") shall mean any compound of carbon that participates in atmospheric photochemical reactions, but excludes carbon monoxide, carbon dioxide, carbonic acid, metallic carbides or carbonates, ammonium carbonate, and specific compounds that the EPA has determined are of negligible photochemical reactivity, which are listed at 40 C.F.R. § 51.100(s).

I.

IT IS ORDERED that respondent, 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 make any representation, in any manner, expressly or by implication, that the VOC level of a paint is zero, unless:

A. After tinting, the VOC level is zero grams per liter ("g/L"), or respondent possesses and relies upon competent and reliable scientific evidence that the paint contains no more than a trace level of VOCs;

B. After tinting, the VOC level is less than 50 g/L, and respondent clearly and prominently discloses, either within or in close proximity to the representation, that

the representation applies only to the base paint and that the VOC level may increase, depending on the color choice; or

C. Respondent clearly and prominently discloses, either within or in close proximity to the representation, that the representation applies only to the base paint and that the VOC level may increase "significantly" or "up to [insert: the highest possible VOC level after tinting]," depending on the color choice.

II.

IT IS FURTHER ORDERED that respondent, 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 make any representation, in any manner, expressly or by implication, regarding:

A. The VOC level of such product; or

B. Any other environmental benefit or attribute of such product,

unless the representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

III.

IT IS FURTHER ORDERED that respondent, 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 provide to others the means and instrumentalities with which to make any representation prohibited by Part I or II above. For the purposes of this Part, "means and instrumentalities" shall mean any information, including, but not necessarily limited to, any advertising, labeling, or promotional, sales training, or purported

substantiation materials, for use by trade customers in their marketing of any covered product.

IV.

IT IS FURTHER ORDERED that respondent shall deliver as soon as practicable, but in no event later than sixty (60) days after the date of service of this order, an exact copy of the notice attached hereto as Attachment A, showing the date of delivery, to all of respondent's dealers and distributors, and all other entities to which respondent provided point-of-sale advertising, including product labels, for the product identified in Attachment A. The notice required by this paragraph shall not include any document or enclosures other than those referenced in the notice and may be sent to the principal place of business of each entity.

V.

IT IS FURTHER ORDERED that respondent PPG Architectural Finishes, 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 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.

VI.

IT IS FURTHER ORDERED that respondent PPG Architectural Finishes, Inc., and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within sixty (60) days after the date of service of this order, and to future personnel within sixty (60) 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.

VII.

IT IS FURTHER ORDERED that respondent PPG Architectural Finishes, Inc., and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor; 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: "PPG Architectural Finishes, Inc., File No. C-4385."

VIII.

IT IS FURTHER ORDERED that respondent PPG Architectural Finishes, Inc., and its successors and assigns, 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 own 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.

IX.

This order will terminate March 5, 2033, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

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

By the Commission, Commissioners Leibowitz and Wright not participating.

ATTACHMENT A

[ON PPG LETTERHEAD]

IMPORTANT NOTICE ABOUT PPG PURE PERFORMANCE ADVERTISING AND MARKETING MATERIALS

[insert addressee name]
[insert addressee address]

Dear Dealer or Distributor,

In response to a settlement with the Federal Trade Commission, PPG Architectural Finishes, Inc. (PPG) has agreed not to make claims that its paints contain zero VOCs (volatile organic compounds), unless the VOC level is zero after tinting or PPG clearly and prominently discloses that the VOC claim applies only to the base paint and that the VOC level may increase (or, if 50 g/L or more, increase "significantly" or "up to [the highest possible VOC level after tinting]"), depending on the consumer's color choice. This is because the FTC has alleged that PPG marketed its Pure Performance paints as "zero VOC" but did not communicate that the VOC level increased when the base paints were tinted with colorants containing VOCs. Therefore, PPG requests that you immediately stop using your existing Pure Performance advertising and marketing materials that describe the paint as containing "no VOCs" or "zero VOCs." PPG will make revised marketing materials available to you shortly.

Furthermore, we have included stickers that should be affixed to each can of Pure Performance paint in your possession if those cans utilize the old Pure Performance labels. This should be done immediately. Please find the enclosed instruction sheet which will provide you with directions as to how to apply the stickers correctly.

Should you have any questions about compliance with this notification, please contact [insert contact person]. In addition, further information about the settlement can be obtained by visiting www.ftc.gov and searching for "PPG."

Sincerely,

Scott Sinetar
President
PPG Architectural Finishes, Inc.

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 PPG Architectural Finishes, Inc. ("PPG").

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

This matter involves PPG's marketing and sale of "zero VOC" paints. According to the FTC complaint, PPG represented that its *Pure Performance* paints, including paints with color added, contain zero VOCs. But the complaint alleges that, in numerous instances, the paint does not contain zero VOCs after the addition of color. It also alleges that PPG did not possess and rely upon a reasonable basis substantiating these representations when it made them. Finally, it alleges that, by providing independent distributors and retailers with promotional materials making the above representations, PPG provided these third parties with the means and instrumentalities to engage in deceptive practices. Thus, the complaint alleges that PPG engaged in deceptive practices in violation of Section 5(a) of the FTC Act.

The proposed order contains three provisions designed to prevent PPG from engaging in similar acts and practices in the future. Part I addresses the marketing of zero VOC paints. It prohibits PPG from claiming that its paints (including paints manufactured under its PPG, Pittsburgh Paints, Porter Paints, and Olympic brands) contain "zero VOCs" unless: (1) after tinting, the VOC level is zero grams per liter ("g/L") or PPG possesses competent and reliable scientific evidence that the paint contains no more than a trace level of VOCs; or (2) PPG clearly and prominently discloses that the claim applies only to the base paint and that, depending on the color choice, the VOC level may increase. In situations where a paint's post-tint VOC level is 50 g/L or more, the order requires PPG to disclose that the VOC

level increases "significantly" or "up to [the highest possible VOC level after tinting]."[1]

Part II addresses VOC and environmental benefit or attribute claims made about paints and other architectural coatings. It prohibits such representations unless the representation is true, not misleading, and substantiated by competent and reliable scientific evidence.

Part III prohibits PPG from providing to others the means and instrumentalities with which to make any claim prohibited by Part I or II. It defines "means and instrumentalities" as any information, including any advertising, labeling, or promotional, sales training, or purported substantiation materials, for use by trade customers in their marketing of any such product or service.

Part IV requires PPG to send a letter to its retailers, requiring them to remove all *Pure Performance* ads with zero VOC claims and affix a sticker to existing *Pure Performance* paint can labels.

Finally, Parts V though VIII require PPG 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 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. 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.

[1] The order does not require PPG to characterize an increase of less than 50 g/L as "significant" because paints with this level of VOCs are considered by air quality regulators and environmental certification groups to be low in VOCs.

Complaint

IN THE MATTER OF

THE SHERWIN-WILLIAMS COMPANY

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

Docket No. C-4386; File No. 112 3198
Complaint, March 5, 2013 – Decision, March 5, 2013

This consent order addresses allegations of deceptive business practices by The Sherwin-Williams Company ("Sherwin-Williams"). The complaint alleges that Sherwin-Williams misled consumers by claiming its *Dutch Boy Refresh* interior paints are free of potentially harmful chemicals known as volatile organic compounds, or VOCs. The order prohibits Sherwin-Williams from claiming that its paints contain "zero" VOCs unless the representation is true and can be substantiated by competent and reliable scientific evidence. It also bars respondent from providing others with any advertising, labeling, or promotional materials for any product alleging to contain "zero" VOCs. Additionally, the order requires Sherwin-Williams to send a letter to its retailers, specifically directing such retailers to remove all *Dutch Boy Refresh* ads containing "zero VOC" claims and to affix Commission-approved labels to existing *Dutch Boy Refresh* paint cans. The order further requires Sherwin-Williams to keep copies of all advertisements and other materials relating to its "zero VOC" claims for the next five years and to make these materials available for inspection by the Commission.

Participants

For the *Commission*: *Sandhya Brown* and *Zachary Hunter.*

For the *Respondent*: *August T. Horvath, Lewis Rose* and *Dana B. Rosenfeld, Kelley Drye & Warren LLP*.

COMPLAINT

The Federal Trade Commission, having reason to believe that The Sherwin-Williams Company ("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 Ohio corporation with its principal office or place of business at 101 West Prospect Avenue, Cleveland, OH 44115. Respondent does business under its own name as well as

the names "Sherwin-Williams," "Dutch Boy," "Krylon," "Minwax," and "Thompson's WaterSeal."

2. Respondent manufactures, advertises, offers for sale, sells, and distributes paint products, including *Dutch Boy Refresh* paints. Respondent distributes these paint products to its own stores, independent distributors, and retailers.

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. Typically, a paint retailer will tint a base paint with colorant in order to produce the paint color desired by the customer. Retailers of *Dutch Boy Refresh* paints typically provide customers with the option of tinting the base paint to a *Dutch Boy*-formulated color prior to purchase and at no additional charge.

5. Both base paints and colorants may contain volatile organic compounds ("VOCs"). Tinting can significantly increase the VOC level of a paint.

6. Respondent has disseminated or has caused the dissemination of promotional materials for its *Dutch Boy Refresh* paints, including print advertisements, website advertisements, and point-of-sale materials to its independent distributors and retailers. *See, e.g.*, Exhibits A through H. Respondent, its independent distributors, and retailers have disseminated or have caused the dissemination of these promotional materials to consumers.

7. In numerous instances, including but not limited to the promotional materials shown in Exhibits A through H, respondent has represented that *Dutch Boy Refresh* paints contain "Zero VOCs."

8. Consumers likely interpret a representation that a paint contains "Zero VOCs" to mean that the quantitative measure of the VOC level is zero grams per liter, or that the VOC level is "trace" (or effectively zero) where: (a) VOCs have not been intentionally added to the paint; (b) the presence of VOCs at that

level does not cause material harm that consumers typically associate with VOCs; and (c) the presence of VOCs at that level does not result in concentrations higher than would be found at background levels in the ambient air.

9. In numerous instances, *Dutch Boy Refresh* paints contain more than a trace level of VOCs after tinting.

10. In certain promotional materials (including in fine print at the bottom of the signs in Exhibits B and D and on the back of the paint can in Exhibit F), and in contrast to respondent's zero VOC representations, respondent inconspicuously has stated that "Some colors may not be Zero VOC after tinting with conventional colorants."

11. In reality, the vast majority of *Dutch Boy*-formulated colors of paint are not zero VOC after tinting *Dutch Boy Refresh* base paints with respondent's colorants. Therefore, any reasonable consumer who saw the inconspicuous disclosure described in Paragraph 10 would likely be deceived about the VOC content of *Dutch Boy Refresh* paints.

COUNT I (False or Misleading Representation)

12. Through the means described in Paragraphs 6 and 7, respondent has represented, expressly or by implication, that all *Dutch Boy Refresh* paints, including paints with color added, contain zero VOCs.

13. In truth and in fact, in numerous instances, *Dutch Boy Refresh* paints do not contain zero VOCs after color is added. Therefore, the representation set forth in Paragraph 12 is false or misleading.

COUNT II (Unsubstantiated Representation)

14. Through the means described in Paragraphs 6 and 7, in numerous instances, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representation set forth in Paragraph 12, at the time the representation was made.

15. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representation set forth in Paragraph 12, at the time the representation was made. Therefore, the representation set forth in Paragraph 14 is false or misleading.

COUNT III (Means and Instrumentalities)

16. Respondent has distributed the promotional materials described in Paragraphs 6 and 7 to independent distributors and retailers. In so doing, respondent has provided them with the means and instrumentalities for the commission of deceptive acts or practices.

17. 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 fifth day of March 2013, has issued this complaint against respondent.

By the Commission, Commissioners Leibowitz and Wright not participating.

Complaint

EXHIBIT A

Complaint

EXHIBIT B

EXHIBIT C


Crayola
Colors chosen by kids.
Formulation approved by moms.
With zero VOCs and low odor,
little noses won't
be bothered.
Dutch Boy
Refresh
• Low odor and zero VOCs
• Arm & Hammer™ odor eliminating technology
• GREENGUARD Indoor Air Quality Certified®

Complaint

EXHIBIT D

Complaint

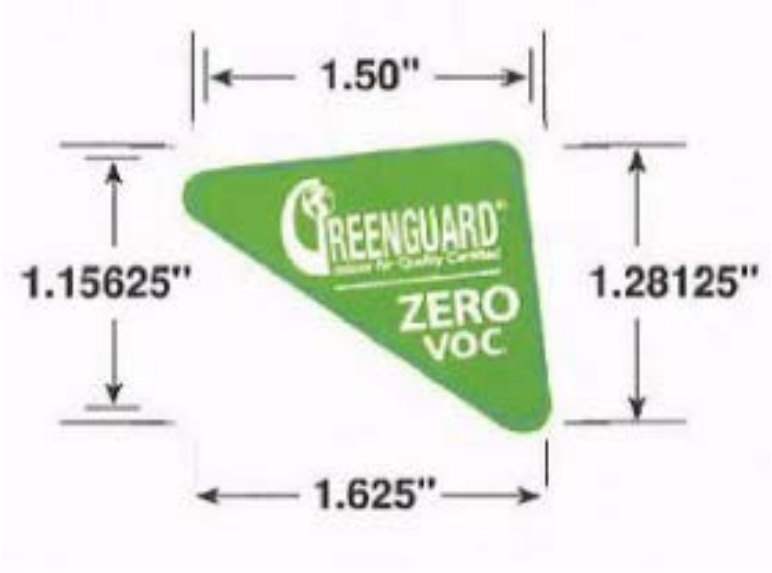
EXHIBIT E

Complaint

EXHIBIT F

EXHIBIT G

EXHIBIT H



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, its counsel, 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 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, 16 C.F.R. § 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent is an Ohio corporation with its principal office or place of business at 101 West Prospect Avenue, Cleveland, OH 44115.

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, "respondent" shall mean The Sherwin-Williams Company, also doing business as Sherwin-Williams, Dutch Boy, Krylon, Minwax, and Thompson's WaterSeal, its successors and assigns, and its officers, agents, representatives, and employees.

2. "Clearly and prominently" shall mean as follows:

   A. In print communications, the disclosure shall be presented in a manner that stands out from the accompanying text, so that it is sufficiently prominent, because of its type size, contrast, location, or other characteristics, for an ordinary consumer to notice, read and comprehend it;

   B. In communications made through an electronic medium (such as television, video, radio, and interactive media such as the Internet, online services, and software), the disclosure shall be presented simultaneously in both the audio and visual portions of the communication. In any communication presented solely through visual or audio means, the disclosure shall be made through the same means through which the communication is presented. In any communication disseminated by means of an interactive electronic medium such as software, the Internet, or online services, the disclosure must be unavoidable. Any audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear

and comprehend it. Any visual disclosure shall be presented in a manner that stands out in the context in which it is presented, so that it is sufficiently prominent, due to its size and shade, contrast to the background against which it appears, the length of time it appears on the screen, and its location, for an ordinary consumer to notice, read and comprehend it; and

C. Regardless of the medium used to disseminate it, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any communication.

3. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

4. "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, that are generally accepted in the profession to yield accurate and reliable results, and that are 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 a representation is true.

5. "Covered product" shall mean any architectural coating applied to stationary structures, portable structures, and their appurtenances.

6. "Tinting" shall mean achieving a particular color through the use of any foreseeably available colorant. *Provided however*, that if respondent clearly and prominently discloses that a representation regarding a covered product applies only if the product is tinted with specified colorant(s), the definition of "tinting" shall be limited to the use of those colorants.

7. "Trace" level of VOCs shall mean:

   A. VOCs have not been intentionally added to the product;

   B. The presence of VOCs at that level does not cause material harm that consumers typically associate with VOCs, including but not limited to, harm to the environment or human health; and

   C. The presence of VOCs at that level does not result in concentrations higher than would be found at background levels in the ambient air.

8. "Volatile Organic Compound" ("VOC") shall mean any compound of carbon that participates in atmospheric photochemical reactions, but excludes carbon monoxide, carbon dioxide, carbonic acid, metallic carbides or carbonates, ammonium carbonate, and specific compounds that the EPA has determined are of negligible photochemical reactivity, which are listed at 40 C.F.R. § 51.100(s).

I.

IT IS ORDERED that respondent, 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 make any representation, in any manner, expressly or by implication, that the VOC level of a paint is zero, unless:

A. After tinting, the VOC level is zero grams per liter ("g/L"), or respondent possesses and relies upon competent and reliable scientific evidence that the paint contains no more than a trace level of VOCs;

B. After tinting, the VOC level is less than 50 g/L, and respondent clearly and prominently discloses, either within or in close proximity to the representation, that the representation applies only to the base paint and

that the VOC level may increase, depending on the color choice; or

C. Respondent clearly and prominently discloses, either within or in close proximity to the representation, that the representation applies only to the base paint and that the VOC level may increase "significantly" or "up to [insert: the highest possible VOC level after tinting]," depending on the color choice.

II.

IT IS FURTHER ORDERED that respondent, 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 make any representation, in any manner, expressly or by implication, regarding:

A. The VOC level of such product; or

B. Any other environmental benefit or attribute of such product,

unless the representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

III.

IT IS FURTHER ORDERED that respondent, 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 provide to others the means and instrumentalities with which to make any representation prohibited by Part I or II above. For the purposes of this Part, "means and instrumentalities" shall mean any information, including, but not necessarily limited to, any advertising, labeling, or promotional, sales training, or purported

substantiation materials, for use by trade customers in their marketing of any covered product.

IV.

IT IS FURTHER ORDERED that respondent shall deliver as soon as practicable, but in no event later than thirty (30) days after the date of service of this order, an exact copy of the notice attached hereto as Attachment A, showing the date of delivery, to all of respondent's dealers and distributors, and all other entities to which respondent provided point-of-sale advertising, including product labels, for the product identified in Attachment A. The notice required by this paragraph shall not include any document or enclosures other than those referenced in the notice and may be sent to the principal place of business of each entity.

V.

IT IS FURTHER ORDERED that respondent The Sherwin-Williams Company, and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, 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.

VI.

IT IS FURTHER ORDERED that respondent The Sherwin-Williams Company, and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities. Respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying all acknowledgments of receipt of this order obtained pursuant to this Part.

VII.

IT IS FURTHER ORDERED that respondent The Sherwin-Williams Company, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor; 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: "The Sherwin-Williams Company, File No. C-4386."

VIII.

IT IS FURTHER ORDERED that respondent The Sherwin-Williams Company, 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, it shall submit additional true and accurate written reports.

IX.

This order will terminate March 5, 2033, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

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

By the Commission, Commissioners Leibowitz and Wright not participating.

ATTACHMENT A

[ON SHERWIN-WILLIAMS LETTERHEAD]

IMPORTANT NOTICE ABOUT DUTCH BOY REFRESH ADVERTISING AND MARKETING MATERIALS

[insert addressee name]
[insert addressee address]

Dear Dealer or Distributor,

In response to a settlement with the Federal Trade Commission, The Sherwin-Williams Company (Sherwin-Williams) has agreed not to make claims that its paints contain zero VOCs (volatile organic compounds), unless the VOC level is zero after tinting or Sherwin-Williams clearly and prominently discloses that the VOC claim applies only to the base paint and that the VOC level may increase (or, if 50 g/L or more, increase "significantly" or "up to [the highest possible VOC level after tinting]"), depending on the consumer's color choice. This is because the FTC has alleged that, in numerous instances, Dutch Boy Refresh paints contain VOCs after tinting. Therefore, Sherwin-Williams requests that you immediately stop using your existing Dutch Boy Refresh advertising and marketing materials that describe the paint as containing "no VOCs" or "zero VOCs." Sherwin-Williams will make revised marketing materials available to you shortly.

Furthermore, we have included stickers that should be affixed to each container of Dutch Boy Refresh paint in your possession if those containers utilize the old Dutch Boy Refresh labels. This should be done immediately. Please find the enclosed instruction sheet which will provide you with directions as to how to apply the stickers correctly.

Should you have any questions about compliance with this notification, please contact [insert contact person]. In addition, further information about the settlement can be obtained by visiting www.ftc.gov and searching for "Sherwin-Williams."

Sincerely,

Christopher Connor
Chief Executive Officer
The Sherwin-Williams Company

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, an agreement containing a consent order from The Sherwin-Williams Company ("Sherwin-Williams").

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

This matter involves Sherwin-Williams's marketing and sale of "zero VOC" paints. According to the FTC complaint, Sherwin-Williams represented that its *Dutch Boy Refresh* paints, including paints with color added, contain zero VOCs. But the complaint alleges that, in numerous instances, the paint does not contain zero VOCs after the addition of color. It also alleges that Sherwin-Williams did not possess and rely upon a reasonable basis substantiating these representations when it made them. Finally, it alleges that, by providing independent distributors and retailers with promotional materials making the above representations, Sherwin-Williams provided these third parties with the means and instrumentalities to engage in deceptive practices. Thus, the complaint alleges that Sherwin-Williams engaged in deceptive practices in violation of Section 5(a) of the FTC Act.

The proposed order contains three provisions designed to prevent Sherwin-Williams from engaging in similar acts and practices in the future. Part I addresses the marketing of zero VOC paints. It prohibits Sherwin-Williams from claiming that its paints (including paints manufactured under its Sherwin-Williams, Dutch Boy, and Krylon brands) contain "zero VOCs" unless: (1) after tinting, the VOC level is zero grams per liter ("g/L") or Sherwin-Williams possesses competent and reliable scientific evidence that the paint contains no more than a trace

level of VOCs; or (2) Sherwin-Williams clearly and prominently discloses that the claim applies only to the base paint and that, depending on the color choice, the VOC level may increase. In situations where a paint's post-tint VOC level is 50 g/L or more, the order requires Sherwin-Williams to disclose that the VOC level increases "significantly" or "up to [the highest possible VOC level after tinting]."[1]

Part II addresses VOC and environmental benefit or attribute claims made about paints and other architectural coatings. It prohibits such representations unless the representation is true, not misleading, and substantiated by competent and reliable scientific evidence.

Part III prohibits Sherwin-Williams from providing to others the means and instrumentalities with which to make any claim prohibited by Part I or II. It defines "means and instrumentalities" as any information, including any advertising, labeling, or promotional, sales training, or purported substantiation materials, for use by trade customers in their marketing of any such product or service.

Part IV requires Sherwin-Williams to send a letter to its retailers, requiring them to remove all *Dutch Boy Refresh* ads with zero VOC claims and affix a sticker to existing *Dutch Boy Refresh* paint can labels.

Finally, Parts V though VIII require Sherwin-Williams 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 IX provides that

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[1] The order does not require Sherwin-Williams to characterize an increase of less than 50 g/L as "significant" because paints with this level of VOCs are considered by air quality regulators and environmental certification groups to be low in VOCs.

Analysis to Aid Public Comment

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.

ENFORCEMENT POLICY STATEMENT REGARDING VOC-FREE CLAIMS FOR ARCHITECTURAL COATINGS

The Guides for the Use of Environmental Marketing Claims ("Green Guides"), 16 C.F.R. Part 260, set forth the Commission's current views on environmental marketing to help advertisers avoid making unfair or deceptive claims under Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45. Although the Green Guides do not bind the FTC or the public, the Commission can take action under the FTC Act if a marketer makes an environmental claim inconsistent with them.

With regard to free-of claims, the Green Guides, as revised in 2012, advise marketers as follows:

> Depending on the context, a free-of or does-not-contain claim is appropriate even for a product, package, or service that contains or uses a trace amount of a substance if: (1) the level of the specified substance is no more than that which would be found as an acknowledged trace contaminant or background level; (2) the substance's presence does not cause material harm that consumers typically associate with that substance; and (3) the substance has not been added intentionally to the product. 16 C.F.R. § 260.9(c) (hereinafter "trace amount test").

This trace amount test is designed to provide general guidance to marketers without regard to product, substance, or industry. As stated in footnote 4 of § 260.9(c), however, what constitutes a trace contaminant or background level depends on the substance at issue and requires a case-by-case analysis.

The Commission recently analyzed the trace amount test in the context of zero-VOC claims for architectural coatings. In March 2013, the Commission issued final decisions and orders resolving allegations that The Sherwin-Williams Company ("Sherwin-Williams") and PPG Architectural Finishes, Inc. ("PPG") had deceptively advertised their paint products as "zero

VOC."[1] These orders prohibit the companies from representing that the VOC level of a paint is "zero" unless, after tinting, the VOC level is zero grams per liter, or they possess and rely upon competent and reliable scientific evidence that the paint contains no more than a "trace level of VOCs." The orders include a definition of "trace level of VOCs" derived from 16 C.F.R. § 260.9(c) and adapted specifically to address VOC-free claims for architectural coatings such as paint. Namely, the orders state that "trace level of VOCs" means:

> (A) VOCs have not been intentionally added to the product; (B) the presence of VOCs at that level does not cause material harm that consumers typically associate with VOCs, including but not limited to, harm to the environment or human health; and (C) the presence of VOCs at that level does not result in concentrations higher than would be found at background levels in the ambient air.

The orders' definition of "trace level of VOCs" tailors the Green Guides' general trace amount test in two key respects. First, the "material harm" prong specifically includes harm to the environment and human health. This refinement acknowledges that consumers find both the environmental and health effects of VOCs material in evaluating VOC-free claims for architectural coatings.

Second, the orders define "trace level" as the background level of VOCs in the ambient air, as opposed to the level at which the VOCs in the paint would be considered "an acknowledged trace contaminant." The harm consumers associate with VOCs in coatings is caused by emissions following application. Thus measuring the impact on background levels of VOCs in the ambient air aligns with consumer expectations about VOC-free claims for coatings. Additionally, the Commission is aware of no scientific or regulatory body that has recognized a specific trace contaminant level of VOCs in paint or any other architectural

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[1] Volatile organic compounds ("VOCs") are carbon-containing compounds that evaporate at room temperature. Some VOCs can have detrimental effects on the environment and human health.

coating. Therefore, it is the Commission's view that the first prong of the trace amount test for VOC-free claims for architectural coatings is the amount beyond which VOC emissions would result in concentrations that exceed the background level of VOCs in the ambient air.

Based on its enforcement experience, the Commission finds it in the public interest to apply the tailored definition of "trace level of VOCs" to all VOC-free claims for architectural coatings.[2] If a marketer makes a VOC-free claim about an architectural coating that contains more than a "trace level of VOCs," as defined by the Sherwin-Williams and PPG orders and discussed above, or lacks substantiation for such claim, the Commission may take action under Section 5 of the FTC Act.

[2] VOC-free marketing claims include, but are not limited to, "zero VOCs," "0 VOCs," "no VOCs," and "free of VOCs."

Complaint

IN THE MATTER OF

EQUIFAX INFORMATION SERVICES LLC

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECS. 604(C) AND 607(A) OF THE FAIR CREDIT REPORTING ACT AND SEC. 5(A) OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4387; File No. 102 3252
Complaint, March 5, 2013 – Decision, March 5, 2013

This consent order settles allegations that Equifax Information Services LLC, one of the largest consumer reporting agencies in the United States, violated the Fair Credit Reporting Act ("FCRA") and Section 5 of the FTC Act by improperly selling lists of consumers who were late on their mortgage payments to third parties. The complaint alleges that, from January 1, 2008, through early 2010, Equifax sold more than 17,000 prescreened lists of consumers in financial distress to Direct Lending Source LLC and its affiliates ("Direct Lending"). Direct Lending subsequently resold these lists to third parties who used the data to pitch loan modification and debt relief services to these consumers. The complaint further alleges that Equifax failed to investigate promptly or fully when it learned that Direct Lending was violating Equifax's internal policies relating to prescreening. The complaint also alleges that Equifax knew or should have known that Direct Lending resold the prescreened list without identifying the end user to Equifax. The order requires Equifax to pay $392,803 in disgorgement and Direct Lending to pay $1.2 million in civil penalties and prohibits either company from using or selling prescreened lists without a permissible purpose.

Participants

For the *Commission*: *Katherine Armstrong, Amanda Koulousias*, and *Katherine White.*

For the *Respondent*: *Tina Fahmy, Cindy Hanson*, and *Constance Robinson, Kilpatrick Townsend & Stockton LLP*.

COMPLAINT

The Federal Trade Commission, having reason to believe that Equifax Information Services LLC ("Equifax" or "Respondent") has violated provisions of the Federal Trade Commission Act ("FTC Act") and the Fair Credit Reporting Act ("FCRA"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Equifax Information Services LLC is a limited liability company organized, existing, and doing business under the laws of the State of Georgia. Respondent is a wholly-owned subsidiary of Equifax Inc. and has its principal place of business at 1550 Peachtree Street, N.W., Atlanta, Georgia 30309.

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

3. Equifax is, and at all times relevant to this complaint, has been a "consumer reporting agency" ("CRA") as that term is defined in section 603(f) of the FCRA, 15 U.S.C. § 1681a(f). Equifax regularly sells in interstate commerce information on consumers that it assembles for the purpose of furnishing consumer reports to third parties.

4. Equifax sells "prescreened lists," which are lists of consumers that meet certain pre- selected criteria such as consumers who were, among other things, 30, 60, or 90 days late on their mortgage payments. Such prescreened lists are "consumer reports" as defined in section 603(d) of the FCRA, 15 U.S.C. § 1681a(d). Information such as whether a consumer is 30, 60, or 90 days late on a mortgage payment bears on, among other things, a consumer's credit worthiness and credit standing and is used or expected to be used as a factor in determining a consumer's eligibility for credit.

5. Section 604 of the FCRA, 15 U.S.C. § 1681b, prohibits consumer reporting agencies from furnishing consumer reports to any person other than those they have reason to believe have a specified "permissible purpose."

6. The only permissible purpose for using a prescreened list is to make a "firm offer of credit or insurance." A "firm offer" is one that will be honored (subject to certain exceptions) if the consumers continue to meet the pre-selected criteria used to select them for the offer. 15 U.S.C. § 1681a(l). Using prescreened lists to send solicitations for general marketing is not a permissible purpose.

7. Section 607(a) of the FCRA, 15 U.S.C. § 1681e(a), requires CRAs to maintain reasonable procedures to limit the furnishing of consumer reports to the purposes listed under section 604 of the FCRA, 15 U.S.C. § 1681b, including making reasonable efforts to verify the identity of each new prospective user of consumer report information and the uses certified by each prospective user prior to furnishing such user a consumer report.

RESPONDENT'S BUSINESS PRACTICES

8. From January 1, 2008 through early 2010, Equifax sold prescreened lists containing the consumer report information of millions of consumers to Direct Lending Source, Inc. or its affiliates, Bailey & Associates Advertising, Inc. and Virtual Lending Source, LLC (collectively "Direct Lending"). These lists included, among other things, consumers' credit scores and whether they were 30, 60, or 90 days late on their mortgage payments. In many instances, Direct Lending did not have a permissible purpose to obtain consumer reports under the FCRA but rather, Direct Lending used and sold these lists for the purpose of marketing products and services to consumers in financial distress.

9. Direct Lending sold the prescreened lists it obtained from Equifax to third parties, many of which did not have a permissible purpose to receive them under the FCRA. For example, it sold lists to marketers for the purpose of targeting consumers in financial distress for loan modification, debt relief, and foreclosure relief services.

10. Equifax did not maintain reasonable procedures to limit the furnishing of the prescreened lists it sold to Direct Lending so that prescreened lists would only be used for a permissible purpose. Equifax failed to investigate promptly or fully on certain occasions when it learned that Direct Lending was violating Equifax's internal policies relating to prescreening. Moreover, Equifax knew or should have known that in multiple instances Direct Lending resold the prescreened lists without identifying the end user to Equifax. Given Direct Lending's failures, Equifax had reason to believe that the entities to whom its prescreened lists were being sold did not have a permissible purpose for

obtaining the lists. Nonetheless, Equifax continued to sell prescreened lists to Direct Lending.

11. Equifax provided prescreened lists to Direct Lending through an online portal. Equifax also provided access to the portal to third parties in connection with Direct Lending's prescreening operations. Equifax did not make reasonable efforts to verify the identity of these entities, and accordingly could not ensure that these entities would only use the lists for a permissible purpose.

12. Equifax's failure to employ reasonable and appropriate measures to control access to the sensitive consumer financial information it maintains and sells for prescreening services resulted in prescreened lists being sold to a number of entities that were ultimately the subject of actions or warnings by law enforcement. Equifax's lack of reasonable procedures caused or is likely to cause substantial consumer injury that is not reasonably avoidable by consumers and is not outweighed by benefits to consumers or competition.

VIOLATIONS OF THE FCRA

13. As described in Paragraphs 8 through 12, in multiple instances, Respondent furnished consumer reports to persons that it did not have reason to believe had a permissible purpose to obtain a consumer report. By and through the acts and practices described in Paragraphs 8 through 12, Respondent has violated section 604(c) of the FCRA, 15 U.S.C. § 1681b(c).

14. As described in Paragraphs 8 through 12, Respondent has failed to maintain reasonable procedures to limit the furnishing of consumer reports to the purposes listed under section 604(c) of the FCRA, has failed to make reasonable efforts to verify the identity of each new prospective user of consumer report information, and has failed to make reasonable efforts to verify the uses certified by each prospective user prior to furnishing such user a consumer report. By and through the acts and practices described in Paragraphs 8 through 12, Respondent has violated section 607(a) of the FCRA, 15 U.S.C. § 1681e(a).

15. By its violation of sections 604(c) and 607(a) of the FCRA, and pursuant to section 621(a), 15 U.S.C. § 1681s, Respondent has engaged in unfair and deceptive acts and practices in or affecting commerce in violation of section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

VIOLATIONS OF THE FTC ACT

16. As described in Paragraphs 8 through 12, in numerous instances, Respondent has failed to employ reasonable and appropriate measures to control access to the sensitive consumer financial information it maintains and sells for prescreening services.

17. Respondent's actions caused or were likely to cause substantial injury to consumers that was not offset by countervailing benefits to consumers or competition and was not reasonably avoidable by consumers. The acts and practices of Respondent as alleged in this complaint constitute unfair acts or practices in or affecting commerce in violation of section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

THEREFORE, the Federal Trade Commission this fifth day of March, 2013, has issued this complaint against the respondent.

By the Commission, Commissioners Leibowitz and Wright not participating.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the Respondent named in the caption hereof, and the Respondent having been furnished thereafter with a copy of a draft Complaint that the Bureau of Consumer Protection proposed to present to the

Commission for its consideration and which, if issued by the Commission, would charge the Respondent with violation of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq*. and the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq*;

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

The Commission having thereafter considered the matter and having determined that it has reason to believe that the Respondent has violated the Fair Credit Reporting Act and 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 duly considered the comments received from interested persons, now in further conformity with the procedure described in Section 2.34 of its Rules, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and enters the following Order:

1. Respondent Equifax Information Services LLC is a Georgia limited liability company with its principal office at 1550 Peachtree Street, N.W., Atlanta, Georgia 30309.

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, "respondent" shall mean: Equifax Information Services LLC, its successors and assigns, and its officers, agents, representatives, and employees.

2. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

3. The definitions set forth in the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681a, *et seq*., which is attached as Appendix A to this order, shall apply.

4. "Debt relief product or service" means any product, service, plan, or program represented, expressly or by implication, to renegotiate, settle, or in any way alter the terms of payment or other terms of the debt or obligation, including but not limited to a tax debt or obligation, between a person and one or more unsecured creditors or debt collectors, including but not limited to, a reduction in the balance, interest rate, or fees owed by a person to an unsecured creditor or debt collector by any person other than the unsecured creditor who holds the debt at issue. Debt relief product or service does not include the creation of a new loan to consolidate debts of a consumer.

5. "Mortgage assistance relief product or service" means any product, service, plan, or program, offered or provided to the consumer in exchange for consideration, by any person other than the dwelling loan holder, that is represented, expressly or by implication, to assist or attempt to assist the consumer with any of the following:

a. stopping, preventing, or postponing any mortgage or deed of trust foreclosure sale for the consumer's dwelling, any repossession of the consumer's dwelling, or otherwise saving the consumer's dwelling from foreclosure or repossession;

b. negotiating, obtaining, or arranging a modification of any term of a dwelling loan, including a reduction in the amount of interest, principal balance, monthly payments, or fees;

c. obtaining any forbearance or modification in the timing of payments from any dwelling loan holder or servicer on any dwelling loan;

d. negotiating, obtaining, or arranging any extension of the period of time within which the consumer may: (1) cure his or her default on a dwelling loan, (2) reinstate his or her dwelling loan, (3) redeem a dwelling, or (4) exercise any right to reinstate a dwelling loan or redeem a dwelling; or

e. obtaining any waiver of an acceleration clause or balloon payment contained in any promissory note or contract secured by any dwelling; or

f. negotiating, obtaining, or arranging: (1) a short sale of a dwelling, (2) a deed-in-lieu of foreclosure, or (3) any other disposition of a dwelling loan other than a sale to a third party that is not the dwelling loan holder.

6. "Prescreening" or "prescreened list" shall refer to the process and the resulting lists covered by sections 603(l), 604(c), 604(e), and 615(d) of the FCRA, 15 U.S.C. §§ 1681a(l), 1681b(c), 1681b(e), and 1681m(d).

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, website, or other device, in connection with the compilation, creation, sale, or dissemination of any prescreened list, is hereby prohibited from:

A. Furnishing a prescreened list to any person which respondent does not have reason to believe has a permissible purpose under section 604(c) of the FCRA, 15 U.S.C. § 1681b(c).

B. Failing to maintain reasonable procedures designed to limit the furnishing of prescreened lists to the purposes listed under section 604(c) of the FCRA,15 U.S.C. § 1681b(c), as set forth in section 607(a) of the FCRA, 15 U.S.C. § 1681e(a), including:

1. Failing to require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose;

2. Failing to make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a prescreened list; and

3. Furnishing a prescreened list to any person respondent has reasonable grounds for believing will use it for a purpose not listed in section 604(c) of the FCRA, 15 U.S.C. § 1681b(c).

C. Furnishing consumer reports pursuant to section 604(c) of the FCRA, 15 U.S.C. 1681b(c), in connection with solicitations for debt relief products or services, or mortgage assistance relief products or services, offered by entities that respondent has reasonable grounds for believing charge advance fees for such services, i.e., fees collected prior to the

provision of such services. This prohibition shall not apply to solicitations for refinancing of a dwelling loan, or services offered by attorneys.

II.

IT IS FURTHER ORDERED that respondent shall pay $392,803 to the Federal Trade Commission, as follows:

A. Within seven (7) days of service of this order, respondent shall transfer the sum to the Commission by electronic funds transfer in accordance with instructions previously provided by a representative of the Commission. These funds will be deposited in the United States Treasury as disgorgement.

B. In the event of any default on any obligation to make payment under this order, which default continues for ten (10) days beyond the due date of the payment, interest shall accrue, computed pursuant to 28 U.S.C. § 1961, from the date of default to the date of payment.

C. Respondent relinquishes all dominion, control, and title to the funds paid to the fullest extent permitted by law. Respondent shall make no claim to or demand return of the funds, directly or indirectly, through counsel or otherwise.

D. This order for equitable monetary relief is solely remedial in nature and is not a fine, penalty, punitive assessment, or forfeiture.

III.

IT IS FURTHER ORDERED that, for five (5) years after the date of issuance of this order, respondent, and its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission business records demonstrating compliance with the terms and provisions of this order, including but not limited to:

A. Files containing the names, addresses, telephone numbers, and all certifications made by persons seeking to obtain prescreened lists from respondent in order to finance the product or service provided by a third party, and all materials considered by respondent in connection with its verification of the identity of those persons and verification of the certifications made by those persons;

B. Copies of all training materials and marketing materials that relate to respondent's prescreening activities as alleged in the complaint and respondent's compliance with the provisions of this order; and

C. All records necessary to demonstrate full compliance with each provision of this order, including all submissions to the Commission.

IV.

IT IS FURTHER ORDERED that, for five (5) years after the date of issuance of this order, respondent, and its successors and assigns, shall deliver a copy of this order to: (1) all current and future principals, officers, and directors; and (2) all current and future managers, employees, agents and representatives who have 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, with any electronic signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq*. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of the order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

V.

IT IS FURTHER ORDERED that respondent and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in respondent that may affect compliance obligations arising under this order, including but not limited to, a dissolution, assignment, sale, merger, or other action

that would result in the emergence of a successor company; the creation or dissolution of a subsidiary, 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 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 sent by overnight courier (not the U.S. Postal Service) to the 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 Equifax Information Services LLC. *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.

VI.

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

VII.

This order will terminate on March 5, 2033, 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 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 this order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, Commissioners Leibowitz and Wright not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, a consent agreement from Equifax Information Services LLC ("Equifax").

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

According to the Commission's proposed complaint Equifax is a "consumer reporting agency" ("CRA") that sells "prescreened lists," which are lists of consumers that meet certain pre-selected

criteria such as consumers who were, among other things, 30, 60, or 90 days late on their mortgage payments. Such prescreened lists are "consumer reports" because information such as whether a consumer is 30, 60, or 90 days late on a mortgage payment bears on, among other things, a consumer's credit worthiness and credit standing and is used or expected to be used as a factor in determining a consumer's eligibility for credit. The only permissible purpose under the Fair Credit Reporting Act ("FCRA") for using a prescreened list is to make a "firm offer of credit or insurance." A firm offer of credit is one that will be honored, subject to limited exceptions, if the consumer continues to meet the selection criteria.

First, the Commission's proposed complaint alleges that Equifax violated Section 604(c) of the FCRA by furnishing consumer reports to persons that it did not have reason to believe had a permissible purpose to obtain a consumer report. The proposed complaint alleges that from January 1, 2008 through early 2010, Equifax sold prescreened lists to Direct Lending Source, Inc. or its affiliates, Bailey & Associates Advertising, Inc. and Virtual Lending Source, LLC (collectively "Direct Lending") which included, among other things, consumers' credit scores and whether they were 30, 60, or 90 days late on their mortgage payments. The proposed complaint further alleges that in many instances, Direct Lending did not have a permissible purpose to obtain consumer reports under the FCRA but rather, Direct Lending used and sold these lists for the purpose of marketing products and services to consumers in financial distress. For example, the complaint alleges Direct Lending sold lists to marketers for the purpose of targeting consumers in financial distress for loan modification, debt relief, and foreclosure relief services.

Second, the proposed complaint alleges that Equifax violated Section 607(a) of the FCRA by failing to maintain reasonable procedures to limit the furnishing of consumer reports to the purposes listed under section 604(c) of the FCRA, failing to make reasonable efforts to verify the identity of each new prospective user of consumer report information, and failing to make reasonable efforts to verify the uses certified by each prospective user prior to furnishing such user a consumer report. According to the proposed complaint, Equifax failed to maintain reasonable

procedures to limit the furnishing of the prescreened lists it sold to Direct Lending by: (1) failing to investigate promptly or fully on certain occasions when it learned that Direct Lending was violating Equifax's internal policies relating to prescreening; and (2) furnishing prescreened lists to Direct Lending although it knew or should have known that Direct Lending resold the prescreened lists, in multiple instances, without identifying the end user to Equifax. The complaint alleges that, given Direct Lending's failures, Equifax had reason to believe that the entities to whom its prescreened lists were being sold did not have a permissible purpose for obtaining the lists. Nonetheless, Equifax continued to sell prescreened lists to Direct Lending. The proposed complaint further alleges that Equifax provided prescreened lists to Direct Lending through an online portal and also provided access to the portal to third parties in connection with Direct Lending's prescreening operations, but did not make reasonable efforts to verify the identity of these entities, and accordingly, could not ensure that these entities would only use the lists for a permissible purpose.

Finally, the proposed complaint also alleges Equifax violated Section 5(a) of the FTC Act by failing to employ reasonable and appropriate measures to control access to the sensitive consumer financial information it maintains and sells for prescreening services. The complaint alleges that Equifax's failures resulted in prescreened lists being sold to a number of entities that were ultimately the subject of actions or warnings by law enforcement and that Equifax's lack of reasonable procedures caused or is likely to cause substantial consumer injury that is not reasonably avoidable by consumers and is not outweighed by benefits to consumers or competition.

The proposed order contains provisions designed to prevent Equifax from engaging in the future in practices similar to those alleged in the complaint.

Part I of the proposed order prohibits Equifax from: (1) furnishing a prescreened list to any person which Equifax does not have reason to believe has a permissible purpose under section 604(c) of the FCRA; (2) failing to maintain reasonable procedures designed to limit the furnishing of prescreened lists to the

purposes listed under section 604(c) of the FCRA; and(3) furnishing consumer reports pursuant to section 604(c) of the FCRA, in connection with solicitations for debt relief products or services, or mortgage assistance relief products or services offered by entities that respondent has reasonable grounds for believing charge advance fees for such services, unless: (a) the product or service is the refinancing of a dwelling loan; or (b) the entity offering the product or service is an attorney.

Part II of the proposed order requires Equifax to pay $392,803 in disgorgement.

Part III through VII of the proposed order are reporting and compliance provisions. Part III requires that Equifax retain for a period of five (5) years: (1) files containing the names, addresses, telephone numbers, and all certifications made by persons seeking to obtain prescreened lists from Equifax in order to finance the product or service provided by a third party, and all materials considered by Equifax in connection with its verification of the identity of those persons and verification of the certifications made by those persons; (2) copies of all training materials and marketing materials that relate to Equifax's prescreening activities as alleged in the complaint and Equifax's compliance with the provisions of this order; and (3) all records necessary to demonstrate full compliance with each provision of this order, including all submissions to the Commission.

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

Analysis to Aid Public Comment

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

OLTRIN SOLUTIONS, LLC, JCI JONES CHEMICALS, INC., OLIN CORPORATION AND TRINITY MANUFACTURING, INC.

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

Docket No. C-4388; File No. 111 0078
Complaint, March 7, 2013 – Decision, March 7, 2013

This consent order addresses the acquisition by Oltrin Solutions, LLC ("Oltrin") of certain assets of JCI Jones Chemicals, Inc. ("JCI"). In March 2010, Oltrin paid JCI $5.5 million for a list of JCI's bulk bleach customers and for an agreement prohibiting JCI from selling bulk bleach in North Carolina and South Carolina for six years. The complaint further alleges that the transaction violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, by eliminating actual, direct, and substantial competition between Oltrin and JCI in a market for bulk supply bleach. The consent order requires Oltrin to release JCI from the agreement not to compete for the sale of bulk bleach in North and South Carolina; to transfer customer contracts to JCI; to enter into a six-month backup bleach supply agreement with JCI; and to notify customers that JCI is also a current bleach supplier. The order further contains a set of provisions designed to ensure compliance.

Participants

For the *Commission*: *Stephen Antonio, Steven A. Dahm, Melanie Hallas, Kenneth Libby, P. Abbott McCartney,* and *Eric M. Sprague.*

For the *Respondents*: *Thomas Dillickrath, David Emanuelson,* and *William A. Henry, Baker Botts LLP*; *Robert W. Turken* and *Scott Wagner, Bilzin Sumberg Baena Price & Axelrod, LLP*; and *Mark W. Merritt* and *Lawrence Moore, Robinson, Bradshaw & Hinson, P.A.*

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 Oltrin Solutions, LLC

("Oltrin," a joint venture between TriOlin LLC, a subsidiary of Olin Corporation, and Trinity Manufacturing, Inc.) entered into a transaction (the "Transaction") with JCI Jones Chemicals, Inc. ("JCI"), in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT OLTRIN SOLUTIONS, LLC

1. Respondent Oltrin is a limited liability company with its headquarters address located at 11 E.V. Hogan Dr., Hamlet, North Carolina, 28345. Oltrin is jointly owned by Trinity Manufacturing, Inc. and TriOlin LLC, a subsidiary of Olin Corporation, and was formed in 2007. Oltrin purchases and resells all of the sodium hypochlorite ("bleach") produced for external sales at the Trinity-operated plant in Hamlet, North Carolina.

II. RESPONDENT JCI JONES CHEMICALS, INC.

2. Respondent JCI is a privately-held, family-owned company headquartered at 1765 Ringling Blvd., Sarasota, Florida, 34236. JCI is one of the world's leading manufacturers and distributors of water treatment chemicals and it produces bleach and other chemicals nationwide at eleven manufacturing plants. Prior to entering into a non-competition agreement with Respondent Oltrin in connection the Transaction, JCI was engaged in the manufacture and sale of bleach from its plant in Charlotte, North Carolina.

III. RESPONDENT OLIN CORPORATION

3. Respondent Olin Corporation ("Olin") is a publicly-traded corporation incorporated in Virginia and headquartered at 190 Carondelet Plaza, Suite 1530, Clayton, Missouri, 63105. Olin produces a variety of chemicals and is the largest North American producer of bleach. Respondent Oltrin is a joint venture between TriOlin LLC, a subsidiary of Olin, and Trinity Manufacturing, Inc.

IV. RESPONDENT TRINITY MANUFACTURING, INC.

4. Trinity Manufacturing, Inc. ("Trinity") is a privately-owned marketer of bleach and other chemicals, headquartered at 11 E.V. Hogan Dr., Hamlet, North Carolina, 28345. Trinity operates a bleach plant in Hamlet, North Carolina. All of the bleach produced at the Hamlet plant is sold to Trinity and that portion intended for external sale is resold through Oltrin, which is a joint venture between Trinity and TriOlin LLC.

V. JURISDICTION

5. Respondents Oltrin, JCI, Olin, and Trinity are, and at all times relevant herein have been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and are corporations whose businesses are in or affect commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

VI. THE TRANSACTION

6. In March 2010, Oltrin agreed to pay JCI $5.5 million over four years for, among other things, a list of the bulk bleach customers to JCI's Charlotte, North Carolina plant, and an agreement that JCI would not sell bulk bleach in North Carolina or South Carolina for six years.

VII. THE RELEVANT PRODUCT MARKET

7. For purposes of this Complaint, the relevant line of commerce within which to analyze the effects of the Transaction is the market for the bulk supply of bleach. "Bulk sales" of bleach typically consist of purchases delivered in quantities of at least 4,500 or 4,800 gallons.

VIII. RELEVANT GEOGRAPHIC MARKET

8. For purposes of this Complaint, the relevant geographic market within which to analyze the effects of the Transaction is no broader than southern Virginia, North Carolina, and South Carolina, and potentially limited to North Carolina and South Carolina.

IX. MARKET STRUCTURE

9. The market for the bulk supply of bleach in the relevant geographic market is highly concentrated. Prior to the Transaction, Oltrin and JCI were direct competitors in the relevant market.

X. CONDITIONS OF ENTRY

10. 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 Transaction. Producers in the relevant geographic market typically produce bleach utilizing a salt-to-bleach plant or by combining electrochemical units ("ECUs") in a Powell unit. It takes three years or more and tens of millions of dollars to build a modern salt-to-bleach plant. Entry by building a plant, or installing a Powell unit at an existing plant, that produces bleach by combining ECUs is also unlikely because doing so requires that the producer handle chlorine, which subjects the handler to stringent security regulations. Finally, there has been no entry into the relevant geographic market since the date of the Transaction.

XI. EFFECTS OF THE TRANSACTION

11. The effects of the Transaction have been a substantial lessening of competition 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 agreement has:

a. Eliminated actual, direct, and substantial competition between Oltrin and JCI in the relevant market;

b. Substantially increased the level of concentration in the relevant market; and

c. Increased Oltrin's ability to exercise market power unilaterally in the relevant market.

XII. VIOLATIONS CHARGED

12. The allegations contained in Paragraphs 1 through 11 above are hereby incorporated by reference as though fully set forth here.

13. The Transaction described in Paragraph 6 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 seventh day of March, 2013, issues its Complaint against said Respondents.

By the Commission, Commissioner Leibowitz not participating.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the transaction between Respondent Oltrin Solutions, LLC ("Oltrin"), a joint venture formed by Respondent Trinity Manufacturing, Inc. ("Trinity") and a subsidiary of Respondent Olin Corporation ("Olin"), and Respondent JCI Jones Chemicals, Inc. ("JCI"), (Oltrin, JCI, Olin, and Trinity collectively, "Respondents") and Respondents having been furnished thereafter with a copy of a draft Complaint that the

Bureau of Competition proposed to present to the Commission for its consideration and that, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

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

1. Respondent Oltrin Solutions, LLC is a limited liability company organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address located at 11 E.V. Hogan Drive, Hamlet, North Carolina 28345. Oltrin Solutions, LLC is jointly owned by Trinity Manufacturing, Inc. and TriOlin LLC, a subsidiary of Olin Corporation.

2. Respondent JCI Jones Chemicals, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its

headquarters address located at 1765 Ringling Blvd., Sarasota, Florida 34236.

3. Respondent Olin Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its headquarters address located at 190 Carondelet Plaza, Suite 1530, Clayton, Missouri 63105.

4. Respondent Trinity Manufacturing, 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 11 E.V. Hogan Drive, Hamlet, North Carolina 28345.

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

ORDER

I.

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

A. "Oltrin" means Oltrin Solutions, LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Oltrin, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "JCI" means, JCI Jones Chemicals, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by JCI, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Olin" means Olin Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Oltrin, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Trinity" means Trinity Manufacturing, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Oltrin, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

E. "Commission" means the Federal Trade Commission.

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 Bleach.

G. "Agreement to Contract Manufacture" means the agreement to manufacture, or to cause to be manufactured, Bleach on behalf of JCI. The Backup Supply Agreement included as part of Confidential Appendix A is an Agreement to Contract Manufacture.

H. "Anticipated Volume" of a Bleach Contract means the amount of Bleach sales, in gallons, that is contained in the Oltrin 2012 Bleach Rolling Forecast prepared on September 6, 2012, as amended by Exhibit A to the Amendment to Asset Purchase Agreement.

I. "Bleach" means sodium hypochlorite at a concentration level of no less than 10% by weight.

J. "Bleach Contract" means any contract, purchase order or customer commitment for the delivery of Bleach to commercial, industrial or governmental customers in North Carolina or South Carolina.

K. "Closing Date" means the date on which Oltrin (or a Divestiture Trustee, if one is appointed) releases JCI from all provisions of the JCI Agreement that prevent JCI from competing in the sale of Bleach to commercial, industrial or governmental customers in North Carolina or South Carolina pursuant to this Order.

L. "Contract Manufacture" means to manufacture, or to cause to be manufactured, Bleach for JCI.

M. "Customer" means any commercial, industrial or governmental purchaser of Bleach in North Carolina or South Carolina.

N. "Direct Cost" means a cost not to exceed the cost of labor, material, freight 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.

O. "Divestiture Trustee" means any trustee appointed by the Commission pursuant to the relevant provisions of this Order.

P. "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.

Q. "Interim Monitor" means any monitor appointed pursuant to Paragraph IV of this Order.

R. "JCI Agreement" means all agreements entered into between Oltrin and JCI in March 2010 related to JCI's bulk Bleach business, including, but not limited to, the

March 18, 2010, Asset Purchase Agreement, the March 26, 2010, Noncompetition, Nondisclosure and Nonsolicitation Agreement, the March 26, 2010, Oltrin Bleach Purchasing Agreement, and the March 26, 2010, JCI Bleach Purchasing Agreement.

S. "JCI Amended Agreement" means the JCI Agreement as amended pursuant to this Order, including, but not limited to the Amendment to Asset Purchase Agreement and the Backup Supply Agreement attached to this Order as Confidential Appendix A.

T. "Law" means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.

U. "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.

V. "Third Party(ies)" means any Person other than the Respondents.

W. "Transaction" means Oltrin's acquisition of assets of JCI in March 2010.

X. "Transaction Date" means March 26, 2010, the date Respondents consummated the Transaction.

Y. The terms "and" and "or" have both conjunctive and disjunctive meanings.

II.

IT IS FURTHER ORDERED that:

A. Not later than ten (10) days after the date the Commission accepts the Agreement Containing Consent Order for public comment, Respondent Oltrin shall release JCI from all provisions of the JCI Agreement that prevent JCI from competing in the sale of Bleach to Customers pursuant to, and in accordance with, the JCI Amended 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 JCI or to reduce any obligations of Respondent Oltrin under such agreements), which is incorporated by reference into this Order and made a part hereof;

provided, however, that if Oltrin has released JCI prior to the date the Order becomes final and effective, 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 release was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of the release (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 Oltrin shall secure all consents and waivers from Customers to effect the assignment of Bleach Contracts to JCI as follows:

1. Prior to the Closing Date, Respondent Oltrin shall secure all consents and waivers from sufficient Customers, acceptable to JCI, to effect the assignment to JCI of Bleach Contracts totaling at least one million gallons of Anticipated Volume of Bleach annually and to permit JCI to supply

Bleach to those Customers for the remainder of each such Bleach Contract;

provided, however, that Respondent JCI shall cooperate with Oltrin and work in good faith to facilitate the assignment of the Bleach Contracts;

provided, further, that Respondent Oltrin may satisfy this requirement by certifying that Respondent JCI has executed sufficient agreements directly with Customers who previously had Bleach Contracts with Oltrin;

provided, further, that Respondent JCI shall commence delivery of Bleach to all such Customers no later than 30 days after it signs the Agreement Containing Consent Order.

2. No later than thirty (30) days after the Closing Date, Respondent Oltrin shall secure all consents and waivers from sufficient additional Customers, acceptable to JCI, to effect the assignment of Bleach Contracts, when combined with the Bleach Contracts assigned pursuant to Paragraph II.B.1. above, totaling at least two million gallons of Anticipated Volume of Bleach annually to JCI and to permit JCI to supply Bleach to those Customers for the remainder of such Bleach Contract;

   provided, however, that Respondent JCI shall cooperate with Oltrin and work in good faith to facilitate the assignment of the Bleach Contracts;

   provided, further, that Respondent Oltrin may satisfy this requirement by certifying that Respondent JCI has executed sufficient agreements directly with Customers who previously had Bleach Contracts with Oltrin;

   provided, further, that Respondent JCI shall commence delivery of Bleach to each such

customer by the later of 30 days after it signs the Agreement Containing Consent Order or 30 days after the customer executes its consent to the assignment.

3. Prior to the later of (a) one (1) year from the date the Bleach Contract is assigned to JCI, or (2) the expiration of the Bleach Contract, including any renewals or extensions, but in any case not to exceed three (3) years from the date the Bleach Contract is assigned to JCI, Oltrin shall not, directly or indirectly, solicit, induce, or persuade the Customer whose Bleach Contract was assigned to JCI, to stop buying from JCI. *Provided, however*, that nothing in this Order shall prevent Oltrin from responding to a request for bids or other invitation to provide Bleach from the Customer and bidding to supply or otherwise furnishing prices to supply Bleach to such Customer when such request or invitation is initiated by the Customer.

C. Respondent Oltrin shall:

1. Contract Manufacture and deliver to JCI, in a timely manner and under reasonable terms and conditions pursuant to the Agreement to Contract Manufacture, a supply of Bleach at Respondent Oltrin's Direct Cost, for a period of no more than six months;

2. make representations and warranties to JCI that the Bleach supplied through Contract Manufacture meets the specifications and quality for its intended use;

3. for the Bleach supplied by Oltrin, agree to indemnify, defend and hold JCI harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the Bleach supplied by Oltrin to JCI to meet the relevant Limited Warranties set out in the

Agreement to Contract Manufacture, as well as any related provisions, in the event that the Bleach manufactured by Oltrin and sold to JCI does not meet the Customer specifications. The Agreement to Contract Manufacture shall be consistent with the obligations assumed by Oltrin under this Order; provided, however, that Oltrin 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 Oltrin's responsibilities to supply Bleach in the manner required by this Order; provided further, that this obligation shall not require Oltrin to be liable for any negligent act or omission of JCI or for any representations and warranties, express or implied, made by JCI that exceed the representations and warranties made by Oltrin to JCI.

4. Be responsible to JCI for any liabilities resulting from any Oltrin breach of its delivery obligations set forth in the Agreement to Contract Manufacture in accordance with that agreement and applicable law;

5. during the term of the Agreement to Contract Manufacture, upon request of JCI or the Interim Monitor (if any has been appointed), make available to JCI and the Interim Monitor (if any has been appointed) all records that relate to the manufacture, storage, or transport of the Bleach supplied pursuant to the Agreement to Contract Manufacture that are generated or created after the Closing Date; and

6. during the term of the Agreement to Contract Manufacture, maintain or cause to be maintained manufacturing facilities necessary to manufacture Bleach in North Carolina.

D. Within thirty (30) days of the Closing Date, Respondents Oltrin and JCI shall jointly send to all

Customers from whom Oltrin received a solicitation for a bid to supply Bleach since the Transaction Date, a notice in the form attached hereto as Appendix B indicating that JCI will be supplying Bleach in North Carolina and South Carolina and requesting that the Customer add JCI's contact information to any future solicitation of bids.

E. No later than ninety (90) days after the Closing Date, JCI will produce Bleach at its Charlotte, North Carolina plant using the Powell bleach machine referred to in Section 10.08 of the March 18, 2010, Asset Purchase Agreement, or with a machine of comparable specification, for the purpose of supplying Customers.

F. For three (3) years after the Closing Date Respondent Oltrin shall forward to Respondent JCI, within five (5) business dates of receipt by Oltrin, a copy of all written Customer solicitations for a bid on supply of Bleach in North Carolina or South Carolina, whether through written contract or purchase order. Respondent Oltrin shall send the copy of the solicitation to JCI's General Counsel, and shall transmit no information other than the materials received from the Customer.

G. The purpose of the amendment to the JCI Agreement and the related obligations imposed on Oltrin by this Order is:

1. to enable JCI to compete in the manufacture and sale of Bleach to commercial, industrial and governmental Customers in North Carolina and South Carolina; and

2. to remedy in a timely and sufficient manner the lessening of competition resulting from the Transaction as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that Respondents Olin and Trinity shall take all steps necessary to ensure that Oltrin complies with the requirements of this Order and any failure by Oltrin to comply with the requirements of this Order shall be a violation by Olin and Trinity, individually and collectively.

IV.

IT IS FURTHER ORDERED that:

A. At any time after Respondent Oltrin signs the Consent Agreement in this matter, the Commission may appoint a monitor ("Interim Monitor") to assure that Respondent Oltrin expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order and the JCI Amended Agreement.

B. The Commission shall select the Interim Monitor, subject to the consent of Respondent Oltrin, which consent shall not be unreasonably withheld. If Respondent Oltrin 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 Oltrin of the identity of any proposed Interim Monitor, Respondent Oltrin 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 Oltrin shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents' compliance with the relevant requirements of the Order in a manner consistent with the purposes of the Order.

D. If an Interim Monitor is appointed:

1. the Interim Monitor shall have the power and authority to monitor Respondents' compliance with the obligations and related requirements of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission;

2. the Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission; and

3. the Interim Monitor shall serve until, the later of:

   a. the assignment of all the Bleach Contracts required to be assigned by the Order; and

   b. the end of the Agreement to Contract Manufacture;

   provided, however, 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 Respondents' personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with its 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.

F. The Interim Monitor shall serve, without bond or other security, at the expense of Respondent Oltrin, 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 Oltrin, 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 Oltrin 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. Respondents shall report to the Interim Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondents. 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 its obligations under the Order.

I. Respondents may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; provided, however, that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.

J. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.

K. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph IV.

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.

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.

V.

IT IS FURTHER ORDERED that:

A. If Respondent Oltrin has not fully complied with the obligations of Paragraph II.A. or II.B. of this Order within the time provided by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to fulfill the obligations of those provisions of the Order in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondent Oltrin shall consent to the appointment of a Divestiture Trustee in such action to accomplish the requirements of the Order. Neither the appointment of

a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent Oltrin to comply with this Order.

B. The Commission shall select the Divestiture Trustee, subject to the consent of the Respondent Oltrin, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondent Oltrin 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 Oltrin 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 Oltrin 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 requirements of this Order.

D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to effectuate the requirements of Paragraphs II.A. and II.B. of this Order.

2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the requirements of Paragraphs II.A. and II.B. of this Order, 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 accomplish the requirements of Paragraphs II.A. and II.B. of this Order or the Commission believes that the requirements of Paragraphs II.A. and II.B. of this Order can be achieved within a reasonable time, the period may be extended by the Commission; *provided, however*, the Commission may extend the period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondent Oltrin shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent Oltrin shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in accomplishing the requirements of Paragraphs II.A. and II.B. of this Order 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

Respondent's absolute and unconditional obligation to divest expeditiously and at no minimum price.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent Oltrin, 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 Oltrin, 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 Oltrin, 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 Oltrin 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 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.

F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

VI.

IT IS FURTHER ORDERED that:

A. Within thirty (30) days after the date this Order is accepted for public comment, and every thirty (30)

days thereafter until Respondent Oltrin has fully complied with Paragraphs II.A., II.B., II.C., and II.D. of this Order, Respondent Oltrin 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 Oltrin 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 Oltrin 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 efforts to assign Bleach Contracts, 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 becomes final, issued, annually for the next two (2) years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondent Oltrin 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.

C. Within thirty (30) days after the date this Order is accepted for public comment, and every thirty (30) days thereafter until Respondent JCI has fully complied with Paragraph II.E. of this Order, Respondent JCI 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 JCI 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 Paragraph of the Order, including a full description of all efforts to produce Bleach in the manner described in Paragraph II.E of this Order.

VII.

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.

VIII.

IT IS FURTHER ORDERED that:

A. The JCI Amended Agreement shall be deemed incorporated into this Order.

B. Any failure by Respondents Oltrin or JCI to comply with any term of the JCI Amended Agreement shall constitute a failure to comply with this Order.

C. Respondents Oltrin and JCI shall include in the JCI Amended Agreement a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of Respondent Oltrin's obligations to JCI pursuant to this Order.

D. Respondent Oltrin shall not modify or amend any of the terms of the JCI Amended Agreement or the JCI 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 a 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.

X.

IT IS FURTHER ORDERED that this Order shall terminate on March 7, 2023.

By the Commission, Commissioner Leibowitz not participating.

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 Oltrin Solutions, LLC ("Oltrin") and JCI Jones Chemicals, Inc. ("JCI"). Oltrin is a joint venture between Olin Corporation ("Olin") and Trinity Manufacturing, Inc. ("Trinity"). The purpose of the Consent Agreement is to remedy the anticompetitive effects stemming from a March, 2010 transaction (the "Transaction") in which Oltrin (1) acquired from JCI, among other things, a list of its bulk sodium hypochlorite ("bleach") customers from its plant in Charlotte, North Carolina and (2) entered into a non-compete agreement that prohibited JCI from selling bulk bleach in North Carolina and South Carolina for six years. Under the terms of the proposed Consent Agreement, Oltrin is required to release JCI from the non-compete agreement, transfer a minimum volume of bleach contracts to JCI, and provide a short-term backup supply agreement in order to facilitate JCI's reentry into the market.

At the time of the Transaction in March of 2010, Oltrin and JCI produced and sold bulk bleach to municipal water departments and industrial customers in southern Virginia, North Carolina, and South Carolina. The Commission's Complaint alleges that the Transaction violated Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by eliminating actual, direct, and substantial competition between Oltrin and JCI in a market no broader than the bulk supply of bleach in southern Virginia, North Carolina, and South Carolina, and potentially limited to North Carolina and South Carolina.

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 Respondents

Respondent Oltrin is a limited liability company with its headquarters address located at 11 E.V. Hogan Dr., Hamlet, North Carolina, 28345. Oltrin is jointly owned by Trinity and TriOlin LLC, a subsidiary of Olin, and was formed in 2007. Oltrin purchases and resells all of the bleach produced for external sales at the Trinity-operated plant in Hamlet, North Carolina.

Respondent JCI is a privately-held, family-owned company headquartered at 1765 Ringling Blvd., Sarasota, Florida, 34236. JCI is one of the world's leading manufacturers and distributors of water treatment chemicals and it produces bleach and other chemicals nationwide at eleven manufacturing plants. Prior to entering into the Transaction, JCI was engaged in the manufacture and sale of bleach from its plant in Charlotte, North Carolina.

Respondent Olin is a publicly-traded corporation incorporated in Virginia and headquartered at 190 Carondelet Plaza, Suite 1530, Clayton, Missouri, 63105. Olin produces a variety of chemicals and is the largest North American producer of bleach.

Trinity is a privately-owned marketer of bleach and other chemicals, headquartered at 11 E.V. Hogan Dr., Hamlet, North Carolina, 28345. Trinity operates a bleach plant in Hamlet, North Carolina. All of the bleach produced at the Hamlet plant is sold to Trinity and that portion intended for external sale is resold through Oltrin.

III. The Relevant Market and Market Structure

The relevant market within which to analyze the competitive effects of the Transaction is no broader than the sale of bulk bleach in southern Virginia, North Carolina, and South Carolina, and potentially limited to North Carolina and South Carolina. Bulk bleach is primarily used by municipal and industrial customers to disinfect water. Although there are other methods of disinfecting water – including ozone, ultraviolet light, and

chlorine gas – customers are unlikely to switch to these alternatives once they have installed the infrastructure to disinfect water with bleach. "Bulk sales" of bleach typically consist of purchases delivered in quantities of 4,500 to 4,800 gallons.

The geographic market for bleach is limited by the expense of transporting it, which when shipped by truck is generally a maximum distance of approximately 250 to 300 miles from the point of production. At the time of the Transaction, Oltrin was the largest, and JCI was Oltrin's next-largest, competitor in the relevant market.

IV. Entry

Entry is not likely to deter or counteract the anticompetitive effects of the Transaction. Producing bleach with a modern salt-to-bleach plant requires time-consuming and capital-intensive investment. Alternatively, producing bleach by combining electrochemical units ("ECUs") requires that the producer handle chlorine. Chlorine is a hazardous substance and handling it subjects the producer to stringent security regulations. There has been no entry in the relevant market since the date of the Transaction.

V. Effects of the Transaction

Absent the proposed Consent Agreement, the Transaction would result in further and ongoing competitive harm in the southern Virginia, North Carolina, and South Carolina bulk bleach market. Prior to the Transaction, Oltrin bid on bleach contracts, either directly or through a distributor, against JCI on multiple occasions. As a result, the Transaction eliminated actual, direct, and substantial competition between Oltrin and JCI for the sale of bulk bleach in the relevant geographic market.

VI. The Consent Agreement

The proposed Consent Agreement remedies the alleged violation by requiring Oltrin to release JCI from the agreement not to compete for the sale of bulk bleach in North and South Carolina. Having formerly produced bleach at its Charlotte, North Carolina plant, JCI has demonstrated that it is capable of

competing with Oltrin. Today, just as before, JCI is well-positioned to restore the competition that was lost when it entered into the Transaction with Oltrin.

The proposed Consent Agreement also contains several provisions designed to ensure that the remedy is successful. First, Oltrin will transfer to JCI customer contracts totaling approximately two million gallons worth of bleach volume. Second, Oltrin will enter into a six month backup bleach supply agreement with JCI, so that JCI can continue to supply its bleach customers if JCI encounters any unexpected production interruptions. Third, Oltrin and JCI must notify the Commission in advance of any future Transactions. Finally, Oltrin must notify any customers which requested a bid since the Transaction occurred (1) that JCI will be supplying bleach in North Carolina and South Carolina and (2) requesting that the customer add JCI's contact information to any future solicitation of bids.

If, after the public comment period, the Commission determines that the Consent Agreement will not restore competition to the relevant market, then the Consent Agreement will be withdrawn. 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.

IN THE MATTER OF

EPIC MARKETPLACE, INC. AND EPIC MEDIA GROUP, LLC

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

Docket No. C-4389; File No. 112 3182
Complaint, March 13, 2013 – Decision, March 13, 2013

This consent order addresses allegations of deceptive business practices by respondents Epic Media Group, LLC and its wholly-owned subsidiary, Epic Marketplace, Inc. (collectively "Epic"). As part of its business, Epic engages in online behavioral advertising, which is the practice of tracking a consumer's online activities in order to deliver advertising targeted to the consumer's interests. The Commission's complaint alleges that Epic failed to disclose to consumers in its privacy policy that it engaged in "history sniffing," a practice that examines a user's browsing history without using cookies. Though Epic claimed it would collect only information about consumers' visits to sites in its network, the complaint alleges that Epic used history sniffing to secretly gather data from millions of consumers about their interests in sensitive medical and financial issues ranging from fertility and incontinence to debt relief and personal bankruptcy. Under the order, respondents are required to destroy all information collected using history sniffing. Respondents are also prohibited from engaging in history sniffing or from using any information obtained by history sniffing for the next 20 years. Further, respondents are prohibited from misrepresenting to consumers their privacy practices or the extent to which software code is used to determine whether a user has previously visited a webpage.

Participants

For the *Commission*: *Kristen Anderson, Katherine White,* and *Jonathan Zimmerman.*

For the *Respondents*: *Charulata B. Pagar, VLP Law Group LLP*.

COMPLAINT

The Federal Trade Commission, having reason to believe that Epic Marketplace, Inc., a corporation, and Epic Media Group, LLC, a corporation, have violated the Federal Trade Commission Act ("FTC Act"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Epic Marketplace, Inc. ("Epic") is a Delaware corporation with its principal office or place of business at 512 7th Ave., 12th Floor, New York, NY 10018.

2. Respondent Epic Media Group, LLC ("EMG") is a Delaware corporation with its principal office or place of business at 512 7th Ave., 12th Floor, New York, NY 10018.

3. The acts and practices of Epic and EMG (collectively "respondents") as alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

RESPONDENTS' BUSINESS PRACTICES

4. EMG is a global digital marketing company. Epic is a wholly-owned subsidiary of EMG, and EMG controls Epic's operations.

5. Epic is an advertising company that engages in online behavioral advertising, which is the practice of tracking a consumer's online activities in order to deliver advertising targeted to the consumer's interests.

6. Epic acts as an intermediary between website owners who publish advertisements on their website for a fee ("publishers") and advertisers who wish to have their advertisements placed on websites. Epic purchases advertising space on publishers' websites and contracts with advertisers to place their advertisements on the websites. Epic refers to the network of websites on which it purchases advertising space as the "Epic Marketplace [N]etwork." The Epic Marketplace Network includes over 45,000 publishers.

7. Epic collects data on consumers who visit the websites within the Epic Marketplace Network. When a consumer visits a website within the Epic Marketplace Network, Epic sets a new cookie in the consumer's browser or automatically receives a cookie it previously set. Cookies are small text files that are commonly used to store information about a consumer's online

activities, including information such as the content of advertisements that a consumer views or the pages a consumer visits within a particular website.

8. In March 2010, Epic merged with Connexus Corporation. One of Connexus' subsidiaries, Traffic Marketplace, engaged in "history sniffing," which is the practice of determining whether a consumer has previously visited a webpage by checking how a user's browser styles the display of a hyperlink. For example, if a consumer has previously visited a webpage, the hyperlink to that webpage may appear in purple, and if the consumer has not previously visited a webpage, the hyperlink may appear in blue. History-sniffing code would sniff whether the consumer's hyperlinks to specific webpages appeared in blue or purple.

9. Through its merger with Connexus, Epic acquired Traffic Marketplace and continued to engage in history sniffing until August 2011. Epic included the history-sniffing code within advertisements it served to visitors on at least 24,000 webpages within the Epic Marketplace Network including, but not limited to, cnn.com, papajohns.com, redcross.com, and orbitz.com. The code exploited a feature of consumers' web browsers that displays hyperlinks in different styles, depending on whether the consumer has previously visited the link. The code allowed Epic to determine whether a consumer had visited any of over 54,000 domains. Among the domains that Epic "sniffed" were pages relating to fertility issues, impotence, menopause, incontinence, disability insurance, credit repair, debt relief, and personal bankruptcy.

10. Based upon its knowledge of which domains a consumer had visited, Epic assigned the consumer an interest segment. Epic's interest segments included sensitive categories such as "Incontinence," "Arthritis," "Memory Improvement," and "Pregnancy-Fertility Getting Pregnant." Epic used this history-sniffing data for behavioral targeting purposes.

11. History sniffing circumvents the most common and widely known method consumers use to prevent online tracking: deleting cookies. Deleting cookies does not prevent a website from querying a consumer's browsing history. Consumers could only protect against history sniffing by deleting their browsing history

and using private browsing mode, or, with regard to Epic's history sniffing, opting out of receiving targeted advertisements from Epic. Once major browser vendors began to implement protections against history sniffing in 2010 and 2011, consumers could also avoid having their browser history sniffed by using updated versions of those browsers.

12. History sniffing allowed Epic to determine whether consumers had visited webpages that were outside the Epic Marketplace Network, information it would not otherwise have been able to obtain.

13. Epic's history sniffing was revealed in July 2011, when researchers at the Center for Internet and Society at Stanford Law School uncovered the practice and posted their findings online.

RESPONDENTS' STATEMENTS RELATING TO THE COLLECTION AND USE OF CONSUMER INFORMATION
(Counts 1 and 2)

14. Respondents have disseminated or caused to be disseminated statements on Epic's website regarding respondents' privacy practices, including but not limited to the following statement in the Epic "Web User Privacy Policy," from approximately March 2010 until at least August 2011, about respondents' collection of consumer information:

> Epic Marketplace automatically receives and records anonymous information that your browser sends whenever you visit a website which is part of the Epic Marketplace Network. We use log files to collect Internet protocol (IP) addresses, browser type, Internet service providers (ISP), referring/exit pages, platform type, date/time stamp, one or more cookies that may uniquely identify your browser, and responses by a web surfer to an advertisement delivered by us.

15. Respondents' statement describing their privacy and online behavioral targeting practices did not disclose that Epic was engaged in history sniffing.

COUNT 1

16. As described in paragraph 14, respondents represented, expressly or by implication, that Epic collected information on consumers' visits to websites only within the Epic Marketplace Network.

17. In truth and in fact, Epic did not collect only information on consumers' visits to websites within the Epic Marketplace Network. Epic used history sniffing to collect information on whether consumers had visited websites outside of the Epic Marketplace Network. Therefore, the representation made in paragraph 16 was false or misleading and constitutes a deceptive act or practice.

COUNT 2

18. As described in paragraphs 14-15, respondents failed to disclose that they were engaged in history sniffing. This fact would be material to consumers in deciding whether to use Epic's opt-out mechanism. Therefore, in light of the representations made, respondents' failure to disclose this fact constitutes a deceptive act or practice.

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

THEREFORE, the Federal Trade Commission this thirteenth day of March 2013, has issued this complaint against respondents.

By the Commission, Commissioner Wright not participating.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents, and the respondents having been furnished thereafter with a copy of a draft Complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondents with violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq*;

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

The Commission having thereafter considered the matter and having determined that it has reason to believe that the respondents have violated the 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 Section 2.34 of its Rules, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and enters the following Order:

1. Epic Marketplace, Inc. and Epic Media Group, LLC are Delaware corporations with their principal offices or places of business at 512 7th Ave, 12th Floor, New York, NY, 10018.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the

respondents, and the proceeding is in the public interest.

ORDER

DEFINITIONS

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

1. Unless otherwise specified, "proposed respondents" or "respondents" shall mean: Epic Marketplace, Inc.; Epic Media Group, LLC; and their parent company, FAS Labs, Inc.; including each of their subsidiaries, successors, and assigns.

2. "Commerce" shall be defined as it is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

3. "Computer" or "device" shall mean any desktop or laptop computer, handheld device, telephone, tablet, or other product or device, through which the consumer accesses the Internet.

4. "History sniffing" shall mean running software code on a webpage that determines whether a user has previously visited a webpage by checking how a user's browser styles the display of a link to a specific URL or by accessing a user's browser cache.

I.

IT IS ORDERED that respondents and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the online advertising, marketing, promotion, offering for sale, sale, or dissemination of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication: (A) the extent to which they maintain the privacy or confidentiality of data from or about a particular

consumer, computer, or device, including but not limited to the extent to which that data is collected, used, disclosed, or shared; or (B) the extent to which software code on a webpage determines whether a user has previously visited a webpage.

II.

IT IS FURTHER ORDERED that respondents and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with online advertising, marketing, promotion, offering for sale, sale, or dissemination of any product or service, in or affecting commerce, are prohibited from collecting any data through history sniffing or using any data obtained by history sniffing.

III.

IT IS FURTHER ORDERED that respondents and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, shall not use, disclose, sell, rent, lease, or transfer any information that was collected using history sniffing. Within five (5) days after the date of service of this order, respondents shall permanently delete or destroy all information collected using history sniffing, and shall provide a written statement to the Commission, sworn under penalty of perjury, confirming that all such information has been deleted or destroyed. *Provided that*, if respondents are prohibited from deleting or destroying such information by law, regulation, or court order, respondents shall provide a written statement to the Commission, sworn under penalty of perjury, identifying any information that has not been deleted or destroyed and the specific law, regulation, or court order that prohibits respondents from deleting or destroying such information. Unless otherwise directed by a representative of the Commission, all statements required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the 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 Epic Marketplace, Inc. and Epic Media Group, LLC. *Provided, however*, that, in lieu of overnight courier, statements may be sent

by first-class mail, but only if an electronic version of such statements is contemporaneously sent to the Commission at Debrief@ftc.gov.

IV.

IT IS FURTHER ORDERED that respondents shall maintain and upon request make available to the Federal Trade Commission for inspection and copying a print or electronic copy of:

A. For a period of three (3) years from the date of service of this order or from the date of preparation, whichever is later:

1. Consumer complaints or inquiries directed to respondents or forwarded to respondents by a third party concerning: (a) any collection of data by respondents; (b) the use, disclosure, or sharing of such data by respondents; or (c) opt-out practices or any other mechanism to limit or prevent such collection of data or the use, disclosure, or sharing of data collected by respondents, as well as any responses to such complaints or inquiries;

2. All records necessary to demonstrate full compliance with each provision of this order, including all submissions to the Commission; and

B. For a period of three (3) years after the last public dissemination thereof by respondents, respondents' terms of use, form network contracts, marketing materials, frequently asked questions, privacy policies, and other documents publicly disseminated by respondents relating to: (a) collection of data by respondents; (b) the use, disclosure or sharing of such data by respondents; (c) opt-out practices and other mechanisms to limit or prevent such collection of data by respondents or the use, disclosure, or sharing of data collected by respondents; (d) respondents'

membership in any self-regulatory body; and (e) respondents' participation in and compliance with any privacy, security, or other compliance program sponsored by the government or other third party.

V.

IT IS FURTHER ORDERED that, for three (3) years after the date of service of this order, respondents shall deliver a copy of this order to: (1) all current and future principals, officers, directors, and managers; and (2) all current and future managers, employees, agents and representatives who have responsibilities on behalf of respondents 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, with any electronic signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq*. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of the order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VI.

IT IS FURTHER ORDERED that respondents shall notify the Commission at least thirty (30) days prior to any change in respondents 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 respondents' name or address. *Provided, however*, that with respect to any proposed change about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the 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 Epic Marketplace,

Inc. and Epic Media Group, LLC. *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 respondents shall, within ninety (90) 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 respondents have complied 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.

VIII.

This order will terminate on March 13, 2033, 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 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 respondents did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that this

order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, Commissioner Wright not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, a consent agreement from Epic Marketplace, Inc. and Epic Media Group, LLC.

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.

Epic Marketplace, Inc. ("Epic") is an advertising company that engages in online behavioral advertising, which is the practice of tracking a consumer's online activities in order to deliver advertising targeted to the consumer's interests. Epic is a wholly-owned subsidiary of Epic Media Group, LLC ("EMG"). Epic acts as an intermediary between website owners who publish advertisements on their website for a fee ("publishers") and advertisers who wish to have their advertisements placed on websites. Epic purchases advertising space on publishers' websites and contracts with advertisers to place their advertisements on the websites. Epic refers to the network of websites on which it purchases advertising space as the Epic Marketplace Network, which includes over 45,000 publishers.

Analysis to Aid Public Comment

The Commission's complaint alleges that, from March 2010 through August 2011, Epic engaged in "history sniffing" – running software code on a webpage to determine whether a user has previously visited a webpage – by checking how a user's browser styles the display of a hyperlink. This practice allegedly allowed Epic to determine whether a consumer had visited any of over 54,000 domains, including pages relating to fertility issues, impotence, menopause, incontinence, disability insurance, credit repair, debt relief, and personal bankruptcy. According to the complaint, history sniffing allowed Epic to determine whether consumers had visited webpages that were outside the Epic Marketplace Network, information it would not otherwise have been able to obtain, and Epic used this history-sniffing data for behavioral targeting purposes.

The FTC's complaint charges that Epic and EMG violated Section 5(a) of the FTC Act by falsely representing to consumers that respondents only collected information on consumers' visits to websites within the Epic Marketplace Network. The complaint also alleges that the companies failed to disclose to consumers that they were engaged in history sniffing.

The proposed order contains provisions designed to prevent Epic; EMG; their parent company FAS Labs, Inc.; and any of their subsidiaries, successors, and assigns (collectively, "respondents") from engaging in practices similar to those alleged in the complaint in the future.

Part I of the proposed order prohibits respondents from misrepresenting in any manner, expressly or by implication: (A) the extent to which they maintain the privacy or confidentiality of data from or about a particular consumer, computer, or device, including but not limited to the extent to which that data is collected, used, disclosed, or shared; or (B) the extent to which software code on a webpage determines whether a user has previously visited a webpage.

Part II of the proposed order prohibits respondents from collecting any data through history sniffing – running software code on a webpage to determine whether a user has previously visited a webpage by checking how a user's browser styles the

display of a hyperlink or by accessing a user's browser cache – or using any data obtained by history sniffing.

Part III of the proposed order prohibits respondents from using, disclosing, selling, renting, leasing, or transferring any information that was collected using history sniffing. In addition, within five (5) days after the date of service of the order, respondents must permanently delete or destroy all information collected using history sniffing.

Parts IV through VIII of the proposed order are reporting and compliance provisions. Part IV requires that respondents retain, for a period of three (3) years, documents relating to its compliance with the order. Part V requires dissemination of the order to all current and future principals, officers, directors, and managers; and all current and future managers, employees, agents, and representatives who have responsibilities on behalf of respondents with respect to the subject matter of this order. Part VI ensures notification to the FTC of changes in corporate status. Part VII mandates that respondents submit an initial compliance report to the FTC and make available to the FTC subsequent reports. Part VIII is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

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

Complaint

IN THE MATTER OF

DESIGNERWARE, LLC

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

Docket No. C-4390; File No. 112 3151
Complaint, April 11, 2013 – Decision, April 11, 2013

This consent order addresses allegations that DesignerWare, LLC's PC Rental Agent software program violated consumers' privacy by collecting confidential information without consumers' knowledge or consent. DesignerWare developed the PC Rental Agent software to aid rent-to-own stores in tracking and recovering rented computers; to render computers inoperable if consumers are late or default on payments or are stolen; and to erase computer hard drives for redistribution. The software featured an add-on program called "Detective Mode" that purported to locate rented computers. The complaint alleges that Designerware intentionally used the PC Rental Agent software and the Detective Mode add-on program to spy on consumers by logging each user's keystrokes; capturing screenshots; taking pictures with the computer's webcam; gathering confidential personal, financial, and medical data; and sending this data to DesignerWare's servers. The consent order prohibits DesignerWare from gathering and disclosing consumers' personal information collected during Detective Mode and from using geophysical location tracking technology without consumer consent. The order further imposes compliance reporting and notification requirements.

Participants

For the *Commission*: *Julie K. Mayer* and *Tracy S. Thorleifson.*

For the *Respondent*: *Robert Bernstein, Bernstein Law Firm*.

COMPLAINT

The Federal Trade Commission, having reason to believe that DesignerWare, LLC, a corporation, and Timothy Kelly and Ronald P. Koller, individually and as officers of the corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent DesignerWare, LLC ("DesignerWare"), is a Nevada limited liability corporation with its principal office or place of business at 108 Hutchinson Drive, North East, Pennsylvania 16428.

2. Respondent Timothy Kelly is an officer and owner of DesignerWare. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of DesignerWare, including the acts or practices alleged in this complaint. His principal office or place of business is 108 Hutchinson Drive, North East, Pennsylvania 16428.

3. Respondent Ronald P. Koller was an officer and owner of DesignerWare until on or about March 28, 2012. Individually or in concert with others, at all relevant times, he formulated, directed, or controlled the policies, acts, or practices of DesignerWare, including the acts or practices alleged in this complaint. He resides in Ocoee, Florida.

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

RESPONDENTS' BUSINESS PRACTICES

5. Respondents developed a software product called PC Rental Agent that they license to stores in the rent-to-own industry. Rent-to-own stores allow consumers to rent, with an option to purchase, goods such as furniture, household appliances, and consumer electronics including computers. Typically, the rental agreement will include an option for the consumer to purchase the rented item for a fixed sum after making a certain number of payments. PC Rental Agent, when installed on a rented computer, offers rent-to-own store licensees the ability to direct DesignerWare's servers to disable a computer remotely when a consumer is late making payments, has stopped communicating with the rent-to-own store, or has otherwise violated the rental contract. As of August 2011, approximately 1,617 rent-to-own stores in the United States, Canada, and Australia have licensed PC Rental Agent. PC Rental Agent has been installed on approximately 420,000 computers worldwide.

6. Through PC Rental Agent, DesignerWare offers rent-to-own store licensees additional functions and features, including the ability to direct DesignerWare's servers to track and report the physical location of a computer and to activate an add-on program called Detective Mode that enables licensees to monitor surreptitiously the activities of the computer's user, including by using the computer's webcam. Through Detective Mode, rent-to-own store licensees can also direct DesignerWare's servers to cause fake software registration windows to pop-up on rented computers and gather consumer's personal information.

7. Rent-to-own stores typically install PC Rental Agent on computers rented to consumers prior to the consumer taking possession of the computer. The presence of PC Rental Agent is not detectible to a computer's user and the computer's renter cannot uninstall it.

8. DesignerWare recommends, but does not require, contractually or otherwise, that its licensees disclose the presence of PC Rental Agent on a rented computer at the time the consumer signs the initial rental contract. DesignerWare takes no steps to determine whether its licensees follow its recommendation and disclose the presence of PC Rental Agent to computer renters. In numerous instances, rent-to-own stores do not disclose to consumers that they have installed and/or are using PC Rental Agent on rented computers. DesignerWare designed the Detective Mode program to operate without the computer user's knowledge, and advises rent-to-own store licensees to install and activate Detective Mode without notice to the computer user.

9. To administer PC Rental Agent commands, rent-to-own store licensees must log on to DesignerWare's website and direct PC Rental Agent to take the desired action on a particular computer. DesignerWare receives reports from computers on which PC Rental Agent is installed every two hours while the computer is connected to the Internet. When a computer reports to DesignerWare, PC Rental Agent executes any commands it has received from a licensee, including, for example, a command to activate Detective Mode.

Monitoring Computer Users via Detective Mode

10. Since at least 2007, DesignerWare has made available to PC Rental Agent licensees an add-on program, Detective Mode. Through DesignerWare, rent-to-own stores can cause Detective Mode to be installed and activated on any computer with PC Rental Agent without telling the computer's renter. DesignerWare limits access to the Detective Mode function to one "Master Account Holder" designated by the licensee. DesignerWare does not charge licensees extra for the use of Detective Mode, nor does DesignerWare sell the program separately from PC Rental Agent.

11. Once installed and activated, Detective Mode can log the keystrokes of the computer user, take screen shots of the computer user's activities on the computer, and photograph anyone within view of the computer's webcam. Detective Mode secretly gathers this information and transmits it to DesignerWare, who then transmits it to the rent-to-own store from which the computer was rented, unbeknownst to the individual using the computer.

12. Respondent Tim Kelly described PC Rental Agent this way in an August 26, 2010 email:

> The way the Detective [Detective Mode] works is like many spyware/malware programs. The Agent [PC Rental Agent] runs outside the user session so it is not detectable by antivirus programs, etc. However when you turn on the Detective, the Agent takes an executable and inject[s] it into the user session and hooks the screen, keyboard, and mouse so it can 'Spy' on the user and gather information. A similar program could be launched to steal credit cards or someone's information.

13. DesignerWare recommends that its licensees install and activate Detective Mode only to locate and identify the person in possession of a lost or stolen computer. It asserts that a consumer who is late in making lease payments has "stolen" the computer. DesignerWare does not monitor its own collection of, or limit its licensees' access to, Detective Mode data to ensure that the information was obtained and used only for designated purposes. In numerous instances, rent-to-own store licensees have caused

Detective Mode to be installed and activated on computers where consumers were late in making rental payments and where the licensees had no reason to believe the computers had been the subject of criminal theft.

14. Detective Mode gathers data about whoever is using the computer, whether it is the computer's renter or another individual. At one level of activation, Detective Mode will gather data and transmit it to DesignerWare every two minutes that the computer is connected to the Internet for a period of 60 minutes. DesignerWare then forwards the data to the licensee who activated "the Detective." If the rent-to-own store wants more information, it can cause Detective Mode to record data every two minutes until prompted to stop doing so. DesignerWare's servers collect this information and transmit it to the licensee for however long the licensee leaves "the Detective" turned on. In numerous instances, data gathered by Detective Mode has revealed private, confidential, and personal details about the computer user. For example, keystroke logs have displayed usernames and passwords for access to email accounts, social media websites, and financial institutions. Screenshots have captured additional confidential and personal information, including medical records, private emails to doctors, employment applications containing Social Security numbers, bank and credit card statements, and discussions of defense strategies in a pending lawsuit. When activated, Detective Mode can also cause a computer's webcam to surreptitiously photograph not only the computer user, but also anyone else within view of the camera. In numerous instances, Detective Mode webcam activations have taken pictures of children, individuals not fully clothed, and couples engaged in sexual activities.

15. DesignerWare's servers send data captured by Detective Mode, unencrypted, directly to the email accounts designated by its licensees. DesignerWare's employees do not themselves view Detective Mode data, but without DesignerWare's licensing of PC Rental Agent and its making Detective Mode available to its licensees, as well as providing licensees with access to its web portal and providing servers to support both PC Rental Agent and Detective Mode, this collection and disclosure of private information would not be possible.

Geophysical Location Tracking

16. Since at least September 2011, on every computer that has a wireless card installed, PC Rental Agent automatically logs the WiFi hotspots that the wireless card either sees or uses to connect to the Internet. When a computer connects to DesignerWare's servers, it reports the WiFi hotspot location information along with the computer's IP address.

17. DesignerWare cross-references the information logged by a rented computer to PC Rental Agent with a publicly available list of WiFi hotspots' physical locations and provides its licensees with street addresses for the particular WiFi hotspots viewed or accessed by the computer. The information derived from WiFi hotspot contacts can frequently pinpoint a computer's location to a single building, and, when aggregated, can track the movements and patterns of individual computer users over time. DesignerWare provides its licensees with this location information for the ten most recent reporting cycles. DesignerWare recommends that rent-to-own stores only use this data in connection with recovering stolen property, but it does not monitor, restrict, or otherwise limit its licensees' access to such location information.

18. DesignerWare applied its location tracking upgrade of PC Rental Agent to every computer on which PC Rental Agent was installed, without obtaining consent from, or providing notice to, the computers' renters. After the September 2011 upgrade, in numerous instances PC Rental Agent has been installed on rented computers without the computer renter's knowledge or consent. Thus, consumers using those computers on which PC Rental Agent is installed – who may or may not be the computers' renters, and who may or may not be current in their lease payments – do not know that their physical location can be identified from the WiFi hotspots that their computers encounter. Nor do they know that employees of the rent-to-own stores from which their computers are rented can monitor their physical locations and the patterns of their movements.

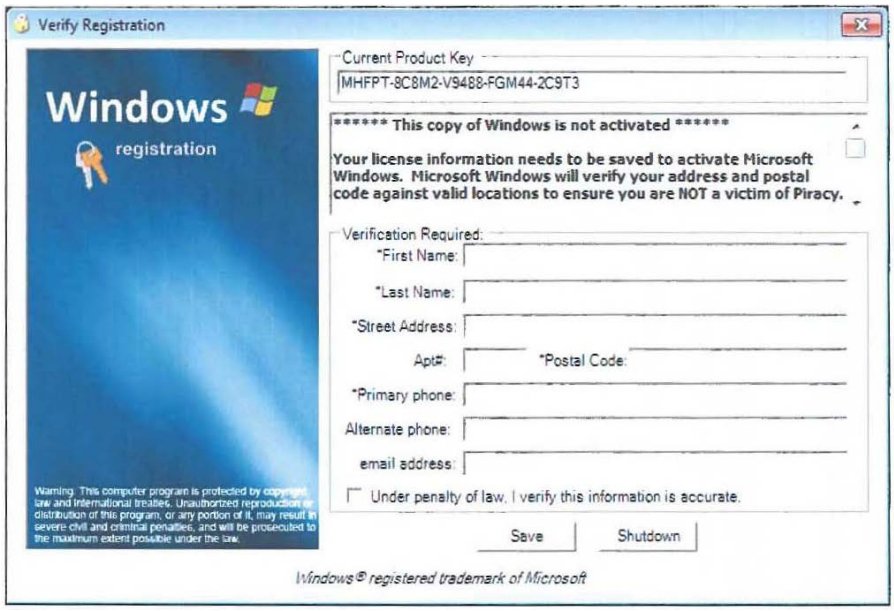
Complaint

Substantial Injury

19. DesignerWare's collection and disclosure to third parties of private and confidential information about consumers, including both those who rented the computer and those who are merely using it, causes or is likely to cause substantial harm to consumers. Because of DesignerWare's intrusions, consumers are at risk of harm from the exposure of personal, financial account access, and medical information to strangers. Consumers are harmed by DesignerWare's unwarranted invasion into their homes and lives and its capture of the private details of individual and family life, including, for example, images of visitors, children, family interactions, partially undressed individuals, and couples engaged in intimate activities. Sharing these images with third parties can cause consumers financial and physical injury and impair their peaceful enjoyment of their homes. Consumers cannot reasonably avoid these injuries because PC Rental Agent is invisible to them. The harm caused by respondents' unauthorized collection and disclosure of confidential consumer information is not outweighed by countervailing benefits to consumers or to competition; indeed in this context, where rent-to-own stores have alternate effective methods of collection, including, e.g., using PC Rental Agent to remotely disable the computer, there are no legitimate benefits to respondents or to the public.

Detective Mode's Deceptive Prompt Windows

20. In addition to its other features, Detective Mode offers licensees the option to cause a user's computer to display a fake software registration window. The fake registration window prompts the computer user to enter a name, address, email address, and phone number. The computer user cannot close the window until the requested information is entered. DesignerWare has created several different fake registration windows for its licensees' use, including ones for Microsoft Windows, Internet Explorer, Microsoft Office, and Yahoo! Messenger, and one to verify a security certificate. A screenshot of DesignerWare's fake Microsoft Windows screen appears below.



21. No actual software is registered as a result of a consumer providing the requested information; instead, Detective Mode captures the information entered in the prompt boxes and transmits it to DesignerWare, and DesignerWare's servers email the data to the rent-to-own store licensee, unbeknownst to the consumer.

22. Consumers who are deceived into providing contact information in this manner are deprived of the ability to control who has access to their contact information and how they are contacted.

VIOLATIONS OF THE FTC ACT

COUNT I
UNFAIR GATHERING AND DISCLOSURE OF CONSUMERS' PERSONAL INFORMATION

23. Through the means described in Paragraphs 5 through 22, in numerous instances respondents have:

a. Installed monitoring software on rented computers, gathered sensitive personal, financial, and medical

information about consumers from those computers, and disclosed that personal information to rent-to-own store licensees; and

b. Installed geophysical location tracking software on rented computers without consent from the computers' renters, tracked the geophysical location of computers without notice to the computer users, and disclosed that location information to rent-to-own store licensees.

24. Respondents' actions cause or are likely to cause substantial injury to consumers that cannot be reasonably avoided and is not outweighed by countervailing benefits to consumers or competition.

25. Therefore, respondents' practices, as described in Paragraph 23, constitute unfair acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a).

COUNT II
MEANS AND INSTRUMENTALITIES TO ENGAGE IN UNFAIRNESS

26. Through the means described in Paragraphs 5 through 22, respondents have:

a. Furnished rent-to-own stores with software for installation on rented computers that i) when activated remotely by the rent-to-own store licensee will record keystrokes typed on a computer, capture screenshots of information displayed on a computer, cause a computer's webcam to take pictures of the computer user, and transmit the recorded keystrokes, screenshots and web pictures to the rent-to-own store licensee to view, and ii) will identify the geophysical location of the computer and track the physical location of the computer's user without consent from the computer's renter or notice to the computer's user; and

b. Provided rent-to-own store licensees with information improperly gathered from consumers for use in connection with collecting or attempting to collect a debt, money, or property pursuant to a consumer rental contract.

27. By furnishing others with the means to engage in the unfair practices described in Paragraph 26, respondents have provided the means and instrumentalities for the commission of unfair acts and practices and thus have caused or are likely to cause substantial injury to consumers that cannot be reasonably avoided and is not outweighed by countervailing benefits to consumers or competition.

28. Therefore, respondents' practices, as described in Paragraph 26, constitute unfair acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a).

COUNT III
DECEPTIVE GATHERING AND DISCLOSURE OF CONSUMERS' PERSONAL INFORMATION

29. Through the means described in Paragraphs 5 through 22, respondents have represented to consumers, expressly or by implication, that certain pop-up notices that appear on a computer's screen are notices from trusted software providers that contain software registration forms that must be filled out with the consumers' contact information in order to continue to use the providers' software.

30. In truth and in fact, these pop-up notices are not from trusted software providers and do not contain software registration forms that must be filled out with the consumers' contact information in order to continue to use the providers' software, but instead serve only to cause the consumer to provide the requested contact information so that it may be provided to respondents' rent-to-own store licensees.

31. Therefore, respondents' practices, as described in Paragraph 29, constitute deceptive acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a).

THEREFORE, the Federal Trade Commission this eleventh day of April, 2013, has issued this complaint against respondents.

By the Commission, Commissioner Wright not participating.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it has reason to believe that the respondent has violated the 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 DesignerWare, LLC ("DesignerWare"), is a Nevada limited liability corporation with its principal office or place of business at 108 Hutchinson Drive, North East, Pennsylvania 16428.

2. The 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:

1. Unless otherwise specified, "respondent" shall mean DesignerWare and its successors and assigns.

2. "Commerce" shall be defined as it is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

3. "Computer" shall mean any desktop or laptop computer, handheld device, tablet, telephone, or other electronic product or device that has a platform on which to download, install, or run any software program, code, script, or other content.

4. "Clear(ly) and prominent(ly)" shall mean:

   a. 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;

b. 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;

c. In communications disseminated through video means (e.g., television or streaming video), the required disclosures are in writing in a form 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;

d. In communications made through interactive media, such as the Internet, online services, and software, the required disclosures are unavoidable and presented in a form consistent with subpart (a) of this definition, in addition to any audio or video presentation of them; and

e. In all instances, the required disclosures are presented in an understandable language and syntax; in the same language as the predominant language that is used in the communication; and 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.

5. "Geophysical location tracking technology" shall mean any hardware, software, or application utilized in conjunction with a computer that collects and reports data or information that identifies the precise

geophysical location of the computer. Geophysical location tracking technologies include, for these purposes, technologies that report: the GPS coordinates of a computer; the WiFi signals available to or actually used by a computer to access the Internet; the telecommunication towers or connections available to or actually used by a computer; the processing of any such reported data through geolocation lookup services; or any information derived from any combination of the foregoing.

6. "Monitoring technology" shall mean any hardware, software, or application utilized in conjunction with a computer that can cause the computer to (1) capture, monitor, or record, and (2) report information about user activities by:

   a. Recording keystrokes, clicks, or other user-generated actions;

   b. Capturing screenshots of the information displayed on a computer monitor or screen; or

   c. Activating the camera or microphone function of a computer to take photographs or record audio or visual content through the computer's webcam or microphone.

7. "Covered rent-to-own transaction" shall mean any transaction where a consumer enters into an agreement for the purchase or rental of a computer and the consumer's contract or rental agreement provides for payments over time and an option to purchase the computer.

I.
MONITORING TECHNOLOGY PROHIBITED

IT IS HEREBY ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, in connection with using, selling, licensing, or otherwise providing any hardware, software, application, program, or other device for use in connection with a covered rent-to-own transaction, directly or indirectly, is hereby permanently restrained and enjoined from:

A. Using any monitoring technology to gather information or data from any computer rented to a consumer; and

B. Licensing, selling, or otherwise providing third parties with monitoring technology for installation or activation on computers rented to consumers.

II.
USE OF TRACKING TECHNOLOGY LIMITED

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, in connection with using, selling, licensing, or otherwise providing any hardware, software, application, program, or other device for use in connection with a covered rent-to-own transaction, directly or indirectly, is hereby permanently restrained and enjoined from:

A. Gathering any information or data from any computer via any geophysical location tracking technology without ensuring that the computer user is provided clear and prominent notice at the time the computer is rented and immediately prior to each use of the

geophysical location tracking technology, and also ensuring that the computer renter's affirmative express consent is obtained at the time the computer is rented. For purposes of this section, providing clear and prominent notice to computer users and obtaining affirmative express consent from computer renters means:

1. Clear and Prominent Notice: a clear and prominent notice is provided to the user, separate and apart from any "privacy policy," "data use policy," "terms of service," "end-user license agreement," "lease agreement," or other similar document, that discloses (1) that geophysical location tracking technology is installed and/or currently running on the computer; (2) the types of user activity or conduct that is being captured by such technology; (3) the identities or specific categories of entities with whom any data or information that is collected will be shared or otherwise provided; (4) the purpose(s) for the collection, use, or sharing of such data or information; and (5) where and how the user can contact someone for additional information;

2. Affirmative Express Consent: affirmative express consent is obtained by giving the computer renter an equally clear and prominent choice to either agree or not agree to any geophysical location tracking technology, and neither option may be highlighted or preselected as a default setting. Activation of any geophysical location tracking technology must not proceed until the computer's renter provides affirmative express consent. Notwithstanding the foregoing, nothing in this Part shall require that a computer be rented to a user who declines to consent to installation or activation of any geophysical tracking technology;

3. Icons: the activation of any geophysical location tracking technology shall be accompanied by the installation of a clear and prominent icon on the

computer on which the technology is installed, such as on the desktop and in the desktop system tray of the computer. Clicking on the icon must clearly and prominently disclose: (1) that geophysical location tracking technology is installed and currently running on the computer; (2) the types of user activity or conduct that is being captured by such technology; (3) the identities or specific categories of entities with whom any data or information that is collected will be shared or otherwise provided; (4) the purpose(s) for the collection, use, or sharing of such data or information; and (5) where and how the user can contact someone for additional information;

Provided that the notice requirements of this Part may be suspended and geophysical location tracking technology activated if (a) the renter reports that the computer has been stolen or there is otherwise a reasonable basis to believe that the computer has been stolen, and (b) either the renter or another person has filed a police report stating that the computer has been stolen. Provided further that respondent shall ensure that documents establishing (a) and (b) are retained. For purposes of this Order, "filing of a police report" means the reporting of a complaint with the police department in any form recognized in the jurisdiction;

Provided further that the notice and record-keeping requirements of this Section II shall be satisfied when respondent acts as a licensor if respondent includes in the licensing agreement contractual requirements that: (i) licensees may only activate geophysical location tracking technology if (a) the renter reports that the computer has been stolen or there is otherwise a reasonable basis to believe that the computer has been stolen and (b) either the renter or another person has filed a police report stating that the computer has been stolen, and (ii) documents establishing (a) and (b) are retained by the licensees; and

B. Licensing, selling, or otherwise providing any third party with geophysical location tracking technology for installation or activation on a computer to be rented in a covered rent-to-own transaction, without requiring as a condition of the license, sale, or other provision of the technology that the third party obtain consent and provide notice as provided in Section II.A, above.

III.
NO DECEPTIVE GATHERING OF CONSUMER INFORMATION

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, in connection with using, selling, licensing, or otherwise providing any hardware, software, application, program, or other device, is hereby permanently restrained and enjoined from making, or assisting others to make, any false representation or depiction in any notice, prompt screen, or other software application appearing on the screen of any computer that results in gathering information from or about a consumer, including without limitation location information.

IV.
PROTECTION OF DATA

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, shall:

A. Delete or destroy all user data, if any, previously gathered using any monitoring or geophysical location tracking technology that does not comply with Parts I, II, and III of this Order, unless such action is otherwise prohibited by court order or other legal obligation; and

B. Transfer data or information, if any, gathered by any monitoring or geophysical location tracking technology from the computer upon which the technology is installed to respondent's server(s), and from the respondent's server(s) to any other computers or servers only if such information is rendered unreadable, unusable, or indecipherable during transmission.

V.
NO MISREPRESENTATIONS ABOUT PRIVACY

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, in connection with using, selling, licensing, or otherwise providing any hardware, software, application, program, or other device, directly or indirectly, shall not misrepresent, in any manner, expressly or by implication, the extent to which respondent maintains and protects the security, privacy, or confidentiality of any personal information gathered from or about consumers.

VI.
DISTRIBUTION OF ORDER

IT IS FURTHER ORDERED that respondent must deliver a copy of this order to all current and future principals, officers, directors, and managers who have responsibilities related to the subject matter of this order, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. Respondent shall deliver this order to such current personnel within thirty (30) days after service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities. From each person to whom respondent delivers a copy of this order, respondent must obtain a signed and dated acknowledgment of receipt of this order, with any electronic

signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001 et seq.

VII.
COMPLIANCE REPORTING

IT IS FURTHER ORDERED that:

A. Respondent, and its successors and assigns, shall within sixty (60) days after the date of service of this order, and at such other times as the Commission may require, file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which they have complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, they shall submit additional true and accurate written reports.

B. Respondent, 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 related entity 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, the respondent shall notify the Commission as soon as is practicable after obtaining such knowledge.

C. 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 for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580,

with the subject line DesignerWare, LLC, File No. 1123151. *Provided, however*; that, in lieu of overnight courier, notices may be sent by first class mail, but only if an electronic version of each such notice is contemporaneously sent to the Commission at DEbrief@ftc.gov.

VIII.
RECORDKEEPING

IT IS FURTHER ORDERED that respondent shall, for five (5) years after the last date of any act or practice covered by Parts I – V of this Order, maintain and upon reasonable notice make available to the Federal Trade Commission for inspection and copying, any documents, whether prepared by or on behalf of respondent, that:

A. Comprise or relate to complaints or inquiries, whether received directly, indirectly, or through any third party, concerning any monitoring or geophysical tracking technologies sold, licensed, or otherwise provided to any third party for use in connection with any covered rent-to-own transaction, and any responses to those complaints or inquiries;

B. Are reasonably necessary to demonstrate full compliance with each provision of this order, including but not limited to, all documents obtained, created, generated, or which in any way relate to the requirements, provisions, or terms of this order, and all reports submitted to the Commission pursuant to this order;

C. Contradict, qualify, or call into question respondent's compliance with this order; or

D. Acknowledge receipt of this order obtained pursuant to Part VI.

IX.
TERMINATION OF ORDER

This Order will terminate on April 11, 2033, 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 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, Commissioner Wright not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission" or "FTC") has accepted, subject to final approval, consent agreements from the following respondents: DesignerWare, LLC; Timothy Kelly, and Ronald P. Koller, individually and as officers of DesignerWare, LLC; Aspen Way Enterprises, Inc.; Watershed Development Corp.; Showplace, Inc., d/b/a Showplace Rent-to-Own; J.A.G. Rents, LLC, d/b/a ColorTyme; Red Zone, Inc., d/b/a

Analysis to Aid Public Comment

ColorTyme; B. Stamper Enterprises, Inc., d/b/a Premier Rental Purchase; and C.A.L.M. Ventures, Inc., d/b/a Premier Rental Purchase.

The proposed consent orders have 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 agreements and the comments received, and will decide whether it should withdraw from any of the agreements and take appropriate action or make final the agreements' proposed orders.

Timothy Kelly and Ronald Koller founded and co-owned DesignerWare, LLC, a small software company that designed and licenses a single product, PC Rental Agent. Mr. Koller ended his association with DesignerWare in March 2012. PC Rental Agent is exclusively marketed to rent-to-own ("RTO") stores. RTO stores rent to consumers a variety of household items, including personal computers. PC Rental Agent is designed to assist RTO stores in tracking and recovering rented computers. Its chief function is a "kill switch," a program that can be used by a store to render a computer inoperable if the consumer renter is late or defaults on payments or if the computer is stolen. PC Rental Agent also offers a wiping feature that permits RTO stores to quickly erase the hard drives of computers prior to re-renting them to consumers.

Through PC Rental Agent, which RTO store licensees installed on rented computers, DesignerWare also provided access to "Detective Mode." Detective Mode was a software application embedded in the PC Rental Agent program. At the request of an RTO store, DesignerWare would remotely complete the Detective Mode installation process on an individual computer and activate "the Detective." Detective Mode would surreptitiously log the computer user's keystrokes, capture screenshots, and take pictures with the computer's webcam and send the data to DesignerWare's servers. Neither DesignerWare nor the RTO stores who have used Detective Mode disclosed to computer users that they were being monitored in this manner. Although DesignerWare recommended that Detective Mode be installed and activated only

to locate and identify the person in possession of a lost or stolen computer, DesignerWare did not monitor its own collection of or limit RTO stores' access to Detective Mode information to ensure that the information was obtained and used only for designated purposes.

DesignerWare sent the information captured by Detective Mode to an email account designated by each RTO store. Although DesignerWare's employees did not themselves view Detective Mode data, without DesignerWare licensing PC Rental Agent and making Detective Mode available to the RTO stores, as well as providing them with access to its web portal and providing servers to support both PC Rental Agent and Detective Mode, this collection and disclosure of consumers' private information would not be possible.

RTO stores also used Detective Mode to send fake "software registration" forms to consumers to deceive them into providing their contact and location information. DesignerWare created several different fake registration forms that its servers displayed on consumers' computers. An RTO store could use this feature of Detective Mode by requesting that DesignerWare activate it. No actual software was registered as a result of a consumer providing the requested information. Rather, Detective Mode captured the information entered in the prompt boxes and sent it to DesignerWare, who then emailed the data to the RTO store, all unbeknownst to the consumer. DesignerWare discontinued use of Detective Mode in January 2012.

In September 2011, DesignerWare added another feature to PC Rental Agent: the capacity to track the physical location of rented computers via WiFi hotspot locations. The information derived from WiFi hotspot contacts can frequently pinpoint a computer's location to a single building and, when aggregated, can track the movements and patterns of individual computer users over time. DesignerWare makes this information easily available to the RTO stores by cross-referencing a list of publicly available WiFi hotspots with the street addresses for the particular hotspots viewed or accessed by rented computers. DesignerWare applied its location tracking upgrade of PC Rental Agent to every computer on which PC Rental Agent was installed, without obtaining consent from, or providing notice to, the computers'

renters. DesignerWare recommends that RTO stores only use this tracking data in connection with recovering stolen property, but it does not monitor or limit the RTO stores' access to such location information.

Aspen Way Enterprises, Watershed Development, Showplace, J.A.G. Rents, Red Zone, B. Stamper Enterprises, and C.A.L.M. Ventures are RTO stores that have licensed PC Rental Agent from DesignerWare. These RTO stores have used information transmitted by DesignerWare when attempting to collect from computer renters who are late in paying or have otherwise breached their rental contracts. Using Detective Mode, these RTO stores have received from DesignerWare webcam photos of computer users (and anyone else within view of the camera), computer users' keystrokes, and screenshots of their computer activities. This information has revealed private and confidential details about computer users, such as their passwords for access to email accounts, social media websites, and financial institutions. Other confidential information was also captured, including medical records, private emails to doctors, employment applications containing Social Security numbers, bank and credit card statements, and discussions of defense strategies in a pending lawsuit. Through Detective Mode, DesignerWare and the RTO stores also secretly photographed the private conduct of consumers in their homes. This included pictures of children, household visitors, individuals not fully clothed, and couples engaged in intimate activities.

The collection and disclosure of such private and confidential information about consumers causes or is likely to cause substantial injury to consumers. Consumers are likely to be substantially injured by the exposure to strangers of personal, financial account access, and medical information. Consumers are actually harmed by DesignerWare's unwarranted invasion into their homes and lives and its capture and disclosure of the private details of individual and family life, including, for example, images of visitors, children, family interactions, partially undressed individuals, and couples engaged in sexual activities. Sharing data like that collected by Detective Mode with third parties can cause consumers financial and physical injury, and impair their peaceful enjoyment of their homes. Because

Detective Mode functions secretly, consumers cannot reasonably avoid this harm, which is neither trivial nor speculative. Moreover, there are no countervailing benefits to consumers or competition for continued use of Detective Mode in this context, where RTO stores have effective alternative methods for collections.

DesignerWare also sent consumers' contact information to the RTO stores. DesignerWare gathered this information from computer users who completed the deceptive "software registration" forms sent through Detective Mode. The RTO stores used this information to find, require payment for, or repossess a rented computer.

The Commission's complaint against DesignerWare, Kelly, and Koller (collectively, "DesignerWare Respondents") alleges that the company and its principals engaged in unfair and deceptive conduct and provided the means and instrumentalities to engage in unfairness, all in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The first count of the complaint focuses on actions taken by DesignerWare that caused or was likely to cause substantial injury to consumers. Count I alleges that the DesignerWare Respondents engaged in unfair conduct by installing monitoring software on rented computers, gathering personal, financial, and health information about consumers from computers, and disclosing that information to RTO store licensees. Count I also alleges as unfair the DesignerWare Respondents' installation of geophysical location tracking software on rented computers without consent from the computer renters, the tracking of computers' geophysical locations without notice to computer users, and the disclosure of that information to the RTO stores.

Count II alleges that the DesignerWare Respondents provided the means to third parties – the RTO stores – to violate Section 5. The first part of the count charges the DesignerWare Respondents with providing RTO stores with the means and instrumentalities to engage in unfairness by furnishing them with software that could monitor consumers by recording their keystrokes, capturing screenshots of information displayed on a computer, and taking pictures of the computer user, and further could track the geophysical location data of rented computers without the consent

of the computer renter or notice to the computer user. The second part of Count II alleges that the DesignerWare Respondents provided the means and instrumentalities to RTO stores to engage in unfair collection practices by providing them with the data gathered via PC Rental Agent and Detective Mode. Count II focuses on actions taken by DesignerWare that were integral to the harm to consumers caused or likely to be caused by the RTO stores. Here, without PC Rental Agent and Detective Mode and without access to DesignerWare's servers to execute their commands to rented computers, collect consumers' confidential information and transmit it to them, the RTO stores could not unfairly monitor their computer renters or use improperly gathered information in connection with collections.

Count III of the complaint charges the DesignerWare Respondents with deceptively gathering – and disclosing – consumers' personal information collected from the fake software registration forms that Detective Mode caused to appear on consumers' rented computers.

Each of the Commission's complaints against the seven RTO stores contains substantially similar allegations regarding the stores' violations of the FTC Act. The complaints charge that the RTO stores unfairly gathered consumers' personal information by installing monitoring software on rented computers and engaged in unfair collection practices by using the improperly gathered information to collect on consumer rental contracts. The complaints further allege that the RTO stores deceptively gathered consumers' personal information by activating the Detective Mode feature that sends the fake software registration forms to consumers' rented computers.

The proposed orders contain strong injunctive relief designed to remedy the unlawful conduct by DesignerWare, its principals, and the RTO stores. The orders define "monitoring technology and geophysical location tracking technology" so that the technological applications covered by the order are clearly described. "Monitoring technology" means any hardware, software, or application utilized in conjunction with a computer that can cause the computer to (1) capture, monitor, or record, and (2) report information about user activities by recording

keystrokes, clicks, or other user-generated actions; capturing screenshots of the information displayed on a computer monitor or screen; or activating the camera or microphone function of a computer to take photographs or record audio or visual content through the computer's webcam or microphone. The definition of "geophysical location tracking" includes the reporting of GPS coordinates, WiFi hotspots, or telecommunications towers – all technologies that allow for a relatively precise location of the item tracked. In addition, a "covered rent-to-own transaction" is defined as one in which a consumer agrees to purchase or rent a computer, where the rental agreement provides for payments over time and an option to purchase the computer.

The proposed orders with DesignerWare and its principals, Kelly and Koller, are separate, but contain identical injunctive provisions. Section I of the proposed orders with DesignerWare and its principals bans them from using – as well as licensing, selling, or otherwise providing third parties with – monitoring technology in connection with any covered RTO transaction. Section II prohibits them from using geophysical location tracking technology to gather information from any computer without providing clear and prominent notice to and obtaining affirmative express consent from the computer's renter at the time the computer is rented. This section also requires clear and prominent notice to computer users immediately prior to each time tracking technology is activated. In addition, Section II mandates that DesignerWare and its principals require their licensees to obtain consent and provide notice prior to initiating any location tracking. However, DesignerWare and its principals do not need to provide notice to a computer user prior to activating geophysical location tracking technology if 1) there is a reasonable basis to believe that the computer has been stolen and 2) a police report has been filed.

Section III of the proposed orders with DesignerWare and its principals prohibits the deceptive collection of consumer information via fake software registration notices. Section IV requires that any data that was collected through any monitoring or tracking software without the requisite notice and consent be destroyed and that any properly collected data be encrypted when transmitted. Section V bars DesignerWare and its principals from

making misrepresentations about the privacy or security of any personal information gathered from or about consumers.

Sections VI through IX of both orders contain reporting and compliance provisions. Section VI of the proposed DesignerWare order requires the company to disseminate the order now and in the future to all current and future principals, officers, directors, and managers, and to persons with responsibilities relating to the subject matter of the order. This section also requires DesignerWare to secure a signed and dated statement acknowledging receipt of the order from all persons who receive a copy. Section VII requires DesignerWare to submit compliance reports to the Commission within sixty (60) days, and periodically thereafter as requested. It also requires the company to notify the Commission of changes in DesignerWare's corporate status.

Section VI of the proposed order with the DesignerWare principals requires respondents to distribute it to all current and future principals, officers, directors, and managers of any company that either respondent controls that engages in any covered RTO transaction as well as to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. It also requires the respondents to secure a signed and dated statement acknowledging receipt of the order from all persons who receive a copy. Section VII of the proposed order with the DesignerWare principals requires them to submit compliance reports to the Commission within sixty (60) days, and periodically thereafter as requested. In addition, this section requires them to notify the Commission of changes in their business or employment for three (3) years.

Under Section VIII of the proposed orders with both DesignerWare and its principals, respondents must retain documents relating to their compliance with the order for a five (5) year period. Finally, Section IX of both proposed orders is a provision "sunsetting" the orders after twenty (20) years, with certain exceptions.

The proposed orders against the RTO stores (which are identical to each other) contain similar injunctive provisions to

those in the proposed orders with DesignerWare and its principals. Section I of each of the proposed orders bans the RTO stores from using monitoring technology in connection with any covered RTO transaction. Section II prohibits the stores from using geophysical location tracking technology to gather information from any computer without providing clear and prominent notice to the computer's renter and obtaining affirmative express consent from the computer's renter at the time the computer is rented. This section also requires clear and prominent notice to a computer user immediately prior to each time such technology is activated. The proposed RTO store orders also suspend the notice requirement if 1) there is a reasonable basis to believe that the computer has been stolen and 2) a police report has been filed. Section III of each of the proposed orders prohibits the deceptive collection of consumer information via fake software registration notices.

Section IV bars the stores from collecting or attempting to collect a debt, money, or property pursuant to a consumer rental contract by using any information or data that was improperly obtained from a computer by monitoring technology. Section V requires that any data collected through any monitoring or tracking software without the requisite notice and consent be destroyed, and that any properly collected data be encrypted when transmitted. As fencing in, Section VI bars misrepresentations about the privacy or security of any personal information gathered from or about consumers.

Sections VII through X of the proposed RTO store orders contain reporting and compliance provisions. Section VII requires distribution of the order now and in the future to all current and future principals, officers, directors, and managers, and to persons with responsibilities relating to the subject matter of the order. It also requires the RTO stores to secure signed and dated statements acknowledging receipt of the order from all persons who receive a copy of the order. Section VIII requires the RTO stores to submit compliance reports to the Commission within sixty (60) days, and periodically thereafter as requested, and ensures notification to the Commission of changes in corporate status. Under Section IX, the RTO stores must retain documents relating to order compliance for a five (5) year period.

Analysis to Aid Public Comment

Finally, Section X is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed orders. It is not intended to constitute an official interpretation of the proposed complaints or orders or to modify the terms of the orders in any way.

Complaint

IN THE MATTER OF

TIMOTHY KELLY
AND
RONALD P. KOLLER

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

Docket No. C-4391; File No. 112 3151
Complaint, April 11, 2013 – Decision, April 11, 2013

This consent order relates to privacy violations by Timothy Kelly and Ronald P. Koller ("Respondents") in the licensing of its PC Rental Agent software application to rent-to-own ("RTO") stores. Respondents founded and co-owned DesignerWare, LLC, a company that licensed a software program known as PC Rental Agent to RTO stores. The purpose of PC Rental Agent was to aid RTO stores in tracking and recovering rented computers; to render computers inoperable if consumers are late or default on payments or are stolen; and to erase computer hard drives for redistribution. The complaint alleges that DesignerWare, LLC and Respondents failed notify consumers that the PC Rental Agent application tracked the movements and patterns of individual computer users over time, or obtain their consent to such tracking, in violation of Section 5 of the Federal Trade Commission Act. The consent order requires Respondents to cease all use, license, and sale of monitoring technology in connection with RTO transactions.

Participants

For the *Commission*: *Julie K. Mayer* and *Tracy S. Thorleifson.*

For the *Respondents*: *Stephen S. Stallings, Burns White LLC,* and *William Woodward Webb, Edmisten & Webb Law Firm.* .

COMPLAINT

The Federal Trade Commission, having reason to believe that DesignerWare, LLC, a corporation, and Timothy Kelly and Ronald P. Koller, individually and as officers of the corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

Complaint

1. Respondent DesignerWare, LLC ("DesignerWare"), is a Nevada limited liability corporation with its principal office or place of business at 108 Hutchinson Drive, North East, Pennsylvania 16428.

2. Respondent Timothy Kelly is an officer and owner of DesignerWare. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of DesignerWare, including the acts or practices alleged in this complaint. His principal office or place of business is 108 Hutchinson Drive, North East, Pennsylvania 16428.

3. Respondent Ronald P. Koller was an officer and owner of DesignerWare until on or about March 28, 2012. Individually or in concert with others, at all relevant times, he formulated, directed, or controlled the policies, acts, or practices of DesignerWare, including the acts or practices alleged in this complaint. He resides in Ocoee, Florida.

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

RESPONDENTS' BUSINESS PRACTICES

5. Respondents developed a software product called PC Rental Agent that they license to stores in the rent-to-own industry. Rent-to-own stores allow consumers to rent, with an option to purchase, goods such as furniture, household appliances, and consumer electronics including computers. Typically, the rental agreement will include an option for the consumer to purchase the rented item for a fixed sum after making a certain number of payments. PC Rental Agent, when installed on a rented computer, offers rent-to-own store licensees the ability to direct DesignerWare's servers to disable a computer remotely when a consumer is late making payments, has stopped communicating with the rent-to-own store, or has otherwise violated the rental contract. As of August 2011, approximately 1,617 rent-to-own stores in the United States, Canada, and Australia have licensed PC Rental Agent. PC Rental Agent has been installed on approximately 420,000 computers worldwide.

6. Through PC Rental Agent, DesignerWare offers rent-to-own store licensees additional functions and features, including the ability to direct DesignerWare's servers to track and report the physical location of a computer and to activate an add-on program called Detective Mode that enables licensees to monitor surreptitiously the activities of the computer's user, including by using the computer's webcam. Through Detective Mode, rent-to-own store licensees can also direct DesignerWare's servers to cause fake software registration windows to pop-up on rented computers and gather consumer's personal information.

7. Rent-to-own stores typically install PC Rental Agent on computers rented to consumers prior to the consumer taking possession of the computer. The presence of PC Rental Agent is not detectible to a computer's user and the computer's renter cannot uninstall it.

8. DesignerWare recommends, but does not require, contractually or otherwise, that its licensees disclose the presence of PC Rental Agent on a rented computer at the time the consumer signs the initial rental contract. DesignerWare takes no steps to determine whether its licensees follow its recommendation and disclose the presence of PC Rental Agent to computer renters. In numerous instances, rent-to-own stores do not disclose to consumers that they have installed and/or are using PC Rental Agent on rented computers. DesignerWare designed the Detective Mode program to operate without the computer user's knowledge, and advises rent-to-own store licensees to install and activate Detective Mode without notice to the computer user.

9. To administer PC Rental Agent commands, rent-to-own store licensees must log on to DesignerWare's website and direct PC Rental Agent to take the desired action on a particular computer. DesignerWare receives reports from computers on which PC Rental Agent is installed every two hours while the computer is connected to the Internet. When a computer reports to DesignerWare, PC Rental Agent executes any commands it has received from a licensee, including, for example, a command to activate Detective Mode.

Monitoring Computer Users via Detective Mode

10. Since at least 2007, DesignerWare has made available to PC Rental Agent licensees an add-on program, Detective Mode. Through DesignerWare, rent-to-own stores can cause Detective Mode to be installed and activated on any computer with PC Rental Agent without telling the computer's renter. DesignerWare limits access to the Detective Mode function to one "Master Account Holder" designated by the licensee. DesignerWare does not charge licensees extra for the use of Detective Mode, nor does DesignerWare sell the program separately from PC Rental Agent.

11. Once installed and activated, Detective Mode can log the keystrokes of the computer user, take screen shots of the computer user's activities on the computer, and photograph anyone within view of the computer's webcam. Detective Mode secretly gathers this information and transmits it to DesignerWare, who then transmits it to the rent-to-own store from which the computer was rented, unbeknownst to the individual using the computer.

12. Respondent Tim Kelly described PC Rental Agent this way in an August 26, 2010 email:

> The way the Detective [Detective Mode] works is like many spyware/malware programs. The Agent [PC Rental Agent] runs outside the user session so it is not detectable by antivirus programs, etc. However when you turn on the Detective, the Agent takes an executable and inject[s] it into the user session and hooks the screen, keyboard, and mouse so it can 'Spy' on the user and gather information. A similar program could be launched to steal credit cards or someone's information.

13. DesignerWare recommends that its licensees install and activate Detective Mode only to locate and identify the person in possession of a lost or stolen computer. It asserts that a consumer who is late in making lease payments has "stolen" the computer. DesignerWare does not monitor its own collection of, or limit its licensees' access to, Detective Mode data to ensure that the information was obtained and used only for designated purposes. In numerous instances, rent-to-own store licensees have caused

Detective Mode to be installed and activated on computers where consumers were late in making rental payments and where the licensees had no reason to believe the computers had been the subject of criminal theft.

14. Detective Mode gathers data about whoever is using the computer, whether it is the computer's renter or another individual. At one level of activation, Detective Mode will gather data and transmit it to DesignerWare every two minutes that the computer is connected to the Internet for a period of 60 minutes. DesignerWare then forwards the data to the licensee who activated "the Detective." If the rent-to-own store wants more information, it can cause Detective Mode to record data every two minutes until prompted to stop doing so. DesignerWare's servers collect this information and transmit it to the licensee for however long the licensee leaves "the Detective" turned on. In numerous instances, data gathered by Detective Mode has revealed private, confidential, and personal details about the computer user. For example, keystroke logs have displayed usernames and passwords for access to email accounts, social media websites, and financial institutions. Screenshots have captured additional confidential and personal information, including medical records, private emails to doctors, employment applications containing Social Security numbers, bank and credit card statements, and discussions of defense strategies in a pending lawsuit. When activated, Detective Mode can also cause a computer's webcam to surreptitiously photograph not only the computer user, but also anyone else within view of the camera. In numerous instances, Detective Mode webcam activations have taken pictures of children, individuals not fully clothed, and couples engaged in sexual activities.

15. DesignerWare's servers send data captured by Detective Mode, unencrypted, directly to the email accounts designated by its licensees. DesignerWare's employees do not themselves view Detective Mode data, but without DesignerWare's licensing of PC Rental Agent and its making Detective Mode available to its licensees, as well as providing licensees with access to its web portal and providing servers to support both PC Rental Agent and Detective Mode, this collection and disclosure of private information would not be possible.

Complaint

Geophysical Location Tracking

16. Since at least September 2011, on every computer that has a wireless card installed, PC Rental Agent automatically logs the WiFi hotspots that the wireless card either sees or uses to connect to the Internet. When a computer connects to DesignerWare's servers, it reports the WiFi hotspot location information along with the computer's IP address.

17. DesignerWare cross-references the information logged by a rented computer to PC Rental Agent with a publicly available list of WiFi hotspots' physical locations and provides its licensees with street addresses for the particular WiFi hotspots viewed or accessed by the computer. The information derived from WiFi hotspot contacts can frequently pinpoint a computer's location to a single building, and, when aggregated, can track the movements and patterns of individual computer users over time. DesignerWare provides its licensees with this location information for the ten most recent reporting cycles. DesignerWare recommends that rent-to-own stores only use this data in connection with recovering stolen property, but it does not monitor, restrict, or otherwise limit its licensees' access to such location information.

18. DesignerWare applied its location tracking upgrade of PC Rental Agent to every computer on which PC Rental Agent was installed, without obtaining consent from, or providing notice to, the computers' renters. After the September 2011 upgrade, in numerous instances PC Rental Agent has been installed on rented computers without the computer renter's knowledge or consent. Thus, consumers using those computers on which PC Rental Agent is installed – who may or may not be the computers' renters, and who may or may not be current in their lease payments – do not know that their physical location can be identified from the WiFi hotspots that their computers encounter. Nor do they know that employees of the rent-to-own stores from which their computers are rented can monitor their physical locations and the patterns of their movements.

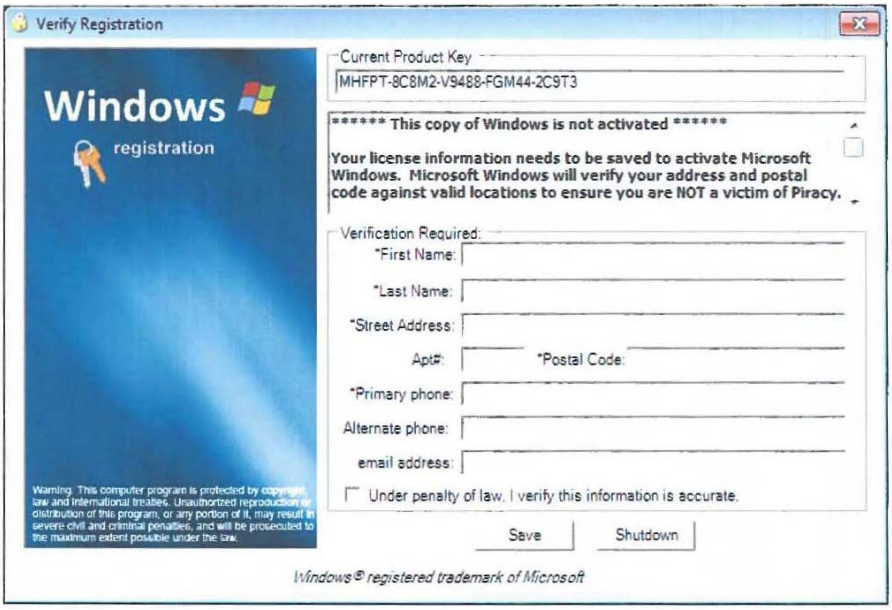
Substantial Injury

19. DesignerWare's collection and disclosure to third parties of private and confidential information about consumers, including both those who rented the computer and those who are merely using it, causes or is likely to cause substantial harm to consumers. Because of DesignerWare's intrusions, consumers are at risk of harm from the exposure of personal, financial account access, and medical information to strangers. Consumers are harmed by DesignerWare's unwarranted invasion into their homes and lives and its capture of the private details of individual and family life, including, for example, images of visitors, children, family interactions, partially undressed individuals, and couples engaged in intimate activities. Sharing these images with third parties can cause consumers financial and physical injury and impair their peaceful enjoyment of their homes. Consumers cannot reasonably avoid these injuries because PC Rental Agent is invisible to them. The harm caused by respondents' unauthorized collection and disclosure of confidential consumer information is not outweighed by countervailing benefits to consumers or to competition; indeed in this context, where rent-to-own stores have alternate effective methods of collection, including, e.g., using PC Rental Agent to remotely disable the computer, there are no legitimate benefits to respondents or to the public.

Detective Mode's Deceptive Prompt Windows

20. In addition to its other features, Detective Mode offers licensees the option to cause a user's computer to display a fake software registration window. The fake registration window prompts the computer user to enter a name, address, email address, and phone number. The computer user cannot close the window until the requested information is entered. DesignerWare has created several different fake registration windows for its licensees' use, including ones for Microsoft Windows, Internet Explorer, Microsoft Office, and Yahoo! Messenger, and one to verify a security certificate. A screenshot of DesignerWare's fake Microsoft Windows screen appears below.

Complaint



21. No actual software is registered as a result of a consumer providing the requested information; instead, Detective Mode captures the information entered in the prompt boxes and transmits it to DesignerWare, and DesignerWare's servers email the data to the rent-to-own store licensee, unbeknownst to the consumer.

22. Consumers who are deceived into providing contact information in this manner are deprived of the ability to control who has access to their contact information and how they are contacted.

VIOLATIONS OF THE FTC ACT

COUNT I
UNFAIR GATHERING AND DISCLOSURE OF CONSUMERS' PERSONAL INFORMATION

23. Through the means described in Paragraphs 5 through 22, in numerous instances respondents have:

c. Installed monitoring software on rented computers, gathered sensitive personal, financial, and medical

information about consumers from those computers, and disclosed that personal information to rent-to-own store licensees; and

d. Installed geophysical location tracking software on rented computers without consent from the computers' renters, tracked the geophysical location of computers without notice to the computer users, and disclosed that location information to rent-to-own store licensees.

24. Respondents' actions cause or are likely to cause substantial injury to consumers that cannot be reasonably avoided and is not outweighed by countervailing benefits to consumers or competition.

25. Therefore, respondents' practices, as described in Paragraph 23, constitute unfair acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a).

COUNT II
MEANS AND INSTRUMENTALITIES TO ENGAGE IN UNFAIRNESS

26. Through the means described in Paragraphs 5 through 22, respondents have:

c. Furnished rent-to-own stores with software for installation on rented computers that i) when activated remotely by the rent-to-own store licensee will record keystrokes typed on a computer, capture screenshots of information displayed on a computer, cause a computer's webcam to take pictures of the computer user, and transmit the recorded keystrokes, screenshots and web pictures to the rent-to-own store licensee to view, and ii) will identify the geophysical location of the computer and track the physical location of the computer's user without consent from the computer's renter or notice to the computer's user; and

d. Provided rent-to-own store licensees with information improperly gathered from consumers for use in

connection with collecting or attempting to collect a debt, money, or property pursuant to a consumer rental contract.

27. By furnishing others with the means to engage in the unfair practices described in Paragraph 26, respondents have provided the means and instrumentalities for the commission of unfair acts and practices and thus have caused or are likely to cause substantial injury to consumers that cannot be reasonably avoided and is not outweighed by countervailing benefits to consumers or competition.

28. Therefore, respondents' practices, as described in Paragraph 26, constitute unfair acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a).

COUNT III
DECEPTIVE GATHERING AND DISCLOSURE OF CONSUMERS' PERSONAL INFORMATION

29. Through the means described in Paragraphs 5 through 22, respondents have represented to consumers, expressly or by implication, that certain pop-up notices that appear on a computer's screen are notices from trusted software providers that contain software registration forms that must be filled out with the consumers' contact information in order to continue to use the providers' software.

30. In truth and in fact, these pop-up notices are not from trusted software providers and do not contain software registration forms that must be filled out with the consumers' contact information in order to continue to use the providers' software, but instead serve only to cause the consumer to provide the requested contact information so that it may be provided to respondents' rent-to-own store licensees.

31. Therefore, respondents' practices, as described in Paragraph 29, constitute deceptive acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a).

THEREFORE, the Federal Trade Commission this eleventh day of April, 2013, has issued this complaint against respondents.

By the Commission, Commissioner Wright not participating.

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 Timothy Kelly is an officer and owner of DesignerWare, LLC, a Nevada limited liability company. His principal office or place of business is 108 Hutchinson Drive, North East, Pennsylvania 16428.

2. Respondent Ronald P. Koller was an officer and owner of DesignerWare, LLC, until on or about March 28, 2012. He resides in Ocoee, Florida.

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, "respondents" shall mean Timothy Kelly and Ronald P. Koller.

2. “Commerce” shall be defined as it is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

3. “Computer” shall mean any desktop or laptop computer, handheld device, tablet, telephone, or other electronic product or device that has a platform on which to download, install, or run any software program, code, script, or other content.

4. “Clear(ly) and prominent(ly)” shall mean:

   a. 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;

b. 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;

c. In communications disseminated through video means (e.g., television or streaming video), the required disclosures are in writing in a form 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;

d. In communications made through interactive media, such as the Internet, online services, and software, the required disclosures are unavoidable and presented in a form consistent with subpart (a) of this definition, in addition to any audio or video presentation of them; and

e. In all instances, the required disclosures are presented in an understandable language and syntax; in the same language as the predominant language that is used in the communication; and 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.

5. "Geophysical location tracking technology" shall mean any hardware, software, or application utilized in conjunction with a computer that collects and reports data or information that identifies the precise geophysical location of the computer. Geophysical

location tracking technologies include, for these purposes, technologies that report: the GPS coordinates of a computer; the WiFi signals available to or actually used by a computer to access the Internet; the telecommunication towers or connections available to or actually used by a computer; the processing of any such reported data through geolocation lookup services; or any information derived from any combination of the foregoing.

6. "Monitoring technology" shall mean any hardware, software, or application utilized in conjunction with a computer that can cause the computer to (1) capture, monitor, or record, and (2) report information about user activities by:

   a. Recording keystrokes, clicks, or other user-generated actions;

   b. Capturing screenshots of the information displayed on a computer monitor or screen; or

   c. Activating the camera or microphone function of a computer to take photographs or record audio or visual content through the computer's webcam or microphone.

7. "Covered rent-to-own transaction" shall mean any transaction where a consumer enters into an agreement for the purchase or rental of a computer and the consumer's contract or rental agreement provides for payments over time and an option to purchase the computer.

I.
MONITORING TECHNOLOGY PROHIBITED

IT IS HEREBY ORDERED that respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and their officers, agents, servants, employees, and all persons or entities in active concert or participation with them who receive actual notice of this order, by personal service or otherwise, in connection with using, selling, licensing, or otherwise providing any hardware, software, application, program, or other device for use in connection with a covered rent-to-own transaction, directly or indirectly, are hereby permanently restrained and enjoined from:

A. Using any monitoring technology to gather information or data from any computer rented to a consumer; and

B. Licensing, selling, or otherwise providing third parties with monitoring technology for installation or activation on computers rented to consumers.

II.
USE OF TRACKING TECHNOLOGY LIMITED

IT IS FURTHER ORDERED that respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and their officers, agents, servants, employees, and all persons or entities in active concert or participation with them who receive actual notice of this order, by personal service or otherwise, in connection with using, selling, licensing, or otherwise providing any hardware, software, application, program, or other device for use in connection with a covered rent-to-own transaction, directly or indirectly, are hereby permanently restrained and enjoined from:

A. Gathering any information or data from any computer via any geophysical location tracking technology without ensuring that the computer user is provided clear and prominent notice at the time the computer is rented and immediately prior to each use of the geophysical location tracking technology, and also

ensuring that the computer renter's affirmative express consent is obtained at the time the computer is rented. For purposes of this section, providing clear and prominent notice to computer users and obtaining affirmative express consent from computer renters means:

1. Clear and Prominent Notice: a clear and prominent notice is provided to the user, separate and apart from any "privacy policy," "data use policy," "terms of service," "end-user license agreement," "lease agreement," or other similar document, that discloses (1) that geophysical location tracking technology is installed and/or currently running on the computer; (2) the types of user activity or conduct that is being captured by such technology; (3) the identities or specific categories of entities with whom any data or information that is collected will be shared or otherwise provided; (4) the purpose(s) for the collection, use, or sharing of such data or information; and (5) where and how the user can contact someone for additional information;

2. Affirmative Express Consent: affirmative express consent is obtained by giving the computer renter an equally clear and prominent choice to either agree or not agree to any geophysical location tracking technology, and neither option may be highlighted or preselected as a default setting. Activation of any geophysical location tracking technology must not proceed until the computer's renter provides affirmative express consent. Notwithstanding the foregoing, nothing in this Part shall require that a computer be rented to a user who declines to consent to installation or activation of any geophysical tracking technology;

3. Icons: the activation of any geophysical location tracking technology shall be accompanied by the installation of a clear and prominent icon on the

computer on which the technology is installed, such as on the desktop and in the desktop system tray of the computer. Clicking on the icon must clearly and prominently disclose: (1) that geophysical location tracking technology is installed and currently running on the computer; (2) the types of user activity or conduct that is being captured by such technology; (3) the identities or specific categories of entities with whom any data or information that is collected will be shared or otherwise provided; (4) the purpose(s) for the collection, use, or sharing of such data or information; and (5) where and how the user can contact someone for additional information;

Provided that the notice requirements of this Part may be suspended and geophysical location tracking technology activated if (a) the renter reports that the computer has been stolen or there is otherwise a reasonable basis to believe that the computer has been stolen, and (b) either the renter or another person has filed a police report stating that the computer has been stolen. Provided further that respondents shall ensure that documents establishing (a) and (b) are retained. For purposes of this Order, "filing of a police report" means the reporting of a complaint with the police department in any form recognized in the jurisdiction;

Provided further that the notice and record-keeping requirements of this Section II shall be satisfied when respondents act as licensors if respondents include in the licensing agreement contractual requirements that: (i) licensees may only activate geophysical location tracking technology if (a) the renter reports that the computer has been stolen or there is otherwise a reasonable basis to believe that the computer has been stolen and (b) either the renter or another person has filed a police report stating that the computer has been stolen, and (ii) documents establishing (a) and (b) are retained by the licensees; and

B. Licensing, selling, or otherwise providing any third party with geophysical location tracking technology for installation or activation on a computer to be rented in a covered rent-to-own transaction, without requiring as a condition of the license, sale, or other provision of the technology that the third party obtain consent and provide notice as provided in Section II.A, above.

III.
NO DECEPTIVE GATHERING OF CONSUMER INFORMATION

IT IS FURTHER ORDERED that respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and their officers, agents, servants, employees, and all persons or entities in active concert or participation with them who receive actual notice of this order, by personal service or otherwise, in connection with using, selling, licensing, or otherwise providing any hardware, software, application, program, or other device, are hereby permanently restrained and enjoined from making, or assisting others to make, any false representation or depiction in any notice, prompt screen, or other software application appearing on the screen of any computer that results in gathering information from or about a consumer, including without limitation location information.

IV.
PROTECTION OF DATA

IT IS FURTHER ORDERED that respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and their officers, agents, servants, employees, and all persons or entities in active concert or participation with them who receive actual notice of this order, by personal service or otherwise, shall:

A. Delete or destroy all user data, if any, previously gathered using any monitoring or geophysical location tracking technology that does not comply with Parts I, II, and III of this Order, unless such action is otherwise prohibited by court order or other legal obligation; and

B. Transfer data or information, if any, gathered by any monitoring or geophysical location tracking technology from the computer upon which the technology is installed to server(s) operated by respondents, and from server(s) operated by respondents to any other computers or servers only if such information is rendered unreadable, unusable, or indecipherable during transmission.

V.
NO MISREPRESENTATIONS ABOUT PRIVACY

IT IS FURTHER ORDERED that respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and their officers, agents, servants, employees, and all persons or entities in active concert or participation with them who receive actual notice of this order, by personal service or otherwise, in connection with using, selling, licensing, or otherwise providing any hardware, software, application, program, or other device, directly or indirectly, shall not misrepresent, in any manner, expressly or by implication, the extent to which respondents maintain and protect the security, privacy, or confidentiality of any personal information gathered from or about consumers.

VI.
DISTRIBUTION OF ORDER

IT IS FURTHER ORDERED that respondents shall deliver a copy of this order to all current and future principals, officers, directors, and managers for all companies that either respondent controls that engage in any covered rent-to-own transactions, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. Respondents shall deliver this order to such current personnel within thirty (30) days after service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities. From each person to whom respondents deliver a copy of this order, respondents must obtain a signed and dated acknowledgment of receipt of this order, with

any electronic signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq*.

VII.
COMPLIANCE REPORTING

IT IS FURTHER ORDERED that:

A. Respondents shall each, within sixty (60) days after the date of service of this order, and at such other times as the Commission may require, file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which they have complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, they shall submit additional true and accurate written reports.

B. Respondents shall each, for a period of three (3) years after the date of issuance of this order, notify the Commission of the discontinuance of their current business or employment, or of their affiliation with any new business or employment. The notice shall include the new business address and telephone number and a description of the nature of the business or employment and respondent's duties and responsibilities.

C. 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 for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line Timothy Kelly and Ronald P. Koller, File No. 1123151. *Provided, however*; that, in lieu of overnight courier, notices may be sent by first class mail, but only if an electronic version of each such notice is contemporaneously sent to the Commission at DEbrief@ftc.gov.

VIII.
RECORDKEEPING

IT IS FURTHER ORDERED that respondents shall, for five (5) years after the last date of any act or practice covered by Parts I – V of this Order, maintain and upon reasonable notice make available to the Federal Trade Commission for inspection and copying, any documents, whether prepared by or on behalf of respondents, that:

A. Comprise or relate to complaints or inquiries, whether received directly, indirectly, or through any third party, concerning any monitoring or geophysical tracking technologies sold, licensed, or otherwise provided to any third party for use in connection with any covered rent-to-own transaction, and any responses to those complaints or inquiries;

B. Are reasonably necessary to demonstrate full compliance with each provision of this order, including but not limited to, all documents obtained, created, generated, or which in any way relate to the requirements, provisions, or terms of this order, and all reports submitted to the Commission pursuant to this order;

C. Contradict, qualify, or call into question respondents' compliance with this order; or

D. Acknowledge receipt of this order obtained pursuant to Part VI.

IX.
TERMINATION OF ORDER

This Order will terminate on April 11, 2033, 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, Commissioner Wright not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission" or "FTC") has accepted, subject to final approval, consent agreements from the following respondents: DesignerWare, LLC; Timothy Kelly, and Ronald P. Koller, individually and as officers of DesignerWare, LLC; Aspen Way Enterprises, Inc.; Watershed Development Corp.; Showplace, Inc., d/b/a Showplace Rent-to-Own; J.A.G. Rents, LLC, d/b/a ColorTyme; Red Zone, Inc., d/b/a ColorTyme; B. Stamper Enterprises, Inc., d/b/a Premier Rental Purchase; and C.A.L.M. Ventures, Inc., d/b/a Premier Rental Purchase.

The proposed consent orders have 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 agreements and the comments received, and will decide whether it should withdraw from any of the agreements and take appropriate action or make final the agreements' proposed orders.

Timothy Kelly and Ronald Koller founded and co-owned DesignerWare, LLC, a small software company that designed and licenses a single product, PC Rental Agent. Mr. Koller ended his association with DesignerWare in March 2012. PC Rental Agent is exclusively marketed to rent-to-own ("RTO") stores. RTO stores rent to consumers a variety of household items, including personal computers. PC Rental Agent is designed to assist RTO stores in tracking and recovering rented computers. Its chief function is a "kill switch," a program that can be used by a store to render a computer inoperable if the consumer renter is late or defaults on payments or if the computer is stolen. PC Rental Agent also offers a wiping feature that permits RTO stores to quickly erase the hard drives of computers prior to re-renting them to consumers.

Through PC Rental Agent, which RTO store licensees installed on rented computers, DesignerWare also provided access to "Detective Mode." Detective Mode was a software application embedded in the PC Rental Agent program. At the request of an RTO store, DesignerWare would remotely complete the Detective Mode installation process on an individual computer and activate "the Detective." Detective Mode would surreptitiously log the computer user's keystrokes, capture screenshots, and take pictures with the computer's webcam and send the data to DesignerWare's servers. Neither DesignerWare nor the RTO stores who have used Detective Mode disclosed to computer users that they were being monitored in this manner. Although DesignerWare recommended that Detective Mode be installed and activated only to locate and identify the person in possession of a lost or stolen computer, DesignerWare did not monitor its own collection of or limit RTO stores' access to Detective Mode information to ensure that the information was obtained and used only for designated purposes.

Analysis to Aid Public Comment

DesignerWare sent the information captured by Detective Mode to an email account designated by each RTO store. Although DesignerWare's employees did not themselves view Detective Mode data, without DesignerWare licensing PC Rental Agent and making Detective Mode available to the RTO stores, as well as providing them with access to its web portal and providing servers to support both PC Rental Agent and Detective Mode, this collection and disclosure of consumers' private information would not be possible.

RTO stores also used Detective Mode to send fake "software registration" forms to consumers to deceive them into providing their contact and location information. DesignerWare created several different fake registration forms that its servers displayed on consumers' computers. An RTO store could use this feature of Detective Mode by requesting that DesignerWare activate it. No actual software was registered as a result of a consumer providing the requested information. Rather, Detective Mode captured the information entered in the prompt boxes and sent it to DesignerWare, who then emailed the data to the RTO store, all unbeknownst to the consumer. DesignerWare discontinued use of Detective Mode in January 2012.

In September 2011, DesignerWare added another feature to PC Rental Agent: the capacity to track the physical location of rented computers via WiFi hotspot locations. The information derived from WiFi hotspot contacts can frequently pinpoint a computer's location to a single building and, when aggregated, can track the movements and patterns of individual computer users over time. DesignerWare makes this information easily available to the RTO stores by cross-referencing a list of publicly available WiFi hotspots with the street addresses for the particular hotspots viewed or accessed by rented computers. DesignerWare applied its location tracking upgrade of PC Rental Agent to every computer on which PC Rental Agent was installed, without obtaining consent from, or providing notice to, the computers' renters. DesignerWare recommends that RTO stores only use this tracking data in connection with recovering stolen property, but it does not monitor or limit the RTO stores' access to such location information.

Aspen Way Enterprises, Watershed Development, Showplace, J.A.G. Rents, Red Zone, B. Stamper Enterprises, and C.A.L.M. Ventures are RTO stores that have licensed PC Rental Agent from DesignerWare. These RTO stores have used information transmitted by DesignerWare when attempting to collect from computer renters who are late in paying or have otherwise breached their rental contracts. Using Detective Mode, these RTO stores have received from DesignerWare webcam photos of computer users (and anyone else within view of the camera), computer users' keystrokes, and screenshots of their computer activities. This information has revealed private and confidential details about computer users, such as their passwords for access to email accounts, social media websites, and financial institutions. Other confidential information was also captured, including medical records, private emails to doctors, employment applications containing Social Security numbers, bank and credit card statements, and discussions of defense strategies in a pending lawsuit. Through Detective Mode, DesignerWare and the RTO stores also secretly photographed the private conduct of consumers in their homes. This included pictures of children, household visitors, individuals not fully clothed, and couples engaged in intimate activities.

The collection and disclosure of such private and confidential information about consumers causes or is likely to cause substantial injury to consumers. Consumers are likely to be substantially injured by the exposure to strangers of personal, financial account access, and medical information. Consumers are actually harmed by DesignerWare's unwarranted invasion into their homes and lives and its capture and disclosure of the private details of individual and family life, including, for example, images of visitors, children, family interactions, partially undressed individuals, and couples engaged in sexual activities. Sharing data like that collected by Detective Mode with third parties can cause consumers financial and physical injury, and impair their peaceful enjoyment of their homes. Because Detective Mode functions secretly, consumers cannot reasonably avoid this harm, which is neither trivial nor speculative. Moreover, there are no countervailing benefits to consumers or competition for continued use of Detective Mode in this context,

where RTO stores have effective alternative methods for collections.

DesignerWare also sent consumers' contact information to the RTO stores. DesignerWare gathered this information from computer users who completed the deceptive "software registration" forms sent through Detective Mode. The RTO stores used this information to find, require payment for, or repossess a rented computer.

The Commission's complaint against DesignerWare, Kelly, and Koller (collectively, "DesignerWare Respondents") alleges that the company and its principals engaged in unfair and deceptive conduct and provided the means and instrumentalities to engage in unfairness, all in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The first count of the complaint focuses on actions taken by DesignerWare that caused or was likely to cause substantial injury to consumers. Count I alleges that the DesignerWare Respondents engaged in unfair conduct by installing monitoring software on rented computers, gathering personal, financial, and health information about consumers from computers, and disclosing that information to RTO store licensees. Count I also alleges as unfair the DesignerWare Respondents' installation of geophysical location tracking software on rented computers without consent from the computer renters, the tracking of computers' geophysical locations without notice to computer users, and the disclosure of that information to the RTO stores.

Count II alleges that the DesignerWare Respondents provided the means to third parties – the RTO stores – to violate Section 5. The first part of the count charges the DesignerWare Respondents with providing RTO stores with the means and instrumentalities to engage in unfairness by furnishing them with software that could monitor consumers by recording their keystrokes, capturing screenshots of information displayed on a computer, and taking pictures of the computer user, and further could track the geophysical location data of rented computers without the consent of the computer renter or notice to the computer user. The second part of Count II alleges that the DesignerWare Respondents provided the means and instrumentalities to RTO stores to engage

in unfair collection practices by providing them with the data gathered via PC Rental Agent and Detective Mode. Count II focuses on actions taken by DesignerWare that were integral to the harm to consumers caused or likely to be caused by the RTO stores. Here, without PC Rental Agent and Detective Mode and without access to DesignerWare's servers to execute their commands to rented computers, collect consumers' confidential information and transmit it to them, the RTO stores could not unfairly monitor their computer renters or use improperly gathered information in connection with collections.

Count III of the complaint charges the DesignerWare Respondents with deceptively gathering – and disclosing – consumers' personal information collected from the fake software registration forms that Detective Mode caused to appear on consumers' rented computers.

Each of the Commission's complaints against the seven RTO stores contains substantially similar allegations regarding the stores' violations of the FTC Act. The complaints charge that the RTO stores unfairly gathered consumers' personal information by installing monitoring software on rented computers and engaged in unfair collection practices by using the improperly gathered information to collect on consumer rental contracts. The complaints further allege that the RTO stores deceptively gathered consumers' personal information by activating the Detective Mode feature that sends the fake software registration forms to consumers' rented computers.

The proposed orders contain strong injunctive relief designed to remedy the unlawful conduct by DesignerWare, its principals, and the RTO stores. The orders define "monitoring technology and geophysical location tracking technology" so that the technological applications covered by the order are clearly described. "Monitoring technology" means any hardware, software, or application utilized in conjunction with a computer that can cause the computer to (1) capture, monitor, or record, and (2) report information about user activities by recording keystrokes, clicks, or other user-generated actions; capturing screenshots of the information displayed on a computer monitor or screen; or activating the camera or microphone function of a computer to take photographs or record audio or visual content

Analysis to Aid Public Comment

through the computer's webcam or microphone. The definition of "geophysical location tracking" includes the reporting of GPS coordinates, WiFi hotspots, or telecommunications towers – all technologies that allow for a relatively precise location of the item tracked. In addition, a "covered rent-to-own transaction" is defined as one in which a consumer agrees to purchase or rent a computer, where the rental agreement provides for payments over time and an option to purchase the computer.

The proposed orders with DesignerWare and its principals, Kelly and Koller, are separate, but contain identical injunctive provisions. Section I of the proposed orders with DesignerWare and its principals bans them from using – as well as licensing, selling, or otherwise providing third parties with – monitoring technology in connection with any covered RTO transaction. Section II prohibits them from using geophysical location tracking technology to gather information from any computer without providing clear and prominent notice to and obtaining affirmative express consent from the computer's renter at the time the computer is rented. This section also requires clear and prominent notice to computer users immediately prior to each time tracking technology is activated. In addition, Section II mandates that DesignerWare and its principals require their licensees to obtain consent and provide notice prior to initiating any location tracking. However, DesignerWare and its principals do not need to provide notice to a computer user prior to activating geophysical location tracking technology if 1) there is a reasonable basis to believe that the computer has been stolen and 2) a police report has been filed.

Section III of the proposed orders with DesignerWare and its principals prohibits the deceptive collection of consumer information via fake software registration notices. Section IV requires that any data that was collected through any monitoring or tracking software without the requisite notice and consent be destroyed and that any properly collected data be encrypted when transmitted. Section V bars DesignerWare and its principals from making misrepresentations about the privacy or security of any personal information gathered from or about consumers.

Sections VI through IX of both orders contain reporting and compliance provisions. Section VI of the proposed DesignerWare order requires the company to disseminate the order now and in the future to all current and future principals, officers, directors, and managers, and to persons with responsibilities relating to the subject matter of the order. This section also requires DesignerWare to secure a signed and dated statement acknowledging receipt of the order from all persons who receive a copy. Section VII requires DesignerWare to submit compliance reports to the Commission within sixty (60) days, and periodically thereafter as requested. It also requires the company to notify the Commission of changes in DesignerWare's corporate status.

Section VI of the proposed order with the DesignerWare principals requires respondents to distribute it to all current and future principals, officers, directors, and managers of any company that either respondent controls that engages in any covered RTO transaction as well as to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. It also requires the respondents to secure a signed and dated statement acknowledging receipt of the order from all persons who receive a copy. Section VII of the proposed order with the DesignerWare principals requires them to submit compliance reports to the Commission within sixty (60) days, and periodically thereafter as requested. In addition, this section requires them to notify the Commission of changes in their business or employment for three (3) years.

Under Section VIII of the proposed orders with both DesignerWare and its principals, respondents must retain documents relating to their compliance with the order for a five (5) year period. Finally, Section IX of both proposed orders is a provision "sunsetting" the orders after twenty (20) years, with certain exceptions.

The proposed orders against the RTO stores (which are identical to each other) contain similar injunctive provisions to those in the proposed orders with DesignerWare and its principals. Section I of each of the proposed orders bans the RTO stores from using monitoring technology in connection with any covered RTO transaction. Section II prohibits the stores from

Analysis to Aid Public Comment

using geophysical location tracking technology to gather information from any computer without providing clear and prominent notice to the computer's renter and obtaining affirmative express consent from the computer's renter at the time the computer is rented. This section also requires clear and prominent notice to a computer user immediately prior to each time such technology is activated. The proposed RTO store orders also suspend the notice requirement if 1) there is a reasonable basis to believe that the computer has been stolen and 2) a police report has been filed. Section III of each of the proposed orders prohibits the deceptive collection of consumer information via fake software registration notices.

Section IV bars the stores from collecting or attempting to collect a debt, money, or property pursuant to a consumer rental contract by using any information or data that was improperly obtained from a computer by monitoring technology. Section V requires that any data collected through any monitoring or tracking software without the requisite notice and consent be destroyed, and that any properly collected data be encrypted when transmitted. As fencing in, Section VI bars misrepresentations about the privacy or security of any personal information gathered from or about consumers.

Sections VII through X of the proposed RTO store orders contain reporting and compliance provisions. Section VII requires distribution of the order now and in the future to all current and future principals, officers, directors, and managers, and to persons with responsibilities relating to the subject matter of the order. It also requires the RTO stores to secure signed and dated statements acknowledging receipt of the order from all persons who receive a copy of the order. Section VIII requires the RTO stores to submit compliance reports to the Commission within sixty (60) days, and periodically thereafter as requested, and ensures notification to the Commission of changes in corporate status. Under Section IX, the RTO stores must retain documents relating to order compliance for a five (5) year period. Finally, Section X is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

Analysis to Aid Public Comment

The purpose of this analysis is to facilitate public comment on the proposed orders. It is not intended to constitute an official interpretation of the proposed complaints or orders or to modify the terms of the orders in any way.

Complaint

IN THE MATTER OF

ASPEN WAY ENTERPRISES, INC.

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

Docket No. C-4392; File No. 112 3151
Complaint, April 11, 2013 – Decision, April 11, 2013

This consent order relates to unfair practices and privacy violations by Aspen Way Enterprises, Inc. ("Aspen Way") in its use of a software program known as PC Rental Agent and an add-on application called Detective Mode in its rent-to-own computers. Aspen Way is a rent-to-own store operator located in the Midwest and Northwest that licensed PC Rental Agent and Detective Mode from DesignerWare, LLC. The complaint alleges Aspen Way violated Section 5 of the FTC Act by installing PC Rental Agent and Detective Mode on its rental computers without consumers' knowledge or consent and using these programs to gather consumers' confidential personal information, including passwords, usernames, Social Security numbers, and credit card information. The complaint further alleges that Aspen Way engaged in unfair collection practices by using Detective Mode to display a fake registration screen on a user's computer to find, require payment for, or repossess a computer. The consent order requires Aspen Way to cease all use, license, and sale of monitoring and tracking technology in connection with its rent-to-own transactions.

Participants

For the *Commission*: *Julie K. Mayer* and *Tracy S. Thorleifson.*

For the *Respondent*: *Michele L. Braukmann, Moulton Belllingham, PC*.

COMPLAINT

The Federal Trade Commission, having reason to believe that Aspen Way Enterprises, Inc., has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Aspen Way Enterprises, Inc. ("Aspen Way" or "respondent"), is a Montana corporation with its principal office or place of business at 2702 Montana Ave., Suite 202, Billings, Montana 59101. Aspen Way is a franchisee of Aaron's,

Inc. It operates 17 rent-to-own stores in six states. Rent-to-own stores allow consumers to rent, with an option to purchase, goods such as furniture, household appliances, and consumer electronics including computers.

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

RESPONDENT'S BUSINESS PRACTICES

3. Since at least April 2007, Aspen Way has licensed a software product known as PC Rental Agent from DesignerWare, LLC ("DesignerWare") and installed it on computers it rents to consumers. PC Rental Agent, when installed on a rented computer, enables Aspen Way to disable the computer remotely. Aspen Way disables the computer when it is reported lost or stolen, or when a consumer is late making payments, has stopped communicating with Aspen Way, or has otherwise violated the rental contract. PC Rental Agent also enables Aspen Way to remotely install and activate an add-on program called Detective Mode. Using Detective Mode, Aspen Way can surreptitiously monitor the activities of the computer's user, including by using the computer's webcam. Through Detective Mode, Aspen Way can also secretly gather consumers' personal information using fake software registration windows.

4. Aspen Way installs PC Rental Agent on computers it rents to consumers prior to the consumer taking possession of the computer. The presence of PC Rental Agent is not detectible to a computer's user and the computer's renter cannot uninstall it.

5. Aspen Way can remotely install and activate Detective Mode on any computer with PC Rental Agent. Once activated, Detective Mode can log the keystrokes of the computer user, take screen shots of the computer user's activities on the computer, and photograph anyone within view of the computer's webcam. Detective Mode gathers this information and transmits it to Aspen Way, unbeknownst to the individual using the computer. Aspen Way does not tell the computer user about the activation of Detective Mode.

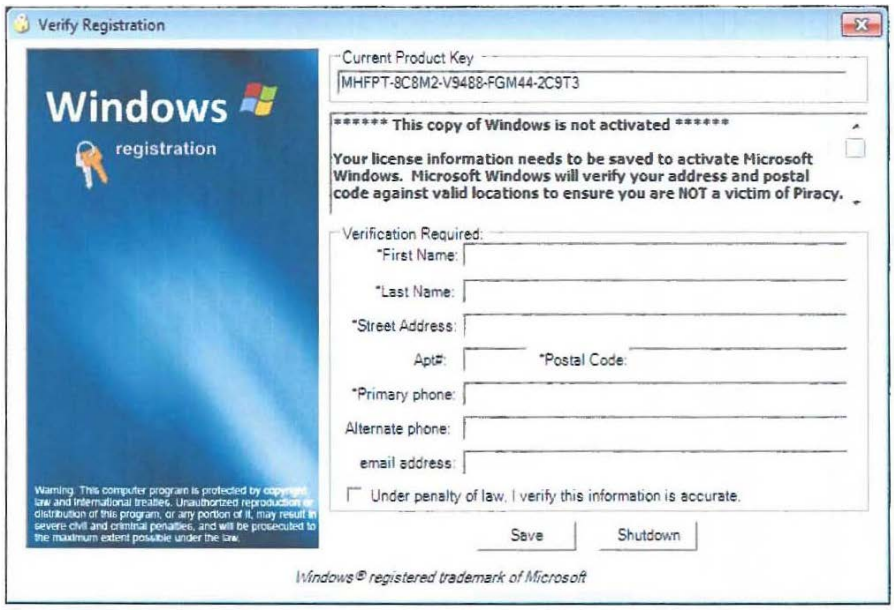
6. Using Detective Mode, Aspen Way gathers data about whoever is using the computer, whether the user is the computer's renter or another individual. At one level of activation, Detective Mode will gather data every two minutes while the computer is connected to the Internet for a period of 60 minutes. If Aspen Way wants more information, it can instruct Detective Mode to record data every two minutes until directed to stop doing so. In numerous instances, Aspen Way has obtained data via Detective Mode that has revealed private, confidential, and personal details about the computer user. Keystroke logs have displayed usernames and passwords for access to email accounts, social media websites, and financial institutions. Screenshots have captured additional confidential details, including medical records, private emails to doctors, employment applications containing Social Security numbers, bank and credit card statements, and discussions of defense strategies in a pending lawsuit. Webcam pictures have photographed not only the computer's user, but also anyone else within view of the camera. In numerous instances, Aspen Way has obtained pictures taken secretly inside the computer user's home. These have included images of minor children and individuals not fully clothed.

7. Aspen Way uses the information improperly obtained via Detective Mode in connection with collecting or attempting to collect debts, money, or property pursuant to consumer rental contracts.

8. Aspen Way's gathering of private and confidential information about individuals causes or is likely to cause substantial harm to consumers. Because of Aspen Way's intrusion, consumers are at risk of harm from exposure of their personal, financial account access, and medical information. Consumers are actually harmed by Aspen Way's unwarranted invasion into their homes and lives, and its capture of the private details of individual and family life, including, for example, images of visitors, minor children, family interactions, and partially undressed individuals. Secretly collecting such data can cause consumers financial and physical injury and impair their peaceful enjoyment of their homes. Consumers cannot reasonably avoid these injuries because Detective Mode is invisible to them. The harm caused by Aspen Way's unauthorized gathering of

confidential consumer information is not outweighed by countervailing benefits to consumers or to competition; indeed, in this context, where rent-to-own stores have alternate effective methods of collection, e.g., using PC Rental Agent to remotely disable the computer, there are no legitimate benefits to respondent or to the public.

9. Aspen Way has also used another feature of Detective Mode that allows it to cause a user's computer to display a fake registration window, purportedly for Microsoft Windows or other software. The fake registration window prompts the computer user to enter a name, address, email address, and phone number. The computer user must enter the requested information to close the window. A screenshot of one such fake software registration window appears below.



10. No actual software is registered as a result of a consumer providing the requested information; instead, Detective Mode captures the information entered in the prompt boxes and sends the data to Aspen Way. In numerous instances, Aspen Way has used this information to find, require payment for, or repossess a computer.

11. Consumers who respond to the fake prompt screen and provide the requested contact information are deprived of the ability to control who has access to their contact information and how they are contacted.

VIOLATIONS OF THE FTC ACT

Count I
Unfair Gathering of Consumers' Personal Information

12. Through the means described in Paragraphs 3 through 11, respondent has installed monitoring software on rented computers and gathered, or caused to be gathered, sensitive personal, financial, and medical information about consumers from those computers.

13. Respondent's actions cause or are likely to cause substantial injury to consumers that cannot be reasonably avoided and is not outweighed by countervailing benefits to consumers or competition.

14. Therefore, respondent's practices, as described in Paragraph 12, constitute unfair acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a).

Count II
Unfair Collection Practices

15. Through the means described in Paragraphs 3 through 11, respondent has used information improperly gathered from consumers to collect or attempt to collect a debt, money, or property pursuant to a consumer rental contract.

16. Respondent's actions cause or are likely to cause substantial injury to consumers that cannot be reasonably avoided and is not outweighed by countervailing benefits to consumers or competition.

17. Therefore, respondent's practices, as described in Paragraph 15, constitute unfair acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a).

Count III
Deceptive Gathering of Consumers' Personal Information

18. Through the means described in Paragraphs 3 through 11, respondent has represented or caused to be represented to consumers, expressly or by implication, that certain pop-up notices that appear on computer screens are notices from trusted software providers that contain software registration forms that must be filled out with the consumers' contact information in order to continue to use the providers' software.

19. In truth and in fact, these pop-up notices are not from trusted software providers and do not contain software registration forms that must be filled out with the consumers' contact information in order to continue to use the providers' software, but instead serve only to cause the consumer to provide the requested contact information so that respondent can use this information in connection with collecting or attempting to collect debts, money, or property pursuant to consumer rental contracts.

20. Therefore, respondent's practices, as described in Paragraph 18, constitute deceptive acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a).

THEREFORE, the Federal Trade Commission this eleventh day of April, 2013, has issued this complaint against respondent.

By the Commission, Commissioner Wright not participating.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft complaint

that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act, 15 U.S.C § 45 *et seq.*; and

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

The Commission having thereafter considered the matter and having determined that it has reason to believe that the respondent has violated the 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 Aspen Way Enterprises, Inc. ("Aspen Way"), is a Montana corporation with its principal office or place of business at 2702 Montana Ave., Suite 202, Billings, Montana 59101.

2. The 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:

1. Unless otherwise specified, "respondent" shall mean Aspen Way and its successors and assigns.

2. "Commerce" shall be defined as it is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

3. "Computer" shall mean any desktop or laptop computer, handheld device, tablet, telephone, or other electronic product or device that has a platform on which to download, install, or run any software program, code, script, or other content.

4. "Clear(ly) and prominent(ly)" shall mean:

   a. 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;

   b. 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;

   c. In communications disseminated through video means (e.g., television or streaming video), the required disclosures are in writing in a form 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;

d. In communications made through interactive media, such as the Internet, online services, and software, the required disclosures are unavoidable and presented in a form consistent with subpart (a) of this definition, in addition to any audio or video presentation of them; and

e. In all instances, the required disclosures are presented in an understandable language and syntax; in the same language as the predominant language that is used in the communication; and 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.

5. "Geophysical location tracking technology" shall mean any hardware, software, or application utilized in conjunction with a computer that collects and reports data or information that identifies the precise geophysical location of the computer. Geophysical location tracking technologies include, for these purposes, technologies that report: the GPS coordinates of a computer; the WiFi signals available to or actually used by a computer to access the Internet; the telecommunication towers or connections available to or actually used by a computer; the processing of any such reported data through geolocation lookup services; or any information derived from any combination of the foregoing.

6. "Monitoring technology" shall mean any hardware, software, or application utilized in conjunction with a computer that can cause the computer to (1) capture, monitor, or record, and (2) report information about user activities by:

a. Recording keystrokes, clicks, or other user-generated actions;

b. Capturing screenshots of the information displayed on a computer monitor or screen; or

c. Activating the camera or microphone function of a computer to take photographs or record audio or visual content through the computer's webcam or microphone.

7. "Covered rent-to-own transaction" shall mean any transaction where a consumer enters into an agreement for the purchase or rental of a computer and the consumer's contract or rental agreement provides for payments over time and an option to purchase the computer.

I.
MONITORING TECHNOLOGY PROHIBITED

IT IS HEREBY ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, in connection with any covered rent-to-own transaction, are hereby permanently restrained and enjoined from using any monitoring technology to gather information or data from any computer rented to a consumer.

II.
USE OF TRACKING TECHNOLOGY LIMITED

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, in connection with any covered rent-to-own transaction, are hereby permanently restrained and enjoined from:

A. Gathering any information or data from any computer via any geophysical location tracking technology without providing clear and prominent notice to the computer user at the time the computer is rented and immediately prior to each use of the geophysical location tracking technology, and also obtaining affirmative express consent from the computer's renter at the time the computer is rented;

B. Installing or activating on rented computers geophysical location tracking technology where that technology does not provide clear and prominent notice to the computer user immediately prior to each use of the geophysical location tracking technology; and

C. Failing to provide clear and prominent notice to computer users and obtaining affirmative express consent from computer renters, as required in subpart A, above, by the following means:

1. Clear and Prominent Notice: respondent shall provide a clear and prominent notice to the user, separate and apart from any "privacy policy," "data use policy," "terms of service," "end-user license agreement," "lease agreement," or other similar document, that discloses (1) that geophysical location tracking technology is installed and/or currently running on the computer; (2) the types of user activity or conduct that is being captured by such technology; (3) the identities or specific categories of entities with whom any data or information that is collected will be shared or otherwise provided; (4) the purpose(s) for the collection, use, or sharing of such data or information; and (5) where and how the user can contact someone for additional information.

2. Affirmative Express Consent: respondent shall obtain affirmative express consent by giving the

computer renter an equally clear and prominent choice to either agree or not agree to any geophysical location tracking technology, and neither option may be highlighted or preselected as a default setting. Activation of any geophysical location tracking technology must not proceed until the computer's renter provides affirmative express consent. Notwithstanding the foregoing, nothing in this Part shall require respondent to rent a computer to a user who declines to consent to installation or activation of any geophysical tracking technology.

3. Icons: respondent shall provide that the activation of any geophysical location tracking technology be accompanied by the installation of a clear and prominent icon on the computer on which the technology is installed, such as on the desktop and in the desktop system tray of the computer. Clicking on the icon must clearly and prominently disclose: (1) that geophysical location tracking technology is installed and currently running on the computer; (2) the types of user activity or conduct that is being captured by such technology; (3) the identities or specific categories of entities with whom any data or information that is collected will be shared or otherwise provided; (4) the purpose(s) for the collection, use, or sharing of such data or information; and (5) where and how the user can contact someone for additional information.

Provided that respondent may suspend the notice requirements of this Part and activate geophysical location tracking technology if a) the renter reports that the computer has been stolen or respondent otherwise has a reasonable basis to believe that the computer has been stolen, and b) either the renter or respondent has filed a police report stating that the computer has been stolen. Provided further that respondent shall retain documents establishing (a) and (b). For purposes of this Order, "filing of a police report" means the filing of the renter's or respondent's

complaint with the police department in any form recognized in the jurisdiction.

III.
NO DECEPTIVE GATHERING OF CONSUMER INFORMATION

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, in connection with any covered rent-to-own transaction, are hereby permanently restrained and enjoined from making or causing to be made any false representation or depiction in any notice, prompt screen, or other software application appearing on the screen of any computer that results in gathering information from or about a consumer, including without limitation location information.

IV.
NO USE OF IMPROPERLY OBTAINED INFORMATION IN COLLECTIONS

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, are hereby permanently restrained and enjoined from using, in connection with collecting or attempting to collect a debt, money, or property pursuant to a covered rent-to-own transaction, any information or data obtained in a manner that does not comply with Parts I, II, and III of this Order.

V.
PROTECTION OF DATA

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, shall:

A. Delete or destroy all user data previously gathered using any monitoring or geophysical location tracking technology that does not comply with Parts I, II, and III of this Order, unless such action is otherwise prohibited by court order or other legal obligation; and

B. Transfer data or information gathered by any monitoring or geophysical location tracking technology from the computer upon which the technology is installed to respondent's server(s), and from the respondent's server(s) to any other computers or servers only if the information collected is rendered unreadable, unusable, or indecipherable during transmission.

VI.
NO MISREPRESENTATIONS ABOUT PRIVACY

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, in connection with any covered rent-to-own transaction shall not misrepresent, in any manner, expressly or by implication, the extent to which respondent maintains and protects the security, privacy, or confidentiality of any personal information collected from or about consumers.

VII.
DISTRIBUTION OF ORDER

IT IS FURTHER ORDERED that respondent must deliver a copy of this order to all current and future principals, officers, directors, and managers who have responsibilities related to the subject matter of this order. Delivery must occur within seven days after the date of service of the order for current personnel. For new personnel, delivery must occur before they assume their responsibilities. From each individual to whom respondent delivers a copy of this Order, respondent must obtain a signed and dated acknowledgment of receipt of this Order, with any electronic signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq*.

VIII.
COMPLIANCE REPORTING

IT IS FURTHER ORDERED that:

A. Respondent, and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Commission may require, file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which they have complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondent shall submit additional true and accurate written reports.

B. Respondent, 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 related entity 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, the respondent shall notify the Commission as soon as is practicable after obtaining such knowledge.

C. 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 for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line Aspen Way Enterprises, Inc., File No. 1123151. *Provided, however*; that, in lieu of overnight courier, notices may be sent by first class mail, but only if an electronic version of each such notice is contemporaneously sent to the Commission at DEbrief@ftc.gov.

IX.
RECORDKEEPING

IT IS FURTHER ORDERED that respondent shall, for five (5) years after the last date of any act or practice covered by Parts I – VI of this Order, maintain and upon reasonable notice make available to the Federal Trade Commission for inspection and copying, any documents, whether prepared by or on behalf of respondent, that:

A. Comprise or relate to complaints or inquiries, whether received directly, indirectly, or through any third party, concerning any monitoring or geophysical tracking technologies sold, licensed, or otherwise provided to any third party, and any responses to those complaints or inquiries;

B. Are reasonably necessary to demonstrate full compliance with each provision of this order, including but not limited to, all documents obtained, created, generated, or which in any way relate to the requirements, provisions, or terms of this order, and all

reports submitted to the Commission pursuant to this order;

C. Contradict, qualify, or call into question respondent's compliance with this order; or

D. Acknowledge receipt of this order obtained pursuant to Part VII.

X.
TERMINATION OF ORDER

This Order will terminate on April 11, 2033, 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 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, Commissioner Wright not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission" or "FTC") has accepted, subject to final approval, consent agreements from the following respondents: DesignerWare, LLC; Timothy Kelly, and Ronald P. Koller, individually and as officers of DesignerWare, LLC; Aspen Way Enterprises, Inc.; Watershed Development Corp.; Showplace, Inc., d/b/a Showplace Rent-to-Own; J.A.G. Rents, LLC, d/b/a ColorTyme; Red Zone, Inc., d/b/a ColorTyme;

B. Stamper Enterprises, Inc., d/b/a Premier Rental Purchase; and C.A.L.M. Ventures, Inc., d/b/a Premier Rental Purchase.

The proposed consent orders have 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 agreements and the comments received, and will decide whether it should withdraw from any of the agreements and take appropriate action or make final the agreements' proposed orders.

Timothy Kelly and Ronald Koller founded and co-owned DesignerWare, LLC, a small software company that designed and licenses a single product, PC Rental Agent. Mr. Koller ended his association with DesignerWare in March 2012. PC Rental Agent is exclusively marketed to rent-to-own ("RTO") stores. RTO stores rent to consumers a variety of household items, including personal computers. PC Rental Agent is designed to assist RTO stores in tracking and recovering rented computers. Its chief function is a "kill switch," a program that can be used by a store to render a computer inoperable if the consumer renter is late or defaults on payments or if the computer is stolen. PC Rental Agent also offers a wiping feature that permits RTO stores to quickly erase the hard drives of computers prior to re-renting them to consumers.

Through PC Rental Agent, which RTO store licensees installed on rented computers, DesignerWare also provided access to "Detective Mode." Detective Mode was a software application embedded in the PC Rental Agent program. At the request of an

RTO store, DesignerWare would remotely complete the Detective Mode installation process on an individual computer and activate "the Detective." Detective Mode would surreptitiously log the computer user's keystrokes, capture screenshots, and take pictures with the computer's webcam and send the data to DesignerWare's servers. Neither DesignerWare nor the RTO stores who have used Detective Mode disclosed to computer users that they were being monitored in this manner. Although DesignerWare recommended that Detective Mode be installed and activated only to locate and identify the person in possession of a lost or stolen computer, DesignerWare did not monitor its own collection of or limit RTO stores' access to Detective Mode information to ensure that the information was obtained and used only for designated purposes.

DesignerWare sent the information captured by Detective Mode to an email account designated by each RTO store. Although DesignerWare's employees did not themselves view Detective Mode data, without DesignerWare licensing PC Rental Agent and making Detective Mode available to the RTO stores, as well as providing them with access to its web portal and providing servers to support both PC Rental Agent and Detective Mode, this collection and disclosure of consumers' private information would not be possible.

RTO stores also used Detective Mode to send fake "software registration" forms to consumers to deceive them into providing their contact and location information. DesignerWare created several different fake registration forms that its servers displayed on consumers' computers. An RTO store could use this feature of Detective Mode by requesting that DesignerWare activate it. No actual software was registered as a result of a consumer providing the requested information. Rather, Detective Mode captured the information entered in the prompt boxes and sent it to DesignerWare, who then emailed the data to the RTO store, all unbeknownst to the consumer. DesignerWare discontinued use of Detective Mode in January 2012.

In September 2011, DesignerWare added another feature to PC Rental Agent: the capacity to track the physical location of rented computers via WiFi hotspot locations. The information

derived from WiFi hotspot contacts can frequently pinpoint a computer's location to a single building and, when aggregated, can track the movements and patterns of individual computer users over time. DesignerWare makes this information easily available to the RTO stores by cross-referencing a list of publicly available WiFi hotspots with the street addresses for the particular hotspots viewed or accessed by rented computers. DesignerWare applied its location tracking upgrade of PC Rental Agent to every computer on which PC Rental Agent was installed, without obtaining consent from, or providing notice to, the computers' renters. DesignerWare recommends that RTO stores only use this tracking data in connection with recovering stolen property, but it does not monitor or limit the RTO stores' access to such location information.

Aspen Way Enterprises, Watershed Development, Showplace, J.A.G. Rents, Red Zone, B. Stamper Enterprises, and C.A.L.M. Ventures are RTO stores that have licensed PC Rental Agent from DesignerWare. These RTO stores have used information transmitted by DesignerWare when attempting to collect from computer renters who are late in paying or have otherwise breached their rental contracts. Using Detective Mode, these RTO stores have received from DesignerWare webcam photos of computer users (and anyone else within view of the camera), computer users' keystrokes, and screenshots of their computer activities. This information has revealed private and confidential details about computer users, such as their passwords for access to email accounts, social media websites, and financial institutions. Other confidential information was also captured, including medical records, private emails to doctors, employment applications containing Social Security numbers, bank and credit card statements, and discussions of defense strategies in a pending lawsuit. Through Detective Mode, DesignerWare and the RTO stores also secretly photographed the private conduct of consumers in their homes. This included pictures of children, household visitors, individuals not fully clothed, and couples engaged in intimate activities.

The collection and disclosure of such private and confidential information about consumers causes or is likely to cause substantial injury to consumers. Consumers are likely to be substantially injured by the exposure to strangers of personal,

financial account access, and medical information. Consumers are actually harmed by DesignerWare's unwarranted invasion into their homes and lives and its capture and disclosure of the private details of individual and family life, including, for example, images of visitors, children, family interactions, partially undressed individuals, and couples engaged in sexual activities. Sharing data like that collected by Detective Mode with third parties can cause consumers financial and physical injury, and impair their peaceful enjoyment of their homes. Because Detective Mode functions secretly, consumers cannot reasonably avoid this harm, which is neither trivial nor speculative. Moreover, there are no countervailing benefits to consumers or competition for continued use of Detective Mode in this context, where RTO stores have effective alternative methods for collections.

DesignerWare also sent consumers' contact information to the RTO stores. DesignerWare gathered this information from computer users who completed the deceptive "software registration" forms sent through Detective Mode. The RTO stores used this information to find, require payment for, or repossess a rented computer.

The Commission's complaint against DesignerWare, Kelly, and Koller (collectively, "DesignerWare Respondents") alleges that the company and its principals engaged in unfair and deceptive conduct and provided the means and instrumentalities to engage in unfairness, all in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The first count of the complaint focuses on actions taken by DesignerWare that caused or was likely to cause substantial injury to consumers. Count I alleges that the DesignerWare Respondents engaged in unfair conduct by installing monitoring software on rented computers, gathering personal, financial, and health information about consumers from computers, and disclosing that information to RTO store licensees. Count I also alleges as unfair the DesignerWare Respondents' installation of geophysical location tracking software on rented computers without consent from the computer renters, the tracking of computers' geophysical locations without notice to computer users, and the disclosure of that information to the RTO stores.

Count II alleges that the DesignerWare Respondents provided the means to third parties – the RTO stores – to violate Section 5. The first part of the count charges the DesignerWare Respondents with providing RTO stores with the means and instrumentalities to engage in unfairness by furnishing them with software that could monitor consumers by recording their keystrokes, capturing screenshots of information displayed on a computer, and taking pictures of the computer user, and further could track the geophysical location data of rented computers without the consent of the computer renter or notice to the computer user. The second part of Count II alleges that the DesignerWare Respondents provided the means and instrumentalities to RTO stores to engage in unfair collection practices by providing them with the data gathered via PC Rental Agent and Detective Mode. Count II focuses on actions taken by DesignerWare that were integral to the harm to consumers caused or likely to be caused by the RTO stores. Here, without PC Rental Agent and Detective Mode and without access to DesignerWare's servers to execute their commands to rented computers, collect consumers' confidential information and transmit it to them, the RTO stores could not unfairly monitor their computer renters or use improperly gathered information in connection with collections.

Count III of the complaint charges the DesignerWare Respondents with deceptively gathering – and disclosing – consumers' personal information collected from the fake software registration forms that Detective Mode caused to appear on consumers' rented computers.

Each of the Commission's complaints against the seven RTO stores contains substantially similar allegations regarding the stores' violations of the FTC Act. The complaints charge that the RTO stores unfairly gathered consumers' personal information by installing monitoring software on rented computers and engaged in unfair collection practices by using the improperly gathered information to collect on consumer rental contracts. The complaints further allege that the RTO stores deceptively gathered consumers' personal information by activating the Detective Mode feature that sends the fake software registration forms to consumers' rented computers.

Analysis to Aid Public Comment

The proposed orders contain strong injunctive relief designed to remedy the unlawful conduct by DesignerWare, its principals, and the RTO stores. The orders define "monitoring technology and geophysical location tracking technology" so that the technological applications covered by the order are clearly described. "Monitoring technology" means any hardware, software, or application utilized in conjunction with a computer that can cause the computer to (1) capture, monitor, or record, and (2) report information about user activities by recording keystrokes, clicks, or other user-generated actions; capturing screenshots of the information displayed on a computer monitor or screen; or activating the camera or microphone function of a computer to take photographs or record audio or visual content through the computer's webcam or microphone. The definition of "geophysical location tracking" includes the reporting of GPS coordinates, WiFi hotspots, or telecommunications towers – all technologies that allow for a relatively precise location of the item tracked. In addition, a "covered rent-to-own transaction" is defined as one in which a consumer agrees to purchase or rent a computer, where the rental agreement provides for payments over time and an option to purchase the computer.

The proposed orders with DesignerWare and its principals, Kelly and Koller, are separate, but contain identical injunctive provisions. Section I of the proposed orders with DesignerWare and its principals bans them from using – as well as licensing, selling, or otherwise providing third parties with – monitoring technology in connection with any covered RTO transaction. Section II prohibits them from using geophysical location tracking technology to gather information from any computer without providing clear and prominent notice to and obtaining affirmative express consent from the computer's renter at the time the computer is rented. This section also requires clear and prominent notice to computer users immediately prior to each time tracking technology is activated. In addition, Section II mandates that DesignerWare and its principals require their licensees to obtain consent and provide notice prior to initiating any location tracking. However, DesignerWare and its principals do not need to provide notice to a computer user prior to activating geophysical location tracking technology if 1) there is a

reasonable basis to believe that the computer has been stolen and 2) a police report has been filed.

Section III of the proposed orders with DesignerWare and its principals prohibits the deceptive collection of consumer information via fake software registration notices. Section IV requires that any data that was collected through any monitoring or tracking software without the requisite notice and consent be destroyed and that any properly collected data be encrypted when transmitted. Section V bars DesignerWare and its principals from making misrepresentations about the privacy or security of any personal information gathered from or about consumers.

Sections VI through IX of both orders contain reporting and compliance provisions. Section VI of the proposed DesignerWare order requires the company to disseminate the order now and in the future to all current and future principals, officers, directors, and managers, and to persons with responsibilities relating to the subject matter of the order. This section also requires DesignerWare to secure a signed and dated statement acknowledging receipt of the order from all persons who receive a copy. Section VII requires DesignerWare to submit compliance reports to the Commission within sixty (60) days, and periodically thereafter as requested. It also requires the company to notify the Commission of changes in DesignerWare's corporate status.

Section VI of the proposed order with the DesignerWare principals requires respondents to distribute it to all current and future principals, officers, directors, and managers of any company that either respondent controls that engages in any covered RTO transaction as well as to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. It also requires the respondents to secure a signed and dated statement acknowledging receipt of the order from all persons who receive a copy. Section VII of the proposed order with the DesignerWare principals requires them to submit compliance reports to the Commission within sixty (60) days, and periodically thereafter as requested. In addition, this section requires them to notify the Commission of changes in their business or employment for three (3) years.

Analysis to Aid Public Comment

Under Section VIII of the proposed orders with both DesignerWare and its principals, respondents must retain documents relating to their compliance with the order for a five (5) year period. Finally, Section IX of both proposed orders is a provision "sunsetting" the orders after twenty (20) years, with certain exceptions.

The proposed orders against the RTO stores (which are identical to each other) contain similar injunctive provisions to those in the proposed orders with DesignerWare and its principals. Section I of each of the proposed orders bans the RTO stores from using monitoring technology in connection with any covered RTO transaction. Section II prohibits the stores from using geophysical location tracking technology to gather information from any computer without providing clear and prominent notice to the computer's renter and obtaining affirmative express consent from the computer's renter at the time the computer is rented. This section also requires clear and prominent notice to a computer user immediately prior to each time such technology is activated. The proposed RTO store orders also suspend the notice requirement if 1) there is a reasonable basis to believe that the computer has been stolen and 2) a police report has been filed. Section III of each of the proposed orders prohibits the deceptive collection of consumer information via fake software registration notices.

Section IV bars the stores from collecting or attempting to collect a debt, money, or property pursuant to a consumer rental contract by using any information or data that was improperly obtained from a computer by monitoring technology. Section V requires that any data collected through any monitoring or tracking software without the requisite notice and consent be destroyed, and that any properly collected data be encrypted when transmitted. As fencing in, Section VI bars misrepresentations about the privacy or security of any personal information gathered from or about consumers.

Sections VII through X of the proposed RTO store orders contain reporting and compliance provisions. Section VII requires distribution of the order now and in the future to all current and future principals, officers, directors, and managers,

and to persons with responsibilities relating to the subject matter of the order. It also requires the RTO stores to secure signed and dated statements acknowledging receipt of the order from all persons who receive a copy of the order. Section VIII requires the RTO stores to submit compliance reports to the Commission within sixty (60) days, and periodically thereafter as requested, and ensures notification to the Commission of changes in corporate status. Under Section IX, the RTO stores must retain documents relating to order compliance for a five (5) year period. Finally, Section X is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed orders. It is not intended to constitute an official interpretation of the proposed complaints or orders or to modify the terms of the orders in any way.

Complaint

IN THE MATTER OF

B. STAMPER ENTERPRISES, INC., D/B/A PREMIER RENTAL PURCHASE

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

Docket No. C-4393; File No. 112 3151
Complaint, April 11, 2013 – Decision, April 11, 2013

This consent order relates to unfair practices and privacy violations by B. Stamper Enterprises, Inc. ("B. Stamper") in its use of a software program known as PC Rental Agent and an add-on application called Detective Mode in its rent-to-own computers. B. Stamper is a rent-to-own store operator located in Indiana that licensed PC Rental Agent and Detective Mode from DesignerWare, LLC. The complaint alleges B. Stamper violated Section 5 of the FTC Act by installing PC Rental Agent and Detective Mode on its rental computers without consumers' knowledge or consent and by using these programs to gather consumers' confidential personal information, including passwords, usernames, Social Security numbers, and credit card information. The complaint further alleges that B. Stamper engaged in unfair collection practices by using Detective Mode to display a fake registration screen on a user's computer to find, require payment for, or repossess a computer. The consent order requires B. Stamper to cease all use, license, and sale of monitoring and tracking technology in connection with its rent-to-own transactions.

Participants

For the *Commission*: *Julie K. Mayer* and *Tracy S. Thorleifson.*

For the *Respondent*: *Paul J. Bruno, Paul J. Bruno Law Office*.

COMPLAINT

The Federal Trade Commission, having reason to believe that B. Stamper Enterprises, Inc., also d/b/a Premier Rental Purchase, 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 B. Stamper Enterprises, Inc., also d/b/a Premier Rental Purchase ("B. Stamper Enterprises" or "respondent"), is a Kentucky corporation with its principal office

or place of business at 608 West 7th Street, Russellville, Kentucky 42276. B. Stamper Enterprises is a franchisee of Premier Rental-Purchase, Inc., and operates a rent-to-own store in Indiana. Rent-to-own stores allow consumers to rent, with an option to purchase, goods such as furniture, household appliances, and consumer electronics including computers.

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

RESPONDENT'S BUSINESS PRACTICES

3. Since at least November 2008, B. Stamper Enterprises has licensed a software product known as PC Rental Agent from DesignerWare, LLC ("DesignerWare") and installed it on computers it rents to consumers. PC Rental Agent, when installed on a rented computer, enables B. Stamper Enterprises to disable the computer remotely. B. Stamper Enterprises disables the computer when it is reported lost or stolen, or when a consumer is late making payments, has stopped communicating with B. Stamper Enterprises, or has otherwise violated the rental contract. PC Rental Agent also enables B. Stamper Enterprises to remotely install and activate an add-on program called Detective Mode. Using Detective Mode, B. Stamper Enterprises can surreptitiously monitor the activities of the computer's user, including by using the computer's webcam. Through Detective Mode, B. Stamper Enterprises can also secretly gather consumer's personal information using fake software registration windows.

4. B. Stamper Enterprises installs PC Rental Agent on computers it rents to consumers prior to the consumer taking possession of the computer. The presence of PC Rental Agent is not detectible to a computer's user and the computer's renter cannot uninstall it.

5. B. Stamper Enterprises can remotely install and activate Detective Mode on any computer with PC Rental Agent. Once activated, Detective Mode can log the keystrokes of the computer user, take screen shots of the computer user's activities on the computer, and photograph anyone within view of the computer's webcam. Detective Mode gathers this information and transmits

it to B. Stamper Enterprises, unbeknownst to the individual using the computer. B. Stamper Enterprises does not tell the computer user about the activation of Detective Mode.

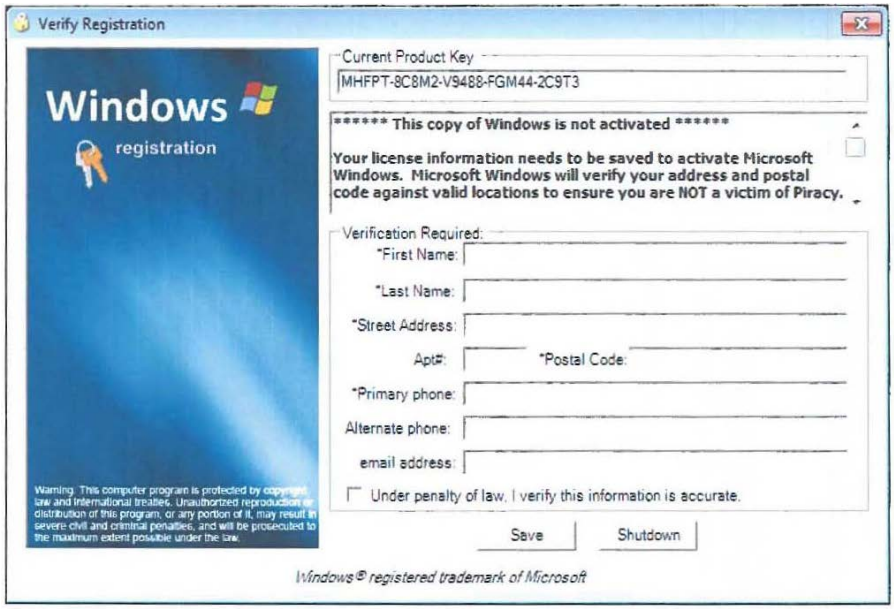
6. Using Detective Mode, B. Stamper Enterprises has gathered data about whoever is using the computer, whether the user is the computer's renter or another individual. At one level of activation, Detective Mode will gather data every two minutes that the computer is connected to the Internet for a period of 60 minutes. If B. Stamper Enterprises wants more information, it can instruct Detective Mode to record data every two minutes until directed to stop doing so. Data gathered via Detective Mode can reveal private, confidential, and personal details about the computer user, including usernames and passwords for access to email accounts, social media websites, and financial institutions, medical records, private emails to doctors, employment applications containing Social Security numbers, and bank and credit card statements. In numerous instances, B. Stamper Enterprises has obtained data via Detective Mode that has revealed private, confidential, or personal information about the computer user.

7. B. Stamper Enterprises has used the information improperly obtained via Detective Mode in connection with collecting or attempting to collect debts, money, or property pursuant to consumer rental contracts.

8. B. Stamper Enterprises' gathering of private and confidential information about individuals causes or is likely to cause substantial harm to consumers. Because of B. Stamper Enterprises' intrusion, consumers are at risk of harm from exposure of their personal, financial account access, and medical information. Consumers are actually harmed by B. Stamper Enterprises' unwarranted invasion into their homes and lives, and its capture of the private details of individual and family life. Secretly collecting such data can cause consumers financial and physical injury and impair their peaceful enjoyment of their homes. Consumers cannot reasonably avoid these injuries because Detective Mode is invisible to them. The harm caused by B. Stamper Enterprises' unauthorized gathering of confidential consumer information is not outweighed by countervailing

benefits to consumers or to competition; indeed, in this context, where rent-to-own stores have alternate effective methods of collection, e.g., using PC Rental Agent to remotely disable the computer, there are no legitimate benefits to respondent or to the public.

9. B. Stamper Enterprises has also used another feature of Detective Mode that allows it to cause a user's computer to display a fake registration window, purportedly for Microsoft Windows or other software. The fake registration window prompts the computer user to enter a name, address, email address, and phone number. The computer user must enter the requested information to close the window. A screenshot of one such fake software registration window appears below.



10. No actual software is registered as a result of a consumer providing the requested information; instead, Detective Mode captures the information entered in the prompt boxes and sends the data to B. Stamper Enterprises. In numerous instances, B. Stamper Enterprises has used this information to find, require payment for, or repossess a computer.

11. Consumers who respond to the fake prompt screen and provide the requested contact information are deprived of the

ability to control who has access to their contact information and how they are contacted.

VIOLATIONS OF THE FTC ACT

Count I
Unfair Gathering of Consumers' Personal Information

12. Through the means described in Paragraphs 3 through 11, respondent has installed monitoring software on rented computers and gathered, or caused to be gathered, sensitive personal information about consumers from those computers.

13. Respondent's actions cause or are likely to cause substantial injury to consumers that cannot be reasonably avoided and is not outweighed by countervailing benefits to consumers or competition.

14. Therefore, respondent's practices, as described in Paragraph 12, constitute unfair acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a).

Count II
Unfair Collection Practices

15. Through the means described in Paragraphs 3 through 11, respondent has used information improperly gathered from consumers to collect or attempt to collect a debt, money, or property pursuant to a consumer rental contract.

16. Respondent's actions cause or are likely to cause substantial injury to consumers that cannot be reasonably avoided and is not outweighed by countervailing benefits to consumers or competition.

17. Therefore, respondent's practices, as described in Paragraph15, constitute unfair acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a).

Count III
Deceptive Gathering of Consumers' Personal Information

18. Through the means described in Paragraphs 3 through 11, respondent has represented or caused to be represented to consumers, expressly or by implication, that certain pop-up notices that appear on a computer's screen are notices from trusted software providers that contain software registration forms that must be filled out with the consumers' contact information in order to continue to use the providers' software.

19. In truth and in fact, these pop-up notices are not from trusted software providers and do not contain software registration forms that must be filled out with the consumer's contact information in order to continue to use the providers' software, but instead serve only to cause the consumer to provide the requested contact information so that respondent can use this information in connection with collecting or attempting to collect debts, money, or property pursuant to consumer rental contracts.

20. Therefore, respondent's practices, as described in Paragraph 18, constitute deceptive acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a).

THEREFORE, the Federal Trade Commission this eleventh day of April, 2013, has issued this complaint against respondent.

By the Commission, Commissioner Wright not participating.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it has reason to believe that the respondent has violated the 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. B. Stamper Enterprises, Inc., also d/b/a Premier Rental Purchase ("B. Stamper Enterprises"), is a Kentucky corporation with its principal office or place of business at 608 West 7th Street, Russellville, Kentucky 42276.

2. The 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:

1. Unless otherwise specified, "respondent" shall mean B. Stamper Enterprises and its successors and assigns.

2. "Commerce" shall be defined as it is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

3. "Computer" shall mean any desktop or laptop computer, handheld device, tablet, telephone, or other electronic product or device that has a platform on which to download, install, or run any software program, code, script, or other content.

4. "Clear(ly) and prominent(ly)" shall mean:

   a. 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;

   b. 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;

   c. In communications disseminated through video means (e.g., television or streaming video), the required disclosures are in writing in a form 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;

d. In communications made through interactive media, such as the Internet, online services, and software, the required disclosures are unavoidable and presented in a form consistent with subpart (a) of this definition, in addition to any audio or video presentation of them; and

e. In all instances, the required disclosures are presented in an understandable language and syntax; in the same language as the predominant language that is used in the communication; and 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.

5. "Geophysical location tracking technology" shall mean any hardware, software, or application utilized in conjunction with a computer that collects and reports data or information that identifies the precise geophysical location of the computer. Geophysical location tracking technologies include, for these purposes, technologies that report: the GPS coordinates of a computer; the WiFi signals available to or actually used by a computer to access the Internet; the telecommunication towers or connections available to or actually used by a computer; the processing of any such reported data through geolocation lookup services; or any information derived from any combination of the foregoing.

6. "Monitoring technology" shall mean any hardware, software, or application utilized in conjunction with a computer that can cause the computer to (1) capture, monitor, or record, and (2) report information about user activities by:

a. Recording keystrokes, clicks, or other user-generated actions;

b. Capturing screenshots of the information displayed on a computer monitor or screen; or

c. Activating the camera or microphone function of a computer to take photographs or record audio or visual content through the computer's webcam or microphone.

7. "Covered rent-to-own transaction" shall mean any transaction where a consumer enters into an agreement for the purchase or rental of a computer and the consumer's contract or rental agreement provides for payments over time and an option to purchase the computer.

I.
MONITORING TECHNOLOGY PROHIBITED

IT IS HEREBY ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, in connection with any covered rent-to-own transaction, are hereby permanently restrained and enjoined from using any monitoring technology to gather information or data from any computer rented to a consumer.

II.
USE OF TRACKING TECHNOLOGY LIMITED

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, in connection with any covered rent-to-own transaction, are hereby permanently restrained and enjoined from:

A. Gathering any information or data from any computer via any geophysical location tracking technology without providing clear and prominent notice to the computer user at the time the computer is rented and immediately prior to each use of the geophysical location tracking technology, and also obtaining affirmative express consent from the computer's renter at the time the computer is rented;

B. Installing or activating on rented computers geophysical location tracking technology where that technology does not provide clear and prominent notice to the computer user immediately prior to each use of the geophysical location tracking technology; and

C. Failing to provide clear and prominent notice to computer users and obtaining affirmative express consent from computer renters, as required in subpart A, above, by the following means:

1. Clear and Prominent Notice: respondent shall provide a clear and prominent notice to the user, separate and apart from any "privacy policy," "data use policy," "terms of service," "end-user license agreement," "lease agreement," or other similar document, that discloses (1) that geophysical location tracking technology is installed and/or currently running on the computer; (2) the types of user activity or conduct that is being captured by such technology; (3) the identities or specific categories of entities with whom any data or information that is collected will be shared or otherwise provided; (4) the purpose(s) for the collection, use, or sharing of such data or information; and (5) where and how the user can contact someone for additional information.

2. Affirmative Express Consent: respondent shall obtain affirmative express consent by giving the

computer renter an equally clear and prominent choice to either agree or not agree to any geophysical location tracking technology, and neither option may be highlighted or preselected as a default setting. Activation of any geophysical location tracking technology must not proceed until the computer's renter provides affirmative express consent. Notwithstanding the foregoing, nothing in this Part shall require respondent to rent a computer to a user who declines to consent to installation or activation of any geophysical tracking technology.

3. Icons: respondent shall provide that the activation of any geophysical location tracking technology be accompanied by the installation of a clear and prominent icon on the computer on which the technology is installed, such as on the desktop and in the desktop system tray of the computer. Clicking on the icon must clearly and prominently disclose: (1) that geophysical location tracking technology is installed and currently running on the computer; (2) the types of user activity or conduct that is being captured by such technology; (3) the identities or specific categories of entities with whom any data or information that is collected will be shared or otherwise provided; (4) the purpose(s) for the collection, use, or sharing of such data or information; and (5) where and how the user can contact someone for additional information.

Provided that respondent may suspend the notice requirements of this Part and activate geophysical location tracking technology if a) the renter reports that the computer has been stolen or respondent otherwise has a reasonable basis to believe that the computer has been stolen, and b) either the renter or respondent has filed a police report stating that the computer has been stolen. Provided further that respondent shall retain documents establishing (a) and (b). For purposes of this Order, "filing of a police report" means the filing of the renter's or respondent's

complaint with the police department in any form recognized in the jurisdiction.

III.
NO DECEPTIVE GATHERING OF CONSUMER INFORMATION

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, in connection with any covered rent-to-own transaction, are hereby permanently restrained and enjoined from making or causing to be made any false representation or depiction in any notice, prompt screen, or other software application appearing on the screen of any computer that results in gathering information from or about a consumer, including without limitation location information.

IV.
NO USE OF IMPROPERLY OBTAINED INFORMATION IN COLLECTIONS

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, are hereby permanently restrained and enjoined from using, in connection with collecting or attempting to collect a debt, money, or property pursuant to a covered rent-to-own transaction, any information or data obtained in a manner that does not comply with Parts I, II, and III of this Order.

V.
PROTECTION OF DATA

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, shall:

A. Delete or destroy all user data previously gathered using any monitoring or geophysical location tracking technology that does not comply with Parts I, II, and III of this Order; and

B. Transfer data or information gathered by any monitoring or geophysical location tracking technology from the computer upon which the technology is installed to respondent's server(s), and from the respondent's server(s) to any other computers or servers only if the information collected is rendered unreadable, unusable, or indecipherable during transmission.

VI.
NO MISREPRESENTATIONS ABOUT PRIVACY

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, in connection with any covered rent-to-own transaction shall not misrepresent, in any manner, expressly or by implication, the extent to which respondent maintains and protects the security, privacy, or confidentiality of any personal information collected from or about consumers.

VII.
DISTRIBUTION OF ORDER

IT IS FURTHER ORDERED that respondent must deliver a copy of this order to all current and future principals, officers, directors, and managers who have responsibilities related to the subject matter of this order. Delivery must occur within seven days after the date of service of the order for current personnel. For new personnel, delivery must occur before they assume their responsibilities. From each individual to whom respondent delivers a copy of this Order, respondent must obtain a signed and dated acknowledgment of receipt of this Order, with any electronic signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq*.

VIII.
COMPLIANCE REPORTING

IT IS FURTHER ORDERED that:

A. Respondent, and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Commission may require, file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which they have complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondent shall submit additional true and accurate written reports.

B. Respondent, 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 related entity 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, the respondent shall notify the Commission as soon as is practicable after obtaining such knowledge.

C. 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 for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line B. Stamper Enterprises, Inc., File No. 1123151. *Provided, however*; that, in lieu of overnight courier, notices may be sent by first class mail, but only if an electronic version of each such notice is contemporaneously sent to the Commission at DEbrief@ftc.gov.

IX.
RECORDKEEPING

IT IS FURTHER ORDERED that respondent shall, for five (5) years after the last date of any act or practice covered by Parts I – VI of this Order, maintain and upon reasonable notice make available to the Federal Trade Commission for inspection and copying, any documents, whether prepared by or on behalf of respondent, that:

A. Comprise or relate to complaints or inquiries, whether received directly, indirectly, or through any third party, concerning any monitoring or geophysical tracking technologies sold, licensed, or otherwise provided to any third party, and any responses to those complaints or inquiries;

B. Are reasonably necessary to demonstrate full compliance with each provision of this order, including but not limited to, all documents obtained, created, generated, or which in any way relate to the requirements, provisions, or terms of this order, and all

reports submitted to the Commission pursuant to this order; and

C. Contradict, qualify, or call into question respondent's compliance with this order; or

D. Acknowledge receipt of this order obtained pursuant to Part VII.

X.
TERMINATION OF ORDER

This Order will terminate on April 11, 2033, 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 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, Commissioner Wright not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission" or "FTC") has accepted, subject to final approval, consent agreements from the following respondents: DesignerWare, LLC; Timothy Kelly, and Ronald P. Koller, individually and as officers of DesignerWare, LLC; Aspen Way Enterprises, Inc.; Watershed Development Corp.; Showplace, Inc., d/b/a Showplace Rent-to-Own; J.A.G. Rents, LLC, d/b/a ColorTyme; Red Zone, Inc., d/b/a ColorTyme;

B. Stamper Enterprises, Inc., d/b/a Premier Rental Purchase; and C.A.L.M. Ventures, Inc., d/b/a Premier Rental Purchase.

The proposed consent orders have 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 agreements and the comments received, and will decide whether it should withdraw from any of the agreements and take appropriate action or make final the agreements' proposed orders.

Timothy Kelly and Ronald Koller founded and co-owned DesignerWare, LLC, a small software company that designed and licenses a single product, PC Rental Agent. Mr. Koller ended his association with DesignerWare in March 2012. PC Rental Agent is exclusively marketed to rent-to-own ("RTO") stores. RTO stores rent to consumers a variety of household items, including personal computers. PC Rental Agent is designed to assist RTO stores in tracking and recovering rented computers. Its chief function is a "kill switch," a program that can be used by a store to render a computer inoperable if the consumer renter is late or defaults on payments or if the computer is stolen. PC Rental Agent also offers a wiping feature that permits RTO stores to quickly erase the hard drives of computers prior to re-renting them to consumers.

Through PC Rental Agent, which RTO store licensees installed on rented computers, DesignerWare also provided access to "Detective Mode." Detective Mode was a software application embedded in the PC Rental Agent program. At the request of an

RTO store, DesignerWare would remotely complete the Detective Mode installation process on an individual computer and activate "the Detective." Detective Mode would surreptitiously log the computer user's keystrokes, capture screenshots, and take pictures with the computer's webcam and send the data to DesignerWare's servers. Neither DesignerWare nor the RTO stores who have used Detective Mode disclosed to computer users that they were being monitored in this manner. Although DesignerWare recommended that Detective Mode be installed and activated only to locate and identify the person in possession of a lost or stolen computer, DesignerWare did not monitor its own collection of or limit RTO stores' access to Detective Mode information to ensure that the information was obtained and used only for designated purposes.

DesignerWare sent the information captured by Detective Mode to an email account designated by each RTO store. Although DesignerWare's employees did not themselves view Detective Mode data, without DesignerWare licensing PC Rental Agent and making Detective Mode available to the RTO stores, as well as providing them with access to its web portal and providing servers to support both PC Rental Agent and Detective Mode, this collection and disclosure of consumers' private information would not be possible.

RTO stores also used Detective Mode to send fake "software registration" forms to consumers to deceive them into providing their contact and location information. DesignerWare created several different fake registration forms that its servers displayed on consumers' computers. An RTO store could use this feature of Detective Mode by requesting that DesignerWare activate it. No actual software was registered as a result of a consumer providing the requested information. Rather, Detective Mode captured the information entered in the prompt boxes and sent it to DesignerWare, who then emailed the data to the RTO store, all unbeknownst to the consumer. DesignerWare discontinued use of Detective Mode in January 2012.

In September 2011, DesignerWare added another feature to PC Rental Agent: the capacity to track the physical location of rented computers via WiFi hotspot locations. The information

derived from WiFi hotspot contacts can frequently pinpoint a computer's location to a single building and, when aggregated, can track the movements and patterns of individual computer users over time. DesignerWare makes this information easily available to the RTO stores by cross-referencing a list of publicly available WiFi hotspots with the street addresses for the particular hotspots viewed or accessed by rented computers. DesignerWare applied its location tracking upgrade of PC Rental Agent to every computer on which PC Rental Agent was installed, without obtaining consent from, or providing notice to, the computers' renters. DesignerWare recommends that RTO stores only use this tracking data in connection with recovering stolen property, but it does not monitor or limit the RTO stores' access to such location information.

Aspen Way Enterprises, Watershed Development, Showplace, J.A.G. Rents, Red Zone, B. Stamper Enterprises, and C.A.L.M. Ventures are RTO stores that have licensed PC Rental Agent from DesignerWare. These RTO stores have used information transmitted by DesignerWare when attempting to collect from computer renters who are late in paying or have otherwise breached their rental contracts. Using Detective Mode, these RTO stores have received from DesignerWare webcam photos of computer users (and anyone else within view of the camera), computer users' keystrokes, and screenshots of their computer activities. This information has revealed private and confidential details about computer users, such as their passwords for access to email accounts, social media websites, and financial institutions. Other confidential information was also captured, including medical records, private emails to doctors, employment applications containing Social Security numbers, bank and credit card statements, and discussions of defense strategies in a pending lawsuit. Through Detective Mode, DesignerWare and the RTO stores also secretly photographed the private conduct of consumers in their homes. This included pictures of children, household visitors, individuals not fully clothed, and couples engaged in intimate activities.

The collection and disclosure of such private and confidential information about consumers causes or is likely to cause substantial injury to consumers. Consumers are likely to be substantially injured by the exposure to strangers of personal,

financial account access, and medical information. Consumers are actually harmed by DesignerWare's unwarranted invasion into their homes and lives and its capture and disclosure of the private details of individual and family life, including, for example, images of visitors, children, family interactions, partially undressed individuals, and couples engaged in sexual activities. Sharing data like that collected by Detective Mode with third parties can cause consumers financial and physical injury, and impair their peaceful enjoyment of their homes. Because Detective Mode functions secretly, consumers cannot reasonably avoid this harm, which is neither trivial nor speculative. Moreover, there are no countervailing benefits to consumers or competition for continued use of Detective Mode in this context, where RTO stores have effective alternative methods for collections.

DesignerWare also sent consumers' contact information to the RTO stores. DesignerWare gathered this information from computer users who completed the deceptive "software registration" forms sent through Detective Mode. The RTO stores used this information to find, require payment for, or repossess a rented computer.

The Commission's complaint against DesignerWare, Kelly, and Koller (collectively, "DesignerWare Respondents") alleges that the company and its principals engaged in unfair and deceptive conduct and provided the means and instrumentalities to engage in unfairness, all in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The first count of the complaint focuses on actions taken by DesignerWare that caused or was likely to cause substantial injury to consumers. Count I alleges that the DesignerWare Respondents engaged in unfair conduct by installing monitoring software on rented computers, gathering personal, financial, and health information about consumers from computers, and disclosing that information to RTO store licensees. Count I also alleges as unfair the DesignerWare Respondents' installation of geophysical location tracking software on rented computers without consent from the computer renters, the tracking of computers' geophysical locations without notice to computer users, and the disclosure of that information to the RTO stores.

Count II alleges that the DesignerWare Respondents provided the means to third parties – the RTO stores – to violate Section 5. The first part of the count charges the DesignerWare Respondents with providing RTO stores with the means and instrumentalities to engage in unfairness by furnishing them with software that could monitor consumers by recording their keystrokes, capturing screenshots of information displayed on a computer, and taking pictures of the computer user, and further could track the geophysical location data of rented computers without the consent of the computer renter or notice to the computer user. The second part of Count II alleges that the DesignerWare Respondents provided the means and instrumentalities to RTO stores to engage in unfair collection practices by providing them with the data gathered via PC Rental Agent and Detective Mode. Count II focuses on actions taken by DesignerWare that were integral to the harm to consumers caused or likely to be caused by the RTO stores. Here, without PC Rental Agent and Detective Mode and without access to DesignerWare's servers to execute their commands to rented computers, collect consumers' confidential information and transmit it to them, the RTO stores could not unfairly monitor their computer renters or use improperly gathered information in connection with collections.

Count III of the complaint charges the DesignerWare Respondents with deceptively gathering – and disclosing – consumers' personal information collected from the fake software registration forms that Detective Mode caused to appear on consumers' rented computers.

Each of the Commission's complaints against the seven RTO stores contains substantially similar allegations regarding the stores' violations of the FTC Act. The complaints charge that the RTO stores unfairly gathered consumers' personal information by installing monitoring software on rented computers and engaged in unfair collection practices by using the improperly gathered information to collect on consumer rental contracts. The complaints further allege that the RTO stores deceptively gathered consumers' personal information by activating the Detective Mode feature that sends the fake software registration forms to consumers' rented computers.

Analysis to Aid Public Comment

The proposed orders contain strong injunctive relief designed to remedy the unlawful conduct by DesignerWare, its principals, and the RTO stores. The orders define "monitoring technology and geophysical location tracking technology" so that the technological applications covered by the order are clearly described. "Monitoring technology" means any hardware, software, or application utilized in conjunction with a computer that can cause the computer to (1) capture, monitor, or record, and (2) report information about user activities by recording keystrokes, clicks, or other user-generated actions; capturing screenshots of the information displayed on a computer monitor or screen; or activating the camera or microphone function of a computer to take photographs or record audio or visual content through the computer's webcam or microphone. The definition of "geophysical location tracking" includes the reporting of GPS coordinates, WiFi hotspots, or telecommunications towers – all technologies that allow for a relatively precise location of the item tracked. In addition, a "covered rent-to-own transaction" is defined as one in which a consumer agrees to purchase or rent a computer, where the rental agreement provides for payments over time and an option to purchase the computer.

The proposed orders with DesignerWare and its principals, Kelly and Koller, are separate, but contain identical injunctive provisions. Section I of the proposed orders with DesignerWare and its principals bans them from using – as well as licensing, selling, or otherwise providing third parties with – monitoring technology in connection with any covered RTO transaction. Section II prohibits them from using geophysical location tracking technology to gather information from any computer without providing clear and prominent notice to and obtaining affirmative express consent from the computer's renter at the time the computer is rented. This section also requires clear and prominent notice to computer users immediately prior to each time tracking technology is activated. In addition, Section II mandates that DesignerWare and its principals require their licensees to obtain consent and provide notice prior to initiating any location tracking. However, DesignerWare and its principals do not need to provide notice to a computer user prior to activating geophysical location tracking technology if 1) there is a

reasonable basis to believe that the computer has been stolen and 2) a police report has been filed.

Section III of the proposed orders with DesignerWare and its principals prohibits the deceptive collection of consumer information via fake software registration notices. Section IV requires that any data that was collected through any monitoring or tracking software without the requisite notice and consent be destroyed and that any properly collected data be encrypted when transmitted. Section V bars DesignerWare and its principals from making misrepresentations about the privacy or security of any personal information gathered from or about consumers.

Sections VI through IX of both orders contain reporting and compliance provisions. Section VI of the proposed DesignerWare order requires the company to disseminate the order now and in the future to all current and future principals, officers, directors, and managers, and to persons with responsibilities relating to the subject matter of the order. This section also requires DesignerWare to secure a signed and dated statement acknowledging receipt of the order from all persons who receive a copy. Section VII requires DesignerWare to submit compliance reports to the Commission within sixty (60) days, and periodically thereafter as requested. It also requires the company to notify the Commission of changes in DesignerWare's corporate status.

Section VI of the proposed order with the DesignerWare principals requires respondents to distribute it to all current and future principals, officers, directors, and managers of any company that either respondent controls that engages in any covered RTO transaction as well as to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. It also requires the respondents to secure a signed and dated statement acknowledging receipt of the order from all persons who receive a copy. Section VII of the proposed order with the DesignerWare principals requires them to submit compliance reports to the Commission within sixty (60) days, and periodically thereafter as requested. In addition, this section requires them to notify the Commission of changes in their business or employment for three (3) years.

Analysis to Aid Public Comment

Under Section VIII of the proposed orders with both DesignerWare and its principals, respondents must retain documents relating to their compliance with the order for a five (5) year period. Finally, Section IX of both proposed orders is a provision "sunsetting" the orders after twenty (20) years, with certain exceptions.

The proposed orders against the RTO stores (which are identical to each other) contain similar injunctive provisions to those in the proposed orders with DesignerWare and its principals. Section I of each of the proposed orders bans the RTO stores from using monitoring technology in connection with any covered RTO transaction. Section II prohibits the stores from using geophysical location tracking technology to gather information from any computer without providing clear and prominent notice to the computer's renter and obtaining affirmative express consent from the computer's renter at the time the computer is rented. This section also requires clear and prominent notice to a computer user immediately prior to each time such technology is activated. The proposed RTO store orders also suspend the notice requirement if 1) there is a reasonable basis to believe that the computer has been stolen and 2) a police report has been filed. Section III of each of the proposed orders prohibits the deceptive collection of consumer information via fake software registration notices.

Section IV bars the stores from collecting or attempting to collect a debt, money, or property pursuant to a consumer rental contract by using any information or data that was improperly obtained from a computer by monitoring technology. Section V requires that any data collected through any monitoring or tracking software without the requisite notice and consent be destroyed, and that any properly collected data be encrypted when transmitted. As fencing in, Section VI bars misrepresentations about the privacy or security of any personal information gathered from or about consumers.

Sections VII through X of the proposed RTO store orders contain reporting and compliance provisions. Section VII requires distribution of the order now and in the future to all current and future principals, officers, directors, and managers,

and to persons with responsibilities relating to the subject matter of the order. It also requires the RTO stores to secure signed and dated statements acknowledging receipt of the order from all persons who receive a copy of the order. Section VIII requires the RTO stores to submit compliance reports to the Commission within sixty (60) days, and periodically thereafter as requested, and ensures notification to the Commission of changes in corporate status. Under Section IX, the RTO stores must retain documents relating to order compliance for a five (5) year period. Finally, Section X is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed orders. It is not intended to constitute an official interpretation of the proposed complaints or orders or to modify the terms of the orders in any way.

Complaint

IN THE MATTER OF

C.A.L.M. VENTURES, INC., D/B/A PREMIER RENTAL PURCHASE

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

Docket No. C-4394; File No. 112 3151
Complaint, April 11, 2013 – Decision, April 11, 2013

This consent order relates to unfair practices and privacy violations by C.A.L.M. Ventures ("CALM") in its use of a software program known as PC Rental Agent and an add-on application called Detective Mode in its rent-to-own computers. CALM is a rent-to-own store operator located in Tennessee that licensed PC Rental Agent and Detective Mode from DesignerWare, LLC. The complaint alleges CALM violated Section 5 of the FTC Act by installing PC Rental Agent and Detective Mode on its rental computers without consumers' knowledge or consent and by using these programs to gather consumers' confidential personal information, including passwords, usernames, Social Security numbers, and credit card information. The complaint further alleges that CALM engaged in unfair collection practices by using Detective Mode to display a fake registration screen on a user's computer to find, require payment for, or repossess a computer. The consent order requires CALM to cease all use, license, and sale of monitoring and tracking technology in connection with its rent-to-own transactions.

Participants

For the *Commission*: *Julie K. Mayer* and *Tracy S. Thorleifson.*

For the *Respondent*: *Paul J. Bruno, Paul J. Bruno Law Office*.

COMPLAINT

The Federal Trade Commission, having reason to believe that C.A.L.M. Ventures, Inc., also d/b/a Premier Rental Purchase, 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 C.A.L.M. Ventures, Inc., also d/b/a Premier Rental Purchase ("C.A.L.M. Ventures" or "respondent"), is a Tennessee corporation with its principal office or place of

business at 8428 Rolling Hills Drive, Nashville, Tennessee 37221. C.A.L.M. Ventures is a franchisee of Premier Rental-Purchase, Inc., and operates a rent-to-own store in Tennessee. Rent-to-own stores allow consumers to rent, with an option to purchase, goods such as furniture, household appliances, and consumer electronics including computers.

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

RESPONDENT'S BUSINESS PRACTICES

3. Since at least November 2009, C.A.L.M. Ventures has licensed a software product known as PC Rental Agent from DesignerWare, LLC ("DesignerWare") and installed it on computers it rents to consumers. PC Rental Agent, when installed on a rented computer, enables C.A.L.M. Ventures to disable the computer remotely. C.A.L.M. Ventures disables the computer when it is reported lost or stolen, or when a consumer is late making payments, has stopped communicating with C.A.L.M. Ventures, or has otherwise violated the rental contract. PC Rental Agent also enables C.A.L.M. Ventures to remotely install and activate an add-on program called Detective Mode. Using Detective Mode, C.A.L.M. Ventures can surreptitiously monitor the activities of the computer's user, including by using the computer's webcam. Through Detective Mode, C.A.L.M. Ventures can also secretly gather consumer's personal information using fake software registration windows.

4. C.A.L.M. Ventures installs PC Rental Agent on computers it rents to consumers prior to the consumer taking possession of the computer. The presence of PC Rental Agent is not detectible to a computer's user and the computer's renter cannot uninstall it.

5. C.A.L.M. Ventures can remotely install and activate Detective Mode on any computer with PC Rental Agent. Once activated, Detective Mode can log the keystrokes of the computer user, take screen shots of the computer user's activities on the computer, and photograph anyone within view of the computer's webcam. Detective Mode gathers this information and transmits it to C.A.L.M. Ventures, unbeknownst to the individual using the

computer. C.A.L.M. Ventures does not tell the computer user about the activation of Detective Mode.

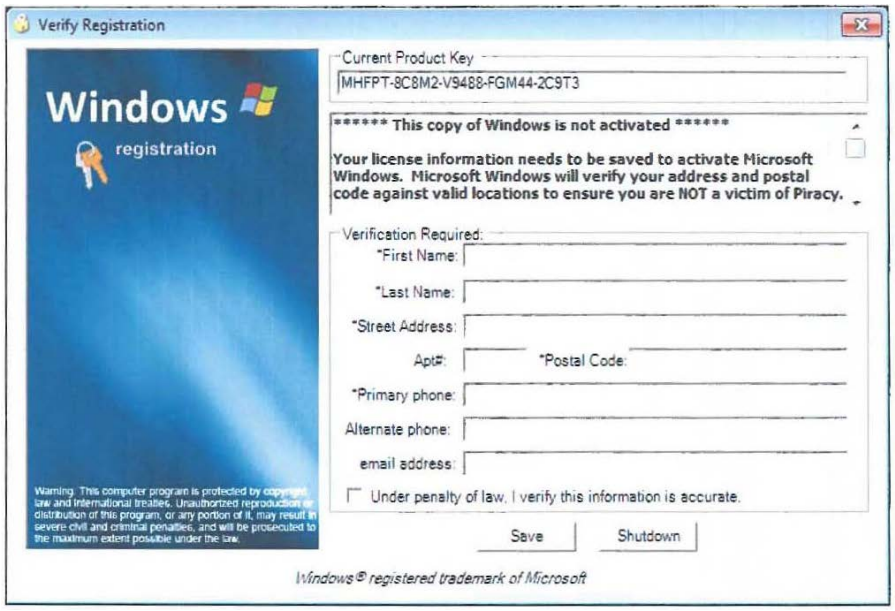
6. Using Detective Mode, C.A.L.M. Ventures has gathered data about whoever is using the computer, whether the user is the computer's renter or another individual. At one level of activation, Detective Mode will gather data every two minutes that the computer is connected to the Internet for a period of 60 minutes. If C.A.L.M. Ventures wants more information, it can instruct Detective Mode to record data every two minutes until directed to stop doing so. In numerous instances, C.A.L.M. Ventures has obtained data via Detective Mode that has revealed private, confidential, and personal details about the computer user. Keystroke logs have displayed usernames and passwords for access to email accounts, social media websites, and financial institutions and screenshots have captured additional confidential information. Webcam pictures have photographed not only the computer's user, but also anyone else within view of the camera. In numerous instances, C.A.L.M. Ventures has obtained pictures taken secretly inside the computer user's home.

7. C.A.L.M. Ventures has used the information improperly obtained via Detective Mode in connection with collecting or attempting to collect debts, money, or property pursuant to consumer rental contracts.

8. C.A.L.M. Ventures' gathering of private and confidential information about individuals causes or is likely to cause substantial harm to consumers. Because of C.A.L.M. Ventures' intrusion, consumers are at risk of harm from exposure of their personal, financial account access, and medical information. Consumers are actually harmed by C.A.L.M. Ventures' unwarranted invasion into their homes and lives, and its capture of the private details of individual and family life. Secretly collecting such data can cause consumers financial and physical injury and impair their peaceful enjoyment of their homes. Consumers cannot reasonably avoid these injuries because Detective Mode is invisible to them. The harm caused by C.A.L.M. Ventures' unauthorized gathering of confidential consumer information is not outweighed by countervailing benefits to consumers or to competition; indeed, in this context,

where rent-to-own stores have alternate effective methods of collection, e.g., using PC Rental Agent to remotely disable the computer, there are no legitimate benefits to respondent or to the public.

9. C.A.L.M. Ventures has also used another feature of Detective Mode that allows it to cause a user's computer to display a fake registration window, purportedly for Microsoft Windows or other software. The fake registration window prompts the computer user to enter a name, address, email address, and phone number. The computer user must enter the requested information to close the window. A screenshot of one such fake software registration window appears below.



10. No actual software is registered as a result of a consumer providing the requested information; instead, Detective Mode captures the information entered in the prompt boxes and sends the data to C.A.L.M. Ventures. In numerous instances, C.A.L.M. Ventures has used this information to find, require payment for, or repossess a computer.

11. Consumers who respond to the fake prompt screen and provide the requested contact information are deprived of the

ability to control who has access to their contact information and how they are contacted.

VIOLATIONS OF THE FTC ACT

Count I
Unfair Gathering of Consumers' Personal Information

12. Through the means described in Paragraphs 3 through 11, respondent has installed monitoring software on rented computers and gathered, or caused to be gathered, sensitive personal information about consumers from those computers.

13. Respondent's actions cause or are likely to cause substantial injury to consumers that cannot be reasonably avoided and is not outweighed by countervailing benefits to consumers or competition.

14. Therefore, respondent's practices, as described in Paragraph 12, constitute unfair acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a).

Count II
Unfair Collection Practices

15. Through the means described in Paragraphs 3 through 11, respondent has used information improperly gathered from consumers to collect or attempt to collect a debt, money, or property pursuant to a consumer rental contract.

16. Respondent's actions cause or are likely to cause substantial injury to consumers that cannot be reasonably avoided and is not outweighed by countervailing benefits to consumers or competition.

17. Therefore, respondent's practices, as described in Paragraph15, constitute unfair acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a).

Count III
Deceptive Gathering of Consumers' Personal Information

18. Through the means described in Paragraphs 3 through 11, respondent has represented or caused to be represented to consumers, expressly or by implication, that certain pop-up notices that appear on a computer's screen are notices from trusted software providers that contain software registration forms that must be filled out with the consumers' contact information in order to continue to use the providers' software.

19. In truth and in fact, these pop-up notices are not from trusted software providers and do not contain software registration forms that must be filled out with the consumer's contact information in order to continue to use the providers' software, but instead serve only to cause the consumer to provide the requested contact information so that respondent can use this information in connection with collecting or attempting to collect debts, money, or property pursuant to consumer rental contracts.

20. Therefore, respondent's practices, as described in Paragraph 18, constitute deceptive acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a).

THEREFORE, the Federal Trade Commission this eleventh day of April, 2013, has issued this complaint against respondent.

By the Commission, Commissioner Wright not participating.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft complaint that the Bureau of Consumer Protection proposed to present to the

Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act, 15 U.S.C § 45 *et seq*.; and

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

The Commission having thereafter considered the matter and having determined that it has reason to believe that the respondent has violated the 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. C.A.L.M. Ventures, Inc., also d/b/a Premier Rental Purchase ("C.A.L.M. Ventures"), is a Tennessee corporation with its principal office or place of business at 8428 Rolling Hills Drive, Nashville, Tennessee 37221.

2. The 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:

1. Unless otherwise specified, "respondent" shall mean C.A.L.M. Ventures and its successors and assigns.

2. "Commerce" shall be defined as it is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

3. "Computer" shall mean any desktop or laptop computer, handheld device, tablet, telephone, or other electronic product or device that has a platform on which to download, install, or run any software program, code, script, or other content.

4. "Clear(ly) and prominent(ly)" shall mean:

   a. 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;

   b. 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;

   c. In communications disseminated through video means (e.g., television or streaming video), the required disclosures are in writing in a form 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;

d. In communications made through interactive media, such as the Internet, online services, and software, the required disclosures are unavoidable and presented in a form consistent with subpart (a) of this definition, in addition to any audio or video presentation of them; and

e. In all instances, the required disclosures are presented in an understandable language and syntax; in the same language as the predominant language that is used in the communication; and 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.

5. "Geophysical location tracking technology" shall mean any hardware, software, or application utilized in conjunction with a computer that collects and reports data or information that identifies the precise geophysical location of the computer. Geophysical location tracking technologies include, for these purposes, technologies that report: the GPS coordinates of a computer; the WiFi signals available to or actually used by a computer to access the Internet; the telecommunication towers or connections available to or actually used by a computer; the processing of any such reported data through geolocation lookup services; or any information derived from any combination of the foregoing.

6. "Monitoring technology" shall mean any hardware, software, or application utilized in conjunction with a computer that can cause the computer to (1) capture, monitor, or record, and (2) report information about user activities by:

a. Recording keystrokes, clicks, or other user-generated actions;

b. Capturing screenshots of the information displayed on a computer monitor or screen; or

c. Activating the camera or microphone function of a computer to take photographs or record audio or visual content through the computer's webcam or microphone.

7. "Covered rent-to-own transaction" shall mean any transaction where a consumer enters into an agreement for the purchase or rental of a computer and the consumer's contract or rental agreement provides for payments over time and an option to purchase the computer.

III.
MONITORING TECHNOLOGY PROHIBITED

IT IS HEREBY ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, in connection with any covered rent-to-own transaction, are hereby permanently restrained and enjoined from using any monitoring technology to gather information or data from any computer rented to a consumer.

IV.
USE OF TRACKING TECHNOLOGY LIMITED

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, in connection with any covered rent-to-own transaction, are hereby permanently restrained and enjoined from:

A. Gathering any information or data from any computer via any geophysical location tracking technology without providing clear and prominent notice to the computer user at the time the computer is rented and immediately prior to each use of the geophysical location tracking technology, and also obtaining affirmative express consent from the computer's renter at the time the computer is rented;

B. Installing or activating on rented computers geophysical location tracking technology where that technology does not provide clear and prominent notice to the computer user immediately prior to each use of the geophysical location tracking technology; and

C. Failing to provide clear and prominent notice to computer users and obtaining affirmative express consent from computer renters, as required in subpart A, above, by the following means:

1. Clear and Prominent Notice: respondent shall provide a clear and prominent notice to the user, separate and apart from any "privacy policy," "data use policy," "terms of service," "end-user license agreement," "lease agreement," or other similar document, that discloses (1) that geophysical location tracking technology is installed and/or currently running on the computer; (2) the types of user activity or conduct that is being captured by such technology; (3) the identities or specific categories of entities with whom any data or information that is collected will be shared or otherwise provided; (4) the purpose(s) for the collection, use, or sharing of such data or information; and (5) where and how the user can contact someone for additional information.

2. Affirmative Express Consent: respondent shall obtain affirmative express consent by giving the

computer renter an equally clear and prominent choice to either agree or not agree to any geophysical location tracking technology, and neither option may be highlighted or preselected as a default setting. Activation of any geophysical location tracking technology must not proceed until the computer's renter provides affirmative express consent. Notwithstanding the foregoing, nothing in this Part shall require respondent to rent a computer to a user who declines to consent to installation or activation of any geophysical tracking technology.

3. Icons: respondent shall provide that the activation of any geophysical location tracking technology be accompanied by the installation of a clear and prominent icon on the computer on which the technology is installed, such as on the desktop and in the desktop system tray of the computer. Clicking on the icon must clearly and prominently disclose: (1) that geophysical location tracking technology is installed and currently running on the computer; (2) the types of user activity or conduct that is being captured by such technology; (3) the identities or specific categories of entities with whom any data or information that is collected will be shared or otherwise provided; (4) the purpose(s) for the collection, use, or sharing of such data or information; and (5) where and how the user can contact someone for additional information.

Provided that respondent may suspend the notice requirements of this Part and activate geophysical location tracking technology if a) the renter reports that the computer has been stolen or respondent otherwise has a reasonable basis to believe that the computer has been stolen, and b) either the renter or respondent has filed a police report stating that the computer has been stolen. Provided further that respondent shall retain documents establishing (a) and (b). For purposes of this Order, "filing of a police report" means the filing of the renter's or respondent's

complaint with the police department in any form recognized in the jurisdiction.

V.
NO DECEPTIVE GATHERING OF CONSUMER INFORMATION

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, in connection with any covered rent-to-own transaction, are hereby permanently restrained and enjoined from making or causing to be made any false representation or depiction in any notice, prompt screen, or other software application appearing on the screen of any computer that results in gathering information from or about a consumer, including without limitation location information.

VI.
NO USE OF IMPROPERLY OBTAINED INFORMATION IN COLLECTIONS

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, are hereby permanently restrained and enjoined from using, in connection with collecting or attempting to collect a debt, money, or property pursuant to a covered rent-to-own transaction, any information or data obtained in a manner that does not comply with Parts I, II, and III of this Order.

VII.
PROTECTION OF DATA

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade

name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, shall:

A. Delete or destroy all user data previously gathered using any monitoring or geophysical location tracking technology that does not comply with Parts I, II, and III of this Order; and

B. Transfer data or information gathered by any monitoring or geophysical location tracking technology from the computer upon which the technology is installed to respondent's server(s), and from the respondent's server(s) to any other computers or servers only if the information collected is rendered unreadable, unusable, or indecipherable during transmission.

VIII.
NO MISREPRESENTATIONS ABOUT PRIVACY

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, in connection with any covered rent-to-own transaction shall not misrepresent, in any manner, expressly or by implication, the extent to which respondent maintains and protects the security, privacy, or confidentiality of any personal information collected from or about consumers.

VII.
DISTRIBUTION OF ORDER

IT IS FURTHER ORDERED that respondent must deliver a copy of this order to all current and future principals, officers, directors, and managers who have responsibilities related to the subject matter of this order. Delivery must occur within seven days after the date of service of the order for current personnel. For new personnel, delivery must occur before they assume their responsibilities. From each individual to whom respondent delivers a copy of this Order, respondent must obtain a signed and dated acknowledgment of receipt of this Order, with any electronic signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq*.

VIII.
COMPLIANCE REPORTING

IT IS FURTHER ORDERED that:

A. Respondent, and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Commission may require, file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which they have complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondent shall submit additional true and accurate written reports.

B. Respondent, 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 related entity 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, the respondent shall notify the Commission as soon as is practicable after obtaining such knowledge.

C. 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 for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line C.A.L.M. Ventures, Inc., File No. 1123151. *Provided, however*; that, in lieu of overnight courier, notices may be sent by first class mail, but only if an electronic version of each such notice is contemporaneously sent to the Commission at DEbrief@ftc.gov.

IX.
RECORDKEEPING

IT IS FURTHER ORDERED that respondent shall, for five (5) years after the last date of any act or practice covered by Parts I – VI of this Order, maintain and upon reasonable notice make available to the Federal Trade Commission for inspection and copying, any documents, whether prepared by or on behalf of respondent, that:

A. Comprise or relate to complaints or inquiries, whether received directly, indirectly, or through any third party, concerning any monitoring or geophysical tracking technologies sold, licensed, or otherwise provided to any third party, and any responses to those complaints or inquiries;

B. Are reasonably necessary to demonstrate full compliance with each provision of this order, including but not limited to, all documents obtained, created, generated, or which in any way relate to the requirements, provisions, or terms of this order, and all

reports submitted to the Commission pursuant to this order;

C. Contradict, qualify, or call into question respondent's compliance with this order; or

D. Acknowledge receipt of this order obtained pursuant to Part VII.

X.
TERMINATION OF ORDER

This Order will terminate on April 11, 2033, 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 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, Commissioner Wright not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission" or "FTC") has accepted, subject to final approval, consent agreements from the following respondents: DesignerWare, LLC; Timothy Kelly, and Ronald P. Koller, individually and as officers of DesignerWare, LLC; Aspen Way Enterprises, Inc.; Watershed Development Corp.; Showplace, Inc., d/b/a Showplace Rent-to-Own; J.A.G. Rents, LLC, d/b/a ColorTyme; Red Zone, Inc., d/b/a ColorTyme; B. Stamper Enterprises, Inc., d/b/a Premier Rental Purchase; and C.A.L.M. Ventures, Inc., d/b/a Premier Rental Purchase.

The proposed consent orders have 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 agreements and the comments received, and will decide whether it should withdraw from any of the agreements and take appropriate action or make final the agreements' proposed orders.

Timothy Kelly and Ronald Koller founded and co-owned DesignerWare, LLC, a small software company that designed and licenses a single product, PC Rental Agent. Mr. Koller ended his association with DesignerWare in March 2012. PC Rental Agent is exclusively marketed to rent-to-own ("RTO") stores. RTO stores rent to consumers a variety of household items, including personal computers. PC Rental Agent is designed to assist RTO stores in tracking and recovering rented computers. Its chief function is a "kill switch," a program that can be used by a store to render a computer inoperable if the consumer renter is late or defaults on payments or if the computer is stolen. PC Rental Agent also offers a wiping feature that permits RTO stores to quickly erase the hard drives of computers prior to re-renting them to consumers.

Through PC Rental Agent, which RTO store licensees installed on rented computers, DesignerWare also provided access to "Detective Mode." Detective Mode was a software application embedded in the PC Rental Agent program. At the request of an

RTO store, DesignerWare would remotely complete the Detective Mode installation process on an individual computer and activate "the Detective." Detective Mode would surreptitiously log the computer user's keystrokes, capture screenshots, and take pictures with the computer's webcam and send the data to DesignerWare's servers. Neither DesignerWare nor the RTO stores who have used Detective Mode disclosed to computer users that they were being monitored in this manner. Although DesignerWare recommended that Detective Mode be installed and activated only to locate and identify the person in possession of a lost or stolen computer, DesignerWare did not monitor its own collection of or limit RTO stores' access to Detective Mode information to ensure that the information was obtained and used only for designated purposes.

DesignerWare sent the information captured by Detective Mode to an email account designated by each RTO store. Although DesignerWare's employees did not themselves view Detective Mode data, without DesignerWare licensing PC Rental Agent and making Detective Mode available to the RTO stores, as well as providing them with access to its web portal and providing servers to support both PC Rental Agent and Detective Mode, this collection and disclosure of consumers' private information would not be possible.

RTO stores also used Detective Mode to send fake "software registration" forms to consumers to deceive them into providing their contact and location information. DesignerWare created several different fake registration forms that its servers displayed on consumers' computers. An RTO store could use this feature of Detective Mode by requesting that DesignerWare activate it. No actual software was registered as a result of a consumer providing the requested information. Rather, Detective Mode captured the information entered in the prompt boxes and sent it to DesignerWare, who then emailed the data to the RTO store, all unbeknownst to the consumer. DesignerWare discontinued use of Detective Mode in January 2012.

In September 2011, DesignerWare added another feature to PC Rental Agent: the capacity to track the physical location of rented computers via WiFi hotspot locations. The information

derived from WiFi hotspot contacts can frequently pinpoint a computer's location to a single building and, when aggregated, can track the movements and patterns of individual computer users over time. DesignerWare makes this information easily available to the RTO stores by cross-referencing a list of publicly available WiFi hotspots with the street addresses for the particular hotspots viewed or accessed by rented computers. DesignerWare applied its location tracking upgrade of PC Rental Agent to every computer on which PC Rental Agent was installed, without obtaining consent from, or providing notice to, the computers' renters. DesignerWare recommends that RTO stores only use this tracking data in connection with recovering stolen property, but it does not monitor or limit the RTO stores' access to such location information.

Aspen Way Enterprises, Watershed Development, Showplace, J.A.G. Rents, Red Zone, B. Stamper Enterprises, and C.A.L.M. Ventures are RTO stores that have licensed PC Rental Agent from DesignerWare. These RTO stores have used information transmitted by DesignerWare when attempting to collect from computer renters who are late in paying or have otherwise breached their rental contracts. Using Detective Mode, these RTO stores have received from DesignerWare webcam photos of computer users (and anyone else within view of the camera), computer users' keystrokes, and screenshots of their computer activities. This information has revealed private and confidential details about computer users, such as their passwords for access to email accounts, social media websites, and financial institutions. Other confidential information was also captured, including medical records, private emails to doctors, employment applications containing Social Security numbers, bank and credit card statements, and discussions of defense strategies in a pending lawsuit. Through Detective Mode, DesignerWare and the RTO stores also secretly photographed the private conduct of consumers in their homes. This included pictures of children, household visitors, individuals not fully clothed, and couples engaged in intimate activities.

The collection and disclosure of such private and confidential information about consumers causes or is likely to cause substantial injury to consumers. Consumers are likely to be substantially injured by the exposure to strangers of personal,

financial account access, and medical information. Consumers are actually harmed by DesignerWare's unwarranted invasion into their homes and lives and its capture and disclosure of the private details of individual and family life, including, for example, images of visitors, children, family interactions, partially undressed individuals, and couples engaged in sexual activities. Sharing data like that collected by Detective Mode with third parties can cause consumers financial and physical injury, and impair their peaceful enjoyment of their homes. Because Detective Mode functions secretly, consumers cannot reasonably avoid this harm, which is neither trivial nor speculative. Moreover, there are no countervailing benefits to consumers or competition for continued use of Detective Mode in this context, where RTO stores have effective alternative methods for collections.

DesignerWare also sent consumers' contact information to the RTO stores. DesignerWare gathered this information from computer users who completed the deceptive "software registration" forms sent through Detective Mode. The RTO stores used this information to find, require payment for, or repossess a rented computer.

The Commission's complaint against DesignerWare, Kelly, and Koller (collectively, "DesignerWare Respondents") alleges that the company and its principals engaged in unfair and deceptive conduct and provided the means and instrumentalities to engage in unfairness, all in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The first count of the complaint focuses on actions taken by DesignerWare that caused or was likely to cause substantial injury to consumers. Count I alleges that the DesignerWare Respondents engaged in unfair conduct by installing monitoring software on rented computers, gathering personal, financial, and health information about consumers from computers, and disclosing that information to RTO store licensees. Count I also alleges as unfair the DesignerWare Respondents' installation of geophysical location tracking software on rented computers without consent from the computer renters, the tracking of computers' geophysical locations without notice to computer users, and the disclosure of that information to the RTO stores.

Count II alleges that the DesignerWare Respondents provided the means to third parties – the RTO stores – to violate Section 5. The first part of the count charges the DesignerWare Respondents with providing RTO stores with the means and instrumentalities to engage in unfairness by furnishing them with software that could monitor consumers by recording their keystrokes, capturing screenshots of information displayed on a computer, and taking pictures of the computer user, and further could track the geophysical location data of rented computers without the consent of the computer renter or notice to the computer user. The second part of Count II alleges that the DesignerWare Respondents provided the means and instrumentalities to RTO stores to engage in unfair collection practices by providing them with the data gathered via PC Rental Agent and Detective Mode. Count II focuses on actions taken by DesignerWare that were integral to the harm to consumers caused or likely to be caused by the RTO stores. Here, without PC Rental Agent and Detective Mode and without access to DesignerWare's servers to execute their commands to rented computers, collect consumers' confidential information and transmit it to them, the RTO stores could not unfairly monitor their computer renters or use improperly gathered information in connection with collections.

Count III of the complaint charges the DesignerWare Respondents with deceptively gathering – and disclosing – consumers' personal information collected from the fake software registration forms that Detective Mode caused to appear on consumers' rented computers.

Each of the Commission's complaints against the seven RTO stores contains substantially similar allegations regarding the stores' violations of the FTC Act. The complaints charge that the RTO stores unfairly gathered consumers' personal information by installing monitoring software on rented computers and engaged in unfair collection practices by using the improperly gathered information to collect on consumer rental contracts. The complaints further allege that the RTO stores deceptively gathered consumers' personal information by activating the Detective Mode feature that sends the fake software registration forms to consumers' rented computers.

Analysis to Aid Public Comment

The proposed orders contain strong injunctive relief designed to remedy the unlawful conduct by DesignerWare, its principals, and the RTO stores. The orders define "monitoring technology and geophysical location tracking technology" so that the technological applications covered by the order are clearly described. "Monitoring technology" means any hardware, software, or application utilized in conjunction with a computer that can cause the computer to (1) capture, monitor, or record, and (2) report information about user activities by recording keystrokes, clicks, or other user-generated actions; capturing screenshots of the information displayed on a computer monitor or screen; or activating the camera or microphone function of a computer to take photographs or record audio or visual content through the computer's webcam or microphone. The definition of "geophysical location tracking" includes the reporting of GPS coordinates, WiFi hotspots, or telecommunications towers – all technologies that allow for a relatively precise location of the item tracked. In addition, a "covered rent-to-own transaction" is defined as one in which a consumer agrees to purchase or rent a computer, where the rental agreement provides for payments over time and an option to purchase the computer.

The proposed orders with DesignerWare and its principals, Kelly and Koller, are separate, but contain identical injunctive provisions. Section I of the proposed orders with DesignerWare and its principals bans them from using – as well as licensing, selling, or otherwise providing third parties with – monitoring technology in connection with any covered RTO transaction. Section II prohibits them from using geophysical location tracking technology to gather information from any computer without providing clear and prominent notice to and obtaining affirmative express consent from the computer's renter at the time the computer is rented. This section also requires clear and prominent notice to computer users immediately prior to each time tracking technology is activated. In addition, Section II mandates that DesignerWare and its principals require their licensees to obtain consent and provide notice prior to initiating any location tracking. However, DesignerWare and its principals do not need to provide notice to a computer user prior to activating geophysical location tracking technology if 1) there is a

reasonable basis to believe that the computer has been stolen and 2) a police report has been filed.

Section III of the proposed orders with DesignerWare and its principals prohibits the deceptive collection of consumer information via fake software registration notices. Section IV requires that any data that was collected through any monitoring or tracking software without the requisite notice and consent be destroyed and that any properly collected data be encrypted when transmitted. Section V bars DesignerWare and its principals from making misrepresentations about the privacy or security of any personal information gathered from or about consumers.

Sections VI through IX of both orders contain reporting and compliance provisions. Section VI of the proposed DesignerWare order requires the company to disseminate the order now and in the future to all current and future principals, officers, directors, and managers, and to persons with responsibilities relating to the subject matter of the order. This section also requires DesignerWare to secure a signed and dated statement acknowledging receipt of the order from all persons who receive a copy. Section VII requires DesignerWare to submit compliance reports to the Commission within sixty (60) days, and periodically thereafter as requested. It also requires the company to notify the Commission of changes in DesignerWare's corporate status.

Section VI of the proposed order with the DesignerWare principals requires respondents to distribute it to all current and future principals, officers, directors, and managers of any company that either respondent controls that engages in any covered RTO transaction as well as to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. It also requires the respondents to secure a signed and dated statement acknowledging receipt of the order from all persons who receive a copy. Section VII of the proposed order with the DesignerWare principals requires them to submit compliance reports to the Commission within sixty (60) days, and periodically thereafter as requested. In addition, this section requires them to notify the Commission of changes in their business or employment for three (3) years.

Under Section VIII of the proposed orders with both DesignerWare and its principals, respondents must retain documents relating to their compliance with the order for a five (5) year period. Finally, Section IX of both proposed orders is a provision "sunsetting" the orders after twenty (20) years, with certain exceptions.

The proposed orders against the RTO stores (which are identical to each other) contain similar injunctive provisions to those in the proposed orders with DesignerWare and its principals. Section I of each of the proposed orders bans the RTO stores from using monitoring technology in connection with any covered RTO transaction. Section II prohibits the stores from using geophysical location tracking technology to gather information from any computer without providing clear and prominent notice to the computer's renter and obtaining affirmative express consent from the computer's renter at the time the computer is rented. This section also requires clear and prominent notice to a computer user immediately prior to each time such technology is activated. The proposed RTO store orders also suspend the notice requirement if 1) there is a reasonable basis to believe that the computer has been stolen and 2) a police report has been filed. Section III of each of the proposed orders prohibits the deceptive collection of consumer information via fake software registration notices.

Section IV bars the stores from collecting or attempting to collect a debt, money, or property pursuant to a consumer rental contract by using any information or data that was improperly obtained from a computer by monitoring technology. Section V requires that any data collected through any monitoring or tracking software without the requisite notice and consent be destroyed, and that any properly collected data be encrypted when transmitted. As fencing in, Section VI bars misrepresentations about the privacy or security of any personal information gathered from or about consumers.

Sections VII through X of the proposed RTO store orders contain reporting and compliance provisions. Section VII requires distribution of the order now and in the future to all current and future principals, officers, directors, and managers,

and to persons with responsibilities relating to the subject matter of the order. It also requires the RTO stores to secure signed and dated statements acknowledging receipt of the order from all persons who receive a copy of the order. Section VIII requires the RTO stores to submit compliance reports to the Commission within sixty (60) days, and periodically thereafter as requested, and ensures notification to the Commission of changes in corporate status. Under Section IX, the RTO stores must retain documents relating to order compliance for a five (5) year period. Finally, Section X is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed orders. It is not intended to constitute an official interpretation of the proposed complaints or orders or to modify the terms of the orders in any way.

Complaint

IN THE MATTER OF

J.A.G. RENTS, LLC, D/B/A COLORTYME

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

Docket No. C-4395; File No. 112 3151
Complaint, April 11, 2013 – Decision, April 11, 2013

This consent order relates to unfair practices and privacy violations by J.A.G. Rents, LLC ("J.A.G. Rents") in its use of a software program known as PC Rental Agent and an add-on application called Detective Mode in its rent-to-own computers. J.A.G. Rents is a rent-to-own store operator located in Florida that licensed PC Rental Agent and Detective Mode from DesignerWare, LLC. The complaint alleges J.A.G. Rents violated Section 5 of the FTC Act by installing PC Rental Agent and Detective Mode on its rental computers without consumers' knowledge or consent and by using these programs to gather consumers' confidential personal information, including passwords, usernames, Social Security numbers, and credit card information. The complaint further alleges that J.A.G. Rents engaged in unfair collection practices by using Detective Mode to display a fake registration screen on a user's computer to find, require payment for, or repossess a computer. The consent order requires J.A.G. Rents to cease all use, license, and sale of monitoring and tracking technology in connection with its rent-to-own transactions.

Participants

For the *Commission*: *Julie K. Mayer* and *Tracy S. Thorleifson.*

For the *Respondent*: *William Woodward Webb, Edmisten & Webb Law Firm*.

COMPLAINT

The Federal Trade Commission, having reason to believe that J.A.G. Rents, LLC, also d/b/a ColorTyme, 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 J.A.G. Rents, LLC, also d/b/a Colortyme ("J.A.G. Rents" or "respondent"), is a Florida limited liability corporation with its principal office or place of business at 4608 Hidden Shadow Drive, Tampa, Florida 33614. J.A.G. Rents is a

franchisee of ColorTyme, Inc. It operates two rent-to-own stores in Florida. Rent-to-own stores allow consumers to rent, with an option to purchase, goods such as furniture, household appliances, and consumer electronics including computers.

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

RESPONDENT'S BUSINESS PRACTICES

3. Since at least October 2008, J.A.G. Rents has licensed a software product known as PC Rental Agent from DesignerWare, LLC ("DesignerWare") and installed it on computers it rents to consumers. PC Rental Agent, when installed on a rented computer, enables J.A.G. Rents to disable the computer remotely. J.A.G. Rents disables the computer when it is reported lost or stolen, or when a consumer is late making payments, has stopped communicating with J.A.G. Rents, or has otherwise violated the rental contract. PC Rental Agent also enables J.A.G. Rents to remotely install and activate an add-on program called Detective Mode. Using Detective Mode, J.A.G. Rents can surreptitiously monitor the activities of the computer's user, including by using the computer's webcam. Through Detective Mode, J.A.G. Rents can also secretly gather consumer's personal information using fake software registration windows.

4. J.A.G. Rents installs PC Rental Agent on computers it rents to consumers prior to the consumer taking possession of the computer. The presence of PC Rental Agent is not detectible to a computer's user and the computer's renter cannot uninstall it.

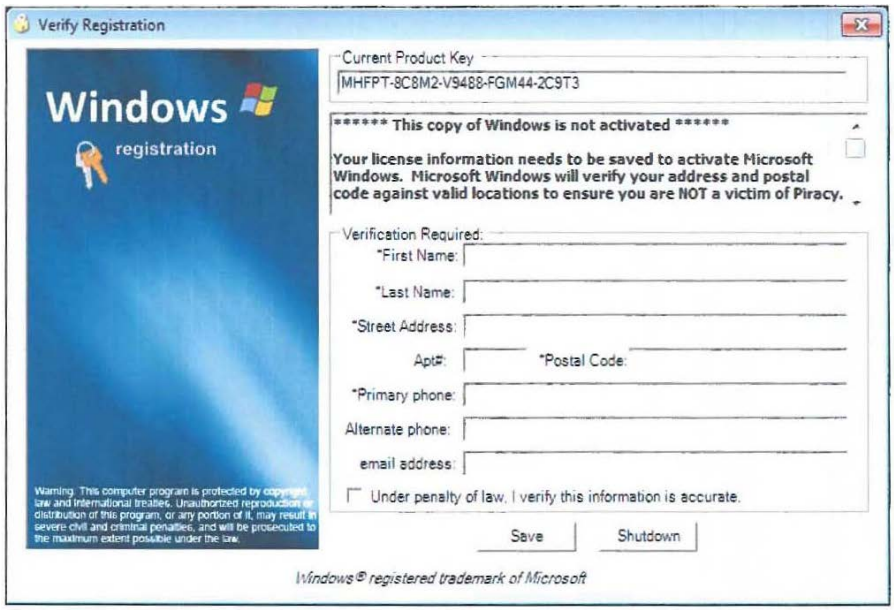
5. J.A.G. Rents can remotely install and activate Detective Mode on any computer with PC Rental Agent. Once activated, Detective Mode can log the keystrokes of the computer user, take screen shots of the computer user's activities on the computer, and photograph anyone within view of the computer's webcam. Detective Mode gathers this information and transmits it to J.A.G. Rents, unbeknownst to the individual using the computer. J.A.G. Rents does not tell the computer user about the activation of Detective Mode.

6. Using Detective Mode, J.A.G. Rents has gathered data about whoever is using the computer, whether the user is the computer's renter or another individual. At one level of activation, Detective Mode will gather data every two minutes that the computer is connected to the Internet for a period of 60 minutes. If J.A.G. Rents wants more information, it can instruct Detective Mode to record data every two minutes until directed to stop doing so. Data gathered via Detective Mode can reveal private, confidential, and personal details about the computer user, including usernames and passwords for access to email accounts, social media websites, and financial institutions, medical records, private emails to doctors, employment applications containing Social Security numbers, and bank and credit card statements. In numerous instances, J.A.G. Rents has obtained data via Detective Mode that has revealed private, confidential, or personal information about computer users.

7. J.A.G. Rents has used the information improperly obtained via Detective Mode in connection with collecting or attempting to collect debts, money, or property pursuant to consumer rental contracts.

8. J.A.G. Rents' gathering of private and confidential information about individuals causes or is likely to cause substantial harm to consumers. Because of J.A.G. Rents' intrusion, consumers are at risk of harm from exposure of their personal, financial account access, and medical information. Consumers are actually harmed by J.A.G. Rents' unwarranted invasion into their homes and lives, and its capture of the private details of individual and family life. Secretly collecting such data can cause consumers financial and physical injury and impair their peaceful enjoyment of their homes. Consumers cannot reasonably avoid these injuries because Detective Mode is invisible to them. The harm caused by J.A.G. Rents' unauthorized gathering of confidential consumer information is not outweighed by countervailing benefits to consumers or to competition; indeed, in this context, where rent-to-own stores have alternate effective methods of collection, e.g., using PC Rental Agent to remotely disable the computer, there are no legitimate benefits to respondent or to the public.

9. J.A.G. Rents has also used another feature of Detective Mode that allows it to cause a user's computer to display a fake registration window, purportedly for Microsoft Windows or other software. The fake registration window prompts the computer user to enter a name, address, email address, and phone number. The computer user must enter the requested information to close the window. A screenshot of one such fake software registration window appears below.



10. No actual software is registered as a result of a consumer providing the requested information; instead, Detective Mode captures the information entered in the prompt boxes and sends the data to J.A.G. Rents. In numerous instances, J.A.G. Rents has used this information to find, require payment for, or repossess a computer.

11. Consumers who respond to the fake prompt screen and provide the requested contact information are deprived of the ability to control who has access to their contact information and how they are contacted.

VIOLATIONS OF THE FTC ACT

Count I
Unfair Gathering of Consumers' Personal Information

12. Through the means described in Paragraphs 3 through 11, respondent has installed monitoring software on rented computers and gathered, or caused to be gathered, sensitive personal information about consumers from those computers.

13. Respondent's actions cause or are likely to cause substantial injury to consumers that cannot be reasonably avoided and is not outweighed by countervailing benefits to consumers or competition.

14. Therefore, respondent's practices, as described in Paragraph 12, constitute unfair acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a).

Count II
Unfair Collection Practices

15. Through the means described in Paragraphs 3 through 11, respondent has used information improperly gathered from consumers to collect or attempt to collect a debt, money, or property pursuant to a consumer rental contract.

16. Respondent's actions cause or are likely to cause substantial injury to consumers that cannot be reasonably avoided and is not outweighed by countervailing benefits to consumers or competition.

17. Therefore, respondent's practices, as described in Paragraph15, constitute unfair acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a).

Count III
Deceptive Gathering of Consumers' Personal Information

18. Through the means described in Paragraphs 3 through 11, respondent has represented or caused to be represented to

consumers, expressly or by implication, that certain pop-up notices that appear on a computer's screen are notices from trusted software providers that contain software registration forms that must be filled out with the consumers' contact information in order to continue to use the providers' software.

19. In truth and in fact, these pop-up notices are not from trusted software providers and do not contain software registration forms that must be filled out with the consumer's contact information in order to continue to use the providers' software, but instead serve only to cause the consumer to provide the requested contact information so that respondent can use this information in connection with collecting or attempting to collect debts, money, or property pursuant to consumer rental contracts.

20. Therefore, respondent's practices, as described in Paragraph 18, constitute deceptive acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a).

THEREFORE, the Federal Trade Commission this eleventh day of April, 2013, has issued this complaint against respondent.

By the Commission, Commissioner Wright not participating.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it has reason to believe that the respondent has violated the 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 J.A.G. Rents, LLC, also d/b/a Colortyme ("J.A.G. Rents"), is a Florida corporation with its principal office or place of business at 4608 Hidden Shadow Drive, Tampa, Florida 33614.

2. The 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:

1. Unless otherwise specified, "respondent" shall mean J.A.G. Rents and its successors and assigns.

2. "Commerce" shall be defined as it is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

3. "Computer" shall mean any desktop or laptop computer, handheld device, tablet, telephone, or other electronic product or device that has a platform on which to download, install, or run any software program, code, script, or other content.

4. "Clear(ly) and prominent(ly)" shall mean:

   a. 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;

   b. 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;

   c. In communications disseminated through video means (e.g., television or streaming video), the required disclosures are in writing in a form 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;

   d. In communications made through interactive media, such as the Internet, online services, and software, the required disclosures are unavoidable and presented in a form consistent with subpart (a)

of this definition, in addition to any audio or video presentation of them; and

e. In all instances, the required disclosures are presented in an understandable language and syntax; in the same language as the predominant language that is used in the communication; and 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.

5. "Geophysical location tracking technology" shall mean any hardware, software, or application utilized in conjunction with a computer that collects and reports data or information that identifies the precise geophysical location of the computer. Geophysical location tracking technologies include, for these purposes, technologies that report: the GPS coordinates of a computer; the WiFi signals available to or actually used by a computer to access the Internet; the telecommunication towers or connections available to or actually used by a computer; the processing of any such reported data through geolocation lookup services; or any information derived from any combination of the foregoing.

6. "Monitoring technology" shall mean any hardware, software, or application utilized in conjunction with a computer that can cause the computer to (1) capture, monitor, or record, and (2) report information about user activities by:

a. Recording keystrokes, clicks, or other user-generated actions;

b. Capturing screenshots of the information displayed on a computer monitor or screen; or

c. Activating the camera or microphone function of a computer to take photographs or record audio or

visual content through the computer's webcam or microphone.

7. "Covered rent-to-own transaction" shall mean any transaction where a consumer enters into an agreement for the purchase or rental of a computer and the consumer's contract or rental agreement provides for payments over time and an option to purchase the computer.

I.
MONITORING TECHNOLOGY PROHIBITED

IT IS HEREBY ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, in connection with any covered rent-to-own transaction, are hereby permanently restrained and enjoined from using any monitoring technology to gather information or data from any computer rented to a consumer.

II.
USE OF TRACKING TECHNOLOGY LIMITED

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, in connection with any covered rent-to-own transaction, are hereby permanently restrained and enjoined from:

A. Gathering any information or data from any computer via any geophysical location tracking technology without providing clear and prominent notice to the computer user at the time the computer is rented and immediately prior to each use of the geophysical location tracking technology, and also obtaining

affirmative express consent from the computer's renter at the time the computer is rented;

B. Installing or activating on rented computers geophysical location tracking technology where that technology does not provide clear and prominent notice to the computer user immediately prior to each use of the geophysical location tracking technology; and

C. Failing to provide clear and prominent notice to computer users and obtaining affirmative express consent from computer renters, as required in subpart A, above, by the following means:

1. Clear and Prominent Notice: respondent shall provide a clear and prominent notice to the user, separate and apart from any "privacy policy," "data use policy," "terms of service," "end-user license agreement," "lease agreement," or other similar document, that discloses (1) that geophysical location tracking technology is installed and/or currently running on the computer; (2) the types of user activity or conduct that is being captured by such technology; (3) the identities or specific categories of entities with whom any data or information that is collected will be shared or otherwise provided; (4) the purpose(s) for the collection, use, or sharing of such data or information; and (5) where and how the user can contact someone for additional information.

2. Affirmative Express Consent: respondent shall obtain affirmative express consent by giving the computer renter an equally clear and prominent choice to either agree or not agree to any geophysical location tracking technology, and neither option may be highlighted or preselected as a default setting. Activation of any geophysical location tracking technology must not proceed until the computer's renter provides affirmative

express consent. Notwithstanding the foregoing, nothing in this Section shall require respondent to rent a computer to a user who declines to allow installation or activation of any geophysical tracking technology.

3. Icons: respondent shall provide that the activation of any geophysical location tracking technology be accompanied by the installation of a clear and prominent icon on the computer on which the technology is installed, such as on the desktop and in the desktop system tray of the computer. Clicking on the icon must clearly and prominently disclose: (1) that geophysical location tracking technology is installed and currently running on the computer; (2) the types of user activity or conduct that is being captured by such technology; (3) the identities or specific categories of entities with whom any data or information that is collected will be shared or otherwise provided; (4) the purpose(s) for the collection, use, or sharing of such data or information; and (5) where and how the user can contact someone for additional information.

Provided that respondent may suspend the notice requirements of this Part and activate geophysical location tracking technology if a) the renter reports that the computer has been stolen or respondent otherwise has a reasonable basis to believe that the computer has been stolen, and b) either the renter or respondent has filed a police report stating that the computer has been stolen. Provided further that respondent shall retain documents establishing (a) and (b). For purposes of this Order, "filing of a police report" means the filing of the renter's or respondent's complaint with the police department in any form recognized in the jurisdiction.

III.
NO DECEPTIVE GATHERING OF CONSUMER INFORMATION

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, in connection with any covered rent-to-own transaction, are hereby permanently restrained and enjoined from making or causing to be made any false representation or depiction in any notice, prompt screen, or other software application appearing on the screen of any computer that results in gathering information from or about a consumer, including without limitation location information.

IV.
NO USE OF IMPROPERLY OBTAINED INFORMATION IN COLLECTIONS

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, are hereby permanently restrained and enjoined from using, in connection with collecting or attempting to collect a debt, money, or property pursuant to a covered rent-to-own transaction, any information or data obtained in a manner that does not comply with Parts I, II, and III of this Order.

V.
PROTECTION OF DATA

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or

participation with it who receive actual notice of this order, by personal service or otherwise, shall:

A. Delete or destroy all user data previously gathered using any monitoring or geophysical location tracking technology that does not comply with Parts I, II, and III of this Order; and

B. Transfer data or information gathered by any monitoring or geophysical location tracking technology from the computer upon which the technology is installed to respondent's server(s), and from the respondent's server(s) to any other computers or servers only if the information collected is rendered unreadable, unusable, or indecipherable during transmission.

VI.
NO MISREPRESENTATIONS ABOUT PRIVACY

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, in connection with any covered rent-to-own transaction shall not misrepresent, in any manner, expressly or by implication, the extent to which respondent maintains and protects the security, privacy, or confidentiality of any personal information collected from or about consumers.

VII.
DISTRIBUTION OF ORDER

IT IS FURTHER ORDERED that respondent must deliver a copy of this order to all current and future principals, officers, directors, and managers who have responsibilities related to the subject matter of this order. Delivery must occur within seven days after the date of service of the order for current personnel. For new personnel, delivery must occur before they assume their responsibilities. From each individual to whom respondent delivers a copy of this Order, respondent must obtain a signed and

dated acknowledgment of receipt of this Order, with any electronic signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq*.

VIII.
COMPLIANCE REPORTING

IT IS FURTHER ORDERED that:

A. Respondent, and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Commission may require, file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which they have complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondent shall submit additional true and accurate written reports.

B. Respondent, 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 related entity 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, the respondent shall notify the Commission as soon as is practicable after obtaining such knowledge.

C. 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 for Enforcement, Bureau of

Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line J.A.G. Rents, LLC, File No. 1123151. *Provided, however*; that, in lieu of overnight courier, notices may be sent by first class mail, but only if an electronic version of each such notice is contemporaneously sent to the Commission at DEbrief@ftc.gov.

IX.
RECORDKEEPING

IT IS FURTHER ORDERED that respondent shall, for five (5) years after the last date of any act or practice covered by Parts I – VI of this Order, maintain and upon reasonable notice make available to the Federal Trade Commission for inspection and copying, any documents, whether prepared by or on behalf of respondent, that:

A. Comprise or relate to complaints or inquiries, whether received directly, indirectly, or through any third party, concerning any monitoring or geophysical tracking technologies sold, licensed, or otherwise provided to any third party, and any responses to those complaints or inquiries;

B. Are reasonably necessary to demonstrate full compliance with each provision of this order, including but not limited to, all documents obtained, created, generated, or which in any way relate to the requirements, provisions, or terms of this order, and all reports submitted to the Commission pursuant to this order;

C. Contradict, qualify, or call into question respondent's compliance with this order; or

D. Acknowledge receipt of this order obtained pursuant to Part VII.

X.
TERMINATION OF ORDER

This Order will terminate on April 11, 2033, 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 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, Commissioner Wright not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission" or "FTC") has accepted, subject to final approval, consent agreements from the following respondents: DesignerWare, LLC; Timothy Kelly, and Ronald P. Koller, individually and as officers of DesignerWare, LLC; Aspen Way Enterprises, Inc.; Watershed

Development Corp.; Showplace, Inc., d/b/a Showplace Rent-to-Own; J.A.G. Rents, LLC, d/b/a ColorTyme; Red Zone, Inc., d/b/a ColorTyme; B. Stamper Enterprises, Inc., d/b/a Premier Rental Purchase; and C.A.L.M. Ventures, Inc., d/b/a Premier Rental Purchase.

The proposed consent orders have 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 agreements and the comments received, and will decide whether it should withdraw from any of the agreements and take appropriate action or make final the agreements' proposed orders.

Timothy Kelly and Ronald Koller founded and co-owned DesignerWare, LLC, a small software company that designed and licenses a single product, PC Rental Agent. Mr. Koller ended his association with DesignerWare in March 2012. PC Rental Agent is exclusively marketed to rent-to-own ("RTO") stores. RTO stores rent to consumers a variety of household items, including personal computers. PC Rental Agent is designed to assist RTO stores in tracking and recovering rented computers. Its chief function is a "kill switch," a program that can be used by a store to render a computer inoperable if the consumer renter is late or defaults on payments or if the computer is stolen. PC Rental Agent also offers a wiping feature that permits RTO stores to quickly erase the hard drives of computers prior to re-renting them to consumers.

Through PC Rental Agent, which RTO store licensees installed on rented computers, DesignerWare also provided access to "Detective Mode." Detective Mode was a software application embedded in the PC Rental Agent program. At the request of an RTO store, DesignerWare would remotely complete the Detective Mode installation process on an individual computer and activate "the Detective." Detective Mode would surreptitiously log the computer user's keystrokes, capture screenshots, and take pictures with the computer's webcam and send the data to DesignerWare's servers. Neither DesignerWare nor the RTO stores who have used Detective Mode disclosed to computer users that they were being monitored in this manner. Although DesignerWare

recommended that Detective Mode be installed and activated only to locate and identify the person in possession of a lost or stolen computer, DesignerWare did not monitor its own collection of or limit RTO stores' access to Detective Mode information to ensure that the information was obtained and used only for designated purposes.

DesignerWare sent the information captured by Detective Mode to an email account designated by each RTO store. Although DesignerWare's employees did not themselves view Detective Mode data, without DesignerWare licensing PC Rental Agent and making Detective Mode available to the RTO stores, as well as providing them with access to its web portal and providing servers to support both PC Rental Agent and Detective Mode, this collection and disclosure of consumers' private information would not be possible.

RTO stores also used Detective Mode to send fake "software registration" forms to consumers to deceive them into providing their contact and location information. DesignerWare created several different fake registration forms that its servers displayed on consumers' computers. An RTO store could use this feature of Detective Mode by requesting that DesignerWare activate it. No actual software was registered as a result of a consumer providing the requested information. Rather, Detective Mode captured the information entered in the prompt boxes and sent it to DesignerWare, who then emailed the data to the RTO store, all unbeknownst to the consumer. DesignerWare discontinued use of Detective Mode in January 2012.

In September 2011, DesignerWare added another feature to PC Rental Agent: the capacity to track the physical location of rented computers via WiFi hotspot locations. The information derived from WiFi hotspot contacts can frequently pinpoint a computer's location to a single building and, when aggregated, can track the movements and patterns of individual computer users over time. DesignerWare makes this information easily available to the RTO stores by cross-referencing a list of publicly available WiFi hotspots with the street addresses for the particular hotspots viewed or accessed by rented computers. DesignerWare applied its location tracking upgrade of PC Rental Agent to every

computer on which PC Rental Agent was installed, without obtaining consent from, or providing notice to, the computers' renters. DesignerWare recommends that RTO stores only use this tracking data in connection with recovering stolen property, but it does not monitor or limit the RTO stores' access to such location information.

Aspen Way Enterprises, Watershed Development, Showplace, J.A.G. Rents, Red Zone, B. Stamper Enterprises, and C.A.L.M. Ventures are RTO stores that have licensed PC Rental Agent from DesignerWare. These RTO stores have used information transmitted by DesignerWare when attempting to collect from computer renters who are late in paying or have otherwise breached their rental contracts. Using Detective Mode, these RTO stores have received from DesignerWare webcam photos of computer users (and anyone else within view of the camera), computer users' keystrokes, and screenshots of their computer activities. This information has revealed private and confidential details about computer users, such as their passwords for access to email accounts, social media websites, and financial institutions. Other confidential information was also captured, including medical records, private emails to doctors, employment applications containing Social Security numbers, bank and credit card statements, and discussions of defense strategies in a pending lawsuit. Through Detective Mode, DesignerWare and the RTO stores also secretly photographed the private conduct of consumers in their homes. This included pictures of children, household visitors, individuals not fully clothed, and couples engaged in intimate activities.

The collection and disclosure of such private and confidential information about consumers causes or is likely to cause substantial injury to consumers. Consumers are likely to be substantially injured by the exposure to strangers of personal, financial account access, and medical information. Consumers are actually harmed by DesignerWare's unwarranted invasion into their homes and lives and its capture and disclosure of the private details of individual and family life, including, for example, images of visitors, children, family interactions, partially undressed individuals, and couples engaged in sexual activities. Sharing data like that collected by Detective Mode with third parties can cause consumers financial and physical injury, and

impair their peaceful enjoyment of their homes. Because Detective Mode functions secretly, consumers cannot reasonably avoid this harm, which is neither trivial nor speculative. Moreover, there are no countervailing benefits to consumers or competition for continued use of Detective Mode in this context, where RTO stores have effective alternative methods for collections.

DesignerWare also sent consumers' contact information to the RTO stores. DesignerWare gathered this information from computer users who completed the deceptive "software registration" forms sent through Detective Mode. The RTO stores used this information to find, require payment for, or repossess a rented computer.

The Commission's complaint against DesignerWare, Kelly, and Koller (collectively, "DesignerWare Respondents") alleges that the company and its principals engaged in unfair and deceptive conduct and provided the means and instrumentalities to engage in unfairness, all in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The first count of the complaint focuses on actions taken by DesignerWare that caused or was likely to cause substantial injury to consumers. Count I alleges that the DesignerWare Respondents engaged in unfair conduct by installing monitoring software on rented computers, gathering personal, financial, and health information about consumers from computers, and disclosing that information to RTO store licensees. Count I also alleges as unfair the DesignerWare Respondents' installation of geophysical location tracking software on rented computers without consent from the computer renters, the tracking of computers' geophysical locations without notice to computer users, and the disclosure of that information to the RTO stores.

Count II alleges that the DesignerWare Respondents provided the means to third parties – the RTO stores – to violate Section 5. The first part of the count charges the DesignerWare Respondents with providing RTO stores with the means and instrumentalities to engage in unfairness by furnishing them with software that could monitor consumers by recording their keystrokes, capturing screenshots of information displayed on a computer, and taking

pictures of the computer user, and further could track the geophysical location data of rented computers without the consent of the computer renter or notice to the computer user. The second part of Count II alleges that the DesignerWare Respondents provided the means and instrumentalities to RTO stores to engage in unfair collection practices by providing them with the data gathered via PC Rental Agent and Detective Mode. Count II focuses on actions taken by DesignerWare that were integral to the harm to consumers caused or likely to be caused by the RTO stores. Here, without PC Rental Agent and Detective Mode and without access to DesignerWare's servers to execute their commands to rented computers, collect consumers' confidential information and transmit it to them, the RTO stores could not unfairly monitor their computer renters or use improperly gathered information in connection with collections.

Count III of the complaint charges the DesignerWare Respondents with deceptively gathering – and disclosing – consumers' personal information collected from the fake software registration forms that Detective Mode caused to appear on consumers' rented computers.

Each of the Commission's complaints against the seven RTO stores contains substantially similar allegations regarding the stores' violations of the FTC Act. The complaints charge that the RTO stores unfairly gathered consumers' personal information by installing monitoring software on rented computers and engaged in unfair collection practices by using the improperly gathered information to collect on consumer rental contracts. The complaints further allege that the RTO stores deceptively gathered consumers' personal information by activating the Detective Mode feature that sends the fake software registration forms to consumers' rented computers.

The proposed orders contain strong injunctive relief designed to remedy the unlawful conduct by DesignerWare, its principals, and the RTO stores. The orders define "monitoring technology and geophysical location tracking technology" so that the technological applications covered by the order are clearly described. "Monitoring technology" means any hardware, software, or application utilized in conjunction with a computer that can cause the computer to (1) capture, monitor, or record, and

(2) report information about user activities by recording keystrokes, clicks, or other user-generated actions; capturing screenshots of the information displayed on a computer monitor or screen; or activating the camera or microphone function of a computer to take photographs or record audio or visual content through the computer's webcam or microphone. The definition of "geophysical location tracking" includes the reporting of GPS coordinates, WiFi hotspots, or telecommunications towers – all technologies that allow for a relatively precise location of the item tracked. In addition, a "covered rent-to-own transaction" is defined as one in which a consumer agrees to purchase or rent a computer, where the rental agreement provides for payments over time and an option to purchase the computer.

The proposed orders with DesignerWare and its principals, Kelly and Koller, are separate, but contain identical injunctive provisions. Section I of the proposed orders with DesignerWare and its principals bans them from using – as well as licensing, selling, or otherwise providing third parties with – monitoring technology in connection with any covered RTO transaction. Section II prohibits them from using geophysical location tracking technology to gather information from any computer without providing clear and prominent notice to and obtaining affirmative express consent from the computer's renter at the time the computer is rented. This section also requires clear and prominent notice to computer users immediately prior to each time tracking technology is activated. In addition, Section II mandates that DesignerWare and its principals require their licensees to obtain consent and provide notice prior to initiating any location tracking. However, DesignerWare and its principals do not need to provide notice to a computer user prior to activating geophysical location tracking technology if 1) there is a reasonable basis to believe that the computer has been stolen and 2) a police report has been filed.

Section III of the proposed orders with DesignerWare and its principals prohibits the deceptive collection of consumer information via fake software registration notices. Section IV requires that any data that was collected through any monitoring or tracking software without the requisite notice and consent be destroyed and that any properly collected data be encrypted when

transmitted. Section V bars DesignerWare and its principals from making misrepresentations about the privacy or security of any personal information gathered from or about consumers.

Sections VI through IX of both orders contain reporting and compliance provisions. Section VI of the proposed DesignerWare order requires the company to disseminate the order now and in the future to all current and future principals, officers, directors, and managers, and to persons with responsibilities relating to the subject matter of the order. This section also requires DesignerWare to secure a signed and dated statement acknowledging receipt of the order from all persons who receive a copy. Section VII requires DesignerWare to submit compliance reports to the Commission within sixty (60) days, and periodically thereafter as requested. It also requires the company to notify the Commission of changes in DesignerWare's corporate status.

Section VI of the proposed order with the DesignerWare principals requires respondents to distribute it to all current and future principals, officers, directors, and managers of any company that either respondent controls that engages in any covered RTO transaction as well as to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. It also requires the respondents to secure a signed and dated statement acknowledging receipt of the order from all persons who receive a copy. Section VII of the proposed order with the DesignerWare principals requires them to submit compliance reports to the Commission within sixty (60) days, and periodically thereafter as requested. In addition, this section requires them to notify the Commission of changes in their business or employment for three (3) years.

Under Section VIII of the proposed orders with both DesignerWare and its principals, respondents must retain documents relating to their compliance with the order for a five (5) year period. Finally, Section IX of both proposed orders is a provision "sunsetting" the orders after twenty (20) years, with certain exceptions.

The proposed orders against the RTO stores (which are identical to each other) contain similar injunctive provisions to

those in the proposed orders with DesignerWare and its principals. Section I of each of the proposed orders bans the RTO stores from using monitoring technology in connection with any covered RTO transaction. Section II prohibits the stores from using geophysical location tracking technology to gather information from any computer without providing clear and prominent notice to the computer's renter and obtaining affirmative express consent from the computer's renter at the time the computer is rented. This section also requires clear and prominent notice to a computer user immediately prior to each time such technology is activated. The proposed RTO store orders also suspend the notice requirement if 1) there is a reasonable basis to believe that the computer has been stolen and 2) a police report has been filed. Section III of each of the proposed orders prohibits the deceptive collection of consumer information via fake software registration notices.

Section IV bars the stores from collecting or attempting to collect a debt, money, or property pursuant to a consumer rental contract by using any information or data that was improperly obtained from a computer by monitoring technology. Section V requires that any data collected through any monitoring or tracking software without the requisite notice and consent be destroyed, and that any properly collected data be encrypted when transmitted. As fencing in, Section VI bars misrepresentations about the privacy or security of any personal information gathered from or about consumers.

Sections VII through X of the proposed RTO store orders contain reporting and compliance provisions. Section VII requires distribution of the order now and in the future to all current and future principals, officers, directors, and managers, and to persons with responsibilities relating to the subject matter of the order. It also requires the RTO stores to secure signed and dated statements acknowledging receipt of the order from all persons who receive a copy of the order. Section VIII requires the RTO stores to submit compliance reports to the Commission within sixty (60) days, and periodically thereafter as requested, and ensures notification to the Commission of changes in corporate status. Under Section IX, the RTO stores must retain documents relating to order compliance for a five (5) year period.

Finally, Section X is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed orders. It is not intended to constitute an official interpretation of the proposed complaints or orders or to modify the terms of the orders in any way.

Complaint

IN THE MATTER OF

RED ZONE INVESTMENT GROUP, INC., D/B/A COLORTYME

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

Docket No. C-4396; File No. 112 3151
Complaint, April 11, 2013 – Decision, April 11, 2013

This consent order relates to unfair practices and privacy violations by Red Zone Investment Group, Inc. ("Red Zone") in its use of a software program known as PC Rental Agent and an add-on application called Detective Mode in its rent-to-own computers. Red Zone is a rent-to-own store operator located in Florida that licensed PC Rental Agent and Detective Mode from DesignerWare, LLC. The complaint alleges Red Zone violated Section 5 of the FTC Act by installing PC Rental Agent and Detective Mode on its rental computers without consumers' knowledge or consent and by using these programs to gather consumers' confidential personal information, including passwords, usernames, Social Security numbers, and credit card information. The complaint further alleges that Red Zone engaged in unfair collection practices by using Detective Mode to display a fake registration screen on a user's computer to find, require payment for, or repossess a computer. The consent order requires Red Zone to cease all use, license, and sale of monitoring and tracking technology in connection with its rent-to-own transactions.

Participants

For the *Commission*: *Julie K. Mayer* and *Tracy S. Thorleifson.*

For the *Respondent*: *William Woodward Webb, Edmisten & Webb Law Firm*.

COMPLAINT

The Federal Trade Commission, having reason to believe that Red Zone Investment Group, also d/b/a ColorTyme, 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 Red Zone Investment Group, also d/b/a Colortyme ("Red Zone" or "respondent"), is a Texas corporation with its principal office or place of business at 3632 Frankford Road, Suite 200A, Dallas, Texas 75287. Red Zone is a franchisee of ColorTyme, Inc., and operates one rent-to-own store in Texas. Rent-to-own stores allow consumers to rent, with an option to purchase, goods such as furniture, household appliances, and consumer electronics including computers.

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

RESPONDENT'S BUSINESS PRACTICES

3. Since at least November 2010, Red Zone has licensed a software product known as PC Rental Agent from DesignerWare, LLC ("DesignerWare") and installed it on computers it rents to consumers. PC Rental Agent, when installed on a rented computer, enables Red Zone to disable the computer remotely. Red Zone disables the computer when it is reported lost or stolen, or when a consumer is late making payments, has stopped communicating with Red Zone, or has otherwise violated the rental contract. PC Rental Agent also enables Red Zone to remotely install and activate an add-on program called Detective Mode. Using Detective Mode, Red Zone can surreptitiously monitor the activities of the computer's user, including by using the computer's webcam. Through Detective Mode, Red Zone can also secretly gather consumer's personal information using fake software registration windows.

4. Red Zone installs PC Rental Agent on computers it rents to consumers prior to the consumer taking possession of the computer. The presence of PC Rental Agent is not detectible to a computer's user and the computer's renter cannot uninstall it.

5. Red Zone can remotely install and activate Detective Mode on any computer with PC Rental Agent. Once activated, Detective Mode can log the keystrokes of the computer user, take screen shots of the computer user's activities on the computer, and photograph anyone within view of the computer's webcam. Detective Mode gathers this information and transmits it to Red

Zone, unbeknownst to the individual using the computer. Red Zone does not tell the computer user about the activation of Detective Mode.

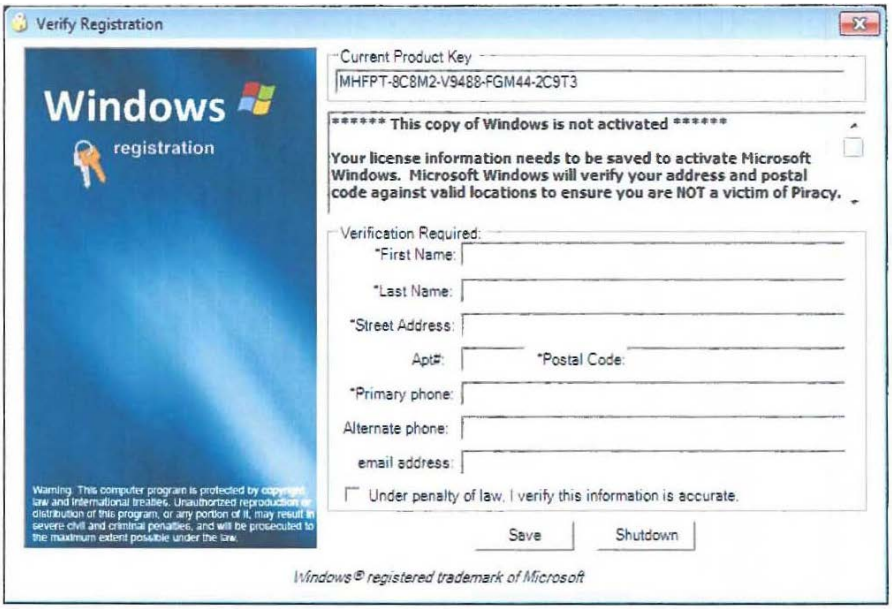
6. Using Detective Mode, Red Zone has gathered data about whoever is using the computer, whether the user is the computer's renter or another individual. At one level of activation, Detective Mode will gather data every two minutes that the computer is connected to the Internet for a period of 60 minutes. If Red Zone wants more information it can instruct Detective Mode to record data every two minutes until directed to stop doing so. In numerous instances, Red Zone has obtained data via Detective Mode that has revealed private, confidential, and personal details about the computer user. Screenshots have captured consumers' usernames and passwords for access to email accounts, social media websites, and financial institutions, and also captured financial account statements. Webcam pictures have photographed not only the computer's user, but also anyone else within view of the camera. In numerous instances, Red Zone has obtained pictures taken secretly inside the computer user's home.

7. Red Zone has used the information improperly obtained via Detective Mode in connection with collecting or attempting to collect debts, money, or property pursuant to consumer rental contracts.

8. Red Zone's gathering of private and confidential information about individuals causes or is likely to cause substantial harm to consumers. Because of Red Zone's intrusion, consumers are at risk of harm from exposure of their personal, financial account access, and medical information. Consumers are actually harmed by Red Zone's unwarranted invasion into their homes and lives, and its capture of the private details of individual and family life. Secretly collecting such data can cause consumers financial and physical injury and impair their peaceful enjoyment of their homes. Consumers cannot reasonably avoid these injuries because Detective Mode is invisible to them. The harm caused by Red Zone's unauthorized gathering of confidential consumer information is not outweighed by countervailing benefits to consumers or to competition; indeed, in this context, where rent-to-own stores have alternate effective

methods of collection, e.g., using PC Rental Agent to remotely disable the computer, there are no legitimate benefits to respondent or to the public.

9. Red Zone has also used another feature of Detective Mode that allows it to cause a user's computer to display a fake registration window, purportedly for Microsoft Windows or other software. The fake registration window prompts the computer user to enter a name, address, email address, and phone number. The computer user must enter the requested information to close the window. A screenshot of one such fake software registration window appears below.



10. No actual software is registered as a result of a consumer providing the requested information; instead, Detective Mode captures the information entered in the prompt boxes and sends the data to Red Zone. In numerous instances, Red Zone has used this information to find, require payment for, or repossess a computer.

11. Consumers who respond to the fake prompt screen and provide the requested contact information are deprived of the ability to control who has access to their contact information and how they are contacted.

VIOLATIONS OF THE FTC ACT

Count I
Unfair Gathering of Consumers' Personal Information

12. Through the means described in Paragraphs 3 through 11, respondent has installed monitoring software on rented computers and gathered, or caused to be gathered, sensitive personal information about consumers from those computers.

13. Respondent's actions cause or are likely to cause substantial injury to consumers that cannot be reasonably avoided and is not outweighed by countervailing benefits to consumers or competition.

14. Therefore, respondent's practices, as described in Paragraph 12, constitute unfair acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a).

Count II
Unfair Collection Practices

15. Through the means described in Paragraphs 3 through 11, respondent has used information improperly gathered from consumers to collect or attempt to collect a debt, money, or property pursuant to a consumer rental contract.

16. Respondent's actions cause or are likely to cause substantial injury to consumers that cannot be reasonably avoided and is not outweighed by countervailing benefits to consumers or competition.

17. Therefore, respondent's practices, as described in Paragraph15, constitute unfair acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a).

Count III
Deceptive Gathering of Consumers' Personal Information

18. Through the means described in Paragraphs 3 through 11, respondent has represented or caused to be represented to consumers, expressly or by implication, that certain pop-up notices that appear on a computer's screen are notices from trusted software providers that contain software registration forms that must be filled out with the consumers' contact information in order to continue to use the providers' software.

19. In truth and in fact, these pop-up notices are not from trusted software providers and do not contain software registration forms that must be filled out with the consumer's contact information in order to continue to use the providers' software, but instead serve only to cause the consumer to provide the requested contact information so that respondent can use this information in connection with collecting or attempting to collect debts, money, or property pursuant to consumer rental contracts.

20. Therefore, respondent's practices, as described in Paragraph 18, constitute deceptive acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a).

THEREFORE, the Federal Trade Commission this eleventh day of April, 2013, has issued this complaint against respondent.

By the Commission, Commissioner Wright not participating.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it has reason to believe that the respondent has violated the 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 Red Zone Investment Group, also d/b/a ColorTyme ("Red Zone"), is a Texas corporation with its principal office or place of business at 3632 Frankford Road, Suite 200A, Dallas, Texas 75287.

2. The 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:

1. Unless otherwise specified, "respondent" shall mean Red Zone and its successors and assigns.

2. "Commerce" shall be defined as it is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

3. "Computer" shall mean any desktop or laptop computer, handheld device, tablet, telephone, or other electronic product or device that has a platform on which to download, install, or run any software program, code, script, or other content.

4. "Clear(ly) and prominent(ly)" shall mean:

   a. 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;

   b. 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;

   c. In communications disseminated through video means (e.g., television or streaming video), the required disclosures are in writing in a form 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;

   d. In communications made through interactive media, such as the Internet, online services, and software, the required disclosures are unavoidable and presented in a form consistent with subpart (a)

of this definition, in addition to any audio or video presentation of them; and

e. In all instances, the required disclosures are presented in an understandable language and syntax; in the same language as the predominant language that is used in the communication; and 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.

5. "Geophysical location tracking technology" shall mean any hardware, software, or application utilized in conjunction with a computer that collects and reports data or information that identifies the precise geophysical location of the computer. Geophysical location tracking technologies include, for these purposes, technologies that report: the GPS coordinates of a computer; the WiFi signals available to or actually used by a computer to access the Internet; the telecommunication towers or connections available to or actually used by a computer; the processing of any such reported data through geolocation lookup services; or any information derived from any combination of the foregoing.

6. "Monitoring technology" shall mean any hardware, software, or application utilized in conjunction with a computer that can cause the computer to (1) capture, monitor, or record, and (2) report information about user activities by:

a. Recording keystrokes, clicks, or other user-generated actions;

b. Capturing screenshots of the information displayed on a computer monitor or screen; or

c. Activating the camera or microphone function of a computer to take photographs or record audio or

visual content through the computer's webcam or microphone.

7. "Covered rent-to-own transaction" shall mean any transaction where a consumer enters into an agreement for the purchase or rental of a computer and the consumer's contract or rental agreement provides for payments over time and an option to purchase the computer.

I.
MONITORING TECHNOLOGY PROHIBITED

IT IS HEREBY ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, in connection with any covered rent-to-own transaction, are hereby permanently restrained and enjoined from using any monitoring technology to gather information or data from any computer rented to a consumer.

II.
USE OF TRACKING TECHNOLOGY LIMITED

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, in connection with any covered rent-to-own transaction, are hereby permanently restrained and enjoined from:

A. Gathering any information or data from any computer via any geophysical location tracking technology without providing clear and prominent notice to the computer user at the time the computer is rented and immediately prior to each use of the geophysical location tracking technology, and also obtaining

affirmative express consent from the computer's renter at the time the computer is rented;

B. Installing or activating on rented computers geophysical location tracking technology where that technology does not provide clear and prominent notice to the computer user immediately prior to each use of the geophysical location tracking technology; and

C. Failing to provide clear and prominent notice to computer users and obtaining affirmative express consent from computer renters, as required in subpart A, above, by the following means:

1. Clear and Prominent Notice: respondent shall provide a clear and prominent notice to the user, separate and apart from any "privacy policy," "data use policy," "terms of service," "end-user license agreement," "lease agreement," or other similar document, that discloses (1) that geophysical location tracking technology is installed and/or currently running on the computer; (2) the types of user activity or conduct that is being captured by such technology; (3) the identities or specific categories of entities with whom any data or information that is collected will be shared or otherwise provided; (4) the purpose(s) for the collection, use, or sharing of such data or information; and (5) where and how the user can contact someone for additional information.

2. Affirmative Express Consent: respondent shall obtain affirmative express consent by giving the computer renter an equally clear and prominent choice to either agree or not agree to any geophysical location tracking technology, and neither option may be highlighted or preselected as a default setting. Activation of any geophysical location tracking technology must not proceed until the computer's renter provides affirmative

express consent. Notwithstanding the foregoing, nothing in this Section shall require respondent to rent a computer to a user who declines to consent to installation or activation of any geophysical tracking technology.

3. Icons: respondent shall provide that the activation of any geophysical location tracking technology be accompanied by the installation of a clear and prominent icon on the computer on which the technology is installed, such as on the desktop and in the desktop system tray of the computer. Clicking on the icon must clearly and prominently disclose: (1) that geophysical location tracking technology is installed and currently running on the computer; (2) the types of user activity or conduct that is being captured by such technology; (3) the identities or specific categories of entities with whom any data or information that is collected will be shared or otherwise provided; (4) the purpose(s) for the collection, use, or sharing of such data or information; and (5) where and how the user can contact someone for additional information.

Provided that respondent may suspend the notice requirements of this Part and activate geophysical location tracking technology if a) the renter reports that the computer has been stolen or respondent otherwise has a reasonable basis to believe that the computer has been stolen, and b) either the renter or respondent has filed a police report stating that the computer has been stolen. Provided further that respondent shall retain documents establishing (a) and (b). For purposes of this Order, "filing of a police report" means the filing of the renter's or respondent's complaint with the police department in any form recognized in the jurisdiction.

III.
NO DECEPTIVE GATHERING OF CONSUMER INFORMATION

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, in connection with any covered rent-to-own transaction, are hereby permanently restrained and enjoined from making or causing to be made any false representation or depiction in any notice, prompt screen, or other software application appearing on the screen of any computer that results in gathering information from or about a consumer, including without limitation location information.

IV.
NO USE OF IMPROPERLY OBTAINED INFORMATION IN COLLECTIONS

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, are hereby permanently restrained and enjoined from using, in connection with collecting or attempting to collect a debt, money, or property pursuant to a covered rent-to-own transaction, any information or data obtained in a manner that does not comply with Parts I, II, and III of this Order.

V.
PROTECTION OF DATA

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or

participation with it who receive actual notice of this order, by personal service or otherwise, shall:

A. Delete or destroy all user data previously gathered using any monitoring or geophysical location tracking technology that does not comply with Parts I, II, and III of this Order; and

B. Transfer data or information gathered by any monitoring or geophysical location tracking technology from the computer upon which the technology is installed to respondent's server(s), and from the respondent's server(s) to any other computers or servers only if the information collected is rendered unreadable, unusable, or indecipherable during transmission.

VI.
NO MISREPRESENTATIONS ABOUT PRIVACY

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, in connection with any covered rent-to-own transaction shall not misrepresent, in any manner, expressly or by implication, the extent to which respondent maintains and protects the security, privacy, or confidentiality of any personal information collected from or about consumers.

VII.
DISTRIBUTION OF ORDER

IT IS FURTHER ORDERED that respondent must deliver a copy of this order to all current and future principals, officers, directors, and managers who have responsibilities related to the subject matter of this order. Delivery must occur within seven days after the date of service of the order for current personnel. For new personnel, delivery must occur before they assume their responsibilities. From each individual to whom respondent delivers a copy of this Order, respondent must obtain a signed and

dated acknowledgment of receipt of this Order, with any electronic signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq*.

VIII.
COMPLIANCE REPORTING

IT IS FURTHER ORDERED that:

A. Respondent, and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Commission may require, file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which they have complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondent shall submit additional true and accurate written reports.

B. Respondent, 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 related entity 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, the respondent shall notify the Commission as soon as is practicable after obtaining such knowledge.

C. 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 for Enforcement, Bureau of

Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line Red Zone Investment Group, File No. 1123151. *Provided, however*; that, in lieu of overnight courier, notices may be sent by first class mail, but only if an electronic version of each such notice is contemporaneously sent to the Commission at DEbrief@ftc.gov.

IX.
RECORDKEEPING

IT IS FURTHER ORDERED that respondent shall, for five (5) years after the last date of any act or practice covered by Parts I – VI of this Order, maintain and upon reasonable notice make available to the Federal Trade Commission for inspection and copying, any documents, whether prepared by or on behalf of respondent, that:

A. Comprise or relate to complaints or inquiries, whether received directly, indirectly, or through any third party, concerning any monitoring or geophysical tracking technologies sold, licensed, or otherwise provided to any third party, and any responses to those complaints or inquiries;

B. Are reasonably necessary to demonstrate full compliance with each provision of this order, including but not limited to, all documents obtained, created, generated, or which in any way relate to the requirements, provisions, or terms of this order, and all reports submitted to the Commission pursuant to this order;

C. Contradict, qualify, or call into question respondent's compliance with this order; or

D. Acknowledge receipt of this order obtained pursuant to Part VII.

X.
TERMINATION OF ORDER

This Order will terminate on April 11, 2033, 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 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, Commissioner Wright not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission" or "FTC") has accepted, subject to final approval, consent agreements from the following respondents: DesignerWare, LLC; Timothy Kelly, and Ronald P. Koller, individually and as officers of DesignerWare, LLC; Aspen Way Enterprises, Inc.; Watershed

Development Corp.; Showplace, Inc., d/b/a Showplace Rent-to-Own; J.A.G. Rents, LLC, d/b/a ColorTyme; Red Zone, Inc., d/b/a ColorTyme; B. Stamper Enterprises, Inc., d/b/a Premier Rental Purchase; and C.A.L.M. Ventures, Inc., d/b/a Premier Rental Purchase.

The proposed consent orders have 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 agreements and the comments received, and will decide whether it should withdraw from any of the agreements and take appropriate action or make final the agreements' proposed orders.

Timothy Kelly and Ronald Koller founded and co-owned DesignerWare, LLC, a small software company that designed and licenses a single product, PC Rental Agent. Mr. Koller ended his association with DesignerWare in March 2012. PC Rental Agent is exclusively marketed to rent-to-own ("RTO") stores. RTO stores rent to consumers a variety of household items, including personal computers. PC Rental Agent is designed to assist RTO stores in tracking and recovering rented computers. Its chief function is a "kill switch," a program that can be used by a store to render a computer inoperable if the consumer renter is late or defaults on payments or if the computer is stolen. PC Rental Agent also offers a wiping feature that permits RTO stores to quickly erase the hard drives of computers prior to re-renting them to consumers.

Through PC Rental Agent, which RTO store licensees installed on rented computers, DesignerWare also provided access to "Detective Mode." Detective Mode was a software application embedded in the PC Rental Agent program. At the request of an RTO store, DesignerWare would remotely complete the Detective Mode installation process on an individual computer and activate "the Detective." Detective Mode would surreptitiously log the computer user's keystrokes, capture screenshots, and take pictures with the computer's webcam and send the data to DesignerWare's servers. Neither DesignerWare nor the RTO stores who have used Detective Mode disclosed to computer users that they were being monitored in this manner. Although DesignerWare

recommended that Detective Mode be installed and activated only to locate and identify the person in possession of a lost or stolen computer, DesignerWare did not monitor its own collection of or limit RTO stores' access to Detective Mode information to ensure that the information was obtained and used only for designated purposes.

DesignerWare sent the information captured by Detective Mode to an email account designated by each RTO store. Although DesignerWare's employees did not themselves view Detective Mode data, without DesignerWare licensing PC Rental Agent and making Detective Mode available to the RTO stores, as well as providing them with access to its web portal and providing servers to support both PC Rental Agent and Detective Mode, this collection and disclosure of consumers' private information would not be possible.

RTO stores also used Detective Mode to send fake "software registration" forms to consumers to deceive them into providing their contact and location information. DesignerWare created several different fake registration forms that its servers displayed on consumers' computers. An RTO store could use this feature of Detective Mode by requesting that DesignerWare activate it. No actual software was registered as a result of a consumer providing the requested information. Rather, Detective Mode captured the information entered in the prompt boxes and sent it to DesignerWare, who then emailed the data to the RTO store, all unbeknownst to the consumer. DesignerWare discontinued use of Detective Mode in January 2012.

In September 2011, DesignerWare added another feature to PC Rental Agent: the capacity to track the physical location of rented computers via WiFi hotspot locations. The information derived from WiFi hotspot contacts can frequently pinpoint a computer's location to a single building and, when aggregated, can track the movements and patterns of individual computer users over time. DesignerWare makes this information easily available to the RTO stores by cross-referencing a list of publicly available WiFi hotspots with the street addresses for the particular hotspots viewed or accessed by rented computers. DesignerWare applied its location tracking upgrade of PC Rental Agent to every

computer on which PC Rental Agent was installed, without obtaining consent from, or providing notice to, the computers' renters. DesignerWare recommends that RTO stores only use this tracking data in connection with recovering stolen property, but it does not monitor or limit the RTO stores' access to such location information.

Aspen Way Enterprises, Watershed Development, Showplace, J.A.G. Rents, Red Zone, B. Stamper Enterprises, and C.A.L.M. Ventures are RTO stores that have licensed PC Rental Agent from DesignerWare. These RTO stores have used information transmitted by DesignerWare when attempting to collect from computer renters who are late in paying or have otherwise breached their rental contracts. Using Detective Mode, these RTO stores have received from DesignerWare webcam photos of computer users (and anyone else within view of the camera), computer users' keystrokes, and screenshots of their computer activities. This information has revealed private and confidential details about computer users, such as their passwords for access to email accounts, social media websites, and financial institutions. Other confidential information was also captured, including medical records, private emails to doctors, employment applications containing Social Security numbers, bank and credit card statements, and discussions of defense strategies in a pending lawsuit. Through Detective Mode, DesignerWare and the RTO stores also secretly photographed the private conduct of consumers in their homes. This included pictures of children, household visitors, individuals not fully clothed, and couples engaged in intimate activities.

The collection and disclosure of such private and confidential information about consumers causes or is likely to cause substantial injury to consumers. Consumers are likely to be substantially injured by the exposure to strangers of personal, financial account access, and medical information. Consumers are actually harmed by DesignerWare's unwarranted invasion into their homes and lives and its capture and disclosure of the private details of individual and family life, including, for example, images of visitors, children, family interactions, partially undressed individuals, and couples engaged in sexual activities. Sharing data like that collected by Detective Mode with third parties can cause consumers financial and physical injury, and

impair their peaceful enjoyment of their homes. Because Detective Mode functions secretly, consumers cannot reasonably avoid this harm, which is neither trivial nor speculative. Moreover, there are no countervailing benefits to consumers or competition for continued use of Detective Mode in this context, where RTO stores have effective alternative methods for collections.

DesignerWare also sent consumers' contact information to the RTO stores. DesignerWare gathered this information from computer users who completed the deceptive "software registration" forms sent through Detective Mode. The RTO stores used this information to find, require payment for, or repossess a rented computer.

The Commission's complaint against DesignerWare, Kelly, and Koller (collectively, "DesignerWare Respondents") alleges that the company and its principals engaged in unfair and deceptive conduct and provided the means and instrumentalities to engage in unfairness, all in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The first count of the complaint focuses on actions taken by DesignerWare that caused or was likely to cause substantial injury to consumers. Count I alleges that the DesignerWare Respondents engaged in unfair conduct by installing monitoring software on rented computers, gathering personal, financial, and health information about consumers from computers, and disclosing that information to RTO store licensees. Count I also alleges as unfair the DesignerWare Respondents' installation of geophysical location tracking software on rented computers without consent from the computer renters, the tracking of computers' geophysical locations without notice to computer users, and the disclosure of that information to the RTO stores.

Count II alleges that the DesignerWare Respondents provided the means to third parties – the RTO stores – to violate Section 5. The first part of the count charges the DesignerWare Respondents with providing RTO stores with the means and instrumentalities to engage in unfairness by furnishing them with software that could monitor consumers by recording their keystrokes, capturing screenshots of information displayed on a computer, and taking

pictures of the computer user, and further could track the geophysical location data of rented computers without the consent of the computer renter or notice to the computer user. The second part of Count II alleges that the DesignerWare Respondents provided the means and instrumentalities to RTO stores to engage in unfair collection practices by providing them with the data gathered via PC Rental Agent and Detective Mode. Count II focuses on actions taken by DesignerWare that were integral to the harm to consumers caused or likely to be caused by the RTO stores. Here, without PC Rental Agent and Detective Mode and without access to DesignerWare's servers to execute their commands to rented computers, collect consumers' confidential information and transmit it to them, the RTO stores could not unfairly monitor their computer renters or use improperly gathered information in connection with collections.

Count III of the complaint charges the DesignerWare Respondents with deceptively gathering – and disclosing – consumers' personal information collected from the fake software registration forms that Detective Mode caused to appear on consumers' rented computers.

Each of the Commission's complaints against the seven RTO stores contains substantially similar allegations regarding the stores' violations of the FTC Act. The complaints charge that the RTO stores unfairly gathered consumers' personal information by installing monitoring software on rented computers and engaged in unfair collection practices by using the improperly gathered information to collect on consumer rental contracts. The complaints further allege that the RTO stores deceptively gathered consumers' personal information by activating the Detective Mode feature that sends the fake software registration forms to consumers' rented computers.

The proposed orders contain strong injunctive relief designed to remedy the unlawful conduct by DesignerWare, its principals, and the RTO stores. The orders define "monitoring technology and geophysical location tracking technology" so that the technological applications covered by the order are clearly described. "Monitoring technology" means any hardware, software, or application utilized in conjunction with a computer that can cause the computer to (1) capture, monitor, or record, and

(2) report information about user activities by recording keystrokes, clicks, or other user-generated actions; capturing screenshots of the information displayed on a computer monitor or screen; or activating the camera or microphone function of a computer to take photographs or record audio or visual content through the computer's webcam or microphone. The definition of "geophysical location tracking" includes the reporting of GPS coordinates, WiFi hotspots, or telecommunications towers – all technologies that allow for a relatively precise location of the item tracked. In addition, a "covered rent-to-own transaction" is defined as one in which a consumer agrees to purchase or rent a computer, where the rental agreement provides for payments over time and an option to purchase the computer.

The proposed orders with DesignerWare and its principals, Kelly and Koller, are separate, but contain identical injunctive provisions. Section I of the proposed orders with DesignerWare and its principals bans them from using – as well as licensing, selling, or otherwise providing third parties with – monitoring technology in connection with any covered RTO transaction. Section II prohibits them from using geophysical location tracking technology to gather information from any computer without providing clear and prominent notice to and obtaining affirmative express consent from the computer's renter at the time the computer is rented. This section also requires clear and prominent notice to computer users immediately prior to each time tracking technology is activated. In addition, Section II mandates that DesignerWare and its principals require their licensees to obtain consent and provide notice prior to initiating any location tracking. However, DesignerWare and its principals do not need to provide notice to a computer user prior to activating geophysical location tracking technology if 1) there is a reasonable basis to believe that the computer has been stolen and 2) a police report has been filed.

Section III of the proposed orders with DesignerWare and its principals prohibits the deceptive collection of consumer information via fake software registration notices. Section IV requires that any data that was collected through any monitoring or tracking software without the requisite notice and consent be destroyed and that any properly collected data be encrypted when

transmitted. Section V bars DesignerWare and its principals from making misrepresentations about the privacy or security of any personal information gathered from or about consumers.

Sections VI through IX of both orders contain reporting and compliance provisions. Section VI of the proposed DesignerWare order requires the company to disseminate the order now and in the future to all current and future principals, officers, directors, and managers, and to persons with responsibilities relating to the subject matter of the order. This section also requires DesignerWare to secure a signed and dated statement acknowledging receipt of the order from all persons who receive a copy. Section VII requires DesignerWare to submit compliance reports to the Commission within sixty (60) days, and periodically thereafter as requested. It also requires the company to notify the Commission of changes in DesignerWare's corporate status.

Section VI of the proposed order with the DesignerWare principals requires respondents to distribute it to all current and future principals, officers, directors, and managers of any company that either respondent controls that engages in any covered RTO transaction as well as to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. It also requires the respondents to secure a signed and dated statement acknowledging receipt of the order from all persons who receive a copy. Section VII of the proposed order with the DesignerWare principals requires them to submit compliance reports to the Commission within sixty (60) days, and periodically thereafter as requested. In addition, this section requires them to notify the Commission of changes in their business or employment for three (3) years.

Under Section VIII of the proposed orders with both DesignerWare and its principals, respondents must retain documents relating to their compliance with the order for a five (5) year period. Finally, Section IX of both proposed orders is a provision "sunsetting" the orders after twenty (20) years, with certain exceptions.

The proposed orders against the RTO stores (which are identical to each other) contain similar injunctive provisions to

those in the proposed orders with DesignerWare and its principals. Section I of each of the proposed orders bans the RTO stores from using monitoring technology in connection with any covered RTO transaction. Section II prohibits the stores from using geophysical location tracking technology to gather information from any computer without providing clear and prominent notice to the computer's renter and obtaining affirmative express consent from the computer's renter at the time the computer is rented. This section also requires clear and prominent notice to a computer user immediately prior to each time such technology is activated. The proposed RTO store orders also suspend the notice requirement if 1) there is a reasonable basis to believe that the computer has been stolen and 2) a police report has been filed. Section III of each of the proposed orders prohibits the deceptive collection of consumer information via fake software registration notices.

Section IV bars the stores from collecting or attempting to collect a debt, money, or property pursuant to a consumer rental contract by using any information or data that was improperly obtained from a computer by monitoring technology. Section V requires that any data collected through any monitoring or tracking software without the requisite notice and consent be destroyed, and that any properly collected data be encrypted when transmitted. As fencing in, Section VI bars misrepresentations about the privacy or security of any personal information gathered from or about consumers.

Sections VII through X of the proposed RTO store orders contain reporting and compliance provisions. Section VII requires distribution of the order now and in the future to all current and future principals, officers, directors, and managers, and to persons with responsibilities relating to the subject matter of the order. It also requires the RTO stores to secure signed and dated statements acknowledging receipt of the order from all persons who receive a copy of the order. Section VIII requires the RTO stores to submit compliance reports to the Commission within sixty (60) days, and periodically thereafter as requested, and ensures notification to the Commission of changes in corporate status. Under Section IX, the RTO stores must retain documents relating to order compliance for a five (5) year period.

Finally, Section X is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed orders. It is not intended to constitute an official interpretation of the proposed complaints or orders or to modify the terms of the orders in any way.

Complaint

IN THE MATTER OF

SHOWPLACE, INC., D/B/A SHOWPLACE RENT-TO-OWN AND SHOWPLACE LEASE/PURCHASE

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

Docket No. C-4397; File No. 112 3151
Complaint, April 11, 2013 – Decision, April 11, 2013

This consent order relates to unfair practices and privacy violations by Showplace, Inc. ("Showplace") in its use of a software program known as PC Rental Agent and an add-on application called Detective Mode in its rent-to-own computers. Showplace is a rent-to-own store operator located in Florida that licensed PC Rental Agent and Detective Mode from DesignerWare, LLC. The complaint alleges Showplace violated Section 5 of the FTC Act by installing PC Rental Agent and Detective Mode on its rental computers without consumers' knowledge or consent and by using these programs to gather consumers' confidential personal information, including passwords, usernames, Social Security numbers, and credit card information. The complaint further alleges that Showplace engaged in unfair collection practices by using Detective Mode to display a fake registration screen on a user's computer to find, require payment for, or repossess a computer. The consent order requires Showplace to cease all use, license, and sale of monitoring and tracking technology in connection with its rent-to-own transactions.

Participants

For the *Commission*: *Julie K. Mayer* and *Tracy S. Thorleifson.*

For the *Respondents*: *Pro Se*.

COMPLAINT

The Federal Trade Commission, having reason to believe that Showplace, Inc., also d/b/a Showplace Rent-to-Own and Showplace Lease/Purchase, 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 Showplace, Inc., also d/b/a Showplace Rent-to-Own and Showplace Lease/Purchase ("Showplace" or "respondent"), is an Ohio corporation with its principal office or

place of business at 611 Bellefontaine Ave., Marion, Ohio 43302. Showplace operates 15 rent-to-own stores in Ohio. Rent-to-own stores allow consumers to rent, with an option to purchase, goods such as furniture, household appliances, and consumer electronics including computers.

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

RESPONDENT'S BUSINESS PRACTICES

3. Since at least December 2009, Showplace has licensed a software product known as PC Rental Agent from DesignerWare, LLC ("DesignerWare") and installed it on computers it rents to consumers. PC Rental Agent, when installed on a rented computer, enables Showplace to disable the computer remotely. Showplace disables the computer when it is reported lost or stolen, or when a consumer is late making payments, has stopped communicating with Showplace, or has otherwise violated the rental contract. PC Rental Agent also enables Showplace to remotely install and activate an add-on program called Detective Mode. Using Detective Mode, Showplace can surreptitiously monitor the activities of the computer's user, including by using the computer's webcam. Through Detective Mode, Showplace can also secretly gather consumer's personal information using fake software registration windows.

4. Showplace installs PC Rental Agent on computers it rents to consumers prior to the consumer taking possession of the computer. The presence of PC Rental Agent is not detectible to a computer's user and the computer's renter cannot uninstall it.

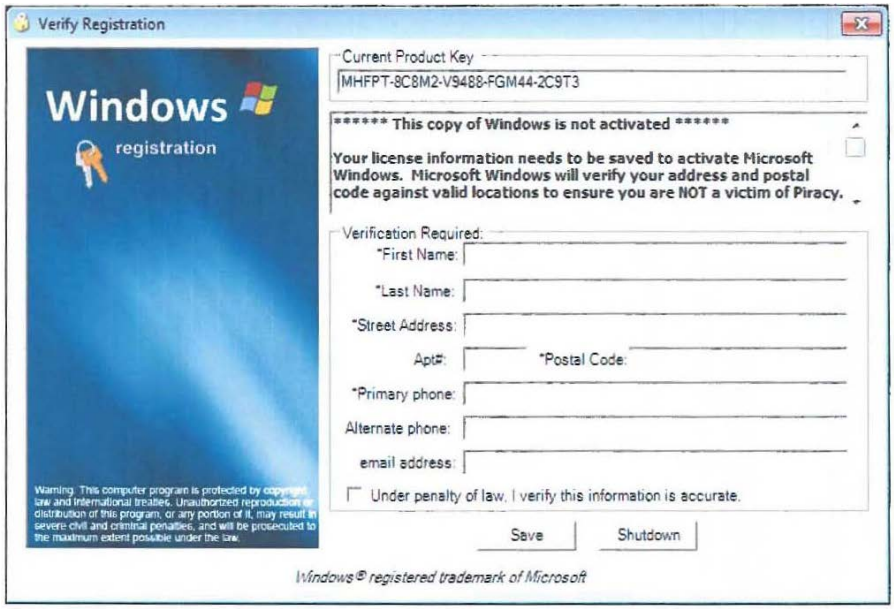
5. Showplace can remotely install and activate Detective Mode on any computer with PC Rental Agent. Once activated, Detective Mode can log the keystrokes of the computer user, take screen shots of the computer user's activities on the computer, and photograph anyone within view of the computer's webcam. Detective Mode gathers this information and transmits it to Showplace, unbeknownst to the individual using the computer. Showplace does not tell the computer user about the activation of Detective Mode.

6. Using Detective Mode, Showplace has gathered data about whoever is using the computer, whether the user is the computer's renter or another individual. At one level of activation, Detective Mode will gather data every two minutes that the computer is connected to the Internet for a period of 60 minutes. If Showplace wants more information it can instruct Detective Mode to record data every two minutes until directed to stop doing so. Data gathered via Detective Mode can reveal private, confidential, and personal details about the computer user, including usernames and passwords for access to email accounts, social media websites, and financial institutions, medical records, private emails to doctors, employment applications containing Social Security numbers, and bank and credit card statements. In numerous instances, Showplace has obtained data via Detective Mode that has revealed private, confidential, or personal information about computer users.

7. Showplace has used the information improperly obtained via Detective Mode in connection with collecting or attempting to collect debts, money, or property pursuant to consumer rental contracts.

8. Showplace's gathering of private and confidential information about individuals causes or is likely to cause substantial harm to consumers. Because of Showplace's intrusion, consumers are at risk of harm from exposure of their personal, financial account access, and medical information. Consumers are actually harmed by Showplace's unwarranted invasion into their homes and lives, and its capture of the private details of individual and family life. Secretly collecting such data can cause consumers financial and physical injury and impair their peaceful enjoyment of their homes. Consumers cannot reasonably avoid these injuries because Detective Mode is invisible to them. The harm caused by Showplace's unauthorized gathering of confidential consumer information is not outweighed by countervailing benefits to consumers or to competition; indeed, in this context, where rent-to-own stores have alternate effective methods of collection, e.g., using PC Rental Agent to remotely disable the computer, there are no legitimate benefits to respondent or to the public

9. Showplace has also used another feature of Detective Mode that allows it to cause a user's computer to display a fake registration window, purportedly for Microsoft Windows or other software. The fake registration window prompts the computer user to enter a name, address, email address, and phone number. The computer user must enter the requested information to close the window. A screenshot of one such fake software registration window appears below.



10. No actual software is registered as a result of a consumer providing the requested information; instead, Detective Mode captures the information entered in the prompt boxes and sends the data to Showplace. In numerous instances, Showplace has used this information to find, require payment for, or repossess a computer.

11. Consumers who respond to the fake prompt screen and provide the requested contact information are deprived of the ability to control who has access to their contact information and how they are contacted.

VIOLATIONS OF THE FTC ACT

Count I
Unfair Gathering of Consumers' Personal Information

12. Through the means described in Paragraphs 3 through 11, respondent has installed monitoring software on rented computers and gathered, or caused to be gathered, sensitive personal information about consumers from those computers.

13. Respondent's actions cause or are likely to cause substantial injury to consumers that cannot be reasonably avoided and is not outweighed by countervailing benefits to consumers or competition.

14. Therefore, respondent's practices, as described in Paragraph 12, constitute unfair acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a).

Count II
Unfair Collection Practices

15. Through the means described in Paragraphs 3 through 11, respondent has used information improperly gathered from consumers to collect or attempt to collect a debt, money, or property pursuant to a consumer rental contract.

16. Respondent's actions cause or are likely to cause substantial injury to consumers that cannot be reasonably avoided and is not outweighed by countervailing benefits to consumers or competition.

17. Therefore, respondent's practices, as described in Paragraph15, constitute unfair acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a).

Count III
Deceptive Gathering of Consumers' Personal Information

18. Through the means described in Paragraphs 3 through 11, respondent has represented or caused to be represented to

consumers, expressly or by implication, that certain pop-up notices that appear on a computer's screen are notices from trusted software providers that contain software registration forms that must be filled out with the consumers' contact information in order to continue to use the providers' software.

19. In truth and in fact, these pop-up notices are not from trusted software providers and do not contain software registration forms that must be filled out with the consumer's contact information in order to continue to use the providers' software, but instead serve only to cause the consumer to provide the requested contact information so that respondent can use this information in connection with collecting or attempting to collect debts, money, or property pursuant to consumer rental contracts.

20. Therefore, respondent's practices, as described in Paragraph 18, constitute deceptive acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a).

THEREFORE, the Federal Trade Commission this eleventh day of April, 2013, has issued this complaint against respondent.

By the Commission, Commissioner Wright not participating.

DECISION AND ORDER

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

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order ("consent agreement"), an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of said consent agreement is for settlement purposes only and does not constitute an admission by the respondent that the law has been violated as alleged in the complaint, or that 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, 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 Showplace, Inc., also d/b/a Showplace Rent-to-Own and Showplace Lease/Purchase ("Showplace"), is an Ohio corporation with its principal office or place of business at 611 Bellefontaine Ave., Marion, Ohio 43302.

2. The 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:

1. Unless otherwise specified, "respondent" shall mean Showplace and its successors and assigns.

2. "Commerce" shall be defined as it is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

3. "Computer" shall mean any desktop or laptop computer, handheld device, tablet, telephone, or other electronic product or device that has a platform on which to download, install, or run any software program, code, script, or other content.

4. "Clear(ly) and prominent(ly)" shall mean:

   a. 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;

   b. 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;

   c. In communications disseminated through video means (e.g., television or streaming video), the required disclosures are in writing in a form 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;

   d. In communications made through interactive media, such as the Internet, online services, and software, the required disclosures are unavoidable and presented in a form consistent with subpart (a)

of this definition, in addition to any audio or video presentation of them; and

e. In all instances, the required disclosures are presented in an understandable language and syntax; in the same language as the predominant language that is used in the communication; and 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.

5. "Geophysical location tracking technology" shall mean any hardware, software, or application utilized in conjunction with a computer that collects and reports data or information that identifies the precise geophysical location of the computer. Geophysical location tracking technologies include, for these purposes, technologies that report: the GPS coordinates of a computer; the WiFi signals available to or actually used by a computer to access the Internet; the telecommunication towers or connections available to or actually used by a computer; the processing of any such reported data through geolocation lookup services; or any information derived from any combination of the foregoing.

6. "Monitoring technology" shall mean any hardware, software, or application utilized in conjunction with a computer that can cause the computer to (1) capture, monitor, or record, and (2) report information about user activities by:

a. Recording keystrokes, clicks, or other user-generated actions;

b. Capturing screenshots of the information displayed on a computer monitor or screen; or

c. Activating the camera or microphone function of a computer to take photographs or record audio or visual content through the computer's webcam or microphone.

7. "Covered rent-to-own transaction" shall mean any transaction where a consumer enters into an agreement for the purchase or rental of a computer and the consumer's contract or rental agreement provides for payments over time and an option to purchase the computer.

I.
MONITORING TECHNOLOGY PROHIBITED

IT IS HEREBY ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, in connection with any covered rent-to-own transaction, are hereby permanently restrained and enjoined from using any monitoring technology to gather information or data from any computer rented to a consumer.

II.
USE OF TRACKING TECHNOLOGY LIMITED

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, in connection with any covered rent-to-own transaction, are hereby permanently restrained and enjoined from:

A. Gathering any information or data from any computer via any geophysical location tracking technology without providing clear and prominent notice to the computer user at the time the computer is rented and immediately prior to each use of the geophysical

location tracking technology, and also obtaining affirmative express consent from the computer's renter at the time the computer is rented;

B. Installing or activating on rented computers geophysical location tracking technology where that technology does not provide clear and prominent notice to the computer user immediately prior to each use of the geophysical location tracking technology; and

C. Failing to provide clear and prominent notice to computer users and obtaining affirmative express consent from computer renters, as required in subpart A, above, by the following means:

1. Clear and Prominent Notice: respondent shall provide a clear and prominent notice to the user, separate and apart from any "privacy policy," "data use policy," "terms of service," "end-user license agreement," "lease agreement," or other similar document, that discloses (1) that geophysical location tracking technology is installed and/or currently running on the computer; (2) the types of user activity or conduct that is being captured by such technology; (3) the identities or specific categories of entities with whom any data or information that is collected will be shared or otherwise provided; (4) the purpose(s) for the collection, use, or sharing of such data or information; and (5) where and how the user can contact someone for additional information.

2. Affirmative Express Consent: respondent shall obtain affirmative express consent by giving the computer renter an equally clear and prominent choice to either agree or not agree to any geophysical location tracking technology, and neither option may be highlighted or preselected as a default setting. Activation of any geophysical location tracking technology must not proceed

until the computer's renter provides affirmative express consent. Notwithstanding the foregoing, nothing in this Part shall require respondent to rent a computer to a user who declines to consent to installation or activation of any geophysical tracking technology.

3. Icons: respondent shall provide that the activation of any geophysical location tracking technology be accompanied by the installation of a clear and prominent icon on the computer on which the technology is installed, such as on the desktop and in the desktop system tray of the computer. Clicking on the icon must clearly and prominently disclose: (1) that geophysical location tracking technology is installed and currently running on the computer; (2) the types of user activity or conduct that is being captured by such technology; (3) the identities or specific categories of entities with whom any data or information that is collected will be shared or otherwise provided; (4) the purpose(s) for the collection, use, or sharing of such data or information; and (5) where and how the user can contact someone for additional information.

Provided that respondent may suspend the notice requirements of this Part and activate geophysical location tracking technology if a) the renter reports that the computer has been stolen or respondent otherwise has a reasonable basis to believe that the computer has been stolen, and b) either the renter or respondent has filed a police report stating that the computer has been stolen. Provided further that respondent shall retain documents establishing (a) and (b). For purposes of this Order, "filing of a police report" means the filing of the renter's or respondent's complaint with the police department in any form recognized in the jurisdiction.

III.
NO DECEPTIVE GATHERING OF CONSUMER INFORMATION

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, in connection with any covered rent-to-own transaction, are hereby permanently restrained and enjoined from making or causing to be made any false representation or depiction in any notice, prompt screen, or other software application appearing on the screen of any computer that results in gathering information from or about a consumer, including without limitation location information.

IV.
NO USE OF IMPROPERLY OBTAINED INFORMATION IN COLLECTIONS

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, are hereby permanently restrained and enjoined from using, in connection with collecting or attempting to collect a debt, money, or property pursuant to a covered rent-to-own transaction, any information or data obtained in a manner that does not comply with Parts I, II, and III of this Order.

V.
PROTECTION OF DATA

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or

participation with it who receive actual notice of this order, by personal service or otherwise, in connection with shall:

A. Delete or destroy all user data previously gathered using any monitoring or geophysical location tracking technology that does not comply with Parts I, II, and III of this Order; and

B. Transfer data or information gathered by any monitoring or geophysical location tracking technology from the computer upon which the technology is installed to respondent's server(s), and from the respondent's server(s) to any other computers or servers only if the information collected is rendered unreadable, unusable, or indecipherable during transmission.

VI.
NO MISREPRESENTATIONS ABOUT PRIVACY

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, in connection with any covered rent-to-own transaction shall not misrepresent, in any manner, expressly or by implication, the extent to which respondent maintains and protects the security, privacy, or confidentiality of any personal information collected from or about consumers.

VII.
DISTRIBUTION OF ORDER

IT IS FURTHER ORDERED that respondent must deliver a copy of this order to all current and future principals, officers, directors, and managers who have responsibilities related to the subject matter of this order. Delivery must occur within seven days after the date of service of the order for current personnel. For new personnel, delivery must occur before they assume their responsibilities. From each individual to whom respondent delivers a copy of this Order, respondent must obtain a signed and

dated acknowledgment of receipt of this Order, with any electronic signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq*.

VIII.
COMPLIANCE REPORTING

IT IS FURTHER ORDERED that:

A. Respondent, and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Commission may require, file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which they have complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondent shall submit additional true and accurate written reports.

B. Respondent, 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 related entity 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, the respondent shall notify the Commission as soon as is practicable after obtaining such knowledge.

C. 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 for Enforcement, Bureau of

Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line Showplace, Inc., File No. 1123151. *Provided, however*; that, in lieu of overnight courier, notices may be sent by first class mail, but only if an electronic version of each such notice is contemporaneously sent to the Commission at DEbrief@ftc.gov.

IX.
RECORDKEEPING

IT IS FURTHER ORDERED that respondent shall, for five (5) years after the last date of any act or practice covered by Parts I – VI of this Order, maintain and upon reasonable notice make available to the Federal Trade Commission for inspection and copying, any documents, whether prepared by or on behalf of respondent, that:

A. Comprise or relate to complaints or inquiries, whether received directly, indirectly, or through any third party, concerning any monitoring or geophysical tracking technologies sold, licensed, or otherwise provided to any third party, and any responses to those complaints or inquiries;

B. Are reasonably necessary to demonstrate full compliance with each provision of this order, including but not limited to, all documents obtained, created, generated, or which in any way relate to the requirements, provisions, or terms of this order, and all reports submitted to the Commission pursuant to this order;

C. Contradict, qualify, or call into question respondent's compliance with this order; or

D. Acknowledge receipt of this order obtained pursuant to Part VII.

X.
TERMINATION OF ORDER

This Order will terminate on April 11, 2033, 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 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, Commissioner Wright not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission" or "FTC") has accepted, subject to final approval, consent agreements from the following respondents: DesignerWare, LLC; Timothy Kelly, and Ronald P. Koller, individually and as officers of DesignerWare, LLC; Aspen Way Enterprises, Inc.; Watershed

Development Corp.; Showplace, Inc., d/b/a Showplace Rent-to-Own; J.A.G. Rents, LLC, d/b/a ColorTyme; Red Zone, Inc., d/b/a ColorTyme; B. Stamper Enterprises, Inc., d/b/a Premier Rental Purchase; and C.A.L.M. Ventures, Inc., d/b/a Premier Rental Purchase.

The proposed consent orders have 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 agreements and the comments received, and will decide whether it should withdraw from any of the agreements and take appropriate action or make final the agreements' proposed orders.

Timothy Kelly and Ronald Koller founded and co-owned DesignerWare, LLC, a small software company that designed and licenses a single product, PC Rental Agent. Mr. Koller ended his association with DesignerWare in March 2012. PC Rental Agent is exclusively marketed to rent-to-own ("RTO") stores. RTO stores rent to consumers a variety of household items, including personal computers. PC Rental Agent is designed to assist RTO stores in tracking and recovering rented computers. Its chief function is a "kill switch," a program that can be used by a store to render a computer inoperable if the consumer renter is late or defaults on payments or if the computer is stolen. PC Rental Agent also offers a wiping feature that permits RTO stores to quickly erase the hard drives of computers prior to re-renting them to consumers.

Through PC Rental Agent, which RTO store licensees installed on rented computers, DesignerWare also provided access to "Detective Mode." Detective Mode was a software application embedded in the PC Rental Agent program. At the request of an RTO store, DesignerWare would remotely complete the Detective Mode installation process on an individual computer and activate "the Detective." Detective Mode would surreptitiously log the computer user's keystrokes, capture screenshots, and take pictures with the computer's webcam and send the data to DesignerWare's servers. Neither DesignerWare nor the RTO stores who have used Detective Mode disclosed to computer users that they were being monitored in this manner. Although DesignerWare

recommended that Detective Mode be installed and activated only to locate and identify the person in possession of a lost or stolen computer, DesignerWare did not monitor its own collection of or limit RTO stores' access to Detective Mode information to ensure that the information was obtained and used only for designated purposes.

DesignerWare sent the information captured by Detective Mode to an email account designated by each RTO store. Although DesignerWare's employees did not themselves view Detective Mode data, without DesignerWare licensing PC Rental Agent and making Detective Mode available to the RTO stores, as well as providing them with access to its web portal and providing servers to support both PC Rental Agent and Detective Mode, this collection and disclosure of consumers' private information would not be possible.

RTO stores also used Detective Mode to send fake "software registration" forms to consumers to deceive them into providing their contact and location information. DesignerWare created several different fake registration forms that its servers displayed on consumers' computers. An RTO store could use this feature of Detective Mode by requesting that DesignerWare activate it. No actual software was registered as a result of a consumer providing the requested information. Rather, Detective Mode captured the information entered in the prompt boxes and sent it to DesignerWare, who then emailed the data to the RTO store, all unbeknownst to the consumer. DesignerWare discontinued use of Detective Mode in January 2012.

In September 2011, DesignerWare added another feature to PC Rental Agent: the capacity to track the physical location of rented computers via WiFi hotspot locations. The information derived from WiFi hotspot contacts can frequently pinpoint a computer's location to a single building and, when aggregated, can track the movements and patterns of individual computer users over time. DesignerWare makes this information easily available to the RTO stores by cross-referencing a list of publicly available WiFi hotspots with the street addresses for the particular hotspots viewed or accessed by rented computers. DesignerWare applied its location tracking upgrade of PC Rental Agent to every

computer on which PC Rental Agent was installed, without obtaining consent from, or providing notice to, the computers' renters. DesignerWare recommends that RTO stores only use this tracking data in connection with recovering stolen property, but it does not monitor or limit the RTO stores' access to such location information.

Aspen Way Enterprises, Watershed Development, Showplace, J.A.G. Rents, Red Zone, B. Stamper Enterprises, and C.A.L.M. Ventures are RTO stores that have licensed PC Rental Agent from DesignerWare. These RTO stores have used information transmitted by DesignerWare when attempting to collect from computer renters who are late in paying or have otherwise breached their rental contracts. Using Detective Mode, these RTO stores have received from DesignerWare webcam photos of computer users (and anyone else within view of the camera), computer users' keystrokes, and screenshots of their computer activities. This information has revealed private and confidential details about computer users, such as their passwords for access to email accounts, social media websites, and financial institutions. Other confidential information was also captured, including medical records, private emails to doctors, employment applications containing Social Security numbers, bank and credit card statements, and discussions of defense strategies in a pending lawsuit. Through Detective Mode, DesignerWare and the RTO stores also secretly photographed the private conduct of consumers in their homes. This included pictures of children, household visitors, individuals not fully clothed, and couples engaged in intimate activities.

The collection and disclosure of such private and confidential information about consumers causes or is likely to cause substantial injury to consumers. Consumers are likely to be substantially injured by the exposure to strangers of personal, financial account access, and medical information. Consumers are actually harmed by DesignerWare's unwarranted invasion into their homes and lives and its capture and disclosure of the private details of individual and family life, including, for example, images of visitors, children, family interactions, partially undressed individuals, and couples engaged in sexual activities. Sharing data like that collected by Detective Mode with third parties can cause consumers financial and physical injury, and

impair their peaceful enjoyment of their homes. Because Detective Mode functions secretly, consumers cannot reasonably avoid this harm, which is neither trivial nor speculative. Moreover, there are no countervailing benefits to consumers or competition for continued use of Detective Mode in this context, where RTO stores have effective alternative methods for collections.

DesignerWare also sent consumers' contact information to the RTO stores. DesignerWare gathered this information from computer users who completed the deceptive "software registration" forms sent through Detective Mode. The RTO stores used this information to find, require payment for, or repossess a rented computer.

The Commission's complaint against DesignerWare, Kelly, and Koller (collectively, "DesignerWare Respondents") alleges that the company and its principals engaged in unfair and deceptive conduct and provided the means and instrumentalities to engage in unfairness, all in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The first count of the complaint focuses on actions taken by DesignerWare that caused or was likely to cause substantial injury to consumers. Count I alleges that the DesignerWare Respondents engaged in unfair conduct by installing monitoring software on rented computers, gathering personal, financial, and health information about consumers from computers, and disclosing that information to RTO store licensees. Count I also alleges as unfair the DesignerWare Respondents' installation of geophysical location tracking software on rented computers without consent from the computer renters, the tracking of computers' geophysical locations without notice to computer users, and the disclosure of that information to the RTO stores.

Count II alleges that the DesignerWare Respondents provided the means to third parties – the RTO stores – to violate Section 5. The first part of the count charges the DesignerWare Respondents with providing RTO stores with the means and instrumentalities to engage in unfairness by furnishing them with software that could monitor consumers by recording their keystrokes, capturing screenshots of information displayed on a computer, and taking

pictures of the computer user, and further could track the geophysical location data of rented computers without the consent of the computer renter or notice to the computer user. The second part of Count II alleges that the DesignerWare Respondents provided the means and instrumentalities to RTO stores to engage in unfair collection practices by providing them with the data gathered via PC Rental Agent and Detective Mode. Count II focuses on actions taken by DesignerWare that were integral to the harm to consumers caused or likely to be caused by the RTO stores. Here, without PC Rental Agent and Detective Mode and without access to DesignerWare's servers to execute their commands to rented computers, collect consumers' confidential information and transmit it to them, the RTO stores could not unfairly monitor their computer renters or use improperly gathered information in connection with collections.

Count III of the complaint charges the DesignerWare Respondents with deceptively gathering – and disclosing – consumers' personal information collected from the fake software registration forms that Detective Mode caused to appear on consumers' rented computers.

Each of the Commission's complaints against the seven RTO stores contains substantially similar allegations regarding the stores' violations of the FTC Act. The complaints charge that the RTO stores unfairly gathered consumers' personal information by installing monitoring software on rented computers and engaged in unfair collection practices by using the improperly gathered information to collect on consumer rental contracts. The complaints further allege that the RTO stores deceptively gathered consumers' personal information by activating the Detective Mode feature that sends the fake software registration forms to consumers' rented computers.

The proposed orders contain strong injunctive relief designed to remedy the unlawful conduct by DesignerWare, its principals, and the RTO stores. The orders define "monitoring technology and geophysical location tracking technology" so that the technological applications covered by the order are clearly described. "Monitoring technology" means any hardware, software, or application utilized in conjunction with a computer that can cause the computer to (1) capture, monitor, or record, and

(2) report information about user activities by recording keystrokes, clicks, or other user-generated actions; capturing screenshots of the information displayed on a computer monitor or screen; or activating the camera or microphone function of a computer to take photographs or record audio or visual content through the computer's webcam or microphone. The definition of "geophysical location tracking" includes the reporting of GPS coordinates, WiFi hotspots, or telecommunications towers – all technologies that allow for a relatively precise location of the item tracked. In addition, a "covered rent-to-own transaction" is defined as one in which a consumer agrees to purchase or rent a computer, where the rental agreement provides for payments over time and an option to purchase the computer.

The proposed orders with DesignerWare and its principals, Kelly and Koller, are separate, but contain identical injunctive provisions. Section I of the proposed orders with DesignerWare and its principals bans them from using – as well as licensing, selling, or otherwise providing third parties with – monitoring technology in connection with any covered RTO transaction. Section II prohibits them from using geophysical location tracking technology to gather information from any computer without providing clear and prominent notice to and obtaining affirmative express consent from the computer's renter at the time the computer is rented. This section also requires clear and prominent notice to computer users immediately prior to each time tracking technology is activated. In addition, Section II mandates that DesignerWare and its principals require their licensees to obtain consent and provide notice prior to initiating any location tracking. However, DesignerWare and its principals do not need to provide notice to a computer user prior to activating geophysical location tracking technology if 1) there is a reasonable basis to believe that the computer has been stolen and 2) a police report has been filed.

Section III of the proposed orders with DesignerWare and its principals prohibits the deceptive collection of consumer information via fake software registration notices. Section IV requires that any data that was collected through any monitoring or tracking software without the requisite notice and consent be destroyed and that any properly collected data be encrypted when

transmitted. Section V bars DesignerWare and its principals from making misrepresentations about the privacy or security of any personal information gathered from or about consumers.

Sections VI through IX of both orders contain reporting and compliance provisions. Section VI of the proposed DesignerWare order requires the company to disseminate the order now and in the future to all current and future principals, officers, directors, and managers, and to persons with responsibilities relating to the subject matter of the order. This section also requires DesignerWare to secure a signed and dated statement acknowledging receipt of the order from all persons who receive a copy. Section VII requires DesignerWare to submit compliance reports to the Commission within sixty (60) days, and periodically thereafter as requested. It also requires the company to notify the Commission of changes in DesignerWare's corporate status.

Section VI of the proposed order with the DesignerWare principals requires respondents to distribute it to all current and future principals, officers, directors, and managers of any company that either respondent controls that engages in any covered RTO transaction as well as to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. It also requires the respondents to secure a signed and dated statement acknowledging receipt of the order from all persons who receive a copy. Section VII of the proposed order with the DesignerWare principals requires them to submit compliance reports to the Commission within sixty (60) days, and periodically thereafter as requested. In addition, this section requires them to notify the Commission of changes in their business or employment for three (3) years.

Under Section VIII of the proposed orders with both DesignerWare and its principals, respondents must retain documents relating to their compliance with the order for a five (5) year period. Finally, Section IX of both proposed orders is a provision "sunsetting" the orders after twenty (20) years, with certain exceptions.

The proposed orders against the RTO stores (which are identical to each other) contain similar injunctive provisions to

those in the proposed orders with DesignerWare and its principals. Section I of each of the proposed orders bans the RTO stores from using monitoring technology in connection with any covered RTO transaction. Section II prohibits the stores from using geophysical location tracking technology to gather information from any computer without providing clear and prominent notice to the computer's renter and obtaining affirmative express consent from the computer's renter at the time the computer is rented. This section also requires clear and prominent notice to a computer user immediately prior to each time such technology is activated. The proposed RTO store orders also suspend the notice requirement if 1) there is a reasonable basis to believe that the computer has been stolen and 2) a police report has been filed. Section III of each of the proposed orders prohibits the deceptive collection of consumer information via fake software registration notices.

Section IV bars the stores from collecting or attempting to collect a debt, money, or property pursuant to a consumer rental contract by using any information or data that was improperly obtained from a computer by monitoring technology. Section V requires that any data collected through any monitoring or tracking software without the requisite notice and consent be destroyed, and that any properly collected data be encrypted when transmitted. As fencing in, Section VI bars misrepresentations about the privacy or security of any personal information gathered from or about consumers.

Sections VII through X of the proposed RTO store orders contain reporting and compliance provisions. Section VII requires distribution of the order now and in the future to all current and future principals, officers, directors, and managers, and to persons with responsibilities relating to the subject matter of the order. It also requires the RTO stores to secure signed and dated statements acknowledging receipt of the order from all persons who receive a copy of the order. Section VIII requires the RTO stores to submit compliance reports to the Commission within sixty (60) days, and periodically thereafter as requested, and ensures notification to the Commission of changes in corporate status. Under Section IX, the RTO stores must retain documents relating to order compliance for a five (5) year period.

Finally, Section X is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed orders. It is not intended to constitute an official interpretation of the proposed complaints or orders or to modify the terms of the orders in any way.

Complaint

IN THE MATTER OF

WATERSHED DEVELOPMENT CORPORATION, D/B/A WATERSHED AND AARON'S SALES & LEASE OWNERSHIP

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

Docket No. C-4398; File No. 112 3151
Complaint, April 11, 2013 – Decision, April 11, 2013

This consent order relates to unfair practices and privacy violations by Watershed Development Corporation ("Watershed") in its use of a software program known as PC Rental Agent and an add-on application called Detective Mode in its rent-to-own computers. Watershed is a rent-to-own store operator located in Florida that licensed PC Rental Agent and Detective Mode from DesignerWare, LLC. The complaint alleges Watershed violated Section 5 of the FTC Act by installing PC Rental Agent and Detective Mode on its rental computers without consumers' knowledge or consent and by using these programs to gather consumers' confidential personal information, including passwords, usernames, Social Security numbers, and credit card information. The complaint further alleges that Showplace engaged in unfair collection practices by using Detective Mode to display a fake registration screen on a user's computer to find, require payment for, or repossess a computer. The consent order requires Watershed to cease all use, license, and sale of monitoring and tracking technology in connection with its rent-to-own transactions.

Participants

For the *Commission*: *Julie K. Mayer* and *Tracy S. Thorleifson.*

For the *Respondents*: *Douglas E. Lee, Ehremann, Gehlback, Badger & Lee*.

COMPLAINT

The Federal Trade Commission, having reason to believe that Watershed Development Corporation, also d/b/a Watershed and Aaron's Sales & Lease Ownership, 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 Watershed Development Corporation, also d/b/a Watershed and Aaron's Sales & Lease Ownership ("Watershed" or "respondent"), is an Illinois corporation with its principal office or place of business at 28835 N. Herky Drive, Unit 106, Lake Bluff, Illinois 60044. Watershed is a franchisee of Aaron's, Inc. It operates eight rent-to-own stores in Illinois. Rent-to-own stores allow consumers to rent, with an option to purchase, goods such as furniture, household appliances, and consumer electronics including computers.

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

RESPONDENT'S BUSINESS PRACTICES

3. Since 2007, Watershed has licensed a software product known as PC Rental Agent from DesignerWare, LLC ("DesignerWare") and installed it on computers it rents to consumers. PC Rental Agent, when installed on a rented computer, enables Watershed to disable the computer remotely. Watershed disables the computer when it is reported lost or stolen, or when a consumer is late making payments, has stopped communicating with Watershed, or has otherwise violated the rental contract. PC Rental Agent also enables Watershed to remotely install and activate an add-on program called Detective Mode. Using Detective Mode, Watershed can surreptitiously monitor the activities of the computer's user. Through Detective Mode, Watershed can also secretly gather consumers' personal information using fake software registration windows.

4. Watershed installed PC Rental Agent on computers it rented to consumers prior to the consumer taking possession of the computer. Consumers cannot uninstall PC Rental Agent. Watershed stopped using PC Rental Agent on January 1, 2012.

5. Watershed can remotely install and activate Detective Mode on any computer with PC Rental Agent. Once activated, Detective Mode can log the keystrokes of the computer user, take screen shots of the computer user's activities on the computer, and photograph anyone within view of the computer's webcam. Detective Mode gathers requested information and transmits it to

Watershed unbeknownst to the individual using the computer. Watershed does not tell the computer user about the activation of Detective Mode.

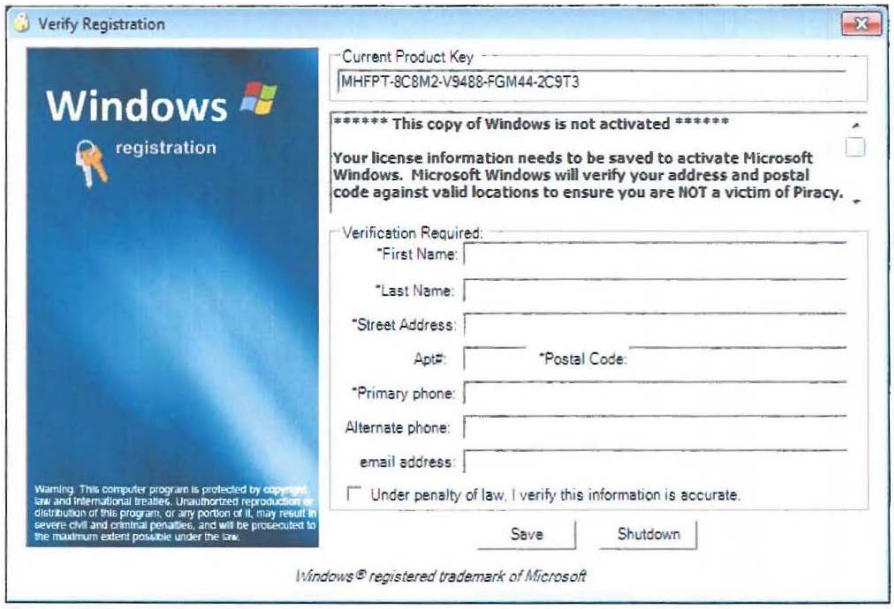
6. Using Detective Mode, Watershed has gathered data about whoever is using the computer, whether the user is the computer's renter or another individual. At one level of activation, Detective Mode will gather data every two minutes that the computer is connected to the Internet for a period of 60 minutes. If Watershed wants more information it can instruct Detective Mode to record data every two minutes until directed to stop doing so. In numerous instances, Watershed has obtained data via Detective Mode that has revealed private, confidential, or personal details about computer users. Keystroke logs have displayed usernames and passwords for access to email accounts, social media websites, and financial institutions. Screenshots have captured additional confidential information about the computer user. Watershed did not activate the webcam feature of Detective Mode.

7. Watershed has used the information improperly obtained via Detective Mode in connection with collecting or attempting to collect debts, money, or property pursuant to consumer rental contracts.

8. Gathering this private and confidential information about individuals causes or is likely to cause substantial harm to consumers. Because of Watershed's intrusion, consumers are at risk of harm from exposure of their personal, financial account access, and medical information. Consumers are actually harmed by the unwarranted invasion into their homes and lives, and the capture of the private details of individual and family life. Secretly collecting such data can cause consumers financial and physical injury and impair their peaceful enjoyment of their homes. Consumers cannot reasonably avoid these injuries because Detective Mode is invisible to them. The harm caused by Watershed's unauthorized gathering of confidential consumer information is not outweighed by countervailing benefits to consumers or to competition; indeed, in this context, where rent-to-own stores have alternate effective methods of collection, e.g.,

using PC Rental Agent to remotely disable the computer, there are no legitimate benefits to respondent or to the public.

9. Watershed has also used another feature of Detective Mode that allows it to cause a user's computer to display a fake registration window, purportedly for Microsoft Windows or other software. The fake registration window prompts the computer user to enter a name, address, email address, and phone number. The computer user must enter the requested information to close the window. A screenshot of one such fake software registration window appears below.



10. No actual software is registered as a result of a consumer providing the requested information; instead, Detective Mode captures the information entered in the prompt boxes and sends the data to Watershed. In numerous instances, Watershed has used this information to find, require payment for, or repossess a computer.

11. Consumers who respond to the fake prompt screen and provide the requested contact information are deprived of the ability to control who has access to their contact information and how they are contacted.

Complaint

VIOLATIONS OF THE FTC ACT

Count I
Unfair Gathering Of Consumers' Personal Information

12. Through the means described in Paragraphs 3 through 11, respondent has installed monitoring software on rented computers and gathered, or caused to be gathered, sensitive personal information about consumers from those computers.

13. Respondent's actions cause or are likely to cause substantial injury to consumers that cannot be reasonably avoided and is not outweighed by countervailing benefits to consumers or competition.

14. Therefore, respondent's practices, as described in Paragraph 12, constitute unfair acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a).

Count II
Unfair Collection Practices

15. Through the means described in Paragraphs 3 through 11, respondent has used information improperly gathered from consumers to collect or attempt to collect a debt, money, or property pursuant to a consumer rental contract.

16. Respondent's actions cause or are likely to cause substantial injury to consumers that cannot be reasonably avoided and is not outweighed by countervailing benefits to consumers or competition.

17. Therefore, respondent's practices, as described in Paragraph 15, constitute unfair acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a).

Count III
Deceptive Gathering Of Consumers'
Personal Information

18. Through the means described in Paragraphs 3 through 11, respondent has represented or caused to be represented to consumers, expressly or by implication, that certain pop-up notices that appear on computer screens are notices from trusted software providers that contain software registration forms that must be filled out with the consumers' contact information in order to continue to use the providers' software.

19. In truth and in fact, these pop-up notices are not from trusted software providers and do not contain software registration forms that must be filled out with the consumers' contact information in order to continue to use the providers' software, but instead serve only to cause the consumer to provide the requested contact information so that respondent can use this information in connection with collecting or attempting to collect debts, money, or property pursuant to consumer rental contracts.

20. Therefore, respondent's practices, as described in Paragraph 18, constitute deceptive acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a).

THEREFORE, the Federal Trade Commission this eleventh day of April, 2013, has issued this complaint against respondent.

By the Commission, Commissioner Wright not participating.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft complaint

that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act, 15 U.S.C § 45 *et seq*.; and

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

The Commission having thereafter considered the matter and having determined that it has reason to believe that the respondent has violated the 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 Watershed Development Corp., also d/b/a Watershed and Aaron's Sales & Lease Ownership ("Watershed"), is an Illinois corporation with its principal office or place of business at 28835 N. Herky Drive, Unit 106, Lake Bluff, Illinois 60044.

2. The 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:

1. Unless otherwise specified, "respondent" shall mean Watershed and its successors and assigns.

2. "Commerce" shall be defined as it is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

3. "Computer" shall mean any desktop or laptop computer, handheld device, tablet, telephone, or other electronic product or device that has a platform on which to download, install, or run any software program, code, script, or other content.

4. "Clear(ly) and prominent(ly)" shall mean:

   a. 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;

   b. 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;

   c. In communications disseminated through video means (e.g., television or streaming video), the required disclosures are in writing in a form 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;

d. In communications made through interactive media, such as the Internet, online services, and software, the required disclosures are unavoidable and presented in a form consistent with subpart (a) of this definition, in addition to any audio or video presentation of them; and

e. In all instances, the required disclosures are presented in an understandable language and syntax; in the same language as the predominant language that is used in the communication; and 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.

5. "Geophysical location tracking technology" shall mean any hardware, software, or application utilized in conjunction with a computer that collects and reports data or information that identifies the precise geophysical location of the computer. Geophysical location tracking technologies include, for these purposes, technologies that report: the GPS coordinates of a computer; the WiFi signals available to or actually used by a computer to access the Internet; the telecommunication towers or connections available to or actually used by a computer; the processing of any such reported data through geolocation lookup services; or any information derived from any combination of the foregoing.

6. "Monitoring technology" shall mean any hardware, software, or application utilized in conjunction with a computer that can cause the computer to (1) capture, monitor, or record, and (2) report information about user activities by:

d. Recording keystrokes, clicks, or other user-generated actions;

e. Capturing screenshots of the information displayed on a computer monitor or screen; or

f. Activating the camera or microphone function of a computer to take photographs or record audio or visual content through the computer's webcam or microphone.

7. "Covered rent-to-own transaction" shall mean any transaction where a consumer enters into an agreement for the purchase or rental of a computer and the consumer's contract or rental agreement provides for payments over time and an option to purchase the computer.

I.
MONITORING TECHNOLOGY PROHIBITED

IT IS HEREBY ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, in connection with any covered rent-to-own transaction, are hereby permanently restrained and enjoined from using any monitoring technology to gather information or data from any computer rented to a consumer.

II.
USE OF TRACKING TECHNOLOGY LIMITED

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, in connection with any covered

rent-to-own transaction, are hereby permanently restrained and enjoined from:

A. Gathering any information or data from any computer via any geophysical location tracking technology without providing clear and prominent notice to the computer user at the time the computer is rented and immediately prior to each use of the geophysical location tracking technology, and also obtaining affirmative express consent from the computer's renter at the time the computer is rented;

B. Installing or activating on rented computers geophysical location tracking technology where that technology does not provide clear and prominent notice to the computer user immediately prior to each use of the geophysical location tracking technology; and

C. Failing to provide clear and prominent notice to computer users and obtaining affirmative express consent from computer renters, as required in subpart A, above, by the following means:

1. Clear and Prominent Notice: respondent shall provide a clear and prominent notice to the user, separate and apart from any "privacy policy," "data use policy," "terms of service," "end-user license agreement," "lease agreement," or other similar document, that discloses (1) that geophysical location tracking technology is installed and/or currently running on the computer; (2) the types of user activity or conduct that is being captured by such technology; (3) the identities or specific categories of entities with whom any data or information that is collected will be shared or otherwise provided; (4) the purpose(s) for the collection, use, or sharing of such data or information; and (5) where and how the user can contact someone for additional information.

2. Affirmative Express Consent: respondent shall obtain affirmative express consent by giving the computer renter an equally clear and prominent choice to either agree or not agree to any geophysical location tracking technology, and neither option may be highlighted or preselected as a default setting. Activation of any geophysical location tracking technology must not proceed until the computer's renter provides affirmative express consent. Notwithstanding the foregoing, nothing in this Part shall require respondent to rent a computer to a user who declines to consent to installation or activation of any geophysical tracking technology.

3. Icons: respondent shall provide that the activation of any geophysical location tracking technology be accompanied by the installation of a clear and prominent icon on the computer on which the technology is installed, such as on the desktop and in the desktop system tray of the computer. Clicking on the icon must clearly and prominently disclose: (1) that geophysical location tracking technology is installed and currently running on the computer; (2) the types of user activity or conduct that is being captured by such technology; (3) the identities or specific categories of entities with whom any data or information that is collected will be shared or otherwise provided; (4) the purpose(s) for the collection, use, or sharing of such data or information; and (5) where and how the user can contact someone for additional information.

Provided that respondent may suspend the notice requirements of this Part and activate geophysical location tracking technology if a) the renter reports that the computer has been stolen or respondent otherwise has a reasonable basis to believe that the computer has been stolen, and b) either the renter or respondent has filed a police report stating that the computer has been stolen. Provided further that respondent shall retain documents establishing (a) and

(b). For purposes of this Order, "filing of a police report" means the filing of the renter's or respondent's complaint with the police department in any form recognized in the jurisdiction.

III.
NO DECEPTIVE GATHERING OF CONSUMER INFORMATION

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, in connection with any covered rent-to-own transaction, are hereby permanently restrained and enjoined from making or causing to be made any false representation or depiction in any notice, prompt screen, or other software application appearing on the screen of any computer that results in gathering information from or about a consumer, including without limitation location information.

IV.
NO USE OF IMPROPERLY OBTAINED INFORMATION IN COLLECTIONS

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, are hereby permanently restrained and enjoined from using, in connection with collecting or attempting to collect a debt, money, or property pursuant to a covered rent-to-own transaction, any information or data obtained in a manner that does not comply with Parts I, II, and III of this Order.

V.
PROTECTION OF DATA

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, in connection with shall:

A. Delete or destroy all user data previously gathered using any monitoring or geophysical location tracking technology that does not comply with Parts I, II, and III of this Order; and

B. Transfer data or information gathered by any monitoring or geophysical location tracking technology from the computer upon which the technology is installed to respondent's server(s), and from the respondent's server(s) to any other computers or servers only if the information collected is rendered unreadable, unusable, or indecipherable during transmission.

VI.
NO MISREPRESENTATIONS ABOUT PRIVACY

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with it who receive actual notice of this order, by personal service or otherwise, in connection with any covered rent-to-own transaction shall not misrepresent, in any manner, expressly or by implication, the extent to which respondent maintains and protects the security, privacy, or confidentiality of any personal information collected from or about consumers.

VII.
DISTRIBUTION OF ORDER

IT IS FURTHER ORDERED that respondent must deliver a copy of this order to all current and future principals, officers, directors, and managers who have responsibilities related to the subject matter of this order. Delivery must occur within seven days after the date of service of the order for current personnel. For new personnel, delivery must occur before they assume their responsibilities. From each individual to whom respondent delivers a copy of this Order, respondent must obtain a signed and dated acknowledgment of receipt of this Order, with any electronic signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq*.

VIII.
COMPLIANCE REPORTING

IT IS FURTHER ORDERED that:

A. Respondent, and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Commission may require, file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which they have complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondent shall submit additional true and accurate written reports.

B. Respondent, 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 related entity 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, the respondent shall notify the Commission as soon as is practicable after obtaining such knowledge.

C. 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 for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line Watershed Development Corp., File No. 1123151. *Provided, however*; that, in lieu of overnight courier, notices may be sent by first class mail, but only if an electronic version of each such notice is contemporaneously sent to the Commission at DEbrief@ftc.gov.

IX.
RECORDKEEPING

IT IS FURTHER ORDERED that respondent shall, for five (5) years after the last date of any act or practice covered by Parts I – VI of this Order, maintain and upon reasonable notice make available to the Federal Trade Commission for inspection and copying, any documents, whether prepared by or on behalf of respondent, that:

A. Comprise or relate to complaints or inquiries, whether received directly, indirectly, or through any third party, concerning any monitoring or geophysical tracking technologies sold, licensed, or otherwise provided to any third party, and any responses to those complaints or inquiries;

B. Are reasonably necessary to demonstrate full compliance with each provision of this order, including but not limited to, all documents obtained, created, generated, or which in any way relate to the requirements, provisions, or terms of this order, and all

reports submitted to the Commission pursuant to this order;

C. Contradict, qualify, or call into question respondent's compliance with this order; or

D. Acknowledge receipt of this order obtained pursuant to Part VII.

X.
TERMINATION OF ORDER

This Order will terminate on April 11, 2033, 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 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, Commissioner Wright not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission" or "FTC") has accepted, subject to final approval, consent agreements from the following respondents: DesignerWare, LLC; Timothy Kelly, and Ronald P. Koller, individually and as officers of DesignerWare, LLC; Aspen Way Enterprises, Inc.; Watershed Development Corp.; Showplace, Inc., d/b/a Showplace Rent-to-Own; J.A.G. Rents, LLC, d/b/a ColorTyme; Red Zone, Inc., d/b/a ColorTyme; B. Stamper Enterprises, Inc., d/b/a Premier Rental Purchase; and C.A.L.M. Ventures, Inc., d/b/a Premier Rental Purchase.

The proposed consent orders have 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 agreements and the comments received, and will decide whether it should withdraw from any of the agreements and take appropriate action or make final the agreements' proposed orders.

Timothy Kelly and Ronald Koller founded and co-owned DesignerWare, LLC, a small software company that designed and licenses a single product, PC Rental Agent. Mr. Koller ended his association with DesignerWare in March 2012. PC Rental Agent is exclusively marketed to rent-to-own ("RTO") stores. RTO stores rent to consumers a variety of household items, including personal computers. PC Rental Agent is designed to assist RTO stores in tracking and recovering rented computers. Its chief function is a "kill switch," a program that can be used by a store to render a computer inoperable if the consumer renter is late or defaults on payments or if the computer is stolen. PC Rental Agent also offers a wiping feature that permits RTO stores to quickly erase the hard drives of computers prior to re-renting them to consumers.

Through PC Rental Agent, which RTO store licensees installed on rented computers, DesignerWare also provided access to "Detective Mode." Detective Mode was a software application embedded in the PC Rental Agent program. At the request of an

Analysis to Aid Public Comment

RTO store, DesignerWare would remotely complete the Detective Mode installation process on an individual computer and activate "the Detective." Detective Mode would surreptitiously log the computer user's keystrokes, capture screenshots, and take pictures with the computer's webcam and send the data to DesignerWare's servers. Neither DesignerWare nor the RTO stores who have used Detective Mode disclosed to computer users that they were being monitored in this manner. Although DesignerWare recommended that Detective Mode be installed and activated only to locate and identify the person in possession of a lost or stolen computer, DesignerWare did not monitor its own collection of or limit RTO stores' access to Detective Mode information to ensure that the information was obtained and used only for designated purposes.

DesignerWare sent the information captured by Detective Mode to an email account designated by each RTO store. Although DesignerWare's employees did not themselves view Detective Mode data, without DesignerWare licensing PC Rental Agent and making Detective Mode available to the RTO stores, as well as providing them with access to its web portal and providing servers to support both PC Rental Agent and Detective Mode, this collection and disclosure of consumers' private information would not be possible.

RTO stores also used Detective Mode to send fake "software registration" forms to consumers to deceive them into providing their contact and location information. DesignerWare created several different fake registration forms that its servers displayed on consumers' computers. An RTO store could use this feature of Detective Mode by requesting that DesignerWare activate it. No actual software was registered as a result of a consumer providing the requested information. Rather, Detective Mode captured the information entered in the prompt boxes and sent it to DesignerWare, who then emailed the data to the RTO store, all unbeknownst to the consumer. DesignerWare discontinued use of Detective Mode in January 2012.

In September 2011, DesignerWare added another feature to PC Rental Agent: the capacity to track the physical location of rented computers via WiFi hotspot locations. The information

derived from WiFi hotspot contacts can frequently pinpoint a computer's location to a single building and, when aggregated, can track the movements and patterns of individual computer users over time. DesignerWare makes this information easily available to the RTO stores by cross-referencing a list of publicly available WiFi hotspots with the street addresses for the particular hotspots viewed or accessed by rented computers. DesignerWare applied its location tracking upgrade of PC Rental Agent to every computer on which PC Rental Agent was installed, without obtaining consent from, or providing notice to, the computers' renters. DesignerWare recommends that RTO stores only use this tracking data in connection with recovering stolen property, but it does not monitor or limit the RTO stores' access to such location information.

Aspen Way Enterprises, Watershed Development, Showplace, J.A.G. Rents, Red Zone, B. Stamper Enterprises, and C.A.L.M. Ventures are RTO stores that have licensed PC Rental Agent from DesignerWare. These RTO stores have used information transmitted by DesignerWare when attempting to collect from computer renters who are late in paying or have otherwise breached their rental contracts. Using Detective Mode, these RTO stores have received from DesignerWare webcam photos of computer users (and anyone else within view of the camera), computer users' keystrokes, and screenshots of their computer activities. This information has revealed private and confidential details about computer users, such as their passwords for access to email accounts, social media websites, and financial institutions. Other confidential information was also captured, including medical records, private emails to doctors, employment applications containing Social Security numbers, bank and credit card statements, and discussions of defense strategies in a pending lawsuit. Through Detective Mode, DesignerWare and the RTO stores also secretly photographed the private conduct of consumers in their homes. This included pictures of children, household visitors, individuals not fully clothed, and couples engaged in intimate activities.

The collection and disclosure of such private and confidential information about consumers causes or is likely to cause substantial injury to consumers. Consumers are likely to be substantially injured by the exposure to strangers of personal,

financial account access, and medical information. Consumers are actually harmed by DesignerWare's unwarranted invasion into their homes and lives and its capture and disclosure of the private details of individual and family life, including, for example, images of visitors, children, family interactions, partially undressed individuals, and couples engaged in sexual activities. Sharing data like that collected by Detective Mode with third parties can cause consumers financial and physical injury, and impair their peaceful enjoyment of their homes. Because Detective Mode functions secretly, consumers cannot reasonably avoid this harm, which is neither trivial nor speculative. Moreover, there are no countervailing benefits to consumers or competition for continued use of Detective Mode in this context, where RTO stores have effective alternative methods for collections.

DesignerWare also sent consumers' contact information to the RTO stores. DesignerWare gathered this information from computer users who completed the deceptive "software registration" forms sent through Detective Mode. The RTO stores used this information to find, require payment for, or repossess a rented computer.

The Commission's complaint against DesignerWare, Kelly, and Koller (collectively, "DesignerWare Respondents") alleges that the company and its principals engaged in unfair and deceptive conduct and provided the means and instrumentalities to engage in unfairness, all in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The first count of the complaint focuses on actions taken by DesignerWare that caused or was likely to cause substantial injury to consumers. Count I alleges that the DesignerWare Respondents engaged in unfair conduct by installing monitoring software on rented computers, gathering personal, financial, and health information about consumers from computers, and disclosing that information to RTO store licensees. Count I also alleges as unfair the DesignerWare Respondents' installation of geophysical location tracking software on rented computers without consent from the computer renters, the tracking of computers' geophysical locations without notice to computer users, and the disclosure of that information to the RTO stores.

Count II alleges that the DesignerWare Respondents provided the means to third parties – the RTO stores – to violate Section 5. The first part of the count charges the DesignerWare Respondents with providing RTO stores with the means and instrumentalities to engage in unfairness by furnishing them with software that could monitor consumers by recording their keystrokes, capturing screenshots of information displayed on a computer, and taking pictures of the computer user, and further could track the geophysical location data of rented computers without the consent of the computer renter or notice to the computer user. The second part of Count II alleges that the DesignerWare Respondents provided the means and instrumentalities to RTO stores to engage in unfair collection practices by providing them with the data gathered via PC Rental Agent and Detective Mode. Count II focuses on actions taken by DesignerWare that were integral to the harm to consumers caused or likely to be caused by the RTO stores. Here, without PC Rental Agent and Detective Mode and without access to DesignerWare's servers to execute their commands to rented computers, collect consumers' confidential information and transmit it to them, the RTO stores could not unfairly monitor their computer renters or use improperly gathered information in connection with collections.

Count III of the complaint charges the DesignerWare Respondents with deceptively gathering – and disclosing – consumers' personal information collected from the fake software registration forms that Detective Mode caused to appear on consumers' rented computers.

Each of the Commission's complaints against the seven RTO stores contains substantially similar allegations regarding the stores' violations of the FTC Act. The complaints charge that the RTO stores unfairly gathered consumers' personal information by installing monitoring software on rented computers and engaged in unfair collection practices by using the improperly gathered information to collect on consumer rental contracts. The complaints further allege that the RTO stores deceptively gathered consumers' personal information by activating the Detective Mode feature that sends the fake software registration forms to consumers' rented computers.

Analysis to Aid Public Comment

The proposed orders contain strong injunctive relief designed to remedy the unlawful conduct by DesignerWare, its principals, and the RTO stores. The orders define "monitoring technology and geophysical location tracking technology" so that the technological applications covered by the order are clearly described. "Monitoring technology" means any hardware, software, or application utilized in conjunction with a computer that can cause the computer to (1) capture, monitor, or record, and (2) report information about user activities by recording keystrokes, clicks, or other user-generated actions; capturing screenshots of the information displayed on a computer monitor or screen; or activating the camera or microphone function of a computer to take photographs or record audio or visual content through the computer's webcam or microphone. The definition of "geophysical location tracking" includes the reporting of GPS coordinates, WiFi hotspots, or telecommunications towers – all technologies that allow for a relatively precise location of the item tracked. In addition, a "covered rent-to-own transaction" is defined as one in which a consumer agrees to purchase or rent a computer, where the rental agreement provides for payments over time and an option to purchase the computer.

The proposed orders with DesignerWare and its principals, Kelly and Koller, are separate, but contain identical injunctive provisions. Section I of the proposed orders with DesignerWare and its principals bans them from using – as well as licensing, selling, or otherwise providing third parties with – monitoring technology in connection with any covered RTO transaction. Section II prohibits them from using geophysical location tracking technology to gather information from any computer without providing clear and prominent notice to and obtaining affirmative express consent from the computer's renter at the time the computer is rented. This section also requires clear and prominent notice to computer users immediately prior to each time tracking technology is activated. In addition, Section II mandates that DesignerWare and its principals require their licensees to obtain consent and provide notice prior to initiating any location tracking. However, DesignerWare and its principals do not need to provide notice to a computer user prior to activating geophysical location tracking technology if 1) there is a

reasonable basis to believe that the computer has been stolen and 2) a police report has been filed.

Section III of the proposed orders with DesignerWare and its principals prohibits the deceptive collection of consumer information via fake software registration notices. Section IV requires that any data that was collected through any monitoring or tracking software without the requisite notice and consent be destroyed and that any properly collected data be encrypted when transmitted. Section V bars DesignerWare and its principals from making misrepresentations about the privacy or security of any personal information gathered from or about consumers.

Sections VI through IX of both orders contain reporting and compliance provisions. Section VI of the proposed DesignerWare order requires the company to disseminate the order now and in the future to all current and future principals, officers, directors, and managers, and to persons with responsibilities relating to the subject matter of the order. This section also requires DesignerWare to secure a signed and dated statement acknowledging receipt of the order from all persons who receive a copy. Section VII requires DesignerWare to submit compliance reports to the Commission within sixty (60) days, and periodically thereafter as requested. It also requires the company to notify the Commission of changes in DesignerWare's corporate status.

Section VI of the proposed order with the DesignerWare principals requires respondents to distribute it to all current and future principals, officers, directors, and managers of any company that either respondent controls that engages in any covered RTO transaction as well as to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. It also requires the respondents to secure a signed and dated statement acknowledging receipt of the order from all persons who receive a copy. Section VII of the proposed order with the DesignerWare principals requires them to submit compliance reports to the Commission within sixty (60) days, and periodically thereafter as requested. In addition, this section requires them to notify the Commission of changes in their business or employment for three (3) years.

Analysis to Aid Public Comment

Under Section VIII of the proposed orders with both DesignerWare and its principals, respondents must retain documents relating to their compliance with the order for a five (5) year period. Finally, Section IX of both proposed orders is a provision "sunsetting" the orders after twenty (20) years, with certain exceptions.

The proposed orders against the RTO stores (which are identical to each other) contain similar injunctive provisions to those in the proposed orders with DesignerWare and its principals. Section I of each of the proposed orders bans the RTO stores from using monitoring technology in connection with any covered RTO transaction. Section II prohibits the stores from using geophysical location tracking technology to gather information from any computer without providing clear and prominent notice to the computer's renter and obtaining affirmative express consent from the computer's renter at the time the computer is rented. This section also requires clear and prominent notice to a computer user immediately prior to each time such technology is activated. The proposed RTO store orders also suspend the notice requirement if 1) there is a reasonable basis to believe that the computer has been stolen and 2) a police report has been filed. Section III of each of the proposed orders prohibits the deceptive collection of consumer information via fake software registration notices.

Section IV bars the stores from collecting or attempting to collect a debt, money, or property pursuant to a consumer rental contract by using any information or data that was improperly obtained from a computer by monitoring technology. Section V requires that any data collected through any monitoring or tracking software without the requisite notice and consent be destroyed, and that any properly collected data be encrypted when transmitted. As fencing in, Section VI bars misrepresentations about the privacy or security of any personal information gathered from or about consumers.

Sections VII through X of the proposed RTO store orders contain reporting and compliance provisions. Section VII requires distribution of the order now and in the future to all current and future principals, officers, directors, and managers,

and to persons with responsibilities relating to the subject matter of the order. It also requires the RTO stores to secure signed and dated statements acknowledging receipt of the order from all persons who receive a copy of the order. Section VIII requires the RTO stores to submit compliance reports to the Commission within sixty (60) days, and periodically thereafter as requested, and ensures notification to the Commission of changes in corporate status. Under Section IX, the RTO stores must retain documents relating to order compliance for a five (5) year period. Finally, Section X is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed orders. It is not intended to constitute an official interpretation of the proposed complaints or orders or to modify the terms of the orders in any way.

Complaint

IN THE MATTER OF

GRACO INC.

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

Docket No. C-4399; File No. 101 0215
Complaint, April 17, 2013 – Decision, April 17, 2013

This consent order addresses allegations regarding Graco, Inc.'s ("Graco") acquisitions of Gusmer Corporation ("Gusmer") in 2005 and GlasCraft, Inc. ("GCI") in 2008. Graco manufactures fast set equipment ("FSE"), commercial equipment used to apply polyurethane foams or polyuria coatings. FSE manufacturers sell their products almost exclusively through a network of specialized, third-party distributors. The complaint alleges that Graco's acquisitions of Gusmer and GCI, its two closest competitors, eliminated head-to-head competition in the North American market for FSE. As a result of these acquisitions, Graco acquired a near-monopoly in the market for FSE and was able to raise prices and barriers to entry, reduce product options, and force distributors to carry Graco products exclusively. The consent order requires Graco to license its technology patents to, and enter into a settlement agreement with, Gama Machinery USA, Inc. (Gama)/Polyurethane Machinery Corporation (PMC) within ten (10) days of the entry of the order. The order further directs Graco to cease and desist from imposing any conditions on its distributors that could lead, directly or indirectly, to exclusivity. Last, the order obligates Graco to waive or modify any policies or contracts that would violate the order.

Participants

For the *Commission*: *Joel Christie, Benjamin W. Jackson, Karen A. Mills, Jeffrey S. Oliver*, and *Laurel A. Price.*

For the *Respondent*: *John Graubert* and *John W. Nields, Covington & Burling LLP; Richard A. Duncan, Faegre & Benson, LLP*; and *Clifford Greene, Greene Espel PLLP*.

COMPLAINT

The Federal Trade Commission ("Commission"), pursuant to the provisions of the Federal Trade Commission Act and of the Clayton Act, and by virtue of the authority vested in it by said Acts, having reason to believe that Respondent Graco Inc. ("Graco") entered into agreements pursuant to which Graco

acquired, respectively, all of the voting securities of Gusmer Corp. ("Gusmer"), and all of the voting securities of GlasCraft, Inc. ("GlasCraft"), and that each acquisition violated 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 a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. STATEMENT OF THE CASE

1. Graco acquired its only significant competitors in the manufacture and sale of fast-set equipment in North America: Gusmer and GlasCraft.

2. Fast-set equipment combines and applies various reactive chemicals that form polyurethane foams or polyurea coatings. The essential components of a complete fast-set equipment system are: (1) the proportioner, which controls the ratio, temperature, and flow of the chemicals; (2) heated hoses, which independently maintain the fast-set chemicals at proper temperature; and (3) the spray gun, which is specially designed to mix and to dispense polyurethane foams and polyurea coatings. A manufacturer that produces or supplies a complete system of fast-set equipment is generally considered to be a full-line manufacturer.

3. The vast majority of end-users of fast-set equipment are contractors or contracting firms that use the equipment to apply polyurethane foams to insulate commercial and residential buildings, and to apply polyurea coatings to protect structures such as bridges, holding tanks, pipelines, and marine hulls.

4. Prior to the acquisitions, Gusmer, GlasCraft, and Graco competed aggressively on price, innovation, service, and quality. Each company responded to the others' innovations and prices with its own improvements and discounts. Prior to the acquisitions, the three companies were the only domestic full-line manufacturers of fast-set equipment, and at the time of each acquisition, Gusmer and GlasCraft were Graco's closest competitors in the relevant market.

5. These acquisitions have led to higher prices and fewer choices, and enabled Graco to raise barriers to entry that inhibited entry and expansion by potential competitors.

6. Fast-set equipment manufacturers sell their products almost exclusively through a specialized, third-party distribution channel, which consists of distributors acting as intermediaries between the manufacturer and the end user. Fast-set equipment manufacturers do not sell competitively significant quantities of equipment directly to end-users.

7. Fast-set equipment distributors meet end-user demand for a convenient and nearby source of expertise, spare parts, and repair services. A robust network of third-party fast-set equipment distributors is necessary for any manufacturer to compete meaningfully in the relevant market.

8. Before Graco's acquisitions, fast-set equipment distributors historically carried multiple manufacturers' brands. Graco's actions after the acquisitions resulted in higher prices and fewer product choices, and these actions created an opportunity for new entry and expansion in the relevant market.

9. Following Graco's acquisition of GlasCraft, Graco initiated several strategies that reduced any prospective entrant's access to distribution resources required for success in the market. These strategies included raising distributors' discount and inventory thresholds, thereby reducing distributors' ability to carry the products of new entrants, and threatening distributors with termination or other retaliation should they agree to carry the products of competing manufacturers. Given distributors' reliance on Graco post-acquisition, these actions further heightened barriers to entry in the relevant market.

10. In 2007 former Gusmer owners and employees, operating through PMC, Garraf Maquinaria S.A., and Gama Machinery USA, Inc. (now Polyurethane Machinery Corp.) ("Gama/PMC") sought to enter the relevant market. Graco initiated a lawsuit in federal district court ("the Gama/PMC litigation") alleging, among other things, theft of trade secrets and breach of contract.

The uncertainty of the outcome of the litigation has kept some distributors from purchasing fast-set equipment from Gama/PMC.

II. RESPONDENT GRACO

11. Graco is a for-profit corporation, existing and doing business under and by virtue of the laws of the state of Minnesota, with its office and principal place of business located at 88 11th Avenue Northeast, Minneapolis, Minnesota 55413. Graco manufactures and sells a full line of fast-set equipment throughout North America and the world.

III. GUSMER

12. Prior to its acquisition by Respondent in 2005, Gusmer was the largest and most significant competitor engaged in the manufacture and sale of a full line of fast-set equipment throughout North America and the world, with its principal place of business located in Lakewood, New Jersey.

IV. GLASCRAFT

13. At the time of its acquisition by Respondent in 2008, GlasCraft was the only competitor other than Graco engaged in the manufacture and sale of a full line of fast-set equipment throughout North America and the world, with its principal place of business located in Indianapolis, Indiana.

V. JURISDICTION

14. Respondent is, and at all relevant times 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.

15. The acquisition of Gusmer by Graco constitutes an acquisition subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

16. The acquisition of GlasCraft by Graco constitutes an acquisition subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

VI. THE ACQUISITIONS

17. In February 2005, Graco acquired Gusmer and its foreign counterparts from PMC Global, Inc. ("PMC") for $65 million. The transaction was not reportable under the Hart-Scott-Rodino Act, 15 U.S.C. § 18a. The acquisition increased Graco's share of the North American fast-set equipment market to over 65%. The acquisition left GlasCraft as Graco's only significant North American competitor. Following the acquisition of Gusmer, Graco closed Gusmer's fast-set equipment manufacturing facilities.

18. In February 2008, Graco acquired GlasCraft for $35 million. The transaction was not reportable under the Hart-Scott-Rodino Act, 15 U.S.C. § 18a. The acquisition raised Graco's market share above 90% and removed Graco's last significant North American competitor. Following the acquisition of GlasCraft, Graco closed GlasCraft's fast-set equipment manufacturing facilities.

VII. THE RELEVANT PRODUCT MARKET

19. For purposes of this Complaint, the relevant line of commerce within which to analyze the effects of the transactions is the market for the manufacture and sale of fast-set equipment for use by contractors.

VIII. THE RELEVANT GEOGRAPHIC MARKET

20. For purposes of this Complaint, the relevant geographic market within which to analyze the competitive effects of the transactions is North America.

IX. MARKET STRUCTURE

21. The market for fast-set equipment is highly concentrated. Prior to the acquisitions, Gusmer, Graco, and GlasCraft were the only significant suppliers of fast-set equipment in North America. Therefore, the cumulative effect of such acquisitions was that

Graco acquired between a 90% and 95% share of the fast-set equipment market in North America.

X. CONDITIONS OF ENTRY AND EXPANSION

22. 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 acquisitions. No significant entry has occurred since Graco's entry in 2002.

23. There are significant entry barriers to the relevant market, which include, *inter alia,* brand reputation, installed base, and the difficulty in finding adequate third-party distribution.

24. The most significant entry barrier is the need for specialized third-party distribution. A fast-set equipment distributor needs to possess the technical expertise to teach contractors to operate and maintain such equipment properly in accordance with the specifications established by equipment manufacturers and various chemical manufacturers. Through its acquisitions, Graco has become the only remaining full-line manufacturer of fast-set equipment, giving it substantial control of the established fast-set equipment distribution channel in North America. Graco's increasing of discount and inventory thresholds, Graco's threatening of distributors with termination or other retaliation should they agree to carry the products of competing manufacturers, and uncertainties resulting from the Gama/PMC litigation, all have substantially reduced prospective competitors' access to customers in the relevant market, substantially reducing the likelihood of successful entry and the disciplining of Graco's prices.

25. Given all of the above, following Graco's 2008 acquisition of Glascraft, only one competitor, Gama/PMC, has held a market share of as much as five percent, and it is unlikely to expand substantially due to the unavailability of effective distribution.

26. Other prospective entrants have also failed to gain any meaningful market share in the North American fast-set equipment market. These would-be competitors participate at the fringes of the market. Most do not offer full lines of fast-set

equipment, but rather individual proportioners or guns. Together, they comprise significantly less than 5% of the relevant market. Without access to the specialized distribution channels, these prospective entrants are not likely to expand beyond being fringe competitors.

XI. EFFECTS OF THE ACQUISITIONS

27. Graco's acquisitions of Gusmer and GlasCraft substantially lessened competition and tended 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.

28. Specifically, the acquisitions have:

a. Eliminated actual, direct, and substantial competition among Graco, Gusmer, and GlasCraft in the relevant market;

b. Permitted Graco to increase prices, reduce product options and offerings, and reduce innovation;

c. Permitted Graco to increase barriers to entry and expansion by foreclosing access to established fast-set equipment distributors;

d. Substantially increased the level of concentration in the relevant market; and

e. Allowed Graco to exercise market power unilaterally in the relevant market.

29. In particular, the loss of competition from Gusmer and GlasCraft has given Graco the ability to raise barriers to entry and exclude prospective competitors from the North American fast-set equipment market. Graco became the sole supplier for the only significant fast-set equipment distribution channel in North America and the only authorized source of spare parts for its existing installed base. Consequently, Graco has been able to prevent its distributors from carrying the products of competing manufacturers.

30. The significant anticompetitive effects of Graco's acquisitions are not offset by any efficiencies realized by the acquisitions.

XII. VIOLATIONS CHARGED

Count I – Illegal Acquisition

31. The allegations of Paragraphs 1 through 30 are incorporated by reference as though fully set forth.

32. Graco's acquisition of Gusmer substantially lessened competition and tended to create a monopoly 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, 15 U.S.C. § 45.

Count II – Illegal Acquisition

33. The allegations of Paragraphs 1 through 30 are incorporated by reference as though fully set forth.

34. Graco's acquisition of GlasCraft substantially lessened competition and tended to create a monopoly 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, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this seventeenth day of April, 2013, issues its complaint against Respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the acquisition by Respondent Graco Inc. (hereinafter referred to as "Respondent" or "Graco") of Gusmer Corporation and GlasCraft, Inc., and of certain acts and practices of Respondent, and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

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

1. Respondent Graco Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Minnesota, with its office and

principal place of business located at 88-11th Avenue Northeast, Minneapolis, Minnesota 55413.

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

II.

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

A. "Graco" or "Respondent" means Graco Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Graco, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. Graco includes, but is not limited to, Graco Minnesota Inc.

B. "Commission" means the Federal Trade Commission.

C. "PMC" means PMC Global, Inc., a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 12243 Branford Street, Sun Valley, California 91352; and the joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by PMC Global, Inc., including, but not limited to, PMC Inc., Moehs Iberica S.L., and Gama Machinery USA, Inc. d/b/a Polyurethane Machinery Corporation or Polymac.

D. "Antitrust Compliance Program" means a program (including, but not limited to, an effective in-person or web-based antitrust training program) to ensure compliance with this Order and with the Antitrust Laws, as required by Paragraph IV of this Order.

E. "Antitrust Laws" means the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.*, the Sherman Act, 15 U.S.C. § 1 *et seq.*, and the Clayton Act, 15 U.S.C. § 12 *et seq.*

F. "Delivery Services" means all terms and services associated with Respondent delivering FSE Products to a specified location to or on behalf of a Distributor or other Person. Delivery Services include, but are not limited to:

1. Delivery of FSE Products via air, truck, or common carrier, delivery directly to the Distributor or to a FSE Customer's place of business or job site; and,

2. The timely scheduling of deliveries.

G. "Discriminatory Manner" means to transact business with one Distributor in a manner:

1. That is different from the manner of transacting business with one or more similarly-situated Distributors; or,

2. That is other than in accordance with the terms and conditions Generally Available and applied to similarly-situated Distributors.

H. "Distribute" or "Distribution" means the taking of possession (whether by wholesale purchase, lease, consignment, or other methods) of FSE Products from a manufacturer for the primary purpose of transferring or conveying such FSE Products to end users or other resellers by resale, lease, or other methods that are in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

I. "Distributor" means a Person that Distributes, that Graco has reason to believe intends to Distribute, or that engages in the Distribution of, Graco's or another manufacturer's FSE Products in or affecting commerce, as "commerce" is defined in the Federal

Trade Commission Act. Distributor does not include a Person that is a Graco Competitor or a Person that supplies Graco with manufacturing inputs, but only to the extent that such Person is acting in such capacity.

J. "Effective Date" means the date on which Graco executes and enters into the Graco/PMC Agreements with PMC.

K. "Exclusivity" or "Exclusive" means any requirement, term, or condition, whether formal or informal, direct or indirect, by the Respondent, that has the purpose or effect that:

1. A Distributor research, develop, manufacture, Distribute, produce, market, purchase, sell, lease, or license, Graco's FSE Products to the exclusion, in whole or in part, of any FSE Products from Graco Competitors; or

2. A Distributor be restrained from, refrain from, or limit its research, development, manufacture, production, Distribution, marketing, promotion, sales, leasing, purchasing, or licensing of any FSE Product from a Graco Competitor.

L. "Favorable" means more economically advantageous Price Terms, Delivery Services, Product Support, or other terms and conditions than Respondent makes Generally Available to similarly-situated Distributors.

M. "Field" means both "Restricted Field" and "Open Field" as those terms are defined in the Graco/PMC License.

N. "FSE Customer" means any Person that purchases, licenses, or leases FSE Products primarily for use in such Person's trade, profession, or business, or for resale.

O. "FSE Products" means any and all equipment, components, parts, replacement parts, and all other property related to the initial sale, and operation and

maintenance over the useful life, of equipment that is manufactured for use by contractors for the application of sprayed or poured polyurethane foam or polyurea coatings.

P. "Generally Available" means the typical or standard terms and conditions that Respondent offers or provides to Distributors:

1. That have revenues, a number or training level of employees, distribution of FSE Products over geographic areas equivalent in geographic size or total population, or other characteristics, that fall within equivalent categories or ranges of values;

2. That are classified or designated the same by Respondent; or,

3. That have characteristics relevant to assessing Distributors' potential future unit sales of, or future revenue generated from, Respondent's FSE Products that fall within an equivalent category or range of values.

Q. "Graco Competitors" means any Person (other than Respondent) who manufactures FSE Products for sale (directly or through Distributors) to FSE Customers.

R. "Graco/PMC Agreements" mean the Graco/PMC Settlement Agreement and the Graco/PMC License.

S. "Graco/PMC License" means the license between Graco Inc., Graco Minnesota Inc., and Gama Machinery USA, Inc. d/b/a Polyurethane Machinery Corporation or Polymac, to be executed in accordance with Section II.A of this Order, an unexecuted version of which is attached hereto as Appendix B.

T. "Graco/PMC Settlement Agreement" means that certain agreement between Graco Inc., Graco Minnesota Inc., PMC Global, Inc., PMC, Inc., Moehs Iberica S.L., Gama Machinery USA, Inc. d/b/a Polyurethane Machinery Corporation or Polymac, and

Denis S. Commette, to be executed in accordance with Section II.A of this Order, an unexecuted version of which is attached hereto as Appendix A.

U. "Intellectual Property" means all intellectual property owned or licensed (as licensor or licensee) by Respondent in which Respondent has a proprietary interest, and all associated rights thereto, including all of the following in any jurisdiction throughout the world: (i) all Patents; (ii) all trade secrets, know-how, and confidential or proprietary information (including ideas, research and development, formulas, compositions, manufacturing and production processes and techniques, technical data and information, blue prints, designs, drawings, specifications, protocols, quality control information, customer and supplier lists, pricing and cost information, business and marketing plans and proposals, and all other data, technology, and plans); (iii) all brand names, commercial names, trade names, "doing business as" (d/b/a) names, registered and unregistered trademarks, trade dress, logos, slogans, service marks, internet website content and internet domain names, together with all translations, adaptions, derivations, and combinations thereof, and including all goodwill associated therewith, and all applications, registrations, and renewals in connection therewith; (iv) all copyrightable works, all registered and unregistered copyrights in both published works and unpublished works, and all applications, registrations and renewals in connection therewith; (v) all computer software (including source code, executable code, data, databases and related documentation); (vi) all advertising and promotional materials; and (vii) all rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation, or breach of any of the foregoing.

V. "Less Favorable" means less economically advantageous Price Terms, Delivery Services, Product Support, or other terms and conditions than

Respondent makes Generally Available to similarly-situated Distributors.

W. "Order Date" means the date upon which this Order becomes final.

X. "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 Effective Date, and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, restorations, extensions and reexaminations thereof, all inventions disclosed therein, all rights therein provided by international treaties and conventions, and all rights to obtain and file for patents and registrations thereto.

Y. "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.

Z. "PMC Releasees" means PMC, Distributors of PMC's FSE Products, and FSE Customers that purchase, license, or lease PMC's FSE Products.

AA. "Price Term" means the wholesale price, resale price, purchase price, rebate, discount, price list, credit term, or any other term defining, setting forth, or relating to the money or compensation paid by or received by a Distributor in connection with the purchase, lease, consignment, or other means or method of or for obtaining FSE Products from Respondent.

BB. "Product Support" means any service of FSE Products, assistance to FSE Products Distributors or FSE Customers, training provided to FSE Products Distributors or FSE Customers on the use or maintenance of FSE Products, visits to FSE Customers

(whether related to the marketing, sales, use or service of FSE Products), warranty terms or the performance of warranty terms, or other support related to the research, development, manufacture, production, Distribution, marketing, promotion, lease, sale, purchase, or licensing of any FSE Product.

III.

IT IS FURTHER ORDERED that:

A. Not later than ten (10) days after the Order Date, Respondent shall execute and enter into the Graco/PMC Agreements with PMC. The Graco/PMC Agreements are incorporated by reference into this Order and made a part hereof.

B. Once both Respondent and PMC have executed and entered into the Graco/PMC Agreements, Respondent shall comply with all terms of the Graco/PMC Agreements, and any breach by Respondent of any term of the Graco/PMC Agreements shall constitute a violation of this Order. If any term of the Graco/PMC Agreements varies from the terms of this Order ("Order Term"), then to the extent Respondent cannot fully comply with both terms, the Order Term shall determine Respondent's obligations under this Order.

C. Respondent shall not modify or amend any of the terms of the Graco/PMC Agreements 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). Notwithstanding any paragraph, section, or other provision of the Graco/PMC Agreements, any modification of the Graco/PMC Agreements without the prior approval of the Commission, or as otherwise provided in Rule 2.41(f)(5), shall constitute a failure to comply with this Order.

D. Respondent shall not:

1. join, or file, prosecute or maintain any suit, in law or equity, against any PMC Releasee alleging that

the research, development, manufacture, use, import, export, distribution, sale or lease or offer for sale of PMC's FSE Products in the Field on or prior to the Effective Date infringe any Intellectual Property owned or licensed by Respondent as of the Effective Date;

2. assign, transfer or license any Intellectual Property in the Field owned or licensed by Respondent as of the Effective Date unless the assignee, transferee, or licensee agrees in writing to provide a covenant not to sue the PMC Releasees that is at least as protective as the prohibitions in Paragraph II.D.1. above, as a condition of such assignment, transfer or license; and

3. actively induce, assist or participate in any suit, legal or other action or proceeding against any one or more of the PMC Releasees alleging that the research, development, manufacture, use, import, export, distribution, sale or lease or offer for sale of PMC's FSE Products in the Field on or prior to the Effective Date infringe any third party rights licensed to Respondent as of the Effective Date as to which Respondent does not control the right of prosecution of any suit, legal or other action.

III.

IT IS FURTHER ORDERED that Respondent, acting directly or indirectly, or through any corporate or other device, in connection with the actual or potential research, development, manufacturing, marketing, lease, or sale of FSE Products, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall cease and desist from the following acts and practices:

A. Respondent shall cease and desist from inviting, entering into, implementing, continuing, enforcing, or attempting thereto, any condition, policy, practice, agreement, or understanding that has the purpose or effect of achieving Exclusivity with a Distributor, including, but not limited to:

1. Conditioning availability or terms of the research, development, manufacturing, marketing, lease, sale, or service of FSE Products on Exclusivity;

2. Conditioning availability or terms of Price Terms, Delivery Services, Product Support, or other terms and conditions on Exclusivity;

3. Providing or offering to provide Favorable Price Terms, Delivery Services, Product Support, or other terms and conditions to a Distributor because the Distributor agrees to Exclusivity;

4. Providing or offering to provide Less Favorable Price Terms, Delivery Services, Product Support, or other terms and conditions to a Distributor because the Distributor fails or refuses to agree to Exclusivity;

5. Urging, inducing, coercing, threatening, or pressuring, or attempting thereto, a Distributor to refuse to research, develop, manufacture, market, lease, sell, or service FSE Products manufactured by a Graco Competitor; and,

6. Requiring Distributors to make annual purchases, or maintain inventory levels, of Graco's FSE Products in an amount greater than is necessary based on market conditions or other objective factors (such as sales forecasts or historic purchasing or demand levels) in order for Distributors to sell and service FSE Products to and for FSE Customers on a commercially reasonable and timely basis.

   Provided, however, that:

   a. Respondent may offer to provide or provide to Distributors special (one-time) purchase terms, discounts, marketing assistance, Price Terms, Delivery Services, or Product Support.

   b. Respondent may enter into written agreements or understandings with a Distributor providing for Exclusivity with respect to both Respondent and a Distributor regarding the research,

development, manufacturing, marketing, sale or lease of FSE Products developed jointly by Respondent and the Distributor, the development of which resulted from a contribution of significant capital, Intellectual Property rights, labor, or other things of value by both Respondent and the Distributor.

c. Respondent may require its Distributors to make annual purchases of Graco's FSE Products in stated amounts and to maintain inventory of Graco's FSE Products at stated levels in order to qualify for various Price Terms.

Provided further, however, that such purchase requirements for such discounts for calendar year 2013, or such part thereof that may be covered by this Order, for a Distributor in the "Advanced" category shall be no more than $450,000 of Respondent's FSE Products, and for a Distributor in the "Specialized" category shall be no more than $100,000 of Respondent's FSE Products, which amounts will include in either case one demonstration model of Respondent's FSE Products. Such inventory requirements for discounts for calendar year 2013, or such part thereof that may be covered by this Order, for a Distributor in the "Advanced" category shall be no more than $45,000 of Respondent's FSE Products, and for a Distributor in the "Specialized" category shall be no more than $10,000 of Respondent's FSE Products, excluding in either case the value on one demonstration model of Respondent's FSE Products. Such purchase and inventory requirements for such discounts in calendar years 2014, and thereafter, shall be determined by increasing the purchase or inventory amounts actually required in accordance with this Order in the

immediately preceding calendar year by not more than 5%.

d. It shall not by itself constitute prohibited Exclusivity if a Distributor, acting unilaterally and without an agreement with or invitation from Respondent, chooses to carry the FSE Products of Respondent on an exclusive basis, or to give preference to the FSE Products of Respondent.

B. Respondent shall not discriminate against, penalize, or otherwise retaliate against any FSE Products because such Distributor researches, develops, markets, leases, sells, or otherwise deals in (or negotiates, intends to, or proposes or announces an intention to research, develop, market, lease, sell, or otherwise deal in) FSE Products manufactured by a Graco Competitor, or otherwise refuses to enter into or continue any condition, agreement, contract, understanding or other requirement of Exclusivity. Examples of prohibited retaliation include, but are not limited to:

1. Terminating, suspending, reducing, or delaying, or threatening or proposing thereto, purchases or sales of FSE Products;

2. Auditing or reviewing the books and records of a Distributor to determine the revenue from or unit sales of purchases, sales, leases, or other Distribution of FSE Products manufactured by Graco Competitors;

3. Withdrawing or modifying, or threatening or proposing thereto, Favorable Delivery Services, Price Terms, Product Support or other terms and conditions;

4. Providing, or threatening or proposing thereto, Less Favorable Delivery Services, Price Terms, Product Support, or other terms and conditions;

5. Withholding from a Distributor FSE Products newly developed or introduced by Respondent;

6. Dealing with Distributors in a Discriminatory Manner;

7. Withholding or conditioning in a Discriminatory Manner Respondent's consent to permit a Distributor: (a) to resell FSE Products to Persons who research, develop, market, lease, sell or otherwise deal in FSE Products manufactured by a Graco Competitor; or, (b) to sell FSE Products outside certain geographic areas or territories (including, but not limited to, areas designated as Primary Trading Areas in Respondent's contracts) to Persons who research, develop, market, lease, sell or otherwise deal in FSE Products manufactured by a Graco Competitor;

   Provided, however, it shall not by itself constitute prohibited retaliation if Respondent, not acting in a Discriminatory Manner:

   a. Changes the status of a Distributor because the Distributor fails to meet written objective standards including, but not limited to, sales levels, completion of training or customer service certification, or the like;

   b. Requires Distributors to receive specialized technical training or satisfy other qualification requirements to receive one or more of Respondent's FSE Products with respect to which specialize training or other qualification requirements reasonably are required;

   c. Imposes commercially reasonable and objective requirements (including, but not limited to, payment history and creditworthiness) for credit and payment arrangements;

d. Prohibits Distributors from reselling one or more of Respondent's FSE Products to other Distributors of FSE Products where the relevant FSE Products reasonably require specialized training or other qualification requirements that the purchasing Distributor does not have;

e. Establishes or seeks to establish new Distributors to meet actual or potential customer demand for Respondent's FSE Products; and,

f. Offers promotional programs or other Product Support that are Generally Available to similar Distributors who meet objective written qualifications.

C. Within thirty (30) days after the Order Date, Respondent shall waive, without penalty to or financial cost from the Distributor, and shall no longer enforce any condition, requirement, policy, agreement, contract, or understanding with any Distributor that is inconsistent with the terms of this Order. Examples of provisions that shall be waived and not enforced include, but are not limited to:

1. Any provision in any agreement between Graco and a Distributor that calls for the Distributor to inform Graco, in whatever manner, of the non-Graco FSE Products that are being marketed or sold by the Distributor;

2. Any provision in any agreement between Graco and a Distributor that requires a Distributor to obtain consent from Graco in advance of any sale of FSE Products by that Distributor to any other Person.

Provided, however, Respondent shall not be prohibited from requiring a Distributor to provide reasonable notice to Respondent prior to such

Distributor making an initial sale of FSE Products to any FSE Customer that Distributor has reason to believe will make a regular practice of reselling such FSE Products. Such notice shall only include the name and address of the FSE Customer. In addition, Respondent shall not be prohibited from requiring a Distributor to provide to Respondent, no more than once in any calendar year, the name and address of all its FSE Customers that such Distributor has reason to believe make a regular practice of reselling FSE Products as of the time of such notice. If after diligent inquiry, Respondent finds that any such FSE Customer does not meet written objective standards for reselling its FSE Products, it may require such Distributor to stop selling FSE Products to that FSE Customer for resale; so long as such directive is not otherwise in violation of the Order. Respondent's directive to its Distributor shall include a statement of the objective standard(s) that such FSE Customer fails to satisfy. A copy of Respondent's directive shall be provided to the FSE Customer in question, and be included in Respondent's annual compliance report to the Commission.

3. Any inventory or annual purchase requirements that fail to comply with Paragraph III.A.6.

D. Within thirty (30) days after the Order Date, Graco shall deliver written confirmation of all waivers required by Paragraph III.C. of this Order to all applicable Distributors, and shall negotiate and offer to execute contract amendments with such Distributors to modify, without penalty or financial cost, all contracts so that all contract terms comply with the terms of this Order.

E. Respondent shall, within thirty (30) days after the Order Date, mail a copy of this Order and Appendix C to this Order (with Appendix C affixed as the first page) by first class mail to:

1. Each of its officers and directors; and,

2. Each Distributor that has purchased any one or more of Graco's FSE Products from Respondent within twelve (12) months prior to the Order Date.

IV.

IT IS FURTHER ORDERED that Respondent shall design, maintain, and operate an Antitrust Compliance Program to assure compliance with this Order and with the Antitrust Laws. This program shall include, but not be limited to:

A. Respondent's designation of an officer or director to supervise personally the design, maintenance, and operation of this program, and to be available on an ongoing basis to respond to any questions by employees of Respondent;

B. Distribution of a copy of this Order and Appendix D to this Order (with Appendix D affixed as the first page) to all officers and directors, and to its employees in the United States whose duties relate primarily to marketing and sales of FSE Products:

1. Within thirty (30) days after the Order Date; and,

2. Annually within thirty (30) days of the anniversary of the Order Date until the Order terminates;

C. Annual training on the requirements of this Order and the Antitrust Laws for Respondent's officers and directors, and its employees in the United States whose duties relate primarily to marketing and sales of FSE Products; and,

D. The retention of documents and records sufficient to record Respondent's compliance with its obligations under this Paragraph IV of this Order.

V.

IT IS FURTHER ORDERED that:

A. Respondent shall not, without providing advance written notification to the Commission in the manner described in Paragraph V.B., and without complying with the terms of the waiting period described in Paragraph V.C., acquire, directly or indirectly, any stock, share capital, equity, or other interest in or assets (but not including FSE Products offered for sale to Distributors) of any Person, corporate or non-corporate, that Graco has reason to believe researches, develops, manufactures, markets, sells, leases or licenses FSE Products in the United States, or has done so within six (6) months prior to the acquisition.

B. The advance written notification provided by Respondent 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 Respondent 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 (or any successor Items in the Form) under the Hart-Scott-Rodino Premerger Notification Act, Section 7A of the Clayton Act, 15 U.S.C. § l8a, and Rules, 16 C.F.R. § 801-803, relating to the proposed acquisition;

3. Gross annual revenues of FSE Products of the Person and of Respondent in the United States;

4. The name and address of the ten largest customers of the Person and of Respondent;

5. The total number of FSE Customers of the Person and of Respondent; and,

6. A description in reasonable detail of the FSE Products sold and services offered by the Person in which or from whom Respondent proposes to acquire equity or assets, as well as the geographic areas in which such products and services are sold and offered for sale.

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.

C. Respondent 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), Respondent 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.

D. Respondent shall provide the Commission with no fewer than thirty (30) days' notice prior to filing any lawsuit, arbitration proceeding, or mediation proceeding against any Distributor or FSE Customer alleging in whole or in part that such Person has:

1. Breached or violated any provision of the Graco/PMC License or the Graco/PMC Settlement Agreement; or,

2. Has infringed any of Respondent's rights in or to any Intellectual Property:

a. Related to the research, manufacture, marketing, sale, lease or use of FSE Products (including, but not limited to, trade secrets and Patents licensed to PMC pursuant to the Graco/PMC License); or,

b. Within the scope of Paragraph II.D. of this Order.

E. Respondent's notice pursuant to Paragraph V.D. of this Order shall include the name and address of each party to the lawsuit, arbitration proceeding, or mediation proceeding, a brief description of the claims of each party, and a copy of each complaint or answer filed by each party to the lawsuit, arbitration proceeding, or mediation.

VI.

IT IS FURTHER ORDERED that

A. Within sixty (60) days after the Order Date, and on the first annual anniversary of the Order Date, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. For the period covered by this report, the report shall include, but not be limited to:

1. The name, title, business address, e-mail address, and business phone number of the officer or director designated by Respondent to design, maintain, and operate Respondent's Antitrust Compliance Program; and

2. The name, title, and business address of each Person to whom Respondent distributed a copy the Order and Appendix, pursuant to Section IV(B) of this Order, and the date and manner of distribution to each.

B. On the first anniversary of the Order Date, and thereafter on the annual anniversary until this Order terminates, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order.

VII.

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.

VIII.

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

A. Access, during business office hours of Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondent related to compliance with this Order, which copying services shall be provided by 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 Respondent, who may have counsel present, regarding such matters.

IX.

IT IS FURTHER ORDERED that this Order shall terminate on April 17, 2023.

By the Commission.

CONFIDENTIAL APPENDIX A
Graco/PMC Settlement Agreement

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

CONFIDENTIAL APPENDIX B
Graco/PMC License Agreement

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

APPENDIX C

[Graco letterhead]

To our customers and business partners:

The Federal Trade Commission ("FTC") has been investigating whether two acquisitions by Graco Inc. ("Graco") in the U.S. market for spray foam equipment, as well as certain other terms of our distributor agreements, violated federal antitrust laws.

Graco does not believe that its past or present practices violate any state or federal laws. However, to end the investigation quickly and to obtain clear guidelines from the FTC relating to Graco' s future marketing efforts, Graco has reached a consent agreement with the FTC pursuant to which the FTC can issue and Graco will be bound by a Decision and Order issued by the FTC. This consent agreement acknowledges that Graco does not admit to any violations of any law.

The consent agreement contains two general groups of provisions. Under the first, the Decision and Order incorporates Graco's settlement of its pending litigation with Polyurethane Machinery Corporation (PMC), a manufacturer of competing spray foam equipment, its ultimate parent company, PMC Global Inc., and others. Graco's litigation with PMC was based on its strong belief that PMC's products were unlawfully based on trade secrets, confidential information and other property that Graco acquired from PMC in 2005 ("Gusmer Intellectual Property"). Under the terms of the settlement, PMC will purchase licenses to the technology that Graco alleged is based on the Gusmer Intellectual Property. Because PMC will purchase these licenses, Graco no longer claims that PMC's polyurethane foam and

polyurea are unfairly based on Graco's intellectual property; Graco therefore now recognizes PMC as a legitimate competitor. As with any other legitimate competitor, you are free to decide whether you wish to do business with PMC in the U.S. spray foam market.

Second, the Order provides limitations on Graco' s ability to require exclusivity from distributors, subject to certain exceptions, and prohibits Graco from punishing or retaliating against distributors who also deal in competitors' spray foam products in the U.S. market.

You may read and download a copy of the Order, as well as an Analysis to Aid Public Comment, from the FTC at its website [add link]. If you have any concerns in the future about whether Graco is complying with its obligations under the Order, Graco invites you to raise them with us directly. You may contact any of our sales staff with whom you do business, or contact our corporate offices directly by phoning or emailing [name] at [phone number and email address]. Alternatively or additionally, you may contact the FTC directly to express your concerns, at [phone number] or [email].

Thank you again for your continued support and the confidence you have shown for Graco products.

Sincerely,

APPENDIX D

[Graco internal communication format]

The Federal Trade Commission ("FTC") has been investigating whether two acquisitions by Graco Inc. ("Graco") in the U.S. market for spray foam equipment, as well as certain other terms of our distributor agreements, violated federal antitrust laws.

Graco does not believe that its past or present practices violate any state or federal laws. However, to end the investigation quickly and to obtain clear guidelines from the FTC relating to Graco's future marketing efforts, Graco has reached a consent agreement with the FTC pursuant to which the FTC can issue and Graco will be bound by a Decision and Order issued by the FTC. This consent agreement acknowledges that Graco does not admit to any violations of any law.

It is very important to Graco that all of its officers and directors, as well as employees whose duties relate primarily to the marketing and sales of spray foam equipment in the United States, understand and comply with the Order. We are providing this notice as a first step to help you do that by telling you about the Order, describing a few of its most important terms, and telling you how you can learn more about the Order and get answers to any questions you may have about it.

The Order contains two general groups of provisions. Under the first, the Order incorporates Graco's settlement of its pending litigation with Polyurethane Machinery Corporation (PMC), a manufacturer of competing spray foam equipment, its ultimate parent company, PMC Global Inc., and others. Graco's litigation with PMC was based on its strong belief that PMC's products were unlawfully based on trade secrets, confidential information and other property that Graco acquired from PMC in 2005 ("Gusmer Intellectual Property"). Under the terms of the settlement, PMC will purchase licenses to the technology that Graco alleged is based on the Gusmer Intellectual Property. Because PMC will purchase these licenses, Graco no longer claims that PMC's polyurethane foam and polyurea are unfairly

based on Graco's intellectual property; Graco therefore now recognizes PMC as a legitimate competitor. As with any other legitimate competitor, Graco customers are free to decide whether they wish to do business with PMC in the U.S. spray foam market.

Second, the Order provides limitations on Graco's ability to require exclusivity from distributors, subject to certain exceptions, and prohibits Graco from punishing, retaliating, or in any way discriminating against distributors who also deal in competitors' spray foam products in the U.S. market.

Graco management wants to help you better understand Graco's rights and obligations under the Order. Therefore, as required by the Order, Graco has appointed [name and title] to oversee a program to train you on the Order and applicable antitrust laws. You will be contacted soon to schedule your training. In the meantime, if you have any questions at any time about the Order or your training, please contact [identify contact person] at [email or phone].

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted for public comment an Agreement Containing Consent Order ("Consent Order") with Graco, Inc. ("Graco") to remedy the alleged anticompetitive effects resulting from Graco's acquisition of its most significant competitors, Gusmer Corp. ("Gusmer") and GlasCraft, Inc. ("GlasCraft"). The Commission Complaint ("Complaint") alleges that, at the time of the acquisitions, Graco, Gusmer, and GlasCraft each manufactured and sold equipment for the application of fast-set chemicals ("fast-set equipment"). Neither acquisition was reportable under the Hart-Scott-Rodino Act. The Consent Order seeks to restore competition lost through the acquisitions by requiring Graco to license certain technology to a small competitor to facilitate its entry and expansion, and to cease and desist from engaging in certain conduct that may delay or prevent entry and expansion of competing firms. The Complaint and Consent Order in this matter have been issued as final and the Consent Order is now effective.

The Complaint alleges that the acquisitions each violated Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

The purpose of this Analysis to Aid Public Comment is to invite and facilitate public comment concerning the Consent Order. It is not intended to constitute an official interpretation of the Agreement and Consent Order or in any way to modify their terms.

The Consent Order is for settlement purposes only. The Commission has placed the Consent Order on the public record for thirty (30) days for the receipt of comments by interested persons.

I. The Relevant Market and Market Structure

The relevant market within which to analyze the competitive effects of these acquisitions is fast-set equipment used by

contractors in North America. Fast-set equipment combines and applies various reactive chemicals that form polyurethane foams or polyurea coatings used for the application of insulation and protective coatings. The essential components of a fast-set equipment system are the proportioner, the heated hoses, and the spray gun.

Fast-set equipment manufacturers sell their products almost exclusively through a network of specialized, third-party distributors. These independent distributors sell to end-users. End-users demand a proximate source of expertise, spare parts, and repair services. Therefore, a robust network of third-party fast-set equipment distributors is necessary for any manufacturer to compete effectively in the relevant market.

Prior to its acquisition by Respondent in 2005, Gusmer was the largest and most significant competitor engaged in the manufacture and sale of a full line of fast-set equipment throughout North America and the world. The acquisition increased Graco's share of the North American fast-set equipment market to over 65%, and left GlasCraft as Graco's only significant North American competitor. Graco's acquisition of GlasCraft in 2008 raised Graco's market share above 90% and removed Graco's last significant North American competitor. Following the acquisitions of each of Gusmer and GlasCraft, Graco closed both firms' fast-set equipment manufacturing facilities and has fully assimilated or terminated all remaining assets, products, intellectual property, and personnel from both firms.

Prior to the acquisitions, fast-set equipment distributors typically carried products from multiple manufacturers. Distributors and end-users were able to mix and match the products from the different manufacturers to assemble a fast-set system that best satisfied end-users' demands. Further, manufacturers did not impose exclusive relationships on distributors – a distributor was free to make some or all of its fast-set equipment purchases from whichever manufacturers it chose. The Complaint alleges, among other effects, that the acquisitions of Gusmer and GlasCraft have removed the ability of distributors and end-users to select the equipment that best serves their, and their customers', interests and needs.

II. Conditions of Entry and Expansion

The Complaint alleges high entry barriers in the relevant market. The principal barrier to entry is the need for specialized third-party distribution. As a result of its acquisitions, Graco obtained substantial control over access to that distribution channel. Subsequent Graco practices have further heightened barriers to competitive entry and expansion, such that restoration of the competition lost as a result of Graco's acquisitions is unlikely to be restored unless Graco's continuation of those practices is enjoined.

Beginning in 2007, former employees of Gusmer began distributing fast-set equipment as Gama Machinery USA, Inc., now doing business as Polyurethane Machinery Corp. ("Gama/PMC"). In March 2008, Graco sued Gama/PMC and others alleging, among other things, breach of contract. The continuation of that litigation has reduced the willingness of distributors to purchase fast-set equipment from Gama/PMC, for fear that their supply of fast-set equipment might later be interrupted as a result of litigation. To reduce that barrier, an impending settlement of that litigation is incorporated in the Commission's Consent Order.

Like Gama/PMC, other prospective competitors—some of which presently offer only some components, rather than a full line of proportioners, hoses, and spray guns—have been unable to gain a meaningful foothold in the North American fast-set equipment market because of barriers to access to the required specialty distribution channel. Following its obtaining of market power through its acquisitions, Graco increased the discount and inventory thresholds it required of distributors, and threatened to cut off any distributor's access to needed Graco fast-set equipment if the distributor purchased fast-set equipment from any Graco rival. The reduction of barriers to entry and expansion by enjoining the continuation of this conduct is necessary to the restoration of competition lost as a result of Graco's acquisitions, and certain provisions of the Commission's cease and desist order are directed to that end.

III. Effects of Graco's Acquisitions

As a result of the acquisitions, Graco has eliminated head-to-head competition with Gusmer and GlasCraft. The Complaint alleges that concentration in the relevant market has increased substantially, and given Graco the ability to exercise market power unilaterally. The Complaint alleges that Graco has exercised that market power by raising prices, reducing product options and alternatives, and reducing innovation. The Complaint further alleges that Graco engaged in certain post-acquisition conduct that has raised barriers to entry and expansion such that the continuation of that conduct must be enjoined if the competition lost as a result of Graco's acquisitions is to be restored.

IV. The Consent Agreement

Since the acquisitions were completed some time ago, it is not practicable to recreate the acquired firms as independent going concerns. Instead, the purpose of the Consent Order is to ensure the restoration of the competitive conditions that existed before the acquisitions, to the extent possible, by facilitating Gama/PMC's entry and expansion and lowering barriers to entry. Therefore, the Consent Order requires Graco to enter into a settlement agreement with Gama/PMC within ten (10) days of the entry of the Order. In addition, Graco must grant to Gama/PMC an irrevocable license to certain Graco patents and other intellectual property in order to ensure that Graco cannot continue or renew its suit. In exchange, PMC will pay to Graco a sum of money for the settlement of the litigation and agree to a deferred license fee for the intellectual property. The settlement documents will be incorporated by reference into the Consent Order, and cannot be modified without the Commission's prior approval. Further, the Consent Order independently prohibits Graco from filing suit against Gama/PMC for infringing the licensed intellectual property.

In order to reduce barriers to competitor entry, the Consent Order directs Graco to cease and desist from imposing any conditions on its distributors that could, directly or indirectly, lead to exclusivity. The Consent Order also prohibits Graco from discriminating against, coercing, threatening, or in any other

manner pressuring its distributors not to carry or service any competing fast-set equipment. The Consent Order does not mandate that any distributor carry competitive fast-set equipment; rather, it bars Graco from imposing exclusivity on its distributors.

The Consent Order further obligates Graco to waive or modify any policies or contracts that would violate the Consent Order. Graco will have thirty (30) days after the Consent Order is final to negotiate changes in the contracts with its distributors to comply with the Consent Order. Graco must provide all of its distributors, employees and agents with a copy of the Consent Order and a plain-language explanation of what is says and requires.

The Consent Order further requires Graco to provide the Commission with prior notice: (1) if it intends to make another acquisition of fast-set equipment (after an appropriate waiting period); or (2) if it intends, within thirty (30) days, to institute a lawsuit or similar legal action against a distributor or end-user with regard to a claimed violation of Graco's trade secrets or other intellectual property covering fast-set equipment. The Consent Order will remain in effect for ten (10) years, and contains standard compliance and reporting requirements.

V. Effective Date of the Consent Order and Opportunity for Public Comment

In this instance, the Commission issued the Complaint and the Consent Order as final, and served them upon Graco at the same time it accepted the Consent Agreement for public comment. As a result of this action, the Consent Order has become effective. The Commission adopted procedures in August 1999 to allow for immediate implementation of an order prior to the public comment period. The Commission announced that it "contemplates doing so only in exceptional cases where, for example, it believes that the allegedly unlawful conduct to be prohibited threatens substantial and imminent public harm." 64 Fed. Reg. 46,267, 46,268 (1999).

This is an appropriate case in which to issue a final order before receiving public comment because the effectiveness of the remedy depends on the timeliness of the private settlement

agreement between Graco and Gama/PMC, which only becomes effective when the Consent Order becomes final. Both Graco and Gama/PMC have made initial efforts to address distributor concerns about possible Graco retribution by separately sending letters to distributors assuring them that preliminary discussions of business relations with Gama/PMC would not have any adverse consequences on the distributors' relationship with Graco. However, the protections of the applicable license and covenants, as well as those included in the Consent Order, are needed to provide distributors reasonable assurances that buying from Gama/PMC will not jeopardize the distributors' relationship with Graco. As a result, any delay in the effectiveness of the Consent Order and the associated private settlement will prevent Gama/PMC from finalizing relationships with distributors in time for the current construction season – and this will have a significant and meaningful impact on competition in the fast-set equipment market that the Consent Order is intended to foster.

The Commission anticipates that the competitive problems alleged in the Complaint will be remedied by the Consent Order, as issued. Nonetheless, public comments are encouraged and will be considered by the Commission. The purpose of this analysis is to invite and facilitate such comments concerning the Consent Order and to aid the Commission in determining whether to modify the Consent Order in any respect. Therefore, the Complaint and Consent Order have 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 comments received, and may determine that the Consent Order should be modified in response to the comments.[1]

[1] If the Respondent does not agree to any such modifications, the Commission may (1) initiate a proceeding to reopen and modify the Consent Order in accordance with Rule 3.72(b), 16 CFR § 3.72(b), or (2) commence a new administrative proceeding by issuing an administrative complaint in accordance with Rule 3.11. *See* 16 CFR § 2.34(e)(2).

STATEMENT OF THE COMMISSION

Today the Commission has voted unanimously to approve the Complaint and Decision & Order ("Order") against Graco, Inc. ("Graco") to resolve allegations that it violated Section 7 of the Clayton Act when it acquired Gusmer Corp. ("Gusmer") in 2005 and Glascraft, Inc. ("Glascraft") in 2008. At the time of the acquisitions, Gusmer and Glascraft were Graco's two closest competitors in the market for fast-set equipment ("FSE") used to apply polyurethane and polyurea coatings. The acquisitions eliminated the only significant competition in the market, and resulted in Graco holding a monopoly position as the only full-line FSE manufacturer. The Order contains provisions, including prohibitions on discriminating against distributors selling competitors' FSE products, that are intended to constrain Graco's ability to exclude prospective entrants into the FSE market by establishing and/or maintaining exclusive relationships with its third-party distributors. Commissioner Wright voted in favor of the Complaint and Order, but also issued a statement outlining his disagreement with these portions of the Order. We respectfully disagree with Commissioner Wright, and believe that these specific provisions are necessary to remediate the anticompetitive impact of the two mergers in this case.

The typical remedy for the Commission in a Section 7 matter is a divestiture of the illegally acquired assets (and any other assets necessary to make the divestiture buyer a viable competitor). Pursuing such a remedy in this matter, however, would be difficult, if not impossible, because Graco had long ago integrated or discontinued the product lines it acquired from Gusmer and Glascraft. There was no easily severable package of assets that could be divested to recreate one – much less two – viable competitors to replace Gusmer and Glascraft. As a result, the most effective relief available was a behavioral remedy intended to facilitate entry into the FSE market, which, of course, includes addressing the post-acquisition conduct described in the Complaint that had precluded entry into the relevant market. Specifically, after the acquisitions Graco solidified its market share by locking up third-party distributors through a series of purchase and inventory threshold requirements, as well as threats

of retaliation and termination if distributors carried the products of any remaining or newly entering FSE manufacturers.

The evidence gathered in the course of the Commission's investigation demonstrates that Graco's efforts were successful; no other firm gained more than five percent of the North American FSE market and Graco's market share of between 90 and 95 percent has remained intact since its 2008 acquisition of Glascraft. Further, the investigation uncovered no evidence that Graco's post-acquisition conduct provided any cognizable efficiency that would benefit consumers. A remedy that does not address Graco's ability to raise and maintain nearly insurmountable entry barriers is substantially less likely to return competition to the FSE market. The Order provisions that Commissioner Wright criticizes, in our view, are integral to achieving that goal but will not cause market inefficiencies.

We believe that exclusive dealing relationships can have procompetitive benefits and that such relationships should not be condemned in the absence of a thorough factual and economic assessment of the circumstances surrounding such conduct. But it is equally important to recognize that, when employed by a competitor that has acquired significant market power or monopoly power, exclusive dealing arrangements have the potential to cement such power and prevent or deter entry that would lead to lower prices, higher quality, and better service for consumers.[1] In any event, regardless of how one views exclusive dealing arrangements generally, there is ample support for the fencing-in relief prescribed in this merger settlement, which is designed to restore competition in the FSE market lost as a result of Graco's illegal acquisitions.

We join Commissioner Wright in commending the Commission staff for their hard work in this matter. They have done an excellent job in investigating the market involved and the issues raised during the course of this investigation.

[1] *See, e.g.*, *United States v. Microsoft Corp.*, 253 F.3d 34, 71-72, 74 (D.C. Cir. 2001) (holding that Microsoft's exclusive dealing arrangements with Internet access providers, independent software vendors, and Apple violated Sherman Act § 2).

STATEMENT OF COMMISSIONER JOSHUA D. WRIGHT

The Commission has voted to issue a Complaint and Order against Graco, Inc. ("Graco") to remedy the allegedly anticompetitive effects of Graco's acquisition of Gusmer Corp. ("Gusmer") in 2005 and GlasCraft, Inc. ("GlasCraft") in 2008. I supported the Commission's decision because there is reason to believe Graco's acquisitions substantially lessened competition in the market for fast-set equipment in violation of Section 7 of the Clayton Act. I want to commend staff for their hard work in this matter. Staff has conducted a thorough investigation and developed strong evidence that Graco's acquisition of Gusmer and GlasCraft likely resulted in higher prices and fewer choices for consumers.

I write separately to discuss two aspects of the Order with which I respectfully disagree, namely the provisions prohibiting Graco from entering into exclusive dealing contracts with distributors and establishing purchase and inventory thresholds that must be satisfied in order for distributors to obtain discounts. Both provisions are aimed at prohibiting exclusivity or, in the case of purchase and inventory thresholds, loyalty discounts that might be viewed as *de facto* exclusive arrangements. I am not persuaded in this case that prohibiting exclusive dealing contracts and regulating loyalty discounts will make consumers better off. To the contrary, these provisions may lead to reduced output or higher prices for consumers. I therefore do not believe the limitations on such arrangements imposed by the Order are in the public interest.

I. Appropriate Use of Behavioral Remedies

The majority and I agree that although the most suitable remedy for an anticompetitive merger usually is a divestiture of assets, under certain circumstances behavioral remedies may be appropriate.[1] One scenario in which behavioral remedies may be

[1] *See e.g.*, Fed. Trade Comm'n, Statement of Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies, at 5 (2012), *available at* http://www.ftc.gov/bc/bestpractices/merger-remediesstmt.pdf (stating the Commission favors structural relief, such as divestitures, in horizontal mergers, but that behavioral relief may be appropriate in some cases).

appropriate is when the challenged merger has long since been consummated and divestiture or other structural remedies are not a viable option for restoring competition to pre-merger levels. Given that Graco has fully integrated Gusmer and Glascraft and discontinued their product lines, divestiture is not an option and the Commission should rightly consider whether behavioral remedies in this case would protect consumers.

As with merger remedies generally, when deciding whether and what behavioral remedy to impose, the Commission must ultimately be guided by its mission of protecting consumers.[2] Because behavioral remedies displace normal competitive decision-making in a market, they pose a particularly high risk of inadvertently reducing consumer welfare and should be examined closely prior to adoption to ensure consumers' interests are best served. In particular, effective behavioral remedies must be "tailored as precisely as possible to the competitive harms associated with the merger to avoid unnecessary entanglements with the competitive process."[3] Merely showing high market shares and the unavailability of structural remedies does not justify restricting conduct that typically is procompetitive because these conditions do not make the conduct any more likely, much less generally likely, to be anticompetitive.[4] A minimum

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[2] The Commission should keep in mind that ours is not a binary choice simply between imposing a structural or a behavioral remedy. The most attractive option from a consumer welfare point of view for any given circumstance may be to block the merger in its entirety, allow the merger to proceed without any remedy, or a hybrid solution combining some aspects of each of these options. Having ruled out structural remedies in this case, the question is which, if any, of the non-structural alternatives best improves consumer welfare. *See* Ken Heyer, *Optimal Remedies for Anticompetitive Mergers*, 26 ANTITRUST 27 (2012) (arguing behavioral remedies are not justified simply because structural remedies are unavailable, and that an agency should weigh the economic costs and benefits of each non-structural alternative, including doing nothing).

[3] U.S. Dep't of Justice Antitrust Div., Antitrust Division Policy Guide to Merger Remedies, at 7 n.12 (June 2011), *available at* http://www.justice.gov/atr/public/guidelines/272350.pdf; *see also*, Heyer, *supra* note 2, at 27-28 ("[A]mong the most important considerations in devising a behavioral remedy is that there be a close nexus between the remedy imposed and the theory of harm motivating its use.").

[4] In fact, efficiencies justifications for exclusive dealing contracts apply, and some even more strongly, when a firm has market power.

safeguard to ensure remedial provisions – whether described as fencing-in relief or otherwise – restore competition rather than inadvertently reduce it is to require evidence that the type of conduct being restricted has been, or is likely to be, used anticompetitively to harm consumers.

With this analytical framework in mind, I support those remedies in the Order that seek to restore pre-merger competition by imposing restrictions closely linked to the evidence of anticompetitive harm in this case. For instance, staff uncovered evidence Graco threatened distributors that considered carrying fast-set equipment sold by competing manufacturers, and that these threats actually led to distributors not purchasing the competing products. Staff also learned that distributors refused to purchase fast-set equipment from Gama/PMC, one of the few fringe competitors remaining after Graco's acquisitions, because of the uncertainty resulting from Graco's lawsuit against Gama/PMC. The Order thus appropriately prohibits Graco from retaliating against distributors that consider purchasing fast-set equipment from other manufacturers[5] and requires Graco to settle its lawsuit against Gama/PMC.

In contrast, and as is discussed in more detail below, there is insufficient evidence linking the remedial provisions in the Order prohibiting exclusive dealing contracts and regulating loyalty discounts to the anticompetitive harm in this case.

II. Prohibitions on Exclusive Dealing

It is widely accepted that exclusive dealing and *de facto* exclusive contracts – while generally efficiency enhancing – can lead to anticompetitive results when certain conditions are satisfied. The primary competitive concern is that exclusive dealing may be used by a monopolist to raise rivals' costs of distribution by depriving them the opportunity to compete for distribution sufficient to achieve efficient scale, and ultimately

[5] Such retaliatory conduct alone is outside the normal competitive process and has no plausible procompetitive benefit. Its proscription therefore is unlikely to harm consumers. Of course, a decision by Graco to refuse to sell to distributors who do not enter into an exclusive contract should not itself be proscribed as illegitimate retaliation.

harm consumers by putting competitors out of business.[6] On the other hand, the economic literature is replete with procompetitive justifications for exclusive dealing, including aligning the incentives of manufacturers and distributors, preventing free-riding, and facilitating relationship-specific investments.[7] In fact, the empirical evidence substantially supports the view that exclusive dealing arrangements are much more likely to be procompetitive than anticompetitive.[8]

Because exclusive dealing contracts typically are procompetitive and a part of the normal competitive process, the Commission should only restrict the use of such arrangements when there is sufficient evidence that they have or are likely to decrease consumer welfare. This ensures consumers the merger remedy does not deprive them the fruits of the competitive process. The evidence in this case is insufficient to conclude that Graco has used, or intends to use, exclusive dealing or *de facto* exclusive contracts to foreclose rivals and ultimately harm consumers. To the contrary, the Commission's Complaint describes the fast-set equipment market as one particularly well suited for exclusive arrangements. Specifically, the Complaint acknowledges the sale of fast-set equipment demands specialized third party distributors that possess the technical expertise to teach consumers how to use and maintain the manufacturer's equipment.[9] One could therefore easily imagine that

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[6] *See e.g.*, Alden F. Abbott & Joshua D. Wright, *Antitrust Analysis of Tying Arrangements and Exclusive Dealing, in* ANTITRUST LAW AND ECONOMICS 183, 194-96 (Keith N. Hylton ed., 2d ed. 2010). There also are novel theories of anticompetitive harm, including models exploring the possibility that certain types of discount programs effectively impose a tax upon distributors' choice to expand rivals' sales and thereby potentially prevent rivals from acquiring a sufficient number of retailers to cover the fixed costs of entry. *See e.g.*, Joe Farrell, et al., *Economics at the FTC: Mergers, Dominant-Firm Conduct, and Consumer Behavior*, 37 (4) REV. INDUS. ORG. 263 (2010).

[7] *See e.g.*, Abbott & Wright, *supra* note 6, at 200-01; Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy, in* HANDBOOK OF ANTITRUST ECONOMICS, 393-94 (Paolo Buccirossi, ed., 2008); Benjamin Klein & Kevin Murphy, *Exclusive Dealing Intensifies Competition for Distribution*, 75 ANTITRUST L. J. 433, 465 (2008).

[8] *See e.g.*, Abbott & Wright, *supra* note 6, at 200-01; Lafontaine & Slade, *supra* note 7, at 393-94.

[9] Complaint ¶ 24, Graco, Inc., FTC File No.101-0215, (April 17, 2013).

manufacturers might only be willing to provide training to distributors if they have some assurance that current or future competitors will be unable to free ride on their investments in the distributors' technical expertise. Exclusive dealing arrangements with distributors are one well-known and common method of preventing such free riding.

The provisions in the Order prohibiting exclusive contracts therefore may needlessly harm consumers by deterring potentially procompetitive arrangements. For that reason, I do not believe that provision is in the public interest.

III. Restrictions on Loyalty Discounts

The primary anticompetitive concerns with loyalty discounts are analytically similar to those associated with exclusive dealing and *de facto* exclusive contracts.[10] As with exclusive dealing, the economic literature also supports the view that loyalty discounts more often than not are procompetitive.[11] The Commission's competition mission therefore is best served by an approach that counsels against imposing restrictions on loyalty discounts unless there is sufficient evidence to establish that such arrangements have or are likely to harm competition and consumers.

The Order permits Graco to enter into certain loyalty discount agreements that require distributors to meet annual purchase and inventory thresholds to qualify for discounted prices.[12] The Order, however, restricts the scope of these loyalty discounts by prescribing the maximum threshold levels Graco may set in 2013 and by only allowing those maximums to increase by 5 percent year to year. Although there is evidence that Graco in some instances increased the inventory and purchase thresholds it required distributors to meet to receive discounts on fast-set equipment following its acquisitions, I have not seen evidence sufficient to link these increases to the anticompetitive effects of the mergers alleged in the Commission's Complaint. For example,

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[10] *See generally* Bruce H. Kobayashi, *The Economics of Loyalty Discount and Antitrust Law in the United States*, 1 COMP. POL'Y INT'L 115 (2005).

[11] *Id.*

[12] Decision & Order § III(6)(c), Graco, Inc., FTC File No.101-0215, (April 17, 2013).

I have seen no evidence that a distributor dropped Gama/PMC or any other fringe competitor in response to Graco's increased thresholds. Further, although there appears to be evidence that at least some distributors are unable to both meet the thresholds necessary to receive Graco's discounts and carry competing manufacturers' products, there is nothing barring these distributors from forgoing those discounts in order to carry multiple products lines. It has been several years since Graco increased the thresholds. In the absence of evidence this change harmed competition, the fact that some distributors prefer to take the discounts is not a sufficient reason to believe that prohibiting these contracts will protect consumers. Moreover, it is unlikely that the Commission is best positioned to gauge what the appropriate threshold should be for each distributor over time and as market conditions change.

As a result, based upon the available evidence, I am concerned the restrictions on loyalty discounts in the Order ultimately may reduce consumer welfare rather than protect competition. Thus, I do not believe this aspect of the Order is in the public interest.

* * * * *

For these reasons, I voted in favor of the Commission's Complaint and Order, but respectfully disagree with the Order provisions prohibiting exclusive contracts and restricting loyalty discounts. To the extent the majority believes Graco may use such arrangements to engage in anticompetitive conduct in the future, the Commission's willingness and ability to bring a monopolization claim where the evidence indicates it is appropriate would protect consumers against the competitive risks posed by these arrangements without depriving consumers of their potential benefits.

Decision and Order

IN THE MATTER OF

ROBERT BOSCH GMBH

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

Docket No. C-4377; File No. 121 0081
Complaint, November 21, 2012 – Decision, April 23, 2013

This consent order addresses the acquisition by Robert Bosch GmbH ("Bosch") of the SPX Service Solutions business of SPX. Bosch is a global supplier of automotive and industrial, consumer goods, and building technology. On January 23, 2012, Bosch entered into an agreement to acquire the SPX Service Solutions business from SPX, the leading supplier of air conditioning recycling, recovery, and recharge (ACRRR) devices. ACRRR devices are stand-alone pieces of equipment used by automotive technicians to remove refrigerant from a vehicle's on-board air conditioning system, store the refrigerant while the air conditioning system is being serviced, and recycle the refrigerant back into the system. The complaint alleges that Bosch's proposed acquisition of SPX Service Solutions would create a virtual monopoly in the ACRRR market. The order requires Bosch to divest its ACRRR business to a viable competitor, Mahle Clevite, Inc. Bosch is also required to grant manufacturers' licenses to key patents that Mahle needs in order to compete in the ACRRR market. Lastly, the order also requires Bosch to end agreements that restrict third parties from advertising, servicing, distributing, or selling competitive products in the United States.

Participants

For the *Commission*: *Jordan S. Andrew, Jacqueline Mendel, Eric Rohlck* and *Mark Silvia.*

For the *Respondent*: *Michael A. Kindsay* and *Jaime Stilson, Dorsey & Whitney LLP*; and *Maria Cirincione, Damon Kalt,* and *Barry Nigro, Fried Frank Harris Shriver & Jacobson*.

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 Robert Bosch GmbH, a corporation subject to the jurisdiction of the Commission has: (1) agreed to acquire the SPX Service

Solutions business ("SPX Service Solutions") from SPX Corporation, a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and (2) has engaged in conduct that violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent Robert Bosch GmbH ("Bosch") is a corporation organized, existing, and doing business under and by virtue of the laws of Germany, with its principal U.S. subsidiary, Robert Bosch LLC, a limited liability company organized, existing and doing business under the laws of the State of Delaware with its headquarters at 38000 Hills Tech Drive, Farmington, MI 48331. Bosch is a leading global supplier of automotive and industrial technology, consumer goods and building technology. Bosch employs approximately 300,000 people and had sales of over $71 billion in fiscal year 2011. In North America, Bosch has approximately 22,500 employees and had revenues of approximately $9.8 billion in 2011. Bosch, through its subsidiary RTI Technologies, Inc., develops, manufactures and markets air conditioning recovery, recycling and recharging systems ("ACRRR") for motor vehicles, sold under the brand names Bosch and RTI in the United States. After the Acquisition, Bosch shall include SPX Service Solutions, and its Robinair-brand ACRRRs.

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 corporation whose business is in or affects commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

II. THE ACQUIRED COMPANY

3. SPX Service Solutions is a division of SPX Corporation, with its headquarters address located at 28635 Mound Road, Warren, MI 48092. SPX Service Solutions is comprised of various legal entities and assets (including the patents referenced in Paragraph 15 herein) that constitute a global business of SPX Corporation. The global SPX Service Solutions business includes: (i) providing vehicle repair and maintenance solutions, including diagnostic products, services and dealer equipment, technical information, tools and equipment, daily sale and air conditioning (including Robinair-brand ACRRRs) and fluids to automotive original equipment manufacturers, OEM dealers and the aftermarket; and, (ii) tungsten carbide machining, ceramic machining and machining other hard exotic material to specification. SPX Service Solutions had 2011 sales of approximately $927 million.

4. The ultimate parent entity of SPX Service Solutions is SPX Corporation. SPX Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its headquarters located at 13515 Ballantyne Corporate Place, Charlotte, NC 28277. SPX Corporation is a diversified global supplier of highly engineered products for the following industries: power and energy, food and beverage, vehicle and transit, infrastructure and industrial processes with 2011 revenues of over $5 billion. The company employs over 18,000 people.

III. THE PROPOSED ACQUISITION

5. On January 23, 2012, Respondent entered into a Purchase and Sale Agreement ("the Acquisition Agreement") with SPX Corporation whereby Respondent proposes to acquire substantially all assets and legal entities that comprise the SPX Service Solutions business. The transaction is valued at $1.15 billion ("the Acquisition").

IV. THE RELEVANT MARKET

6. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the manufacture and sale of ACRRRs used for the repair of motor vehicle air conditioning systems ("MVACs"). ACRRRs, including add-ons and accessories, are used to repair malfunctioning MVACs by recovering and recycling the refrigerant, and then recharging the MVACs.

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

V. STRUCTURE OF THE MARKET

8. The market for ACRRRs in the United States is highly concentrated. Bosch and SPX Service Solutions are currently the two most significant participants in the ACRRR market in the United States, as measured by the Herfindahl-Hirschman Index ("HHI"). Post-Acquisition, Bosch would control over 90% of the relevant market, combining Bosch's approximate 10% market share with SPX Service Solutions's market share of over 80%. Four other firms comprise the balance of sales in the United States.

VI. ENTRY CONDITIONS

9. Entry into the relevant market is not likely to occur in a timely manner sufficient to deter or counteract the anticompetitive effects of the Acquisition. The most significant barriers to entry into the relevant market are (1) building a sufficient national network of after-sale service centers to provide rapid-turnaround repair services for equipment when repairs are required, and (2) obtaining sufficient access and visibility in the relevant distribution channels. In addition, ACRRRs must be in compliance with standards established by SAE International, an industry standard-setting organization. Such compliance may involve potentially costly licensing of standard-essential patents. SAE also requires ACRRR market participants to manufacture multiple ACRRR prototypes for testing by independent testing facilities, a requirement that adds manufacturing costs. For these

reasons, an entrant is unlikely to achieve a significant market impact within two years to counteract or deter any anticompetitive effects of the Acquisition.

VII. EFFECTS OF THE ACQUISITION

10. The effects of the Acquisition, if consummated, may be to substantially lessen competition and to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by eliminating actual, direct, and substantial competition between Bosch and SPX Service Solutions in the ACRRR market, thereby (1) increasing the likelihood that Bosch will be able to exercise unilateral market power in this market, and (2) increasing the likelihood that customers would be forced to pay higher prices.

VIII. CONDUCT

11. The United States Environmental Protection Agency ("EPA") regulates the refrigerants used in MVACs. Section 608 of the Clean Air Act Amendments of 1990 directs EPA to establish requirements to prevent the release of ozone-depleting substances during the servicing, repair, or disposal of appliances and industrial process refrigeration. The repair of MVACs is regulated under section 609 of the Clean Air Act.

12. Industry standards for ensuring compliance with EPA regulations during the repair of MVACs are established by SAE. Standards for ACRRRs at SAE are established by SAE's Interior Climate Control Standards Committee ("ICCSC").

13. Two SAE standards established for the regulation of ACRRR equipment are J-2788 and J-2843. J-2788 relates to a type of air conditioner refrigerant called HFC-134a. This standard establishes the specific minimum equipment performance requirements for recovery and recycling of HFC-134a that has been directly removed from, and is intended for reuse in, MVACs. It also is intended to establish requirements that the equipment used to recharge MVACs utilizing HFC-134a meet certain specified accuracy levels established by SAE J-2099

(another SAE standard). J-2843 relates to another air conditioner refrigerant called R-1234yf. Like J-2788, J-2843 establishes requirements that the equipment used to recharge MVACs with R-1234yf refrigerant meet certain specified accuracy levels established by SAE J-2099.

14. A representative(s) of SPX Service Solutions was a working group member of SAE's ICCSC during the drafting of SAE J-2788 and SAE J-2843.

15. Section 1.14 of SAE's Technical Standards Governance Board Policy Manual ("the SAE Policy Manual") requires that a working group member that owns, controls or licenses potentially standard essential patents make such patents available for licensing either (1) without compensation or (2) under reasonable terms and conditions that are demonstrably free of any unfair discrimination. These licensing commitments enable SAE to include relevant patents in its standards, and have confidence in the subsequent widespread adoption of the standard.

16. After the adoption of SAE J-2788, SPX Corporation sued certain competitors, including Bosch, for infringing patents that may be essential to the practice of SAE J-2788. After the adoption of J-2843, SPX amended its complaint to include a patent essential to the practice of J-2843. SPX Corporation sought injunctive relief in this lawsuit.

17. Following the commencement of the suit described in paragraph 16, SAE sought assurance from SPX Service Solutions that it did not hold or currently intend to hold any invention claimed in a patent the use of which would be required for compliance with SAE J-2788 and J-2843 standards; or in the alternative, written assurance that SPX Service Solutions would license its standard-essential patents royalty-free or under reasonable terms and conditions that were demonstrably free of any unfair discrimination.

18. After receiving the letter from SAE referenced in Paragraph 17, SPX Service Solutions provided a letter of assurance to SAE stating that it believed it owned or controlled patents or pending patent applications that it believed could potentially be infringed by compliance with SAE J-2788 and SAE

J-2843, and that, to the extent that a claim is essential to practicing either the SAE J-2788 or J-2843 standards, SPX Service Solutions would license these patents to applicants, on a claim-by-claim basis, as required for compliance with the SAE J-2788 and J-2843 standards, under reasonable terms and conditions that are demonstrably free of any unfair discrimination. SPX Service Solutions has not provided SAE with a list of all patents and patent applications that may be essential to the implementation of SAE J-2788 and SAE J-2843.

19. Despite its letter of assurance to SAE, however, SPX Service Solutions continued to prosecute the suit for injunctive relief described in Paragraph 16. The defendants in this suit were willing licensees of SPX Service Solutions' standard-essential patents.

20. SPX Service Solutions' breach of its commitment to offer licenses its standard-essential patents pursuant to its obligations under 1.14 of the SAE Policy Manual by seeking injunctive relief over the same standard-essential patents, would exclude its competitors from the market, have caused, or threaten to cause, harm to competition and will continue to do so unless the relief requested herein is granted. SPX Service Solutions' conduct, if left unchecked, tends to undermine the vitality of the standard-setting process.

IX. VIOLATIONS CHARGED

21. The Acquisition Agreement described in Paragraph 8 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

22. The Acquisition described in Paragraph 8, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

23. The allegations alleged in paragraph 11-20 are incorporated herein by reference. The conduct of SPX Service Solutions and SPX Corporation, constitutes an unfair method of competition in or affecting commerce in violation of Section 5 of

the FTC Act, as amended, 15 U.S.C. § 45. This conduct, or the effects thereof, will continue or recur in the absence of appropriate relief.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-first day of November, 2012, issues its Complaint against said Respondent.

By the Commission, Commissioner Rosch and Commissioner Ohlhausen dissenting.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of SPX Service Solutions ("SPX SS") a division of SPX Corporation ("SPX") by Robert Bosch GmbH ("Respondent Bosch"), and Respondent Bosch 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

Respondent its 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 Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent Bosch 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 Bosch 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 Bosch is a corporation organized, existing and doing business under and by virtue of the laws of Germany, with its principal U.S. subsidiary, Robert Bosch LLC, a limited liability company organized, existing and doing business under the laws of the State of Delaware with its headquarters located at 38000 Hills Tech Drive, Farmington MI 48331.

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

ORDER

I.

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

A. "Bosch" means Robert Bosch GmbH, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Robert Bosch GmbH (including Robert Bosch LLC, RTI Technologies, Inc. ("RTI"), Beissbarth GmbH, and SPX SS after the Acquisition), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "SPX " means SPX Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its headquarters located at 13515 Ballantyne Corporate Place, Charlotte, NC 28277

C. "SPX SS" means SPX Service Solutions, a division of SPX, with its headquarters located at 28635 Mound Road, Warren, MI 48092.

D. "Commission" means the Federal Trade Commission.

E. "Acquisition" means Respondent Bosch's acquisition of SPX SS.

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

H. "ACRRR" means air conditioning recovery, recycling and recharging.

I. "ACRRR Product" means an ACRRR stand-alone piece of equipment, including add-ons and accessories, used to repair malfunctioning vehicular air

conditioning systems by recovering and recycling the refrigerant, and recharging the air conditioning unit including, but not limited to, equipment related to the SAE J2788 (R-134a) and SAE J2843 (R-1234yf) standards.

J. "Action" means any proceeding whether legal, equitable, or administrative, as well as any arbitration, mediation, or any other form of public or private dispute resolution in the United States or anywhere else in the world.

K. "Bosch ACRRR Product" means any ACRRR Products made by or for Respondent Bosch, before the Acquisition, by any Person including, but not limited to, ACRRR Products manufactured by Respondent Bosch's RTI subsidiary, the ACS 620, the ACS 620H, the ACS 625, the ArcticPRO RHS980, and AC Safe (Mercedes Benz). *Provided, however*, that unless otherwise required or described in this Order, "Bosch ACRRR Product" does not mean any ACRRR Product manufactured or sold by SPX SS. *Provided further, however*, that "Bosch ACRRR Product" does not mean the ACRRR Products made by Respondent Bosch's subsidiary in India that are not currently sold in the United States or Canada.

L. "Bosch ACRRR Business" means all of Respondent Bosch's assets, tangible and intangible, businesses and goodwill, related to the research, Development, manufacture, distribution, marketing or sale of Bosch ACRRR Products worldwide including, without limitation, the following:

1. all Bosch ACRRR Product Intellectual Property;

2. all manufacturing technology;

3. all Bosch ACRRR Product scientific and regulatory material;

4. all Bosch ACRRR Product manufacturing equipment, to the extent owned by Respondent Bosch and located in the United States;

5. to the extent related to the Bosch ACRRR Product, all of Respondent Bosch'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 each case that are Third Parties, including, without limitation, all of Respondent Bosch's contracts with any Third Party to the extent related to the supply of components used in the manufacture of the Bosch ACRRR Product. *Provided, however*, that Bosch ACRRR Business shall not include Third Party supply contracts with Bosch Limited related to the human machine interface;

6. all inventory wherever located worldwide, 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 Bosch ACRRR Product including, but not limited to, factory-installed accessories, and other accessories or add-ons related to the Bosch ACRRR Product.

7. 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 Bosch ACRRR Product;

8. all rights under warranties and guarantees, express or implied, with respect to the Bosch ACRRR Product;

9. all items of prepaid expenses, to the extent related to the Bosch ACRRR Product; and

10. all books, records and files related to the foregoing, or to the Bosch ACRRR Product including, but not limited to, all records, contact information, notes, and files of Respondent Bosch, including its Beissbarth GmbH affiliate, relating to Respondent Bosch's marketing, sales, and homologation of Bosch ACRRR Products to any Third Party (including original equipment manufacturers and aftermarket Persons) wherever located.

Provided, however, that unless otherwise required in this Order, "Bosch ACRRR Business" does not include: (1) any assets related to the ACRRR Products manufactured and sold by SPX SS; and (2) assets or groups of assets specifically excluded, and listed in the Remedial 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, "Bosch ACRRR Business" shall not include any of the following: (a) the name "Bosch," or the names of any other divisions, businesses, corporations or companies owned by Respondent Bosch; (b) any interest in real property; or (c) any personal property.

M. "Bosch ACRRR Product Intellectual Property" means all of the following related to the Bosch ACRRR Product:

1. all of Respondent Bosch's intellectual property used in the development, manufacturing, storage, distribution, service, and sale of Bosch ACRRR Product including, but not limited to:

   a. Bosch ACRRR Manufacturing Copyrights;

   b. Trademarks and Trade Dress including, but not limited to, all rights to the name RTI, and all Trademarks, Trade Dress, and logos related to RTI. *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, "Bosch ACRRR Product Intellectual Property" shall not include the name "Bosch," or the names of any other divisions, businesses, corporations or companies owned by Respondent Bosch;

c. Software;

d. computer programs;

e. Patents including, but not limited to, the RTI Patents, the Bosch/Agramkow Patents, the Bosch Limited Patents, and the right to obtain and file for Patents;

f. Bosch ACRRR Product Sales Copyrights;

g. licenses including, but not limited to, licenses to Third Party Software if transferable and sub-licenses to Software modified by Respondent Bosch;

h. Know-How;

i. technical information (including, but not limited to, material and final product specifications);

j. protocols (including, but not limited to, operational manuals);

k. quality control information and methods, and other confidential or proprietary technical, business, development and other information;

l. trade secrets; and

m. 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 Bosch and Acquirer, rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach of any of the foregoing.

Provided, however, that "Bosch ACRRR Intellectual Property" does not include the Bosch/Agramkow Safety Patent or the the Bosch/Agramkow Patents Know-How.

N. "Bosch ACRRR Product Manufacturing Copyrights" means copyrights in all process development data and reports relating to the research and development of the ACRRR Product manufactured and sold by Respondent Bosch, or of any materials used in the research, Development, manufacture, manufacturing records, manufacturing processes, and supplier lists of or for the Bosch ACRRR Product; all copyrights in data contained in laboratory notebooks relating to the Bosch ACRRR Product; all copyrights in analytical and quality control data relating to the Bosch ACRRR Product; and all correspondence with governmental agencies or qualifying or homologating organizations worldwide relating to the foregoing.

O. "Bosch ACRRR Product Sales Copyrights" means rights to all original works of authorship of any kind directly related to the sale of the Bosch ACRRR Product, and any registrations and applications for registrations thereof, including, but not limited to, all such rights with respect to:

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 Bosch ACRRR Product 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.

P. "Bosch/Agramkow Patents" means the Patents currently owned in whole or in part by Respondent Bosch but were previously owned by Agramkow (the former owner of RTI).

Q. "Bosch/Agramkow Patents Know-How" means Know-How licensed to Respondent Bosch from Agramkow related to the Bosch/Agramkow Patents, including the Know-How related to the Bosch/Agramkow Safety Patent.

R. "Bosch/Agramkow Safety Patent" means the only Bosch/Agramkow Patent, numbered WO 2011/066833 A1, that is co-owned by Respondent Bosch and Agramkow (the former owner of RTI).

S. "Bosch Limited Patents" means Patents owned by Respondent Bosch's India subsidiary and used in the manufacture of ACRRR Products including, but not limited to, the human machine interface Patents.

T. "Bosch Limited Patents Know-How" means the Know-How owned by Respondent Bosch's India subsidiary related to the Bosch Limited Patents.

U. "Bosch/Mahle Divestiture Agreement" means the asset purchase agreement, together with all licenses, assignments, and other agreements entered into by Respondent Bosch and Mahle for the sale of the Bosch

ACRRR Business, and all other agreements, leases, transfers, and licenses required by this Order. The Bosch/Mahle Divestiture Agreement is attached as Confidential Appendix A to this Order.

V. "Confidential Business Information" means competitively sensitive, proprietary, and all other information, solely relating to the Bosch ACRRR Business, 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 ACRRR Product, including the terms of the Remedial Agreement, all customer lists, price lists, contracts, cost information, technologies, processes, or other trade secrets related to the ACRRR Product and the Bosch ACRRR 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 Bosch or (2) information that Respondent Bosch can demonstrate it lawfully obtained prior to the Acquisition Date.

W. "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 Confidential Appendix B to this Order.

X. "Development" means all development activities, including formulation, process development, manufacturing scale-up, development-stage manufacturing, quality assurance/quality control development, statistical analysis and report writing, conducting trials for the purpose of obtaining any and all approvals, licenses, homologation, registrations or authorizations from any agency, standard setting organization, or customer necessary for the manufacture, use, import, export, promotion, marketing and sale of a Bosch ACRRR Product, and

regulatory affairs activities related to the foregoing. "Develop" means to engage in Development.

Y. "Divestiture Date" means the date on which Respondent Bosch or a divestiture trustee divests the Bosch ACRRR Business pursuant to Paragraph II or VIII.

Z. "Mahle" means Mahle Clevite Inc., a corporation organized, existing and doing business under and by virtue of the laws of Delaware, headquarters address located at 1240 Eisenhower Place, Ann Arbor, MI 48108.

AA. "Know-How" means 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.

BB. "Patents" means all patents, pending 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.

CC. "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.

DD. "Remedial Agreement" means the following:

1. the Bosch/Mahle 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 Bosch and a Commission-approved Acquirer (or between a Divestiture Trustee and a Commission-approved Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, and all amendments, exhibits, attachments, agreements, and schedules thereto, Related to the relevant assets to be granted, licensed, delivered or otherwise conveyed, that have been approved by the Commission to accomplish the requirements of this Order.

EE. "RTI" means RTI Technologies, Inc., a wholly owned subsidiary of Respondent Bosch.

FF. "RTI Patents" means the Patents owned by RTI.

GG. "RTI Sandwich Manifold Patent" means the RTI Patent No. 7,726,343.

HH. "Software" means executable computer code and the documentation for such computer code, but does not mean data processed by such computer code.

II. "SPX ACRRR Patents" means Patents that are listed in Appendix D to this Order. "SPX ACRRR Patents" may be, but are not necessarily, "SPX Essential Patents."

JJ. "SPX Essential Patents" means any Patents owned by SPX or SPX SS before the Acquisition and Respondent Bosch after the Acquisition that are or may be essential to the practice of the SAE J2788 or SAE J2843 standards as described in the Letter of

Assurance to SAE International, attached at Appendix E to this Order.

KK. "SPX Patent Lawsuit" means the lawsuit in the Northern District of Ohio captioned: SPX Corp. v. Mastercool U.S.A., Inc., Norco Industries, and RTI Tech., No. 3:10-cv-1266, which includes, among other things, a demand for an injunction.

LL. "SPX Patent Lawsuit Patents" means the Patents listed in Exhibit F to this Order.

MM. "Third Party(ies)" means any Person other than Respondent Bosch or the Acquirer.

NN. "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.

OO. "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.

PP. "United States" means United States of America.

QQ. "York, Pennsylvania Facility" means the facility and offices located at 10 Innovation Drive, York, Pennsylvania 17402, that is related to the Bosch ACRRR Business consisting of, among other things, office, manufacturing, production, and packaging space for the Bosch ACRRR Business.

II. (Divestiture)

IT IS FURTHER ORDERED that:

A. No later than December 31, 2012, Respondent Bosch shall divest the Bosch ACRRR Business absolutely and in good faith, to Mahle, pursuant to, and in accordance with, the Bosch/Mahle Divestiture Agreement. The Bosch/Mahle Divestiture Agreement (which shall include, among other things, the asset purchase agreement, transition services agreements, the lease to or assignment of a lease to the York, Pennsylvania Facility, licenses between Respondent Bosch and Mahle including, but not limited to, a license to the Bosch Limited Patents Know-How, Bosch/Agramkow Patents Know-How which includes the Bosch/Agramkow Safety Patent Know-How, and assignment of the RTI Patents, the Bosch Limited Patents, and the Bosch/Agramkow Patents) 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 Mahle, or to reduce any obligations of Respondent Bosch 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 nothing in this Paragraph II.A. prohibits Respondent Bosch from negotiating, as part of the Remedial Agreement, a non-exclusive, paid-up, royalty-free license to the Bosch Limited Patents or the RTI Sandwich Manifold Patent for use on ACRRR Products not manufactured or sold in The United States or Canada.

Provided further, however, that with respect to documents or other materials included in the Bosch ACRRR Business that contain information (a) that relates to both the Bosch ACRRR Business and to other products or businesses of Respondent Bosch, or

(b) for which Respondent Bosch has a legal obligation to retain the original copies, Respondent Bosch shall be required to divest to the Acquirer only copies or, at its option, relevant excerpts of such documents and materials, but Respondent Bosch shall provide the Acquirer access to the originals of such documents as necessary, it being a purpose of this proviso to ensure that Respondent Bosch not be required to divest itself completely of records or information that relates to products or businesses other than the Bosch ACRRR Business;

Provided further, however, that with respect to any contract or agreement included in the Bosch ACRRR Business that relates both to the Bosch ACRRR Product and to any other product, Respondent Bosch may, concurrently with assigning such contract or agreement to the extent it relates to the Bosch ACRRR Product, 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 Bosch that Mahle is not an acceptable Acquirer then, after receipt of such written notification: (1) Respondent Bosch shall immediately notify Mahle of the notice received from the Commission and shall as soon as practicable effect the rescission of the Bosch/Mahle Divestiture Agreement; and (2) Respondent Bosch shall, within one-hundred-twenty (120) days from the date this Order becomes final, divest the Bosch ACRRR 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 Bosch has complied with the terms of Paragraphs II.A. 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 Bosch that the manner in which the divestiture and assignments were accomplished is not acceptable, the Commission may direct Respondent Bosch, 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. Respondent Bosch shall, as part of the Remedial Agreement:

1. grant a royalty-free, fully-paid-up, irrevocable, perpetual exclusive license (even as to the Respondent Bosch) to the:

   a. Bosch/Agramkow Safety Patent, with rights to sublicense (to the extent that Respondent Bosch has the legal authority to grant such rights);

   b. Bosch/Agramkow Patent Know-How, with rights to sublicense (to the extent that Respondent Bosch has the legal authority to grant such rights);

2. grant a royalty-free, fully-paid-up, irrevocable, perpetual non-exclusive license, to the SPX Patent Lawsuit Patents and the SPX ACRRR Patents (whether or not they are SPX Essential Patents) solely for the sale of ACRRR Products in the United States.

C. Prior to the Divestiture Date, Respondent Bosch shall secure all consents, assignments, and waivers from all Third Parties that are required for the Acquirer to

manufacture and sell the Bosch ACRRR Products as of the Divestiture Date including, but not limited to, securing a lease for the York, Pennsylvania Facility, if such facilities are being leased to the Acquirer, and securing consents from all customers of the Bosch ACRRR Business whose contracts are being assigned or extended to the Acquirer pursuant to Paragraph II.A.

Provided, however, Respondent Bosch 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.

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

E. Respondent Bosch shall include, as part of a Remedial Agreement, any transition services agreement or agreements under which Respondent Bosch shall provide services or assistance to the Acquirer. Such transition services agreement or agreements shall include, but not be limited to:

1. an agreement relating to the Acquirer's assuming accounts that were administered by Respondent Bosch in which it sells Bosch ACRRR Products and accessories under Respondent Bosch's (or its subsidiary's) name. Such agreement may include, among other things, procedures for introducing the Acquirer to contact persons from the various accounts, either in person or by written communication and a transfer of all relevant information relating to such accounts;

2. an agreement relating to the Acquirer's assuming accounts, and continuing the marketing, sales, and homologation of Bosch ACRRR Products sold under Respondent Bosch's (or its subsidiary's) name worldwide. Such agreement may include, among other things, procedures for introducing the Acquirer to contact persons from the various accounts or manufacturers, either in person or by written communication, and a transfer of all relevant information relating to such accounts or manufacturers;

3. an agreement for the temporary and transitional use of Respondent Bosch's Trade Dress, Trademarks, or other trade name on products sold by the Acquirer;

4. scope of services, term, and prices or costs for such services; and

5. 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.

F. Respondent Bosch shall not terminate or modify any agreement that is part of a Remedial Agreement before the end of the term approved by the Commission without prior approval of the Commission pursuant to Commission rule 2.41(f)(5).

G. 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 Bosch ACRRR Products

independently of Respondent Bosch; and (2) to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III. (Terminate Agreements)

IT IS FURTHER ORDERED that:

A. Within thirty (30) days of the Acquisition Date:

1. Respondent Bosch shall terminate, and cease and desist from continuing or enforcing, any existing oral or written condition, requirement, policy, agreement, contract or understanding ("Restrictions") with any Person that, directly or indirectly prohibits or restricts a Person from advertising, servicing, distributing, or selling any ACRRR Product from any Third Party in the United States including, but not limited to, Restrictions contained in the following provisions and agreements: the "Robinair Domestic Service Center Agreement," the "SPX Service Solutions Authorized Warehouse Distributor Contract," and the "Robinair Advertising Loyalty Commitment Form."

2. Respondent Bosch shall notify, in the form of the letter attached in Appendix G to this Order, by first class mail, return receipt requested, or by e-mail with a return acknowledgment required, the general counsel, president, or main contact person responsible for the sales and marketing of ACRRR Products for all Third Parties with such Agreements described in Paragraph III.A., above, including, but not limited to, the Third Parties listed in Confidential Appendix H to this Order, that Respondents:

   a. are terminating, pursuant to this Order, such Restrictions, and

b. shall be prohibited from entering into such Restrictions or any similar Restrictions in the United States for ten (10) years from the date the Order becomes final.

B. For ten (10) years from the date the Order becomes final, Respondent Bosch shall cease and desist from inviting, entering into, implementing, continuing, enforcing, or attempting or threatening thereto, any Restrictions with any Person that, directly or indirectly prohibits or restricts a Person from advertising, servicing, distributing, or selling any ACRRR Product from any Third Party in the United States.

IV. (Patents)

IT IS FURTHER ORDERED that:

A. Respondent Bosch shall not reinstate or refile the SPX Patent Lawsuit that was dismissed, which included, among other things, a demand for an injunction;

B. Within sixty (60) days after the Divestiture Date, Respondent Bosch shall:

1. make and deliver a written, unconditional, unilateral, irrevocable offer for a royalty-free, fully-paid-up, irrevocable, perpetual, non-exclusive license to the SPX Patent Lawsuit Patents and the SPX ACRRR Patents, solely to sell ACRRR Products in the United States to:

   a. each of the defendants, other than RTI and Respondent Bosch or its successors, in the SPX Patent Lawsuit; and

   b. the Persons listed in Confidential Exhibit I; and

2. enter into such license if the offer is accepted.

C. For the length of time until the last SPX Patent Lawsuit Patent or SPX ACRRR Patent expires, Respondent Bosch shall make an irrevocable offer to any Third Party, upon request, that it will grant a royalty-free, fully-paid-up, irrevocable, perpetual, non-exclusive license to the SPX Patent Lawsuit Patents and the SPX ACRRR Patents, solely to sell ACRRR Products in the United States, and enter into such license if the offer is accepted.

D. Within five (5) days of date this Order is final, Respondent Bosch shall provide the Letter of Assurance attached as Appendix E to this Order to the SAE IP Department of SAE International for the purpose of making a binding, irrevocable commitment to license the SPX Essential Patents to any Third Party on fair, reasonable and non-discriminatory terms for the purpose of practicing the SAE J2788 or SAE J2843 standard in any ACRRR Product sold in the United States. Such Letter of Assurance shall have an effective date before the date of adoption of the SAE J2788 and SAE J2843 standards, respectively.

E. For the length of time until the last SPX Essential Patents expire, Respondent Bosch shall not revoke the Letter of Assurance attached as Appendix E of this Order. Pursuant to its commitment in the Letter of Assurance, Respondent Bosch shall cease and desist from, directly or indirectly, in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, initiating, or threatening to initiate, any Action demanding injunctive relief against any Third Party with respect to any, or for any alleged infringement of any claims of any, of the SPX Essential Patents including, but not limited to, Actions against manufacturers and customers. *Provided, however*, that Respondent Bosch shall be permitted to seek injunctive relief in an Action alleging infringement of the SPX Essential Patents if, and only if:

1. a court determines that an SPX Essential Patent (other than an SPX ACRRR Patent or an SPX Patent Lawsuit Patent) is being used for a purpose other than as required to comply with the SAE J2788 and SAE J2843 standards, or

2. a Third Party:

   a. states in writing it will not license one or more of the SPX Essential Patents consistent with the Letter of Assurance; or

   b. refuses to license one or more of the SPX Essential Patents on terms that have been determined to comply with the Letter of Assurance through a process agreed upon by both parties or through a court.

V. (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, for a period of ten (10) years from the date this Order becomes final, Respondent Bosch shall not interfere, directly or indirectly, with the Bosch ACRRR Business of the Acquirer.

Provided however, that unless otherwise prohibited by the Order, nothing in this Paragraph V.A. shall prevent (a) Respondent Bosch (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 ACRRR Products.

B. During the time period before the Divestiture Date, Respondent Bosch 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 Bosch ACRRR Business to minimize any risk of loss of competitive potential for the Bosch ACRRR Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Bosch ACRRR Business, except for ordinary wear and tear. Respondent Bosch shall not sell, transfer, encumber or otherwise impair the Bosch ACRRR 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 Bosch ACRRR Business including, but not limited to, hiring or offering to hire any Designated Employees;

2. retain all of Respondent Bosch's rights, title, and interest in the Bosch ACRRR 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 Bosch ACRRR 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 Bosch ACRRR Business and shall use its best efforts to preserve the existing relationships with the following: car manufacturers, suppliers, vendors, distributors, customers, governmental agencies, employees, and others having business relations with the Bosch ACRRR Business including, but not limited to, continuing the homologation process for the Bosch ACRRR Products. Respondent Bosch's responsibilities shall include, but are not limited to, the following:

a. Respondent Bosch shall provide the Bosch ACRRR 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 Bosch ACRRR Business;

b. Respondent Bosch shall continue, at least at their scheduled pace, any additional expenditures for the Bosch ACRRR Business authorized prior to the date the Consent Agreement was signed by Respondent Bosch including, but not limited to, all research, Development, manufacture, distribution, marketing and sales expenditures;

c. Respondent Bosch shall provide such resources as may be necessary to respond to competition against the Bosch ACRRR Business and/or to prevent any diminution in sales of the Bosch ACRRR Business, world-wide, after the Acquisition Date and prior to the Divestiture Date including the maintenance of the homologation process for the Bosch ACRRR Products worldwide;

d. Respondent Bosch shall provide such resources as may be necessary to maintain the competitive strength and positioning of the Bosch ACRRR Business in a business-as-usual manner and/or in accordance with the applicable Bosch ACRRR Business plan;

e. Respondent Bosch shall make available for use by the Bosch ACRRR Business funds in a business-as-usual manner and/or in accordance with the applicable Bosch ACRRR 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 Bosch ACRRR Business;

f. Respondent Bosch shall provide the Bosch ACRRR Business with such funds as are necessary to maintain the full economic viability, marketability and competitiveness of the Bosch ACRRR Business; and

g. Respondent Bosch shall provide such support services to the Bosch ACRRR Business as were being provided to such business by Respondent Bosch as of the date the Consent Agreement was signed by Respondent Bosch.

4. maintain a work force substantially as large as, and with training and expertise equivalent to or better, what was associated with the Bosch ACRRR Business as of the Acquisition Date including, but not limited to, instructing Respondent Bosch's Distributors to maintain a work force substantially as large as, and with training and expertise equivalent to or better, what was associated with the Bosch ACRRR Business as of the Acquisition Date.

5. develop, sell, participate in the homologation process, and manufacture the Bosch ACRRR Product consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the Bosch ACRRR Business pending divestiture.

C. The purpose of this Paragraph V is to maintain the full economic viability, marketability and competitiveness of the Bosch ACRRR Business until the Divestiture Date, to minimize any risk of loss of competitive potential for the Bosch ACRRR Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Bosch ACRRR Business, except for ordinary wear and tear.

VI. (Confidentiality)

IT IS FURTHER ORDERED that for a period of ten (10) years from the date this Order becomes final:

A. Except in the course of performing its obligations under a Remedial Agreement, or as expressly allowed pursuant to this Order:

1. Respondent Bosch shall not seek, receive, obtain, use, share or otherwise have or grant access to, directly or indirectly, any Confidential Business Information from or with any Person. Among other things, Respondent Bosch shall not use such Confidential Business Information:

   a. to assist or inform Respondent Bosch employees who Develop, manufacture, solicit for sale, sell, or service Respondent Bosch products that compete with the products divested, sold, or distributed pursuant to this Order including, but not limited to, the employees of the ACRRR business owned and operated by SPX SS;

   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 Bosch ACRRR Business divested pursuant to this Order.

2. Respondent Bosch 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 Bosch shall not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information to the employees associated with the SPX SS ACRRR Products; and

4. Respondent Bosch shall institute procedures and requirements to ensure that:

   a. Respondent Bosch 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 this Order; and

   b. Respondent Bosch employees associated with the SPX SS ACRRR Products 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 VI do not apply to Confidential Business Information that Respondent Bosch 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 Bosch;

2. is necessary to be included in mandatory regulatory filings; *provided, however*, that Respondent Bosch shall make all reasonable efforts to maintain the confidentiality of such information in the regulatory filings;

3. was available, or becomes available, to Respondent Bosch on a non-confidential basis, but only if, to the knowledge of Respondent Bosch, 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;

7. is information the disclosure of which is necessary to allow Respondent Bosch 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 Bosch or the Bosch ACRRR Business; or

9. is disclosed in obtaining legal advice.

C. The purpose of this Paragraph VI is to maintain the full economic viability, marketability and competitiveness of the Bosch ACRRR Business until the Divestiture Date, to minimize any risk of loss of competitive potential for the Bosch ACRRR Business, to minimize the risk of disclosure and unauthorized use of Confidential Business Information of the Bosch ACRRR Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Bosch ACRRR Business, except for ordinary wear and tear.

VII. (Monitor)

IT IS FURTHER ORDERED that:

A. Mr. Charles Johnson of BC Partners, LLC, shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondent Bosch and attached as Appendix C ("Monitor Agreement") and Confidential Appendix C-1 ("Monitor Compensation"). The Monitor is appointed to assure that Respondent Bosch 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 Bosch transfers to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities, pursuant to this Order and the Order to Maintain Assets, and consistent with the purposes of this Order.

C. No later than one (1) day after the Acquisition Date, Respondent Bosch 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 Bosch 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 Bosch'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 Bosch 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 Bosch 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 Bosch'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 Bosch's compliance with its obligations under the Order. Respondent Bosch 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 Bosch's compliance with the Order.

4. The Monitor shall serve, without bond or other security, at the expense of Respondent Bosch 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 Bosch, 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 Bosch 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 Bosch of its obligations under the Order.

7. Respondent Bosch may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Monitor from providing any information to the Commission.

E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Monitor's duties.

F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor:

1. The Commission shall select the substitute Monitor, subject to the consent of Respondent Bosch, which consent shall not be unreasonably withheld. If Respondent Bosch 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 Bosch of the identity of any proposed Monitor, Respondent Bosch 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 Bosch 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 Bosch's compliance with the relevant terms of the Order in a manner consistent with the purposes of the Order.

G. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Order.

H. A Monitor appointed pursuant to this Order may be the same person appointed as the Divestiture Trustee pursuant to the relevant provisions of this Order.

VIII. (Divestiture Trustee)

IT IS FURTHER ORDERED that:

A. If Respondent Bosch 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 Bosch ACRRR 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 Bosch 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 VIII 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 Bosch to comply with this Order.

B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent Bosch, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent Bosch 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 Bosch of the identity of any proposed Divestiture Trustee, Respondent Bosch 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 Bosch 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 VIII, Respondent Bosch 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 Bosch ACRRR 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 Bosch ACRRR 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.

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 Bosch shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent Bosch shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent Bosch shall extend the time for divestiture under this Paragraph

VIII 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 Bosch'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 Bosch from among those approved by the Commission;

   Provided further, however, that Respondent Bosch shall select such entity within five (5) days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent Bosch, 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 Bosch, 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 Bosch, 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 Bosch shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, malfeasance, willful or wanton acts, or bad faith by the Divestiture Trustee.

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.

8. The Divestiture Trustee shall act in a fiduciary capacity for the benefit of the Commission.

9. The Divestiture Trustee shall report in writing to Respondent Bosch and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

10. Respondent Bosch 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 VIII.

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 VIII of this Order may be the same Person appointed as the Monitor pursuant to Paragraph VII of this Order, and the Order to Maintain Assets.

IX. (Employees)

IT IS FURTHER ORDERED that:

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

1. Respondent Bosch shall 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 Bosch 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 Bosch ACRRR Business to the Acquirer;

2. Respondent Bosch shall not interfere with the interviewing, hiring, or employing of the Designated Employees by the Acquirer as described in this Order, and shall remove any impediments within the control of Respondent Bosch that may deter, or otherwise prevent or discourage the Designated Employees from accepting employment with the Acquirer including, but not limited to, any noncompete provisions of employment or other contracts with Respondent Bosch that would affect the ability or incentive of those individuals to be employed by the Acquirer. In addition, Respondent Bosch shall not make any counteroffer to a Designated Employee who receives a written offer of employment from the Acquirer, unless and until the Designated Employee has declined, in writing, the Acquirer's offer.

3. Respondent Bosch shall, in a manner consistent with local labor laws:

    a. facilitate employment interviews between each Designated Employee and the Acquirer including providing the names and contact information for such employees and allowing such employees reasonable opportunity to interview with the Acquirer and shall not

discourage such employee from participating in such interviews;

b. not interfere in employment negotiations between each Designated Employee and the Acquirer;

c. and with respect to each Designated Employee who receives an offer of employment from the Acquirer:

(1) not prevent, prohibit, or restrict, or threaten to prevent, prohibit, or restrict the Designated Employee from being employed by the Acquirer, and shall not offer any incentive to the Designated Employee to decline employment with the Acquirer including, but not limited to, the Acquirer offering to hire the Designated Employee;

(2) cooperate with the Acquirer in effecting transfer of the Designated Employee to the employ of the Acquirer, if the Designated Employee accepts an offer of employment from the Acquirer;

(3) eliminate any confidentiality restrictions that would prevent the Designated Employee who accepts employment with the Acquirer from using or transferring to the Acquirer any information relating to the manufacture and sale of the Bosch ACRRR Product; and

(4) unless alternative arrangements are agreed upon with the Acquirer, retain the obligation to pay the benefits of any Designated Employee who accepts employment with the Acquirer 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 IX.A. shall not prohibit Respondent Bosch 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 to such employee.

B. Respondent Bosch shall not, for a period of two (2) years following the Divestiture Date, directly or indirectly, solicit, induce, or attempt to solicit or induce any Acquirer employee, who is employed by the Acquirer to terminate his or her employment relationship with the Acquirer.

Provided, however, Respondent Bosch 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 employees;

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

X. (Prior Notice)

IT IS FURTHER ORDERED that, for a period of five (5) years from the date this Order becomes final, Respondent Bosch shall not, without providing advance written notification to the Commission in the manner described in this Paragraph X, directly or indirectly, acquire:

A. any stock, share capital, equity, or other interest in any Person, corporate or non-corporate, that produces, designs, manufactures, or sells ACRRR Products 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 ACRRR Products 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 Bosch and not of any other party to the transaction. Respondent Bosch 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 Bosch 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 after which Respondent Bosch would hold no more than one percent (1%) of the outstanding securities or other equity interest in any Person described in this Paragraph VIII.

XI. (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 Bosch has fully complied with Paragraphs II.A., II.B., II.C., II.D., II.E., III.A., IV.B., IV.D., V.B., VII.A., VII.B., VII.C., VII.D., VIII, and IX.A. of this Order, Respondent Bosch 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 Bosch 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 Bosch 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 Bosch 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 Bosch 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 Bosch shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with the Order and copies of all written communications to and from all

persons Relating To this Order. Additionally, Respondent Bosch shall include in its compliance report whether or not it made any notifiable acquisitions pursuant to Paragraph XI. Respondent Bosch shall include a description of such acquisitions.

XII. (Reorganization)

IT IS FURTHER ORDERED that Respondent Bosch 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.

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

A. access, during business office hours of Respondent Bosch 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 Bosch Relating To compliance with this Order, which copying services shall be provided by Respondent Bosch at its expense; and

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

XIV. (Termination)

IT IS FURTHER ORDERED that, except for any provision of this Order that terminates on its own terms, this Order shall terminate on the date when the term of the last SPX Essential Patent ends.

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

CONFIDENTIAL APPENDIX A
BOSCH/MAHLE DIVESTITURE AGREEMENT

Redacted From the Public Version
But Incorporated by Reference

CONFIDENTIAL APPENDIX B
DESIGNATED EMPLOYEES

Redacted From the Public Version
But Incorporated by Reference

APPENDIX C

MONITOR AGREEMENT

This Monitor Agreement ("Monitor Agreement"), entered into this13th day of November, 2012, between Robert Bosch GmbH ("Respondent") and BC Partners, LLC ("BC Partners") provides as follows:

WHEREAS, the Staff of the United States Federal Trade Commission (the "Commission"), in *In the Matter of Robert Bosch GmbH* .and Respondent have agreed to an Agreement Containing Consent Order ("Consent Agreement"), incorporating a Decision and Order ("Decision and Order") with Respondent, which, among other things, requires Respondent to divest or transfer certain defined assets pursuant to the Asset Purchase Agreement between Respondent and Mahle Clevite Inc. ("Acquirer") and those ancillary agreements referenced therein (collectively, the "Remedial Agreement"), and provides for the appointment of a Monitor to ensure that Respondent complies with its obligations under the Remedial Agreement, and its obligations under the Decision & Order and the Order to Maintain Assets (collectively, "Orders");

WHEREAS, the staff of the Commission may appoint Mr. Johnson of BC Partners, LLC as such monitor (the "Monitor") pursuant to the Decision and Order to monitor Respondent's compliance with the terms of the Orders and with the Remedial Agreement referenced in the Orders, and Mr. Johnson of BC Partners has consented to such appointment;

WHEREAS, the Staff of the Commission on October 27, 2012, notified Respondent of selection of Mr. Charles Johnson of BC Partners as the Monitor, and Respondent agreed to the selection of Mr. Johnson of BC Partners, and is executing this Monitor Agreement that, subject to the prior approval of the Commission, confers on the Monitor all rights and powers necessary to permit the Monitor to monitor Respondent's compliance with the relevant requirements of the Orders in a manner consistent with the purpose of the Order;

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

WHEREAS, the parties to this Monitor Agreement intend to be legally bound;

NOW, THEREFORE, the parties agree as follows:

(1) Capitalized terms used herein and not specifically defined herein shall have the respective definitions given to them in the Decision and Order.

(2) Respondent shall transfer to the Monitor, no later than one (1) day after the Acquisition Date, all of the powers, responsibilities and protections conferred upon the Monitor by the Decision and Order and the Order to Maintain Assets.

(3) This Monitor Agreement confers upon the Monitor the powers and authority to monitor Respondent's compliance with the terms of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner

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consistent with the purposes of the Orders and in consultation with the Commission, including, but not limited to:

a) Assuring that Respondent expeditiously complies with all of its obligations and performs all of its responsibilities as required by the Orders; and

b) Monitoring any agreements between Respondent and the Acquirer.

(4) Respondent hereby agrees that Respondent will fully comply with all terms of the Orders requiring it to confer its 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.

(5) Respondent further agrees that:

a) it will use commercially reasonable best efforts to provide the Monitor with prompt notification of significant meetings, including date, time and venue, scheduled after the execution of this Monitor Agreement, relating to the Remedial Agreement and such meetings may be attended by the Monitor or his representative, at the Monitor's option, or at the request of the Commission or staff of the Commission;

b) it will provide the Monitor the minutes of the above-referenced meetings as soon as practicable and, in any event, not later than those minutes are available to any employee of the Respondent;

c) it will provide the Monitor with electronic or hard copies, as may be appropriate, of all reports submitted to the Commission pursuant to the Decision and Order, simultaneous with the submission of such reports to the Commission, for the duration of the Monitor's term under this Monitor Agreement;

d) it will, subject to any demonstrated legally recognized privilege, grant the Monitor 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 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; and

e) 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 Respondent's compliance with the Orders.

(6) Respondent shall promptly notify the Monitor of any significant written or oral communication that occurs after the date of this Monitor Agreement between the Commission and the Respondent related to the Remedial Agreement, together with copies of such communications.

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(7) Within one (1) month from the date the Monitor is appointed, and every sixty (60) days thereafter, the Monitor shall report in writing to the Commission concerning performance by Respondent of its obligations under the Orders.

(8) The 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 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 Monitor's duties and responsibilities.

(9) Respondent shall pay Monitor in accordance with the fee schedule attached hereto as Confidential Appendix C-1, 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, Respondent 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 telephone calls and 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.

(10) The Monitor shall maintain the confidentiality of all information provided to the Monitor by Respondent. 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 and such persons shall be informed 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 the Commission and working on this matter;

c) other persons if consented to by Respondent.

(11) The Monitor shall maintain a record and inform the Commission of all persons (other than representatives of the Commission) to whom confidential information related to this Monitor Agreement has been disclosed.

(12) The Monitor shall act in a fiduciary capacity for the benefit of the Commission.

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(13) Upon termination of the Monitor's duties under this Monitor Agreement, the Monitor shall promptly return to the Respondent all materials provided to the Monitor by Respondent and shall destroy any material prepared by the Monitor that contains or reflects any confidential information of Respondent. Nothing herein shall abrogate the Monitor's duty of confidentiality, including the obligation to keep such information confidential for a period of ten (10) years after the termination of this Monitor Agreement.

(14) The Monitor shall keep confidential for a period of ten (10) years all other aspects of the performance of his duties under this Monitor Agreement and shall not disclose any confidential or proprietary information relating thereto. 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 Respondent.

(15) Nothing in this Monitor 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 any agreement with a third party.

(16) Each party shall be reasonably available to the other to discuss any questions or issues either party may have concerning compliance with the Orders as they relate to Respondent.

(17) Respondent hereby confirms its obligation to indemnify the Monitor and hold the Monitor harmless in accordance with and to the extent required by the Orders. Respondent shall indemnify the Monitor and hold 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.

(18) Upon this Monitor Agreement becoming effective, the Monitor shall be permitted, and Respondent shall be required, to notify Acquirer with respect to Monitor's appointment.

(19) 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 Commission's Compliance Division to resolve this issue.

(20) This Monitor Agreement shall be subject to the substantive law of the State of New York (regardless of the choice of law principles of New York or those of any other jurisdiction).

(21) This Monitor Agreement shall terminate the earlier of: (a) the expiration or termination of the Decision and Order; (b) Respondent's receipt of written notice from the

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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 a least (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 or enter into an additional agreement as may be necessary or appropriate to accomplish the purpose of the Orders. The confidentiality obligations of this Monitor Agreement shall survive its termination.

(22) 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 both Respondent and the Commission of such conflict or potential conflict.

(23) 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.

(24) 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 Respondent.

(25) This Monitor Agreement is for the sole benefit of the parties hereto and their permitted assigns and the Commission, and nothing herein express or implied shall give or be construed to give any other person any legal or equitable rights hereunder.

(26) This Monitor Agreement contains the entire agreement between the parties hereto with respect to the matters described herein and replaces and any and all prior agreements or understandings, whether written or oral.

(27) Any notices or other communication required to be given hereunder shall be deemed to have been properly given if sent by mail, facsimile (with acknowledgement 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:

Charles E. Johnson
BC Partners, LLC
225 Overture Way
Centreville, MD 21617
Phone: (203) 506-5626
Email: Charley23@me.com

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If Respondent to:

Robert Bosch LLC
Attn: Judith Adler, Esq.
Assistant General Counsel
38000 Hills Tech Drive
Farmington Hills, MI 48331
Telephone: (248) 876-1163
Email: judith.adler@us.bosch.com

With copy to:

Dorsey & Whitney LLP
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402
Attention: Michael Lindsay
Telephone: (612) 340-7819
Facsimile: (612) 340-2868
Email: lindsay.michael@dorsey.com

If to the Commission, to:

Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
Attention: Secretary
Telephone: (202) 326-2514
Facsimile: (202) 326-2496

With a copy to:

Federal Trade Commission
601 New Jersey Avenue, N.W. Washington, D.C. 20001
Attention: Dan Ducore, Director for Compliance
Telephone: (202) 326-2526
Facsimile: (202) 326-3396
Email: dducore@ftc.gov

(28) This Monitor Agreement shall not become binding until it has been approved by the Commission.

(29) This Monitor Agreement may be signed in counterparts.

APPENDIX C

IN WITNESS WHEREOF, the parties hereto have executed this Monitor Agreement as of the date first above written.

RESPONDENT

ppa.

Robert Bosch GmbH

MONITOR

Charles Johnson
BC Partners, LLC

ppa.

Robert Bosch GmbH

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IN WITNESS WHEREOF, the parties hereto have executed this Monitor Agreement as of the date first above written.

RESPONDENT

ppa.

Robert Bosch GmbH

MONITOR

Charles Johnson
BC Partners, LLC

ppa.

Robert Bosch GmbH

CONFIDENTIAL APPENDIX C-1
COMPENSATION PROVISION OF MONITOR AGREEMENT

Redacted From the Public Version
But Incorporated by Reference

APPENDIX D

APPENDIX D
PARTIAL LIST OF SPX PATENTS RELATED TO ACRRR PRODUCTS

Patent No. (or Publication No./Application No.)	Title	Short Description	Filing Date	Status
6,185,945 (US)	ISOLATED REFRIGERANT IDENTIFIER	A refrigerant handling system includes a cabinet having two service ports and two sample ports and housing recycling/recharging apparatus coupled to the service ports and a refrigerant identifier coupled to one of the sample ports and coupled through solenoid-actuated valves to the recharging/recycling apparatus.	07/22/1999	Issued 02/13/2001
7,845,178 (US)	A/C MAINTENANCE SYSTEM USING HEAT TRANSFER FROM THE CONDENSER TO THE OIL SEPARATOR FOR IMPROVED EFFICIENCY	An apparatus and methodology are provided for advantageously increasing heat transfer between the evaporator/oil separator ("accumulator") and condenser of a refrigerant recovery/recycling system, to increase the efficiency of the system and to simplify the system.	12/19/2006	Issued 12/07/2010
7,841,363 (US)	MODULAR UPGRADEABLE PNEUMATIC/HYDRAULIC MANIFOLD	An upgradeable A/C maintenance system and methodology is provided including one or more modular manifolds for mounting and fluidly connecting several components.	04/03/2007	Issued 11/30/2010

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Patent No. (or Publication No./Application No.)	Title	Short Description	Filing Date	Status
8,122,731 (US)	METHOD AND APPARATUS FOR CLEARING OIL INJECT CIRCUIT FOR CHANGING OIL TYPES	A refrigerant recovery unit is provided that can clear oil from an oil inject path in order to prepare the unit to switch over to a different kind of oil.	10/20/2008	Issued 02/28/2012
7,854,130 (US)	INTERNAL CLEARING FUNCTION FOR A REFRIGERANT RECOVERY/RECHARGE MACHINE	An apparatus and method providing a refrigeration servicing system that comprises a clean refrigerant source, a recovery circuit and a flushing circuit.	11/30/2005	Issued 12/21/2010
7,937,957 (US)	METHOD FOR USING HIGH PRESSURE REFRIGERANT FOR LEAK CHECKING A SYSTEM	A method for using refrigerant to check for a leak in a refrigerant system is provided that establishing fluid communication between a refrigerant recovery unit and a refrigerant system.	05/05/2008	Issued 05/10/2011
7,421,848 (US)	AUTOMATED HOSE CLEARING AFTER REFRIGERANT CHARGING METHOD	An automated hose clearing after refrigerant charge method and appropriate apparatus is provided. The method includes detecting a pressure differential between the interiors of a high and low pressure hose on an air conditioning charging unit, determining if a pressure differential exceeds a predetermined threshold and temporarily providing fluid communication between the interiors of the high and low pressure hoses.	11/10/2005	Issued 09/09/2008

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Patent No. (or Publication No./Application No.)	Title	Short Description	Filing Date	Status
6,202,433 (US)	PROTECTION SYSTEM FOR REFRIGERANT IDENTIFICATION DETECTOR	A flow control system allows sampling of refrigerant from a refrigerant recovery inlet of the system or, alternatively, the refrigerant recovery tank. Refrigerant selected from either source is metered and oil is filtered therefrom to provide a clean vapor refrigerant sample to a refrigerant identification detector. Oil separated from the refrigerant is returned to the oil drain of the main system for collection. In a preferred embodiment, a first conduit having a pressure control valve is coupled from a refrigerant inlet to the refrigerant recovery and recharging system.	10/05/1999	Issued 03/20/2001
6,138,462 (US)	REFRIGERANT RECOVERY AND RECHARGING SYSTEM WITH AUTOMATIC OIL DRAIN	A conduit is coupled to an oil accumulator with an orifice coupled in series with the conduit for limiting the flow of oil therethrough. A pressure sensor is coupled to the conduit for measuring the pressure in the conduit. An oil drain control solenoid valve is coupled to an electrical circuit also coupled to the pressure sensor for selectively opening the oil drain for the draining of oil into a collection tank without losing refrigerant.	03/19/2009	Issued 10/31/2000

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Patent No. (or Publication No./Application No.)	Title	Short Description	Filing Date	Status
6,134,899 (US)	REFRIGERANT RECOVERY AND RECHARGING SYSTEM WITH AUTOMATIC AIR PURGING	Conduits are coupled to a supply tank of refrigerant to allow the sensing of the amount of air present in the refrigerant tank and, upon the detection of air, the purging of air from the tank with a minimal loss of refrigerant. Preferably, the conduits include flow restrictors such as orifices and solenoid valves controlled by a microprocessor to sequentially sample and purge air from the refrigerant tank as required.	03/19/1999	Issued 10/24/2000
6,134,896 (US)	BACKGROUND TANK FILL	A refrigerant servicing system includes a main supply tank of refrigerant and an auxiliary tank which is coupled to the main tank by a valve which is selectively controlled by a circuit also coupled to weight and pressure sensors to assure the main tank has a level of refrigerant adequate for providing a continuous supply of refrigerant during servicing.	03/19/1999	Issued 10/24/2000

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Patent No. (or Publication No./Application No.)	Title	Short Description	Filing Date	Status
5,603,223 (US)	REFRIGERANT HANDLING WITH LUBRICANT SEPARATION AND DRAINING	In a refrige rant recovery system, a refrigerant compressor has an inlet for connection to a source of refrigerant to be recovered and an outlet for connection to a refrigerant storage container. A separator is connected in series with the compresso r for separating lubricant from refrigerant either before or after passage of the refrigerant through the compresso r.	01/02/1996	Issued 02/18/1997
5,597,533 (US)	APPARATUS FOR ANALYZING REFRIGERANT PROPERTIES	One or more properties of a refrigerant sample, such as composition, purity or both composition and purity, are analyzed for purposes of refrigerant recovery and reuse By providing a refrigerant cell having a chamber for containing a refrigerant sample and a passage for connecting the chamber to a source of refrigerant in vapor phase.	12/14/1995	Issued 01/28/1997.

APPENDIX D

Patent No. (or Publication No./Application No.)	Title	Short Description	Filing Date	Status
5,469,714 (US)	METHOD AND APPARATUS FOR ANALYZING REFRIGERANT PROPERTIES	One or more properties of a refrigerant are analyzed by evacuating a refrigerant sample vessel, drawing a refrigerant vapor sample into the vessel, and condensing the refrigerant sample within the vessel for measurement and indication of one or more desired properties of the liquid refrigerant sample. By drawing the sample refrigerant in vapor phase rather than liquid phase, the sample will be relatively free of lubricant, particulate or water contamination. The sample vessel can be readily cleaned by simple evacuation in preparation for the next measurement cycle.	09/30/1994	Issued 11/28/1995

Decision and Order

APPENDIX D

Patent No. (or Publication No./Application No.)	Title	Short Description	Filing Date	Status
5,371,019 (US)	METHOD AND APPARATUS FOR ANALYZING REFRIGERANT PROPERTIES	One or more properties of a refrigerant are analyzed by evacuating a refrigerant sample vessel, drawing a refrigerant vapor sample into the vessel, and condensing the refrigerant sample within the vessel for measurement and indication of one or more desired properties of the liquid refrigerant sample. By drawing the sample refrigerant in vapor phase rather than liquid phase, the sample will be relatively free of lubricant, particulate or water contamination. The sample vessel can be readily cleaned by simple evacuation in preparation for the next measurement cycle.	12/02/1993	Issued 12/06/1994.

APPENDIX D

Patent No. (or Publication No./Application No.)	Title	Short Description	Filing Date	Status
5,285,647 (US)	REFRIGERANT HANDLING SYSTEM WITH AIR PURGE AND MULTIPLE REFRIGERANT CAPABILITIES	A refrigerant handling system that includes a closed vessel for storing refrigerant and an apparatus for determining quantity of air captured within the vessel. A first sensor is operatively coupled to the vessel for providing a first electrical signal as a function of air/refrigerant vapor pressure within the vessel, and a second sensor is operatively coupled to the vessel for providing a second electrical signal as a function of air/refrigerant vapor temperature within the vessel.	03/08/1993	Issued 02/15/1994.
5,248,125 (US)	REFRIGERANT SERVICE SYSTEM WITH SELF-SEALING COUPLING	A self-sealing coupling for connection to a fluid fitting having an open end of predetermined configuration includes an adapter having an axial passage and an open end contour to be received over the open end of the fitting.	04/02/1992	Issued 09/28/1993.

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APPENDIX D

Patent No. (or Publication No./Application No.)	Title	Short Description	Filing Date	Status
5,211,024 (US)	REFRIGERANT FILTRATION SYSTEM WITH FILTER CHANGE INDICATION	Apparatus for purification of a single refrigerant type, or of differing refrigerant types having differing density and moisture solubility characteristics, that includes a filter/drier unit for removing water from refrigerant passing therethrough and having a predetermined water absorption capacity.	04/20/1992	Issued 05/18/1993.
5,209,653 (US)	VACUUM PUMP	A vacuum pump that includes an electric motor and a pump module mounted to the motor housing with the motor shaft being rotatably coupled to a pumping mechanism within the pump module.	01/17/1992	Issued 05/11/1993.
5,203,177 (US)	REFRIGERANT HANDLING SYSTEM WITH INLET REFRIGERANT LIQUID/VAPOR FLOW CONTROL	A refrigerant recovery system includes a compressor and an evaporator connected to the compressor inlet for evaporating refrigerant passing therethrough to the compressor inlet from refrigerant equipment under service.	11/25/1991	Issued 04/20/1993.

APPENDIX D

Patent No. (or Publication No./Application No.)	Title	Short Description	Filing Date	Status
5,182,918 (US)	REFRIGERANT RECOVERY SYSTEM	A refrigerant recovery system that includes a refrigerant accumulator having an inlet port for connection to the liquid port of equipment from which refrigerant is to be recovered, a vapor outlet port and a liquid outlet port.	05/26/1992	Issued 02/02/1993.
5,172,562 (US)	REFRIGERANT RECOVERY, PURIFICATION AND RECHARGING SYSTEM AND METHOD	In a combined recovery, purification and recharging system, a refrigerant compressor has an inlet coupled to a recovery control valve for connection to a refrigeration system under service from which refrigerant is to be recovered, purified and recharged into the system.	09/10/1991	Issued 12/22/1992.
5,158,747 (US)	APPARATUS FOR IDENTIFYING AND DISTINGUISHING DIFFERENT REFRIGERANTS	Apparatus for identifying and distinguishing between at least two different types of refrigerant includes a sample container having a fixed internal volume. Refrigerant to be tested is selectively admitted into the container in a vapor phase, vapor pressure of refrigerant within the container is measured, and admission of refrigerant into the container is terminated when the vapor pressure of refrigerant contained therein reaches a preselected level.	04/26/1991	Issued 10/27/1992.

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APPENDIX D

Patent No. (or Publication No./Application No.)	Title	Short Description	Filing Date	Status
7,498,806 (US)	APPARATUS AND METHOD FOR ISOLATING NOISE FROM A SIGNAL	Apparatus and method for isolating noise from a signal A circuit is provided for isolating noise from an input signal to an Analog/Digital (A/D) converter.	06/20/2005	Issued 03/03/2009.
5,367,886 (US)	REFRIGERANT HANDLING SYSTEM WITH AIR PURGE AND SYSTEM CLEARING CAPABILITIES	A refrigerant handling system that includes an air purge chamber and a refrigerant pump for directing refrigerant into the air purge chamber so that the refrigerant collects in liquid phase at a lower portion of the chamber while air and other non-condensibles collect in a vapor space at the upper portion of the chamber over the refrigerant.	08/02/1993	Issued 11/29/1994.
5,261,249 (US)	REFRIGERANT HANDLING SYSTEM WITH AUXILIARY CONDENSER FLOW CONTROL	A refrigera nt handling system that includes a compressor and an evaporator for adding heat to refrigerant fed to the compressor inlet. A first condenser is connected to the compressor outlet and disposed in heat exchange relationship to the evaporator for at least partially condensing refrigerant vapor from the compressor outlet by transfer of heat to refrigerant in the evaporator.	11/16/1992	Issued 11/16/1993.

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Patent No. (or Publication No./Application No.)	Title	Short Description	Filing Date	Status
12/960928 (US) (Application No.)	A/C MAINTENANCE SYSTEM USING HEAT TRANSFER FROM THE CONDENSER TO THE OIL SEPARATOR FOR IMPROVED EFFICIENCY	An apparatus and methodology are provided for advantageously increasing heat transfer between the evaporator/oil separator ("accumulator") and condenser of a refrigerant recovery/recycling sys...	12/06/2010	Published on 04/28/2011, 2011-0094247 A1
12/916051 (US) (Application No.)	MODULAR UPGRADEABLE PNEUMATIC/HYDRAULIC MANIFOLD	An upgradeable A/C maintenance system and methodology is provided including one or more modular manifolds for mounting and fluidly connecting several components.	10/29/2010	Published on 02/24/2011, 2011-0041540 A1

Decision and Order

APPENDIX D

Patent No. (or Publication No./Application No.)	Title	Short Description	Filing Date	Status
12/059715 (US) (Application No.)	METHOD FOR RECOVERY AND RECHARGE OF BLEND REFRIGERANTS WITH BLEND SENT FOR RECLAMATION	A refrigerant recovery unit that diverts blended refrigerant withdrawn out of a refrigerant system to an external tank outside the refrigerant recovery unit for reclamation includes a recovery circuit coupled on one end to the refrigerant system and coupled on another end to the external tank, a controller in communication with the recovery circuit for controlling a transfer of the refrigerant withdrawn from the refrigerant system to the external tank, and a valve operatively engaged with the controller and the recovery circuit and operable to transfer the refrigerant withdrawn from the refrigerant system to the external tank for recycling or reclamation.	03/31/2008	Published on 10/01/2009. 2009-0241560 A1 Non-final rejection on 08/30/2012.

APPENDIX D

Patent No. (or Publication No./Application No.)	Title	Short Description	Filing Date	Status
8,079,226 (US)	METHOD FOR ACCURATELY RECHARGING A/C SYSTEMS	A refrigerant recovery unit for accurately filling a refrigerant system with a refrigerant is provided which includes a storage vessel for holding refrigerant, sensors to assist in determining the pressure of the refrigerant in the storage vessel, a controller to control the flow of refrigerant from the storage vessel to the refrigerant system to be serviced, and a heating device to heat the refrigerant, which is activated only if heating is required, as determined by data received by the controller.	12/20/2007	Issued 12/20/2011
12/898299 (US) (Application No.)	VACUUM PUMP OIL CHANGING METHOD AND APPARATUS	Refrigerant processing equipment is provided. The refrigerant processing equipment may include: a vacuum pump; an outlet for draining vacuum pump lubricating oil from the vacuum pump; a fluid container; and a conduit configured to provide a fluid connection between the outlet and the container.	10/05/2010	Published 04/05/2012 - 2012-0079839 A1.

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APPENDIX D

Patent No. (or Publication No./Application No.)	Title	Short Description	Filing Date	Status
12/974931 (US) (Application No.)	INTERNAL CLEARING FUNCTION FOR A REFRIGERANT RECOVERY/RECHARGE MACHINE	An apparatus and method providing a refrigeration servicing system that comprises a clean refrigerant source, a recovery circuit and a flushing circuit.	12/21/2010	Published 06/23/2011 – 2011-0146304 A1. Non-final rejection 09/19/2012.
11/709825 (US) (Application No.)	COMPONENT IDENTIFICATION SYSTEM AND METHOD	A component identification system and method, including an identifier associated with a replacement component, a memory to store one or more identifiers for each previously used component corresponding to the replacement component, and a predecessor to compare the identifier of the replacement component with the one or more stored identifiers of each previously used component.	02/23/2007	Published 08/28/2008, 2008-0205910 A1 Non-final rejection 02/23/2012, Request for Reconsideration filed 07/23/2012.

APPENDIX E

LETTER OF ASSURANCE

Please return to: SAE IP Department, SAE International, 400 Commonwealth Drive, Warrendale, PA 15096 USA

No License is implied by submission of this Letter of Assurance

PATENT OWNER/ORGANIZATION:

Legal Name of Organization: Robert Bosch GmbH

PATENT OWNER'S CONTACT FOR LICENSE APPLICATION:

Name & Department:

Address:

Telephone: _____ Fax: _____

SAE TECHNICAL REPORT:

Number: J2788
Title: "HFC-134a (R-134a) Recovery/Recycle/Recharging Equipment for Mobile Air-Conditioning Systems"

Number: J2843
Title: "R-1234yf [HFO-: I 234yf] Recovery/Recycle/Recharging Equipment for Flammable Refrigerants for Mobile Air-Conditioning Systems"

PATENT HOLDER'S POSITION REGARDING LICENSING ESSENTIAL PATENT RIGHTS

The Patent Holder believes it owns or controls granted patent(s) and/or pending applications (formerly owned by SPX Corporation) which it believes could potentially be infringed by compliance with the proposed SAE Technical Report. Patent Holder states that its position with respect to licensing such patent(s) is as follows:

To the extent that a claim is essential to practicing either the SAE J2788 or J2843 standards, a license will be made available, on a claim by claim basis, as required for compliance with the SAE J2788 and J2843 standards, to applicants under reasonable terms and conditions that are demonstrably free of any unfair discrimination.

A license that includes a reciprocity requirement, field of use restrictions or termination upon withdrawal of Proposed Technical Report shall not be deemed unreasonable.

SIGNATURE

Print name of authorized person: _____

Title of authorized person: _____

Signature of authorized person: _____ Date: _____

APPENDIX F

APPENDIX F
SPX PATENT LAWSUIT PATENTS

Patent No. (or Publication No./Application No.)	Title	Short Description	Filing Date	Status
5,335,512 (US)	REFRIGERANT RECOVERY DEVICE	A single pass refrigerant recovery device recovers refrigerant from a refrigeration system. The device includes at least one hose for withdrawing refrigerant from the refrigeration systemand a first oil seperator disposed downstream of the refrigerant hose. A filter is disposed downstream from the oil separator and a compressor is disposed downstream from the filter. A second oil separator is disposed downstream from the compressor, and the condenser is disposed downstream from the second oil separator. A moisture indicator is disposed downstream from the condenser, and a storage tank is disposed downstream from the moisture indicator. The refrigerant recovery device also contains an oil return line having a first end disposed downstream from the second oil separator, and a second end disposed upstream from the compressor.	12/07/1992	Issued 08/09/1994

APPENDIX F

Patent No. (or Publication No./Application No.)	Title	Short Description	Filing Date	Status
6,442,963 (US)	NON-CONDENSABLE PURGE TECHNIQUE USING REFRIGERANT TEMPERATURE OFFSET	In a refrigerant recycling system non-condensables are purged from a recovery vessel which stores refrigerant recovered from a vehicular refrigeration system. A programmed controller controls operation of a purge valve for purging to atmosphere non-condensables in the recovered refrigerant in accordance with a purge routine, wherein the temperature in the recovery vessel is measured, and a look-up table is consulted to ascertain a target pressure corresponding to the measured temperature plus an offset, and the pressure in the recovery vessel is measured.	06/22/2001	Issued 09/03/2002

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APPENDIX F

Patent No. (or Publication No./Application No.)	Title	Short Description	Filing Date	Status
7,726,137 (US)	METHOD AND APPARATUS FOR REFRIGERANT RECOVERY UNIT FILTER DRYER MAINTENANCE	A method and apparatus for ensuring a user to change a filter dryer of a refrigerant recovery unit having a refrigerant determining module that is configured to determine a condition of the refrigerant or an amount of refrigerant that has passed through the filter dryer, or a condition of the filter dryer, an alert device that notifies the user to change the filter dryer in response to the condition, a pressure module that regulates the pressure in the filter dryer, and a pressure-sensing device that is configured to detect a change of pressure in response to filter dryer maintenance.	06/30/2006	Issued 06/01/2010
5,388,416 (US)	REFRIGERANT HANDLING METHOD WITH AIR PURGE AND SYSTEM CLEARING CAPABILITIES	A refrigerant handling system that includes an air purge chamber and a refrigerant pump for directing refrigerant into the air purge chamber so that the refrigerant collects in liquid phaseat a lower portion of the chamber while air and other non-condensibles collect in a vapor space at the upper portion of the chamber over the refrigerant.	07/25/1994	Issued 02/14/1995

APPENDIX G

To Whom It May Concern:

Robert Bosch GmbH is happy to announce that it has completed its acquisition of the Services Solutions business of SPX Corp. We are excited to welcome the Robinair brand of air conditioning service equipment to the Bosch family of products. Bosch looks forward to working with you to continue bringing Robinair products to our customers.

Version for Distributors Continues:
One thing that Bosch will not do, however, is to require distributors either to carry or advertise only the Robinair brand of ACS equipment on an exclusive basis. Although you are not required to carry or advertise any other brand of ACS equipment if you choose not to do so, Bosch will not enforce any provision in your agreement that would prevent you from doing so. Bosch generally does not use such provisions in its automotive aftermarket business, and as part of the Federal Trade Commission's review of the SPX acquisition, Bosch willingly offered to agree not to enforce such exclusivity provisions or to enter into them in the future. Bosch's agreement with the FTC and the FTC's order are available at [insert URL].

Version for Service Providers Continues:
One thing that Bosch will not do, however, is to require service providers to service only the Robinair brand of ACS equipment. Although you are not required to service any other brand of ACS equipment if you choose not to do so, Bosch will not enforce any provision in your agreement that would prevent you from doing so. Bosch generally does not use such provisions in its automotive aftermarket business, and as part of the Federal Trade Commission's review of the SPX acquisition, Bosch willingly offered to agree not to enforce such exclusivity provisions or to enter into them in the future. Bosch's agreement with the FTC and the FTC's order are available at [insert URL].

Thank you again for your work on Robinair products. We look forward to working together.

CONFIDENTIAL APPENDIX H
LIST OF THIRD PARTIES WITH AGREEMENTS DESCRIBED IN PARAGRAPH III.A.

Redacted From the Public Version
But Incorporated by Reference

CONFIDENTIAL APPENDIX I
LIST OF THIRD PARTIES DESCRIBED IN PARAGRAPH IV

Redacted From the Public Version
But Incorporated by Reference

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of SPX Service Solutions ("SPX SS") a subsidiary of SPX Corporation ("SPX") by Robert Bosch GmbH ("Respondent Bosch"), and Respondent Bosch 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

Respondent its 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 Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent Bosch 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 Bosch 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 Order to Maintain Assets ("Asset Maintenance Order").

1. Respondent Bosch is a corporation organized, existing and doing business under and by virtue of the laws of Germany, with its principal U.S. subsidiary, Robert

Bosch LLC, a limited liability company organized, existing and doing business under the laws of the State of Delaware with its headquarters located at 38000 Hills Tech Drive, Farmington MI 48331.

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

ORDER

I.

IT IS ORDERED that 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:

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. (Consents)

IT IS FURTHER ORDERED that prior to the Divestiture Date, Respondent Bosch shall secure all consents, assignments, and waivers from all Third Parties that are required for the Acquirer to manufacture and sell the Bosch ACRRR Products as of the Divestiture Date including, but not limited to, securing a lease for the York, Pennsylvania Facility, if such facilities are being leased to the Acquirer, and securing consents from all

customers of the Bosch ACRRR Business whose contracts are being assigned or extended to the Acquirer pursuant to Paragraph II.A of the Decision and Order.

Provided, however, Respondent Bosch 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.

III. (Asset Maintenance)

IT IS FURTHER ORDERED that:

A. From the date Respondent Bosch signs the Consent Agreement, Respondent Bosch shall appoint an executive responsible for overseeing and maintaining the Bosch ACRRR Business to be the primary contact between Respondent Bosch, Commission staff, and the Monitor. Respondent Bosch shall have such executive continue the oversight and maintenance of Bosch ACRRR Business until the Divestiture Date.

B. During the time period before the Divestiture Date, Respondent Bosch shall, except as otherwise provided in the Orders:

1. take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of the Bosch ACRRR Business to minimize any risk of loss of competitive potential for the Bosch ACRRR Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Bosch ACRRR Business, except for ordinary wear and tear. Respondent Bosch shall not sell, transfer, encumber or otherwise impair the Bosch ACRRR Business (other than in the manner prescribed in the Orders), nor take any action that lessens the full economic viability, marketability or competitiveness of the Bosch ACRRR Business including, but not limited to,

hiring or offering to hire any Designated Employees;

2. retain all of Respondent Bosch's rights, title, and interest in the Bosch ACRRR 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 Bosch ACRRR 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 Bosch ACRRR Business and shall use its best efforts to preserve the existing relationships with the following: car manufacturers, suppliers, vendors, distributors, customers, governmental agencies, employees, and others having business relations with the Bosch ACRRR Business including, but not limited to, continuing the homologation process for the Bosch ACRRR Products. Respondent Bosch's responsibilities shall include, but are not limited to, the following:

   a. Respondent Bosch shall provide the Bosch ACRRR 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 Bosch ACRRR Business;

   b. Respondent Bosch shall continue, at least at their scheduled pace, any additional expenditures for the Bosch ACRRR Business authorized prior to the date the Consent Agreement was signed by Respondent Bosch including, but not limited to, all research,

Development, manufacture, distribution, marketing and sales expenditures;

c. Respondent Bosch shall provide such resources as may be necessary to respond to competition against the Bosch ACRRR Business and/or to prevent any diminution in sales of the Bosch ACRRR Business, world-wide, after the Acquisition Date and prior to the Divestiture Date including the maintenance of the homologation process for the Bosch ACRRR Products worldwide;

d. Respondent Bosch shall provide such resources as may be necessary to maintain the competitive strength and positioning of the Bosch ACRRR Business in a business-as-usual manner and/or in accordance with the applicable Bosch ACRRR Business plan;

e. Respondent Bosch shall make available for use by the Bosch ACRRR Business funds in a business-as-usual manner and/or in accordance with the applicable Bosch ACRRR 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 Bosch ACRRR Business;

f. Respondent Bosch shall provide the Bosch ACRRR Business with such funds as are necessary to maintain the full economic viability, marketability and competitiveness of the Bosch ACRRR Business; and

g. Respondent Bosch shall provide such support services to the Bosch ACRRR Business as were being provided to such business by Respondent Bosch as of the date the Consent Agreement was signed by Respondent Bosch.

4. maintain a work force substantially as large as, and with training and expertise equivalent to or better, what was associated with the Bosch ACRRR Business as of the Acquisition Date including, but not limited to, instructing Respondent Bosch's Distributors to maintain a work force substantially as large as, and with training and expertise equivalent to or better, what was associated with the Bosch ACRRR Business as of the Acquisition Date.

5. develop, sell, participate in the homologation process, and manufacture the Bosch ACRRR Product consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the Bosch ACRRR Business pending divestiture.

C. The purpose of this Paragraph III is to maintain the full economic viability, marketability and competitiveness of the Bosch ACRRR Business until the Divestiture Date, to minimize any risk of loss of competitive potential for the Bosch ACRRR Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Bosch ACRRR Business, except for ordinary wear and tear.

IV. (Confidentiality)

IT IS FURTHER ORDERED that, for a period of ten (10) years from the date this Asset Maintenance Order becomes final, or until the Decision and Order becomes final, whichever is earlier:

A. Except in the course of performing its obligations under a Remedial Agreement, or as expressly allowed pursuant to the Orders, after the Divestiture Date:

1. Respondent Bosch shall not seek, receive, obtain, use, share or otherwise have or grant access to, directly or indirectly, any Confidential Business

Information from or with any Person. Among other things, Respondent Bosch shall not use such Confidential Business Information:

a. to assist or inform Respondent Bosch employees who Develop, manufacture, solicit for sale, sell, or service Respondent Bosch products that compete with the products divested, sold, or distributed pursuant to the Orders including, but not limited to, the employees of the ACRRR business owned and operated by SPX SS;

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 Bosch ACRRR Business divested pursuant to the Decision and Order.

2. Respondent Bosch 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 Bosch shall not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information to the employees associated with the SPX SS ACRRR Products; and

4. Respondent Bosch shall institute procedures and requirements to ensure that:

a. Respondent Bosch 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 Bosch employees associated with the SPX SS ACRRR Products do not solicit, access or use any Confidential Business Information that they are prohibited under the Orders from receiving for any reason or purpose.

B. The requirements of this Paragraph IV do not apply to Confidential Business Information that Respondent Bosch 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 Bosch;

2. is necessary to be included in mandatory regulatory filings; *provided, however*, that Respondent Bosch shall make all reasonable efforts to maintain the confidentiality of such information in the regulatory filings;

3. was available, or becomes available, to Respondent Bosch on a non-confidential basis, but only if, to the knowledge of Respondent Bosch, 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 Bosch 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 Bosch or the Bosch ACRRR 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 Bosch ACRRR Business until the Divestiture Date, to minimize any risk of loss of competitive potential for the Bosch ACRRR Business, to minimize the risk of disclosure and unauthorized use of Confidential Business Information of the Bosch ACRRR Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Bosch ACRRR Business, except for ordinary wear and tear.

V. (Monitor)

IT IS FURTHER ORDERED that:

A. Mr. Charles Johnson of BC Partners, LLC, shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondent Bosch and attached as Appendix A ("Monitor Agreement") and Confidential Appendix A-1 ("Monitor Compensation"). The Monitor is appointed to assure that Respondent Bosch expeditiously complies with all of its obligations and performs all of its responsibilities as required by the Orders.

B. The Monitor Agreement shall require that, no later than one (1) day after the Acquisition Date, Respondent Bosch transfers to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities, pursuant to the Orders, and consistent with the purposes of the Orders.

C. No later than one (1) day after the Acquisition Date, Respondent Bosch 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 the Orders.

D. Respondent Bosch 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 Bosch's compliance with the terms of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission including, but not limited to:

   a. Assuring that Respondent Bosch expeditiously complies with all of its obligations and performs all of its responsibilities as required by the Orders; and

   b. Monitoring any agreements between Respondent Bosch 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 Bosch'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 Bosch's compliance with its obligations under the Orders. Respondent Bosch 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 Bosch's compliance with the Orders.

4. The Monitor shall serve, without bond or other security, at the expense of Respondent Bosch 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 Bosch, 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 Bosch 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 Bosch of its obligations under the Orders.

7. Respondent Bosch may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Monitor from providing any information to the Commission.

E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Monitor's duties.

F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor:

1. The Commission shall select the substitute Monitor, subject to the consent of Respondent Bosch, which consent shall not be unreasonably withheld. If Respondent Bosch 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 Bosch of the identity of any proposed Monitor, Respondent Bosch 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 Bosch 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 Bosch's

compliance with the relevant terms of the Orders in a manner consistent with the purposes of the Orders.

G. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.

H. A Monitor appointed pursuant to this Asset Maintenance Order may be the same person appointed as the Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

VI. (Employees)

IT IS FURTHER ORDERED that:

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

1. Respondent Bosch shall 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 Bosch 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 Bosch ACRRR Business to the Acquirer;

2. Respondent Bosch shall not interfere with the interviewing, hiring, or employing of the Designated Employees by the Acquirer as described in the Orders, and shall remove any

impediments within the control of Respondent Bosch that may deter, or otherwise prevent or discourage the Designated Employees from accepting employment with the Acquirer including, but not limited to, any noncompete provisions of employment or other contracts with Respondent Bosch that would affect the ability or incentive of those individuals to be employed by the Acquirer. In addition, Respondent Bosch shall not make any counteroffer to a Designated Employee who receives a written offer of employment from the Acquirer, unless and until the Designated Employee has declined, in writing, the Acquirer's offer.

3. Respondent Bosch shall, in a manner consistent with local labor laws:

   a. facilitate employment interviews between each Designated Employee and the Acquirer including providing the names and contact information for such employees and allowing such employees reasonable opportunity to interview with the Acquirer and shall not discourage such employee from participating in such interviews;

   b. not interfere in employment negotiations between each Designated Employee and the Acquirer;

   c. and with respect to each Designated Employee who receives an offer of employment from the Acquirer:

      (1) not prevent, prohibit, or restrict, or threaten to prevent, prohibit, or restrict the Designated Employee from being employed by the Acquirer, and shall not offer any incentive to the Designated Employee to decline employment with the Acquirer including, but not limited to, the

Acquirer offering to hire the Designated Employee;

(2) cooperate with the Acquirer in effecting transfer of the Designated Employee to the employ of the Acquirer, if the Designated Employee accepts an offer of employment from the Acquirer;

(3) eliminate any confidentiality restrictions that would prevent the Designated Employee who accepts employment with the Acquirer from using or transferring to the Acquirer any information relating to the manufacture and sale of the Bosch ACRRR Product; and

(4) unless alternative arrangements are agreed upon with the Acquirer, retain the obligation to pay the benefits of any Designated Employee who accepts employment with the Acquirer 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 the Orders, this Paragraph VI.A. shall not prohibit Respondent Bosch 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 to such employee.

B. Respondent Bosch shall not, for a period of two (2) years following the Divestiture Date, directly or indirectly, solicit, induce, or attempt to solicit or induce any Acquirer employee, who is employed by the Acquirer to terminate his or her employment relationship with the Acquirer.

Provided, however, Respondent Bosch 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 employees;

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

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 Bosch 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 Asset Maintenance Order and the related Decision and Order; *provided, however*, that, after the Decision and Order in this matter 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 Bosch pursuant to the Decision and Order.

VIII. (Reorganization)

IT IS FURTHER ORDERED that Respondent Bosch 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 Orders.

IX. (Access)

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

A. access, during business office hours of Respondent Bosch 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 Bosch Relating To compliance with the Orders, which copying services shall be provided by Respondent Bosch at its expense; and

B. to interview officers, directors, or employees of Respondent Bosch, 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, Commissioner Rosch and Commissioner Ohlhausen dissenting.

Order to Maintain Assets

APPENDIX A

MONITOR AGREEMENT

This Monitor Agreement ("Monitor Agreement"), entered into this13th day of November, 2012, between Robert Bosch GmbH ("Respondent") and BC Partners, LLC ("BC Partners") provides as follows:

WHEREAS, the Staff of the United States Federal Trade Commission (the "Commission"), in *In the Matter of Robert Bosch GmbH* .and Respondent have agreed to an Agreement Containing Consent Order ("Consent Agreement"), incorporating a Decision and Order ("Decision and Order") with Respondent, which, among other things, requires Respondent to divest or transfer certain defined assets pursuant to the Asset Purchase Agreement between Respondent and Mahle Clevite Inc. ("Acquirer") and those ancillary agreements referenced therein (collectively, the "Remedial Agreement"), and provides for the appointment of a Monitor to ensure that Respondent complies with its obligations under the Remedial Agreement, and its obligations under the Decision & Order and the Order to Maintain Assets (collectively, "Orders");

WHEREAS, the staff of the Commission may appoint Mr. Johnson of BC Partners, LLC as such monitor (the "Monitor") pursuant to the Decision and Order to monitor Respondent's compliance with the terms of the Orders and with the Remedial Agreement referenced in the Orders, and Mr. Johnson of BC Partners has consented to such appointment;

WHEREAS, the Staff of the Commission on October 27, 2012, notified Respondent of selection of Mr. Charles Johnson of BC Partners as the Monitor, and Respondent agreed to the selection of Mr. Johnson of BC Partners, and is executing this Monitor Agreement that, subject to the prior approval of the Commission, confers on the Monitor all rights and powers necessary to permit the Monitor to monitor Respondent's compliance with the relevant requirements of the Orders in a manner consistent with the purpose of the Order;

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

WHEREAS, the parties to this Monitor Agreement intend to be legally bound;

NOW, THEREFORE, the parties agree as follows:

(1) Capitalized terms used herein and not specifically defined herein shall have the respective definitions given to them in the Decision and Order.

(2) Respondent shall transfer to the Monitor, no later than one (1) day after the Acquisition Date, all of the powers, responsibilities and protections conferred upon the Monitor by the Decision and Order and the Order to Maintain Assets.

(3) This Monitor Agreement confers upon the Monitor the powers and authority to monitor Respondent's compliance with the terms of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner

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consistent with the purposes of the Orders and in consultation with the Commission, including, but not limited to:

a) Assuring that Respondent expeditiously complies with all of its obligations and performs all of its responsibilities as required by the Orders; and

b) Monitoring any agreements between Respondent and the Acquirer.

(4) Respondent hereby agrees that Respondent will fully comply with all terms of the Orders requiring it to confer its 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.

(5) Respondent further agrees that:

a) it will use commercially reasonable best efforts to provide the Monitor with prompt notification of significant meetings, including date, time and venue, scheduled after the execution of this Monitor Agreement, relating to the Remedial Agreement and such meetings may be attended by the Monitor or his representative, at the Monitor's option, or at the request of the Commission or staff of the Commission;

b) it will provide the Monitor the minutes of the above-referenced meetings as soon as practicable and, in any event, not later than those minutes are available to any employee of the Respondent;

c) it will provide the Monitor with electronic or hard copies, as may be appropriate, of all reports submitted to the Commission pursuant to the Decision and Order, simultaneous with the submission of such reports to the Commission, for the duration of the Monitor's term under this Monitor Agreement;

d) it will, subject to any demonstrated legally recognized privilege, grant the Monitor 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 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; and

e) 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 Respondent's compliance with the Orders.

(6) Respondent shall promptly notify the Monitor of any significant written or oral communication that occurs after the date of this Monitor Agreement between the Commission and the Respondent related to the Remedial Agreement, together with copies of such communications.

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(7) Within one (1) month from the date the Monitor is appointed, and every sixty (60) days thereafter, the Monitor shall report in writing to the Commission concerning performance by Respondent of its obligations under the Orders.

(8) The 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 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 Monitor's duties and responsibilities.

(9) Respondent shall pay Monitor in accordance with the fee schedule attached hereto as Confidential Appendix C-1, 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, Respondent 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 telephone calls and 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.

(10) The Monitor shall maintain the confidentiality of all information provided to the Monitor by Respondent. 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 and such persons shall be informed 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 the Commission and working on this matter;

c) other persons if consented to by Respondent.

(11) The Monitor shall maintain a record and inform the Commission of all persons (other than representatives of the Commission) to whom confidential information related to this Monitor Agreement has been disclosed.

(12) The Monitor shall act in a fiduciary capacity for the benefit of the Commission.

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(13) Upon termination of the Monitor's duties under this Monitor Agreement, the Monitor shall promptly return to the Respondent all materials provided to the Monitor by Respondent and shall destroy any material prepared by the Monitor that contains or reflects any confidential information of Respondent. Nothing herein shall abrogate the Monitor's duty of confidentiality, including the obligation to keep such information confidential for a period of ten (10) years after the termination of this Monitor Agreement.

(14) The Monitor shall keep confidential for a period of ten (10) years all other aspects of the performance of his duties under this Monitor Agreement and shall not disclose any confidential or proprietary information relating thereto. 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 Respondent.

(15) Nothing in this Monitor 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 any agreement with a third party.

(16) Each party shall be reasonably available to the other to discuss any questions or issues either party may have concerning compliance with the Orders as they relate to Respondent.

(17) Respondent hereby confirms its obligation to indemnify the Monitor and hold the Monitor harmless in accordance with and to the extent required by the Orders. Respondent shall indemnify the Monitor and hold 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.

(18) Upon this Monitor Agreement becoming effective, the Monitor shall be permitted, and Respondent shall be required, to notify Acquirer with respect to Monitor's appointment.

(19) 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 Commission's Compliance Division to resolve this issue.

(20) This Monitor Agreement shall be subject to the substantive law of the State of New York (regardless of the choice of law principles of New York or those of any other jurisdiction).

(21) This Monitor Agreement shall terminate the earlier of: (a) the expiration or termination of the Decision and Order; (b) Respondent's receipt of written notice from the

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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 a least (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 or enter into an additional agreement as may be necessary or appropriate to accomplish the purpose of the Orders. The confidentiality obligations of this Monitor Agreement shall survive its termination.

(22) 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 both Respondent and the Commission of such conflict or potential conflict.

(23) 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.

(24) 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 Respondent.

(25) This Monitor Agreement is for the sole benefit of the parties hereto and their permitted assigns and the Commission, and nothing herein express or implied shall give or be construed to give any other person any legal or equitable rights hereunder.

(26) This Monitor Agreement contains the entire agreement between the parties hereto with respect to the matters described herein and replaces and any and all prior agreements or understandings, whether written or oral.

(27) Any notices or other communication required to be given hereunder shall be deemed to have been properly given if sent by mail, facsimile (with acknowledgement 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:

Charles E. Johnson
BC Partners, LLC
225 Overture Way
Centreville, MD 21617
Phone: (203) 506-5626
Email: Charley23@me.com

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If Respondent to:

Robert Bosch LLC
Attn: Judith Adler, Esq.
Assistant General Counsel
38000 Hills Tech Drive
Farmington Hills, MI 48331
Telephone: (248) 876-1163
Email: judith.adler@us.bosch.com

With copy to:

Dorsey & Whitney LLP
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402
Attention: Michael Lindsay
Telephone: (612) 340-7819
Facsimile: (612) 340-2868
Email: lindsay.michael@dorsey.com

If to the Commission, to:

Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
Attention: Secretary
Telephone: (202) 326-2514
Facsimile: (202) 326-2496

With a copy to:

Federal Trade Commission
601 New Jersey Avenue, N.W. Washington, D.C. 20001
Attention: Dan Ducore, Director for Compliance
Telephone: (202) 326-2526
Facsimile: (202) 326-3396
Email: dducore@ftc.gov

(28) This Monitor Agreement shall not become binding until it has been approved by the Commission.

(29) This Monitor Agreement may be signed in counterparts.

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IN WITNESS WHEREOF, the parties hereto have executed this Monitor Agreement as of the date first above written.

RESPONDENT	MONITOR
ppa.	
Robert Bosch GmbH	Charles Johnson BC Partners, LLC
ppa.	
Robert Bosch GmbH	

APPENDIX A

IN WITNESS WHEREOF, the parties hereto have executed this Monitor Agreement as of the date first above written.

RESPONDENT

ppa.

Robert Bosch GmbH

MONITOR

Charles Johnson
BC Partners, LLC

ppa.

Robert Bosch GmbH

CONFIDENTIAL APPENDIX A-1
COMPENSATION PROVISION OF MONITOR AGREEMENT

Redacted From the Public Record
But Incorporated by Reference

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

I. Introduction

The Federal Trade Commission ("Commission") has accepted from Robert Bosch GmbH ("Bosch"), subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement"), which is designed to remedy the anticompetitive effects resulting from Bosch's acquisition of SPX Service Solutions U.S. LLC ("SPX Service Solutions") from SPX Corporation ("SPX") and to remedy anticompetitive conduct by SPX in violation of Section 5 of the FTC Act.

Under the terms of the Consent Agreement, Bosch is required to (1) divest its air conditioning recycling, recovery, and recharge ("ACRRR") business, including RTI Technologies, Inc. ("RTI"), to Mahle Clevite, Inc. ("Mahle") by December 31, 2012; (2) terminate agreements with any persons that limit the ability of SPX's competitors, including Bosch, from advertising, servicing, distributing, or selling any ACRRR product in the U.S. market; and (3) make available for licensing certain patents which may be used in the implementation of two industry standards established by SAE International, an industry association responsible for setting standards for products so that they comply with regulations of the U.S. Environmental Agency ("EPA"). The 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 Consent Agreement and the comments received, and will decide whether it should withdraw from the Consent Agreement, modify it, or make it final.

On January 23, 2012, Bosch entered into an agreement to acquire the SPX Service Solutions business from SPX. The Commission's complaint alleges the facts described below and that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by lessening competition in the market for ACRRR devices.

II. The Parties

Bosch, headquartered in Stuttgart, Germany and with U.S. operations based in Broadview, Illinois, is a global supplier of automotive and industrial technology, consumer goods, and building technology. North American sales represent 18% of Bosch's revenues, and Automotive Technology is Bosch's largest business sector in North America. Bosch is the second leading U.S. supplier of ACRRR equipment. It acquired RTI in 2010, and sells ACRRR equipment under both the Bosch and RTI brand, which account for approximately 10% of the U.S. ACRRR market.

Headquartered in Warren, Michigan, SPX is a diversified global supplier of highly engineered products for the following industries: power and energy, food and beverage, vehicle and transit, infrastructure and industrial processes. SPX's Service Solutions business is a global supplier of automotive tools, equipment and services, for both original equipment manufacturers ("OEMs") and aftermarket repair shops and technicians. SPX's Robinair brand is the leading supplier of ACRRR equipment in the United States, accounting for over 80% of sales in that market.

III. The Product And Structure Of The Market

Bosch's proposed acquisition of SPX Service Solutions would create a virtual monopoly in the ACRRR market. ACRRR devices are stand-alone pieces of equipment used by automotive technicians to remove refrigerant from a vehicle's on-board air conditioning system, store the refrigerant while the air conditioning system is being serviced, and recycle the refrigerant back into the system, adding more as necessary. These tools are required to repair or service motor vehicle air conditioning systems because no other equipment performs the removal, recycling, and recharging functions while staying compliant with EPA regulations prohibiting refrigerant from escaping into the atmosphere. Devices that only extract refrigerant from air conditioning systems but do not recycle or recharge them are not cost-effective alternatives because they do not store or dispose of extracted refrigerant as required. As a result, if the price of

ACRRR equipment were to increase 5-10%, customers would not switch to extraction-only equipment or to equipment that flushes other fluids from vehicles, which cannot be used in its place.

The relevant geographic area in which to evaluate the market for ACRRR equipment is the United States. Environmental regulations vary by country, so ACRRR machines designed to adhere to the regulations of one country are not necessarily compatible with those of other countries. In addition, differing electrical power specifications across the world necessitate that the internal pumps and motors vary to meet differing specification. As a result, purchasers in the United States could not turn to suppliers in other countries for ACRRR equipment.

SPX's Robinair brand holds a dominant position in the ACRRR market, with a share of over 80%. Bosch's RTI and Bosch brands comprise approximately 10% of the market and are Robinair's most significant competition. Four other firms selling ACRRR equipment in the U.S. together account for the balance of ACRRR sales. Thus, the combination of Bosch and SPX would confer a virtual monopoly position on Bosch. The elimination of the direct competition between Robinair and Bosch would allow the combined entity to exercise market power by unilaterally increasing price, slowing innovation, or lowering its levels of service.

IV. Entry

Entry into the ACRRR market sufficient to deter the anticompetitive effects of this transaction is unlikely to occur in the next two years. While designing and engineering a system to work effectively and meet industry standards may be possible within a relatively short time frame, other barriers, including the challenges of obtaining effective distribution and developing a service network, make successful entry very difficult. Advertising through leading automotive wholesale distributors is the most effective means of promoting ACRRR to independent auto repair shops and rapid-turnaround repair of ACRRR equipment is critical because repair shops cannot provide air conditioning service without this equipment. Obtaining effective distribution and service networks has been especially challenging for competitors of SPX because of limitations SPX puts on

distributors and service centers that sell and service Robinair-brand ACRRR. Another factor affecting the likelihood of significant new entry or expansion is the costs associated with meeting industry standards, which are established by SAE International, formerly the Society of Automotive Engineers.

IV. Effects Of The Acquisition

The proposed acquisition would cause significant anticompetitive harm to consumers in the U.S. ACRRR device market. The transaction would combine SPX's Robinair brand ACRRR, that already commands over 80% of the market with its leading competitor, Bosch, with its Bosch- and RTI ACRRR brands, with approximately 10% of the market, creating a near-monopolist with a share of over 90%. The impact of eliminating the competition between Bosch and SPX in the ACRRR market is highly likely to result in consumers, who are automotive repair shops and technicians, paying higher prices for ACRRR devices.

V. The Consent Agreement

A. The Merger Remedy

The proposed Consent Agreement eliminates the competitive concerns raised by Bosch's proposed acquisition of SPX Service Solutions by requiring the divestiture of Bosch's assets relating to the manufacture and sale of ACRRR devices in the United States, including the RTI business. Bosch and SPX have agreed to sell the U.S. ACRRR assets to Mahle Clevite, Inc. ("Mahle") before December 31, 2012.

Mahle possesses the resources, industry experience, and financial viability to successfully purchase and manage the divestiture assets and continue as an effective competitor in the ACRRR market. Mahle, headquartered in Stuttgart, Germany with U.S. operations based in Farmington, Michigan, is a supplier and development partner to the automotive and engine industry. Mahle's diverse product lines include aftermarket parts and automotive equipment sold a similar customer base as RTI. Mahle's significant size and global presence will allow it to quickly support additional expansion in the ACRRR market and

replace the loss of competition presented by Bosch's acquisition of SPX SS.

Pursuant to the Consent Agreement, Mahle would receive all the assets necessary to operate Bosch's current U.S. ACRRR business, including RTI's operations in York, Pennsylvania which include the RTI manufacturing plant, current inventory, and relevant intellectual property. In addition to ensuring that current RTI employees will continue their employment with Mahle, the Consent Agreement requires Bosch to provide access to certain key employees who may be necessary to help facilitate the transition and fully establish the Bosch ACRRR business within Mahle. The Consent Agreement also requires Bosch to transfer all relevant intellectual property and all contracts and confidential business information associated with the ACRRR business. In addition, the Consent Agreement requires Bosch to license, royalty-free, certain SPX patents that may be essential to the practice of two industry standards to Mahle.

B. The Conduct Remedy

In addition, the Consent Agreement includes a provision that requires Bosch to make certain patents available to its competitors in the ACRRR market. During its merger investigation, the Commission uncovered evidence that SPX holds certain potentially standard-essential patents necessary for implementing two SAE International ACRRR industry standards, J-2788 and J-2843, which govern the operation of ACRRR machines that handle the two most common types of air conditioning refrigerant in vehicles today. SAE International adopted J-2788 and J-2843 while SPX was a member of the SAE Interior Climate Control Committee, the committee responsible for developing the standards. SAE International's rules include an obligation by working group members to disclose any patents or patent applications that would be essential to the practice of a standard being developed, and to offer a license to such patents on either royalty-free or fair, reasonable, and non-discriminatory ("FRAND") terms. After the standards were adopted, SPX issued a letter of assurance to SAE International acknowledging that it held patents that were potentially essential to both standards and committing to license them under FRAND terms. Following this letter of assurance, however, SPX continued to seek previously

initiated injunction actions against competitors using those patents to implement the SAE International standards.

SPX's suit for injunctive relief against implementers of its standard essential patents constitutes a failure to license its standard-essential patents under the FRAND terms it agreed to while participating in the standard setting process, and is an unfair method of competition actionable under Section 5 of the FTC Act. Standard setting is "widely acknowledged to be one of the engines driving the modern economy." Participants in the standard setting process rely on the licensing commitments made by patent holders during the standard setting process to protect them against patent hold-up. Patent hold-up can occur when, after an entire industry has become "locked in" to practicing a standard, a patent holder reneges on a licensing obligation and seeks to exercise the market power that accrues to a patent by virtue of being incorporated in the standard. FRAND commitments and licensing obligations, such as those at issue here, are an important way to mitigate the risk of patent hold-up, and are common in the standard setting process. Seeking injunctions against willing licensees of FRAND-encumbered standard essential patents, as SPX is alleged to have done here, is a form of FRAND evasion and can reinstate the risk of patent hold-up that FRAND commitments are intended to ameliorate. As the Commission has previously explained, "negotiation that occurs under threat of an [injunction] may be weighted heavily in favor of the patentee in a way that is in tension with the [F]RAND commitment. High switching costs combined with the threat of an [injunction] could allow a patentee to obtain unreasonable licensing terms despite its [F]RAND commitment, not because its invention is valuable, but because implementers are locked in to practicing the standard."

Bosch has agreed in the Consent Order to resolve the violations committed by SPX. The Consent Order requires Bosch to offer a royalty-free license to all potential implementers for certain enumerated patents for the purpose of manufacturing ACRRR devices in the United States. While a royalty-free license may not be an appropriate remedy in every case involving evasion of a FRAND commitment, in this matter Bosch has chosen to license these patents to the buyer of its ACRRR business, Mahle, royalty-free, and a license to other market place

participants on the same terms is necessary to ensure that the merger remedy is not inequitable in application. The Consent Order further requires Bosch to deliver to the SAE a letter of assurance that makes a binding, irrevocable commitment to license any additional patents that Bosch may acquire in the future that are essential to practicing the J-2788 or J-2843 standards on FRAND terms to any third party that wishes to use such patents to produce an ACRRR device for sale in the United States. Pursuant to its FRAND obligations, Bosch has agreed not to seek injunctive relief against such third parties, unless the third party refuses in writing to license the patent consistent with the letter of assurance, or otherwise refuses to license the patent on terms that comply with the letter of assurance as determined by a process agreed upon by both parties (e.g., arbitration) or a court.

The Consent Agreement also requires that Bosch discontinue its restrictive arrangements with wholesale distributors and independent service technicians. Bosch will be prevented from enforcing any agreement that restricts a distributor or repair service provider from advertising, servicing, distributing, or selling any ACRRR product from any third party in the United States. Bosch will be prevented from entering into such agreements for ten years after the date of the Order. This provision allows entry by other competitors, and will allow the existing competitors in the ACRRR market, including Mahle, to more easily have access to leading wholesale distributors and service providers to assemble repair networks to which customers can turn after they have purchased ACRRRs.

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

STATEMENT OF THE FEDERAL TRADE COMMISSION

The Federal Trade Commission ("Commission") has voted to issue for public comment a Complaint and Order against Robert Bosch GmbH ("Bosch") designed to remedy the allegedly anticompetitive effects of Bosch's acquisition of SPX Services ("SPX"), a division of SPX Corporation. The Commission has reason to believe that the proposed acquisition would cause significant anticompetitive harm to consumers by creating a virtual monopoly in the market for automobile air conditioning servicing equipment known as "air conditioning recycling, recovery, and recharge devices" or "ACRRRs." The proposed Order eliminates the anticompetitive concerns raised by the proposed acquisition by requiring the divestiture of Bosch's assets relating to the manufacture and sale of ACRRRs to Mahle Clevite, Inc. The proposed Order further requires Bosch to discontinue restrictive arrangements SPX maintained with wholesale distributors and independent service technicians.

The Complaint also alleges that, before its acquisition by Bosch, SPX reneged on a licensing commitment made to two standard-setting bodies to license its standards-essential patents ("SEPs") relating to ACRRRs on fair, reasonable and non-discriminatory terms ("FRAND") by seeking injunctions against willing licensees of those SEPs.[1] We have reason to believe this conduct tended to impair competition in the market for these important automobile air conditioning servicing devices. To its credit, Bosch has abandoned these claims for injunctive relief and agreed to license the SEPs at issue.

This case is another chapter in the Commission's longstanding commitment to safeguard the integrity of the standard-setting process.[2] Standard setting can deliver substantial benefits to

[1] The licensing obligation in this matter was a FRAND obligation, although RAND (reasonable and non-discriminatory) licensing obligations raise similar issues.

[2] *See In re Dell Computer Corp.*, 121 F.T.C. 616 (1996); *In re Union Oil Company of California,* 2004 FTC LEXIS 115 (July 7, 2004)*; In re Rambus, Inc.,* Dkt. No. 9302, 2006 FTC LEXIS 101 (Aug. 20, 2006), *rev'd*, *Rambus Inc. v. F.T.C.,* 522 F.3d 456 (D.C. Cir. 2008); *In re Negotiated Data Solutions LLC*, FTC File No. 051-0094, Decision and Order (Jan. 23, 2008), *available at* http://www.ftc.gov/os/caselist/0510094/080122do.pdf.

American consumers, promoting innovation, competition, and consumer choice. But standard setting also risks harm to consumers. Because standard setting often displaces the normal competitive process with the collective decision-making of competitors, preserving the integrity of the standard-setting process is central to ensuring standard setting works to the benefit of, rather than against, consumers.[3] The Commission's action today does just that.

As explained in the Commission's unanimous filings before the United States International Trade Commission in June 2012, the threat of injunctive relief "in matters involving RAND-encumbered SEPs, where infringement is based on implementation of standardized technology, has the potential to cause substantial harm to U.S. competition, consumers and innovation."[4] By threatening to exclude standard-compliant products from the marketplace, a SEP holder can demand and realize royalty payments that reflect the investments firms make to develop and implement the standard, rather than the economic value of the technology itself.[5] This can harm incentives to

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[3] *See, e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc*., 486 U.S. 492, 500-01 (1988) (noting that "private standard-setting associations have traditionally been objects of antitrust scrutiny" because of their potential use as a means for anticompetitive agreements among competitors).

[4] Third Party United States Federal Trade Commission's Statement on the Public Interest filed on June 6, 2012 in *In re Certain Wireless Communication Devices, Portable Music & Data Processing Devices, Computers and Components Thereof*, Inv. No. 337-TA-745, *available at* www.ftc.gov/os/2012/06/1206ftcwirelesscom.pdf and in *In re Certain Gaming and Entertainment\ Consoles, Related Software, and Components Thereof*, Inv. No. 337-TA-752, *available at* http://www.ftc.gov/os/2012/06/1206 ftcgamingconsole.pdf.

[5] *Id.* at 3-4 ("[A] royalty negotiation that occurs under threat of an exclusion order may be weighted heavily in favor of the patentee in a way that is in tension with the RAND commitment. High switching costs combined with the threat of an exclusion order could allow a patentee to obtain unreasonable licensing terms despite its RAND commitment, not because its invention is valuable, but because implementers are locked in to practicing the standard. The resulting imbalance between the value of patented technology and the rewards for innovation

> may be especially acute where the exclusion order is based on a patent covering a small component of a complex multicomponent product. In these ways, the threat of an exclusion order may allow the holder of a RAND-

develop standard-compliant products. The threat of an injunction can also lead to excessive royalties that can be passed along to consumers in the form of higher prices.

There is increasing judicial recognition, coinciding with the view of the Commission, of the tension between offering a FRAND commitment and seeking injunctive relief.[6] Patent holders that seek injunctive relief against willing licensees of their FRAND-encumbered SEPs should understand that in appropriate cases the Commission can and will challenge this conduct as an unfair method of competition under Section 5 of the FTC Act.[7] Importantly, stopping this conduct using a stand-alone Section 5 unfair methods of competition claim, rather than one based on the Sherman Act, minimizes the possibility of follow-on treble damages claims. Violations of Section 5 that are not also violations of the antitrust laws do not support valid federal antitrust claims for treble damages. There is also no private right of action under Section 5, and a Section 5 action has no preclusive effect in subsequent federal court cases.

In her dissent, Commissioner Ohlhausen claims that today's decision imposes liability on protected petitioning activity and

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encumbered SEP to realize royalty rates that reflect patent hold-up, rather than the value of the patent relative to alternatives, which could raise prices to consumers while undermining the standard setting process.").

[6] *See, e.g., Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 885 (9th Cir. 2012) ("Implicit in such a sweeping promise is, at least arguably, a guarantee that the patent-holder will not take steps to keep would-be users from using the patented material, such as seeking an injunction, but will instead proffer licenses consistent with the commitment made."); *Apple, Inc. v. Motorola, Inc.*, No. 1:11-cv-08540, 2012 U.S. Dist. LEXIS 89960, at *45 (N.D. Ill. June 22, 2012) (Posner, J., sitting by designation) ("I don't see how, given FRAND, I would be justified in enjoining Apple from infringing the '898 [patent] unless Apple refuses to pay a royalty that meets the FRAND requirement. By committing to license its patents on FRAND terms, Motorola committed to license the '898 to anyone willing to pay a FRAND royalty and thus implicitly acknowledged that a royalty is adequate compensation for a license to use that patent. How could it do otherwise?").

[7] We have no reason to believe that, in this case, a monopolization count under the Sherman Act was appropriate. However, the Commission has reserved for another day the question whether, and under what circumstances, similar conduct might also be challenged as an unfair act or practice, or as monopolization.

effectively undermines the role of federal courts and the ITC in the adjudication of SEP-related disputes. We respectfully disagree. As alleged in the Complaint, SPX committed to license its SEPs on FRAND terms. In doing so, we have reason to believe SPX voluntarily gave up the right to seek an injunction against a willing licensee. Moreover, the fact that both the federal courts and the ITC have the authority to deny injunctive relief where the SEP holder has broken its FRAND commitment does not mean that this conduct is not itself a violation of Section 5 or within our reach.

We also take issue with Commissioner Ohlhausen's suggestion that the Commission's action "appears to lack regulatory humility." The Commission is first and foremost a law enforcement agency, and this consent decree, like all of our unfair methods of competition enforcement actions, is a fact-specific response to a very real problem that threatens competition and consumer welfare.

Indeed, we view this action as well within our Section 5 authority. The plain language of Section 5, the relevant legislative history, and a long line of Supreme Court cases all affirm that Section 5 extends beyond the Sherman Act.[8] Moreover, this is not a circumstance where, as Commissioner Ohlhausen contends, there are no discernible limiting principles. SPX's failure to abide by its commitment took place in the standard-setting context. In that setting, long an arena of concern to the Commission, a breach of contract risks substantial consumer injury. The standard setting context, together with the acknowledgment that a FRAND commitment also depends on the presence of a willing licensee, appropriately limit the Commission's enforcement policy and provide guidance to standard-setting participants.

[8] *See, e.g., F.T.C. v. R.F. Keppel & Bros., Inc.*, 291 U.S. 304, 310-313 (1934); *F.T.C. v. Cement Inst.*, 333 U.S. 683, 693 & n.6 (1948); *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 241-244 (1972).

For these reasons, we find Commissioner Ohlhausen's analogy of SPX's conduct to a "garden variety breach-of-contract" to be unpersuasive. While not every breach of a FRAND licensing obligation will give rise to Section 5 concerns, when such a breach tends to undermine the standard-setting process and risks harming American consumers, the public interest demands action rather than inaction from the Commission.

CONCURRING AND DISSENTING STATEMENT OF COMMISSIONER MAUREEN K. OHLHAUSEN

I voted against accepting the proposed consent agreement in this matter because I strongly dissent from those portions of the consent that relate to alleged conduct by the respondent involving standard-essential patents, or SEPs.[1] Even if all of the SEP-related allegations in the complaint were proved – including the allegation that the patents at issue are standard-essential – I would not view such conduct as violating Section 5 of the FTC Act.[2] Simply seeking injunctive relief on a patent subject to a fair, reasonable, and non-discriminatory ("FRAND") license, without

[1] I concur with the consent agreement reached in this matter insofar as it requires the divestiture of certain assets to remedy the Clayton Act Section 7 violation that likely would have resulted from the proposed transaction. I do have strong reservations, however, about the relatively broad fencing-in relief included in the proposed Decision and Order that requires the respondent to cancel the exclusivity provisions in its contracts with various distributors and equipment servicers. *See* Decision and Order ¶ III. Fencing-in relief that modifies contracts entered into by participants across an industry raises concerns for me about whether such relief goes beyond that which is necessary to protect the viability of the divestiture buyer and thus effectuate the legitimately pursued remedy in this matter.

[2] *See* Complaint ¶¶ 11-20, 23. *See also* Decision and Order ¶ IV; Analysis of Agreement Containing Consent Order to Aid Public Comment § V.B.

more,[3] even if seeking such relief could be construed as a breach of a licensing commitment, should not be deemed either an unfair method of competition or an unfair act or practice under Section 5. The enforcement policy on the seeking of injunctive relief on FRAND-encumbered SEPs that the Commission has announced today suffers from several critical defects.

First, this enforcement policy raises significant issues of jurisdictional and institutional conflict. It is simply not in the public interest to effectively oust other institutions, including the federal courts and the International Trade Commission ("ITC") from the important and complex area of SEPs through the use of our Section 5 authority. By imposing Section 5 liability on a firm that seeks injunctive relief on its SEPs, the Commission is doing exactly that. The FTC is not, nor should it be, the only institution acting in the SEPs space. Moreover, it is unclear how the seeking of injunctive relief, in either the courts or the ITC, on a patent – even a FRAND-encumbered SEP – would not be considered protected petitioning of the government under the *Noerr-Pennington* doctrine.[4] In fact, a court recently dismissed Sherman Act and state unfair competition claims grounded on the seeking of injunctive relief in the courts and the ITC on FRAND-encumbered SEPs, holding that such conduct was protected by *Noerr*.[5]

Second, this enforcement policy appears to lack regulatory humility. The policy implies that our judgment on the availability of injunctive relief on FRAND-encumbered SEPs is superior to

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[3] *See, e.g.*, *In re Rambus, Inc.*, Dkt. No. 9302 (FTC Aug. 2, 2006) (Commission opinion) (finding deception that undermined the standard-setting process), *rev'd*, *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008); *In re Union Oil Co. of Cal.*, 138 F.T.C. 1 (2003) (Commission opinion) (same); *In re Dell Computer Corp.*, 121 F.T.C. 616 (1996) (consent order) (alleging same).

[4] *See Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (applying *Noerr-Pennington* doctrine to petitioning of judicial branch).

[5] *See Apple, Inc. v. Motorola Mobility, Inc.*, No. 3:11-cv-00178-BBC, 2012 WL 3289835, at *12-14 (W.D. Wis. Aug. 10, 2012) (dismissing Apple's Sherman Act and state unfair competition claims and holding that Motorola's filing of litigation in the federal courts and ITC on its FRAND-encumbered SEPs was immune under *Noerr*).

that of these other institutions. I agree that the FTC is well positioned to offer its views and to advocate on the important issue of patent hold-up using its policy tools. For that reason, I supported the Commission's June 2012 filing with the ITC.[6] However, as the Commission testified to Congress shortly after filing its statement with the ITC, "Federal district courts have the tools to address this issue [hold-up], by balancing equitable factors or awarding money damages, and the FTC believes that the ITC likewise has the authority under its public interest obligations to address this concern and limit the potential for hold-up."[7] I see no reason why this unanimous statement no longer holds.[8]

Third, to the extent that the SEP allegations in the complaint aspire to the consent agreement reached in the Commission's *N-Data*[9] matter, I would submit that that consent is an ill-advised guidepost for this agency to use in its enforcement of Section 5 for several reasons. Most importantly, the *N-Data* consent fails to identify meaningful limiting principles that would govern the Commission's use of its Section 5 authority.[10] As former

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[6] Third Party United States Federal Trade Commission's Statement on the Public Interest, *In re Certain Wireless Communications Devices, Portable Music and Data Processing Devices, Computers and Components Thereof*, Inv. No. 337-TA-745 (Int'l Trade Comm'n June 6, 2012), *available at* http://www.ftc.gov/os/2012/06/1206ftcwirelesscom.pdf.

[7] *Oversight of the Impact on Competition of Exclusion Orders to Enforce Standard-Essential Patents: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 1-2 (2012) (statement of the Federal Trade Commission), *available at* http://www.ftc.gov/os/testimony/120711standardpatents.pdf.

[8] The cases cited in the Commission's statement for the proposition that there is an "increasing judicial recognition" on the tension between FRAND commitments and injunctive relief, to the extent that they reveal anything, show that the courts are not freely issuing injunctions against willing licensees of FRAND-encumbered SEPs. *See* Statement of the Commission, at 2 n.6. Thus, far from supporting the position that the FTC should block access to other institutions, these cases clearly demonstrate that the courts are well equipped to address issues involving injunctions on FRAND-encumbered SEPs.

[9] *In re Negotiated Data Solutions LLC*, FTC File No. 051-0094, Decision and Order (Jan. 23, 2008), *available at* http://www.ftc.gov/os/caselist/0510094/080923ndsdo.pdf.

[10] *See, e.g.*, *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 139 (2d Cir. 1984) ("*Ethyl*"); ("[T]he Commission owes a duty to define the conditions under which conduct . . . would be unfair so that business will have an inkling

Chairman Majoras explained in her dissent, the *N-Data* consent was a material departure from the prior line of standard-setting organization ("SSO") cases brought by the Commission, which were grounded in deceptive conduct in the standard-setting context that led to, or was likely to lead to, anticompetitive effects.[11] Then-Commissioner Kovacic also dissented, objecting to, among other things, the majority's assumption that a Section 5 action would have no spillover effects in terms of follow-on private litigation.[12]

The SEP allegations and consent in the instant matter suffer from many of the same deficiencies as the *N-Data* consent. I simply do not see any meaningful limiting principles in the enforcement policy laid out in these cases. The Commission statement emphasizes the context here (*i.e.* standard setting); however, it is not clear why the type of conduct that is targeted here (*i.e.* a breach of an allegedly implied contract term with no allegation of deception) would not be targeted by the Commission in any other context where the Commission believes consumer harm may result. If the Commission continues on the path begun in *N-Data* and extended here, we will be policing garden variety breach-of-contract and other business disputes between private parties. Mere breaches of FRAND commitments, including potentially the seeking of injunctions if proscribed by SSO

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as to what they can lawfully do rather than be left in a state of complete unpredictability."); *FTC v. Abbott Labs.*, 853 F. Supp. 526, 535-36 (D.D.C. 1994) ("The Second Circuit stated emphatically that some workable standard must exist for what is or is not to be considered an unfair method of competition under § 5. Otherwise, companies subject to FTC prosecution would be the victims of 'uncertain guesswork rather than workable rules of law.'") (quoting *Ethyl*, 729 F.2d at 139); ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 661 (7th ed. 2012) ("FTC decisions have been overturned despite proof of anticompetitive effect where the courts have concluded that the agency's legal standard did not draw a sound distinction between conduct that should be proscribed and conduct that should not.").

[11] *See In re Negotiated Data Solutions LLC*, FTC File No. 051-0094, Dissenting Statement of Chairman Majoras, at 1-2 (Jan. 23, 2008), *available at* http://www.ftc.gov/os/caselist/0510094/080122majoras.pdf.

[12] *See id.*, Dissenting Statement of Commissioner William E. Kovacic, at 1-2, *available at* http://www.ftc.gov/os/caselist/0510094/080122kovacic.pdf.

rules,[13] are better addressed by the relevant SSOs or by the affected parties via contract and/or patent claims resolved by the courts or through arbitration.

It is important that government strive for transparency and predictability. Before invoking Section 5 to address business conduct not already covered by the antitrust laws (other than perhaps invitations to collude), the Commission should fully articulate its views about what constitutes an unfair method of competition, including the general parameters of unfair conduct and where Section 5 overlaps and does not overlap with the antitrust laws, and how the Commission will exercise its enforcement discretion under Section 5. Otherwise, the Commission runs a serious risk of failure in the courts[14] and a possible hostile legislative reaction,[15] both of which have accompanied previous FTC attempts to use Section 5 more expansively.

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[13] The instant matter also raises concerns about the Commission imposing requirements on the respondent that go beyond those it agreed to as part of the SSO at issue here, which does not appear to ban the seeking of injunctions on SEPs included in its standards. *See* SAE International, Technical Standards Board Governance Policy § 1.14 (Nov. 2008), *available at* http://www.sae.org/standardsdev/tsb/tsbpolicy.pdf. Even more troublesome, it is an open question whether the patents at issue are even standard-essential. *See, e.g.*, Complaint ¶ 16 ("After the adoption of SAE J-2788, SPX Corporation sued certain competitors, including Bosch, for infringing patents that may be essential to the practice of SAE J-2788.").

[14] *See Ethyl*, 729 F.2d 128; *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980); *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980); *Abbott Labs.*, 853 F. Supp. 526.

[15] *See* William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 943 (2010) ("In the 1950s and the 1970s, Commission efforts to use Section 5 litigation to reach beyond prevailing interpretations of Sections 1 and 2 of the Sherman Act elicited strong political backlash from the Congress.").

This consent does nothing either to legitimize the creative, yet questionable application of Section 5 to these types of cases or to provide guidance to standard-setting participants or the business community at large as to what does and does not constitute a Section 5 violation. Rather, it raises more questions about what limits the majority of the Commission would place on its expansive use of Section 5 authority.

IN THE MATTER OF

CBR SYSTEMS, INC.

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

Docket No. C-4400; File No. 112 3120
Complaint, April 29, 2013 – Decision, April 29, 2013

The complaint alleges that Cbr Systems, Inc. ("Cbr"), a provider of umbilical cord blood and umbilical cord tissue banking services, failed to protect the security of its customers' personal information. According to the complaint, in December 2010, a Cbr laptop, external hard drive, USB drive, and several unencrypted backup tapes were stolen from a Cbr employee's personal vehicle, exposing the Social Security numbers and credit and debit card numbers of nearly 300,000 consumers. The complaint alleges that Cbr's privacy policy misrepresented its efforts to protect the security of its customers' personal information, making its privacy policy claims deceptive under the Federal Trade Commission Act. The consent order requires Cbr to establish and maintain a comprehensive information security program that is designed to protect the security, confidentiality, and integrity of personal information from or about consumers. The order further prohibits Cbr from engaging in future practices similar to those alleged in the complaint.

Participants

For the *Commission*: *Ryan Mehm* and *Laura Riposo VanDruff.*

For the *Respondent*: *Thomas F. Chaffin*, *Michael Sibarium*, and *Joseph R. Tiffany*, *Pillsbury Winthrop Shaw Pittman LLP*.

COMPLAINT

The Federal Trade Commission, having reason to believe that Cbr Systems, Inc. has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Cbr Systems, Inc. ("Cbr") is a California corporation with its principal office or place of business at 1200 Bayhill Drive, Suite 301, San Bruno, California 94066.

2. The acts and practices of Cbr as alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

3. At all relevant times, Cbr has been in the business of collecting and storing umbilical cord blood and tissue for potential medical use. Umbilical cord blood and tissue contain certain stem cells, the use of which researchers are investigating to treat some diseases and conditions.

4. Cbr maintains several websites through which consumers and physicians may interact with Cbr to obtain information regarding cord blood and cord tissue banking. Cbr also operates websites about pregnancy, parenting, maternity fashion, and baby names through which consumers may learn about Cbr's cord blood and cord tissue banking services. Certain Cbr websites require consumers to provide personal information to obtain a free membership.

5. When a pregnant woman agrees to have Cbr collect and store her umbilical cord blood or umbilical cord blood and cord tissue following delivery, Cbr collects her personal information, including but not limited to the following: name, address, email address, telephone number, date of birth, Social Security number, driver's license number, credit card number, debit card number, medical health history profile, blood typing results, and infectious disease marker results. During the enrollment process, Cbr also collects personal information from fathers, including fathers' Social Security numbers. Cbr also collects from parents information relating to newborn children, including the following: name; gender; date and time of birth; birth weight, delivery type, and adoption type (i.e., open, closed, or surrogate). For certain children, Cbr may also collect limited health information.

6. An individual – such as a friend or family member – may contribute toward the cost of collecting and storing a pregnant woman's umbilical cord blood or umbilical cord blood and cord tissue through a service Cbr promotes as a "Gift Registry." When an individual contributes to a Gift Registry, Cbr collects personal information, including but not limited to the following: name, address, email address, and credit card information.

7. The misuse of the types of personal information Cbr collects – including Social Security numbers, dates of birth, credit card numbers, and health information – can facilitate identity theft, including existing and new account fraud, expose sensitive medical data, and lead to related consumer harms.

8. Between March 2006 and October 2011, Cbr disseminated or caused to be disseminated to consumers privacy policies and statements, including, but not limited, to Exhibits A through D. These materials contain the following statements:

> **Privacy Policy** (Exhibits A, B, C & D) (effective Mar. 6, 2006 through Oct. 9, 2011)
>
> Whenever CBR handles personal information, regardless of where this occurs, CBR takes steps to ensure that your information is treated securely and in accordance with the relevant Terms of Service and this Privacy Policy. . . . Once we receive your transmission, we make our best effort to ensure its security on our systems.

9. Cbr has engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for consumers' personal information. Among other things, Cbr:

A. Failed to implement reasonable policies and procedures to protect the security of consumers' personal information it collected and maintained;

B. Created unnecessary risks to personal information by:

   i. transporting portable media containing personal information in a manner that made the media vulnerable to theft or other misappropriation;

   ii. failing to adequately supervise a service provider, resulting in the retention of a legacy database that contained consumers' personal information, including consumers' names, addresses, email addresses, telephone numbers, dates of birth, Social Security numbers, drivers' license numbers,

credit card numbers, and health information, in a vulnerable format on its network;

iii. failing to take reasonable steps to render backup tapes or other portable media containing personal information or information that could be used to access personal information unusable, unreadable, or indecipherable in the event of unauthorized access;

iv. not adequately restricting access to or copying of personal information contained in its databases based on an employee's need for information; and

v. failing to destroy consumers' personal information for which Cbr no longer had a business need; and

C. Failed to employ sufficient measures to prevent, detect, and investigate unauthorized access to computer networks, such as by adequately monitoring web traffic, confirming distribution of anti-virus software, employing an automated intrusion detection system, retaining certain system logs, or systematically reviewing system logs for security threats.

10. Cbr's failures to provide reasonable and appropriate security for consumers' personal information contributed to a December 2010 incident in which 298,000 consumers' personal information was unnecessarily exposed.

11. Specifically, on December 9, 2010, a Cbr employee removed four backup tapes from Cbr's San Francisco, California facility and placed them in a backpack to transport them to Cbr's corporate headquarters in San Bruno, California, approximately thirteen miles away. The backpack contained the four Cbr backup tapes, a Cbr laptop, a Cbr external hard drive, a Cbr USB drive, and other materials. At approximately 11:35 PM on December 13, 2010, an intruder removed the backpack from the Cbr employee's personal vehicle. The Cbr backup tapes were unencrypted, and they contained consumers' personal information, including, in some cases, names, gender, Social Security numbers, dates and times of birth, drivers' license

numbers, credit/debit card numbers, card expiration dates, checking account numbers, addresses, email addresses, telephone numbers, and adoption type (i.e., open, closed, or surrogate) for approximately 298,000 consumers.

12. The Cbr laptop and Cbr external hard drive, both of which were unencrypted, contained enterprise network information, including passwords and protocols, that could have facilitated an intruder's access to Cbr's network, including additional personal information contained on the Cbr network.

FTC ACT VIOLATIONS

13. Through the means described in Paragraph 8, Cbr represented, expressly or by implication, that it implemented reasonable and appropriate measures to protect consumers' personal information from unauthorized access.

14. In truth and in fact, as set forth in Paragraph 9, Cbr had not implemented 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.

15. The acts and practices of Cbr as alleged in this complaint constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

THEREFORE, the Federal Trade Commission, this twenty-ninth day of April, 2013, has issued this complaint against Cbr.

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 that 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 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 filed by an interested person, 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 Cbr Systems, Inc. is a California corporation with its principal office or place of business at 1200 Bayhill Drive, Suite 301, San Bruno, California 94066.

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, "respondent" shall mean Cbr Systems, Inc., and its successors and assigns.

2. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

3. "Personal information" shall mean individually identifiable information from or about an individual consumer including, but not limited to: (a) a first and last name; (b) a home or other physical address, including street name and name of city or town; (c) an email address or other online contact information, such as an instant messaging user identifier or a screen name; (d) a telephone number; (e) a Social Security number; (f) a driver's license number or other government-issued identification number; (g) a bank account, debit card, or credit card account number; (h) a persistent identifier, such as a customer number held in a "cookie" or processor serial number; (i) clinical laboratory testing information, including test results; or (j) the fact and circumstances of a child's adoption, such as whether the birth mother was a surrogate. For the purpose of this provision, a "consumer" shall mean any person, including, but not limited to, any user of respondent's services, any employee of respondent, or any individual seeking to become an employee, where "employee" shall mean an agent, servant, salesperson, associate, independent contractor, or other person directly or indirectly under the control of respondent.

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, website, or other device or affiliate owned or controlled by respondent, shall not misrepresent in any manner, expressly or by implication, the extent to which it uses, maintains, and protects the privacy, confidentiality, security, or integrity of personal information collected from or about consumers.

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 information security program that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers by respondent or by any corporation, subsidiary, division, website, or other device or affiliate owned or controlled by respondent. This section may be satisfied through the review and maintenance of an existing program so long as that program fulfills the requirements set forth herein. Such program, the content and implementation of which must be fully documented in writing, shall contain administrative, technical, and physical safeguards appropriate to respondent's size and complexity, the nature and scope of respondent's activities, and the sensitivity of the personal information collected from or about consumers, including:

A. the designation of an employee or employees to coordinate and be accountable for the information security program;

B. the identification of material internal and external risks to the security, confidentiality, and integrity of personal information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, and assessment of the sufficiency of any safeguards in place to control these risks. At a minimum, this risk

assessment should include consideration of risks in each area of relevant operation, including, but not limited to: (1) employee training and management; (2) information systems, including network and software design, information processing, storage, transmission, and disposal; and (3) prevention, detection, and response to attacks, intrusions, or other systems failures;

C. the design and implementation of reasonable safeguards to control the risks identified through risk assessment, and 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 the information security program in light of the results of the testing and monitoring required by subpart C, any material changes to any 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 the 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 SANS Institute; or a

qualified person or organization approved by the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580. 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 Part II of this order; and

D. certify that the 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 completed. 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, the initial Assessment, and any subsequent Assessments requested, shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director of Enforcement,

Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, D.C. 20580, with the subject line *In the matter of Cbr Systems, Inc.*, FTC File No.1123120. *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.

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 three (3) years after the date of preparation of each Assessment required under Part III of this order, all materials relied upon to prepare the Assessment, whether prepared by or on behalf of respondent, including but not limited to, all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, and any other materials relating to respondent's compliance with Parts II and III of this order, for the compliance period covered by such Assessment;

B. unless covered by IV.A, for a period of five (5) years from the date of preparation or dissemination, whichever is later, a print or electronic copy of each document relating to compliance with this order, including but not limited to:

1. all advertisements and promotional materials containing any representations covered by this order, with all materials used or relied upon in making or disseminating the representation; and

2. any documents, whether prepared by or on behalf of respondent, that contradict, qualify, or call into question compliance with this order.

V.

IT IS FURTHER ORDERED that respondent shall deliver copies of the order as directed below:

A. 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 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. 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.

B. Respondent shall 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 in respondent that may affect compliance obligations arising under this order, including, but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor company; the creation or dissolution of a subsidiary, 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 sent by

overnight courier (not the U.S. Postal Service) to the Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, D.C. 20580, with the subject line *In the matter of Cbr Systems, Inc.*, FTC File No.1123120. *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.

VII.

IT IS FURTHER ORDERED that respondent, 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, it shall submit additional true and accurate written reports.

VIII.

This order will terminate on April 29, 2033, 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 order applicable to Cbr Systems, 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.

Cbr collects and stores umbilical cord blood and umbilical cord tissue for potential medical use. When a pregnant woman agrees to have Cbr collect and store her umbilical cord blood or umbilical cord blood and umbilical cord tissue, Cbr collects her personal information, including, but not limited to, the following: name, address, email address, telephone number, date of birth, Social Security number, driver's license number, credit card number, debit card number, medical health history profile, blood typing results, and infectious disease marker results. During the enrollment process, Cbr also collects personal information, such as fathers' Social Security numbers, and the company collects information relating to newborn children, such as name, gender, date and time of birth, birth weight, delivery type, and adoption type (i.e., open, closed, or surrogate). Cbr may also collect limited health information for certain children and the name,

address, email address, and credit card information for individuals, such as friends or family members, who contribute to the cost of collecting and storing cord blood or cord tissue. The misuse of the types of personal information Cbr collects – including Social Security numbers, dates of birth, credit card numbers, and health information – can facilitate identity theft, including existing and new account fraud, expose sensitive medical data, and lead to related consumer harms.

The Commission's complaint alleges that Cbr misrepresented that it maintained reasonable and appropriate practices to protect consumers' personal information from unauthorized access. Cbr engaged in a number of practices, however, that, taken together, failed to provide reasonable and appropriate security for consumers' personal information. Among other things, Cbr:

(1) failed to implement reasonable policies and procedures to protect the security of consumers' personal information it collected and maintained;

(2) created unnecessary risks to personal information by (a) transporting portable media containing personal information in a manner that made the media vulnerable to theft or other misappropriation; (b) failing to adequately supervise a service provider, resulting in the retention of a legacy database that contained consumers' personal information, including consumers' names, addresses, email addresses, telephone numbers, dates of birth, Social Security numbers, drivers' license numbers, credit card numbers, and health information, in a vulnerable format on its network; (c) failing to take reasonable steps to render backup tapes or other portable media containing personal information or information that could be used to access personal information unusable, unreadable, or indecipherable in the event of unauthorized access; (d) not adequately restricting access to or copying of personal information contained in its databases based on an employee's need for information; and (e) failing to destroy consumers'

personal information for which Cbr no longer had a business need; and

(3) failed to employ sufficient measures to prevent, detect, and investigate unauthorized access to computer networks, such as by adequately monitoring web traffic, confirming distribution of anti-virus software, employing an automated intrusion detection system, retaining certain system logs, or systematically reviewing system logs for security threats.

The complaint further alleges that these failures contributed to a December 2010 incident in which hundreds of thousands of consumers' personal information was unnecessarily exposed. On December 9, 2010, a Cbr employee removed four backup tapes from Cbr's San Francisco, California facility and placed them in a backpack to transport them to Cbr's corporate headquarters in San Bruno, California, approximately thirteen miles away. The backpack contained the four Cbr backup tapes, a Cbr laptop, a Cbr external hard drive, a Cbr USB drive, and other materials. At approximately 11:35 PM on December 13, 2010, an intruder removed the backpack from the Cbr employee's personal vehicle. The Cbr backup tapes were unencrypted, and they contained consumers' personal information, including, in some cases, names, gender, Social Security numbers, dates and times of birth, drivers' license numbers, credit/debit card numbers, card expiration dates, checking account numbers, addresses, email addresses, telephone numbers, and adoption type (i.e., open, closed, or surrogate) for approximately 298,000 consumers. The Cbr laptop and Cbr external hard drive, both of which were unencrypted, contained enterprise network information, including passwords and protocols, that could have facilitated an intruder's access to Cbr's network, including additional personal information contained on the Cbr network.

The proposed order contains provisions designed to prevent Cbr 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, confidentiality, security, or integrity of personal information collected from or about consumers. Part II of the

proposed order requires Cbr to establish and maintain a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers. The security program must contain administrative, technical, and physical safeguards appropriate to Cbr's size and complexity, nature and scope of its activities, and the sensitivity of the information collected from or about consumers. Specifically, the proposed order requires Cbr to:

- designate an employee or employees to coordinate and be accountable for the information security program;

- identify material internal and external risks to the security, confidentiality, and integrity of personal information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, and assess the sufficiency of any safeguards in place to control these risks;

- design and implement reasonable safeguards to control the risks identified through risk assessment, and regularly test or monitor the effectiveness of the safeguards' key controls, systems, and procedures;

- develop and use reasonable steps to select and retain service providers capable of appropriately safeguarding personal information they receive from Cbr, and require service providers by contract to implement and maintain appropriate safeguards; and

- evaluate and adjust its information security program in light of the results of testing and monitoring, any material changes to operations or business arrangement, or any other circumstances that it knows or has reason to know may have a material impact on its information security program.

Part III of the proposed order requires Cbr to obtain within the first one hundred eighty (180) days after service of the order, and

on a biennial basis thereafter for a period of twenty (20) years, an assessment and report from a qualified, objective, independent third-party professional, certifying, among other things, that: (1) it has in place a security program that provides protections that meet or exceed the protections required by Part II of the proposed order; and (2) its security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of sensitive consumer, employee, and job applicant information has been protected.

Parts IV through VIII of the proposed order are reporting and compliance provisions. Part IV requires Cbr 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, Cbr 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 all current and future principals, officers, directors, and managers, and 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 Cbr submit a compliance report to the FTC within 60 days, and periodically thereafter as requested. Part VIII is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

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

Complaint

IN THE MATTER OF

FILIQUARIAN PUBLISHING, LLC; CHOICE LEVEL, LLC; AND JOSHUA LINSK

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTIONS 604 AND 607 OF THE FAIR CREDIT REPORTING ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4401; File No. 112 3195
Complaint, April 30, 2013 – Decision, April 30, 2013

This consent order relates to Filiquarian Publishing, LLC, Choice Level, LLC, and their owner and sole officer, Joshua Linsk (collectively "respondents"), who developed and marketed a mobile application that allowed customers to conduct an unlimited number of searches for criminal records within a particular state or county. Respondents advertised that customers could use its mobile apps to screen employees or conduct credit screenings. At the same time, however, respondents issued a disclaimer stating its mobile application was not compliant with the Federal Credit Reporting Act (FCRA) and that anyone using their mobile application for employment or credit screening purposes assumed sole responsibility for FCRA compliance. The complaint alleges that respondents failed to adhere to three key requirements of the Fair Credit Reporting Act (FCRA) (1) to maintain reasonable procedures for verifying user identity and that the information would be used for a permissible purpose; (2) to ensure that the information they provided in consumer reports was accurate; and (3) to provide adequate notice to users and to those who furnished respondents with information that was included in consumer reports. The complaint further alleges respondents' disclaimers are insufficient to circumvent FCRA liability because the company expressly advertised that its reports could be used for employment purposes. The order requires respondents to comply with the relevant provisions of the FCRA, retain documents relating to their compliance with the order for a five year period.

Participants

For the *Commission*: *Jessica Lyon* and *Anthony Rodriguez.*

For the *Respondent*: *Andrea Delgadillo Ostrovsky, Calfo, Harrigan, Leyh, and Eakes*.

COMPLAINT

The Federal Trade Commission ("FTC" or "Commission"), having reason to believe that Filiquarian Publishing, LLC, Choice Level, LLC, and Joshua Linsk, individually, and as an officer of

the companies, have violated the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 et seq., and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(a), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Filiquarian Publishing, LLC ("Filiquarian") is a Minnesota company with its principal office or place of business at 3722 Las Vegas Boulevard S. #2807E, Las Vegas, NV 89158.

2. Respondent Choice Level, LLC ("Choice Level") is a Minnesota company with its principal office or place of business at 3722 Las Vegas Boulevard S. #2807E, Las Vegas, NV 89158.

3. Respondent Joshua Linsk is the owner and sole officer of the corporate respondents. During all times material to this complaint, Joshua Linsk, individually or in concert with others, formulated, directed, or controlled the policies, acts, or practices of the companies. His principal office or place of business is the same as that of Filiquarian and Choice Level.

4. The acts and practices of respondents as alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

RESPONDENTS' BUSINESS PRACTICES

5. Since at least 2010, respondent Filiquarian has operated a series of mobile applications ("apps") that it advertised consumers could use to conduct a "quick criminal background check for convictions" in specific states. Mobile apps offered by respondent Filiquarian include Alaska Criminal Records Search, Arizona Criminal Records Search, Arkansas Criminal Records Search, Connecticut Criminal Records Search, Indiana Criminal Records Search, Iowa Criminal Records Search, Minnesota Criminal Records Search, Orange County Criminal Records Search, Texas Criminal Records Search, Utah Criminal Records Search, Virginia Criminal Records Search, and Wisconsin Criminal Records Search.

6. Respondent Filiquarian represented that the apps could access hundreds of thousands of criminal records, and that users

could conduct a search on potential employees. For example, respondent Filiquarian's mobile app, Texas Criminal Record Search, included the following representation:

> "Are you hiring somebody and wanting to quickly find out if they have a record? Then Texas Criminal Record Search is the perfect application for you."

Respondent Filiquarian's mobile apps for other states included identical language, other than the name of the app.

7. Since at least 2010, respondent Filiquarian distributed and sold its mobile apps through two online stores, iTunes and Google Android store, now GooglePlay. Consumers were charged $0.99 to download the app. After downloading the app, users could conduct an unlimited number of searches for criminal record reports within a specific geographic location such as a state or county.

8. As of May 2012, respondent Filiquarian sold at least 6,879 copies of its mobile apps offering criminal record reports.

9. Respondent Choice Level provided the criminal records to respondent Filiquarian that were accessed by Filiquarian's mobile apps. In light of the common ownership and control of respondents Choice Level and Filiquarian, and respondent Filiquarian's representations that its mobile apps could be used to access criminal records for hiring purposes, respondent Choice Level was aware that the criminal records it provided would be used for employment purposes.

10. Both respondents Filiquarian and Choice Level included a disclaimer in their "terms and conditions" stating that their respective products were not to be considered screening products for insurance, employment, loans, and credit applications, among other things. Respondents' disclaimer also stated that respondents were not compliant with the FCRA and any person using respondents' information for FCRA purposes "assumes sole responsibility for compliance with the Fair Credit Reporting Act and all/any other applicable laws."

APPLICATION OF THE FCRA

11. Under Section 603(f) of the FCRA, 15 U.S.C. § 1681a(f), a company is a consumer reporting agency ("CRA") if it assembles or evaluates information on consumers for the purpose of furnishing "consumer reports" to third parties. According to Section 603(d) of the FCRA, 15 U.S.C. § 1681a(d)(1), consumer reports are communications that include information relating to an individual's character, reputation, or personal characteristics and are used or expected to be used for employment, housing, credit, or other similar purposes.

12. Respondents regularly assembled criminal records into reports that they provided to third parties in interstate commerce via mobile apps distributed by respondent Filiquarian. Despite the disclaimer discussed in Paragraph 10, respondent Filiquarian's mobile apps advertised that their reports, which were assembled from criminal records provided by Choice Level, could be used by customers for employment purposes, thus reflecting that respondents expected their reports to be used for employment purposes. Such reports are consumer reports as defined by the FCRA because they bear on a consumer's character, general reputation, personal characteristics, or mode of living and/or other attributes listed in Section 603(d) of the FCRA, 15 U.S.C. § 1681a(d)(1) and they were "used or expected to be used . . . in whole or in part" as a factor in determining a consumer's eligibility for employment.

13. In providing "consumer reports" respondents are now and have been a "consumer reporting agency" as that term is defined in Section 603(f) of the FCRA, 15 U.S.C. § 1681a(f).

VIOLATIONS OF THE FCRA

14. Respondents did not comply with or maintain any procedures related to the FCRA, as described below.

15. Section 604(a) of the FCRA, 15 U.S.C. § 1681b(a), prohibits a CRA from furnishing consumer reports to persons who the consumer reporting agency does not have a reason to believe have a "permissible purpose." According to Section 604(a) of the FCRA, 15 U.S.C. § 1681b(a), permissible purposes include use in

credit transactions, insurance underwriting, employment purposes, investment purposes, and other uses specified in the FCRA.

16. Respondents have regularly furnished consumer reports to third parties without procedures to inquire into the purpose for which the user is buying the report. Thus, respondents have violated Section 604(a) of the FCRA, 15 U.S.C. § 1681b(a).

17. Section 607(a) of the FCRA, 15 U.S.C. § 1681e(a), requires every CRA to maintain reasonable procedures to limit the furnishing of consumer reports for permissible purposes. These procedures require that the CRA, prior to furnishing a user with a consumer report, require the prospective users of the information to identify themselves to the CRA, certify the purpose for which the information is sought, and certify that the information will be used for no other purpose. The CRA must make a reasonable effort to verify the identity of each new prospective user and the uses certified prior to furnishing such user a consumer report. In addition, Section 607(a) prohibits a CRA from furnishing a consumer report to any person it has reasonable grounds to believe will not use the consumer report for a permissible purpose.

18. Respondents failed to maintain reasonable procedures to limit the furnishing of consumer reports for permissible purposes. For example, respondents failed to require that prospective users of their reports identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. By failing to limit the furnishing of reports to those who had a permissible purpose to use such a report, respondents have violated Section 607(a) of the FCRA, 15 U.S.C. § 1681e(a).

19. Section 607(b) of the FCRA, 15 U.S.C. § 1681e(b), requires CRAs to follow reasonable procedures to assure maximum possible accuracy of information concerning the individual about whom the report relates.

20. Respondents maintained no procedures to assure maximum possible accuracy of information in the reports it

provided. Accordingly, respondents have violated Section 607(b) of the FCRA, 15 U.S.C. § 1681e(b).

21. Section 607(d) of the FCRA, 15 U.S.C. § 1681e(d), requires CRAs to provide notices to all users of respondents' consumer reports; and to all persons who regularly furnish consumer report information to respondents.

22. Respondents failed to provide such notices. Accordingly, respondents have violated Section 607(d) of the FCRA, 15 U.S.C. § 1681e(d).

23. By their violations of Sections 604(a), 607(a), 607(b), and 607(d) of the FCRA, 15 U.S.C. §§ 1681b(a), 1681e(a), 1681e(b), and 1681e(d), and pursuant to Section 621(a) thereof, 15 U.S.C. § 1681s, respondents have engaged in unfair and deceptive acts and practices in or affecting commerce, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

THEREFORE, the Federal Trade Commission this thirtieth day of April, 2013, has issued this complaint against respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the Respondents named in the caption hereof, and the Respondents having been furnished thereafter with a copy of a draft Complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the Respondents with violation of the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq*; and the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq*.; and

The Respondents, their attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), which includes: a statement by Respondents that they neither admit nor deny any of the allegations in the draft complaint, except as specifically stated in the Consent Agreement, and, only for purposes of this action, admit the facts necessary to establish jurisdiction; 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 the Fair Credit Reporting 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 duly considered the comments received from interested persons, now in further conformity with the procedure described in Section 2.34 of its Rules, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and enters the following Order:

1. Respondent Filiquarian Publishing, LLC ("Filiquarian") is a Minnesota company with its principal office or place of business at 3722 Las Vegas Boulevard S. #2807E, Las Vegas, NV 89158.

2. Respondent Choice Level, LLC ("Choice Level") is a Minnesota company with its principal office or place of business at 3722 Las Vegas Boulevard S. #2807E, Las Vegas, NV 89158.

3. Respondent Joshua Linsk is an officer of the corporate respondents. During all times material to this complaint, Joshua Linsk, individually or in concert with others, formulated, directed, or controlled the policies, acts, or practices of the companies. His principal office or place of business is the same as that of Filiquarian and Choice Level.

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, "respondents" shall mean Filiquarian Publishing, LLC, a corporation; Choice Level, LLC, a corporation; their successors and assigns, and officers; Joshua Linsk, individually and as an officer of the corporations; and each of the above's agents, representatives, and employees.

2. The definitions set forth in the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681a, *et seq*., shall apply.

3. "Clear and prominent" shall mean:

   i. In textual communications (*e.g.*, printed publications or words displayed on the screen of a computer), the required disclosures are unavoidable and of a type, size, and location sufficiently noticeable for an ordinary consumer to read and comprehend them, in print that contrasts with the background on which they appear;

   ii. 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;

   iii. In communications disseminated through video means (e.g., television or streaming video), the required disclosures are in writing in a form

consistent with subparagraph (i) 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

iv. In all instances, the required disclosures are presented in an understandable language and syntax, and with nothing contrary to, inconsistent with, or in mitigation of the disclosures used in any communication of them.

4. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

5. "Permissible purpose" shall mean the circumstances under which a consumer report may be furnished as described in Section 604 of the FCRA, 15 U.S.C. § 1681b.

I.

IT IS ORDERED that respondents, whether acting directly or through any sole proprietorship, partnership, limited liability company, corporation, subsidiary, branch, division, or other business entity, in connection with the compilation, creation, sale, or dissemination of any consumer report, are hereby prohibited from:

A. Furnishing a consumer report to any person which respondents do not have reason to believe has a permissible purpose under Section 604(a) of the FCRA, 15 U.S.C. § 1681b(a);

B. Failing to maintain reasonable procedures designed to limit the furnishing of consumer reports to the purposes listed under Section 604(c) of the FCRA,15 U.S.C. § 1681b(a), as set forth in Section 607(a) of the FCRA, 15 U.S.C. § 1681e(a);

C. Failing to maintain reasonable procedures to assure the maximum possible accuracy of the information concerning the individual about whom a consumer report relates, as required by Section 607(b) of the FCRA, 15 U.S.C. § 1681e(b);

D. Failing to provide the "Notice to Users of Consumer Reports: Obligations of Users Under the FCRA" ("User Notice") required by Section 607(d) of the FCRA, 15 U.S.C. § 1681e(d), to all users of respondents' consumer reports. *Provided, however*, that respondents may provide an electronic copy of the User Notice to a user if: (a) in the ordinary course of business, the user obtains consumer report information from respondents in electronic form, and (b) the notice is clear and prominent; and

E. Failing to provide the Notice to Furnishers of Information: Obligations of Furnishers Under the FCRA ("Furnisher Notice") required by Section 607(d) of the FCRA, 15 U.S.C. § 1681e(d), to all furnishers of consumer report information to respondents. Provided, however, that respondents may provide an electronic copy of this notice to a furnisher if: (a) in the ordinary course of business, the furnisher provides consumer report information to respondents in electronic form, and (b) the notice is clear and prominent.

II.

IT IS FURTHER ORDERED that, for five (5) years after the date of issuance of this order, respondents, and their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission business records demonstrating compliance with the terms and provisions of this order, including but not limited to:

A. Files containing the names, addresses, telephone numbers, and all certifications made by persons seeking to obtain consumer reports, including but not limited to reports containing criminal record

information, from respondents, and all materials considered by respondents in connection with their verification of the identity of those persons and verification of the certifications made by those persons;

B. Copies of all training materials and marketing materials that relate to respondents' provision of consumer reports as alleged in the complaint and respondents' compliance with the provisions of this order; and

C. All records necessary to demonstrate full compliance with each provision of this order, including all submissions to the Commission.

III.

IT IS FURTHER ORDERED that, for five (5) years after the date of issuance of this order, respondents, and their successors and assigns, shall deliver a copy of this order to: (1) all current and future principals, officers, and directors; and (2) all current and future managers, employees, agents and representatives who have 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, with any electronic signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq*. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of the order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

IT IS FURTHER ORDERED that respondents and their successors and assigns shall notify the Commission at least thirty (30) days prior to any change in a respondent that may affect compliance obligations arising under this order, including but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor company; the

creation or dissolution of a subsidiary, 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 a respondent's name or address. *Provided, however*, that with respect to any proposed change about which a respondent learns less than thirty (30) days prior to the date such action is to take place, the 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 sent by overnight courier (not the U.S. Postal Service) to the 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 Filiquarian Publishing, LLC, FTC File Number 1123195. 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.

V.

IT IS FURTHER ORDERED that respondents and their successors and assigns shall, within sixty (60) days after the date of service of this order, file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which respondents have complied 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.

VI.

This order will terminate on April 30, 2033, 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 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 respondents did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that this order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Filiquarian Publishing, LLC; Choice Level, LLC; and Joshua Linsk, individually, and as an officer of the companies.

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 administrative complaint alleges that the companies were operating as consumer reporting agencies

without any procedures or policies in place to comply with the Fair Credit Reporting Act ("FCRA").

The respondents sold background screening reports containing criminal records through mobile applications ("apps") available in the iTunes and Google Android store (now GooglePlay) and through a website. Filiquarian developed and marketed apps that sold for $0.99 each and allowed purchasers to conduct unlimited searches of criminal history information within a specific geographic area, such as a state or county. Each app included an express representation that purchasers could use the reports for employment purposes. Choice Level provided the underlying records accessed by purchasers of the Filiquarian apps. Joshua Linsk is the owner and sole officer of Filiquarian and Choice Level. During all times material to this complaint, Linsk, individually or in concert with others, formulated, directed, or controlled the policies, acts, or practices of the companies.

According to the complaint, despite Filiquarian clearly promoting its background reports for use in employment screening, both Filiquarian and Choice Level included disclaimers in their terms and conditions stating that their reports were not to be considered a screening product for insurance, employment, or credit, and that they were not compliant with the FCRA. Such disclaimers contradicted and failed to counteract the express representations made in Filiquarian's advertising, urging the use of the reports to screen potential employees. Marketing and selling background screening reports to potential employers without implementing any of the accuracy or dispute safeguards required by the FCRA potentially exposes a large number of consumers to harm to their reputations and employment prospects.

The complaint alleges that the reports produced by respondents were consumer reports under the FCRA and that respondents lacked any policies or procedures to comply with the FCRA. Specifically, the complaint alleges that respondents failed to adhere to three key requirements of the FCRA: to maintain reasonable procedures to verify who their users are and that the information would be used for a permissible purpose; to ensure that the information they provided in consumer reports was accurate; and to provide notices to users and to those who furnished proposed respondents with information that was

included in consumer reports. The complaint further alleges that by their violations of the FCRA, as stated above, proposed respondents have engaged in unfair and deceptive acts and practices, in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

The proposed consent order contains provisions designed to prevent the respondents from engaging in the future in practices similar to those alleged in the complaint.

Part I of the order includes injunctive relief requiring respondents to comply with the relevant provisions of the FCRA. Parts II through VI are reporting and compliance provisions. Part II requires respondents to retain documents relating to their compliance with the order for a five-year period. Part III requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part IV ensures notification to the FTC of changes in corporate status. Part V mandates that respondents submit a compliance report to the FTC within 60 days, and periodically thereafter as requested. Part VI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of this 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.

IN THE MATTER OF

PRÁXEDES E. ALVAREZ SANTIAGO, M.D., DANIEL PÉREZ BRISEBOIS, M.D., JORGE GRILLASCA PALAU, M.D., RAFAEL GARCÍA NIEVES, M.D., FRANCIS M. VÁZQUEZ ROURA, M.D., ANGEL B. RIVERA SANTOS, M.D., COSME D. SANTOS TORRES, M.D., AND JUAN L. VILARÓ CHARDÓN, M.D.

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

Docket No. C-4402; File No. 121 0098
Complaint, May 1, 2013 – Decision, May 1, 2013

This consent order relates to eight physicians located in southwestern Puerto Rico which provide nephrology services for commercial, Medicare and Medicaid patients through contracts with various payers. The Medicaid program in Puerto Rico, Mi Salud, is administered by Administración de Seguros de Salud (ASES), a public corporation that is charged with ensuring that Puerto Rico residents have access to full medical services, including the kidney treatments that respondents provide. ASES contracts with two health plans, Humana Health plans and Triple-S. The complaint alleges that respondents jointly terminated their contracts with Humana and refused to treat patients enrolled in Mi Salud in an effort to extract higher reimbursements rates. The order bars respondents from collectively refusing to treat patients and requires the physicians to notify the Federal Trade Commission before entering into certain joint arrangements.
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Participants

For the *Commission*: *Linda Blumenreich, Garry Gibbs, Melea Greenfeld,* and *Tim Slattery.*

For the *Respondents*: *Carlos A. Del Valle Cruz*.

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 Respondents Práxedes E. Alvarez Santiago, M.D., Daniel Pérez Brisebois, M.D., Jorge Grillasca Palou, M.D., Rafael García Nieves, M.D., Francis M. Vázquez Roura, M.D., Angel B. Rivera Santos, M.D., Cosme D. Santos Torres, M.D., and Juan L. Vilaró Chardón, M.D., ("Respondents") violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint, stating its charges in that respect as follows:

I. NATURE OF THE CASE

1. This matter concerns an agreement among eight independent nephrologists in southwestern Puerto Rico to fix the prices and conditions under which they would participate in Mi Salud, the Commonwealth of Puerto Rico's Medicaid program for providing healthcare services to indigent residents. In furtherance of their conspiracy, Respondents collectively terminated their participation in the Mi Salud program in southwestern Puerto Rico after the program's regional administrator, Humana Health Plans of Puerto Rico, Inc. ("Humana") refused to accede to Respondents' demands to restore a cut in reimbursements for certain patients eligible for benefits under both Medicare and Mi Salud ("dual eligibles"). After Respondents terminated their service agreements with Humana, they refused to treat any of Humana's Mi Salud patients. As a result, Respondents have unreasonably restrained competition and engaged in unfair methods of competition in violation of the Federal Trade Commission Act.

II. RESPONDENTS

2. Respondents are individuals licensed to practice medicine in the Commonwealth of Puerto Rico and engaged in the business of providing nephrology services to patients for a fee. They represent all of the nephrologists in the southwest region who participate in the Humana Mi Salud program and almost 90 percent of all nephrologists in the region. Their respective names and business addresses are:

(1) Praxedes E. Alvarez Santiago, M.D., 2916 Avenue Emilio Fagot, Suite 1, Ponce, PR 00716-3611.

(2) Daniel Pérez Brisebois, M.D., 3011 Avenue Emilio Fagot, Ponce, PR 00716.

(3) Jorge Grillasca Palou, M.D., 302 Torre San Cristobal, Coto Laurel, PR 00780.

(4) Rafael Garcia Nieves, M.D., 909 Avenue Tito Castro, Torre Medica San Lucas, Suite 723, Ponce, PR 00716.

(5) Francis M. Vázquez Roura, M.D.,1203 Avenue Muñoz Rivero, Ponce, PR 00717-0634.

(6) Angel B. Rivera Santos, M.D., Caribbean Medical Centre, Suite 202-2275, Ponce By-Pass, Ponce, PR 00731.

(7) Cosme D. Santos Torres, M.D., 3011 Avenue Emilio Fagot, Ponce, PR 00716.

(8) Juan L. Vilaró Chardón, M.D., Edificio Parra, Oficina 302, Ponce, PR 00731.

III. JURISDICTION AND INTERSTATE COMMERCE

3. At all times relevant to this Complaint, Respondents have been engaged in the business of contracting with third parties for the provision of nephrology services to persons for a fee.

4. The general business practices of Respondents, including the acts and practices alleged herein, are in or affecting "commerce," as defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

5. Except to the extent that competition has been restrained as alleged herein, Respondents have been, and are now, in competition with each other for the provision of nephrology services to persons for a fee.

6. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over Respondents, who are "persons" within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44, and the proceeding is in the public interest.

IV. BACKGROUND

7. Certain government-sponsored healthcare programs contract with physicians, hospitals, and other providers of healthcare services in a geographic area to create a network of healthcare providers that have agreed to provide healthcare services to enrollees covered under these healthcare programs.

8. To become members of these programs' provider networks, physicians often enter into contracts with the programs that establish the terms and conditions, including fees and other competitively significant terms, for providing healthcare services to enrollees covered by the government-sponsored healthcare programs. Physicians entering into such contracts often agree to reductions in their usual compensation in order to obtain access to additional patients made available to them by the programs' coverage of their enrollees. Such reductions in physician fees may permit government-sponsored healthcare programs to reduce their costs and offer broader benefits coverage to their enrollees.

V. MI SALUD PROGRAM

9. Puerto Rico's Mi Salud program is administered by Administración de Seguros de Salud ("ASES"), a public corporation that is charged with ensuring that the more than 1.5 million indigent residents of Puerto Rico have access to a full complement of medical services. ASES determines the benefits Mi Salud members will receive. ASES contracts with two health plans, Humana and Triple-S, to facilitate the provision of medical services to Mi Salud members and payments to participating providers. Administration of the Mi Salud program takes place in eight regions in Puerto Rico. Humana administers and insures the program in three regions: the east, the southeast, and the southwest. Triple-S administers the program in the other five regions.

10. In October 2010, the Mi Salud reimbursement program was modified for persons eligible for both Medicare and Medicaid ("dual eligibles"). Under the previous program, called La Reforma, providers received 100 percent of the Medicare established rate for dual eligibles. As the primary payer, Medicare paid 80 percent, and payers administering the Mi Salud program paid the remaining 20 percent coordination of benefits amount ("20 percent COB"). Under the Mi Salud program, providers no longer received a coordination of benefits amount for dual eligibles, except in rare circumstances. Thus, Respondents' reimbursements were lower under Mi Salud than they had previously been under La Reforma.

11. In November and December of 2010, all participating providers, including Respondents, signed agreements with Humana that reflected the change in the reimbursement policy. For several months after entering into new agreements, Humana continued to reimburse Respondents at the 20 percent COB rate under the preexisting La Reforma policy. As a result Respondents received greater reimbursements than they were entitled to under the new reimbursement policy in their contracts with Humana. In May 2011, Humana began implementing the new reimbursement policy. Humana also began recovering overpayments made to providers, including Respondents, under the old formula by deducting the overpayments from current reimbursements.

VI. ANTICOMPETITIVE CONDUCT

12. Respondents have acted collectively to restrain competition by engaging in conduct such as:

(a) negotiating, entering into, and implementing agreements to fix the prices upon which they would contract with Humana; and

(b) terminating their contracts with Humana and refusing to treat Humana patients enrolled in the Mi Salud program in response to Humana's unwillingness to accede to Respondents' price-related demands.

Complaint

A. Joint Negotiations

13. Respondents' conduct unfolded in three phases. First, between October 2011 and March 2012, Respondents repeatedly pressed Humana for higher reimbursement rates and ultimately collectively terminated their participation in the Mi Salud program. Second, immediately after terminating their contracts with Humana, Respondents refused to treat Humana's Mi Salud patients. Finally, ASES, concerned over access by Mi Salud patients to nephrology services in the southwest region, acquiesced to Respondents' demands and retroactively reinstated the 20 percent COB reimbursement rate.

14. Respondents began pressing their case for the reinstatement of the higher reimbursement in an October 28, 2011 email to Humana. In that email, Respondent Jorge Grillasca Palou, MD, wrote:

> Under the present conditions, I can anticipate that I will not continue offering services to Humana patients if these [policies for payment for services to dual eligibles] are not modified. Please remember that the renal population requires our services to stay alive and in good health. I am legitimately concerned that service may be affected for patients that can only [emphasis in original] be attended by a nephrologist. Loosing [sic] nephrology services for your population may create a complicated and dangerous situation, especially for critical care patients in a hospital.
>
> He requested that Humana "hold an urgent meeting with me and other colleagues that share the same concern." Dr. Grillasca copied the other Respondents on the email.

15. On December 8, 2011, Humana met with two of the Respondents, Dr. Angel Rivera Santos and Dr. Daniel Perez Brisebois, to discuss the reimbursement policy. During the meeting they pressed Humana to pay the 20 percent COB, and Dr. Perez handed to Humana a proposed schedule of codes for which Respondents wanted rate increases.

16. On December 9, 2011, the day after the meeting, Respondent Dr. Rivera sent to Humana an email stating,

> I understand as well that I have the right to receive the 20 percent that has been denied. It will depend on these issues if I decided to continue my professional relationship with Humana Mi Salud. Also remember that I am waiting for your response related to the newly proposed rates that were handed to you yesterday by my colleague Dr. Daniel Perez. I will expect your answer concerning these issues on or before December 16, 2011.

Dr. Rivera copied all of the other Respondents on the email.

17. In a separate email sent to Humana on December 9, 2011, Dr. Grillasca expressed his support for Dr. Rivera's demand for the reinstatement of the 20 percent COB and implementation of Respondents' proposed fee schedule. "I am echoing the expressions of my colleague Dr. Angel Rivera Santos. I hope we communicate early next week to solve the pending issues." Dr. Grillasca copied all of the other Respondents on the email.

18. Hoping to avoid the possible loss of nephrology services for Mi Salud patients, ASES called a meeting of Respondents, Humana and others on February 16, 2012. ASES explained at that meeting that the new reimbursement formula was a government rule and would not be changed because the government had a very limited budget. Despite the ASES explanation, Respondents continued to jointly seek a rate increase. At the end of the meeting Respondents presented Humana a revised schedule of fees and codes for which they wanted increased payments.

19. Two weeks later Respondents again sent Humana a schedule of proposed fee increases and threatened to terminate their contracts with Humana if the payer did not agree to their price demands by March 1, 2012. Dr. Grillasca sent an email to Humana on February 28, 2012, stating,

> [W]e sent you a proposal of revised rates so I can continue offering nephrology and dialysis services in the south of Puerto Rico . . . . I am sending once again the proposed

> rates in this e-mail. If I do not receive an answer before March 1, 2012, I will think that you are no longer interested in my services and I shall rescind providing services to Humana Mi Salud patients effective March 1.

Dr. Grillasca copied all of the other Respondents on the email.

B. Contract Termination and Refusal to Treat Humana Mi Salud Nephrology Patients

20. When Humana failed to agree to their price demands by the March 1, 2012 deadline, Respondents carried out their joint threat to terminate their contracts with Humana. Between March 1 and March 5, 2012, each of the Respondents sent to Humana a virtually identical termination letter. Respondents terminated their contracts with Humana. Dr. Grillasca copied the other Respondents on his termination letter to Humana.

21. Respondents also collectively agreed to withhold nephrology services from Humana Mi Salud patients, despite provisions in their contracts with Humana requiring them to provide 120 days written notice before terminating their medical services. On at least two instances Respondents collectively refused to treat Humana's Mi Salud patients needing urgent nephrology services because of their dispute with Humana over reimbursement rates.

22. On March 13, 2011, a multi-specialty practice group near Ponce sent to the emergency room of a hospital in Ponce a patient needing admission because of critical renal failure. Dr. Grillasca told the hospital emergency room staff that none of the nephrologists were accepting Humana's Mi Salud patients because of a disagreement with Humana over rates. The patient's condition worsened, and because the hospital could not identify a nephrologist in the southwest region to provide medical services to the patient, it became necessary to transfer the patient to another hospital 74 miles away, in San Juan. An official from the practice group emailed Humana representatives regarding the situation, stating that, "the nephrologists in our region are not accepting the Mi Salud plan. According to Dr. Jorge Grillasca, this is due to a disagreement regarding rates. Meanwhile, the

nephrology patients are suffering the consequences." The official asked for an evaluation of the situation as soon as possible, "since this problem could have greater consequences for nephrology patients."

23. On the same day, Respondents refused to treat a Humana Mi Salud patient admitted to another hospital in Ponce with a renal illness. The patient was pregnant, had a history of bronchial asthma, and needed nephrology services. According to the notes of the nurses and the unit coordinator, calls were made to all eight of the Respondents, but all said they did not accept Mi Salud patients. Hospital staff recommended transferring the patient to another hospital 67 miles away, but the family objected because of the distance.

24. Respondents eventually began treating patients again only after being ordered to do so by the Office of the Health Advocate, who determined that Respondents' immediate terminations violated the notice provision in their contracts and the continuation of services requirement in the Puerto Rico Patient's Bill of Rights and Responsibilities.

C. Resulting Increase in Reimbursement

25. Respondents' refusal to treat Humana's Mi Salud patients forced ASES to ultimately accede to Respondents' demands for reinstatement of the policy requiring payment of the 20 percent COB. On June 13, 2012, ASES issued Circular Letter No. 12-0613, stating that retroactive to March 16, 2012, it would require insurers to pay the 20 percent COB to all healthcare providers, essentially abandoning the new reimbursement formula and adopting the reimbursement policy under La Reforma. ASES reinstated the 20 percent COB because it was concerned about lack of access to nephrology services for its Mi Salud members, and believed that it had no other choice but to accede to adopting the 20 percent COB reimbursement policy. ASES believes that reinstating this reimbursement will increase the annual costs of the Mi Salud program by between $4 and $6 million.

VII. NO LEGITIMATE JUSTIFICATION FOR THE CONDUCT

26. Respondents' conduct is not reasonably related to achieving any efficiency-enhancing integration. Respondents have undertaken no activities to integrate their delivery of nephrology services and thus cannot justify the conduct described in the foregoing paragraphs. They neither shared financial risk in providing nephrology services nor clinically integrated their delivery of care to patients.

VIII. ANTICOMPETITIVE EFFECTS

27. Respondents' actions have the purpose and had the effect of unreasonably restraining trade and hindering competition in the provision of nephrology services in the southwest region of Puerto Rico by:

(a) depriving third-party payers and consumers of the benefits of such competition;

(b) increasing prices of nephrology services to Mi Salud; and

(c) collectively withholding treatment from Mi Salud patients, resulting in significant and real consequences to patients.

IX. VIOLATION OF THE FTC ACT

28. 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 first day of May, 2013.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of Praxedes E. Alvarez Santiago, M.D., Daniel Pérez Brisebois, M.D., Jorge Grillasca Palou, M.D., Rafael Garcia Nieves, M.D., Francis M. Vázquez Roura, M.D., Angel B. Rivera Santos, M.D., Cosme D. Santos Torres, M.D., and Juan L. Vilaró Chardón, M.D., hereinafter referred to as "Respondents," and Respondents 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 Respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order to Cease and Desist ("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 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 Respondents

have 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 by an interested person, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues the following Order:

1. Respondent Praxedes E. Alvarez Santiago, M.D., is an individual licensed to practice medicine in the Commonwealth of Puerto Rico and engaged in the business of providing nephrology services to patients for a fee with a business address of 2916 Avenue Emilio Fagot, Suite 1, Ponce, PR 00716-3611.

2. Respondent Daniel Pérez Brisebois, M.D., is an individual licensed to practice medicine in the Commonwealth of Puerto Rico and engaged in the business of providing nephrology services to patients for a fee with a business address of 3011 Avenue Emilio Fagot, Ponce, PR 00716.

3. Respondent Jorge Grillasca Palou, M.D., is an individual licensed to practice medicine in the Commonwealth of Puerto Rico and engaged in the business of providing nephrology services to patients for a fee with a business address of 302 Torre San Cristobal, Coto Laurel, PR 00780.

4. Respondent Rafael Garcia Nieves, M.D., is an individual licensed to practice medicine in the Commonwealth of Puerto Rico and engaged in the business of providing nephrology services to patients for a fee with a business address of 909 Avenue Tito Castro, Torre Medica San Lucas, Suite 723, Ponce, PR 00716.

5. Respondent Francis M. Vázquez Roura, M.D., is an individual licensed to practice medicine in the

Commonwealth of Puerto Rico and engaged in the business of providing nephrology services to patients for a fee with a business address of 1203 Avenue Muñoz Rivero, Ponce, PR 00717-0634.

6. Respondent Angel B. Rivera Santos, M.D., is an individual licensed to practice medicine in the Commonwealth of Puerto Rico and engaged in the business of providing nephrology services to patients for a fee with a business address of Caribbean Medical Centre, Suite 202-2275, Ponce By-Pass, Ponce, PR 00731.

7. Respondent Cosme D. Santos Torres, M.D., is an individual licensed to practice medicine in the Commonwealth of Puerto Rico and engaged in the business of providing nephrology services to patients for a fee with a business address of 3011 Avenue Emilio Fagot, Ponce, PR 00716.

8. Respondent Juan L. Vilaró Chardón, M.D., is an individual licensed to practice medicine in the Commonwealth of Puerto Rico and engaged in the business of providing nephrology services to patients for a fee with a business address of Edificio Parra, Oficina 302, Ponce, PR 00731.

9. The Federal Trade Commission has jurisdiction over 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. "Respondents" means the following individuals (both individually and collectively): Praxedes E. Alvarez Santiago, M.D.; Daniel Pérez Brisebois, M.D.; Jorge

Grillasca Palou, M.D.; Rafael Garcia Nieves, M.D.; Francis M. Vázquez Roura, M.D.; Angel B. Rivera Santos, M.D.; Cosme D. Santos Torres, M.D.; and Juan L. Vilaró Chardón, M.D.

B. "Commission" means the Federal Trade Commission.

C. "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.

D. "Medical Group Practice" means a bona fide, integrated firm in which Physicians practice medicine together as partners, shareholders, owners, or employees, or in which only one Physician practices medicine.

E. "Non-exclusive Arrangement" means an arrangement that does not restrict the ability of, or facilitate the refusal of, Physicians who Participate in it to deal with Payers on an individual basis or through any other arrangement.

F. "Order Date" means the date this Decision and Order is issued by the Commission to become final and effective.

G. "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 Payor 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."

H. "Payor" means any Person that pays, or arranges for payment, for all or any part of any Physician services for itself or for any other Person. The term "Payor" includes any Person that develops, leases, or sells access to networks of Physicians.

I. "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.

J. "Physician" means a doctor of allopathic medicine ("M.D.") or a doctor of osteopathic medicine ("D.O.").

K. "Principal Address" means either: (1) primary business address, if there is a business address, or (2) primary residential address, if there is no business address.

L. "Qualified Clinically-Integrated Joint Arrangement" means an arrangement to provide Physician services in which:

1. all Physicians who Participate in the arrangement Participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among the Physicians who Participate in the arrangement, in order to control costs and ensure the quality of services provided through the arrangement; and

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

M. "Qualified Risk-Sharing Joint Arrangement" means an arrangement to provide Physician services in which:

1. all Physicians who Participate in the arrangement share substantial financial risk through their Participation in the arrangement and thereby create incentives for the Physicians who Participate jointly to control costs and improve quality by managing the provision of Physician services such as risk-sharing involving:

    a. the provision of Physician services at a capitated rate;

    b. the provision of Physician services for a predetermined percentage of premium or revenue from Payers;

    c. the use of significant financial incentives (e.g., substantial withholds) for Physicians who Participate to achieve, as a group, specified cost-containment goals; or

    d. the provision of a complex or extended course of treatment that requires the substantial coordination of care by Physicians in different specialties offering a complementary mix of services, for a fixed, predetermined price, when the costs of that course of treatment for any individual patient can vary greatly due to the individual patient's condition, the choice, complexity, or length of treatment, or other factors; and

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

N. "Qualified Arrangement" means a Qualified Clinically-Integrated Joint Arrangement or a Qualified Risk-Sharing Joint Arrangement.

II.

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

A. entering into, adhering to, Participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding:

1. to negotiate on behalf of another Physician(s) with any Payor;

2. to refuse to deal, or threaten to refuse to deal with any Payor; or

3. regarding any term, condition, or requirement upon which another Physician(s) deals, or is willing to deal, with any Payor, including, but not limited to, price terms.

B. exchanging or facilitating in any manner the exchange or transfer of information with another Physician(s) concerning that Physician's willingness to deal with a Payor, or the terms or conditions, including price terms, on which that Physician(s) is willing to deal with a Payor;

C. entering into, adhering to, Participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among another Physician(s) to withhold Physician services from any Person;

D. exchanging or facilitating in any manner the exchange or transfer of information among Physicians concerning any Physician's willingness to offer or withhold Physician services from any Person;

E. attempting to engage in any action prohibited by Paragraphs II.A, II.B., II.C. or II.D. of this Order; and

F. encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any Person to engage in any action that would be prohibited by Paragraph II of this Order;

provided, however, that nothing in this Paragraph II shall prohibit any agreement or conduct between the Respondents that, subject to the requirements of Paragraphs III of this Order, is reasonably necessary to form, Participate in, or take any action in furtherance of, a Qualified Arrangement, so long as such Qualified Arrangement is a Non-exclusive Arrangement.

III.

IT IS FURTHER ORDERED that:

A. For three (3) years from the date this Order becomes final, pursuant to each Qualified Arrangement in which any Respondent is a Participant, Respondent shall notify the Commission in writing ("Paragraph III Notification") at least sixty (60) days prior to:

1. Participating in, organizing, or facilitating any discussion or understanding with or among any Physicians or Medical Group Practices in such Qualified Arrangement relating to price or other terms or conditions of dealing with any Payor; or

2. contacting a Payor, pursuant to a Qualified Arrangement to negotiate or enter into any agreement concerning price or other terms or conditions of dealing with any Payor, on behalf of

any Physician or Medical Group Practice in such Qualified Arrangement.

B. The Paragraph III Notification shall include the following information regarding the Qualified Arrangement:

1. the total number of Physicians and the number of Physicians in each specialty Participating in the Qualified Arrangement;

2. a description of the Qualified Arrangement, including its purpose and geographic area of operation;

3. a description of the nature and extent of the integration and the efficiencies resulting from the Qualified Arrangement;

4. an explanation of the relationship of any agreement on prices, or contract terms related to price, to furthering the integration and achieving the efficiencies of the Qualified Arrangement;

5. a description of any procedures proposed to be implemented to limit possible anticompetitive effects resulting from the Qualified Arrangement or its activities; and

6. all studies, analyses, and reports that were prepared for the purpose of evaluating or analyzing competition for Physician services in any relevant market, including, but not limited to, the market share of Physician services in any relevant market.

C. If, within sixty (60) days from the Commission's receipt of the Paragraph III Notification, a representative of the Commission makes a written request to any Respondent for additional information, then Respondent shall not Participate in any arrangement described in the Respondent's Paragraph III Notification prior to the expiration of thirty (30)

days after substantially complying with such request for additional information, or such shorter waiting period as may be granted in writing from the Bureau of Competition;

D. The expiration of any waiting period described herein without a request for additional information, or without the initiation of an enforcement proceeding, shall not be construed as a determination by the Commission, or its staff, that the proposed Qualified Arrangement does or does not violate this Order or any law enforced by the Commission;

E. The absence of notice that the proposed Qualified Arrangement has been rejected, regardless of a request for additional information, shall not be construed as a determination by the Commission, or its staff, that the proposed Qualified Arrangement has been approved;

F. Receipt by the Commission of any Paragraph III Notification regarding Participation pursuant to a proposed Qualified Arrangement is not to be construed as a determination by the Commission that any such proposed Qualified Arrangement does or does not violate this Order or any law enforced by the Commission; and

G. Paragraph III Notification shall not be required prior to Participating in any Qualified Arrangement for which Paragraph III Notification has previously been given and where any waiting period for the previously submitted notification pursuant to this Order has expired.

IV.

IT IS FURTHER ORDERED that each Respondent shall:

A. Within thirty (30) days after the Order Date distribute a copy of this Order and the Complaint:

1. by (i) first-class mail with delivery confirmation, (ii) electronic mail with return receipt confirmation, or (iii) in-person delivery with a signed acknowledgment of receipt by the recipient, to:

   a. every Physician who Participates, or has Participated, in Respondent's Medical Practice Group at any time since January 1, 2010; and

   b. each current officer, director, manager, and employee of Respondent's Medical Group Practice;

2. by first-class mail, return receipt requested to the highest-ranking executive (e.g., chief executive officer) of each Payor with whom Respondent has a record of being in contact since January 1, 2010, regarding contracting for the provision of Physician services.

B. For three (3) years from the Order Date distribute a copy of this Order and the Complaint:

1. by (i) first-class mail, return receipt requested, (ii) electronic mail with return receipt confirmation, or (iii) in-person delivery with a signed acknowledgment of receipt from the recipient, to:

   a. each Physician who begins Participating in Respondent's Medical Group Practice, and who did not previously receive a copy of this Order and the Complaint from Respondents within thirty (30) days of the time that such Participation begins;

   b. each Person who becomes an officer, director, manager, or employee of the Respondent's Medical Group Practice, and who did not previously receive a copy of this Order and the Complaint from Respondent, within thirty (30)

days of the time that he or she assumes such position; and

2. by first-class mail, return receipt requested, to the highest-ranking executive (e.g., chief executive officer) of each Payor who contracts with Respondent for the provision of Physician services, and who did not previously receive a copy of this Order and the Complaint from Respondent, within thirty (30) days of the time that such Payor enters into such contract.

V.

IT IS FURTHER ORDERED that:

A. Within sixty (60) days from the Order Date, each Respondent shall file a verified written report setting forth in detail the manner in which the Respondent intends to comply, is complying and has complied with the Order.

B. One (1) year after the Order Date, annually thereafter for the next three (3) years on the anniversary of the Order Date, and at such other times as the Commission may by written notice require, each Respondent shall file a verified written report setting forth in detail the manner in which the Respondent intends to comply, is complying and has complied with the Order.

C. Each of the above-described reports by a Respondent shall include, among other information that may be necessary:

1. The name, address, and telephone number of each Payor with which Respondent has had any contact during the one (1) year period preceding the date for filing such report;

2. Copies of the delivery confirmations obtained from the recipients by the Respondent in connection

with the Respondent's distribution of the Order and Complaint as required by Paragraph IV.

VI.

IT IS FURTHER ORDERED that each Respondent shall notify the Commission of any change in Respondent's Principal Address within twenty (20) days of such change in address.

VII.

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

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on May 1, 2033.

By the Commission.

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with Práxedes E. Alvarez Santiago, M.D., Daniel Pérez Brisebois, M.D., Jorge Grillasca Palou, M.D., Rafael García Nieves, M.D., Francis M. Vázquez Roura, M.D., Angel B. Rivera Santos, M.D., Cosme D. Santos Torres, M.D., and Juan L. Vilaró Chardón, M.D. ("Respondents"). The agreement settles charges that Respondents violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by jointly negotiating contracts to fix the prices for their services and by collectively refusing to deal with a third-party payer in Puerto Rico.

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

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

The Proposed Complaint

Respondents are eight independent physicians in southwestern Puerto Rico who provide nephrology services for commercial, Medicare, and Medicaid patients through contracts with various payers. Respondents constitute almost 90 percent of the nephrologists in the southwestern region of Puerto Rico.

Analysis to Aid Public Comment

The Medicaid program in Puerto Rico, Mi Salud, is administered by Administración de Seguros de Salud ("ASES"), a public corporation that is charged with ensuring that the more than 1.5 million indigent residents of Puerto Rico have access to a full complement of medical services. ASES determines the benefits Mi Salud members will receive. ASES contracts with two health plans, Humana Health Plans of Puerto Rico, Inc. ("Humana") and Triple-S, to facilitate the provision of medical services to Mi Salud members and payments to participating providers. Humana administers the Mi Salud program in the southwestern region of Puerto Rico, where the Respondents do business.

The Mi Salud reimbursement program was modified in October 2010 for Mi Salud members who are also covered by Medicare ("dual eligibles"). Under the previous program Medicare paid 80 percent of its established rate, and payers administering the Mi Salud program paid the remaining 20 percent, known as the coordination of benefits amount ("20 percent COB"). After October 2010, providers no longer received a coordination of benefits amount for dual eligibles, except in rare circumstances. As a result of this change, providers' reimbursements decreased for dual eligibles under the Mi Salud program.

The proposed complaint alleges that Respondents collectively (1) negotiated in an attempt to extract higher reimbursement rates by fixing the prices upon which Respondents would contract with Humana and (2) terminated their contracts with Humana and refused to treat Humana patients enrolled in the Mi Salud program because Humana would not acquiesce to Respondents' price-related demands.

The joint price negotiations and collective refusals to deal commenced in late 2011. On October 28, 2011, Dr. Jorge Grillasca sent an email to Humana stating that Humana's failure to reimburse the full 20 percent COB would force him to discontinue his treatment of Humana's Mi Salud members and create a dangerous situation for these patients. He requested that Humana "hold an urgent meeting with me and other colleagues that share the same concern." He copied all of the other Respondents on this email.

Analysis to Aid Public Comment

The meeting occurred on December 8, 2011, when two of the Respondents, Dr. Angel Rivera Santos and Dr. Daniel Perez, met with Humana representatives to discuss the 20 percent COB. During that meeting, Dr. Daniel Perez presented to Humana a fee schedule that proposed higher reimbursement rates. The next day Dr. Rivera Santos wrote an email to Humana stating, "I understand as well that I have the right to receive the 20% that had been denied. It will depend on these issues if I decide to continue my professional relationship with Humana Mi Salud. Also remember that I am waiting for your response related to the newly proposed rates that were handed to you yesterday by my colleague Dr. Daniel Perez." Dr. Rivera Santos copied all the other Respondents on this email.

The following February 2012, ASES and Humana met with Respondents to discuss the 20 percent COB rule. At the conclusion of the meeting, Dr. Grillasca presented to Humana a fee schedule proposing increased rates. On February 28, 2012, Dr. Grillasca stated in an email to Humana that the payer had until March 1, 2012, to respond to the Respondents' proposed fee schedule. He copied the other Respondents on this email. When Humana did not respond by the March 1 deadline, all eight Respondents terminated their Mi Salud service agreements with Humana with virtually identical letters.

Respondents immediately ceased providing nephrology services to Humana Mi Salud patients despite having a legal obligation under their contract with Humana to continue providing services for 120 days after giving written notice of termination. The termination of services had significant and real consequences to patients. In one instance, a patient with critical renal failure arrived at an area hospital in need of immediate care and likely long-term dialysis treatment. All of the nephrologists refused to treat the patient, whose condition worsened and who was later transferred to a hospital 74 miles away in San Juan. Dr. Grillasca told hospital personnel that the nephrologists were not taking Mi Salud patients due to a disagreement with Humana over rates. On the same day, Respondents refused to treat another Humana Mi Salud patient admitted to another area hospital with a renal illness. The patient's family objected to the patient's

transfer to a hospital with nephrology services that was 67 miles away. Respondents eventually began treating patients again only after being ordered to do so by Puerto Rico's Office of the Health Advocate.

ASES ultimately agreed to Respondents' demand for higher reimbursement rates. ASES believed it had no choice but to acquiesce to Respondents' demands because of its concerns over access to nephrology services for Mi Salud patients. On June 13, 2012, ASES abandoned the new reimbursement formula and reinstated the 20 percent COB. The requirement that payers reimburse providers the full 20 percent COB, retroactive to March 16, 2012, is estimated to cost ASES and the Mi Salud program an additional $4 million to $6 million annually. Thus, the denial of nephrology services and the demands for higher reimbursement rates caused substantial harm to the consumers of Puerto Rico.

Finally, the proposed complaint alleges that Respondents' actions were a naked agreement to fix prices and a collective refusal to deal, not related to any efficiency-enhancing justification or any efforts at clinical or financial integration. Respondents, at all times relevant to the proposed complaint, maintained separate, independent nephrology practices and made no attempt to share the financial risk in the provision of nephrology services or to clinically integrate the delivery of care to patients, which might justify the otherwise illegal joint activity.

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 not prohibiting the Respondents to engage in legitimate joint conduct in the future, if they so choose.

Paragraph II of the proposed consent order prevents Respondents from continuing the challenged conduct. In particular, Paragraph II.A prevents Respondents from entering into or participating in agreements: (1) to negotiate on behalf of another physician with any payer, (2) to refuse to deal, or threaten to refuse to deal with any payer, or (3) regarding any term, condition, or requirement upon which another physician deals, or

is willing to deal, with any payer, including, but not limited to, price terms.

The other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits Respondents from exchanging information with another physician concerning whether and on what terms that other physician is willing to contract with a payer. Paragraph II.C prevents Respondents from entering into agreements to withhold services from any person. Paragraph II.D bars Respondents from exchanging information among physicians concerning any physician's willingness to offer or withhold services from any person. Paragraph II.E prohibits attempts to engage in the actions precluded by Paragraphs II.A, II.B, II.C, or II.D. Paragraph II.F proscribes encouraging or attempting to induce any action that would be prohibited by Paragraph II. Nothing in Paragraph II prohibits any agreement or conduct among Respondents that is reasonably necessary to a Qualified Arrangement.

Paragraph III requires Respondents to provide the Commission with notice and certain information before entering into a Qualified Arrangement. Paragraph III.A requires Respondents to notify the Commission 60 days prior to entering into any Qualified Arrangement. Paragraph III.B requires Respondents to provide information about the nature and effects of the proposed agreement as part of the Paragraph III.A notification. Paragraph III.C allows the Commission to make a written request for additional information within 60 days, which then prevents the participating Respondents from entering into the proposed agreement until 30 days after substantially complying with the request for additional information. Paragraphs III.D through F state that certain actions with respect to a proposed Qualified Arrangement should not be construed as a determination by the Commission that the action violates the law, is approved, or violates this order.

Paragraph IV is similarly designed to prevent the challenged conduct from recurring by requiring Respondents to send copies of the complaint and consent order to those impacted by its terms. Paragraph IV.A requires each Respondent to send a copy of the complaint and consent order to every physician, officer, manager,

and staff member in each Respondent's medical practice group at any time since January 1, 2010. Paragraph IV.A also requires each Respondent to send a copy of the complaint and consent order to every payer whom Respondent had contacted regarding contracting for physician services at any time since January 1, 2010. Paragraph IV.B carries the provisions in Paragraph IV.A forward for three years from the date of the order.

Paragraphs V, VI, and VII impose various obligations on Respondents to report or to provide access to information to the Commission to facilitate Respondents' compliance with the consent order. Finally, Paragraph VIII provides that the proposed consent order will expire 20 years from the date it is issued.

Initial Decision

IN THE MATTER OF

MCWANE, INC.
AND
STAR PIPE PRODUCTS, LTD.

INITIAL DECISION IN REGARD TO ALLEGED VIOLATIONS OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. 9351; File No. 101 0080
Complaint, June 4, 2012 – Initial Decision, May 1, 2013

In January 2012, the Commission issued an administrative complaint against respondents McWane, Inc. ("McWane") and Star Pipe Products, Ltd. ("Star Pipe"), alleging that McWane and Star Pipe, along with their competitor Sigma Corporation, conspired in 2008 to raise and stabilize prices for imported ductile iron pipe fittings ("DIPF") and to maintain a monopoly in the market for domestic DIPF. Ductile iron pipe fittings are used in water distribution systems for the installation of valves, water meters, and hydrants, and to change the flow of water. The complaint alleged seven counts of violating Section 5 of the FTC Act, including restraint of trade, unfair methods of competition, conspiracy to monopolize, monopolization, and attempted monopolization. Prior to issuing its complaint, the Commission entered a separate consent agreement settling charges against Sigma Corporation. After the complaint issued, respondent Star Pipe also entered into a consent agreement with the Commission, resolving the Commission's competitive concerns.

Following an administrative trial, Administrative Law Judge D. Michael Chappell issued an Initial Decision dismissing the first three counts of the complaint and upholding the remaining four counts. In dismissing the first three counts of the complaint, the court found the Commission failed to establish (1) that McWane illegally conspired with Sigma Corporation and Star Pipe to raise and stabilize prices for imported DIPF; (2) that McWane conspired with its competitors to exchange competitively sensitive sales information; and (3) that McWane invited competitors to collude on prices in the imported DIPF market. However, the court held that the preponderance of the evidence showed that McWane engaged in monopolistic practices, attempted to monopolize, engaged in a conspiracy to monopolize and engaged in an unreasonable restraint of trade with Sigma Corporation in the market for domestic DIPF. The court further found that the evidence supported the existence of a separate product market for domestic DIPF

The court further issued an order requiring McWane to cease and desist from certain conduct within the DIPF market, including allocating or dividing DIPF markets; agreeing with competitors not to compete in the DIPF market; entering into certain types of exclusivity agreements; entering into certain retroactive customer sales incentives; and retaliating or discriminating against customers.

Participants

For the *Commission*: *J. Alexander Ansaldo, Joseph Baker, Michael J. Bloom, Thomas Brock, Monica Castillo, James W. Frost, Geoffrey Green, Edward Hassi, Linda Holleran, Michael Kades, Mika Ikeda*, and *Priya Viswanath.*

For the *Respondents*: *Heather Choi, Erik Koons, Joseph Ostoyich, Andreas Stargard*, and *William Lavery, Baker Botts LLP*; *Shannon Dacus, The Dacus Firm*; and *Gregory S.C. Huffman, William M. Katz, Jr, Brian W. Stoltz*, and *Nicole Williams, Thompson and Knight LLP*.

INITIAL DECISION

By CHAPPELL, D. MICHAEL, Chief Administrative Law Judge.

I. INTRODUCTION

This is the Initial Decision on an administrative complaint issued by the Federal Trade Commission ("FTC" or "Commission") charging that Respondent McWane, Inc. ("Respondent" or "McWane") engaged in collusive and exclusionary conduct in violation of Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45.

As explained herein, McWane is a manufacturer of ductile (easily molded) 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 – McWane, Sigma Corporation ("Sigma"), and Star Pipe Products, Ltd. ("Star") – account for the overwhelming majority of ductile iron pipe fittings sales in the United States. The Complaint alleges that these three companies entered into an agreement beginning in 2008 to fix, raise, and stabilize the prices for ductile iron pipe fittings. The Complaint also alleges that McWane, the largest of the three suppliers, has a monopoly in the market for ductile iron pipe fittings made in the United States and that McWane illegally sought to maintain its monopoly after Sigma and Star tried to enter the market in 2009. Respondent denies these allegations, as explained below.

A. Summary of the Complaint and Answer

The Commission issued an administrative complaint against Respondent McWane on January 4, 2012 ("Complaint"). The Complaint also named Star as a Respondent. However, by Order dated February 23, 2012, the Commission withdrew the matter from adjudication as to Star for the purpose of considering a proposed consent agreement. The Commission issued its Decision and Order withdrawing the matter from adjudication as to Star and accepting an executed consent decree with Star on May 8, 2012. Also on the same date that it issued this Complaint, the Commission 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 Complaint in this case alleges seven separate counts of unfair competition in violation of Section 5 of the FTC Act, which Complaint Counsel refers to as the First through Seventh Violations (hereafter, "Counts"), including agreements in restraint of trade, invitation to collude, exclusionary conduct, and monopolization. These Counts are further described below.

COUNTS ONE, TWO AND THREE

The first three Counts are based upon Respondent's alleged conduct in: (i) announcing certain pricing changes in 2008, which were allegedly followed shortly thereafter by substantially similar announcements by its competitors; and (ii) participating, with certain of its competitors, in the collection, aggregation and dissemination of certain sales related information. As to these violations, the Complaint alleges that "beginning in January 2008," McWane conspired with its competitors Sigma and Star (collectively, the "Suppliers") to raise and stabilize prices at which small and medium diameter pipe fittings (24 inches and under) (hereafter "Fittings"), were sold in the United States. Complaint ¶¶ 2, 21, 22, 29. Specifically, the Complaint alleges that on January 11, 2008, and again on June 17, 2008, McWane "publicly announced" price increases, which were followed by Sigma and Star, and that such price increases were "the result of a

combination and conspiracy among" McWane, Sigma, and Star. Complaint ¶¶ 31-34.

The Complaint further alleges that, prior to McWane's announced price increases in January 2008, McWane had a plan to "trade its support for higher prices in exchange for" Sigma and Star's changing their "business methods" to "reduce the risk" of their local sales personnel selling Fittings "at prices lower than published levels"; that McWane communicated the terms of its plan to Sigma and Star, including through a letter to its distributor customers ("Distributors"), with the intent to conspire with Sigma and Star to restrain price competition; and that Sigma and Star "manifested their understanding and acceptance of McWane's offer by publicly taking steps to limit their discounting from published price levels in order to induce McWane to support higher price levels." Complaint ¶ 32 a.-c. The Complaint also alleges, with respect to the June 2008 price increase, that prior to McWane's announcement, McWane "planned to trade its support for higher prices in exchange for information from Sigma and Star documenting the volume of their monthly sales" of Fittings through the Ductile Iron Fittings Research Association ("DIFRA"); that "McWane communicated the terms of its plan to Sigma and Star" through a letter to its Distributor customers, with the intent to conspire with Sigma and Star; and that Sigma and Star "manifested their understanding and acceptance of McWane's offer by initiating their participation in the DIFRA" data reporting system in order to induce McWane to raise prices; and that McWane "then led a price increase, and Sigma and Star followed." Complaint ¶¶ 34 a.-d.

The Complaint next alleges that through DIFRA, the Suppliers "submitted a report of their previous month's sales" to an accounting firm that aggregated and distributed the data submissions to the Suppliers, that the reporting system facilitated collusion by enabling each of them "to monitor its own market share and, indirectly, the output levels of its rivals," and that the reporting system had no legitimate procompetitive efficiencies outweighing its anticompetitive effects in facilitating collusion. Complaint ¶¶ 35-36. The Complaint also alleges that the foregoing acts and practices "have the purpose, capacity, tendency and effect of (i) fixing, maintaining and raising prices" of Fittings

and "(ii) facilitating collusion" in the relevant Fittings market. Complaint ¶ 37.

Based on the foregoing, the Complaint charges conspiracy to restrain price competition in the relevant Fittings market (Count One); conspiracy to exchange competitively sensitive sales information (Count Two); and invitation to collude (Count Three).

COUNTS FOUR, FIVE, SIX, AND SEVEN

In addition to a relevant Fittings market, Complaint ¶ 21, the Complaint alleges a narrower relevant market comprised of domestically produced small and medium diameter Fittings for use in projects specified as domestic only (the "Domestic Fittings" market). Complaint ¶ 22. The Complaint alleges that, at the time of the passage of the American Recovery and Reinvestment Act in February 2009 ("ARRA"), which allocated federal funds for waterworks projects so long as the projects used domestically produced materials, including Fittings, Complaint ¶ 3, McWane had monopoly power in the Domestic Fittings market, as the sole supplier of a full line of domestically produced Fittings in the most commonly used size ranges. Complaint ¶¶ 4, 39-40.

The violations charged in Counts Four and Five arise in connection with a 2009 Master Distribution Agreement ("MDA") between McWane and Sigma. The Complaint alleges that prior to the MDA, Sigma took steps to evaluate entry into the market for the production of Domestic Fittings; that McWane perceived that Sigma was preparing to enter the Domestic Fittings market; and that McWane sought to eliminate the risk of competition from Sigma by inducing Sigma to be a distributor of McWane's Domestic Fittings, rather than a competitor. Complaint ¶¶ 47-48. Pursuant to the MDA, as alleged in the Complaint, McWane and Sigma agreed that McWane would be Sigma's exclusive source for Domestic Fittings; that Sigma would resell Domestic Fittings at or very near McWane's published prices; and that Sigma would resell McWane's Domestic Fittings to Distributors only on the condition that the Distributor agreed to purchase Domestic Fittings exclusively from McWane or Sigma. Complaint ¶¶ 49-51. Thus, the Complaint alleges, the MDA was intended to, and did, serve to transfer a share of McWane's sales and monopoly

profits in Domestic Fittings to Sigma in exchange for Sigma's commitment to abandon its plans to enter into the relevant Domestic Fittings market. Complaint ¶ 54. In addition, the Complaint charges that, through the MDA, McWane and Sigma conspired to exclude competitors from the Domestic Fittings market. Complaint ¶ 55.

Based on the foregoing, the Complaint charges that the MDA was an agreement in restraint of trade (Count Four) and a conspiracy between McWane and Sigma to monopolize the Domestic Fittings market (Count Five). Complaint ¶¶ 67-68.

Counts Six and Seven allege unlawful exclusionary acts and practices toward Star. Complaint ¶¶ 69-70. The Complaint alleges that Star announced its intent to enter into the relevant Domestic Fittings market in June 2009 and that McWane responded by adopting certain policies intended to impede and delay Star's entry. Complaint ¶¶ 56-57. Specifically, the Complaint alleges that McWane "threatened" Distributors with delayed or diminished access to McWane's Domestic Fittings and the loss of accrued rebates, if such Distributors purchased from Star; and that a "similar distribution policy" was provided for under McWane's MDA with Sigma. Complaint ¶ 57.

The Complaint alleges that the foregoing policies were intended to, and did, compel the majority of Distributors to deal with McWane and Sigma on an exclusive or nearly exclusive basis for Domestic Fittings, and to foreclose Star from a substantial volume of sales opportunities with Distributors. Complaint ¶¶ 58-59. Further, the Complaint alleges that, by foreclosing Star from a substantial volume of sales opportunities with Distributors, McWane's policies tended to minimize and delay Star's ability to compete and constrain prices in the Domestic Fittings market. Complaint ¶ 60.

The Complaint concludes that McWane's alleged exclusionary acts constitute willful practices to acquire, enhance, or maintain McWane's alleged monopoly power in the relevant Domestic Fittings market (Count Six), and were specifically intended to monopolize the Domestic Fittings market (Count Seven). Complaint ¶¶ 69-70.

RESPONDENT'S ANSWER

Respondent filed its Answer to the Complaint on February 2, 2012. Respondent denies that it conspired to raise and stabilize Fittings prices, Answer ¶¶ 29, 32, and specifically denies each of the Complaint's allegations detailing the alleged conspiracy, including that the January and June 2008 alleged price increases were the result of a conspiracy, that McWane "planned to trade its support for higher prices in exchange for" Sigma and Star "reducing the risk" of pricing below published prices and participating in DIFRA; that McWane communicated any such plan to Sigma and Star, or that the actions of Sigma and Star were "manifestations of assent" to McWane's "offer" or "plan." Answer ¶¶ 32, 34.

Respondent further denies that the data collected and distributed through DIFRA was sales data, but was only aggregated shipment tonnage. Answer ¶ 35. Respondent also denies that the aggregated tons-shipped data allowed it to monitor the output of its rivals or that the data facilitated coordination. Answer ¶ 36. In addition, Respondent denies that it "invited" its competitors to "collude," as alleged in the Complaint. Answer ¶ 66.

Respondent further denies that there is a relevant market consisting of Domestic Fittings and that Respondent has monopoly power in that market. Answer ¶¶ 21, 39. In addition, Respondent denies that Respondent eliminated Sigma as a potential entrant to the Domestic Fittings market. Answer ¶¶ 47-55. Respondent also denies that Respondent excluded Star from the Domestic Fittings market through exclusive dealing. Answer ¶¶ 56-63.

As affirmative defenses, Respondent asserts that the Complaint fails to state a claim upon which relief can be granted; the alleged conduct is procompetitive and benefits consumers; and the causes of action alleged in the Complaint are barred by mootness because ARRA expired more than a year ago, DIFRA ceased operations more than three years ago, and the MDA terminated more than a year ago.

B. Procedural History

On June 1, 2012, Respondent filed with the Commission a Motion for Summary Decision on all seven alleged violations. On the same date, Complaint Counsel also filed with the Commission a Motion for Partial Summary Decision on its conspiracy claim related to an alleged telephone conversation between an executive of Star and an executive of McWane in April 2009.[1] The Commission, on August 9, 2012, issued an Opinion and Order denying both motions. *In re McWane, Inc.*, Docket 9351, 2012 FTC LEXIS 155 (Sept. 14, 2012).

The administrative trial in the instant case began on September 4, 2012 and concluded on November 2, 2012. By Order dated November 7, 2012, the hearing record was closed. Over 2,000 exhibits were admitted into evidence, 53 witnesses testified, either live or by deposition, and there are 6,045 pages of trial transcript. The parties' proposed findings of fact, replies to proposed findings of fact, post trial briefs, and reply briefs total 3,052 pages.

Rule 3.51(a) of the Commission's Rules of Practice states that "[t]he Administrative Law Judge shall file an initial decision within 70 days after the filing of the last filed initial or reply proposed findings of fact, conclusions of law and order . . . ." 16 C.F.R. § 3.51(a). The parties filed concurrent post trial briefs and proposed findings of fact on December 14, 2012. The parties filed replies to the other's proposed findings and briefs on January 18, 2013. Pursuant to Commission Rule 3.41(b)(6), closing arguments were held on January 24, 2013. On March 28, 2013, pursuant to Commission Rule 3.51(a) and based upon a finding of good cause, an order was issued extending the 70-day period for the filing of the initial decision in this case by an additional 30 days. *See* Rule 3.51(a) ("The Administrative Law Judge may extend any of these time periods by up to 30 days for good

[1] The Commission, in 2009, amended its Rules of Practice to require that motions to dismiss the Complaint filed before the evidentiary hearing and motions for summary decision shall be directly referred back to the Commission, who issued the Complaint, rather than to the Administrative Law Judge assigned to adjudicate the Complaint, and "shall be ruled on by the Commission unless the Commission in its discretion refers the motion to the Administrative Law Judge." 16 C.F.R. § 3.22(a).

cause."). This Initial Decision is filed in accordance with Commission Rule 3.51(a).

C. Evidence

This Initial Decision is based on a consideration of the whole record relevant to the issues, including the exhibits properly admitted into evidence, deposition transcripts, and the transcripts of testimony at trial, and addresses the material issues of fact and law. The briefs and proposed findings of fact and conclusions of law, and the replies thereto, submitted by the parties were thoroughly reviewed. Proposed findings of fact submitted by the parties, but not included in this Initial Decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations of the Complaint or the defenses thereto. The Commission has held that Administrative Law Judges are not required to discuss the testimony of each witness or all exhibits that are presented during the administrative adjudication. *In re Amrep Corp.*, No. 9018, 102 F.T.C. 1362, 1670, 1983 FTC LEXIS 17, *566-67 (Nov. 2, 1983). Further, administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" *Minneapolis & St. Louis Ry. Co. v. United States*, 361 U.S. 173, 193-94 (1959). *Accord Stauffer Labs., Inc. v. FTC*, 343 F.2d 75, 89 (9th Cir. 1965). *See also Borek Motor Sales, Inc. v. National Labor Relations Bd.*, 425 F.2d 677, 681 (7th Cir. 1970) (holding that it is adequate for the Board to indicate that it had considered each of the company's exceptions, even if only some of the exceptions were discussed, and stating that "[m]ore than that is not demanded by the [Administrative Procedure Act] and would place a severe burden upon the agency").

Under Commission Rule 3.51(c)(1), "[a]n initial decision shall be based on a consideration of the whole record relevant to the issues decided, and shall be supported by reliable and probative evidence." 16 C.F.R. § 3.51(c)(1); *see In re Chicago Bridge & Iron Co.*, No. 9300, 138 F.T.C. 1024, 1027 n.4, 2005 FTC LEXIS 215, at *3 n.4 (Jan. 6, 2005). Under the Administrative Procedure Act ("APA"), an Administrative Law Judge may not issue an

order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d). All findings of fact in this Initial Decision are supported by reliable, probative, and substantial evidence. Citations to specific numbered findings of fact in this Initial Decision are designated by "F."[2]

Pursuant to Commission Rule 3.45(b), several orders were issued in this case granting *in camera* treatment to material, after finding, in accordance with the Rule, that its public disclosure would likely result in a clearly defined, serious injury to the entity requesting *in camera* treatment. 16 C.F.R. § 3.45(b). In addition, when the parties sought to elicit testimony at trial that revealed information that had been granted *in camera* treatment, the hearing went into an *in camera* session.

Commission Rule 3.45(a) allows the Administrative Law Judge ("ALJ") "to grant *in camera* treatment for information at the time it is offered into evidence subject to a later determination by the [administrative] law judge or the Commission that public disclosure is required in the interests of facilitating public understanding of their subsequent decisions." *In re Bristol-Myers Co.*, Nos. 8917-19, 90 F.T.C. 455, 457, 1977 FTC LEXIS 25, at *6 (Nov. 11, 1977). As the Commission later reaffirmed in

[2] References to the record are abbreviated as follows:

CX – Complaint Counsel's Exhibit
RX – Respondent's Exhibit
JX – Joint Exhibit
Tr. – Transcript of testimony before the Administrative Law Judge
Dep. – Transcript of Deposition
IHT – Investigational Hearing Transcript
CCB – Complaint Counsel's Post Trial Brief
CCRB – Complaint Counsel's Post Trial Reply Brief
CCFF – Complaint Counsel's Proposed Findings of Fact
CCRRFF – Complaint Counsel's Reply to Respondent's Proposed Findings of Fact
RB – Respondent's Post Trial Brief
RRB – Respondent's Reply Brief
RFF – Respondent's Proposed Findings of Fact
RRCCFF – Respondent's Reply to Complaint Counsel's Proposed Findings of Fact

another leading case on *in camera* treatment, since "in some instances the ALJ or Commission cannot know that a certain piece of information may be critical to the public understanding of agency action until the Initial Decision or the Opinion of the Commission is issued, the Commission and the ALJs retain the power to reassess prior *in camera* rulings at the time of publication of decisions." *In re General Foods Corp.*, No. 9085, 95 F.T.C. 352, 356 n.7; 1980 FTC LEXIS 99, at *12 n.7 (March 10, 1980). Thus, in instances where a document or trial testimony had been given *in camera* treatment, but the portion of the material cited to in this Initial Decision does not in fact require *in camera* treatment, such material is disclosed in the public version of this Initial Decision, pursuant to Commission Rule 3.45(a) (the ALJ "may disclose such *in camera* material to the extent necessary for the proper disposition of the proceeding"). Where *in camera* information is used in this Initial Decision, it is indicated in bold font and braces ("**{ }**") in the *in camera* version and is redacted from the public version of the Initial Decision, in accordance with Commission Rule 3.45(e).

D. Summary of Initial Decision

The preponderance of the evidence in the record, viewed as a whole, fails to demonstrate a conspiracy among McWane, Sigma, and Star to raise and stabilize prices in the Fittings market. Among other things, the evidence fails to prove that McWane had a "plan" to conspire with Sigma and Star; that McWane communicated to Sigma and Star an "offer" or "plan" to trade price increases in exchange for Sigma and Star reducing price discounting and increasing price transparency through DIFRA; or that Sigma's and Star's actions with regard to price discounting or DIFRA constituted their "manifestations" of "assent" to McWane's "offer." Accordingly, Count One is dismissed. The dismissal of Count One is not, however, a finding that no price fixing conspiracy existed in the Fittings market, or that Complaint Counsel's conspiracy theory is implausible. Rather, Count One is dismissed because the greater weight of the evidence failed to prove the alleged conspiracy.

In addition, the evidence fails to show that McWane issued any "invitation to collude," and therefore Count Three is

dismissed. Count Two is also dismissed, because the evidence fails to prove that the tons-shipped data, collected, aggregated, and reported through DIFRA, constitutes concerted action in restraint of trade. Specifically, the evidence fails to demonstrate that the aggregated tons-shipped data has the likely anticompetitive effect of "facilitating collusion."

The preponderance of the evidence in the record, viewed as a whole, demonstrates that Domestic Fittings is a relevant product market and that Respondent has monopoly power in the Domestic Fittings market. The preponderance of the evidence also shows that McWane announced and implemented an exclusionary policy to forestall Star's entry into the Domestic Fittings market. In addition, the preponderance of the evidence shows that McWane entered into a Master Distribution Agreement with Sigma that unreasonably restrained trade in the Domestic Fittings market and that was designed to and did further exclude Star from the Domestic Fittings market.

Counts One, Two, and Three of the Complaint have not been proven by a preponderance of the evidence, and are dismissed. Counts Four, Five, Six, and Seven of the Complaint have been proven by a preponderance of the evidence. An appropriate remedial order is entered herewith.

II. FINDINGS OF FACT

A. Background

1. Jurisdiction

1. Respondent McWane, Inc. ("McWane") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 2900 Highway 280, Suite 300, Birmingham, Alabama 35223. (Answer ¶ 8).

2. McWane manufactures, imports, markets, and sells products for the waterworks industry, including ductile (easily molded) iron pipe fittings that are 3" to 24" in diameter

("Fittings")[3]. (Joint Stipulations of Fact, JX0001 ¶ 1; Answer ¶ 8).

3. At all times relevant herein, McWane has been, and is now, a corporation, as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44. (Joint Stipulations of Law, JX0001 ¶ 1).

4. McWane's acts and practices, including the acts and practices alleged herein, are in or affect commerce in the United States, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44. (Answer ¶ 10 (McWane sells Fittings in interstate commerce)).

2. Key Terms

5. Fittings are used in pressurized water distribution and treatment systems to join pipes, valves and hydrants, and to change, divide or direct the flow of water. (Joint Stipulations of Fact, JX0001 ¶ 6).

6. Domestic Fittings are Fittings that are manufactured in the United States and sold into domestic-only specifications.[4] (F. 347).

7. The American Recovery and Reinvestment Act of 2009, known as "ARRA," enacted by Congress in February 2009 and signed into law by the President in early 2009, included stimulus funds for waterworks projects. (Joint Stipulations of Fact, JX0001 ¶ 19; Tatman, Tr. 610-611; Pais, Tr. 1732-1733; Thees, Tr. 3075). ARRA contained certain "Buy American" provisions applicable to Fittings. (Joint Stipulations of Fact, JX0001 ¶ 21).

8. The Ductile Iron Fittings Research Association ("DIFRA") was incorporated as a nonprofit corporation in

[3] Except where otherwise noted or where the context otherwise requires, and, as explained *infra* II.B., the term "Fittings" as used herein refers to ductile iron pipe fittings of 24 inches or less in diameter.

[4] Except where otherwise noted or where the context otherwise requires, the term "Domestic Fittings" as used herein refers to Domestic Fittings sold into domestic-only specifications.

Alabama on January 12, 2007. (CX 1480 at 007; Brakefield, Tr. 1220, 1227-1228). DIFRA's four members were McWane; Sigma Corporation ("Sigma"); Star Pipe Products, Ltd. ("Star") and United States Pipe and Foundry ("U.S. Pipe"). (Joint Stipulations of Fact, JX0001 ¶ 17; Brakefield, Tr. 1227-1228).

9. The American Water Works Association ("AWWA") is a waterworks industry trade association. (CX 2537 (McCutcheon, IHT (Vol. 1) at 29-30)). The AWWA establishes certain standards for the production of fittings for use in the United States; all fittings have to comply with AWWA standards. (Minamyer, Tr. 3136-3137; Tatman, Tr. 878; CX 2522 (Agarwal, Dep. at 37); CX 2508 (Kuhrts Dep. at 30-31), *in camera*. The AWWA hosts an annual convention and trade show that is widely attended by suppliers, distributors, municipalities, contractors, and engineers. Industry participants (almost 500 exhibitors) exhibit their products at booths, and there are technical sessions as well. (Pais, Tr. 1899-1901).

10. "End Users" of Fittings are typically municipalities, regional water authorities, and the contractors they engage to construct waterworks projects. (Joint Stipulations of Fact, JX0001 ¶ 12; Saha, Tr. 1156; CX 2502 (Prescott, Dep. at 14); CX 2489 (Morrison, IHT at 29); McCutcheon, Tr. 2257; Rybacki, Tr. 3487).

11. Wholesale waterworks distributors ("Distributors") purchase Fittings from suppliers and resell them to End Users. (Webb, Tr. 2707, 2726-2727; Thees, Tr. 3051, 3082).

12. Ductile iron foundries ("foundries") are businesses that produce castings pursuant to purchase orders for producers of Fittings and other iron products. (CX 2505 (Frazier, Dep. at 23, 26-27); CX 2507 (Glidewell, Dep. at 21, 138); RX 658 (Keffer, Dep. at 14); RX 657 (Teske, Dep. at 22).

3. Fittings industry participants

a. McWane, Inc.

i. Company basics

13. Fittings are a small segment of McWane's business, representing about 5% of McWane's overall business. (Tatman, Tr. 218-219; RX 642 (Page, Dep. at 42)).

14. McWane estimates that it manufactures approximately 2,000 fittings. (RX 637 (Jansen, Dep. at 87)).

15. McWane has manufactured Fittings in the United States in two locations: its Union Foundry Company in Anniston, Alabama, and its Tyler Pipe & Foundry Co. South Plant in Tyler, Texas. (Tatman, Tr. 209, 212-214, 301-302).

16. McWane started producing Fittings at a foundry in China, Tyler Xian Xian ("TXX") in 2005. (Tatman, Tr. 210-212).

17. In a 2007 corporate reorganization, McWane consolidated all its fittings business, both domestically and in China, into a single division, "Tyler/Union." (Tatman, Tr. 209-214).

18. Faced with high inventory levels and insufficient demand for Domestic Fittings, McWane closed its foundry in Tyler, Texas, in November 2008. (Tatman, Tr. 210-212).

19. In 2009, McWane did not manufacture any Fittings larger than 30 inches in diameter at Union Foundry. Clow Water, a division of McWane, made 36 inch fittings, and McWane sourced 42 inches to 48 inches fittings externally. (Tatman, Tr. 591-592).

ii. Key employees

RICHARD (RICK) TATMAN

20. Richard Tatman joined McWane in May 2006 as the General Manager of McWane's Tyler Pipe division. (Tatman, Tr. 208-209).

21. Following a 2007 reorganization of McWane's fittings business, Mr. Tatman became Vice President and General Manager in charge of McWane's Tyler/Union division. (Tatman, Tr. 212-214).

22. In approximately July or August 2007 when the McWane reorganization was complete, Mr. Tatman reported to Mr. Thomas Walton and Mr. Leon McCullough. (CX 2484 (Tatman, Dep. at 10); Tatman, Tr. 216-217). Since Mr. Walton's departure from McWane in 2009, Mr. Tatman has reported directly to Mr. McCullough. (CX 2483 (Tatman, IHT at 10)).

23. Since the 2007 McWane reorganization, Mr. Tatman has had day-to-day responsibilities for the Fittings Division at McWane. (CX 2479 (McCullough, Dep. at 17)).

24. Since the 2007 McWane reorganization, Mr. Tatman shared responsibility for pricing and strategy with other McWane employees, including Mr. McCullough and Mr. Jerry Jansen. (Tatman, Tr. 218-219, 253-254, 306).

25. Because Fittings represent a small portion of McWane's business, Mr. Tatman did not normally discuss Fittings pricing with Mr. G. Ruffner Page. (Tatman, Tr. 218-219).

26. Mr. Tatman has ultimate responsibility for the pricing of Fittings sold through the Fittings Division, including the authority to issue new list prices. McWane's letters to customers were drafted and reviewed by Mr. Tatman and Mr. Jansen. (CX 2479 (McCullough, Dep. at 21, 23); Tatman, Tr. 218-219, 254, 306.

27. During the 2008 through 2009 time period, Mr. Tatman, with input from McWane's national sales manager, Mr. Jansen, also developed the sales strategy at McWane. (CX 2479 (McCullough, Dep. at 18); CX 2477 (Jansen, Dep. at 154-155)).

28. Leon McCullough is an executive Vice President of McWane in charge of its valve and hydrant group, as well as the waterworks Fittings Division. (CX 2479 (McCullough, Dep. at 8, 15-17); Tatman, Tr. 217).

29. Mr. McCullough has worked for McWane since 1973, and has been in his current position for 12 to 15 years. Mr. McCullough acquired responsibility for the Fittings Division of McWane in 2007. (CX 2479 (McCullough, Dep. at 8, 16)).

30. Mr. McCullough does not have day-to-day responsibilities on the operational side of McWane's Fittings Division, but provides strategic direction for the division. (CX 2479 (McCullough, Dep. at 17)).

31. Mr. Tatman reports to Mr. McCullough, who reports directly to Mr. Page. (CX 2479 (McCullough, Dep. at 18-19)).

JERRY JANSEN

32. Jerry Jansen is the national sales manager for Tyler/Union. Mr. Jansen has worked for various McWane subsidiaries since 1979, and has been the national sales manager for Tyler/Union since August 2004. (CX 2477 (Jansen, Dep. at 10-11); Tatman, Tr. 219 (describing Mr. Jansen as having a long history in the fittings industry)).

33. Mr. Jansen reports to Mr. Tatman. (CX 2477 (Jansen, Dep. at 12)).

34. Mr. Jansen's responsibilities include managing the Tyler/Union's sales team, as well as providing market reports and recommendations for market actions to his superiors. (CX 2477 (Jansen, Dep. at 11)). Mr. Jansen also provides input on any new sales strategy, and is responsible for implementing those policies. (CX 2477 (Jansen, Dep. at 154-155)).

VINCENT NAPOLI

35. Vincent Napoli is a pricing coordinator at McWane. He has held that position since it was first created in January 2008. (CX 2480 (Napoli, Dep. at 9-10, 35)).

36. Mr. Napoli has worked for McWane since 1991 in a variety of positions, including as an inside sales manager, a national sales manager, a quality manager, a position in accounting, and as a pricing manager. (CX 2480 (Napoli, Dep. at 9-10)).

37. As quality manager, Mr. Napoli was responsible for all aspects of quality control, including internal audits, day-to-day quality supervision, inspection, and shipping inspections. Mr. Napoli continues to use his technical expertise in Fittings to answer field personnel questions relating to interpreting specifications, product usage, product applications, and product quality. (CX 2480 (Napoli, Dep. at 32-33, 50-51)).

38. As pricing manager, Mr. Napoli has responsibility for approving Project Pricing (F. 428) for discounts of up to a couple of percentage points, and keeping track of annual bids and Project Pricing. (CX 2480 (Napoli, Dep. at 44-45, 47, 49-50).

G. RUFFNER PAGE

39. G. Ruffner Page is the President and Chief Executive Officer ("CEO") of McWane. Mr. Page became the President and CEO of McWane in 1999. Previously, Mr. Page worked for McWane's venture fund and bank, beginning in 1986. (CX 2482 (Page, Dep. at 11-14); Tatman, Tr. 218).

40. Mr. Page's primary responsibilities as the CEO of McWane are to oversee the McWane family's interests, and to provide top-level strategy, such as how to allocate capital, whether to build new plants, or whether to make any acquisitions or diversify any acquisitions. (CX 2482 (Page, Dep. at 14-15)).

41. Generally, Mr. Page is not actively involved in McWane's day-to-day Fittings business and can go weeks without speaking to Mr. McCullough, and "never" talks to Mr. Tatman except at general manager meetings. (CX 2482 (Page, Dep. at 44-46); Tatman, Tr. 218-219).

Initial Decision

DAVID GREEN (FORMER EMPLOYEE)

42. David Green was the Executive Vice President of McWane's soil pipe utility division, with responsibility for the Tyler Pipe, Union, Bibby, and AB&I subsidiaries, along with rubber couplings. Mr. Green was in charge of McWane's Fittings business until he was dismissed by Mr. Page in 2007. (Tatman, Tr. 210-212; CX 2118 at 001).

CHARLES F. NOWLIN

43. Charles F. Nowlin is the senior Vice President and Chief Financial Officer of McWane, and has been at the company since 1980. (CX 2481 (Nowlin, Dep. at 7); Tatman, Tr. 215). Mr. Nowlin oversees all financial reporting for McWane, including "blue books," income statements, balance sheets, and sales and gross profit analyses. (CX 2481 (Nowlin, Dep. at 8-9, 15)).

THOMAS WALTON (FORMER EMPLOYEE)

44. Thomas Walton began working at a division of McWane, Inc. as a management trainee in 1991. Mr. Walton was promoted throughout McWane's valve and hydrants business until becoming Vice President and General Manager of McWane's M&H and Kennedy Valve divisions in 2001. In late 2007, Mr. Walton was promoted to Senior Vice President, where he gained responsibilities for McWane's Fittings Division for the first time. (CX 2485 (Walton Dep. at 8-9, 17-18)).

45. As Senior Vice President overseeing the Fittings Division, Mr. Walton had ultimate responsibility for operations and sales, and participated in strategic decisions. Mr. Walton reported directly to Mr. McCullough, and Mr. Tatman reported directly to Mr. Walton. (CX 2485 (Walton Dep. at 18-19)).

JOHN SPRINGER

46. In the 2008 through 2009 time period, John Springer was the controller for Tyler Pipe and Tyler/Union, and was

responsible for publishing McWane's "blue books." (Tatman, Tr. 818).

47. Blue books are prepared by McWane's controller's office, are provided to Mr. McCullough and other executives within the company, and are important financial documents used in running the waterworks business. (Tatman, Tr. 497-498, 844-845, *in camera*).

LAURA ALVEY

48. Laura Alvey is an Administrative Assistant at McWane. (Tatman, Tr. 208).

49. Ms. Alvey was in McWane's sales department from 1995 until 2001. In 2001, she was promoted to her current position, Administrative Assistant for the general manager, Mr. Tatman, and Mr. Jansen. (RX 636 (Alvey, Dep. at 7); CX 2476 (Alvey, Dep. at 7-8, 10)).

50. Ms. Alvey's responsibilities include compiling the Tyler/Union Monthly Sales Reports, the Weekly Highlight Report, the Weekly Competitive Feedback Report (including the Domestic Activity Report), the DIWF [Fittings] report, and the Nondomestic versus Domestic Report, and the DIWF Nondomestic Pricing by the month for Mr. Tatman and Mr. Jansen. (CX 2476 (Alvey, Dep. at 10-13)).

b. Sigma Corporation

i. Company basics

51. Since about 1985, Sigma Corporation ("Sigma") has imported and sold Fittings and other waterworks products in the United States. (Joint Stipulations of Fact, JX0001 ¶ 2; Pais, Tr. 1722-1723). Sigma's headquarters are in Cream Ridge, New Jersey. (Rybacki, Tr. 1090).

52. Fittings are Sigma's main product line, and comprised approximately 40% of Sigma's business in the 2008 through 2009 time period. (Rybacki, Tr. 1090-1091; Pais, Tr. 1731 (in 2008

and 2009, Fittings were Sigma's largest-selling product, accounting for 40 to 45% of revenues)). Sigma currently sells approximately 3,000 distinct Fittings items (or SKUs). (Pais, Tr. 1723).

53. In 2007, 2008 and 2009, Sigma's net sales were [redacted] million, respectively. (CX 2026 at 066, *in camera*). Sigma has approximately 250 to 260 employees. (Pais, Tr. 1722).

54. On October 10, 2007, the Frontenac Group purchased a 60% ownership interest of Sigma. (Pais, Tr. 1725; Rybacki, Tr. 1084; CX 2523 (Bhattacharji, Dep. at 8)).

55. Walter Florence is a Frontenac managing director and a member of Sigma's board of directors. (CX 2523 (Bhattacharji, Dep. at 152, 197-198)).

56. Sigma imports Fittings from China, India, and Mexico. (CX 2524 (Box, Dep. at 16); Pais, Tr. 1731-1732 (all Fittings Sigma sold in 2008 were manufactured by its "virtual manufacturing" partners in China, India and Mexico)).

57. Sigma has used a "virtual manufacturing" model for over twenty years. (CX 2530 (Rona, Dep. at 211-212)). While Sigma is responsible for the technical know-how that goes into producing its Fittings, the Fittings are actually made overseas at foundries in China, Mexico and India. Sigma handles administration, engineering, drawings, inspection, testing, quality control, and transportation, and has engineering groups in China and India. (Rybacki, Tr. 1092, 1094; *see also* Pais, Tr. 1732; Rona, Tr. 1466-1467).

58. Sigma has sourced a small portion of its Fittings from McWane. (Pais, Tr. 1731).

59. Sigma's original equipment manufacturer ("OEM") business involves the sale of products to original equipment manufacturers (as opposed to Distributors), including pipe, valve, and hydrant manufacturers and other Fittings suppliers. Sigma's OEM business sells some products unrelated to waterworks, as well as parts used for assembly of waterworks valves and hydrants, and both industry standard and proprietary Fittings to

companies in the waterworks industry. (Rona, Tr. 1440-1441; Rybacki, Tr. 1094-1095; Brakefield, Tr. 1215).

60. Sigma's OEM business in 2008 had approximately $50 million in sales to customers such as McWane, U.S. Pipe, American Cast Iron Pipe Company, Griffin Pipe Products Co., and Star. (Rona, Tr. 1440-1442). Sigma's OEM business accounted for approximately 10% of its sales of Fittings. (Rona, Tr. 1442; CX 2530 (Rona, Dep. at 24-25)).

61. Sigma has approximately 23 territory sales managers across the United States and approximately 25 inside customer service personnel supporting the sales force. (Rybacki, Tr. 1089-1090).

62. Sigma has five regional managers, who manage the outside Fittings sales force: Al Richardson (southwest), Dave Pietryga (midwest), Greg Fox (southeast), Mike Walsh (northeast and Eastern Canada), and Chris King (northwest). (Rybacki, Tr. 1090, 1093).

63. Beginning in September 2009, Sigma began selling Domestic Fittings that it sourced from McWane. (CX 0803 at 001-002).

ii. Key employees

VICTOR PAIS

64. Victor Jerome Pais was one of the founders of Sigma in 1985. (Pais, Tr. 1721-1722; Rybacki, Tr. 1085). Mr. Pais worked for Star before the founding of Sigma. (Rybacki, Tr. 1117-1118; Pais, Tr. 1860-1862).

65. Mr. Pais currently owns approximately 6% to 7% of Sigma. In 2008, Mr. Pais' ownership share in Sigma was 1 to 2 percentage points higher. (Pais, Tr. 1726; Rybacki, Tr. 1085). Prior to Frontenac's purchase of Sigma in 2007, Mr. Pais held an 18% share. (CX 2527 (Pais, IHT at 19-20)).

66. Mr. Pais is a current member of Sigma's board and was also a member in 2008 and 2009. (Pais, Tr. 1725).

67. In the 2008 and 2009 time period, Mr. Pais was the President and CEO of Sigma. (Rybacki, Tr. 1085; Pais, Tr. 1723). Mr. Pais stepped down as President and CEO of Sigma in January 2010. (Pais, Tr. 1725). Mr. Pais remains an employee of Sigma. (Pais, Tr. 1721).

68. Mr. Pais' responsibilities in 2008 and 2009 included growing Sigma, monitoring profits and costs, helping the supply chain, and setting strategy relating to growth and profitability, including pricing strategy. (Pais, Tr. 1724-1725; CX 2528 (Pais, Dep. at 192-193)).

69. Mr. Pais was actively involved in Sigma's Fittings pricing strategy and would discuss pricing strategy with Mr. Lawrence Rybacki and others at Sigma. (CX 2528 (Pais, Dep. at 193-194)).

SIDDARTH BHATTACHARJI

70. Siddarth Bhattacharji was a founder of Sigma. Mr. Bhattacharji worked for Star before the founding of Sigma. (Rybacki, Tr. 1117-1118; Pais, Tr. 1860-1862).

71. In 2007, Mr. Bhattacharji became Executive Vice President of Sigma following Frontenac's acquisition of interest in Sigma. Mr. Bhattacharji had been vice president of Sigma from its founding in 1985. (CX 2523 (Bhattacharji, Dep. at 8-11)).

72. During 2008 and 2009, as Executive Vice President of Sigma, Mr. Bhattacharji was responsible for engineering and supply chain. (CX 2523 (Bhattacharji, Dep. at 8-9); Rybacki, Tr. 1087).

73. Mr. Bhattacharji is a shareholder of Sigma, owning less than 10% of the company, and is the Secretary of the Sigma board of directors. (CX 2523 (Bhattacharji, Dep. at 9-10, 23)).

LAWRENCE (LARRY) RYBACKI

74. Larry Rybacki is the President of Sigma and has held that position since approximately August 2011. Prior to becoming President of Sigma, Mr. Rybacki was Sigma's Vice President of sales for 21 years. (Rybacki, Tr. 1082-1083).

75. Mr. Rybacki owns about 3.5% of Sigma's shares. (Rybacki, Tr. 1085).

76. In the 2008 through 2009 time period, Mr. Rybacki was vice president of sales for Sigma, responsible for Fittings sales to Distributors (as distinct from OEM customers), all of Sigma's warehouses, regional managers, and outside salespeople reported to him. (Rybacki, Tr. 1086; Rona, Tr. 1453-1454).

77. Mr. Rybacki had authority over Sigma's pricing decisions, with input from Mr. Pais and Mr. Bhattacharji. (Brakefield, Tr. 1332; Rybacki, Tr. 1096; CX 2530 (Rona, Dep. at 198)).

78. Mr. Rybacki and Mr. Pais would be responsible for drafting list price and price multiplier change letters to customers, which would be sent to customers by regional managers under Mr. Rybacki's signature. (Rybacki, Tr. 1099-1100).

79. It was Mr. Rybacki's practice, before sending out a price increase letter, to share a draft with Sigma's top 20 managers to get their feedback. (Rybacki, Tr. 3489-3491).

80. Sigma's regional managers sometimes discuss Project Pricing (F. 428) with Mr. Rybacki. (Rybacki, Tr. 3527-3528).

MITCHELL RONA

81. Mitchell Rona has worked for Sigma since September 1988. Mr. Rona is also a shareholder of Sigma. (CX 2523 (Bhattacharji, Dep. at 9-10); Rona, Tr. 1438).

82. Mr. Rona was a Sigma sales representative and regional manager from 1988 to 1998. From about 1999 through July 2011, Mr. Rona was Sigma's OEM business manager, reporting to

Mr. Pais. (Rona, Tr. 1439-1440). Mr. Rona was not involved in setting prices for Fittings at Sigma and did not have authority or responsibility for sales into the distribution channel. (Rona, Tr. 1453-1454, 1627-1628).

83. In July 2011, Mr. Rona was promoted to Sigma's Vice President of operations. (Rona, Tr. 1438). Mr. Rona currently reports to Sigma's CEO, Jim McGivern. As Vice President of operations, Mr. Rona oversees Sigma's engineering and IT departments, manages global supplier relationships, controls inventory and supply chain, and runs Sigma's OEM business. (Rona, Tr. 1438-1439).

84. Mr. Rona worked on the Sigma Domestic Production ("SDP") team, along with Stuart Box, Gopi Ramanathan, Victor Pais and Siddarth Bhattacharji. (CX 2530 (Rona, Dep. at 40-41)).

85. Mr. Rona was significantly involved in the Master Distribution Agreement negotiations between Sigma and McWane (F. 1540) as the Sigma contact point for negotiations. His level of involvement diminished somewhat following execution of a letter of intent for the MDA, but he continued to play a liaison role interacting with McWane, even after the MDA was signed and went into the operation phase. (Rona, Tr. 1562-1571; CX 1436 at 001-003).

JIM MCGIVERN

86. Jim McGivern succeeded Mr. Pais as CEO of Sigma. Mr. McGivern was selected by Frontenac, first joined Sigma in July 2009, and gradually took over aspects of the business. (Pais, Tr. 1723-1724, 1772-1773). By June 2010, Mr. McGivern was acting as CEO of Sigma. (Rybacki, Tr. 3490-3491).

TOMMY BRAKEFIELD

87. Tommy Eugene Brakefield was the national sales manager at Sigma from November 2003 through December 2011. (Brakefield, Tr. 1214).

88. Although Mr. Brakefield's title did not change, his responsibilities evolved over time. In 2005, Mr. Brakefield's

responsibilities shifted predominantly to consulting for Sigma's OEM business rather than dealing with Sigma's distribution business. From about 2005 to 2008, Mr. Brakefield's role at Sigma was as an OEM consultant with Mr. Rona, with a focus on non-Distributor OEM Fittings customers. (Brakefield, Tr. 1214-1216).

89. From 2008 to December 2011, Mr. Brakefield took on a special projects role for Sigma, taking on projects for Mr. Rybacki, Mr. Pais, Mr. Bhattacharji, or Mr. McGivern, while reporting to Larry Rybacki, the Vice President of sales. (Brakefield, Tr. 1214, 1216-1217).

90. Mr. Brakefield was Vice President of sales and marketing at U.S. Pipe before his employment at Sigma. (Brakefield, Tr. 1219-1220; CX 2496 (Brakefield, Dep. (Vol. 2) at 9-10)).

91. In 2005, Mr. Pais approached Mr. Brakefield and asked if he knew anything about how to start a trade association. This was Mr. Brakefield's first involvement in conversations about forming a trade association that later became known as DIFRA. (Brakefield, Tr. 1220).

92. Mr. Brakefield became involved with organizing DIFRA on Sigma's behalf. (Brakefield, Tr. 1220-1221; Rybacki, Tr. 3546-3547). He became DIFRA's President in January 2007, and was the first and only President of DIFRA. (Brakefield, Tr. 1221-1222, 1227).

93. Mr. Brakefield is currently a Fittings consultant for McWane's pipe division under Jeff Otterstedt and Dennis Charko, and the executive director of the National Association of Pipe Fabricators. (Brakefield, Tr. 1212-1213).

STUART BOX

94. Stuart Jackson Box was Sigma's OEM operations manager from May 2007, when he started with the company, until July 2011. (CX 2524 (Box, Dep. at 8)). As OEM operations manager, Mr. Box reported to Mitchell Rona and had responsibility for customizing Fittings for Sigma OEM customers. (CX 2524 (Box,

Dep. at 11, 12)). Mr. Box was promoted to Sigma's director of engineering in July 2011. (CX 2524 (Box, Dep. at 7-8)).

95. Prior to joining Sigma, Mr. Box held positions as plant manager and manufacturing manager at foundries for Mueller Water Company, the parent of U.S. Pipe. (CX 2524 (Box, Dep. at 9-10)).

96. Mr. Box was involved in Sigma's decision to explore the feasibility of production of Domestic Fittings, and in carrying out that evaluation through the SDP project. (CX 2524 (Box, Dep. at 20-22)).

97. Mr. Box was not involved in negotiating the MDA, but was aware that MDA negotiations were ongoing while he evaluated SDP. (CX 2524 (Box, Dep. at 62-63)).

98. Mr. Box was responsible for making sure that the Fittings Sigma received from McWane met specification. (CX 2524 (Box, Dep. at 67-68)).

OTHER SIGMA EMPLOYEES

99. George Liu (Liuguang) is Sigma's production manager for China. (Pais, Tr. 1853).

100. Yin Baohai is the owner of Sigma's primary Fittings supplier in China, which Sigma refers to as "A1," and Yin Zhenhao is his son. (Pais, Tr. 1881-1882; CX 2118 at 001).

101. Iona Shenoy is an executive secretary at Sigma. (Rybacki, Tr. 3494).

iii. Sigma email distribution lists

102. Sigma's M20 email distribution list was a distribution list for Sigma's approximately top 20 managers. (Pais, Tr. 1750; Rybacki, Tr. 3490). Mr. Brakefield was a member of the M20 email distribution list. (Brakefield, Tr. 1218).

103. Sigma's RM6 email distribution list included Sigma's regional managers and Mr. Rona. (Brakefield, Tr. 1218-1219).

104. Sigma's M11 email distribution group is comprised of approximately 11 or 12 Sigma managers, including regional managers, and senior managers such as Mr. Pais, Mr. Bhattacharji, Mr. McGivern, Mr. Rybacki, and Mr. Brakefield. (Pais, Tr. 1837-1838; Brakefield, Tr. 1219).

105. Sigma's M3 email distribution list included Mr. Bhattacharji, Mr. Pais and Mr. Rybacki, and then Mr. McGivern when he joined Sigma. (CX 2527 (Pais, IHT at 14)).

106. Sigma's OEM5 email distribution list included Mr. Pais, Mr. Bhattacharji, Mr. Rybacki, Mr. Brakefield, and Mr. Rona. (Rona, Tr. 1491).

107. Sigma's SIGALL distribution list included the entire Sigma team. (Pais, Tr. 1790).

c. Star Pipe Products Ltd.

i. Company basics

108. Star Pipe Products Ltd. ("Star") imports and sells Fittings and other waterworks products. (Joint Stipulations of Fact, JX 0001 ¶ 3; Answer ¶ 11; Minamyer, Tr. 3131-3132).

109. Star was founded in 1981, and it has sold Fittings since approximately 1985. (RX 694 (Bhutada, Dep. at 6, 7)). Star's current annual revenues are approximately $135 million. (McCutcheon, Tr. 2250). Star has approximately 300 employees. (McCutcheon, Tr. 2249).

110. In 2007 and 2008, Star's waterworks division sold Fittings, joint restraints, municipal construction castings, nuts and bolts, flanges, flange packs, and accessories. (Minamyer, Tr. 3129-3131; McCutcheon, Tr. 2249).

111. In 2007 and 2008, Star's main product was Fittings, and accounted for approximately 50% of Star's annual revenues. (Minamyer, Tr. 3132-3133; McCutcheon, Tr. 2250).

112. Beginning in 2009, Star has contracted with foundries in the United States to manufacture Domestic Fittings. (Joint Stipulations of Fact, JX0001 ¶ 4).

113. Star has a controlling interest in Chinese foundries that manufacture Fittings for Star and imports Fittings manufactured at five foundries in China. ((McCutcheon, Tr. 2251-2252; RX 694 (Bhutada, Dep. at 8)). Star does not own the foundries in China. (CX 2539 (McCutcheon, Dep. at 8); RX 694 (Bhutada, Dep. at 8)).

114. Star does not have any joint ventures with, or ownership interests in, any of the foundries in the United States that produce Fittings on Star's behalf. (McCutcheon, Tr. 2251-2252).

115. Prior to 2009, Star did not sell Domestic Fittings and had not considered selling Domestic Fittings. It sold only imported Fittings. (CX 2533 (Bhargava, Dep. at 11); *see also* McCutcheon, Tr. 2267; Minamyer, Tr. 3136).

116. Star is responsible for quality assurance and quality control in Fittings production at both the domestic and foreign foundries from which it obtains Fittings. Quality assurance involves establishing the production processes at the foundry necessary to assure the quality of the product. (Bhargava, Tr. 2924-2926, 2936; CX 2533 (Bhargava, Dep. at 13)). Quality control involves conducting routine reviews, after production, to determine that the product meets the specifications. (Bhargava, Tr. 2924; CX 2533 (Bhargava, Dep. at 14)).

117. In the 2007 through 2009 time period, Star's waterworks division had an outside sales force of approximately 22 sales representatives (territory managers) and approximately six division managers, who supervised the territory managers. (Minamyer, Tr. 3129-3132, 3178; McCutcheon, Tr. 2253).

118. In 2008, Star had an inside sales force of approximately 15 people. (McCutcheon, Tr. 2253-2254; Minamyer, Tr. 3132). Star's inside sales force oversees customer

service, including checking inventory, fielding inquiries, and arranging shipping. (McCutcheon, Tr. 2253-2254).

119. Star has around 10 distribution centers throughout the United States where it stocks product in order to provide faster delivery times to its customers. (McCutcheon, Tr. 2264-2265); CX 2535 (Bhutada, Dep. at 10)).

ii. Key employees

120. Star's management team consists of three key people – Ramesh Bhutada, Daniel McCutcheon, and Navin Bhargava. Most of Star's major decisions are made by consensus of these three people. (Bhargava, Tr. 2926-2927).

DANIEL MCCUTCHEON

121. Daniel Ward McCutcheon has been employed by Star since approximately 1995. (CX 2537 (McCutcheon, IHT (Vol. 1) at 6); McCutcheon, Tr. 2247).

122. Mr. McCutcheon is currently the President of Star, and has held that position since the beginning of 2012. (McCutcheon, Tr. 2246-2247; CX 2539 (McCutcheon, Dep. at 6)).

123. Before becoming Star's President, Mr. McCutcheon was the Vice President of sales and operations at Star for 14 years, reporting to Ramesh Bhutada. (McCutcheon, Tr. 2247; CX 2537 (McCutcheon, IHT (Vol. 1) at 6)). In that position, Mr. McCutcheon was responsible for all sales, marketing, sales strategies, operations, and the distribution center operations. Mr. McCutcheon also had responsibility for the sales of Fittings in that position. (CX 2537 (McCutcheon, IHT (Vol. 1) at 7)). Mr. McCutcheon managed the sales department and Star's distribution centers. Star's outside and inside sales forces reported up to Mr. McCutcheon. (McCutcheon, Tr. 2254).

124. In 2008 and 2009, Mr. McCutcheon and Ramesh Bhutada together were responsible for setting Star's pricing strategy. (McCutcheon, Tr. 2252; CX 2538 (McCutcheon, IHT (Vol. 2) at 398)).

MATTHEW MINAMYER (FORMER EMPLOYEE)

125. Matthew Patrick Minamyer is currently the national sales manager for the Piping Products Division of Sigma (which includes Sigma's Fittings business), and he has held that position since July 2009. (Minamyer, Tr. 3127-3128; CX 2525 (Minamyer, IHT at 5)).

126. From approximately 2004 until he joined Sigma in July 2009, Mr. Minamyer was Star's national sales manager, with responsibility for managing Star's sales force, interfacing with customers, and increasing Star's sales. (McCutcheon, Tr. 2254; Minamyer, Tr. 3128; CX 2525 (Minamyer, IHT at 5-6)).

127. From approximately 1999 through 2005, Mr. Minamyer was a territory manager (December 1999 through mid-2000) and a division manager (mid-2000 through mid-2004) at Star. (Minamyer, Tr. 3128-3129; CX 2525 (Minamyer, IHT at 6-7); CX 2526 (Minamyer, Dep. at 9-10)).

128. As Star's national sales manager in 2007 and 2008, Mr. Minamyer reported to Daniel McCutcheon. (Minamyer, Tr. 3130; CX 2526 (Minamyer, Dep. at 11-12)).

129. When Mr. Minamyer was the national sales manager for Star's waterworks division, only the waterworks division sales force reported to him. (Minamyer, Tr. 3131-3132). Mr. Minamyer had six division managers reporting to him, covering five territories within the United States and one in Canada. (Minamyer, Tr. 3130).

130. When Mr. Minamyer was national sales manager at Star (F. 128), Mr. Minamyer and Mr. McCutcheon were in charge of setting and changing Star's list prices and multipliers and approving multiplier letters to customers. (Minamyer, Tr. 3139, 3142; CX 2526 (Minamyer, Dep. at 99-100).

RAMESH BHUTADA

131. Ramesh Bhutada was the President and CEO of Star from 1981 until approximately November 2011. Since November

2011, Mr. Bhutada has been CEO of Star. (CX 2534 (Bhutada, IHT at 6); CX 2535 (Bhutada, Dep. at 5)).

132. In 2008 and 2009, Mr. Bhutada was responsible, together with Mr. McCutcheon, for setting Star's pricing strategy. (McCutcheon, Tr. 2252; CX 2538 (McCutcheon, IHT (Vol. 2) at 398)).

NAVIN BHARGAVA

133. From 2003 to the present, Navin Bhargava has been a Vice President and, later, an Executive Vice President of Star, with responsibility for sourcing, inventory, engineering, quality control, and new product development. (Bhargava, Tr. 2917-2919, 2921; CX 2533 (Bhargava, Dep. at 7-8)).

134. Mr. Bhargava began at Star as a product manager in 1994, responsible for inventory planning and sourcing foundries for manufacturing. (Bhargava, Tr. 2918).

135. Mr. Bhargava was Star's purchasing manager from 1996 to 1998. In this role, Mr. Bhargava was also responsible for sourcing and supervising foundries that manufactured Star's products. (Bhargava, Tr. 2918-2920).

136. Mr. Bhargava was Star's director of manufacturing in 1998 until approximately 2003. His responsibilities in this role related to expanding Star's manufacturing, which was manufacturing in South America, Korea, China, and India at that time. (Bhargava, Tr. 2920).

137. Mr. Bhargava became a Vice President of Star in approximately 2003. He became Executive Vice President in approximately 2011. (Bhargava, Tr. 2917, 2921).

138. Mr. Bhargava's responsibilities included supervision of Star's entry into Domestic Fittings manufacturing. (Bhargava, Tr. 2921). Mr. Bhargava was responsible for locating appropriate domestic third-party foundries for Fittings production, developing tooling for those foundries, setting up quality control procedures,

and assessing the manufacturing capacities of domestic foundries. (Bhargava, Tr. 2925-2926).

139. Mr. Bhargava's quality control responsibilities involve establishing and conducting testing and reporting at Star's third-party foundries. (Bhargava, Tr. 2924).

140. Mr. Bhargava has had responsibilities related to Star's foundry operations in China, including aspects of opening a foundry such as: assessing the capabilities of a third-party foundry, establishing manufacturing processes for foundries, developing and approving product patterns, testing, and troubleshooting inventory and customer service. (Bhargava, Tr. 2921-2923).

LEROY H. LEIDER, JR.

141. Leroy H. Leider, Jr. is a general sales manager for Star. Mr. Leider has been employed by Star since approximately 2004. (CX 2536 (Leider, Dep. at 9-11)).

142. Mr. Leider was a territory manager for Star for approximately four years, from 2004 until 2008. (CX 2536 (Leider, Dep. at 11)).

143. In 2008 and 2009, Mr. Leider was a division manager for the northwestern United States, including Washington, Oregon, Montana, Idaho, Utah, New Mexico, Colorado, Wyoming, North Dakota, South Dakota, Minnesota, and Wisconsin. (CX 2536 (Leider, Dep. at 11, 13)).

144. Mr. Leider became a general sales manager in 2009. (CX 2536 (Leider, Dep. at 13)). As general sales manager, Mr. Leider has responsibility for supervising the division managers in much of the eastern United States. (CX 2536 (Leider, Dep. at 13, 16)).

145. As division manager, Mr. Leider reported to Matt Minamyer. (CX 2536 (Leider, Dep. at 17)). As division manager and as general sales manager, Mr. Leider has not had authority for setting Star's list prices or establishing Star's published multipliers for fittings. (CX 2536 (Leider, Dep. at 22)).

MICHAEL BERRY

146. Michael Berry has been a general sales manager for Star since 2009. (CX 2532 (Berry, Dep. at 12)).

147. Mr. Berry was first employed as a territory manager by Star in approximately 2004. As a territory manager, Berry was a sales person for Star. (CX 2532 (Berry, Dep. at 10)). From approximately 2005 to 2009, Mr. Berry was a division manager for Star, with responsibility for Star's western division, which included portions of the United States including west of Arizona and Utah. As division manager, Mr. Berry had responsibility for supervising the territory mangers in the western United States. (CX 2532 (Berry, Dep. at 13-15)).

148. John Ristine, John Lemoine, and Kris Kadai are territory managers for Star and reported to Mr. Berry in his capacity as division manager. (CX 2532 (Berry, Dep. at 13-14)).

149. As division manager, Mr. Berry did not have responsibility for setting price lists or published multipliers for Star. (RX 691 (Berry, Dep. at 18)). As division manager, Mr. Berry sometimes exercised authority to approve Project Pricing (F. 428), but that authority was sometimes exercised directly by either Mr. McCutcheon or Mr. Minamyer. (CX 2532 (Berry, Dep. at 22)).

OTHER STAR EMPLOYEES

150. Pawan Sharda has been a Senior Financial Analyst at Star since 2007. He has worked at Star since 2004. (CX 2540 (Sharda, Dep. at 6-7)).

151. Kirthi Jain was an accounting manager at Star in 2008. (McCutcheon, Tr. 2500, *in camera*).

152. Narendra Zamwar was a product development manager at Star in 2011, responsible for working with the independent foundries with which Star contracted for the

production of Domestic Fittings. (Bhargava, Tr. 2943, *in camera*).

153. Pam Garey was the inside sales manager at Star in 2008. (Minamyer, Tr. 3159-3160).

d. Other fittings suppliers and pipe suppliers

i. American Cast Iron Pipe Company

154. American Cast Iron Pipe Company ("ACIPCO") is a domestic manufacturer and seller of ductile iron pipe, fabricated pipe, spiral weld steel pipe, steel pipe, fire hydrants, gate valves and Fittings, with a foundry in Birmingham, Alabama. (CX 2486 (Burns, Dep. at 13)).

155. ACIPCO currently manufactures fittings in the United States ranging from 30" to 64" in diameter. ACIPCO exited the manufacture of Fittings under 30" in diameter in 2006. (CX 1897 at 002; CX 2486 (Burns, Dep. at 15, 17, 23-28); CX 2521 (Agarwal, IHT at 19-20)).

156. ACIPCO sells fittings as an ancillary product line; ACIPCO has focused its improvements and investments on ductile iron pipe production over the years. (CX 2486 (Burns, Dep. at 41-42, 49-51)).

157. In 2009, 2010, and 2011, ACIPCO's fittings sales accounted for less than 5% of its overall revenue. (CX 2486 (Burns, Dep. at 16-17)).

158. As an OEM supplier of pipe systems, ACIPCO purchases Fittings from Sigma to sell as part of its packaged sales of pipes and Fittings. (Pais, Tr. 1980-1981; CX 1092 at 005).

159. Jerry Neal Burns has been the division sales manager for the ductile iron pipe division of ACIPCO for the last 22 years. His responsibilities include the promotion and sales of ductile iron pipe and spiral weld steel pipe in the United States. (CX 2486 (Burns, Dep. at 6-7)).

160. Michael Hays has been the director of supply chain management for ACIPCO for the last six years. (CX 2487 (Hays, Dep. at 7-8)).

ii. Backman Foundry

161. Backman Foundry, located in Provo, Utah, is a foundry that has been in operation since 1938. Backman Foundry employs 32 people. (RX 648 (Backman, Dep. at 9, 12)).

162. Backman Foundry manufactures Fittings, which comprise approximately 20% to 25% of Backman Foundry's business, or approximately $3 million in sales annually. (CX 2488 (Backman, Dep. at 14, 18)). Backman Foundry manufactures customized Fittings, niche products that do not compete with McWane or other large Fittings suppliers who sell "standard off-the-shelf, the bread-and-butter [Fittings]." (CX 2488 (Backman, Dep. at 16-17)). Due to the high degree of customization of its Fittings, Backman Foundry produces products on a purchase-order-by-purchase-order basis. (CX 2488 (Backman, Dep. at 33)).

163. Alan Backman is the President, CEO, and primary owner of Backman Foundry. Mr. Backman has had supervisory responsibility for everything that goes on at the foundry for 17 years. (CX 2488 (Backman, Dep. at 11)). Mr. Backman's responsibilities are to oversee operations of the entire facility on a global, long-term basis. Mr. Backman also deals with customers and keeps "an eye on day-to-day operations to some degree." (CX 2488 (Backman, Dep. at 48)).

iii. Griffin Pipe Products

164. Griffin Pipe Products Co. ("Griffin") is a domestic manufacturer of ductile iron pipes and has been in operation since the 1960s. Griffin also resells Fittings as part of packaged sales of pipes and Fittings. (CX 2508 (Kurhts, Dep. at 9-11)).

165. At some point prior to 2002 or 2003, Griffin manufactured Domestic Fittings. However, Griffin no longer possesses the equipment or expertise necessary to manufacture

Fittings in the United States, has not considered re-entering the Domestic Fittings market, and has not studied what the associated costs of reentry would be. (CX 2508 (Kurhts, Dep. at 18-20, 48-50, 73-74), *in camera*).

166. Griffin continues to resell Fittings because some customers prefer to purchase their Fittings and ductile iron pipes from a single source. However, Griffin has attempted to reduce its Fittings sales over the last few years because Griffin loses sales when it cannot supply 100% of all Fittings to a particular job. (CX 2508 (Kurhts, Dep. at 42-45), *in camera*).

167. Griffin purchases the Fittings that it sells from four main sources, McWane, Star, Sigma, and Metalfit, Inc. (CX 2508 (Kurhts, Dep. at 20-21, 24-27), *in camera*).

168. Douglas Kuhrts became the national customer service manager at Griffin. Before that, Mr. Kuhrts was the customer service manager for Griffin's west region for ten years. Mr. Kurhts has been with Griffin for 12 years. (CX 2508 (Kurhts, Dep. at 6-7)).

iv. Metalfit, Inc.

169. Metalfit, Inc. ("Metalfit") is a foundry in Monterrey, Mexico and a manufacturer of flanged fittings from 3" to 48" in diameter and mechanical joint fittings from 4" to 48" in diameter. Metalfit supplies fittings under the Metalfit brand name, and as private label products for ACIPCO, U.S. Pipe, Griffin, and Sigma. (CX 2518 (Meyer, Dep. at 16-23)).

170. In addition to fittings, Metalfit produces municipal castings for the Mexican market and non-waterworks products including valve bodies, butterfly valves, ball valves, plug valves, and pump parts. (CX 2518 (Meyer, Dep. at 21)).

171. Metalfit exports approximately 98% of its fittings to the United States. (CX 2518 (Meyer, Dep. at 20-21)).

172. All of the fittings sold under the Metalfit brand name are sold through Distributors. (CX 2518 (Meyer, Dep. at 23-24)).

173. In 2011, approximately 70% of Metalfit's sales were of Fittings. Over the last five years, Fittings sales have generally been less than 70%. (CX 2518 (Meyer, Dep. at 21-22, 108-109)).

174. Mark L. Meyer has been an owner and Vice President of Metalfit since 2004. As Vice President of Metalfit, Mr. Meyer is responsible for sales, marketing, customer development, new product development, strategic planning, government affairs and all non-manufacturing aspects of the business. (CX 2518 (Meyer, Dep. at 9-12)).

175. Mr. Meyer and his partners built the Metalfit foundry in 1991 and began operations in 1994. In 2000, Mr. Meyer and his partners sold the foundry to Griffin Pipe Products, but they purchased it back in July 2004, and continue to operate the foundry today. (CX 2518 (Meyer, Dep. at 9-11)).

v. NAPAC, Inc.

176. NAPAC, Inc. ("NAPAC") is a Fittings supplier with close to a full product line of non-Domestic Fittings. (CX 2500 (Swalley, Dep. at 135); CX 2526 (Minamyer, Dep. at 14)).

177. NAPAC has three distribution centers, in Massachusetts, Florida, and California. (CX 2500 (Swalley, Dep. at 137)).

vi. NACIP

178. In 2010, North American Cast Iron Products ("NACIP") began selling Fittings in the United States that it imports from India and China. (Saha, Tr. 1152-1153, 1163, 1173-1176). NACIP's corporate headquarters is in New Jersey, and its distribution centers are in New Jersey, Norfolk, Virginia; Covington, Georgia; and Houston, Texas. (Saha, Tr. 1153-1154).

179. NACIP sells Fittings to Distributors. (Saha, Tr. 1153-1154). NACIP currently sells Fittings to approximately 50 separate Distributor branches, primarily third tier and independent distributors. (Saha, Tr. 1167-1168, 1171).

180. The volume of NACIP's Fittings sales is "[i]nsignificant" in comparison to McWane. (Saha, Tr. 1164, 1167-1168 (estimating NACIP's sales to be less than 5% of the overall Fittings distribution network in the United States); CX 2519 (Saha, Dep. at 26)).

181. NACIP Fittings sales are primarily in the eastern and southern parts of the United States. NACIP has no current plans to expand its Fittings sales to other geographical areas. (Saha, Tr. 1163-1164).

182. Suvobrata Saha is the President and part-owner of NACIP, and has worked in the Fittings industry since 1983. Mr. Saha's responsibilities at NACIP include sales planning, purchasing, and finance. (Saha, Tr. 1152-1157).

183. Mr. Saha serves as the joint managing director of Carnation Industries, Limited, a foundry that produces Fittings in China and India for NACIP. (Saha, Tr. 1155-1156).

184. Previously in his career, Mr. Saha worked as an eastern United States regional sales manager for Star. (Saha, Tr. 1157-1158).

185. In 1996, Mr. Saha started a waterworks company called Pipeline Components, Inc. ("PCI"), of which he was Vice President and part owner. (Saha, Tr. 1158). In 2005, Mr. Saha sold PCI to Sigma, at which time Sigma closed down all three of PCI's locations. The agreement by which Sigma purchased PCI included a 3-year non-compete clause binding Mr. Saha. During that time period, Mr. Saha was not permitted to be in the Fittings business. (Saha, Tr. 1161-1162).

vii. Serampore Industries Private

186. Serampore Industries Private ("SIP" or "Serampore") supplies Fittings in the United States that it imports from China, India and Mexico. (CX 2522 (Agarwal, Dep. at 6, 22), *in camera*).

187. SIP began selling Fittings in the United States in 2003 or 2004, and currently sells to approximately 50 to 60 Distributors

in approximately 35 states. (CX 2522 (Agarwal, Dep. at 29, 38), *in camera*).

188. SIP offers a full line of Fittings up to 48" in diameter. (RX 681 (Agarwal, Dep. at 30); CX 2521 (Agarwal, IHT at 64-65)).

189. Bharat Agarwal has been SIP's Vice President for business development since approximately 2007. In that position, Mr. Agarwal is responsible for finding new business opportunities, including new products and markets, and growing sales. (CX 2522 (Agarwal, Dep. at 6-7); RX 681 (Agarwal, Dep. at 9-10)).

viii. United States Pipe and Foundry Company, LLC

190. United States Pipe and Foundry Company, LLC ("U.S. Pipe"), headquartered in Birmingham, Alabama, currently manufactures ductile iron pipe. In the 2005 through 2012 time period, U.S. Pipe manufactured ductile iron pipe at two plants in Bessemer, Alabama, and a plant in Union City, California. (Morton, Tr. 2809).

191. U.S. Pipe sells complete waterworks systems that include its ductile iron pipe packaged together with related products, including Fittings and accessories. (Morton, Tr. 2809-2812).

192. Until April 2006, U.S. Pipe manufactured Domestic Fittings from 4" to 64" in diameter at its Chattanooga, Tennessee facility. U.S. Pipe stopped manufacturing Fittings in April 2006, and has since sold the Chattanooga facility. (Morton, Tr. 2810).

193. U.S. Pipe currently purchases non-Domestic Fittings primarily from Sigma, with Star as a secondary supplier, and Domestic Fittings from McWane and Star. U.S. Pipe sells the Fittings that it purchases as a part of a bundled package of Fittings and ductile iron pipe. (Morton, Tr. 2810, 2819-2820).

194. Thomas Morton was U.S. Pipe's Vice President of purchasing from 2005 until August 14, 2012. As Vice President of purchasing, Mr. Morton typically had final authority over all purchasing decisions at U.S. Pipe, including which vendors U.S. Pipe used. (Morton, Tr. 2807-2808).

195. Gary Crawford has been U.S. Pipe's sales director since 2010. From 1978 to 1989, Mr. Crawford was a sales representative for various geographic regions in the United States, selling U.S. Pipe products, including Fittings. From 1989 to 1994, Mr. Crawford was the Assistant Eastern Regional Sales Manager. From 1994 to December 2003, Mr. Crawford was the Eastern Regional Sales Manager. From December 2003 through 2010, Mr. Crawford was the Vice President of sales. (CX 2541 (Crawford, Dep. at 6-9)).

ix. Electrosteel USA, LLC

196. In 2009, Electrosteel USA, LLC ("Electrosteel") began selling 4" to 24" Fittings in the United States that were manufactured in India. (CX 2500 (Swalley, Dep. at 8-10, 12-13)).

197. Of approximately 75 Distributor branches in the southeastern United States, Electrosteel currently sells to only 7 to 10 branches. Those 7 to 10 branches purchase approximately 10% of their Fittings needs from Electrosteel. (CX 2500 (Swalley, Dep. at 152-153)).

198. Electrosteel estimates its own market share in the southeast as one percent after two and a half years. (CX 2500 (Swalley, Dep. at 33, 131)).

199. Robert Daniel Swalley has been the business development manager at Electrosteel since August 2007, when he first began working for Electrosteel. (RX 659 (Swalley, Dep. at 5)).

e. Domestic foundries

200. Foundries sell to (or are owned by) Fittings suppliers, not Distributors or End Users. (CX 2505 (Frazier, Dep. at 68-69);

CX 2507 (Glidewell, Dep. at 122-123); CX 2517 (Hall, Dep. at 148-150)).

i. EBAA Iron, Inc.

201. EBAA Iron, Inc. ("EBAA"), originally Earl Bradley and Associates, is a domestic joint restraint manufacturer with two domestic iron foundries in Texas and one in Georgia. (RX 658 (Keffer, Dep. at 7-8)).

202. EBAA does not produce any Fittings. (CX 2499 (Keffer, Dep. at 9)).

203. Jim Keffer is the sales division President for EBAA, where he has worked for 35 years. (RX 658 (Keffer, Dep. at 4-6)).

ii. EJ

204. EJ is the successor company to East Jordan Ironworks, a domestic foundry that began making gray iron municipal products in the 1920s, including: fire hydrants, gate valves, construction castings, municipal manhole frames and covers, and gray iron water main fittings. (RX 657 (Teske, Dep. at 8)).

205. EJ does not currently make Fittings, and has never made Fittings. (CX 2498 (Teske, Dep. at 12)).

206. EJ does currently resell McWane Fittings to a few clients in the Midwest which accounts for less than 1% of EJ's overall sales. (CX 2498 (Teske, Dep. at 33-34, 39-40)).

207. Thomas Michael Teske has been at East Jordan Ironworks, now EJ, since 1976, and is currently the company's Vice President and General Manager, responsible for EJ Canada, EJ USA, Inc., and EJ America Latina. (RX 657 (Teske, Dep. at 5-6)).

iii. Frazier & Frazier Industries

208. Frazier & Frazier Industries ("Frazier & Frazier") is a domestic foundry that was founded in 1972. Frazier & Frazier produces castings for Domestic Fittings for suppliers like McWane and Star. (RX 664 (Frazier, Dep. at 6-8, 14, 19-20)).

209. Frazier & Frazier produces unfinished Domestic Fittings; the castings that Frazier & Frazier makes for Fittings still require finishing, such as bolts, fasteners, and paint. (CX 2505 (Frazier, Dep. at 71-72)).

210. Frazier & Frazier typically produces castings for Domestic Fittings through metal patterns that are sometimes provided to Frazier & Frazier by its customers. (CX 2505 (Frazier, Dep. at 24-25) (noting that Frazier & Frazier may still incur expenses to set up the new pattern, including adapting the pattern to the foundry's flask and sampling)).

211. Charles W. Frazier, Jr. has been Frazier & Frazier's President and Chief Operating Officer since 2000. Mr. Frazier has been involved in the foundry business all of his life. (RX 664 (Frazier, Dep. at 5-6)).

212. VJ Gupta is the sales manager at Frazier & Frazier. (RX 665 (Gupta, Dep. at 6)).

213. Lee Ann Ewing has been the secretary and treasurer at Frazier & Frazier since approximately 2001, and has been employed by Frazier & Frazier since 1978. Ms. Ewing oversees Frazier & Frazier's accounting functions, including billing, bill payment, and profit and loss statement preparation. (RX 706 (Ewing, Dep. at 4-5)).

iv. Glidewell Foundry

214. Glidewell Foundry ("Glidewell") makes ductile iron castings for a wide variety of industries, including the waterworks industry. (RX 666 (Glidewell, Dep. at 13-14)).

215. Approximately 50% of Glidewell's total castings sales are for waterworks industry customers and products, including

Star, McWane, ACIPCO, and valve manufacturers. (RX 666 (Glidewell, Dep. at 14-15)).

216. Glidewell began making Domestic Fittings castings in 2009, and sold Domestic Fittings castings to Star in 2010. (RX 666 (Glidewell, Dep. at 16, 54); CX 2507 (Glidewell, Dep. at 95-96)).

217. Since 2009, Glidewell has cast only large-diameter Domestic Fittings of 30" to 48" in diameter. Glidewell has never had the equipment necessary to efficiently make Domestic Fittings castings smaller than 30". (CX 2507 (Glidewell, Dep. at 63)).

218. David Glidewell has worked in the foundry business since 1974, and has been the President and CEO of Glidewell Foundry since 1991. (RX 666 (Glidewell, Dep. at 8-10)). Mr. Glidewell oversees Glidewell's operations and handles all quoting and estimating for the company, including reviewing all requests for quotes. (RX 666 (Glidewell, Dep. at 11-12)).

v. Mabry Castings

219. Mabry Castings ("Mabry") manufactures castings for Domestic Fittings. (RX 676 (Hall, Dep. at 18-19)).

220. In 2009, Mabry began producing Domestic Fittings castings for Star. (CX 1581; RX 676 (Hall, Dep. at 67-68)). Mabry currently makes mechanical joint bend Domestic Fittings that are 8" in diameter and larger for Star. (RX 676 (Hall, Dep. at 19)).

221. Eddie N. Hall, Jr. is the sales manager at the Mabry foundry in Beaumont, Texas, where he has worked for over 29 years. As sales manager, Mr. Hall provides quotes to Domestic Fittings castings customers. Before 2011, Mr. Hall was Mabry's plant operations manager. (RX 676 (Hall, Dep. at 5, 7-12, 17, 18)).

f. Distributors

i. HD Supply

222. HD Supply is the largest waterworks Distributor in terms of sales in the United States. (Joint Stipulations of Fact, JX0001 ¶ 24). HD Supply sells all waterworks products, including polyvinyl chloride ("PVC") plastic pipe, ductile iron pipe, valves, hydrants, brass items, appurtenances, and Fittings. (Webb, Tr. 2706).

223. HD Supply is a national Distributor with 235 branches in major metropolitan areas in 44 states. Each branch stocks Fittings and other products for HD Supply's customers. (Webb, Tr. 2698-2699).

224. Jerry L. Webb was President and CEO of HD Supply's Waterworks Division from 2007 through December 2011. (Webb, Tr. 2694-2695). Mr. Webb reports to Joe DeAngelo, who is the CEO for all of HD Supply, and also gives monthly updates to the board on performance, long range forecasting, initiatives and sales. Mr. Webb's direct reports are the HD Supply waterworks division's president, the chief financial officer, the chief information officer, the vice president of market development, and the strategic business development director. (Webb, Tr. 2695-2696). Prior to December 2011, HD Supply's six waterworks regional vice presidents (including one vice president of fire protection) reported to Mr. Webb. (Webb, Tr. 2696-2697).

225. As CEO of the HD Supply Waterworks division, Mr. Webb is responsible for strategic growth, new markets, market and product initiatives, and vendor relations. (Webb, Tr. 2696-2697; CX 2514 (Webb, Dep. at 9-10)). Mr. Webb exerts final authority over which Fittings suppliers HD Supply selects. (Webb, Tr. 2746).

226. Rob Hixon and Don Taylor were employees of HD Supply in 2008. (CX 2536 (Leider, Dep. at 83)).

ii. Ferguson Enterprises

227. Ferguson Enterprises ("Ferguson") is the second largest waterworks Distributor in terms of sales in the United States. (Joint Stipulations of Fact, JX0001 ¶ 25). Ferguson serves the water and wastewater industry, supplying primarily pipe, valves, and fittings to contractors and municipalities. (CX 2503 (Thees, IHT at 15)). Ferguson has an approximately 25% market share nationwide. (Tatman, Tr. 952-953; Thees, Tr. 3059).

228. Ferguson is a national Distributor with approximately 167 branches throughout the country that distribute waterworks products, including Fittings. (Thees, Tr. 3042, 3045-3046).

229. Ferguson employs a sales force of over 300 outside sales people and 250 inside sales people. (Thees, Tr. 3060).

230. Ferguson and HD Supply are McWane's two largest Fittings customers. (Tatman, Tr. 953; Thees, Tr. 3042).

231. William Taylor Thees, Jr. is the Vice President of waterworks at Ferguson, where he has worked for the last 22 years. (Thees, Tr. 3032-3033). Before becoming Vice President in August 2009, Mr. Thees held a series of positions at Ferguson, including branch manager, district manager, and business group owner of Ferguson's waterworks group, with responsibilities similar to his Vice President responsibilities. (Thees, Tr. 3034-3035).

232. As Vice President of Ferguson's waterworks division, Mr. Thees has profit and loss and strategy development responsibilities for the waterworks group. These responsibilities include deciding what initiatives to pursue or ways to grow the waterworks group, and deciding whether to acquire or open new Ferguson branches. (Thees, Tr. 3039).

233. Mr. Thees regularly interacts with his district managers, gathering intelligence in order to understand relationships with suppliers, the relative sales volumes of each district, and potential growth areas. (Thees, Tr. 3040-3041).

234. Mr. Thees often has the final authority in the selection of waterworks suppliers, including Fittings suppliers, though he discusses waterworks decisions with other Ferguson divisions when the supplier sells non-waterworks products to Ferguson as well. (Thees, Tr. 3041-3042).

235. Mr. Thees participates in negotiating rebates with Ferguson's waterworks suppliers. The corporate rebate department takes the lead when it is a corporate rebate, and the local or regional office takes the lead on regional rebates. (Thees, Tr. 3041).

iii. WinWholesale

236. WinWholesale, which does business as WinWater Works ("WinWater"), is the third largest waterworks Distributor in the United States with 43 local companies or branches in 22 states. (CX 2162 at 001; CX 2546 (Gibbs, Dep. at 11, 15-16)). WinWater sells waterworks products, including Fittings, to End Users. (CX 2546 (Gibbs, Dep. at 7-8)).

237. In 2008, WinWholesale purchased approximately $9.5 million in Fittings. In 2009, WinWholesale purchased approximately $8.7 million in Fittings. In 2010, WinWholesale purchased approximately $9.0 million in Fittings. In 2011, WinWholesale purchased approximately $9.0 million in Fittings. (CX 2546 (Gibbs, Dep. at 12)).

238. Eddie Gibbs has been the Vice President of vendor relations for WinWholesale since 2005. (CX 2546 (Gibbs, Dep. at 7-8)). As the Vice President of vendor relations, Mr. Gibb's responsibilities include negotiating programs for all of WinWholesale's products, including Fittings, with vendors, gaining access to vendor lines, and dealing with disputes with local companies (branches) and vendors. (CX 2546 (Gibbs, Dep. at 7)).

iv. Hajoca Corporation

239. Hajoca Corporation ("Hajoca") distributes plumbing, heating, and industrial products. (Pitts, Tr. 3291-3292). Hajoca

sells waterworks products including flanged pipes and fittings, saddles, valves, and Fittings. (Pitts, Tr. 3297).

240. Hajoca has 351 locations. Approximately nine of these locations sell waterworks products. Three branches sell waterworks exclusively: Tulsa, Oklahoma; Salt Lake City, Utah; and Olathe, Kansas. Lansdale, Pennsylvania also sells waterworks products. (Pitts, Tr. 3296-3297).

241. Compared to Ferguson and HD Supply, Hajoca's presence in the waterworks distribution business, with three dedicated waterworks locations, is very small. (Pitts, Tr. 3299-3300).

242. Roy Lee Pitts has been the director of vendor relations at Hajoca for the last fifteen years. (Pitts, Tr. 3292). As director of vendor relations, Mr. Pitts negotiates programs with Hajoca's vendors, supervises Hajoca's supplier rebate programs, and represents Hajoca at industry events. Mr. Pitts' responsibilities include waterworks. (Pitts, Tr. 3293-3294).

243. Mr. Pitts regularly communicates with waterworks suppliers about Hajoca's waterworks purchasing goals. (Pitts, Tr. 3294). Mr. Pitts advises individual Hajoca branches about supplier corporate rebate programs, cash discounts, and shipping terms, and the branch managers of those branches make final decisions on which products to purchase. (Pitts, Tr. 3295-3296).

v. The Distribution Group (TDG)

244. The Distribution Group, also known as "TDG," is a group of distributors that collectively negotiates with suppliers, which TDG refers to as vendors, on behalf of the 32 independent Distributors that make up the membership of TDG. (CX 2494 (R. Fairbanks, Dep. at 10); Sheley, Tr. 3380; Minamyer, Tr. 3188).

245. TDG pools its members' buying power together to jointly earn rebates based on group purchases from vendors. (CX 2494 (R. Fairbanks, Dep. at 10); Minamyer, Tr. 3188). The purpose of TDG is to increase the negotiating power of individual Distributors who would otherwise not receive terms as favorable

to them as the terms that suppliers extend to larger Distributors like HD Supply. (Sheley, Tr. 3394-3395).

246. TDG collectively negotiates for freight terms, payment terms, rebate programs, and extended purchasing agreements with 68 suppliers for various products, including Fittings. (Sheley, Tr. 3378-3379; CX 2494 (R. Fairbanks, Dep. at 11)).

247. TDG negotiates rebate terms, but not product prices, with vendors. Individual members negotiate price with their suppliers. (CX 2494 (R. Fairbanks, Dep. at 21), *in camera*; Sheley, Tr. 3393).

248. Vendors pay earned rebates to TDG and TDG then distributes those rebates back to the member Distributors in proportion to their purchases. (CX 2494 (R. Fairbanks, Dep. at 21, 57-58), *in camera*; Sheley, Tr. 3379-3380).

249. TDG's Vendor Committee reviews proposals from vendors and selects the vendors with whom TDG will have rebate programs. (CX 2494 (R. Fairbanks, Dep. at 12); Sheley, Tr. 3379-3380). The Vendor Committee consists of nine members, each with an equal vote. (CX 2494 (R. Fairbanks, Dep. at 12-14)). Members of the Vendor Committee include, Dennis Sheley, Illinois Meter Company; Curtis Porter, Utility Supply Company; Michael Coryn, Utility Equipment Company; Jenks Hayes, Hayes Pipe & Supply; Peter Prescott, E.J. Prescott Company; Wayne Johnson, Dana Kepner Company; Dennis Johnson, Atlas Utility; Hod Fowler, H.D. Fowler Company; and Jeff Konen, Consolidated Supply Company. (CX 2494 (R. Fairbanks, Dep. at 13)).

250. Currently, TDG has contracts with 72 different waterworks vendors. (Sheley, Tr. 3396-3397). TDG members must purchase certain percentages of their purchases from TDG vendors, but members are not required to purchase products from any specific vendor just because the vendor has a rebate program with TDG. (CX 2494 (R. Fairbanks, Dep. at 33); Sheley, Tr. 3395-3396).

251. Richard Frank Fairbanks II is the President of TDG. (CX 2494 (R. Fairbanks, Dep. at 10)). His primary

responsibilities are to manage relationships between members and vendors, to facilitate negotiations between members and vendors, to manage the numbers of purchases and rebates, and to oversee the purchasing goals and commitments. (CX 2494 (R. Fairbanks, Dep. at 58-59, 61)).

252. Mr. Fairbanks has relationships with Larry Rybacki at Sigma, Dan McCutcheon at Star, and Rick Tatman and Jerry Jansen at Tyler/Union. (CX 2494 (R. Fairbanks, Dep. at 65-66)). Previously Mr. Fairbanks had relationships with Victor Pais at Sigma and Matt Minamyer at Star. (CX 2494 (R. Fairbanks, Dep. at 65-66)).

vi. E.J. Prescott, Inc.

253. E.J. Prescott, Inc. ("E.J. Prescott") is a waterworks Distributor headquartered in Gardiner, Maine. (CX 2501 (Prescott, IHT at 7-9)). E.J. Prescott has 27 branches located throughout Maine, New Hampshire, Rhode Island, Vermont, Massachusetts, Connecticut, Indiana, Ohio, and New York. (CX 2502 (Prescott, Dep. at 9); CX 2501 (Prescott, IHT at 8)).

254. Right before the passage of ARRA, 20% of E.J. Prescott customers were "[a] hundred percent domestic." (CX 2501 (Prescott, IHT at 41)). E.J. Prescott's fitting inventory in 2012 was 50% domestic and 50% imported. (CX 2502 (Prescott, Dep. at 11)).

255. E.J. Prescott purchases ductile iron pipe fittings from McWane, Sigma, Star, and SIP. (CX 2502 (Prescott, Dep. at 15, 20)).

256. E.J. Prescott is a member of TDG. (RX 661 (Prescott, Dep. at 40)).

257. Peter Prescott has been the CEO of E.J. Prescott for ten years. (CX 2502 (Prescott, Dep. at 6-7)). From 1978 until he became CEO, Mr. Prescott was the President of E.J. Prescott. (CX 2502 (Prescott, Dep. at 7)).

vii. Groeniger & Company

258. Groeniger & Company ("Groeniger") was a waterworks Distributor that had 14 branches before it had to close five branches due to the economy. (CX 2509 (Groeniger, IHT at 24)). Ferguson purchased Groeniger in 2011. (CX 2510 (Groeniger, Dep. at 125)).

259. Groeniger was a member of TDG. (CX 2510 (Groeniger, Dep. at 58-59)).

260. Groeniger purchased Fittings from McWane, Sigma, and Star. (CX 2510 (Groeniger, Dep. at 44)).

261. Michael Groeniger was the President of Groeniger from 1984 to 2011, when Groeniger was purchased by Ferguson. (CX 2509 (Groeniger, IHT at 7); CX 2510 (Groeniger, Dep. at 125)). Mr. Groeniger became the Chairman of the Board in 1988 or 1989. (CX 2509 (Groeniger, IHT at 7)). Mr. Groeniger's responsibilities as President were to oversee the entire company; which he did by visiting his branches to make sure things were running well. (CX 2509 (Groeniger, IHT at 7-8)).

viii. Illinois Meter, Inc.

262. Illinois Meter, Inc. ("Illinois Meter") is a Distributor of waterworks, utility, sewer, and gas products, including Fittings. (Sheley, Tr. 3376-3378). Illinois Meter purchases Fittings from McWane and Star. (CX 2516 (Sheley, Dep. at 11, 133)).

263. Illinois Meter is a member of TDG. (Sheley, Tr. 3378). Illinois Meter has five branches, located in Missouri and Illinois. (Sheley, Tr. 3382).

264. In 2008, approximately 35% of Illinois Meter's Fittings sales consisted of Domestic Fittings. (Sheley, Tr. 3433, *in camera*).

265. Dennis James Sheley is the President and owner of Illinois Meter, and has been the owner of Illinois Meter for the last 28 years. (Sheley, Tr. 3375-3376).

266. Mr. Sheley's responsibilities at Illinois Meter include: visiting with customers, overseeing purchasing and sales decisions, and ultimate authority on the selection of waterworks suppliers, including Fittings suppliers. (Sheley, Tr. 3376-3378).

267. Mr. Sheley is also the Chairman of the Board of TDG, and one of nine equal voting members of TDG's Vendor Selection Committee. (Sheley, Tr. 3379).

ix. C.I. Thornburg Company, Inc.

268. C.I. Thornburg Company, Inc. ("C.I. Thornburg") is a waterworks Distributor, and is a member of TDG. (CX 1362 at 002; CX 2489 (Morrison, IHT at 6-8)).

269. C.I. Thornburg has grown from one branch in 1973 to five branches in West Virginia, Kentucky, and Tennessee. (CX 2489 (Morrison, IHT at 19)).

270. C.I. Thornburg purchases 85% of their imported Fittings from Sigma, 10% from Star and 5% from Tyler. (CX 2489 (Morrison, IHT at 60)).

271. Edward Morrison Jr. is the President of C.I. Thornburg and has been since 1991. (CX 2489 (Morrison, IHT at 6)). Mr. Morrison's role as president includes overseeing administrative functions, serving on various industry boards, vendor relations, helping with pricing and contractor sales, and municipal sales. (CX 2490 (Morrison, Dep. at 15)).

x. Utility Equipment Company

272. Utility Equipment Company ("UECO") is a Distributor that sells all materials related to underground water, sewer, and storm water retention and detention systems. (CX 2544 (Coryn, Dep. at 8)).

273. UECO has seven branches located in Iowa, Nebraska, and Illinois. (CX 2544 (Coryn, Dep. at 8-9)). UECO is a member of TDG. (CX 1362 at 002; RX 703 (Coryn, Dep. at 47-48)).

274. Michael R. Coryn is the President of UECO, which is a family company, and has been for 17 years. (CX 2544 (Coryn, Dep. at 6)). Mr. Coryn's responsibilities as President include making all major business decisions and involvement in purchasing and inventory decisions and sales. (CX 2543 (Coryn, IHT at 8-9); CX 2544 (Coryn, Dep. at 7)).

xi. Dana Kepner Company

275. Dana Kepner Company ("Dana Kepner") is a Distributor that sells waterworks products, including Fittings, to End Users. (CX 2492 (Johnson, Dep. at 9, 39, 79)).

276. Dana Kepner has 15 branches in Montana, Wyoming, Colorado, Texas, Arizona, and Nevada. (CX 2492 (Johnson, Dep. at 9)). Dana Kepner is a member of TDG. (CX 1362 at 001).

277. Wayne Edward Johnson is President and part owner of Dana Kepner. Mr. Johnson has been President since 1994 and has worked for the company since 1991. (CX 2492 (Johnson, Dep. at 6)). Mr. Johnson's responsibility as President of Dana Kepner is "[t]he overall supervision of the company," including overseeing the purchasing of Fittings. (CX 2492 (Johnson, Dep. at 7-8)).

4. Industry background

a. Fittings basics

i. Applications

278. Fittings are used in pressurized water distribution and treatment systems to join pipes, valves and hydrants, and to change, divide or direct the flow of water. (Joint Stipulations of Fact, JX0001 ¶ 6; Tatman, Tr. 219-220; CX 2494 (R. Fairbanks, Dep. at 79); CX 2502 (Prescott, Dep. at 51); CX 2489 (Morrison, IHT at 40); Thees, Tr. 3052-3053).

279. Pressurized pipe applications, which include all potable water lines and some sewer lines, almost always use Fittings. (Webb, Tr. 2710-2711). Pressurized applications are those applications where the flow is not caused by gravity, and include pressurized water, pressurized reclaimed water, pump

stations, treatment plants, and pressurized force main sewers. (Thees, Tr. 3053).

280. All water lines are pressurized and some sewer lines are pressurized. (Thees, Tr. 3053).

281. Fittings are rarely used in gravity pipe lines; plastic fittings are more prevalent in those applications. (Webb, Tr. 2711-2712; CX 2489 (Morrison, IHT at 40)).

282. Fittings are used for both "line" (*i.e.*, underground) and "plant" waterworks projects. (Webb, Tr. 2710).

283. "Plant" work refers to waterworks projects for water treatment plants, pumping stations, or wastewater treatment plants, which process water so that it can be consumed and process sewage so that it is clean when it is dumped. (CX 2502 (Prescott, Dep. at 48-49); Webb, Tr. 2710; Tatman, Tr. 227-228). Plant work often involves the use of Fittings in systems that are indoors. (CX 2480 (Napoli, Dep. at 19-20)).

284. Plant work generally uses the largest sized fittings; uses many different, uncommonly used configurations; and has special coating and painting requirements. (Pais, Tr. 1913-1914).

285. "Line" work refers to waterworks projects related to pipes that are located under the street in order to move water from water supply facilities to neighborhoods, or from neighborhoods to sewage facilities. (CX 2502 (Prescott, Dep. at 48); Webb, Tr. 2710). In comparison to plant work, "underground" distribution network waterworks projects use more predictable configurations and numbers of Fittings. (Pais, Tr. 1913; CX 2480 (Napoli, Dep. at 19-20)).

ii. Shapes, sizes, and configurations

286. There are several thousand unique configurations of Fittings in different shapes, sizes and coatings. (Joint Stipulations of Fact, JX0001 ¶ 8). Each unique configuration has its own identifier and is a unique item or stock-keeping unit ("SKU"). (Tatman, Tr. 463; CX 2500 (Swalley, Dep. at 104-105)).

287. Fittings come in several shapes, including elbows, reducers and "T's." (Tatman, Tr. 220-221).

288. Typically, ductile iron pipe fittings range in size from two or three inches to 48 inches. (CX 2521 (Agarwal, IHT at 64-65), *in camera*; CX 2491 (Johnson, IHT at 19-20); CX 2525 (Minamyer, IHT at 95-96); CX 2483 (Tatman, IHT at 23)).

289. Two to twelve inch Fittings, or "small-diameter" Fittings, are predominately used for housing subdivisions and private contracting work. (Brakefield, Tr. 1279-1280; CX 1479; CX 2477 (Jansen, Dep. at 89)).

290. Fittings 24" in diameter and below make up around 90% of the overall market for ductile iron pipe fittings. (*See* CX 1895 at 001, 005, *in camera*; RX 127 at 002; CX 2502 (Prescott, Dep. at 76-77); CX 2510 (Groeniger, Dep. at 160-161); CX 2492 (Johnson, Dep. at 71); CX 2504 (Thees, Dep. at 135); CX 2502 (Prescott, Dep. at 76-77).

291. Fittings 24" in diameter or smaller are commonly used in underground water distribution networks. (Brakefield, Tr. 1279-1281; CX 1479; Pais, Tr. 1913).

292. Fittings above 24" in diameter, or "large-diameter" fittings, are predominately used for public works jobs for large treatment plants or for moving water through large transmission lines. (Brakefield, Tr. 1281; CX 1479; CX 2477 (Jansen, Dep. at 90)).

293. There are several different types of Fittings "end configurations," including "flanged," "mechanical joint," and "push-on." (Webb, Tr. 2712-2713; Thees, Tr. 3052-3055).

294. "Flanged" Fittings are flat faced Fittings that connect to a flanged ductile iron pipe with nuts and bolts and a flat rubber gasket sandwiched between the two flanges that provides a sealed joint. (Thees, Tr. 3054; Webb, Tr. 2713). Flanged fittings do not require an external restraint, and bolt directly onto a pipe. (CX 2480 (Napoli, Dep. at 22-23)).

295. Flanged Fittings are typically used in above-ground applications, such as plants and lift stations. (Webb, Tr. 2713; Tatman, Tr. 227-228; Thees, Tr. 3054; CX 2502 (Prescott, Dep. at 18); CX 2480 (Napoli, Dep. at 22-23); CX 2477 (Jansen, Dep. at 78- 80).

296. "Mechanical joint" ("MJ") Fittings do not employ nuts and bolts to connect to the ductile iron pipe, but use a gland that compresses the Fitting gasket against the ductile iron pipe as pressure flows through the system and an external restraint that secures the pipe to the fitting. (Tatman, Tr. 228; Webb, Tr. 2713; Thees, Tr. 3054-3055; CX 2480 (Napoli, Dep. at 22-23)).

297. MJ Fittings are typically used for non-plant, underground applications. (Tatman, Tr. 228; Webb, Tr. 2713; CX 2502 (Prescott, Dep. at 50); CX 2522 (Agarwal, Dep. at 84), *in camera*).

298. "Push-on" Fittings are Fittings that connect only by being pushed on to the pipe. (Webb, Tr. 2713).

299. Push-on Fittings are used in underground applications. (Webb, Tr. 2713-2714; CX 2522 (Agarwal, Dep. at 84), *in camera*).

300. There are "full-body" and "short-body" Fittings. (Webb, Tr. 2712). Short-body Fittings are smaller and have thinner walls than full-body Fittings. Full-body Fittings are used less often than short-body Fittings. (Webb, Tr. 2712-2713; CX 2477 (Jansen, Dep. at 83)).

301. Full-body Fittings are commonly referred to as C110 Fittings. (CX 2510 (Groeniger, Dep. at 159-160)). A C110 Fitting is a longer, thicker, and heavier Fitting used in approximately 10% of Fittings jobs. C110 is a type of AWWA specification. (McCutcheon, Tr. 2292; CX 2477 (Jansen, Dep. at 83)).

302. Short-body Fittings are commonly referred to as C153 Fittings. A C153 Fitting is thinner and lighter than a C110

Fitting. C153 is a type of AWWA specification. (McCutcheon, Tr. 2292; CX 2477 (Jansen, Dep. at 83-84)).

303. C110 and C153 Fittings are pressure rated up to 350 pounds per square inch ("PSI'). (Thees, Tr. 3053).

304. Suppliers generally line flanged Fittings with cement, but can also line them with polyethylene or epoxy to prevent corrosion. (Thees, Tr. 3055; CX 2509 (Groeniger, IHT at 42); CX 2491 (Johnson, IHT at 18)).

305. Of the many configurations of Fittings, a small number of Fittings cover a large percentage of the volume of Fittings sold in the market. (Tatman, Tr. 225).

306. Approximately 80% of the demand for Fittings may be serviced with approximately 100 or fewer commonly used sizes and configurations of Fittings. These Fittings are commonly referred to in the industry as "A" or "B" Fittings. (Joint Stipulations of Fact, JX0001 ¶ 9; CX 0120 at 10; Tatman, Tr. 225; Bhargava, Tr. 3010-3011, *in camera*; CX 2522 (Agarwal, Dep. at 73), *in camera*).

307. "A" and "B" Fittings are generally relatively fast-moving Fittings items that require approximately 120 patterns to make, and are primarily 4" in diameter to 12" in diameter. (Bhargava, Tr. 3010-3011, *in camera*; CX 2477 (Jansen, Dep. at 91); Webb, Tr. 2720-2722; Thees, Tr. 3057-3058; CX 2533 (Bhargava, Dep. at 62), *in camera*; CX 2522 (Agarwal, Dep. at 73), *in camera*).

308. "C" and "D" Fittings are very low volume items (*e.g.*, items for which McWane sells 50 or fewer per year), and are relatively expensive to manufacture. (Tatman, Tr. 225-226; *see* McCutcheon, Tr. 2292-2293; CX 2533 (Bhargava, Dep. at 62), *in camera*).

309. "Oddball" Fittings are Fittings that are not routinely used on every project and are Fittings that End Users might request once a year or every five years. Distributors generally prefer not to stock Oddball Fittings. (Webb, Tr. 2721-2722; CX 2513 (Webb, IHT at 160); Thees, Tr. 3057-3058).

iii. Manufacturing

310. Generally, a Fitting is manufactured through the following steps: melting scrap metal in a cupola; transferring the molten metal to a casting area via a transfer ladle; fitting cores into molds so that the molded fitting is hollow; pouring the molten iron; shaking the casting out of the mold; machining off gates and risers, and creating bolt holes; cleaning; preparing for cement lining; painting; packaging; and shipping. (Brakefield, Tr. 1412-1414; Rona, Tr. 1488).

311. "Patterns" are molds made of aluminum, stainless steel, or wood. Manufacturers use patterns to make impressions in sand for pouring molten iron that takes the shape of the pattern. (CX 2522 (Agarwal, Dep. at 74), *in camera*).

312. Disamatic ("DISA") molding lines are automated and represent the most efficient and economical manufacturing process for small diameter Fittings. DISA is a brand of fittings molding equipment. (Tatman, Tr. 435, 447; Rona, Tr. 1489).

313. McWane's DISA automated molding unit for Fittings castings in Anniston, Alabama cost $20 million, and can produce fittings up to 8" in diameter. (Tatman, Tr. 435).

314. "Cope and drag" is a type of molding process for Fittings production. Cope and drag patterns are molds where the Fitting casting is produced in halves that are put together. (Rona, Tr. 1509-1510). The foundry pours molten iron into the cope and drag pattern to produce a Fitting. A foundry cannot produce a casting that is larger than the heights of the cope and drag put together. (CX 2505 (Frazier, Dep. at 55-56)).

315. "Lost foam" is another Fittings production method, and involves placing styrofoam replicas of Fittings in casting sand. Molten metal is then poured into the sand, and the metal replaces the styrofoam. (Rona, Tr. 1510).

316. A flask is a steel vessel that holds a Fittings pattern during the manufacture of a Fitting. (Rona, Tr. 1511, 1549-1550; CX 0282 at 008, 011).

iv. Related waterworks products

317. The primary products used in most waterworks projects are ductile iron pipe and PVC pipe. Other waterworks products include the following: high density polyethylene pressurized pipe; drainage pipe; concrete pipe; gate valves; fire hydrants; butterfly valves; service brass; marking tape; water meters; joint restraints; glands; and mechanical joint and flanged Fittings. (Thees, Tr. 3050-3051; *see also* Sheley, Tr. 3386; CX 2477 (Jansen, Dep. at 63-64)).

318. "Glands" are made of ductile iron, and are used to create a seal between a pipe and a mechanical joint Fitting. (Tatman, Tr. 458-461; CX 1653 at 004; CX 2477 (Jansen, Dep. at 67)).

319. "Joint restraints," like glands, are made of ductile iron and also create a seal between a pipe and a fitting. In addition, a joint restraint is bolted on to both the pipe and the fitting in order to keep the pipe from blowing out of the fitting when the pipe is under pressure. (Tatman, Tr. 460-461; CX 2477 (Jansen, Dep. at 66-67)).

320. "Accessories" include various products associated with Fittings, such as bolts, nuts, gaskets, and flanges. (McCutcheon, Tr. 2255). Glands are considered to be a Fitting accessory. (Tatman, Tr. 461). McWane sometimes sells Fittings with accessories. Fittings alone and Fittings with accessories have different price points and SKUs associated with them. (Tatman, Tr. 462-463).

321. "Municipal castings" is a category that consists of products such as manhole covers and drainage grates. (CX 2539 (McCutcheon, Dep. at 8), *in camera*; CX 2543 (Coryn, IHT at 21-22)).

b. Fitting sales

i. Fittings as commodity products

322. Fittings are commodity products produced to American Water Works Association ("AWWA") standards and specifications. (Joint Stipulations of Fact, JX0001 ¶ 7; Answer ¶ 27(a); Rybacki, Tr. 1114; CX 2477 (Jansen, Dep. at 18)).

323. Any Fitting that meets an AWWA specification is functionally interchangeable with any other Fitting that meets the same specification. (Tatman, Tr. 878-879 (referring to Domestic versus imported Fittings: "They're exact one for one. . . . There's no difference in how you apply or use the product."); Pais, Tr. 1922-1923 ("[T]he product is interchangeable. It's a common product. Yes, we like to believe our quality is better, our service is better, but at the end of the day, that really doesn't translate into a premium."); CX 2477 (Jansen, Dep. 141); Rybacki, Tr. 3572).

324. Fittings produced by Sigma, McWane and Star that meet the same AWWA specifications are interchangeable with each other. (CX 2477 (Jansen, Dep. at 86)).

ii. Demand inelasticity

325. Demand for Fittings is largely driven by housing-related infrastructure construction and by construction of wastewater treatment plants, which in turn are driven by such factors as the rate of housing growth, and the age and condition of existing systems. (Joint Stipulations of Fact, JX0001 ¶ 11; CX 2480 (Napoli, Dep. at 20-21)).

326. Fittings typically comprise 5% or less of the total cost of a typical waterworks project. (Joint Stipulations of Fact, JX0001 ¶ 10; Tatman, Tr. 220-221; CX 2477 (Jansen, Dep. at 61)). Fittings account for only 1.5% to 2% of the cost of the materials in a typical line job. (CX 2538 (McCutcheon, IHT (Vol. 2) at 344-345), *in camera*).

327. The price of Fittings is not a major factor in determining whether a Distributor wins a bid. (CX 2489

(Morrison, IHT at 37-38)). The price of the pipe (either PVC or ductile iron) is the primary factor when pricing a bundle of goods. (CX 2489 (Morrison, IHT at 37)).

328. End User demand for Fittings is not impacted by the price of Fittings. (CX 2477 (Jansen, Dep. at 81-82) (testifying that he has not observed the demand of Fittings being affected by the price of Fittings); *see also* Webb, Tr. 2723 (testifying that he has "never seen a correlation with any of our product lines up or down that impacted the demand side."); Thees, Tr. 3058 ("Q. When the price of fittings go down, do your sales of fittings go up? A. No. Q. And when the price of fittings go up, do your sales of fittings go down? A. No."); *see also* CX 2538 (McCutcheon, IHT (Vol. 2) at 344), *in camera*; (testifying that a 10% increase in price of Fittings would not prompt an End User to forego the purchase of Fittings because the Fittings are a small portion of the total cost of the project to the End User)).

iii. Bidding process

329. Some municipalities stock inventory and when they buy inventory they put out a list and purchase by line items. (CX 2502 (Prescott, Dep. at 16)).

330. Some municipalities put up for bid an annual contract for specific items, such as Fittings, hydrants, valves, PVC pipe or ductile iron pipe. (CX 2480 (Napoli, Dep. at 37-41) (describing the annual contract bidding process for some municipal governments and municipal water authorities)). Whoever is the low bidder on the contract holds the price for that item and supplies the item to the municipality for the year. (CX 2509 (Groeniger, IHT at 46)).

331. Most waterworks projects are individual projects subject to a bidding process. (CX 2516 (Sheley, Dep. at 108-109), *in camera*; CX 2504 (Thees, Dep. at 139)).

iv. Specifications

332. The Fittings bidding process on an individual waterworks project typically begins with an End User completing

a specification and publicly or privately requesting bids from contractors. (Thees, Tr. 3065-3066).

333. When a municipality or regional water authority undertakes a waterworks project, it will generally issue specifications for all of the pipes, valves, hydrants, Fittings, and related waterworks equipment needed for the project, and seek bids from contractors for its completion. (CX 2546 (Gibbs, Dep. at 61-62); CX 2504 (Thees, Dep. at 138-140) (Once a project is "put on a bid list," the contractor begins "soliciting bids from suppliers for the various components that make up that project.")).

334. Either project consulting engineers or municipal water districts (or both) write Fittings specifications. (Minamyer, Tr. 3136).

335. Once contractors receive the specification, they solicit bids and other assistance from Distributors that can supply the various products for that project. (CX 2504 (Thees, Dep. at 139)).

v. Material takeoffs

336. A contractor may request a "material takeoff" from a Distributor when the contractor wants to submit a bid for the project. (CX 2502 (Prescott, Dep. at 96).

337. A "material takeoff" is a process whereby a Distributor's sales personnel look at a project's blueprints and gather a list of materials that the End User will need to build the project. After performing a material takeoff, the Distributor provides the bidding contractor with a quotation for all of the waterworks products needed to complete the project. (Thees, Tr. 3037, 3066-3067).

338. Distributors typically do not specify the manufacturer of the Fittings when providing a material takeoff. (Thees, Tr. 3048 ("[I]t's not out of the realm of possibility that fittings may be specified by brand, but that is not as common as what you would see on . . . valves, hydrants and service brass."); CX 2492 (Johnson, Dep. at 82) ("Q. Do you ever see a supplier's name for fittings? A. Very seldom if at all.")).

vi. Submittals

339. A "submittal" is a packet of information provided by a Distributor to an End User after the Distributor has been selected that identifies the types of products and brands that are being supplied. The End User will review the submittal to make sure it conforms to the specifications. (Thees, Tr. 3066-3069; CX 2489 (Morrison, IHT at 38)). Distributors supply whatever brand was listed on the submittal documents. (*See* CX 2489 (Morrison, IHT at 38)).

vii. The sale

340. After a contractor wins its bid, it contacts the Distributor to discuss scheduling and to submit either a verbal or written purchase order. (Thees, Tr. 3069-3070). After it places the purchase order, the contractor will call to request that the Distributor release product, and the Distributor will supply product to the waterworks project either from its stock, or via a direct purchase order from the Distributor to a supplier who will deliver the product to the project site. (Thees, Tr. 3069-3070).

341. Because Fittings are a commodity, price and relationship are the dispositive factors in making a Fittings sale. (Minamyer, Tr. 3135).

342. According to Mr. Jansen of McWane, price was becoming more important than relationship and Distributors' customers were becoming more price sensitive. (CX 2477 (Jansen, Dep. at 143-144)).

343. Typically, the Fittings supplier with the lower price wins the job. (CX 2480 (Napoli, Dep. at 60)).

viii. Shipping

344. There is generally a time lag between the date of the Fittings bid and order to the date of shipment or delivery. The time period between order and delivery varies depending on the market. Delivery can take place any time from immediately to as long as 1 year, but typically is between two or three weeks to two

months. (CX 2502 (Prescott, Dep. at 16); CX 2504 (Thees, Dep. at 93); CX 2522 (Agarwal, Dep. at 89), *in camera*).

345. The prices reflected in Fittings invoice data typically reflects market pricing of 30 to 60 days prior to the invoice. (CX 1181 at 003).

c. Domestic and open specifications

346. End Users and/or their consulting engineers who write the specifications determine whether a job requires Fittings that are manufactured domestically in the United States. (Answer ¶ 19; Webb, Tr. 2732-2733).

347. A "Domestic" or "domestic-only" specification or project requires Fittings manufactured in the United States to be used for that waterworks project, either because of End User preference or because it is required by municipal, state, or federal law. (Joint Stipulations of Fact, JX0001 ¶ 13; Tatman, Tr. 236, 273; McCutcheon, Tr. 2265-2266).

348. The Commonwealth of Pennsylvania, federal government projects, Air Force bases, and some municipalities around the country require Domestic Fittings, even without the Buy American provisions in ARRA. (McCutcheon, Tr. 2267-2268; CX 2523 (Bhattacharji, Dep. at 127); CX 2531 (Rybacki, Dep. at 270-272); Rona, Tr. 1520-1521; Webb, Tr. 2732-2733; RX 637 (Jansen, Dep. at 99-100)).

349. Projects that do not require that Domestic Fittings be used – *i.e.*, that allow Fittings manufactured anywhere in the world – are referred to as "open specification" projects. (Tatman, Tr. 273-274; McCutcheon, Tr. 2266).

350. Domestically manufactured Fittings can be used in open specification projects, but imported Fittings cannot be used in domestic-only projects. (CX 2516 (Sheley, Dep. at 155-156), *in camera*; CX 2501 (Prescott, IHT at 41); Thees, Tr. 3056, 3078; Webb, Tr. 2717-2718; CX 2510 (Groeniger, Dep. at 171)).

351. At various times, McWane has referred to the mix of imported and domestically manufactured Fittings that it supplies to open specification projects as "blended" or "non-Domestic" Fittings. (Tatman, Tr. 273-274 (discussing RX410, 2008 blended and domestic multiplier maps); CX 2440 at 002 ("Non-Domestic" multiplier map); Tatman, Tr. 320-321 (discussing CX 2440)).

352. Waterworks jobs that require Domestic Fittings generally will also require domestically manufactured restraints, glands, and other accessories. (Tatman, Tr. 463).

d. Market Structure

i. Suppliers

353. McWane, Sigma, and Star each sell Fittings, joint restraints, castings, and accessories. (McCutcheon, Tr. 2254-2255; CX 2528 (Pais, Dep. at 7-8); CX 2442-A at 001; Tatman, Tr. 319, 1009-1010).

354. In 2008 and 2009, and "historically for a number of years," McWane's primary competitors in the Fittings market in the United States were Sigma and Star. (Tatman, Tr. 245; CX 2480 (Napoli, Dep. at 59-60); Pais, Tr. 1904, 2005-2006; CX 2536 (Leider, Dep. at 18)).

355. Over 90% of all Fittings sold in the United States are sold by three suppliers, McWane, Sigma, and Star. (Tatman, Tr. 240-242, 559-560 (estimating 2008 through 2009 combined market share of 90% to 92%, including Fittings above 24" in diameter); Pais, Tr. 1981-1982 (estimating combined market share of 91% or 92%); McCutcheon, Tr. 2256 (estimating combined market share between 90% and 95%); CX 1163 at 006 (August 4, 2008 Pais email describing McWane, Sigma, and Star as the three suppliers of AWWA fittings, with McWane holding a 45% market share, Sigma holding about 30% and Star holding about 20%)).

356. McWane, Sigma, and Star had the following shares of United States Fittings sales, by tonnage, for the years 2007 through 2011:

	2007	2008	2009	2010	2011
McWane	[redacted]				
Sigma	[redacted]				
Star	[redacted]				

(CX 2260-A (Schumann Rep. at 18 tbl. 1), *in camera*).

357. McWane and Star had the following shares of United States Domestic Fittings sales, by tonnage, for the years 2010 and 2011:

	2010	2011
McWane	[redacted]	
Star	[redacted]	

(CX 2260-A (Schumann Rep. at 19 tbl. 2), *in camera*).

358. Suppliers Metalfit, SIP, NAPAC, NACIP, Electrosteel and ACIPCO constitute the share of the United States Fittings market not belonging to McWane, Star and Sigma. (CX 2260-A (Schumann Rep. at 18); McCutcheon, Tr. 2255-2256 (estimating combined market share of these companies at 5% to 10% of Fittings sales (in tons)).

359. As described in a 2009 McWane budget planning document, McWane's "primary competitors" in Fittings are Sigma and Star, with SIP and NAPAC as "[s]econd tier" competitors. (RX 618 at 004 (noting that Electrosteel was a potential entrant in 2009)).

360. Pricing decisions of companies such as ACIPCO, NAPAC, and Metalfit do not affect the ability of McWane, Sigma, and Star to implement a price increase. (CX 2538 (McCutcheon, IHT (Vol. 2) at 394), *in camera*).

361. Sigma and Star have larger shares in the market for large fittings (over 24" in diameter), in which McWane is not as significant a competitor. (Schumann, Tr. at 4111 ("only about 5 percent of the large fittings were produced by McWane in 2008 . . . ."); CX 2531 (Rybacki, Dep. at 198) (large fittings "was [Sigma's] strong point and Star's strong point as well . . . ."); Pais,

Tr. 1915 (McWane "never had a plant work specialty" and "[f]or a long time they did not even produce most of the fittings used in plant work, such as the larger ones")).

362. The Fittings Market is an oligopoly. (F. 353-361; Schumann, Tr. 5796-5797; CX 2260-A (Schumann Rep. at 25).

ii. End Users

363. Municipalities typically outsource large waterworks projects to contractors. (CX 2489 (Morrison, IHT at 31) ("Typically a municipality is not going to have enough people on the payroll to be able to do a major project.")).

364. The relationship between Distributors and contractors is very important, although this has deteriorated due to the economic decline in the United States and pricing pressure. Contractors typically deal with a limited number of waterworks Distributors and tend to use some Distributors more than others. (CX 2477 (Jansen, Dep. at 18-19); CX 2480 (Napoli, Dep. at 15); CX 2489 (Morrison, IHT at 22-23) (explaining that 75% to 80% of C.I. Thornburg's contractor customers are giving 80% to 90% of their business to them); CX 2501 (Prescott, IHT at 30, 32) (some contractor customers give all of their business to one Distributor)).

365. Contractors typically look to work with Distributors with whom they have relationships and that are close geographically. (*See* CX 2489 (Morrison, IHT at 10); CX 2480 (Napoli, Dep. at 13-15); CX 2477 (Jansen, Dep. at 18-19)).

366. End Users may shift their business to a different Distributor if a Distributor fails to provide them with all the goods they require. (CX 2501 (Prescott, IHT at 58); CX 2489 (Morrison, IHT at 29); CX 2489 (Morrison, IHT at 75) (It would be "devastating" to a Distributor if it could not supply Fittings on a project: "I'm choosing the word 'devastating.' I mean, it would not be good to not be able to supply fittings.")).

iii. Distributors

GENERALLY

367. McWane, Sigma, Star, and others sell Fittings directly to Distributors, which then resell the Fittings to End Users. (Joint Stipulations of Fact, JX0001 ¶ 14; Tatman, Tr. 251-252 (99% of McWane's sales of ductile iron pipe fittings are through Distributors, rather than direct to contractors); McCutcheon, Tr. 2256-2257).

368. Distributors generally obtain quotes for specific projects from more than one Fittings supplier, in order to negotiate lower net prices. (RX 643 (Tatman, IHT at 77-78)).

369. In 2008, Illinois Meter played Fittings suppliers off one another in order to try and negotiate better prices. (Sheley, Tr. 3444-3445).

370. Distributors sell pipe, valves, hydrants, and other waterworks products, appurtenances, and accessories, in addition to Fittings. (Webb, Tr. 2706; Thees, Tr. 3050-3051; RX 705 (Gibbs, Dep. at 10-13); RX 675 (Sheley, Dep. at 11); RX 650 (Morrison, Dep. at 18-19); RX 661 (Prescott, Dep. at 8-9)).

371. Fittings typically comprise a relatively small portion of a Distributor's business. (Thees, Tr. 3111; RX 705 (Gibbs, Dep. at 12-13); RX 672 (Webb, IHT at 42); RX 652 (Johnson, Dep. at 9-10); RX 661 (Prescott, Dep. at 10-11); RX 703 (Coryn, Dep. at 11-12); RX 669 (Groeniger, Dep. at 13)).

372. The relationship between Fittings suppliers and Distributors is important to the success in selling Fittings because Fittings are a commodity product. (CX 2477 (Jansen, Dep. at 18-19); CX 2480 (Napoli, Dep. at 13-15)).

373. Sigma and Star sell almost all of their Fittings to Distributors. (Rybacki, Tr. 1094-1095; CX 2531 (Rybacki, Dep. at 290); CX 2527 (Pais, IHT at 38-39); CX 2534 (Bhutada, IHT at 9), *in camera*; McCutcheon, Tr. 2256-2257, 2260, 2263; Minamyer, Tr. 3134; CX 2526 (Minamyer, Dep. at 110)).

374. All or virtually all of McWane's sales of Fittings are to Distributors. (Joint Stipulations of Fact, JX0001 ¶ 15; Tatman, Tr. 252; CX 2477 (Jansen, Dep. at 17)).

NUMBERS AND MARKET SHARE OF DISTRIBUTORS

375. There are at least 630 separate waterworks Distributors in the United States. Most of these Distributor customers are small, local companies with just one or a few distribution yards. There are a few regional waterworks Distributors, with multiple branches, and two national waterworks Distributors. Collectively, all of these customers make up thousands of branch locations throughout the United States. (CX 2564 (McWane sales data); CX 2504 (Thees, Dep. at 14-15); Saha, Tr. 1170 (noting 3,000 to 4,000 branches nationwide)).

376. Regional waterworks Distributors with multiple branches serving specific regions of the country include E.J. Prescott, Groeniger & Company, C.I. Thornburg Company, and Illinois Meter Company. (F. 253, 258, 262-263, 268-269).

377. HD Supply and Ferguson are the two largest Fittings Distributors and each has a national presence. (McCutcheon, Tr. 2261; Thees, Tr. 3045). Together, HD Supply and Ferguson have about 50% of the Fittings distribution market share in the United States. (F. 378-379).

378. HD Supply's Fittings distribution market share is approximately 28% to 35%. (McCutcheon, Tr. 2261; Webb, Tr. 2703-2704). HD Supply carries as much as $174,000,000 in inventory at any given time. (RX 673 (Webb, Dep. at 48)).

379. Ferguson is the second largest waterworks Distributor in terms of sales in the United States, with a share of the overall waterworks distribution market of approximately 25%. (Joint Stipulations of Fact, JX0001 ¶ 25; RX 663 (Thees, Dep. at 15); Thees, Tr. 3045-3046).

380. McWane sells its Fittings to about 250 to 300 Distributors that have approximately 1200 total branches. (CX 2477 (Jansen, Dep. at 139-140)).

DISTRIBUTORS' RELATIONSHIPS WITH END USERS

381. It is beneficial for End Users to purchase waterworks products from Distributors rather than directly from suppliers because Distributors bundle waterworks products together, provide a single point of contact for all products, find alternate supply sources when needed, and have local relationships and local specification knowledge. (Thees, Tr. 3058-3059; CX 2510 (Groeniger, Dep. at 202); CX 2504 (Thees, Dep. at 145-146); CX 2480 (Napoli, Dep. at 29-31)).

382. End Users typically source all of their waterworks for a particular project from a single Distributor, as a "one stop shop," because doing so allows them to access service, payment and delivery from a single source, rather than duplicating administrative effort with various sources. (Webb, Tr. 2723, 2707; Thees, Tr., 3060; CX 2489 (Morrison, IHT at 31-32); CX 2501 (Prescott, IHT at 25); Sheley, Tr. 3388; CX 2537 (McCutcheon, IHT (Vol. 1) at 73-74), *in camera*; CX 2544 (Coryn, Dep. at 102); CX 2510 (Groeniger, Dep. at 202); CX 2516 (Sheley, Dep. at 127-128), *in camera*; CX 2513 (Webb, IHT at 135-136); CX 2502 (Prescott, Dep. at 81); CX 2480 (Napoli, Dep. at 30)).

383. Most waterworks distribution business is conducted on a bid-by-bid basis. Infrequently, Distributors will sometimes enter into contracts for up to one year with a municipality. (Thees, Tr. 3052). These up to one year contracts require Distributors to supply specific items at an agreed upon price for a customer, primarily municipalities. (CX 2509 (Groeniger, IHT at 46)).

384. Most End Users deal primarily with two or three Distributors, rather than fielding bids from a broader array of Distributors, in order to receive the best service and price. (Webb, Tr. 2725-2726; Sheley, Tr. 3392).

385. The vast majority of Ferguson's and HD Supply's customers are repeat customers. (Thees, Tr. 3064-3065; Webb, Tr. 2726).

386. Distributors compete with each other on the basis of price, service, and relationship with the End User. (Sheley, Tr. 3390-3391; Thees, Tr. 3062; CX 2502 (Prescott, Dep. at 12-13) ("price gets involved, but if it was just price a small company like this we would have a hard time surviving"); CX 2489 (Morrison, IHT at 37) (along with price, "there's no doubt service is a factor and your personal relationship . . .")).

387. End Users demand a high level of service such as timely delivery, trouble-shooting during the job, and competitive pricing. (Thees, Tr. 3061; Webb, Tr. 2723-2726 (Distributor's ability to "provide on time deliveries, 95% order fill rates, zero errors" is the most important factor to End User Fittings customers in selecting a Distributor, followed by price and relationship); CX 2502 (Prescott, Dep. at 12)).

LOCAL NATURE OF DISTRIBUTION BUSINESS

388. A Distributor's service area is generally 50 to 200 miles from its branch location, depending on population, geography, and driving patterns. Branch service areas tend to be smaller in more densely populated areas. (CX 2502 (Prescott, Dep. at 58); Webb, Tr. 2701-2702; Thees, Tr. 3044; Sheley, Tr. 3382; CX 2501 (Prescott, IHT at 9-10); CX 2489 (Morrison, IHT at 9); CX 2509 (Groeniger, IHT at 28-31)).

389. Distributors primarily service waterworks projects in their own service area but may also serve another area, when a customer has a project outside the service area. (CX 2502 (Prescott, Dep. at 59); Sheley, Tr. 3383).

390. Generally, it is difficult for an out-of-area Distributor to compete with the logistics and service of a local branch, local sales people, and locally stocked product. Delivery is also more expensive for out-of-area Distributors. (Webb, Tr. 2700-2701; Sheley, Tr. 3382).

DISTRIBUTORS' RELATIONSHIPS WITH FITTINGS SUPPLIERS

391. Distributors consider price, service, relationship, financial stability, warranty, and product quality when selecting a

Fittings supplier. (Thees, Tr. 3082-3083; Webb, Tr. 2746-2747; CX 2489 (Morrison, IHT at 61)).

392. Distributors generally purchase Fittings from at least two different suppliers. (McCutcheon, Tr. 2258-2259; Webb, Tr. 2746 (HD Supply purchases imported Fittings from McWane, Sigma, and Star); Thees, Tr. 3082 (Ferguson purchases imported Fittings from McWane, Sigma, and Star); *but see* Sheley, Tr. 3406 (Illinois Meter purchases Domestic Fittings from McWane only).

393. Distributors generally can obtain better pricing on Fittings when they have the option of purchasing Fittings from multiple suppliers. (Sheley, Tr. 3444-3445; CX 2489 (Morrison, IHT at 61-63); CX 2513 (Webb, IHT at 172)).

394. A Distributor generally will purchase Fittings from another Distributor only as a last resort when it is required to service a customer. Purchasing from competitors is more expensive and not routine. (Webb, Tr. 2726-2727; Thees, Tr. 3065).

DISTRIBUTOR PRICING

395. Higher Fittings prices are helpful to Distributors from a revenue standpoint, but are not helpful from a profit margin standpoint. Generally, higher dollars obtained from higher prices can be advantageous for a Distributor. (RX 672 (Webb, IHT at 144-146)).

396. Some Distributors may prefer higher market prices for Fittings because decreases in Fittings prices decreases the value of their inventory. (Rybacki, Tr. 1110-1111; Minameyer, Tr. 3246).

397. The senior managers of some Distributors will pressure suppliers to take price increases, but lower pricing is preferred by those at the branch level. (Minameyer, Tr. 3246-3247).

398. Distributors pass along to customers increases in wholesale prices of Fittings; and when wholesale prices go down, the competitive forces of the market will demand that such

reductions also be passed on to End Users. (CX 2489 (Morrison, IHT at 98-99); CX 2513 (Webb, IHT at 144-145)).

399. Distributors make higher profit margins on sales of valves, hydrants, and Fittings, than on sales of pipe. (Sheley, Tr. 3387; CX 2503 (Thees, IHT at 22); CX 2489 (Morrison, IHT at 32)).

DISTRIBUTOR BENEFITS TO FITTINGS SUPPLIERS

400. For McWane, Distributor benefits include offering better sales coverage than McWane would have with its sales force alone; Distributors have more local influence and more local knowledge of projects in their market area; Distributors carry local inventory; Distributors offer one-stop shopping for all needed waterworks products for the End User; Distributors help McWane's products be included in specifications; and Distributors streamline McWane's account receivables by taking the risk of non-payment from contractors. (CX 2477 (Jansen, Dep. at 139-141, 144-145); CX 2480 (Napoli, Dep. at 29-31)).

401. McWane views Distributors as being "critical to [its] success." (CX 2477 (Jansen, Dep. at 139-141, 144-145, 150); CX 0169 at 003; CX 2480 (Napoli, Dep. at 29-31)).

402. Distributors are critical to Star. (CX 2537 (McCutcheon, IHT (Vol. 1) at 41-46), *in camera* (listing efficiencies Distributors provide to suppliers and describing the cost to replicate these efficiencies as "astronomical"); CX 2534 (Bhutada, IHT at 9-15), *in camera* (Distributors perform a variety of functions at a local level that would be prohibitively expensive for Star to perform)).

403. Distributors' carrying Fittings inventory frees up the suppliers' working capital; and it provides much faster delivery service from the Distributors' local branches to End Users than a Fittings supplier could achieve by selling directly to End Users. (Webb, Tr. 2728-2730; Thees, Tr. 3059-3060; CX 2534 (Bhutada, IHT at 10, 19-20), *in camera*; CX 2510 (Groeniger, Dep. at 202); CX 2516 (Sheley, Dep. at 127-128), *in camera*; CX 2504 (Thees, Dep. at 145-146); CX 2494 (R. Fairbanks, Dep. at 95-96) ("Distributors are stocking distributors, and so there's just a wide

variety of fittings that can be on a project. And so the advantage is, is that, one is it could be in stock, and two is it can be almost immediate deliveries due to stock. And also deliveries, because there might be other products going out on the job site."); Sheley, Tr. 3398 ("A manufacturer can't reasonably service a small municipality or a small contractor. There has to be local inventory, local delivery, a local contact person, if you will. It would be . . . uneconomical for every party involved . . . ."); CX 2477 (Jansen, Dep. at 145)).

404. Providing inventory within a close proximity to the waterworks projects that the Distributor is servicing can help prevent expensive work delays if a Fitting is missing or malfunctioning. (CX 2502 (Prescott, Dep. at 79); CX 2489 (Morrison, IHT at 55); CX 2509 (Groeniger, IHT at 26-28)).

405. Distributors maintain an inventory and aggregate small orders and shipments from contractors, which typically purchase small numbers of Fittings for individual projects. (CX 2502 (Prescott, Dep. at 81); Sheley, Tr. 3387; CX 2534 (Bhutada, IHT at 19), *in camera*).

406. Distributors provide local freight for deliveries from the Distributor's warehouse to the contractor's job site. (CX 2534 (Bhutada, IHT at 10), *in camera*).

407. Contractors often purchase on credit, and Distributors carry the resulting credit risk. Suppliers avoid credit costs by dealing through Distributors. (CX 2534 (Bhutada, IHT at 12-13), *in camera*; Webb, Tr. 2729; CX 2502 (Prescott, Dep. at 81); McCutcheon, Tr. 2260; CX 0169 at 003 (January 2010 McWane Sales Managers Conference Call minutes noting benefits of distribution to include Distributors "carry[ing] the paper and inventory and once in a great while do spec work")).

408. Distributors employ sales personnel dedicated to identifying business opportunities and servicing End Users, saving suppliers from having to employ their own large, nationwide sales forces. (CX 2480 (Napoli, Dep. at 31); McCutcheon, Tr. 2260-2261; Webb, Tr. 2728; CX 2534 (Bhutada, IHT at 12-13, 19-20), *in camera*; CX 2544 (Coryn, Dep. at 103);

CX 2546 (Gibbs, Dep. at 65-66); CX 2502 (Prescott, Dep. at 46); CX 2516 (Sheley, Dep. at 127-128), *in camera*; CX 2504 (Thees, Dep. at 145-146)).

409. Distributors support End Users through technical assistance and training regarding waterworks jobs, and by packaging up the discrete waterworks components and making sure that all pieces that the customer needs have the correct characteristics and arrive on time. In addition, End Users pay Distributors directly, rather than paying individual suppliers, and provide a higher level of service than a supplier would, including small-volume deliveries and 24-hour service. (Sheley, Tr. 3399-3401).

410. Distributors handle returns of products from the contractor. (CX 2534 (Bhutada, IHT at 11, 20), *in camera*; Webb, Tr. 2729-2730).

411. Distributors manage the extension of credit, invoicing, and collection, which saves suppliers the costs and risks of these functions. (CX 2544 (Coryn, Dep. at 102-103); CX 2510 (Groeniger, Dep. at 202); CX 2516 (Sheley, Dep. at 127-128), *in camera*; CX 2504 (Thees, Dep. at 145-146); CX 2494 (R. Fairbanks, Dep. at 96); CX 2502 (Prescott, Dep. at 81)).

412. Distributors have local knowledge of what is required in each specific market that they are servicing. (CX 2489 (Morrison, IHT at 55); CX 2480 (Napoli, Dep. at 30).

e. How Prices Are Set

i. List Prices and multipliers

413. Published Fittings prices have two components: a nationwide list (or catalog) price, and a regional "multiplier" that reduces the list price. (Tatman, Tr. 277; Rybacki, Tr. 1096-1097; CX 2535 (Bhutada, Dep. at 102); Webb, Tr. 2770-2771).

414. The "published price" or "standard price" for a given Fittings item in a given state is the list price multiplied by the then-applicable multiplier for that state. For example, if a Fitting has a $1,000 list price, and the Texas multiplier is .28, the

published price for that individual Fitting in Texas will be $1,000 x .28, or $280. (Tatman, Tr. 277; Rybacki, Tr. 1096-1097; CX 2535 (Bhutada, Dep. at 102); Webb, Tr. 2770-2771).

415. McWane publishes its list price for its Fittings on the Tyler/Union website. (RX 644 (Tatman, Dep. at 15)).

416. Historically, Fittings suppliers have published list price increases once per year, or once every couple of years. (Tatman, Tr. 256-257).

417. List price changes usually occur during the first quarter of a calendar year. (Sheley, Tr. 3421-3422, 3436-3437).

418. Virtually no Fittings customer pays list price for Fittings. (RX 639 (McCullough, Dep. at 170); McCutcheon, Tr. 2269; Rybacki, Tr. 1096-1097).

419. Multipliers are published discounts off a Fittings supplier's published list price. (RX 639 (McCullough, Dep. at 170-171); RX 644 (Tatman, Dep. at 15)).

420. Multipliers vary from state to state based upon the prevailing competitive environment in each state. (Tatman, Tr. 277; CX 2526 (Minamyer, Dep. at 102)).

421. Distributors prefer that Fittings suppliers like McWane, Sigma, and Star have identical list prices because it is easier for Distributors to compare the suppliers' multipliers and discounts to determine net prices when the suppliers' published list prices are the same. (Tatman, Tr. 257-258; McCutcheon, Tr. 2527-2528, 2271; RX 694 (Bhutada, Dep. at 101-102)).

422. Multiplier changes are cheaper to implement than list price changes, because the cost of printing and distributing new list pricing booklets to customers can cost tens of thousands of dollars. (Tatman, Tr. 255-257; RX 644 (Tatman, Dep. at 43-46); Rybacki, Tr. 3542).

423. Fittings suppliers typically announce multiplier changes to their customers by letter. (Sheley, Tr. 3437).

424. McWane typically announces increases in published prices four weeks before the increase goes into effect. (Tatman, Tr. 325). Customers normally want four weeks' notice, three weeks is "on the verge" of acceptable notice, and two weeks is too little notice. (Tatman, Tr. 519).

425. Typically, the highest price at which a Fitting can be sold is the published multiplier. (Tatman, Tr. 258).

426. Although not normally the case, on occasion, McWane sells Fittings at a price higher than the published multiplier; for example, if there is a special add-on, such as a special coating or added piece, or if there is special handling, such as a rush order. (Tatman, Tr. 443-444, 448).

427. The primary factor driving McWane's pricing decisions is the competitive price level in the marketplace. A secondary factor is that the pricing level must be above a minimum margin that allows McWane to make money. (Tatman, Tr. 289-290).

ii. Project Pricing and other discounts

428. "Job prices," "special prices," or "project prices" are discounts off the published multiplier. (RX 643 (Tatman, IHT at 37-38); McCutcheon, Tr. 2271-2272 (collectively, "Project Pricing")).

429. Historically, Project Pricing has been the standard practice in the Fittings market. (RX 639 (McCullough, Dep. at 189-190); RX 638 (McCullough, IHT at 220); Rybacki, Tr. 1101-1108).

430. In addition to its published multipliers, McWane has historically offered its customers a variety of further price reductions for Fittings, including special, project or job-pricing discounts off the published multipliers, as well as other price concessions including freight concessions, cash discounts, extended payment terms, cash-backs, corporate rebates, and branch rebates. (Tatman, Tr. 257-260; *see* F, 441, 443-456).

431. Project Pricing generally takes the form of a price multiplier that is lower than the published multiplier and may be negotiated for an entire project or job, or on a one-time basis for a single order. (CX 2535 (Bhutada, Dep. at 105-106)).

432. Approximately 90 to 95% of Star's net realized prices to the customer have some type of discount variable to them. (McCutcheon, Tr. 2509-2510).

433. Star further offers a discount called a "buy plan," which is "a negotiated price" with a Distributor that constitutes that Distributor's "everyday" purchase price and is not necessarily attached to a project. (McCutcheon, Tr. 2274).

434. A sales person will often convey a job price verbally to a customer, but then may also provide the customer with a copy of a written proposal or quotation. (Sheley, Tr. 3437; RX 698 (McCutcheon, Dep. at 57)).

435. Project Pricing is not published and is therefore less transparent than the published list prices and multipliers. (Tatman, Tr. 266-268, 927 (describing responding to Project Pricing as "shooting in the dark")).

436. If Star was offering a Project Price for a particular project, it would not want its competitors to know what Project Price it was offering, for the fear that the competitors would price lower than Star to try to take the project. (Minamyer, Tr. 3145).

437. At times, McWane, Sigma, and Star have provided additional discounts and price concessions to Distributors, separate from Project Pricing, in the form of rebates, reductions in freight charges, and/or extensions of credit or payment terms. The foregoing concessions are part of the "total deal." (Joint Stipulations of Fact, JX0001 ¶ 16; Minamyer, Tr. 3266-3267).

438. Once the various forms of price discounts are combined, including Project Pricing, corporate rebates, branch rebates, cash discounts and freight terms, are taken into account, a Fittings supplier's "net price is all over the map." (RX 694 (Bhutada, Dep. at 17-18)).

439. Even if a sale is made at the published price, the net price may be lower based upon other concessions, such as rebates, timely payment discounts, or freight allowances. (Tatman, Tr. 257-260; RX 644 (Tatman, Dep. at 15-17)).

440. Project Pricing is generally negotiated in relation to a specific job and is a reaction to the competitive environment. Price concessions such as rebates and payment terms are generally not negotiated on a job-by-job basis, but rather on an annual basis. Negotiation of the multiplier is the big factor, because other terms such as payment terms and rebates are already set. (Minamyer, Tr. 3143-3144; RX 644 (Tatman, Dep. at 27); Webb, Tr. 2774; *see also* F. 443-449).

441. Fittings suppliers may agree to lower freight costs, or provide a discount in exchange for timely payment, as part of arriving at a final transaction price. Competing suppliers try to hide these terms from one another. As Mr. Tatman of McWane stated: "Because of rebates or we agreed to take his payment terms to 90 days or we agreed to lower his freight terms or we said if you pay us on time, rather than taking a 2 percent cash discount, we'll give you 5. There's all sorts of mechanisms for driving price. And the reason why that's there is, quite frankly, we're all trying to hide from our competitors what we're doing." (Tatman, Tr. 1017-1019, *in camera*; *see also* Minamyer, Tr. 3266-3267).

442. Price competition among Fittings suppliers takes place principally through Project Pricing, and to a lesser extent, through other price concessions such as rebates, reductions in freight charges, and/or extensions of credit or payment terms. (F. 428-441, 443-456).

iii. Rebates

443. A "rebate" is a percentage discount on all purchases by a Distributor from a supplier during a specific time period, typically for a year. (Minamyer, Tr. 3143; RX 655 (Brakefield, Dep. (Vol. 2) at 28-29); Tatman, Tr. 297-298; CX 2480 (Napoli, Dep. at 102-103)).

444. A "corporate rebate" is a percentage discount based on all purchases by all branches of a Distributor. A corporate rebate is generally negotiated between the supplier and the corporate headquarters of a Distributor. (CX 2535 (Bhutada, Dep. at 107-108), *in camera*).

445. A "branch rebate" is a percentage discount based on purchases by an individual branch of a Distributor. (CX 2535 (Bhutada, Dep. at 109), *in camera*; Tatman, Tr. 298-299).

446. McWane offers one-year to three-year corporate rebate agreements to its largest Distributor customers that are based on the Distributors' total purchases of Fittings and other products manufactured by McWane, such as ductile iron pipes, hydrants, and valves. (Tatman, Tr. 297-298).

447. The value of rebates to Distributors on Fittings can be greater than the Distributors' net profits from the sales of Fittings. (CX 2534 (Bhutada, IHT at 57-58)).

448. Gross sales figures in McWane's financial reports are netted out of rebates. If a sale is for $100 and there is a $15 rebate, the sale will be booked for $85. (CX 2481 (Nowlin, Dep. at 22-23, 111-112)).

449. Distributors look at rebates differently than Project Pricing because rebates do not apply to a specific job that a Distributor is bidding, and are instead usually applied on an annual basis. (Webb, Tr. 2774).

iv. Freight terms

450. Each supplier has standard freight terms pursuant to which it will pay for shipping of Fittings to Distributors and may also negotiate separate agreements with Distributors whereby the supplier will pay for freight outside of the standard terms for a specific project. (Tatman, Tr. 303-304; CX 2531 (Rybacki, Dep. at 24); CX 2535 (Bhutada, Dep. at 110)).

451. McWane's standard freight term is "full freight allowed," or free shipping, for all purchases of at least 5,000

pounds of McWane products, including Fittings. (Tatman, Tr. 303-304). McWane sometimes offers shipping "discounts" to customers, by providing free shipping for quantities less than 5,000 pounds. (Tatman, Tr. 304).

v. Payment terms

452. Payment terms are discounts that suppliers provide to Distributors for payment within a fixed amount of time. (Minamyer, Tr. 3143; Tatman, Tr. 304-305).

453. A "cash discount" is a discount that a supplier extends to an individual purchase by a Distributor if payment is made within a certain period of time, *e.g.*, 2% off if payment is made within 60 days. Generally, the terms of a cash discount are negotiated between the supplier and a Distributor at the start of the fiscal year. (CX 2535 (Bhutada, Dep. at 109), *in camera*).

454. The majority of McWane's customers are subject to McWane's standard payment terms, which provide a 2% discount for payment by the 15th of the month following the order. Most Distributor customers pay within McWane's standard payment terms. (Tatman, Tr. 304-305; CX 2479 (McCullough, Dep. at 174-175)).

455. McWane has offered longer payment terms – up to 90 days – to some customers, as well as discounts of up to 6% for on time payments. (Tatman, Tr. 305).

456. Star also extends cash discounts for paying within Star's payment terms. Star extends such cash discounts to 95% or more of its customers. (CX 2535 (Bhutada, Dep. at 109-110), *in camera*).

vi. Effects of Project Pricing

457. Project Pricing lowers the prevailing transaction price in a given geographic area. This happens when one supplier offers a Project Price, and the other suppliers seek to match or beat it, or when as other Distributors in the region learn of the Project Price, Distributors demand the same discount, so as to be competitive on their bids to the End User for the same job.

(Rybacki, Tr. 1107-1108; CX 2484 (Tatman, Dep. at 27); CX 2480 (Napoli, Dep. at 84-85)).

458. Mr. Tatman defines pricing "instability" as occurring when Project Pricing in a region results in average invoice prices 10% or more below published pricing. (Tatman, Tr. 283-284, 332-333).

459. Project Pricing can bring down the market price because if a supplier offers a special price to one Distributor, then the supplier needs to be prepared to offer that special price to all Distributors bidding on that project. Those Distributors then expect that lower price in later projects, and the spiral of declining prices can lead to zero gross margin. (CX 2480 (Napoli, Dep. at 46-47)).

460. Project Pricing can cause price erosion and thereby contributes to a lower "bottom line" for suppliers. To the extent that Project Pricing causes price erosion and lower profits, Project Pricing is not good for a supplier's long-term health, and therefore, suppliers would prefer not to offer Project Pricing. (Rybacki, Tr. 1105, 1107-1108; CX 2531 (Rybacki, Dep. at 221, 224); *see also* CX 2480 (Napoli, Dep. at 46, 83-85); CX 2485 (Walton, Dep. at 31-34)).

461. Project Pricing is inconsistent with consistent and disciplined pricing. (Rybacki, Tr. 3523).

5. Economic background

462. A few decades ago, most Fittings used in waterworks projects in the United States were manufactured in the United States. Full line Fittings manufacturers included U.S. Pipe, Griffin, and ACIPCO. (Tatman, Tr. 1046-1047; RX 644 (Tatman, Dep. at 191); RX 675 (Sheley, Dep. at 57)).

463. Beginning in the mid-1980s, importers began to successfully convert End Users' specifications for domestically produced Fittings to open specifications, which permitted the use of both domestic and imported Fittings. (RX 644 (Tatman, Dep. 192-93); RX 694 (Bhutada, Dep. 12-13)). This process

accelerated during the 1990s and 2000s, with non-domestic Fittings comprising the vast majority of the Fittings market by 2005. (Tatman, Tr. 879).

464. During the past 15 to 20 years, Domestic Fittings sales in the United States have declined, while non-domestic Fittings sales have increased. (RX 675 (Sheley, Dep. 53-54); RX 646 (Burns, Dep. at 20-21); Normann, Tr. 4836-4837).

465. Over the past 25 years, Sigma's non-domestic fittings sales in the United States have steadily grown. (Pais, Tr. 1977-1978; RX 687 (Pais, Dep. at 9-10)).

466. Since Star started selling Fittings in the United States in 1985, Star's non-domestic sales have steadily grown. (RX 694 (Bhutada, Dep. at 6-7); McCutcheon, Tr. 2578, 2584-2585.

467. Non-domestic Fittings have accounted for the majority of sales of Fittings in the United States in the last five years. (Joint Stipulations of Fact, JX0001 ¶ 5).

468. In the 1990s and early 2000s, Fittings manufactured in countries such as China, India, Korea and Mexico were far less expensive than Fittings produced in the United States, because production costs in those countries are lower. (Tatman, Tr. 275, 879; RX 642 (Page, Dep. at 112); RX 646 (Burns, Dep. at 20-21); RX 658 (Keffer, Dep. at 58); RX 672 (Webb, IHT at 71-73)).

469. In 2003, McWane filed a complaint before the International Trade Commission ("ITC") to challenge dumping by Fittings importers, seeking to have tariffs imposed on non-domestically produced fittings. (RX 730 at 009, 011).

470. In December 2003, the ITC determined that Fittings from China were "being imported into the United States in such increased quantities or under such conditions as to cause market disruption" to domestic Fittings producers. (RX 730 at 009).

471. In December 2003, the ITC found that imported Fittings manufactured in China were materially injuring the domestic Fittings producers in the United States, but the President

declined to impose the recommended tariff. (RX 730 at 011, 023-026; RX 642 (Page, Dep. at 18-19)).

472. U.S. Pipe, Griffin, and ACIPCO either dramatically reduced or exited domestic Fittings production in the face of cheap imports from China, Korea, India, Mexico, and Brazil. (Tatman, Tr. 275; RX 730; RX 646 (Burns, Dep. at 25-28); RX 643 (Tatman, IHT at 47-51); RX 701 (Morton, Dep. at 10)). ACIPCO continues to make Fittings in the United States ranging from 30 in diameter" to 64" in diameter. (CX 1897 at 003; CX 2486 (Burns, Dep. at 15, 17, 23-28); CX 2521 (Agarwal, IHT at 19-20)).

473. ACIPCO exited the manufacture of Fittings under 30" in diameter in 2006. (CX 1897 at 002; CX 2486 (Burns, Dep. at 15, 17, 23-28); CX 2521 (Agarwal, IHT at 19-20)).

474. U.S. Pipe ceased domestic production of Fittings at its Chattanooga, Tennessee manufacturing facility in 2006 because it concluded that it could not justify the continued operation of the plant given the low volumes of domestic fittings being sold. (Morton, Tr. 2863-2864; RX 701 (Morton, Dep. at 10)).

475. Griffin ceased domestic production of Fittings several years ago. (Tatman, Tr. 198; RX 643 (Tatman, IHT at 47); CX 2508 (Kurhts, Dep. at 18-20)).

476. By late 2007, McWane was "the last guy standing producing fittings domestically" in the under 30-inch diameter segment of the Fittings market. (RX 643 (Tatman, IHT at 47)).

477. In the fall of 2008, McWane closed its Domestic Fittings manufacturing facility in Tyler, Texas, in part because of cheaper imports, which caused underutilization of McWane fittings plants and unsustainable production levels. (Tatman, Tr. 963-968 ("I've got high inventory levels and I don't have enough demand, domestic only, to keep up with production. And if I start substituting domestic product with my import sales, I have to wrap a dollar bill around it. And if I did that, then I don't know what to do with the plant I just opened in China that's got to

produce tons and has to sell something there also."); RX 643 (Tatman, IHT at 46-51)).

478. Prior to closing its Tyler South Foundry, both of McWane's United States plants were "throttled down as low as you could throttle them. . . . we can't keep two plants limping along, not meeting our inventory objectives and bleeding millions of dollars a year in idle plant." (Tatman, Tr. 964-965; RX 616).

479. Roughly two hundred employees lost their jobs as a result of the Tyler South plant closure in 2008. (Tatman, Tr. 968).

B. Relevant Market

1. Relevant product markets

a. Fittings for use in open specification projects

480. Based on the findings below, ductile iron pipe fittings of 24 inches or less in diameter for use in open specification applications, whether manufactured within or outside the United States, for use in projects within the United States constitute a relevant product market (the "Fittings market"). (F. 481-516; *see also* CX 2260-A (Schumann Rep. at 13-14, 16-17); Schumann, Tr. 3769-3770, 3788-3789).

i. Functional interchangeability with other products

481. The principal potential substitute for Fittings is polyvinyl chloride (PVC) plastic fittings. (Minamyer, Tr. 3133). In some applications, a ductile iron pipe fitting is used on PVC pipe, but a PVC fitting cannot be used on ductile iron pipe. (Tatman, Tr. 249-250; CX 2501 (Prescott, IHT at 36) (pressure rated PVC fittings are not used with ductile iron pipe); CX 2538 (McCutcheon, IHT (Vol. 2) at 343) (PVC fittings are rarely used on ductile iron pipe); CX 2480 (Napoli, Dep. at 27) (PVC not a substitute for Fittings)).

482. PVC fittings are more expensive than Fittings. (CX 2538 (McCutcheon, IHT (Vol. 2) at 340); Webb, Tr. 2715).

483. PVC fittings do not have as high of a pressure rating as Fittings. (CX 2521 (Agarwal, IHT at 54-55) ("[T]hey [PVC fittings] do not hold up the pressure"); CX 2489 (Morrison, IHT at 41) ("The pressure rating on the plastic water fitting is a little less. It's a 200-pound max rating, whereas a ductile waterworks fitting is 250-pound max. So, depending on the pressure, it's going to exclude the PVC fitting."); CX 2480 (Napoli, Dep. at 27-28) ("I don't recall ever seeing a PVC fitting even attempt to be used by an engineer.")).

484. PVC fittings are susceptible to fracture. (*See* CX 2480 (Napoli, Dep. at 27-28) ("No one, to my knowledge, has come up with a good plastic substitute for the strength of ductile iron.")).

485. PVC fittings are limited in size to 12" and below. (Webb, Tr. 2714-2715 (PVC fittings are "just not made in the sizes and configurations that mechanical joint fittings are."); CX 2491 (Johnson, IHT at 44-45); CX 2525 (Minamyer, IHT at 95-96); CX 2489 (Morrison, IHT at 42) (PVC pressure-rated fittings are only a potential substitute for small diameter applications: "2-inch, maybe 3-inch, but anything above that, 99 percent would be a ductile iron waterworks fitting over a PVC fitting.")).

486. Certain markets do not allow PVC fittings to be used. (CX 2501 (Prescott, IHT at 33-34); CX 2515 (Sheley, IHT at 65)).

487. PVC fittings are harder to restrain and install. (CX 2543 (Coryn, IHT at 53); Webb, Tr. 2715).

488. Other than the limited, rare use of PVC pressure-rated fittings, there are no other products that are substitutes for Fittings in pressurized applications. (CX 2489 (Morrison, IHT at 41-42); CX 2538 (McCutcheon, IHT (Vol. 2) at 342-343); CX 2525 (Minamyer, IHT at 95)).

489. Brass fittings are typically threaded and do not come larger than 2" in diameter. (Thees, Tr. 3057-3058; Webb, Tr. 2720).

490. Steel fittings are not used underground because the steel fitting would rust. (Thees, Tr. 3057, 3058; CX 2538 (McCutcheon, IHT (Vol. 2) at 343)).

491. Cast iron or gray iron fittings are an older fittings technology that use a different iron component than ductile iron fittings and are not as easily molded. Distributors receive only a negligible demand for these products from End Users. (Webb, Tr. 2719; Thees, Tr. 3056; CX 2513 (Webb, IHT at 59-60); CX 2498 (Teske, Dep. at 68-69); CX 2501 (Prescott, IHT at 37)).

492. There are no widely used functional substitutes for Fittings. (F. 482-491; Answer ¶ 23; Saha, Tr. 1177-1178 (other types of fittings are not interchangeable with ductile iron Fittings)).

ii. Price constraints of other products

493. Fittings suppliers do not track prices of PVC fittings or take them into account when setting prices of Fittings. (Tatman, Tr. 250-251; CX 2477 (Jansen, Dep. at 69-70, 77, 94); Minamyer, Tr. 3133-3134; CX 2538 (McCutcheon, IHT (Vol. 2) at 341); Saha, Tr. 1177).

494. Fittings suppliers do not track the price of cast iron fittings when setting ductile iron Fittings prices. (CX 2477 (Jansen, Dep. at 94)).

495. Distributors do not seek to use prices of PVC fittings to negotiate prices of Fittings. (Webb, Tr. 2718; CX 2480 (Napoli, Dep. at 28); Saha, Tr. 1177).

496. The prices of PVC fittings have no bearing on the prices of Fittings. (Saha, Tr. 1177-1178). If the price of ductile iron pipe fittings went up 5 to 10 percent from suppliers, Distributors would not switch to pressure-rated PVC fittings. (Webb, Tr. 2718-2719).

497. When the price of Fittings goes down, sales of Fittings do not go up. (Webb, Tr. 2723 ("I've never seen a correlation with any of our product lines up or down that impacted the demand side."); CX 2538 (McCutcheon, IHT (Vol. 2) at 344) (A

10% increase in price of Fittings would not prompt an End User to forego the purchase of Fittings because the Fittings are a small portion of the total cost of the project to the End User)).

iii. Cluster of Fittings of 24 inches or less in diameter

498. There are several thousand unique configurations of Fittings in different sizes, shapes and coatings. (Joint Stipulations of Fact, JX0001 ¶ 8).

499. Each Fitting must have a diameter appropriate for the pipe to which it is attached and a shape or design appropriate for its intended function. (Tatman, Tr. 220-221).

500. Fittings of different shapes and different diameters are not substitutes for one another. For example, a 6" 90-degree bend mechanical joint pipe fitting cannot substitute for an 8" "T" fitting. (Schumann, Tr. 3790-3791).

501. The primary suppliers, customers, and Distributors of each Fitting are the same and the materials and other inputs used to produce the products are the same. (*E.g.*, F. 2, 51, 108, 310, 322-324; *see also* CX 2260-A (Schumann Rep. at 13); Schumann, Tr. 3791-3792).

502. Each size and shape of Fittings of 24" or less in diameter is made of the same material and by the same methods. F. 310; *see also* CX 2260-A (Schumann Rep. at 13).

503. Each size and shape of Fittings of 24" or less in diameter is sold and marketed together by the same suppliers, through the same distribution channels, to the same customers, for use in the same or similar projects. (F. 505-509; *See also* RX 712A (Normann Rep. at 23)).

504. All Fittings must comply with AWWA standards. (CX 2522 (Agarwal, Dep. at 37), *in camera*; McCutcheon, Tr. 2292).

505. McWane, Sigma, and Star each supply a full line of Fittings of 24" or less in diameter. (Rybacki, Tr. 3572-3573;

Tatman, Tr. 589; McCutcheon, Tr. 2254-2255; Joint Stipulations of Fact, JX0001, ¶¶ 1-3).

506. Fittings prices are set as a package, through the announcement of price multipliers and the negotiation of Project Pricing multipliers and other pricing terms that apply across all of the different Fittings included in a given purchase. (*See* CX 2535 (Bhutada, Dep. at 102, 106); Tatman, Tr. 258-259, 277; Rybacki, Tr. 1096-1097, 1103-1104; Webb, Tr. 2770-2771; CX 1147 at 001).

507. Distributors purchase Fittings from suppliers, and then further incorporate the Fittings into a bundle with other waterworks products for resale to End Users. (CX 2502 (Prescott, Dep. at 15); CX 2490 (Morrison, Dep. at 66); CX 2504 (Thees, Dep. at 114, 149); CX 2503 (Thees, IHT at 71)).

508. Virtually all Fittings are sold through waterworks Distributors. F. 373-374.

509. The typical End Users of all Fittings are municipalities, regional water authorities, and the contractors they engage to construct waterworks projects. F. 10.

510. Fittings up to 12" in diameter are typically used for residential work, and Fittings 14" to 24" in diameter are typically used by municipalities or plants with long transmission lines. (Brakefield, Tr. 1279-1281; CX 1479).

511. Fittings over 24" in diameter are considered to be a large diameter and are a more unusual size for the industry. (CX 2538 (McCutcheon, IHT (Vol. 2) at 322)). They are used for large treatment plants or large transmission lines. (Brakefield, Tr. 1281; CX 1479).

512. ACIPCO currently manufactures Domestic Fittings ranging only from 30" in diameter to 64" in diameter. ACIPCO exited the manufacture of Fittings under 30" in diameter in 2006. (CX 1897 at 002; CX 2486 (Burns, Dep. at 15, 23-28)). ACIPCO does not have any interest in extending its product scope to include small and medium diameter Fittings. (CX 2486 (Burns, Dep. at 15, 30)).

513. For 2008, in the market consisting of ductile iron pipe fittings with diameters greater than 24" (*i.e.*, 30" and above), ACIPCO's share of United States sales was approximately around 40%. (*See* CX 1895 at 001, 005, *in camera* (ACIPCO data showing 2008 sales of [redacted] tons); CX 2486 (Burns, Dep. at 159-160) (describing CX 1895); RX-127 at 002 (DIFRA data showing the other suppliers' combined 2008 sales of fittings greater than 24" in diameter to be [redacted] tons).

514. McWane's internal documents grouped Fittings into categories of 24" or less and 24" or greater. (RX 632 at 028-029 (Tyler/Union Waterworks Fittings Financial Statements containing fittings sales and gross profit analysis by three size ranges: 3" to 12", 14" to 24", and 30" and up); CX 0622 at 008-010 (Tyler/Union 2009 Sales Meeting presentation, separating out market share by size categories of 3" to 12" diameter, 14" to 24" diameter, and > 24" diameter)).

515. Historically, the waterworks industry has differentiated Fittings of 3" in diameter to 24" in diameter from Fittings of 30" or greater diameter. (CX 2533 (Bhargava, Dep. at 43), *in camera*).

516. The January 2009 DIFRA Schedule of Ductile Iron Waterworks Fittings (Trade Tons Shipped) Comparison For the Years Ended 2007 and 2008 analyzed shipments by three size ranges: 2" to 12", 14" to 24", and over 24". (CX 1339 at 003).

b. Fittings for use in domestic-only specification projects

517. In form and functionality, non-domestic and Domestic Fittings are completely interchangeable. (Tatman, Tr. 878-879 ("There's no difference in how you apply [or] use the product."); McCutcheon, Tr. 2528 ("For the most part, the fittings are interchangeable. … we all provide an interchangeable fitting."); Webb, Tr. 2730-2731 ("Q. Is there a difference between domestic fittings and import fittings? A. In functionality, no."); RX 694 (Bhutada, Dep. at 14); RX 659 (Swalley, Dep. at 63); RX 669 (Groeniger, Dep. at 36); RX 650 (Morrison, Dep. at 57-58); RX

661 (Prescott, Dep. at 29); RX 646 (Burns, Dep. at 147); RX 701 (Morton, Dep. at 13-14); RX 675 (Sheley, Dep. at 51-52)).

518. Based on the findings below, ductile iron pipe fittings of 24" and smaller in diameter that are made in the United States, that are sold for use on jobs with domestic-only specifications ("Domestic Fittings") constitute a relevant product market (the "Domestic Fittings market"). (F. 519-550; *see also* CX 2260-A (Schumann Rep. at 15-16); Schumann, Tr. 3769-3770, 3789-3791).

i. Domestic-only requirements other than ARRA

519. At times, some waterworks projects require that only Domestic Fittings be used because of either End User preference or because it is required by municipal, state, or federal law ("Domestic-only projects"). (Joint Stipulations of Fact, JX0001 ¶ 13).

520. The Commonwealth of Pennsylvania requires the use of Domestic Fittings. (CX 2523 (Bhattacharji, Dep. at 127-128) (Pennsylvania has a Buy American law); CX 2531 (Rybacki, Dep. at 270-272); RX 637 (Jansen, Dep. at 99-100) (attributing Pennsylvania's Domestic Fittings requirements to the Pennsylvania Steel Act)).

521. New Jersey has a Buy American law. (CX 2523 (Bhattacharji, Dep. at 127-128); N.J. Stat. § 52:33-3 (requiring that "[e]very contract for the construction, alteration or repair of any public work in this state shall contain a provision that in the performance of the work the contractor and all subcontractors shall use only domestic materials in the performance of the work")).

522. Some federal government projects and air force bases require Domestic Fittings, even without the Buy American provisions (F. 526) in ARRA. (McCutcheon, Tr. 2267; Tatman, Tr. 449).

523. Some municipalities require the use of domestically-manufactured products as a matter of preference or as a matter of law. If a particular municipality has a preference or law that says

that only Domestic Fittings can be used, the specification will state that the Fittings need to be "domestic only." (Webb, Tr. 2732-2733; McCutcheon, Tr. 2267; CX 2537 (McCutcheon, IHT (Vol. 1) at 84, 90-91), *in camera*; Thees, Tr. 3068).

ii. Requirements of ARRA

524. The American Recovery and Reinvestment Act of 2009, known as "ARRA," allocated more than $6 billion to water infrastructure products. (Joint Stipulations of Fact, JX0001 ¶¶ 19, 20).

525. Waterworks projects receiving ARRA funds were required to be "under contract or construction within 12 months of the date of enactment of this Act." (American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (codified as amended in scattered sections of 6, 19, 26, 42, and 47 U.S.C. (2006 Supp. III))).

526. ARRA contained certain Buy American provisions applicable to Fittings. (Joint Stipulations of Fact, JX0001 ¶ 21). ARRA's Buy American provisions required that all ARRA-funded projects use products made in the United States. (Brakefield, Tr. 1401; Sheley, Tr. 3402; Morton, Tr. 2816).

527. Domestic Fittings were required and used on ARRA-funded projects. (CX 2513 (Webb, IHT at 95); CX 2501 (Prescott, IHT at 66-67)).

528. Star looked into the possibility of whether Star could satisfy the ARRA Buy American requirement with Fittings produced in Mexico or Korea, but concluded in early 2009 that Fittings produced in Mexico or Korea would not satisfy ARRA's Buy American requirement. (McCutcheon, Tr. 2277, 2279; Bhargava, Tr. 2927-2928; RX 694 (Bhutada, Dep. at 39); CX 2537 (McCutcheon, IHT (Vol. 1) at 102-103), *in camera*).

529. Sigma also considered the possibility that Fittings manufactured in Korea or Mexico might satisfy the Buy American requirement of ARRA, but concluded that such Fittings would not

be ARRA-compliant. (CX 0214 at 004; CX 1998 at 003; Pais, Tr. 1738-1739).

iii. Waivers of ARRA's Buy American requirement

530. The United States Environmental Protection Agency ("EPA") was the sole authority for granting or approving waivers of ARRA's Buy American requirement for any ARRA-funded waterworks project. (Respondent's Supplemental Response to Complaint Counsel's Requests for Admission, July 16, 2012 ("Supp. Response to RFA") at ¶ 2).

531. ARRA contains three types of waivers or exceptions to the Buy American requirement for ARRA-funded waterworks projects (also referred to by the EPA as "Regional Project Waivers" or "Regional Waivers"): public interest; insufficient and not reasonably available quantities; and cost. (American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 §1605(b), 123 Stat. 115 (codified as amended in scattered sections of 6, 19, 26, 42, and 47 U.S.C. (2006 Supp. III))).

532. The EPA granted three public interest waivers of ARRA's Buy American provision for Fittings, which allowed three local municipalities to purchase imported Fittings for use on ARRA-funded waterworks projects. (CX 1592 (waiver for City of Lewiston, ME and the Auburn, Maine Water District for purchase of 33 imported Fittings); CX 1590 (waiver for Lowell, MA for purchase of an imported 30" diameter pipe tee fitting); CX 1591 (waiver for Richland, WA for purchase of an imported 42" by 24" AWWA C153 cement lined mechanical joint reducer tee fitting)).

533. The EPA did not issue any Regional Waivers for Fittings under the authority of Section 1605(b)(3), which allows for waivers due to overall cost increases of more than 25 percent. (Clean Water and Drinking Water State Revolving Funds: ARRA Implementation,
http://water.epa.gov/grants_funding/eparecovery/index.cfm
(listing waivers)).

534. McWane informed its customers in an April 8, 2009 letter that an exception from ARRA's Buy American requirements related to the cost impact of a project would only be available if domestic sourcing would increase the cost of an entire project (as opposed to the cost of a given component) by at least 25%: "[T]he exception does not apply if the cost of the pipe or valves for a project will be 25% greater than foreign products; rather the use of U.S. made pipe or valves must increase the cost of the *entire project* by more than 25%." (CX 1886 (emphasis in original); CX 2498 (Teske, Dep. at 57) (discussing CX 1886)).

535. On August 10, 2009, the EPA granted a revised *de minimis* waiver from the requirements of ARRA Section 1605(a) for any incidental components that comprise a total of no more than five percent of the total cost of the materials used in and incorporated into a project. (RX 195; *see also* RX 155 (original *de minimis* waiver)). Those using this waiver did not have to apply for the waiver and be granted such a waiver, but they were required to retain documentation as to these incidental items in their project files, and to "summarize in reports to the State the types and/or categories of items to which this waiver is applied, the total cost of incidental components covered by the waiver for each type or category, and the calculations by which they determined the total cost of materials used in and incorporated into the project." (RX 195). The Federal Register Notice setting out the revised *de minimis* waiver described incidental goods as "'nuts and bolts'-type components whose origins cannot readily be identified prior to procurement." (RX 195).

536. Fittings typically comprise five (5) percent or less of the total cost of a typical waterworks project. (Joint Stipulations of Fact, JX0001 ¶ 10).

537. With few exceptions, non-Domestic Fittings were not used on ARRA-funded projects. (CX 2501 (Prescott, IHT at 66) ("Q. Did you ever get a waiver or try to get a waiver to allow the use of imported fittings on stimulus projects? A. To my knowledge, no."); CX 2510 (Groeniger, Dep. at 173), *in camera* ("Q. So you never used a *de minimis* waiver for fittings? A. Not that I can recall."); CX 2489 (Morrison, IHT at 51) (there were no waivers or exemptions that allowed the use of imported Fittings

on Domestic-only ARRA-funded projects); CX 2489 (Morrison, IHT at 51)).

538. McWane did not sell any imported Fittings for use in any ARRA-funded waterworks projects. (Supp. Response to RFA at ¶ 5 (admitting that McWane possesses no first-hand knowledge of the use of an imported Fitting in an ARRA-funded waterworks project under a *de minimis* waiver)).

539. To the extent that Sigma's imported Fittings were used on any ARRA-funded waterworks projects, the quantities were few and the circumstances limited. (Pais, Tr. 1742-1744; CX 2523 (Bhattacharji, Dep. at 222-223) (*de minimis* waivers on ARRA projects were "few and far between")).

540. Star did not sell any imported Fittings for use in any ARRA-funded waterworks projects under either a public interest waiver or a *de minimis* waiver. (CX 2535 (Bhutada, Dep. at 43-44)).

541. Ferguson does not know of any instance in which Ferguson used the *de minimis* waiver to use an imported Fitting in a domestic-only waterworks project. (Thees, Tr. 3081). Ferguson believed that the *de minimis* waiver did not apply to Fittings because the waiver only applied to products where the country of origin for such products was not readily identifiable, such as nuts and bolts, not Fittings. (Thees, Tr. 3078-3080) (Fitting's country of origin is readily identifiable because suppliers stamp this information on the side of the Fitting).

542. HD Supply believed that the EPA's *de minimis* waiver did not apply to Fittings based on information gathered from End Users. (Webb, Tr. 2740-2742). HD Supply never sold an imported Fitting to any customer for use on an ARRA-funded waterworks project, and its President is unaware of any instance where any Distributor supplied imported Fittings into an ARRA-funded waterworks project under any circumstances. (Webb, Tr. 2742-2744; CX 2514 (Webb, Dep. at 66-67)).

543. SIP worked with End Users to apply for two or three waivers for specific ARRA-funded projects, but was unsuccessful in obtaining a single waiver. (CX 2522 (Agarwal, Dep. at 92-93),

in camera). SIP is unaware of any sales of its imported Fittings that were used for ARRA-funded projects. (CX 2522 (Agarwal, Dep. at 92), *in camera*).

544. Illinois Meter is unaware of anyone using imported Fittings as a substitute for Domestic Fittings on any ARRA-funded waterworks projects. (Sheley, Tr. 3405-3406).

545. Metalfit is unaware of any project for which Metalfit, a Mexican manufacturer, provided imported Fittings for use on an ARRA-funded waterworks project. (CX 2518 (Meyer, Dep. at 66, 71-72, 133-134)).

546. Electrosteel does not know of any instance in which a customer used an imported Fitting for an ARRA-funded waterworks project, or any instance in which a customer received a waiver of ARRA's Buy American requirement for a Fittings purchase. (CX 2500 (Swalley, Dep. at 62-63, 159)).

iv. Price correlation between Domestic and non-domestic Fittings

547. Domestic Fittings are sold at substantially higher prices than non-domestic Fittings. F. 1075-1076.

548. Due to the price differential between Fittings sold into open and domestic specifications, McWane does not provide quotes for Domestic Fittings to be used for open specification. (CX 2477 (Jansen, Dep. at 96)).

549. Regardless of price, a Distributor will not purchase an imported Fitting if the End User's specification calls for a Domestic Fitting. (*See* Webb, Tr. 2716-2718; Thees, Tr. 3056; CX 2516 (Sheley, Dep. at 156); Saha, Tr. 1173-1174).

550. Some End Users who specify Domestic Fittings because of preference are aware of, but not sensitive to, the price differential between Domestic Fittings and import Fittings. (CX 2489 (Morrison, IHT at 46) ("Well, they're aware of [the price differential], but in the overall cost of a project, the cost of your fittings is minimal. Now, they may be twice as much, but if

you're doing a million-dollar project and you're paying $10,000 more for the fittings, that's negligible in some people's eyes."); CX 2527 (Pais, IHT at 36-37) (engineers deciding whether to have a domestic-only specification are not sensitive to prices of Fittings)).

2. Relevant geographic market

551. Fittings suppliers ship their products nationally from multiple locations. (Rybacki, Tr. 1089-1092 (Sigma has five main warehouses, some satellite warehouses, and distribution centers in Florida, California, Washington, and Arizona); McCutcheon, Tr. at 2264 (Star has 13 distribution centers in North America in order to "stock product closer to [customers] for better delivery times"); RX 637 (Jansen, Dep. at 144-145); CX 2483 (Tatman IHT at 60-61) (McWane has distribution centers in Texas, Alabama, California, Oregon, and Illinois, enabling one to two day delivery to 95 percent of the country)).

552. From the perspective of a local Distributor, the Fittings of one manufacturer/supplier are interchangeable with those of another manufacturer/supplier located elsewhere in the United States. (CX 2477 (Jansen, Dep. at 86) (Fittings produced by Sigma, McWane and Star that meet the same AWWA specifications are interchangeable with each other)).

553. Both Complaint Counsel's and Respondent's expert witnesses opined that the geographic market is no larger than the United States; however, it may be smaller than the whole United States, as there may be separate regional markets. (RX 712A (Normann Report at 30-31); Schumann, Tr. 3794-3795).

554. The relevant geographic market in this case is the United States. F. 551-553.

C. Competitive environment

1. Market characteristics

a. Pricing interdependence

555. McWane is an industry leader with respect to pricing, and other suppliers try to follow McWane as best they can. (Pais, Tr. 1920; 1923-1924).

556. Historically, when McWane announces new list prices, Sigma and Star generally follow with substantially matching list prices. (Tatman, Tr. 257, 336-337; McCutcheon, Tr. 2269; Rybacki, Tr. 1098). Sigma and Star generally also try to match new multipliers published by McWane. (Minamyer, Tr. 3138-3142; McCutcheon, Tr. 1098, 2270; Rybacki, Tr. 3576-3577).

557. Any published price increase by one supplier that is not adopted by the other suppliers will not be accepted in the market and will not be sustained. As Mr. McCutcheon of Star explained: "[I]f you're the highest-priced fitting in a commodity market, you're not going to sell a lot of fittings." (McCutcheon, Tr. 2425; Pais, Tr. 1936-1937; Rybacki, Tr. 1113-1114; *see also* Tatman, Tr. 1070 (if not adopted by the other suppliers, a published price increase "isn't going to work because, number one, you're going to have to sit there, it's your published multipliers for at least three months while your competitors pick you clean job-pricing and it will be at least three months or more until you know where you're at . . .")).

558. McWane, Sigma, and Star generally received and read each other's letters to customers announcing price changes. These letters were typically provided to a supplier by its Distributor customers, and then circulated internally at the supplier. (CX 2450 at 002; Tatman, Tr. 306-307; Minamyer, Tr. 3148; Rybacki, Tr. 3487; Pais, Tr. 2058-2060; CX 2526 (Minamyer, Dep. at 125-126); CX 2531 (Rybacki, Dep. 205-206)).

559. McWane, Sigma, and Star consider each other's customer letters, along with other relevant information, when

making their own pricing decisions. (Tatman, Tr. 287; CX 2526 (Minamyer, Dep. at 126-127); Rybacki, Tr. 1108-1109).

b. Price transparency

i. List and multiplier prices

560. All major Fittings suppliers publish their list prices in price books or catalogues that are widely disseminated to all of their customers. Suppliers also post their list prices on their public websites. (Tatman, Tr. 255-256; Rybacki, Tr. 1097-1096, 1099; Minamyer, Tr. 3137-3138; CX 2535 (Bhutada, Dep. at 100)).

561. Any changes in multipliers are widely disseminated through pricing letters that are transmitted via fax or email to Distributors, either on an individual state or region basis, or, in the case of the large national Distributors, via "multiplier maps" that identify local multipliers for each state across the United States. (Tatman, Tr. 262-263, 305, 322; CX 2440; RX 410 (sample McWane multiplier map); Rybacki, Tr. 1100; McCutcheon, Tr. 2270).

ii. Project Pricing

562. For a specific project, Distributors commonly seek bids from multiple Fittings suppliers. (RX 650 (Morrison, Dep. at 68); RX 703 (Coryn, Dep. at 36)).

563. Suppliers do not want their competitors to know when a Project Price is being offered, for fear that their competitors will offer a lower price and take the project. (Minamyer, Tr. 3145).

564. Suppliers do not want their competitors to know about freight terms, payment terms, cash discount or rebates being provided to a Distributor. (Tatman, Tr. 1017-1019, *in camera*, ("There's all sorts of mechanisms for driving price. And the reason why that's there is, quite frankly, we're all trying to hide from our competitors what we're doing."); RX 396).

565. Suppliers attempt to learn from their Distributor customers the amount a competitor has bid; however, the supplier

may not trust information provided by the Distributor because the Distributor has a financial incentive to "trick" the supplier into offering a lower price. As Mr. Tatman explained with the following example:

> [The contractor] goes to now multiple distributors saying, What's your price? What's your price? And he's probably getting the best price, and then he's probably calling a second time and a third time, saying, Oh, you're close, but I need an extra 3 percent, I need an extra 4 percent. The distributor now, because he's making no money selling to the contractor anymore, he's going back to the supplier, and he calls me up and he says, Hey, look, I've got this job. It's got 20 tons of fittings on it. It's 12" product. What's your best price? I'll give him a price. He's going to come up to Star. He's going to call Sigma. He's going to call Metalfit. He's going to call Serampore. He's going to call NACIP. He's going to call Electrosteel. He's going to get a number from them. And then he's going to come back and he's going to call me again. Maybe he wants to buy from Tyler/Union, but, you know, maybe my price is equal, but he's going to try. Well, [the distributor would say] "I'd like to give you that job, but you're off by 5 percent. You've got to give me a little bit more.["] And then we cough it up again. And that's why I'm saying by auction. I'm not aware of what the other person is bidding except for the information that I'm getting from my customer, the distributor. And you will see in this case we don't believe what the distributor is telling us because he has a personal and a financial incentive to trick me into giving a lower price.

(Tatman, Tr. 266-267; *see also* F. 434 (Project Prices are often conveyed verbally).

566. Project Pricing in the "auction" environment described in F. 565 results in losing "visibility" as to where the true competitive price level is, or as Mr. Tatman said, bidding in this environment is "shooting in the dark." (Tatman, Tr. 267-268, 342, 926-927).

567. McWane prefers to have greater visibility into where the true competitive market level is, *i.e.*, the actual purchase and

sale prices, so it can know what it's "shooting at." As Mr. Tatman stated: "If I can see it, I can shoot it." (Tatman, Tr. 332, 361, 376-377).

568. Project Pricing was a significant part of Star's competitive strategy, because it was the smallest competitor in the market and it needed to Project Price to remain competitively viable. Project Pricing helped Star grow its market share. (McCutcheon, Tr. 2387; RX 685 (Minamyer, Dep. 26-27)).

569. Sigma perceived Star to be very aggressive in its pricing and believed that Star had taken prices to a depressed level at which it was hard to compete. (Rybacki, Tr. 1136-1137).

570. Mr. Pais of Sigma was of the opinion "that Star was most aggressive in their pricing under this special pricing or job or whatever it's called." (Pais, Tr. 1937).

iii. Gathering competitive information

571. In 2008, one way that McWane obtained competitive information was through its sales force, including through weekly narrative reports, submitted by the sales force, which reported information learned in the field. These "competitive feedback reports" were submitted to, and reviewed by, Mr. Jansen and Mr. Tatman. (RX 598; Tatman, Tr. 330, 333-334, 915-916, 919-920).

572. Sigma learns about what its competitors are charging for Fittings "[t]hrough the marketplace, through my salespeople, through my regional managers and through my customers." (Rybacki, Tr. 1108).

573. Although they reviewed and considered each other's customer letters, McWane, Sigma, and Star, did not necessarily trust that the pricing announced in a competitor's letter, especially multipliers, would actually be used by that competitor in the market, and they preferred to rely on competitive input received from customers, rather than competitors. (Tatman, Tr. 306-307, 415-416, 899-901; Rybacki, Tr. 1108-1109, 3559-3660; Minamyer, Tr. 3240-3242; McCutcheon, Tr. 2507-2509).

574. McWane knows that its competitors receive McWane's customer letters. (Tatman, Tr. 377, 1067 ("My competitors are going to pick up this letter through normal competitive channels")).

575. When Mr. Minamyer of Star would read McWane's pricing letters, he would consider whether the letters contained signals to Star. (CX 2525 (Minamyer, IHT at 77)).

576. Mr. Tatman received a copy of Sigma's December 20, 2007 Customer Letter (F. 615) and read it, in part, as "bashing" McWane. (Tatman, Tr. 351-352; CX 0627 at 001, 012).

577. Mr. Rybacki of Sigma reads McWane and Star letters carefully to determine their intentions, and he expects his competitors to do the same with Sigma letters. (CX 2531 (Rybacki, Dep. at 205-206)).

578. Customer letters served to communicate to competitors, as well as customers. (F. 571-577).

2. Competitive Environment prior to January 2008

579. Demand for Fittings is largely driven by housing-related infrastructure construction and by construction of wastewater treatment plants, which in turn are driven by such factors as the rate of housing growth, and the age and condition of existing systems. (Joint Stipulations of Fact, JX0001 ¶ 11).

580. The collapse of the housing market in 2007 through 2008 had a particularly adverse impact on the waterworks industry, which depends on new housing starts to drive demand. (Tatman, Tr. 271-272; McCutcheon, Tr. 2654, *in camera*; RX 675 (Sheley, Dep. at 58); Rybacki, Tr. 3664, *in camera*).

581. During 2007, with the economic decline, the Fittings industry experienced a period of declining demand, increased price competition resulting in price erosion, and increased costs. (RX 690 (Rybacki, Dep. at 66-67); Tatman Tr. 263-265; CX 2457).

582. Beginning in 2007, demand for Fittings was falling because of the economic downturn and decreased demand for new housing. Business continued to drop off, particularly by the summer of 2008, when the economic crisis really hit "full steam." (Tatman, Tr. 269-272; Rybacki, Tr. 1105; McCutcheon, Tr. 2654, *in camera*).

583. With the economic decline, the Fittings market became more price competitive, as Distributors demanded discounts off published multipliers in order to compete for the limited number of jobs available with Contractors. (Tatman, Tr. 263-265; *see also* CX 2477 (Jansen, Dep. at 248-249) (the use of Project Pricing increased in or around August 2006 as the market started to decline)).

584. The price erosion in the Fittings market occurred not in published list prices or multipliers, but in the effective or "actual" multipliers. (CX 1138 at 001; Pais, Tr. 2079). The effective multiplier is the average weighted multiplier at which Fittings products are sold in a given area and includes Project Pricing but not other discounts such as rebates. (Tatman, Tr. 329, 393-395).

585. Historically, McWane's two United States plants had a higher cost of production than its Chinese plant and the overseas plants of its competitors. (Tatman, Tr. 431-432).

586. In 2007, the costs of doing business overseas, particularly in China, increased due to the withdrawal of the China export rebate, strengthening of the Chinese currency, increases in the costs of labor, raw materials, such as pig iron and scrap iron, commodity price increases, and energy price increases affecting freight and fuel. (RX 687 (Pais, Dep. at 39-40); McCutcheon, Tr. 2515-2516; Tatman, Tr. 870-875; Rybacki, Tr. 1113).

587. Prior to January 2008, the cost of producing Fittings in China was lower than the cost of domestic production, although with China costs increasing, domestic production of small diameter "A" items on a high speed Disamatic ("DISA") line was competitive with Fittings produced in China. (RX 642 (Page, Dep. at 111-112)).

588. On November 29, 2007, McWane's CFO, Mr. Nowlin, transmitted to Mr. Walton a model Mr. Nowlin prepared, called a "sensitivity analysis." The model looked at cost variables in China such as the Chinese currency, the Chinese Value Added Tax ("VAT"), and Chinese cost of inflation, and concluded that if the Chinese currency heats up and strengthens, that would not be good for McWane, because McWane produces in China, but that this would hurt importers a lot more than McWane. (CX 2481 (Nowlin, Dep. at 107-109); CX 2143).

589. In a December 22, 2007 internal email to Mr. McCullough and Mr. Walton, Mr. Tatman described "accelerated inflation in China compared to Domestic cost," (CX 1702), and in an internal email three days later to Mr. McCullough, Mr. Jansen, and Mr. Walton, Mr. Tatman again stated that "China inflation [is] out pacing domestic costs." (CX 2327).

590. Rather than scaling back production and reducing inventory in the face of declining demand, the then-manager of McWane's Fittings business, David Green, increased production to spread fixed costs over a higher production volume, thereby creating the appearance of reducing manufacturing costs in the short term. (RX 642 (Page, Dep. at 165-167)).

591. When Mr. Tatman assumed responsibility for the management of McWane's Fittings business unit after Mr. Green's departure at the end of 2007, McWane had "runaway inventory levels" in the face of declining demand. Mr. Tatman stated: "When I took over that facility or those operations, we had inventory levels that were three times normal. Every yard was full of fittings as far as the eyes could see. We had fittings sitting out in grass yards. We had just had more inventory than we could handle, and the marketplace was going down." (Tatman, Tr. 214-215).

592. In 2007, McWane had excess inventory, creating "pressure on volume." Pressure on volume refers to a smaller market, declining volume, and the need to increase volume. (Tatman, Tr. 346-347 ("the market place is tanking . . . I need

volume. My competitors need volume. Everybody needs volume.")).

593. Mr. Tatman's main concern in late 2007 was to increase McWane's sales volume in order to reduce excess inventory. Increasing volume was needed to justify keeping McWane's foundries open. Mr. Tatman was more concerned about volume than price. (Tatman, Tr. 215-216).

594. McWane had lost market share from 2006 through 2007. (CX 0622 at 003; *see also* Tatman, Tr. 262-264, 342 (McWane was losing share year over year)).

595. By late 2007, Sigma and Star each had Fittings sales forces that were approximately twice as large as McWane's sales force of 8 to 10 persons. Mr. Tatman believed that McWane was losing share because McWane's smaller sales force inhibited its ability to detect and respond to Project Prices being offered in the field. Due to this lack of visibility, McWane was getting "beat at the pricing game." (Tatman, Tr. 262-264, 342 (McWane was losing share year over year, due to others price undercutting); 269-270, 281-283, 285-286, 1025, *in camera*).

596. Mr. Tatman believed that salespeople for Sigma and Star were "better than ours . . . . I think they had more boots on the ground. I think they had better people at that point in time. And it is my understanding that their people were on an incentive-based [pay scale], which made them more aggressive probably than our salespeople, who were on fixed salaries." (Tatman, Tr. 285).

597. Net pricing for McWane in 2007 was not keeping up with cost inflation. (CX 0627 at 001). As Mr. Tatman explained:

> Inflation is 10 percent. We're only getting 5 percent in price because everybody needs volume and they're beating the crap out of one another.
>
> So if you're looking there, we did not recover . . . inflation in 2007 because we gave up more in price than what inflation was or we didn't recover enough in price to offset inflation

because of pressure on volume. Everybody is trying to get volume at this point.

(Tatman, Tr. 346).

D. January and February 2008 Pricing Events

1. January 11, 2008 Customer Letter

a. Background

598. In a letter to its customers on October 5, 2007, McWane, citing rising costs, especially for off-shore operations, announced a multiplier increase to be effective November 5, 2007, as follows:

Blended Utility Fitting and Accessory Orders: +0.020
Domestic Utility Fitting and Accessory Orders: +0.010

(RX 401).

599. The McWane October 5, 2007 letter to customers further noted that the then-current list price would be retained and that it "is our intention to address future price actions with adjustments to invoice multiplier levels" rather than through list price changes. (RX 401).

600. On October 11, 2007, Star followed McWane by announcing in a letter to its customers that it was raising its multiplier on Fittings and accessories by +0.02, effective November 5, 2007, and that Star was retaining its then-current list prices. (RX 402).

601. In an internal email dated October 19, 2007 Mr. Pais of Sigma noted a prior meeting with Mr. Page of McWane. According to the email, the discussion included "changes that [Mr. Page] has initiated to respond to the weak market conditions" which were "publicly known in the AWWA industry," including that Mr. Green had been removed as part of a restructuring at McWane "to be more efficient and manage their overall capacity more effectively" and that Mr. Green would be replaced by Mr.

Tatman. In a subsequent internal email by Mr. Pais regarding his September 2007 meeting with Mr. Page, Mr. Pais stated his believe that Mr. Page was "disappointed at our failure to get a better landscape." (CX 2118 at 001-002).

602. On October 23, 2007, Sigma announced in a letter to its customers that, due to a difficult market and increased costs, it would be implementing a price increase for Fittings, accessories and municipal castings, in "the next few months," with the first increase being a multiplier increase on Fittings of "two or three" points, effective November 5, 2007, and the second being a list price increase for all Sigma's products, to be effective January 2, 2008, which would be "a minimum of 6%." (RX 015).

603. On November 30, 2007, Star announced in a letter to its customers that Star would be publishing a new price list, effective January 1, 2008, although Star did not state a percentage increase. (CX 0627 at 013).

604. On or about December 3, 2007, Mr. Page, of McWane and Mr. Pais of Sigma met in Birmingham, Alabama. (Pais, Tr. 1886-1887; CX 2482 (Page, Dep. 107-108); *see also* CX 2037; CX 2038).

605. Mr. Page, although President and CEO of McWane, was not responsible for determining Fittings pricing, although he inquired about pricing or considered price increases, every couple of years. Mr. Pais testified they discussed Sigma potentially supplying McWane with metric sized fittings that were needed for international markets and that McWane did not have. (Pais, Tr. 1886-1887; CX 2037).

606. Mr. Pais of Sigma believed that he had developed a good relationship with Mr. Page of McWane. (Pais, Tr. 1871-1872; CX 2538 (McCutcheon, IHT (Vol. 2) at 229) (In conversation with Mr. McCutcheon of Star, Mr. Pais suggested he was friendly with Mr. Page of McWane)).

607. Mr. Page of McWane described his relationship with Mr. Pais of Sigma as follows:

> Different. Victor really seems to be a kind of – or seemed to be desirous of being really entrepreneurial and an idea guy, I guess would be a good way to say it. And – and, periodically, off and on it would go in spurts where he would think he would have some good ideas. He would want to get together and discuss those ideas about joint ventures, selling his company to us, us doing business together in the Middle East. Usually, it involved his ideas, McWane money, and him making money on it. So we didn't do any of them.

(RX 642 (Page Dep. p. 30); *see* RX 642 (Page Dep. p. 116-17 ("Victor [Pais] was very repetitive in his – in his focus and requests. Many, many times he would call or e-mail and talk about this. And, then I would say 'Well, we're not interested in that' or 'Yeah, give me more information on that.' And he would say, 'In response to your feedback, here's – here's an opportunity.' So, it was all exploratory. None of these things existed. They were all opportunities in Victor's mind that once again, with his relationships and – McWane's business, that there might be something for us to do together that would be successful"; *see also* RX 642 (Page Dep. p. 275 ("[A]s we've seen a number of things, Victor lives in LaLa Land. He lives an illusion that he thinks he is running around getting things done, and he just has an oversized pair of pants on.")).

608. Mr. Page and Mr. Pais testified that their December 3, 2007 meeting concerned international opportunities for McWane. In addition, Mr. Pais mentioned in this meeting forming an industry association, which was one of what Mr. Page called Mr. Pais' "many . . . ideas" but Mr. Page testified he had had nothing to say on the topic because he did not know any facts on the matter. Mr. Pais and Mr. Page denied discussing domestic Fittings; prices being charged in the market place; pricing discipline; McWane's or Sigma's costs; or ways they could work together in the marketplace in this regard. (Pais, Tr. 1886-1887; RX 642 (Page, Dep. 80-82)).

609. A call from a cell phone issued to Mr. Rybacki of Sigma was placed to McWane's office for two minutes at 2:04 p.m. on December 19, 2007. (CX 1621-A at 124, *in camera*; Rybacki, Tr. 3617, *in camera*).

610. Calls from a cell phone issued to Mr. Rybacki of Sigma were placed to a cell phone issued to Mr. McCutcheon of Star at 1:46 p.m., 2:20 p.m., 2:39 p.m., and 2:55 p.m. on December 19, 2007 for one minute each. Calls were placed from a cell phone issued to Mr. McCutcheon to a cell phone issued to Mr. Rybacki at 3:33 p.m. and 4:09 p.m. on December 19, 2007. Another call was placed from a cell phone issued to Mr. Rybacki to a cell phone issued to Mr. McCutcheon for two minutes at 5:03 p.m. on December 19, 2007. (CX 1621-A at 124, *in camera*; McCutcheon, Tr. 2474, *in camera*; Rybacki, Tr. 3616-3618, *in camera*).

611. A call from a cell phone issued to Mr. Rybacki of Sigma was placed to McWane's office at 2:16 p.m. on December 20, 2007, which lasted 12 minutes. (CX 1621-A at 125, *in camera*; Rybacki, Tr. 3622-3623, *in camera*).

612. Mr. Rybacki testified he did not recall having a telephone conversation with Mr. Tatman on the dates set forth in F. 610-611, but that one call to Mr. Tatman might have been to welcome Mr. Tatman to the industry. (Rybacki, Tr. 3625-3626).

613. Mr. Rybacki's responsibilities for Sigma in 2008 and 2009 did not require him to communicate with anyone at Star or McWane. (Rybacki, Tr. 1087-1089).

614. During the relevant period, Mr. Rybacki of Sigma had a personal friend and former colleague, named Tom Frank, who worked at McWane, and with whom he periodically spoke. (Rybacki, Tr. 3610, 3650-365; RX 467).

615. On December 20, 2007, Sigma issued a letter to its customers delaying implementation of Sigma's Fittings list price increase (previously scheduled for January 2, 2008), explaining in part:

> Unfortunately for <u>you</u> and <u>us</u> one of our competitors in the <u>Fitting</u> <u>Industry</u> has not announced a New List Price increase for 2008 despite the fact that they are subject to the same cost pressures as the rest of us. As a result the New List Price Sheet as it pertains to Fittings only will be delayed for the

> time being. It is our sincere hope that the delay will be short term and that this Price Increase which is healthy for all of us will be implemented in the very near future.

(CX 2455 at 001 (emphasis in original); Rybacki, Tr. 1114-1116).

616. A call from a cell phone issued to Mr. Rybacki of Sigma was placed to a cell phone issued to Mr. McCutcheon of Star for 22 minutes at 9:37 a.m. on December 21, 2007. (CX 1621-A at 112, *in camera*; McCutcheon, Tr. 2476, *in camera*).

617. On December 22, 2007, Mr. Tatman sent an internal email to Mr. McCullough, with a copy to Mr. Walton, with the subject line "DIWF List Price Change." The email stated as follows:

> Leon, I just wanted to put something on your radar in case it comes up before we have a chance to speak.
>
> Sigma recently posted a new List Price effective Jan 2nd and they've been pulsing sources trying to see if Tyler/Union will follow.
>
> Like the last one, the % increases vary greatly by item with no apparent pattern.
>
> Star previously announce[d] their intent to publish a new LP effective Jan 2nd and now they've just posted a letter stating the effective date has been changed to Feb 4th. Unlike Sigma Star has yet to post any actual LP numbers. I believe they are waiting to see what Tyler/Union will do before actually posting numbers or printing books.
>
> As you may recall, our Nov multiplier increase announcement stated that our intent was to manage any future required market pricing with multiplier adjustments rather than LP changes.
>
> Given both the change in the Tyler/Union leadership structure and the accelerated inflation in China compared to Domestic

> cost, I believe we're in a unique position to help drive stability and rational pricing with the proper communication and actions.
>
> I have a concept that I believe will work if properly executed. There are some additional data points to review, but I should be in a position to discuss with you in detail during the sales meeting or potentially before if needed. I don't believe with our silence and Star's push announcement that Sigma will hold to their Jan 2nd effective date so we have some time to get it right. Enjoy the holiday.

(CX 1702).

618. Mr. Tatman explained price "stability" and its effects as follows:

> [I]f the published multiplier is a .25, and on a weighted average of all the jobs that we sell over a period of time I see that where we're selling at is on average 10 percent below where we're published at, . . . we're starting to get in the unstable environment, which means there's a very high variation between where we're publishing at and where we're actually selling at . . . [This is] on average – that's not on a given job. That's on everything that you're selling in a market region over a period of time[. I]f the weighted average is more than a 10 percent discount off of published multipliers, then . . . I'm going to have a tough time finding out where the true competitive price is because there's too big of a spread.

(Tatman, Tr. 284 (*see also* F. 567 ("If I can't see it I can't shoot it")).

619. In late December, Star revised its November 30, 2007 list price change announcement (F. 603) to change the effective date of the price change to February 4, 2008. (CX 0627 at 0014).

620. On December 25, 2007, Mr. Tatman sent a McWane internal email to Mr. McCullough, with a copy to Mr. Jansen and Mr. Walton, attaching a PowerPoint file titled, "Draft Presentation for 1Q 2008 DIWF LP Review.ppt." The email referred to the draft presentation as "a concept we might want to discuss in

regards to our pricing strategy for utility fittings." Mr. Tatman's email continued:

> This is a draft presentation as there's additional analysis required before a final recommendation could be made.
>
> Our past attempts to drive stable pricing haven't been too successful. However, our new leadership structure coupled with China inflation out pacing domestic costs may provide a unique opportunity for success provided our strategy and execution is correct.
>
> Please let me know if this concept is something you want me to scope further.

(CX 2327).

621. A call from a cell phone issued to Mr. Rybacki of Sigma was placed to a cell phone issued to Mr. Tatman of McWane for three minutes at 10:15 a.m. on December 27, 2007. (CX 1621-A at 113, *in camera*; Tatman, Tr. 367; Rybacki, Tr. 3624-3626, *in camera*).

622. A call from a cell phone issued to Mr. Tatman of McWane was placed to a cell phone issued to Mr. Rybacki of Sigma for six minutes at 12:11 p.m. on December 27, 2007. (CX 1621-A at 113, *in camera*; Tatman, Tr. 367-368; Rybacki, Tr. 3626, *in camera*).

623. Mr. Tatman testified that he did not recall speaking with Mr. Rybacki on December 27, 2007, or what they might have spoken about. (Tatman, Tr. 367-368).

624. Mr. Rybacki testified that he had "no clue" what he and Mr. Tatman might have spoken about on December 27, 2007. (Rybacki, Tr. 3626).

625. Mr. Tatman prepared a set of 14 PowerPoint slides, which comprise CX 0627, for purposes of a McWane internal discussion among himself, Mr. Walton, and Mr. McCullough

regarding how to competitively react to what was going on in the marketplace. (Tatman, Tr. 345-346).

626. The 14 slides comprising CX 0627 were: a summary of the then-current competitive environment (CX 0627 at 001); a graphed comparison of Sigma's new price list to McWane's existing price list, (CX 0627 at 002); data regarding cost increases in China (CX 0627 at 003); a slide titled "Desired Message to the Market & Competitors" (CX 0627 at 004); a slide assessing inflation data against announced price increases (CX0627 at 005); two draft customer letters (CX0627 at 006-007); a slide titled "back up reference material" (CX 0627 at 008); McWane's last published national multiplier map for "blended" Fittings (CX 0627 at 009); and copies of customer letters sent by McWane, Sigma, and Star in the October and November 2007 time period. (CX 0627 at 010-014).

627. Mr. Tatman prepared a spreadsheet in connection with determining Fittings price multipliers for January 2008, which comprises CX 1664. The analysis set forth, for every state, and for both blended and domestic Fittings, McWane's then-effective multiplier (*i.e.*, the multiplier at which Fittings were actually selling in the marketplace, F. 584) current published multiplier, and a proposed multiplier; and identified whether or not the proposed multiplier was an increase over the effective multiplier. The spreadsheet also contains Mr. Tatman's analysis of the financial impact of those multiplier changes. (CX 1664; Tatman, Tr. 329, 885).

628. Mr. Tatman analyzed Sigma's list prices, obtained from Sigma's website, by entering them into a spreadsheet and applied them to the mix of products and volume McWane would likely sell. (Tatman, Tr. 348).

629. Based on his analysis, Mr. Tatman determined that the weighted average of Sigma's announced list price increase amounted to a 25% increase. (Tatman, Tr. 348).

630. Mr. Tatman believed that if McWane followed Sigma's 25% increase, McWane would lose more visibility into where the competitive level was. The "competitive level" refers to the price level at which the actual market is selling, *i.e.*, the

actual net price level in the marketplace. (Tatman, Tr. 348, 379 ("So if I'm offering a published price of $20, where is the actual net price in the marketplace? Is it $15? Is it $14? Is it $10. I'm trying to figure out where competitors are taking business away from me", what are they doing with twelve different price mechanisms going on. Job pricing is one of twelve ways to sneak price out of there. I'm just trying to figure out where they're at. And wherever they are at, wherever the customers are truly buying at, I call that the competitive level, sir")).

631. Mr. Tatman recommended to his bosses that McWane not follow Sigma's proposed 25% list price increase, but instead publish an average multiplier increase of approximately 8% over McWane's effective multipliers. (Tatman, Tr. 215-216, 340,354-359).

632. Mr. Tatman's pricing strategy for McWane was designed to reduce the "wiggle room that they had from a financial standpoint so that I could see what was going on." (Tatman, Tr. 361) ("If I can see it, I can shoot it.")).

633. Mr. Tatman's pricing strategy for McWane was designed to put financial pressure on its competitors. As Mr. Tatman explained, reduced "wiggle room" affects the amount of discounting the competitor can do because if it "is making 50 percent profit on something, he's got a lot of things he can do. If he's making 20 percent profit on something, he doesn't have near the amount of flexibility." (Tatman, Tr. 361).

634. Mr. Tatman's concept was to narrow the range between the published price and actual prices and thereby give his competitors less "headroom," within which Star and Sigma could maneuver to undercut McWane on price. (Tatman, Tr. 346-349).

635. Mr. Tatman's objective was to stabilize market pricing by compressing the spread between published pricing and actual pricing, so as to achieve greater pricing transparency. (Tatman, Tr. 1072).

636. McWane's strategy was designed to serve its goal of increasing volume and gaining market share. (Tatman, Tr. 521-522).

637. A McWane internal document, CX 0627 at 001, titled "Current Competitive Environment" read as follows:

General:
- Net pricing in 2007 lagged inflation due to pressure on volume
- The July LP increase wasn't fully realized by Sigma/Star due to lower multipliers and allowing specific accounts to continue buying off prior LP
- Continued inflation out of China is increasing pressure for netting real price

Tyler/Union:
- Oct 5th: Announcement stated that any future price actions would be handled with multiplier changes rather than by publishing new List Price books.
- Due to Domestic Mfg our average inflation is well below Sigma and Star's

Sigma:
- Oct 23rd: Announce a minimum LP increase of 6% for Jan 2nd
- Mid Dec: Posted new LP files on their website (16% to 46%) increase ~ 25% on average
- **Dec 20th: Delayed their effective date while bashing Tyler/Union for not following**

Star:
- Nov 30th: List Price increase announced for Jan 2nd effective date
- Late Dec: Revised effective date to Feb 4th
- No actual values or % changed have yet to be announced or posted

(CX 0627 at 001 (emphasis in original)).

638. A McWane internal document, CX 0627 at 004, titled "Desired Message to the Market & Competitors" read as follows:

- **Tyler/Union will be consistent and follow through with what we've formally communicated.**

- **T/U will encourage/drive both price stability and transparency.**

- **T/U will adjust multipliers as required to remain competitive within any given market area. (Consistent Job Pricing will be met with general market actions)**

- **For 2008, we will support net price increases but will do so in stepped or staged increments. A prerequisite for supporting the next increment of price is reasonable stability and transparency at the prior level.**

Due to their now more desperate need for price, I believe that Sigma and Star will mimic and verbally follow any program we publish. However the keys to actual success are:

1. T/U being consistent with what we say for an extended period (> 3 months)

2. Sigma & Star's mgt pulling price authority away from front line sales and customer service personnel to add discipline to the process

3. Support from our major customers to abandon the current process of branches calling multiple suppliers to auction for price. (We'll need face to face meetings)

4. The Big 3 not allowing 3rd tier suppliers like Serampore to disrupt the process

(CX 0627 at 004 (emphasis in original)).

639. A call from a cell phone issued to Mr. Rybacki of Sigma was placed to a cell phone issued to Mr. Tatman of McWane for three minutes at 11:03 a.m. on January 3, 2008. Mr. Rybacki acknowledged that it appeared from telephone records

that he spoke to Mr. Tatman for a couple of minutes on January 3, 2008 but testified he had no idea what they talked about. Mr. Tatman also testified he had no recollection of what was discussed. (CX 1621-A at 114, *in camera*; Tatman, Tr. 369-370; Rybacki, Tr. 3627, *in camera*).

640. A call from a cell phone issued to Mr. Tatman of McWane was placed to a cell phone issued to Mr. Rybacki of Sigma for nine minutes at 4:30 p.m. on January 4, 2008. Mr. Rybacki and Mr. Tatman testified they did not remember or know what they discussed. (CX 1621-A at 115, *in camera*; Tatman, Tr. 370, *in camera*; Rybacki, Tr. 3627-3628, *in camera*).

641. A call from a cell phone issued to Mr. Rybacki of Sigma was placed to a cell phone issued to Mr. McCutcheon of Star for 26 minutes at 5:47 p.m. on January 9, 2008. (CX 1621-A at 116, *in camera*; Rybacki, Tr. 3628-3629, *in camera*).

642. Mr. Tatman spoke with Mr. Rybacki "a couple of times" but he did not know what they discussed. (Tatman Tr. 364).

643. Mr. Tatman was unable to remember those calls, and did not know what was discussed. (Tatman, Tr. 367-370 ("Q. But you don't know what you and Mr. Rybacki might have talked about on December 27? A. I don't know if he said, 'Merry Christmas. Welcome to the rat race.' I have no clue.")).

644. One of the calls from Mr. Rybacki may have been to welcome Mr. Tatman to the industry. Otherwise, Mr. Rybacki could not recall what was discussed. (Rybacki, Tr. 3626-3628, *in camera* ("Q. Do you know what you and Mr. Tatman spoke about for six minutes on the afternoon of December 27? A. Not a clue."; "Q. And what did you and Mr. Tatman talk about for a couple of minutes on January 3? A. I have no idea."; "Q. And what did you and Mr. Tatman talk about for nine minutes on the afternoon of January 4, 2008? A. I have no idea. None."); Rybacki, Tr. 1088-1089).

b. McWane's January 11, 2008 Customer Letter

645. On January 11, 2008, McWane announced in a letter to its customers, the following:

> Dear Valued Customer,
>
> Due to continued rising costs, especially within our off-shore operations, we find it necessary to increase pricing on Utility Fittings and Accessories.
>
> As per our prior letter of October 5, 2007, we will adjust pricing by increasing multipliers while retaining our current List Price, LP-5072. Letters stating the new region specific multipliers will be mailed January 18, 2008. The increase will be 10% to 12% above the current prevailing multiplier levels on Blended Fittings and Accessories and 3% to 5% on Domestic Fittings effective February 18, 2008.
>
> To help our distribution customers better manage their inventory valuations and compete on a more level playing field, it is our intention going forward to sell all products only off the newly published multipliers. We will continue to monitor the competitive environment and adjust regional multipliers as required to provide you with competitive pricing.
>
> All annual municipal bid contracts will be honored per the terms of the contract. Jobs quoted prior to this announcement will be honored through March 1, 2008, with acceptable documentation provided to your local Tyler/Union sales representative.
>
> If the current inflationary trends continue as forecasted, we anticipate the need to announce another multiplier increase within the next six months. However, we will only do so as conditions require.
>
> We thank you for your business and as always we remain committed to providing you with quality products and service at competitive prices.
>
> Sincerely,

/s/
Jerry Jansen
National Sales Manager

(CX 1178).

646. The January 11, 2008 Customer Letter was the result of Mr. Tatman's internal McWane discussions with Mr. McCullough and Mr. Walton. (Tatman, Tr. 371).

647. McWane knew internally that in order to meet its objectives of increasing volume and share, it would have to Project Price. Mr. Tatman hoped that by declaring a purported intent to stop Project Pricing, McWane might lull (or "head fake," as Mr. Tatman called it) Star and Sigma into temporarily reducing their Project Pricing, leaving McWane to price however it deemed appropriate, and thereby gain a competitive advantage. (Tatman, Tr. 893-894).

648. Mr. Tatman wrote the January 11, 2008 Customer Letter. (CX 2477 (Jansen, Dep. at 254-255)).

649. Regarding the date of March 1, 2008, stated in CX 1178 (F. 645) as the last date prior quotes would be honored, Mr. Tatman explained:

> [W]e would honor old job pricing as long as you got your orders in by March 1 because you -- some of that pricing is twelve months old. There's a long time between when you quote it and then the time you actually sell at, so what we were trying to do is get customers on our new pricing and flush out the old pricing that could be twelve months old there. So what we said is we've given you any sort of incremental job price in the past, could be 12 months ago, could be 18 months ago. You have until March 1 to enter that order. We'll honor that price. But after March 1, we want to requote that business.

(Tatman, Tr. 419-420).

650. In an email transmitting the January 11, 2008 Customer Letter to Mr. Webb and others at HD Supply, Mr. Tatman explained the key points, as follows:

- The % change is significantly lower than the List Price change Sigma posted on their website which appears to be in the range of ~25% on average
- We are going to maintain our List Price Book and make the adjustment with multipliers
- The lower % for Domestic Product reflects both lower cost inflation in the US compared to China and our desire to support Domestic Specifications
- Distributors are ultimately better served with adherence to published pricing as instability and the corresponding price erosion only reduces your profitability

(CX 2172).

651. McWane communicated its new region-specific multipliers, effective February 18, 2008, in letters to customers dated January 18, 2008. (Tatman, Tr. 389-390, 411-412; *e.g.*, CX 0896 at 001; CX 1672 at 001; RX 608; CX 0035 at 001, 003).

652. The multipliers that Mr. Tatman proposed in CX 1664, Mr. Tatman's spreadsheet which he prepared in connection with his recommendations for multiplier changes in December 2007 (F. 627), were used in the final multiplier map announced by McWane on January 18, 2008. (Tatman, Tr. 1054-1055; *compare* CX 1664 *with* CX 0035 at 003).

653. The non-domestic Fittings multipliers announced in McWane's January 18, 2008 customer letters were below the then-current effective multipliers in eight states: New Hampshire, New Jersey, Delaware, Maryland, Virginia, Arkansas, South Dakota, and Idaho. (Tatman, Tr. 403-404; CX 1664 ("final regional multipliers" worksheet)).

654. The non-domestic Fittings multipliers announced in McWane's January 18, 2008 customer letters were above the then-current effective multipliers in at least 40 states or territories: Connecticut (3.6% increase), New York (10.5% increase), Rhode

Island (10.7% increase), Massachusetts (20.8% increase), Vermont (19.2% increase), Pennsylvania (8.8% increase), West Virginia (11.9% increase), Ohio (16% increase), Indiana (13.3% increase), Kentucky (3.7% increase), Alabama (7.4% increase), Georgia (15.3% increase), North Carolina (7.7% increase), South Carolina (9.5% increase), Florida (5.5% increase), Tennessee (2.7% increase), Mississippi (6.7% increase), Louisiana (3.0% increase), Oklahoma (16.2% increase), Missouri (7.6% increase), Kansas (13.1% increase), Nebraska (13.4% increase), Michigan (6.5% increase), Minnesota (6.1% increase), North Dakota (11.9% increase), Iowa (5% increase), Illinois (1-80 north) (13.3% increase), Wisconsin (6.9% increase), Arizona (5.8% increase), New Mexico (7.2% increase), Texas (8.2% increase), Utah (33.3% increase), Wyoming (9.9% increase), Colorado (8.6% increase), Montana (8.6% increase), Washington (35.5% increase), Oregon (31% increase), California (10.7% increase), Nevada (9.3% increase); Puerto Rico (12.5% increase). (CX 1664 ("final regional multipliers" worksheet); Tatman, Tr. 405-406 (walking through calculation for 35.5% increase in Washington)).

655. McWane's January 2008 multiplier adjustment, *vis a vis* the previous published multipliers, resulted in reductions in 28 states and no change in another 8 states. (Tatman, Tr. 885; CX 1664; *see also* Normann, Tr. 4778).

656. In late 2007, Mr. Jansen of McWane approached Vincent Napoli, whose position as an accountant with McWane was being eliminated, about taking a newly created position, eventually called "pricing coordinator" and/or "pricing manager." Mr. Napoli's responsibilities in 2008 were to assist Mr. Jansen with handling product claims, and keeping track of, and verifying, individual job pricing on submitted orders, as middleman between the salespeople and the order entry people. Mr. Napoli also had limited authority to approve pricing adjustments, in the range of one to three discount points off the multiplier. As Mr. Napoli stated: "There's nothing wrong with [giving a discount] except you sure want to know what -- when it's happening, or you like to know before it happens, because they [the sales persons] don't know what the ramifications are as far as profitability." Unusual pricing requests or requests for approval outside Mr. Napoli's limited approval authority went to Mr. Jansen for approval. (RX

640 (Napoli, Dep. 35-36, 43-44, 46, 49-50); Tatman, Tr. 931, 1007).

657. Once Mr. Napoli became the pricing coordinator for McWane, the local sales agents were instructed to "run [discounts] through" him and forms were designed for this purpose. According to Mr. Napoli, not all sales agents complied with the system. (RX 640 (Napoli, Dep. 47-48); *see also* CX 2485 (Walton, Dep. 12-122) ("I think there was a move to go to a more centralized decision-making structure for pricing instead of having individual salespeople make decisions in individual markets . . . I would say they probably had to ask for approval from somebody.")).

658. Mr. Walton of McWane was a proponent of making pricing decisions at a centralized location, so as to get a national view of what was happening. As he explained:

> [I]f we have a salesperson in California making a pricing decision, it may not be in our best interest for what -- how that affects Texas or Missouri or Florida or New York, . . . [O]ftentimes when somebody makes a local decision here, it has effects in other places that may or may not be in our best interest.

(CX 2485 (Walton, Dep. 32)).

659. Mr. McCutcheon of Star received a copy of McWane's Friday, January 11, 2008 letter from a customer on or about Monday, January 14, 2008, and forwarded the letter to Mr. Minamyer. Sigma executives received a copy of the letter on or about January 14, 2008, from one of its sales agents. (CX 0038; McCutcheon, Tr. 2505-2507; Rybacki, Tr. 3557-3558; CX 1291; Minamyer, Tr. 3156).

660. A call from a cell phone issued to Mr. Rybacki of Sigma was placed to a cell phone issued to Mr. McCutcheon of Star on January 15, 2008 for two minutes. A call was placed from Mr. Rybacki's cell phone to Star's general 800 number on January 16, 2008 for ten minutes. A call was placed from a cell phone issued to Mr. Rybacki to a cell phone issued to Mr. McCutcheon

on January 24, 2008 for nine minutes. Neither Mr. McCutcheon nor Mr. Rybacki recalled any details about these calls, or even whether any communication between them actually took place. (CX 1621-A at 108, 117, *in camera*; McCutcheon 2475-76, *in camera*; Rybacki, Tr. 3629-3632).

2. Sigma's reaction to McWane's January 11, 2008 Customer Letter

661. After receiving McWane's January 2008 pricing letter, the letter was reviewed and discussed among the regional managers and the sales team at Sigma. Mr. Rybacki consulted with Mr. Fox and others to discuss what McWane was doing with multipliers and to address how to respond. (Rybacki, Tr. 3692-3695).

662. Sigma did not receive McWane's January 11, 2008 Customer Letter from anyone at McWane. (Pais, Tr. 2058-2059; McCutcheon, Tr. 2506-2507).

663. On January 24, 2008, Mr. Pais of Sigma sent an internal email to "M20." The email group "M20" consists of Sigma's top managers. The email attached a spreadsheet analysis identifying Sigma's fittings sales in each territory in December 2007 and each multiplier level, and McWane's new multiplier, in order to determine if McWane's new multipliers "present a real improvement over" Sigma's "actual current" multiplier levels. Mr. Pais noted that the analysis showed the spread of multiplier levels and also computed the weighted average multiplier for each territory. According to Mr. Pais, the analysis showed that most of Sigma's selling prices were at "very, very low multipliers." Mr. Pais concluded based on the analysis that when comparing "apples to apples" McWane's new multipliers did not provide much improvement in many areas, reasonable improvement in some areas, only marginal or no improvement in many territories, and a lowering in some territories. (CX 1145; *see also* Rybacki, Tr. 3695 (analysis showed that some multipliers were lower than Sigma's at that time); Brakefield, Tr. 1218).

664. In the January 24, 2008 Sigma internal email referred to in F. 663, Mr. Pais continued:

> It's likely that [McWane] did wish to make a definite effort to improve the multiplier levels -- but, may have based their choices for the NEW multipliers on the actual documented competitive pricing that they are known to procure proof for, from the customers. Unfortunately, the illogical pricing approach used by Star -- and hence SIGMA -- for 'Plant quotes' with lower 'special' multipliers may have biased [McWane's] decisions in pegging the NEW multipliers at where they are. Though Tyler is beginning to pay attention to PW jobs too, they just don't understand why PW jobs need to be given LOWER pricing -- when in fact, for Soil Pipe, Tyler and CP are known to offer HIGHER prices, since they feel the Distributors don't commit their resources to stock and usually order direct job-site shipments!
>
> I HAVE URGED LARRY TO INITIATE A NEW COMMITTED AND SERIOUS EFFORT TO NORMALIZE ALL PRICING FOR FITTINGS -- AT SAME LEVELS -- PW AS WELL AS OTHER ORDERS, TO ELIMINATE THE CONFUSION WE ARE CREATING WITH CUSTOMERS AND COMPETITORS, LEADING TO LOWER OVERALL PRICING LEVELS.
>
> Though Tyler's NEW multipliers are discouraging, this is both a lesson and an opportunity [for] Sigma and Star to develop a patient and disciplined Marketing approach and demonstrate to [McWane] that we are capable of being part of a stable and profitability conscious industry. This is the 'leadership capital' we created when we acquired PCI and reduced the supply base to just 3 -- but, so far, we have NOT been astute enough to derive any returns from this capital!
>
> Let's ***get-it-done*** in 08 . . .

(CX 1145 at 001-002 (emphasis in original)).

665. "PW" as used in Sigma's January 24, 2008 internal email referred to in F. 664, means "plant work," such as water treatment plant work. Plant work generally uses the largest size fittings and a lot of different, very uncommonly used configurations. (Pais, Tr. 1912-1913; Rybacki, Tr. 1129).

666. Historically, Sigma charged different prices for plant work fittings than for the smaller fittings used in the underground, housing subdivision-related, business. (Pais, Tr. 1913-1915).

667. Sigma's smaller fittings were generally sold into Distributor inventory and managed by Distributors, because the configurations and volume used were relatively predictable. Over the years, however, for financial reasons, Distributors reduced fittings purchased for stock. When Distributors submitted a single list for all requirements, without stocking for inventory, they were confused by the dual pricing system and were demanding that discounted prices apply to all requirements. (Pais, Tr. 1913-1915; *see also* CX 2528 (Pais, Dep. at 263-267) (Sigma sought to turn back the practice of special pricing, which had spread from the plant work segment into stocking orders); RX 687 (Pais, Dep. at 82-83)).

668. Through his January 24, 2008 email (F. 663-664) Mr. Pais wanted to encourage Sigma's sales force to minimize the practice of plant quotes with lower special multipliers because, if too aggressive, such special pricing causes a vicious cycle of price erosion and keeps prices at a depressed level, which hurts Sigma and its competitors. (Pais, Tr. 1920-1922). As Mr. Pais explained:

> Our sales -- like any salesperson, they hate to lose any order. They somehow think that there is only that order that they're chasing, and there may not be another one coming the next day. And as a result, they get all anxious, . . . if they feel that from their regular good customers they're losing business . . . So in that -- in that anxiety, if they just lower prices too aggressively, then they could prompt the competitors also to react and start a vicious cycle. So this is all in attempt to make them aware one of the way of how to be a smarter salesperson by not giving into too many requests for discounts.

(Pais, Tr. 1921-1922; *see also* Pais, Tr. 1920 ("So because we were indulging in this practice which was not smart anymore, not relevant, we felt this was forcing our other competitors to

keep the price at a depressed level and hurting us and perhaps themselves, too.")).

669. Mr. Rybacki interpreted Mr. Pais' January 24, 2008 email to be asking the sales team to pull back on job pricing. Mr. Rybacki did not disagree with Mr. Pais that Sigma needed to pull back. (Rybacki, Tr. 1129-1130).

670. Mr. Rybacki interpreted McWane's pricing changes to "squeeze . . . the multipliers [making] it very difficult for [Sigma] to make very much margin." (Rybacki, Tr. 1131).

671. Mr. Pais had "always suggested" that Sigma firm up or eliminate Project Pricing, in order to be more profitable and consistent in its pricing approach. (Rybacki, Tr. 3545).

672. Sigma was always trying to curtail Project Pricing, including in 2008. Since Mr. Rybacki joined Sigma in 1990, Project Pricing was an "ongoing battle within Sigma, within the industry." Sigma was trying to be more consistent and disciplined in pricing "every year, every day to today" and were "always trying to curtail project pricing." Project Pricing is inconsistent with consistent and disciplined pricing. (Rybacki, Tr. 3523-3524, 3545).

673. Sigma knew that it could not eliminate Project Pricing. (Rybacki, Tr. 1130; Pais, Tr. 2139-2140 ("[W]e were not trying to eliminate a special pricing, we were trying to minimize it . . . ."); Pais, Tr. 1921 ("[E]liminating the practice is wishful thinking. I was just trying to have them minimize it.")).

674. On or about January 29, 2008, Sigma issued a letter to its customers, signed by Mr. Rybacki, as follows:

Dear Valued Customers,

As you are all aware, SIGMA Corporation was intending to put out a new list price sheet on January 2, 2008 which showed a significant increase in all our products due to the increased cost of raw materials, freight, personnel, etc. When one of our competitors chose not to have a list price increase

> but rather a multiplier increase, we decided to follow suit and on February 25th your new multipliers will be in effect for almost every territory. The key word is "almost" as a few of [the] territory multipliers are below what you currently receive from us and some are in fact well below.
>
> It is our intent to raise prices in 2008, not because we arbitrarily feel like raising them but because every manufacturer in the Waterworks Industry that has Iron products needs one. Manufacturing needs a price increase, distribution needs a price increase, and with product links such as Ductile Iron Pipe and Valve & Hydrants you've already witnessed significant charges.
>
> We think it's unwise and irresponsible to lower multipliers and devalue your inventory, so your Regional Managers will send you new multipliers in the next few days as long as they exceed your current ones. We apologize for the confusion and lack of discipline our segment of the Industry has shown as we at SIGMA Corporation are committed to make this a more profitable business for all. Thanks for your support and understanding and we wish you success throughout 2008 and beyond.

(CX 1189).

675. In the January 29, 2008 letter to its customers, in apologizing for "the confusion and lack of discipline," shown by Sigma's "segment of the market," Mr. Rybacki was referring to Sigma's lack of consistency in pricing, which confuses customers as to what price they are expected to pay, and that being "disciplined" means trying to stick to published prices. (CX 1189; Rybacki, Tr. 3520-3522).

676. Sigma's January 29, 2008 customer letter did not announce any change in Sigma's practice of quoting plant work with lower special multipliers, as referred to in Mr. Pais' January 24, 2008 internal email. (F. 663-664, 674).

677. Sigma did not follow all of McWane's multipliers. Sigma's changes followed some of McWane's January 2008 multiplier changes, but Sigma did not follow those that would

result in a multiplier lower than Sigma's then-existing published multipliers. Sigma "could not afford to follow [McWane] down." (CX 1189; Rybacki, Tr. 1126-1127; 3694-3697).

678. On or about February 1, 2008, Sigma sent letters to its customers announcing new region-specific multipliers, effective February 18, 2008, pursuant to its January 29, 2008 customer letter. The letters noted that "[a]ll municipal bids will be honored through the length of the contract," and that "[j]obs quoted prior to this announcement will be honored through March 1, 2008." (CX 0848 at 002; Minamyer, Tr. 3196).

3. Star's reaction to McWane's January 11, 2008 Customer Letter

679. Historically, Star followed McWane's price increases. (Minamyer, Tr. 3185, 3243-3244).

680. It is normal procedure for Star that if McWane comes out with a price increase, Star wants to be ready to follow as quickly as possible. (CX 2538 (McCutcheon, IHT (Vol. 2) at 424)).

681. Star received a copy of McWane's January 11, 2008 Customer Letter from one of Star's customers. (McCutcheon, Tr. 2506-2507).

682. Mr. Minamyer, of Star, read the statement in McWane's January 11, 2008 letter to its customers that "it is our intention going forward to sell all products only off the newly published multipliers" (F. 645) to mean that McWane was telling its customers that they want to sell at the multiplier and stay there; in practice, no Project Pricing. Mr. Minamyer acknowledged that it was possible this was a communication to Sigma and Star as well. (CX 2525 (Minamyer, IHT at 71, 76-77)).

683. Mr. McCutcheon of Star did not believe "for one second" that McWane would, in fact, stop Project Pricing, despite what was said in McWane's January 11, 2008 Customer Letter. (McCutcheon, Tr. 2386-2387).

684. In time periods prior to McWane's January 11, 2008 Customer Letter, Star's National Sales Manager, Mr. Minamyer, had delegated some of the authority for Project Pricing to his division managers. In the period of time encompassing Mr. Minamyer's January 22, 2008 email (F. 686), Mr. McCutcheon had asked Mr. Minamyer to be more involved and diligent in the future with regard to the Project Pricing approval process than he had been in earlier periods, because Star was experiencing dramatic cost increases. (McCutcheon, Tr. 2393-2394, 2512; CX 2539 (McCutcheon, Dep. at 152)).

685. Mr. McCutcheon was "all over" Mr. Minamyer to stop delegating authority for Project Pricing and that he needed to "tighten up." (CX 2538 (McCutcheon, IHT (Vol. 2) at 424-425)).

686. On January 22, 2008, Mr. Minamyer sent an internal email to Star's division managers to advise them of Star's plan for reacting to McWane's pricing changes. (CX 0752 at 001; Minamyer, Tr. 3159-3560 (e-mail was a plan to react to information from McWane)). The email stated:

> To: All DM's
>
> The Tyler multiplier letters are hitting the streets. We need to be able to react quickly to be at the right prices.
>
> I will be putting out some instructions on our plans to change state multipliers in the case that we don't get much advance warning.
>
> **Our goal is to take a price increase and to stop project pricing.**
>
> For now here is the plan:
>
> Once we know what a state or area's multiplier is, if it goes up, we will change to that number. If it goes down, we will discuss it.
>
> Later today we will E-mail the procedure for multiplier changes. It will be simple[.] (So that you all can understand it J)

We will not be project pricing unless we see firm documentation that there is a project price or a buy plan that is off of the state multiplier.

All project pricing has to go through me.

Tell your TM's not to ask unless they have solid documentation. I have to be very strict on this as we will not be the ones to drag the market down.

You and your TM's need to be able to tell your customers that we need written documentation with project names, dates, and pricing before we move off of the buy plan This is an effort to do the right thing for the industry.

Your TM's need to start cleaning up their existing project pricing.

The Tyler letter states that they will honor their existing project pricing only until March 1st. We will do the same. If we go past that it will cause disruptions and may result in the increases to be soft or not hold at all.

Start preparing yourselves and your TM's to hold strong and get their projects ordered and shipped before March 1st.

Train them that this is what is best for the industry and that we need to be part of the effort to help our industry. We will not part of damaging the industry due to lack of discipline. We all need to be able to explain this to our customers and to take it to whatever level of management within that customer's organization that is required.

I'm all good with you guys using me as the bad guy. (Stop snickering! J)

You need to know that we are strong in revenue and profit. We will have no problems weathering any price wars, even if they are prolonged. What we are doing is what is right for the industry. So, don't think we need the price increases, as that

> is not the case. A price increase will be good for us on the short and long term profit situation but are not vital to our strength. 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.
>
> Deal from strength and commitment and always take the high road when discussing the industry and our competitors. If we do this, we will emerge as the most solid partner in the industry.
>
> Let me know if you have any questions as it is important that we manage this correctly. I know this will take major effort but that is where we need to be focused until the crazy pricing levels out. Make this your priority.
>
> Thanks,
> Matt
>
> Matt Minamyer
> National Sales Manager

(CX 0752 (emphasis in original)).

687. On February 23, 2008, Mr. Minamyer sent an email to Star's division managers reminding them that they were to obtain documentation and justification before submitting a special pricing request for approval, known internally at Star as "pinks" (F. 874). The email stated in pertinent part:

> As you know we are trying to manage the multiplier increase so we don't let it slide back.
>
> We all know that Sigma will be very slippery and manipulate it in many ways in many areas.
>
> We all agreed to take the high road and get documentation and justification before sending any pinks to me.
>
> "Per the salesman" is not and never has been justification. If you have been approving pinks with that as justification then you are just as responsible for price erosion as anyone.

> . . .
>
> If you can't get some type of documentation from your customer then call me and we can do some more training as we are all in senior management positions and should be able to have that conversation with our customers. We agreed that if your branches asked for pricing and would not give us documentation then we would take it up their management chain. Are you doing that? . . . .
>
> I have always been clear that we will always keep our customers at the right price but we need to be diligent at finding out the right price or shipping restrictions. . . .
>
> Don't send me any more pinks without proper justification and documentation. If I get called on the floor by our customers[']' Sr. Management for not taking the increase I will have data to show how we made our decision. So go get it and you can have your pricing.
>
> Let's not get lazy or scared of our customers. Let's show maturity and do the right thing as mature business people.

(CX 0815).

688. Mr. Minamyer knew that a price increase would not hold, or "stick," if Star or any of its competitors undercut the price increase with Project Pricing. (Minamyer, Tr. 3258-3259; *see also* CX 0525 (May 5, 2008 email from Star Western Division Manager Michael Berry noting with respect to upcoming price increase: "There is some flexibility [with pricing after a price increase] but here is the problem. The more flexible we are the less it holds and it won't work. That said, if you document that the competition is not holding, then match and don't lose the orders.")).

689. In 2008, Star was facing rising production costs in China. If Star "took [the] price increase" and could limit Project Pricing, it would make more money. (McCutcheon, Tr. 2516-2518; Minamyer, Tr. 3246-3247).

690. Star's plan in January 2008 was to stabilize its pricing; that is, to have more consistent pricing at the published multiplier. (Minamyer, Tr. 3170, 3173).

691. Mr. Minamyer believed that all of the Fittings competitors would have to make an effort to stabilize Fittings prices for the effort to be successful. (Minamyer, Tr. 3174; CX 2526 (Minamyer, Dep. at 141-142)).

692. Star's plan at the time Mr. Minamyer sent the January 22, 2008 internal email (F. 686) was to follow McWane's new published multipliers. (CX 0752; Minamyer, Tr. 3243).

693. Star's plan in 2008, when Mr. Minamyer sent the January 22, 2008 internal email referred to in F. 686, was to try to stop project pricing. Star was also hoping that McWane and Sigma would stop project pricing as well. However, if a customer told Star that its competitors were Project Pricing below Star, then Star planned to Project Price also. (CX 2526 (Minamyer, Dep. 119-120); Minamyer, Tr. 3259; *see also* CX 2526 (Minamyer, Dep. at 168) ("If McWane did the same, that would be okay; if they didn't, then we would have to follow their price down.")).

694. Star's plan in 2008 was not to "stop" Project Pricing, but to require firm documentation that a competitor was Project Pricing before Star would Project Price itself. (CX 0752; Minamyer, Tr. 2517, 3243).

695. The procedure of requiring documentation before Star gives a project price had been Star's policy for at least ten years prior to January 2008 and Mr. Minamyer's January 22, 2008 email reflected a change in monitoring and managing Project Pricing. (McCutcheon, Tr. 2517-2519).

696. The January 22, 2008 internal email (F. 686) made Mr. Minamyer the central authority for approving Star's Project Pricing. (CX 0752 at 001; Minamyer, Tr. 3167-3168; CX 0034 at 001).

697. Regarding the statement in Mr. Minamyer's January 22, 2008 email (F. 686) that Star's goal was to "take a price

increase and to stop project pricing," according to Mr. McCutcheon, it was neither "logical or reasonable" for Star to think that Project Pricing would actually stop. Stopping Project Pricing would "shut [Star] down." However, because Star was facing dramatic cost increases, Mr. McCutcheon encouraged Mr. Minamyer to minimize Project Pricing by tightening up his sales force and being more involved in the Project Pricing process. (McCutcheon, Tr. 2393; CX 2538 (McCutcheon, IHT (Vol. 2) 425-426)).

698. Mr. Minamyer's language in his January 22, 2008 internal email to the Star division managers regarding "stopping" project pricing was unusual but telling them that Star needs to minimize Project Pricing, "is normal, happens every time there's a [price] increase. There a new rash of emails concerning let's do better this time, every time there's a price increase. [Minamyer's] language is too strong and it's irrational, to me." (CX 2538 (McCutcheon, IHT (Vol. 2) at 452); CX 2539 (McCutcheon, Dep. at 155)).

699. The phrase, "lack of discipline," as used in Mr. Minamyer's January 22, 2008 internal email, referred to pricing discipline, and controlling Project Pricing is a form of pricing discipline. (Minamyer, Tr. 3170).

700. Mr. Minamyer's January 22, 2008 internal email to Star's division managers was his attempt to minimize Project Pricing by Star's sales force. (CX 0752 at 001; McCutcheon, Tr. 2390; CX 2538 (McCutcheon, IHT (Vol. 2) at 425)).

701. On January 29, 2008, Mr. Minamyer forwarded to Star's division managers a copy of McWane's new national blended Fittings multiplier map, effective February 18, 2008. (CX 0035 at 001, 003; Minamyer, Tr. 3184-3185).

702. On January 30, 2008, Bud Leider of Star sent an email to HD Supply, Star's largest customer, stating that "Star is raising or matching all fitting numbers to match [McWane] effective Feb. 18th. . . . NO UTILITY PROJECT PRICING NATION WIDE." (CX 1566 (emphasis in original); McCutcheon, Tr. 2409-2410;

see also CX 2537 (McCutcheon, IHT (Vol. 1) at 56) (HD Supply is Star's largest customer)).

703. Mr. McCutcheon thought telling customers that Star was going to stop Project Pricing (F. 702, 704) was "bizarre." (CX 2538 (McCutcheon, IHT (Vol. 2) at 452)).

704. On February 2, 2008, Mr. Minamyer sent an email to distributor group TDG (F. 244) stating in pertinent part that Star's "plan is to adjust multipliers to be on an even playing field on up front pricing with our competitors. We will adjust various multipliers across the country to be effective on 2-18-08, ship all existing special projects before March 1st, and have no more project pricing after March 1st. Municipal contracts will be honored through the length of the contract. We will begin sending "Multiplier letters" to all of our customers beginning Monday, Feb. 4th . . . . We are working extremely hard to bring stability to the fitting market and we are asking for your support in this effort." (CX 2300; Minamyer, Tr. 3188).

705. "Up-front pricing" in Mr. Minamyer's February 2, 2008 email referred to the standard list price as adjusted by the published multiplier. (Minamyer, Tr. 3190).

706. When Mr. Minamyer wrote in his February 2, 2008 email that Star was "working extremely hard to bring stability to the fitting market," he was referring to price stability. (Minamyer, Tr. 3192).

707. On February 6, 2008, Star issued letters to its customers specifying the new multipliers that it would implement to match McWane's multiplier changes, effective February 18, 2008. (CX 2336 at 001; CX 0035 at 001-003; McCutcheon, Tr. 2408).

708. Star sought to convey the message that Star would no longer offer Project Pricing after March 1, 2008 to all of Star's customers. (Minamyer, Tr. 3193; CX 2526 (Minamyer, Dep. at 156)).

709. Star wanted everybody, principally its customers, but also McWane and Sigma and other competitors, to know that Star

was increasing its multipliers and curtailing Project Pricing. (CX 2526 (Minamyer, Dep. at 168-169)).

E. DIFRA

1. Background

710. Mr. Pais of Sigma initiated the effort to form DIFRA in or around 2004. In 2005, Mr. Pais asked for Mr. Brakefield of Sigma to assist in forming a trade association. Mr. Pais sought the participation of various Fittings suppliers, including McWane and Star. (CX 1225 at 004; Pais, Tr. 1969-1970; Brakefield, Tr. 1220-1221; McCutcheon, Tr. 2411).

711. The concept for DIFRA was modeled after industry groups formed by manufacturers of ductile iron pipe and cast iron soil pipe, such as DIPRA (the Ductile Iron Pipe Research Association) and CISPI (the Cast Iron Soil Pipe Institute). (Tatman, Tr. 469; Pais, Tr. 1968-1969; CX 2527 (Pais, IHT at 57-58)).

712. Star initially declined to join DIFRA because Mr. McCutcheon did not see a benefit for Star and he was not comfortable trusting Star's competitors. Over the course of approximately a year, Mr. Pais, Mr. Rybacki, and Mr. Brakefield of Sigma continued to ask Mr. McCutcheon if Star would join DIFRA, but he declined. Mr. McCutcheon eventually changed his mind and accepted after his colleagues at Star convinced him it would be nice to know what Star's market share was, and he no longer saw any negative impact. (McCutcheon, Tr. 2412-2413; CX 2538 (McCutcheon, IHT (Vol. 2) at 242-243), *in camera*).

713. Beginning in or before 2005, the DIFRA members engaged the law firm of Bradley Arant Rose & White LLP ("Bradley Arant"). DIFRA obtained legal advice from the Bradley Arant lawyers in connection with DIFRA, including with regard to the formation, organization, and activities of DIFRA and the formation of the tons-shipped data reporting system, discussed in more detail below. (*See, e.g.*, F. 718, 726, 733-734, 741-755). (CX 1473; Brakefield, Tr. 1229-1230, 1236-1237, 1244-1245, 1337-1338, 1341, 1343, 1346-1347, 1350-1351, 1358, 1371-1373,

RX 40, RX 43; RX 12; CX 1333; CX 1473; CX 0048; CX 1480; CX 0158; CX 1486; CX 1479; CX 1090; CX 0052; CX 1081; RX 654 (Brakefield, Dep. at 13-17, 19)).

714. A formal meeting was held for DIFRA at the offices of Bradley Arant on March 18, 2005 to explore the possibilities and issues involved in establishing a trade association relating to ductile fittings for the waterworks industry. In addition to the Bradley Arant lawyers, the Fittings suppliers that attended included McWane, Sigma, and Star. (CX 1473).

715. DIFRA was incorporated by David Green of McWane as an Alabama nonprofit corporation on January 12, 2007. (CX 1480 at 007; Brakefield, Tr. 1227, 1349 (DIFRA was incorporated in Alabama in January 2007)). At that time, DIFRA's initial Board of Directors had seven members, consisting of two individuals each from McWane (Tatman, Leonard), Sigma (Brakefield, Pais), and Star (Bhutada, McCutcheon), and one from U.S. Pipe (Crawford). (CX 1480 at 006; Tatman, Tr. 616-617).

716. DIFRA's articles of incorporation set forth various purposes for the organization, including, for example, "to promote the interests of the ductile iron fittings industry and to promulgate policies and conduct activities for the betterment of the ductile iron fittings industry, provided that all policies and activities of the association be consistent with applicable federal, state and local antitrust, trade regulation and other laws and regulations." (CX 0158 at 002-003; Brakefield, Tr. 1229-1230).

717. Mr. Brakefield, then National Sales Manager for Sigma (F. 87), became DIFRA's president in January 2007, and was the first and only president of DIFRA. (Brakefield, Tr. 1221-1222, 1227).

718. On January 8, 2007, DIFRA engaged the accounting firm, Sellers Richardson, of Birmingham, Alabama, as the association's auditor. As part of its duties, Sellers Richardson would "compile on a monthly basis, the data submitted by the members reporting their respective sales of ductile iron fittings" in the form of tons shipped "and will prepare and issue to the members' monthly reports" showing the aggregate tons of ductile

iron fittings shipped (hereafter, "DIFRA data reporting system"). (CX 1333 at 003, 005, and Exhibit A thereto; Brakefield, Tr. 1236-1238).

719. The accounting firm retained by DIFRA, Sellers Richardson, was overseen by the Bradley Arant law firm. (Pais, Tr. 2109-2110).

720. DIFRA had four members: McWane, Sigma, Star, and U.S. Pipe. (Joint Stipulations of Fact, JX0001 ¶ 17; Brakefield, Tr. 1227-1228, 1259-1260).

721. Although DIFRA had articles of incorporation and bylaws in 2007, DIFRA was largely dormant and the DIFRA data reporting system referred to in F. 713 and further described *infra* was not operational in 2007. (CX 1083 at 002; CX 1088 at 001 (DIFRA "stalled" in 2007); *see* F. 738).

722. Sigma decided to revive efforts to establish DIFRA after McWane's CEO in charge of the Fittings business, Mr. Green (F. 42), was replaced and new management (Mr. Tatman, F. 21-22) was in place. (CX 1088 at 001).

723. On February 7, 2008, Mr. Tatman reported to his superiors at McWane that Mr. Rybacki of Sigma had called him that day and advised him that Sigma was interested in participating in a trade association for Fittings. Among other things, Mr. Tatman relayed that Mr. Rybacki told him that DIFRA should become active, that Sigma would support DIFRA, that Mr. Rybacki had discussed DIFRA with Star, and that Star would also consider participating. (CX 1284 at 001; Tatman, Tr. 466-467; Rybacki, Tr. 3536-3538).

724. On February 7, 2008, Mr. Tatman emailed Mr. Brakefield stating: "It appears there is renewed interest in making another attempt to form an industry association for Fittings similar to DIPRA or CISPI. When you're available, I'd like to get your inputs on what the potential next steps should be." In the event "face to face meeting with [pro]spective members would be constructive," Mr. Tatman provided his available dates and suggested possible locations, and further noted: "Of course

we'll need to make sure we have the appropriate legal representation available for any discussions." (CX 1284 at 002; Tatman, Tr. 466-467, 470-471; CX 1081 at 002-003; Brakefield, Tr. 1257).

725. The four DIFRA members held an organizational meeting on March 27, 2008 ("March 27, 2008 DIRFA meeting") in the Birmingham, Alabama offices of Bradley Arant. (CX 1486 at 001).

726. The agenda for the meeting referred to in F. 725 included 20 items, one of which was to discuss the status of a data reporting system, including "frequency, dissemination, and form of reports based on reports input, and proper and improper utilization of the data." (CX 1486 at 002; Brakefield, Tr. 1272).

727. In attendance at the March 27, 2008 DIFRA meeting were representatives of all four DIFRA members: Mr. Brakefield, Mr. Pais, Mr. Bhattacharji, and Mr. Rybacki of Sigma; Mr. McCutcheon of Star; Mr. Crawford or Mr. Murray of U.S. Pipe; Mr. Tatman (and possibly Mr. Leonard and Mr. Walton) of McWane, and Mr. Herren, an attorney with the Bradley Arant firm. (Brakefield, Tr. 1270-1271 (listing attendees); Tatman, Tr. 475 (Mr. Tatman attended); McCutcheon, Tr. 2416; CX 1486 at 001; CX 1477 at 001).

728. After the March 27, 2008 DIFRA meeting, Mr. Tatman had dinner alone with Mr. McCutcheon. (Tatman, Tr. 475; McCutcheon, Tr. 2418; RX 698 (McCutcheon, Dep. at 41)).

729. Mr. Tatman did not recall specifically what was discussed at the dinner referred to in F. 728, but he did not recall discussing Fittings at all. (Tatman, Tr. 475-476).

730. McWane's policy was not to have pricing discussions with competitors. (Tatman, Tr. 475-476).

731. Based on what transpired at the March 27, 2008 DIFRA meeting, it appeared that the association would move forward, and that the four members would report tons-shipped

data for 2006, 2007, and January through March of 2008. (CX 1560 at 001; Tatman, Tr. 476-477; CX 2267 at 002).

732. On the morning of April 25, 2008, Mr. Tatman, Mr. Pais, Mr. Brakefield, and Mr. McCutcheon, along with DIFRA's attorney, Mr. Long, held a conference call. (CX 0160 at 002; Tatman, Tr. 485-486; CX 1479 at 001; McCutcheon, Tr. 2418; Brakefield, Tr. 1276-1277).

733. On the April 25, 2008 conference call referred to in F. 732, the DIFRA members approved a tons-shipped reporting format, and it was further agreed that each member would submit its Fittings tons-shipped data to DIFRA's accounting firm, Sellers Richardson, which would then aggregate the data and provide reports to the DIFRA members reflecting industry-wide tons-shipped by the 20th of the month. It was further agreed that the data would be submitted "no later than" May 15, 2008, and that going forward, members would report their prior months' shipment data by the 15th of each month. (CX 0160 at 002; Tatman, Tr. 486-487; CX 1479 at 001; Brakefield, Tr. 1276-1277; *see also* CX 1186 (Tatman May 23, 2008 email stating that: "Nearly four weeks ago all members agreed on a conference call to report by the 15th."); Brakefield, Tr. 1281-1282 (describing "consensus" on conference call as to May 15 submission of data); McCutcheon, Tr. 2417).

734. It was agreed during the April 25, 2008 conference call, referred to in F. 732, that the tons-shipped data that was to be submitted to the accounting firm Sellers Richardson by May 15, 2008 would include short-tons of Fittings shipped within the United States in the following six categories: 2"-12" Flanged; 2"-12" All Other; 14"-24" Flanged; 14"-24" All Other; Greater than 24" Flanged; Greater than 24" All Other. Members' initial submissions would include annual data for 2006, monthly data for 2007, and monthly data for January through April 2008. An April 25, 2008 email by Mr. Long to the DIFRA members summarized the results of the conference call. (CX 1479 at 001; CX 1329 at 009; CX 0160 at 002; McCutcheon, Tr. 2417).

735. On May 5, 2008, DIFRA's attorney, Mr. Long, noted that he had not heard back from the DIFRA members in response

to his summary of the agreements reached in the April 25, 2008 conference call (F. 732) and asked the DIFRA members to confirm their concurrence with the reporting procedures and parameters he outlined in his April 25, 2008 email (F. 734), so that reporting could begin by mid-May, 2008. McWane, Sigma, and Star each replied that they concurred. McWane and Sigma replied on May 5, 2008 and Star replied on May 7, 2008. (CX 0160 at 001; Tatman, Tr. 487; RX 0580).

736. The most recent DIFRA conference call took place on April 25, 2008. (Brakefield, Tr. 1422; F. 732).

737. The most recent DIFRA meeting took place on March 27, 2008. (Brakefield, Tr. 1422; F. 725).

738. The first DIFRA tons-shipped report was issued by Sellers Richardson on June 17, 2008. (CX 0052; Brakefield, Tr. 1395; RX 679 (Haley, Dep. at 24)).

739. The last DIFRA tons-shipped report was circulated in January 2009, for the month of December 2008. (Brakefield, Tr. 1228, 1400).

740. McWane did not submit tons-shipped data to DIFRA's accountants after January 2009, and Star did not submit tons-shipped data to DIFRA's accountants after December 2008. (Brakefield, Tr. 1400, 1419-1420; CX 1339).

2. The data reported through DIFRA

741. The data collected and reported by Sellers Richardson for DIFRA was organized in categories of Fittings (2" to 12", 14" to 24", larger than 24" in diameter, and flanged versus non-flanged) that McWane used in its blue books, and that are common in the industry. (CX 0052; Tatman, Tr. 535-536).

742. DIFRA's accountants, Sellers Richardson, collected and aggregated tons-shipped data across broad product size ranges containing thousands of different SKUs – all with unique physical attributes and pricing points – that mirrored major size groupings of pipe, and disseminated the aggregated totals to DIFRA members. (RX 113; Brakefield, Tr. 1396-1397).

743. The tons-shipped data gathered by DIFRA's accountants, Sellers Richardson, did not distinguish between Domestic Fittings and non-domestic Fittings and did not indicate whether the tonnage was sold into open preference or domestic preference jobs. (Joint Stipulations of Fact, JX0001 ¶ 18).

744. The DIFRA accountants' report did not break down the tons-shipped data by state. (RX 694 (Bhutada, Dep. at 111-112)).

745. Neither DIFRA nor its accountants, Sellers Richardson , ever collected sales price data. (McCutcheon, Tr. 2561-2562; RX 679 (Haley, Dep. at 18)).

746. The DIFRA reports provided by Sellers Richardson did not include or reveal any sales prices. (Brakefield, Tr. 1352-1353; CX 0052 at 005; McCutcheon, Tr. 2562).

747. The DIFRA data reporting system did not report any dollar figures. (CX 0052 at 005; RX 054; McCutcheon, Tr. 2561-2562; Pais, Tr. 2109-2110).

748. No DIFRA member was permitted to review the tons-shipped data of any other member; the reports revealed only the aggregate total tons-shipped during the relevant reporting period. (RX 679 (Haley, Dep. at 22)).

749. The reporting format used by DIFRA's accountants referred only to past tons-shipped, which would then be aggregated, before being disseminated by the independent accountants to the DIFRA members. (CX 1479).

750. A draft format for a DIFRA reporting document from January 2007, a year and a half before the first DIFRA report (CX 1333 at 007; CX 1467 at 005), contained a blank column where prices, in dollars, could be reported but the members never approved or used that form. (Brakefield, Tr. 1240-1241, 1251, 1352-1353; *compare* CX 0052 (June 17, 2008 DIFRA report)).

751. No DIFRA data was exchanged directly between the supplier members. (RX 694 (Bhutada, Dep. at 26)).

752. The tons-shipped data upon which the DIFRA accountant reports were based represented sales that were made anywhere from a few weeks to a year before the date of shipment. Shipment of public works projects were particularly prone to delay, with an initial 60 to 120 day period after the sale in which the supplier had to wait for a notice to proceed. Thereafter, once the purchase order was received by the supplier it would take between eight and ten weeks to ship. Private jobs varied, but most were shipped within a month of the sale. (RX 654 (Brakefield, Dep. (Vol. 1) at 109-111, 134)).

753. In a June 2008 McWane internal email exchange, Mr. McCullough expressed a concern to Mr. Tatman that the DIFRA reports may be inaccurate due to underreporting. Mr. Tatman agreed. (CX 1187).

754. The data provided by Sigma to DIFRA's accountants, Sellers Richardson, for periods through May 2008 contained errors for every prior month it reported, which errors Sigma corrected by email to Sellers Richardson on June 30, 2008. The affected reports were revised and reissued by Sellers Richardson. (RX 086 at 001-002; RX 090; Brakefield, Tr. 1318, 1391-1394).

755. On November 11, 2008, Mr. Tatman advised Sellers Richardson that McWane had discovered an underreporting in McWane's May 2008 data, and submitted corrected tonnage. (RX 113; Brakefield, Tr. 1396-1397).

3. Uses for aggregated tons-shipped data

a. Generally

756. The DIFRA aggregated tons-shipped reports (F. 741-755), if accurate, allowed a member to figure out its own market share, as well as the total size of the industry. (RX 638 (McCullough, IHT at 209)).

757. One purpose of the DIFRA aggregated tons-shipped data reporting system was to help suppliers determine their market

share. (Tatman, Tr. 558-559; CX 1712 at 001, *in camera*; McCutcheon, Tr. 2477-2479, *in camera*; CX 1088 at 003).

758. The DIFRA aggregated tons-shipped reports were not sufficiently detailed to enable a DIFRA member to determine the respective market shares of any other DIFRA member; or the timing or dollar amount of any sales. (RX 694 (Bhutada, Dep. at 28); RX 654 (Brakefield, Dep. (Vol. I) at 82-83); RX 638 (McCullough, IHT at 209); Joint Stipulations of Fact, JX0001 ¶18).

759. Having a better idea of its own market share helps a supplier to plan future business strategy, and determine if the strategy is on the right track. As Mr. Bhutada of Star stated: "[I]f market share is going down, then you know that you're on the wrong path. If it is stable or going up, then you know that you're on the right path." (RX 694 (Bhutada, Dep. at 20-21)).

760. Because different types of jobs use different types of Fittings sizes, (*i.e.*, plant work use vs. subdivision use), the DIFRA tons-shipped data can help detect market trends, and thereby can help to plan production schedules and better manage supply chain. In other words, identification of how various market segments are moving helps in understanding the "product you need to be making and the size range you need to be dwelling on and having inventory to meet customers' needs." (RX 694 (Bhutada, Dep. at 21); Brakefield, Tr. 1305-1306; RX 687 (Pais, Dep. at 27-28, 126)).

b. Sigma

761. Sigma's motivation for participating in the DIFRA aggregated tons-shipped reporting system included confirmation of Mr. Rybacki's assessment of Sigma's share of the Fittings market. (Rybacki, Tr. 3557).

762. In a June 19, 2008 email to Sigma's "M20" management group, Mr. Pais of Sigma provided comments on the DIFRA data. He further described the establishment and benefits of DIFRA:

> This is a huge step by Sigma and Star, in being able to demonstrate our willingness and commitment to strengthen our industry and signal our willingness to grow in a responsible manner. Though most of the initial benefit is intangible such as increased trust and respect between members, it is also the first step f[or] more substantial economic benefits in the future.

(CX 1092 at 001).

763. In addition to confirming market share, Mr. Pais believed that having a view of the total market size would help Sigma, among other things, view what products were being sold most, and thereby better manage inventory and mitigate problems that arise from long-lead times in obtaining Fittings from overseas. (Pais, Tr. 1971-1972, 1975-1976; RX 687 (Pais, Dep. at 27-28, 126)).

764. Having DIFRA data available helped Sigma to prepare presentations for its bankers. (RX 694 (Bhutada, Dep. at 20)).

765. Having DIFRA data available helped Sigma make a decision whether or not to go into Domestic Fittings in 2009. (RX 694 (Bhutada, Dep. at 20)).

766. Mr. Bhattacharji, who was responsible for sourcing Fittings and managing Sigma's supply chain, found the yearly aggregated DIFRA data useful. Knowing whether the market is growing, flat, or dropping helped Sigma determine its production needs for the following year. (CX 2523 (Bhattacharji, Dep. at 9, 259-264)).

767. On October 1, 2008, Mr. Pais directed Raju Kakani, Sigma's IT Director, to prepare monthly reports of Sigma's market share using DIFRA data. Mr. Kakani prepared such reports monthly under Mr. Brakefield's supervision. (Brakefield, Tr. 1299, 1304-1305; CX 1848 at 001)

768. In a letter dated February 9, 2009 from Mr. Pais to Sigma's lender, Ares Capital, under the heading, "Discuss competitive landscape, market share trends, pricing actions in marketplace and any other changes given the current

environment," Mr. Pais discussed the aggregated tons-shipped data produced by DIFRA. He stated his opinion that "monthly market size data produced by DIFRA" had the benefit of helping to "maintain the pricing discipline, as the market and market share data point to a relatively consistent and stable market pattern. It has helped us not to allow the sharp market decline to be mistaken as a 'loss of market share,' which mostly causes price reaction." The foregoing statements represented Mr. Pais' "very broad assessment as [Mr. Pais] saw it as one of" the intangible benefits of DIFRA that he communicated to Ares Capital in order to reassure the lender, which was concerned about recent declines in Sigma's pricing and volume, that the DIFRA aggregated data will provide visibility into market demand and help prevent panic selling based on misinformation. (CX 0313 at 004; Pais, Tr. 1983, 1993-1996).

769. Mr. Pais further explained further his use of the phrases "maintain market discipline" and "price reaction" in the letter to Sigma's lenders set forth in F. 768: "If the [DIFRA] data point to a significant loss of market share, then Sigma would generally use price to get share back. If Sigma wanted to grow volume, Sigma would also use price to attract sales. [T]hat's always been the case, but it's a question of degree." A "mistaken diagnosis" about the reasons for a loss of market share makes it more difficult for Sigma to make the correct decision going forward, including decisions as to whether to lower price and/or to seek additional volume from existing customers. (CX 2527 (Pais, IHT at 85-87)).

770. In a December 2008 internal email from Mr. Pais to Mr. Walsh, Mr. Bhattacharji and Mr. Rybacki, Mr. Pais stated his belief that DIFRA data showed Suppliers that the severe decline in sales volume being experienced was likely due to "market weakness" rather than "losing to the competition." (CX 1077 at 002; Pais, Tr. 2005-2006).

771. Sigma used the DIFRA data to measure Sigma's market share and to help formulate its pricing strategy. (Pais, Tr. 1986, 2002-2003; CX 1088 at 004).

772. In May 2009, Mr. Pais was reassured by the DIFRA data that Sigma was maintaining its share of the market in a declining market, when Sigma was losing volume. (CX 0319 at 002).

773. Sigma used the DIFRA data to examine demand trends, *i.e.*, whether or not the trend is for small diameter or large diameter or intermediate diameter fittings, which helped Sigma determine product ordering, and thereby better manage its inventory. Mr. Brakefield further explained:

> It just basically helped us in establishing a much better flow of product. If you have what the customer is looking for and the trends in the marketplace, and you have that product and it's available and not having to wait and then see the availability, get an order and then get it shipped from China or India, which obviously it's a long time, we can do a little better forecasting to have what the customer is looking for when he needs it and we had it. And a lot of times that was the basis of a sale, availability.

(Brakefield, Tr. 1305-1306, 1308, 1389-1391).

c. Star

774. Star's motivation for participating in the DIFRA aggregated tons-shipped data reporting system was to obtain good data on the size of the Fittings market and thereby get a better sense of Star's share of the market. Previously, because the industry consists largely of privately held companies, good data was absent. As Mr. McCutcheon stated, absent good data, "it's difficult to plan that way." (CX 2538 (McCutcheon, IHT (Vol. 2) at 241-243, 245), *in camera*; McCutcheon, Tr. 2413). As Mr. McCutcheon further explained:

> [The DIFRA report] was the only confirmation that . . . we thought was accurate. . . . [W]e would try to download data from different government websites on housing starts and we just would do the best job that we could, but we always knew it was an educated guess, . . . [Star liked getting] DIFRA data . . . because it gave us a real-live measuring stick on how we were performing as a company. . . .

(CX 2538 (McCutcheon, IHT (Vol. 2) at 334), *in camera*).

775. According to Mr. McCutcheon, Star's decision to notify its customers of multiplier changes in May 2008 had nothing to do with the fact that the DIFRA tons-shipped data reporting system was in place. (CX 0037; McCutcheon, Tr. 2554-55).

776. Star used the DIFRA data, along with other data, to prepare internal reports estimating and tracking Star's Fittings market share in the United States, in each state and regionally, by division manager. These internal reports were carefully reviewed and used by Star. (McCutcheon, Tr. 2445-2449, 2477-2482, 2492-2496, *in camera*; CX 1712 at 001, 004, *in camera*; CX 1707 at 001, 006, *in camera*; CX 1711 at 001, 002, 004, 006, *in camera*).

d. McWane

777. The DIFRA aggregated tonnage report helped McWane decide, in June 2008, to choose the low end of the 8% to 12% range of multiplier increases that Mr. Tatman had been considering, because the DIFRA report confirmed his suspicion that McWane was continuing to lose market share, and showed that McWane's market share loss was worse than Mr. Tatman had suspected. (Tatman, Tr. 536-540, 958).

778. McWane relied on DIFRA aggregated tons-shipped data to help prepare an internal report tracking McWane's market share. (CX 1562 at 001; Tatman, Tr. 546).

779. On September 9, 2008, Mr. Tatman concluded using the DIFRA data that McWane's "[l]eading price stability has been detrimental to [market] share." (RX 616 at 005; CX 1188 at 005).

780. In a June 18, 2008 internal email from Mr. McCullough of McWane to Mr. Page transmitting the June 17, 2008 DIFRA aggregated tons-shipped report, Mr. McCullough noted that given McWane's "dismal" share loss, McWane would be announcing an 8% increase in Fittings prices and will not

support the 25% increase announced by Sigma and Star. "My gut feel is that we will be seeing increased cost pressures from China that will impact Sigma/Star more than us. . . . I believe that until [Sigma and Star] feel prolonged profit margin pressures they will continue their historical practice of undisciplined market pricing. . . . " Mr. McCullough concluded that he was not in favor of any price increase support in the Fittings market until McWane's market share improved. (CX 0139 at 001; CX 2479 (McCullough, Dep. at 230-231); CX 2482 (Page, Dep. at 207-209)).

781. A September 19, 2008 internal PowerPoint presentation prepared by Mr. Tatman in connection with McWane's evaluation of whether to close its South plant, included the statement "DIFRA will eventually add some increased stability . . ." (RX 616 at 012).

782. On January 21, 2009, Mr. Tatman sent an internal email to Mr. Walton, Mr. McCullough, and Mr. Jansen forwarding and summarizing a spreadsheet titled "McWane, Inc. DIFRA Market Share Analysis" covering DIFRA data from 2006 through December 2008. In his cover email Mr. Tatman noted: "December was clearly our worst share performance for the year!" and that: "Our share performance for the Sept-Dec. period is noticeably off from the May-Aug. period." (CX 0656; Tatman, Tr. 560-564).

783. In a January 23, 2009 McWane internal email regarding McWane's market share based upon the December 2008 DIFRA data, Mr. Page stated: "Trying to not be emotional about it. But these numbers are infuriating. We have serviced our customers I assume and have the product they need, we are just being discounted against?" Mr. Page further explained: "Are . . . Leon, Rick and our salespeople not keeping our customers competitive and -- or do we not have the right product? Why are we losing market share? The question is, are we overpriced? Do we have the wrong mix of products? We don't have what people need? But I'm upset with our people for not . . . managing their business." (CX 1226 at 001; RX 642 (Page, Dep. at 238-239)).

784. Mr. Tatman used the DIFRA tons-shipped data in McWane's internal analysis of its pricing for Fittings, in

connection with McWane's restructuring of list prices for medium and large diameter Fittings in early 2009. (F. 995, 997). Specifically, McWane was able to determine that McWane's market share was strong or growing in some segments, but weak or falling in others, and changed prices accordingly. (CX 0569; Tatman, Tr. 279-280, 594-595, 972-973).

785. DIFRA aimed to include as members the five largest suppliers, McWane/Tyler, Sigma, Star, U.S. Pipe, and ACIPCO. (CX 1088 at 001 (Pais describing DIFRA membership: "Though we had aimed at enlisting the 5 largest members - McWane/Tyler, Sigma, Star, US Pipe and ACIPCO, the latter chose not to join. No effort was made to invite smaller suppliers . . . .").

786. In February 7, 2008 email from Mr. Tatman of McWane to DIFRA's President, Mr. Brakefield of Sigma, Mr. Tatman stated:

> To have a viable association we'd need at a minimum McWane, Sigma and Star to be members. You have a historical perspective from the last attempt, but I would think ACIPCO and U.S. Pipe would bring some value to the association. There's probably going to be some minimum requirement in terms of volume to join. Is 5,000 tons the appropriate level? If so who do you feel would be potential members?

(CX 1081 at 001; Tatman, Tr. 471-472).

787. U.S. Pipe did not participate in the DIFRA conference call on April 25, 2008 (F. 732), reporting to Mr. Long that U.S. Pipe's representative would be out of the country, and that it would accept whatever decision was made by the others regarding reporting issues. (CX 0160 at 002; CX 1479 at 001).

788. U.S. Pipe submitted its tons-shipped data for DIFRA tons-shipped data reporting system, including after January 2009 and into July 2010. (CX 2232 at 001, 006; CX 1343).

F. May and June Pricing Events

1. Sigma notifies its customers of a price increase on April 24, 2008, to be effective May 19, 2008

789. In April 2008, Sigma was continuing to feel the pressure from costs, as it had in 2007. Fittings volume continued to be weak. Sigma was looking for a way to increase prices and at the same time not lose market share. (Pais, Tr. 1926; CX 1138 at 001; Rybacki, Tr. 3541-3542).

790. A call from a cell phone issued to Mr. Rybacki of Sigma was placed to McWane's telephone number for two minutes at 3:49 p.m. on April 4, 2008. A call from a cell phone issued to Mr. Rybacki was placed to someone at McWane for eight minutes at 4:16 p.m. on April 4, 2008. Mr. Rybacki testified that he does not recall what was discussed. (CX 1621-A at 099, *in camera*; Rybacki, Tr. 3635-3636, 3610, 3617, *in camera*).

791. A call from a cell phone issued to Mr. Rybacki of Sigma was placed to a cell phone issued to Mr. Tatman of McWane for 16 minutes at 8:45 a.m. on April 7, 2008. Mr. Rybacki testified that he did not recall what was discussed. (CX 1621-A at 100, *in camera*; Rybacki, Tr. 3636, *in camera*).

792. On April 11, 2008, Mr. Pais wrote an internal email to Sigma's management team urging that Sigma take the lead in implementing a Fittings price increase of between two and ten multiplier points, to be effective in May 2008. Mr. Pais referred to his proposal as "big, bold, moves" by Sigma. Mr. Pais' email to his team stated in pertinent part:

> Keeping with our ongoing effort to boost our Prices and hence GMs as our AIC keep rising due to sharp overseas raw material increases, which have finally caught up with the domestic scrap costs too, please find the proposed MULTIPLIER MAP that LR and I discussed 4/8 . . .
>
> Despite the gloomy assessment -- both about the market and competition -- we have a very strong opportunity to lead and be a catalyst in boosting the Multipliers to another level, in

> ONE SHOT! It's time BIG BOLD MOVES (BBM, baby!) and this M[ultiplier]Map aims at just that...
> . . .
>
> It's definitely time for some 'BBM's and SIGMA will have to make them as our two competitors lack the imitative, credibility and leadership...

(CX 1138 at 001-002 (emphasis in original); Pais, Tr. 1926-1927; Rybacki, Tr. 3541-3546).

793. Mr. Pais and Mr. Rybacki denied discussing Sigma's spring 2008 pricing intentions with anyone at McWane. (RX 687 (Pais, Dep. at 76); Pais, Tr. 2080-2081, 2101-2102; Rybacki, Tr. 3708).

794. In the week following Mr. Pais' April 11, 2008 internal email to Sigma's regional managers (F. 792), there was an internal email discussion among Mr. Rybacki, Mr. Pais, and some of Sigma's regional managers regarding the merits of Mr. Pais' proposal, including whether or not the competition was likely to follow Sigma's lead. (CX 1134; CX 1137).

795. A call from a cell phone issued to Mr. Rybacki of Sigma was placed to a telephone number in Tyler, Texas for two minutes at 2:46 p.m. on April 15, 2008. A call was received by a cell phone issued to Mr. Rybacki from a phone number in Tyler, Texas for five minutes at 8:11 a.m. on April 16, 2008. Mr. Rybacki testified he had no idea who he called or what was discussed. (CX 1621-A at 104-105, *in camera*; Rybacki, Tr. 3638, 3610, 3617, *in camera*).

796. Sigma ultimately decided that it would announce to its customers an increase in its published multipliers of up to ten multiplier points over prior published levels. Mr. Pais noted that the planned multiplier increase was one of the "BIGGEST" one-time increases Sigma had ever had, "almost 40% depending on the current base multipliers." (CX 1134 at 001). Mr. Pais expressed his opinion that Star was "bound" to follow Sigma, "as they too are hit with sharp cost increases from China, from our reports . . . ." Mr. Pais expressed his belief that McWane would

be more cautious because of its years-long excess inventory problem. (CX 1134 at 001-002; *see also* CX 1137).

797. In a customer letter dated April 24, 2008, Sigma notified its customers of a published multiplier increase of "up to10 multiplier points," to take place on May 19, 2008:

> Dear Friends,
>
> To say this year has been a challenge is a gross understatement. With rising costs in transportation, labor, medical benefits, raw materials. etc., 2008 will certainly be a difficult year for all of us. Hopefully we will learn something from it and be better businesses in the future for having endured this very tough downturn.
>
> SIGMA Corporation, like all manufacturers in the Waterworks Industry, has been hit with unprecedented increases in scrap iron prices which have increased 7 fold in just a few short years. As a result we will be raising multipliers up to 10 multiplier points depending on your region. The increase will take place on May 19, 2008 and your SIGMA Regional Manager will inform you by letter before the end of April of your new multiplier.
>
> We've cut the number of different multipliers across the country down to four or five with the ultimate goal of one multiplier for Fittings (MJ & Push-on, C-153, Flanged C-110) nationwide in the not too distant future. We can't promise that this will be the last increase in 2008, but we can promise that we will give you ample warning of any future changes.
>
> Only orders that are placed before May 19, 2008 with a specific shipping date will be honored and any jobs that are held for release will be subject to the new multipliers.
>
> In conclusion, we at SIGMA thank you for your loyalty and friendship and we wish you all the best during these trying times in our marketplace.

(CX 1858 at 002 (emphasis in original) ("April 24, 2008 Customer Letter")).

798. The multiplier increase of up to ten multiplier points set forth in Sigma's April 24, 2008 Customer Letter (F. 797) was equal to a price increase for Sigma of approximately 25 to 30 percent, depending on the geographic region. (Rybacki, Tr. 3710-3711).

799. Although discussed in Mr. Pais' internal email of April 11, 2008 (F. 792), Sigma's April 24, 2008 Customer Letter did not refer to any changes in Sigma's Plant Work or Special Price policies. (CX 1858; *compare* CX 1138 at 001, 004).

800. Sigma's April 24, 2008 Customer Letter was faxed to Sigma's customers on or about April 25, 2008. (CX 1858 at 001; RX 052).

801. Sigma hoped its other competitors, including McWane, would follow Sigma's price increase. (Pais, Tr. 2080-2081).

2. Star's and McWane's reaction to Sigma's April 24, 2008 Customer Letter

802. Star learned of Sigma's April 24, 2008 Customer Letter on April 25, 2008, noting that the letter had "just hit the streets today." (CX 0862 at 001).

803. On May 7, 2008, Star sent a letter to its customers announcing a multiplier increase of a similar magnitude to that announced by Sigma, effective May 19, 2008. (CX 0037 at 001; McCutcheon, Tr. 2419-2420; CX 0819; CX 2538 (McCutcheon, IHT (Vol. 2) at 457-458); CX 0816; CX 0817; CX 0818; CX 0819; CX 0820; CX 0821; CX 0822; CX 0823).

804. McWane learned of Sigma's price increase on April 25, 2008. Mr. Tatman forwarded the letter internally, which also attached one of Sigma's regional multiplier maps, to Mr. McCullough and Mr. Walton of McWane. Mr. Tatman noted, among other things, that Sigma's April 24, 2008 Customer Letter reflected a published multiplier increase of up to ten multiplier points, and that the multiplier map showed an increase of 18%

and 40% over Sigma's prior published multipliers. Mr. Tatman further stated:

> I believe this is great for helping us achieve our business objective of regaining share while netting price. We can talk more next week about strategy. We'll try to gather the other Sigma regional letters and multiplier maps.
>
> I don't think any of us truly believe that degree of net price will stick. Just this week we had a pretty solid input from a Mainline regional manager stating that when Sigma came in pitching the need for this increase[,] they then offered to increase the cash discount from 2% to 5% if Mainline would sign up for some incremental volume.

(CX 0176 at 001; Tatman, Tr. 490-491).

805. On May 5, 2008, Mr. Tatman sent an internal email to Mr. McCullough and Mr. Walton attaching proposed new multipliers for McWane and a draft McWane customer letter, which would "align with the approach of waiting until the DIFRA data is available before announcing any price actions." Mr. Tatman recommended against following Sigma's price increase, regardless of what the DIFRA data would show: "Although the Sigma announcement represented an increase range of 20% to 40%, I don't believe we would follow that lead regardless of the DIFRA data as it would lead to instability." Mr. Tatman instead proposed that McWane publish multiplier increases in the range of 8% to 12%. (CX 0137 at 001, 005-007; *see* F. 458, 618 (Mr. Tatman's defining instability to mean selling prices that are 10% or more below published prices)).

806. Mr. McCullough of McWane believed that it was important to review the DIFRA tons-shipped report, which was due mid-May 2008, before announcing any price actions. Accordingly, on Mr. McCullough's instructions, Mr. Tatman waited for the DIFRA data before issuing any price increases. (Tatman, Tr. 494-495, 519 ("On something like this that [Mr. McCullough] wants, I'm not going to challenge him on it."); CX 0137; *see* F. 734 (targeting May 15, 2008 for submittal of data to DIFRA's accountants)).

807. Mr. Tatman believed that Mr. McCullough wanted to wait for the DIFRA tons-shipped data because Mr. McCullough believed the data to be a more accurate reference point for assessing McWane's market share than other reference points, such as DIPRA statistics and Valve Manufacturers Association (VMA) data, which Mr. Tatman had provided to Mr. McCullough to support Mr. Tatman's price increase recommendation set forth in F. 805. (Tatman, Tr. 946, 950).

808. On May 7, 2008, Star sent a letter to its customers announcing a multiplier increase of a similar magnitude to Sigma's April 24, 2008 Customer Letter (F. 797), to be effective May 19, 2008. Star needed a price increase at the time because market prices had declined, while costs had increased for Star. Mr. McCutcheon denied that Star's May 7, 2008 Customer Letter had anything to do with DIFRA. (Minamyer, Tr. 3209; CX 819; McCutcheon, Tr. 2555).

809. On May 7, 2008, McWane sent a customer letter which stated as follows:

> Dear Valued Customer,
>
> You have likely heard or read about continued increases in factors of production impacting both domestic and global operations. The foundry industry has been hit particularly hard with sharp increases in scrap iron, alloys and transportation costs.
>
> While the financial impact to our business is real, we also recognize there are restrictions as to the level and timing at which pricing can be accommodated in the market.
>
> We are sending this general communication to our waterworks distribution customers to more clearly define our intention in regards to future pricing actions.
>
> Before announcing any price actions, we carefully analyze all factors including: domestic and global inflation, market and competitive conditions within each region, as well as performance against our own internal metrics. We anticipate

> being able to complete our analysis by the end of May. At that point, we will send out letters to each specific region detailing changes, if any, to our current pricing policy.
>
> For planning purposes only, we expect for regions with a change that multipliers will increase in the range of 6% up to 16% effective June 16th.

("May 7, 2008 Customer Letter") (CX 2170 at 002).

810. Mr. Tatman acknowledged that it was unusual to send out a letter that stated intentions as to a future price increase, but not the actual price increase, and explained: "It's not too often that you have to respond to a competitor putting out a 40 percent price increase, so these are unusual times." (Tatman, Tr. 501-502).

811. Mr. Tatman denied that the point of McWane's May 7, 2008 Customer Letter was to "reinforce" the point that Star and Sigma needed to submit their DIFRA data. (Tatman, Tr. 505-506).

812. In addition to the anticipated May 2008 DIFRA report, Mr. Tatman planned to review and analyze McWane's monthly financial data for April 2008, as set forth in McWane's monthly financial reports known as "blue books," which are prepared by McWane's accountants on a monthly basis for management purposes. Mr. Tatman expected to receive this report by mid-May and be able to prepare a spreadsheet analysis by the end of May. Also, Mr. Tatman wanted to review all of the competitive inputs collected from the field. (Tatman, Tr. 497-498, 501-502).

813. Mr. Tatman's email transmitting McWane's May 7, 2008 Customer Letter to McWane's customers explained: "Given the market environment, we feel any pricing action warrants careful consideration and analysis. We simply needed more time beyond the competitive May 19th date to feel comfortable that we properly considered all factors." (CX 2170 at 001).

814. Being given a range of an anticipated price increase does not help a Distributor negotiate a price increase from its own customers (the End Users), and in this regard, McWane's May 7,

2008 Customer Letter was not helpful to Distributors. (CX 2510 (Groeniger, Dep. at 231-234, *in camera*)).

815. Mr. Minamyer of Star received a copy of McWane's May 7, 2008 Customer Letter, via Stars' customer HD Supply, on the afternoon of May 7, 2008. (CX 0863 at 001; McCutcheon, Tr. 2422-2423).

816. Approximately two hours after Mr. Minamyer received a copy of McWane's May 7, 2008 Customer Letter, Mr. McCutcheon sent an email confirmation to Mr. Long, DIFRA's attorney, confirming that Star agreed with the DIFRA reporting procedures, as requested by Mr. Long in an email to DIFRA members dated May 5, 2008. Later in the afternoon of May 7, 2008, Mr. McCutcheon forwarded a copy of Mr. Long's April 25, 2008 email regarding DIFRA's agreed tons-shipped data reporting procedures to Navin Bhargava, who would assemble Star's tons-shipped data. (RX 580; F. 828; CX 0530).

817. Mr. McCutcheon of Star found McWane's May 7, 2008 Customer Letter unusual because he had not seen anything like it before. As Mr. McCutcheon explained: "[H]istorically, when the leader in an industry chooses to take an increase he announces we're taking an increase. This was just written as an explanation to me. It was just worded odd and it looked arrogant and it looked humorous to me." Mr. McCutcheon similarly stated with regard to his impression of the McWane letter: "Third paragraph, I don't know why they did it. I mean, it looks like a -- I took it as being a minor poke at us, because we weren't going to do careful analyzing -- we did our own analysis and we quickly determined that we were getting ready to lose money if we didn't take an increase. . . . Other than an attempt to try to look more sophisticated . . . I don't know." (CX 2539 (McCutcheon, Dep. at 178-179, *in camera*); CX 2538 (McCutcheon, IHT (Vol. 2) at 320, *in camera*)).

818. Mr. McCutcheon denied making any connection between McWane's May 7, 2008 Customer Letter and submission of DIFRA data by Star. (RX 698 (McCutcheon, Dep. 201) ("Q. And it's your testimony here today that you made no connection between . . . the submission of your DIFRA data and this letter,

the May 7th, 2008, letter? A. Absolutely none. As a matter of fact, the first time that thought -- I've even ever heard that was today. Of linking that to DIFRA? Q. Linking this May 7th letter to the need to submit your DIFRA data. A. No, sir.")).

3. Star's and Sigma's reaction to McWane's May 7, 2008 Customer Letter

819. Sigma reviewed McWane's May 7, 2008 Customer Letter. (Rybacki, Tr. 3568-3569).

820. Mr. Rybacki of Sigma thought the language in McWane's May 7, 2008 Customer Letter regarding McWane's "carefully analyzing all factors including: domestic and global inflation, market and competitive conditions within each region, as well as performance against our own internal metrics" was notable because the language looked "a little quirky for Jerry Jansen" and not Mr. Jansen's "style." Mr. Rybacki had "no idea" what the language meant. (Rybacki, Tr. 3568-3570).

821. Mr. Rybacki thought that McWane's May 7, 2008 Customer Letter was ambivalent as to whether McWane was going to issue a price increase and Mr. Rybacki was "leery" of the May 7, 2008 Customer Letter. (Rybacki, Tr. 3570-3571).

822. Mr. Pais of Sigma denied having any understanding that McWane was not going to increase prices on Fittings until all of the DIFRA members submitted their data and DIFRA issued the report, or that McWane was waiting to increase prices until after it had the DIFRA data and the DIFRA report, stating: "It is so farfetched and ridiculous, what can I say? No, no." (RX 687 (Pais, Dep. at 381-382)).

823. Sigma's regions have flexibility regarding the timing of multiplier changes. When Sigma's regional managers saw that McWane was not following Sigma's multiplier increase that Sigma announced in its April 24, 2008 Customer Letter, some regional managers opted to wait for McWane and just kept pricing at the old multipliers. The northeast regional manager chose to go ahead with Sigma's new multipliers in May and June 2008, although the region lost sales as a result because it was higher priced than McWane during that period. (Rybacki, Tr. 3571-

3572; RX 076 (noting that Sigma was delaying its price increase because Sigma was going to match McWane, but McWane had not notified the marketplace of its increase or timing for an increase)).

824. On May 12, 2008, Star put its planned price increase on hold. Mr. Minamyer of Star explained in an email to his district managers:

> Our current multiplier changes on fittings have been put on hold for the time being. The fittings market pricing is just coming off the last increase so we want to evaluate the market conditions for the next few weeks, let the market settle down a little bit, and then make a decision in early to mid June on to how to proceed.
>
> Please let our customers know that we are on hold and will let them know what our plan is in time for them [to] prepare.

(RX 060).

4. Star's submittal of its tons-shipped data to DIFRA's accountants

825. McWane submitted its tons-shipped data to DIFRA's accountants on May 14, 2008. (CX 1303 at 002).

826. On May 16, 2008, a four minute phone call was placed from a cell phone issued to Mr. Rybacki of Sigma to a telephone number at McWane. Mr. Rybacki testified that he does not know who he called that day, or what they spoke about. (Rybacki, Tr. 3642-3643, 3610, 3617 *in camera*; CX 1621-A at 095, *in camera*).

827. On May 16, 2008, Mr. McCutcheon of Star sent an email to Mr. Brakefield of Sigma, DIFRA's president, (F. 717) with the subject line "Star's tonnage data," stating: "Hello Tom, sorry for the delay. The info should be in next week." Mr. Brakefield forwarded that message to Mr. Pais and Mr. Rybacki. (CX 1129; Rybacki, Tr. 3561-3563).

828. On May 19, 2008, Mr. Bhargava, who had been tasked to assemble Star's tons-shipped data submission, sent Star's tons-shipped data to Mr. McCutcheon. (CX 0530 at 001; McCutcheon, Tr. 2427).

829. On May 24, 2008, Mr. McCullough of McWane stated in an internal email to Mr. Tatman and Mr. Walton that he "still believe[d] we stand pat until market share info is available." Mr. Tatman responded that he and Mr. Walton agreed with Mr. McCullough, stating: "Although somewhat painful to the bottom [line] in the short term, that would re[i]nforce the message we've been trying to drill in which when successful will pay long term dividends." (CX 1186).

830. Mr. Tatman denied that the message he was trying to "drill in" (as stated in the email referred to in F. 829) was a message to the DIFRA members that they must get their DIFRA data in before McWane would announce a price increase. The message McWane was trying to "drill in" was that McWane was "not going to lose visibility of where the competitive marketplace is." Mr. Tatman explained:

> [L]et's go back to our core strategy.
>
> If someone announced a 40 percent price increase and I follow it, I'm going to get a lot of price in the short term. That's going to be a significant benefit in the short term to my bottom line. But do I believe that is in my best interest of my longer-term goal, which is gaining volume and gaining share? No.
>
> So if I have a competitor that announces a 40 percent price increase, if I want to put money in my pocket for the next three months or the next six months, I'm going to jump on that.
>
> So that is painful to the bottom line, on a relative basis, that I'm not going to jump on and support a 40 percent price increase because you're going to get some traction off of that. It's not like you're -- you might not get 38-39 percent, but you're going to get some traction on that.

> And what I'm saying here is consistent with what we said all along, was we were not going to lose visibility of where the competitive marketplace is, and our primary focus at this point in time is volume, share.

(Tatman, Tr. 521-522).

831. On the afternoon of May 27, 2008, two calls were placed between a cell phone issued to Mr. Rybacki of Sigma and a cell phone issued to Mr. McCutcheon of Star for a combined duration of ten minutes. That afternoon, a call was placed from a cell phone issued to Mr. Rybacki to a telephone number at McWane for two minutes. Mr. Rybacki testified that he has no idea what he and Mr. McCutcheon talked about, although it could have been the DIFRA data, and that he does not know who in Tyler Texas he called that day, or what they spoke about. (Rybacki, Tr. 3643-3644, 3610, 3617, *in camera*; CX 1621-A at 084, *in camera*).

832. On May 29, 2008, McWane already had a draft of a price increase letter ready to send to its customers, announcing a weighted average increase in published multipliers for blended Fittings of approximately 8%. Mr. Tatman had already reviewed various reference points to assess market share, such as McWane's sales data, and he knew McWane was losing market share. (CX 1193 at 001; Tatman, Tr. 516-517).

833. On May 30, 2008, the president of DIFRA, Mr. Brakefield of Sigma, forwarded an email from Mr. Herren, of the Bradley Arant law firm, dated May 28, 2008, reminding members to submit their data, to Mr. Rybacki, Mr. Bhattacharji, and Mr. Rona of Sigma, noting, "I will follow up on this and advise." Thereafter, Mr. Brakefield, DIFRA's President, spoke with Mr. McCutcheon regarding Star's late submission of data. (CX 1090 at 001; Brakefield, Tr. 1291-1292; McCutcheon, Tr. 2430).

834. Mr. McCutcheon submitted Star's tons-shipped data to Sellers Richardson at 12:37 p.m. on June 5, 2008, which, per the agreement of the DIFRA members, included tons-shipped data for 2006, 2007, and January 2008 through April 2008. (CX 0049;

McCutcheon, Tr. 2427; CX 2538 (McCutcheon, IHT (Vol. 2) at 303-304), *in camera*).

835. At 12:48 p.m. on June 5, 2008, Mr. McCutcheon notified Mr. Brakefield and Mr. Rybacki of Sigma by email that Star had submitted its tons-shipped data, and included a quote from McWane's May 7, 2008 Customer Letter, stating:

> Good morning Mr. President. I just sent our info in. Sorry it took so long, but we were "carefully analyzing all factors including: domestic and global inflation, market and competitive conditions within each region, as well as performance against our own internal metrics." (Does that look familiar?).

(CX 1091; CX 0138).

836. Mr. McCutcheon testified that his quoting of the portion of McWane's May 7, 2008 Customer Letter in his June 5, 2008 transmittal email to Mr. Brakefield, described in F. 835, was an attempt at humor. Mr. McCutcheon testified the quote was designed to "poke fun" at McWane for what Mr. McCutcheon thought was arrogant language by McWane, "poking" at Star for Star's earlier attempt to lead a price increase with Sigma and not using a "careful analysis." (CX 2538 (McCutcheon, IHT (Vol. 2) at 311-313, 315); McCutcheon, Tr. 2431-2432).

837. Mr. McCutcheon denied that one of the reasons Star did not submit its tons-shipped data until June 5, 2008 was a reluctance to share the information with its competitors. "Probably not at that time. Once we decided that Star was going to join, I had every intention of being a member. I do remember it taking us a while to figure out how to do it, running it back through our purchasing people. I know that took a couple of weeks, easy." (RX 698 (McCutcheon, Dep. at 197-198)).

5. McWane's receipt of DIFRA aggregated tons-shipped report and McWane's transmittal of June 17, 2008 Customer Letter

838. McWane and the other DIFRA members received the first DIFRA aggregated tons-shipped report from Sellers

Richardson at 2:41 p.m. on June 17, 2008. The report set forth the aggregated total of tons shipped for the year 2006, for each month of 2007, and for January 2008 through April of 2008. (CX 0052; Tatman, Tr. 534-536, 936; Brakefield, Tr. 1297-1298; Pais, Tr. 2121; McCutcheon, Tr. 2444-2445, *in camera*).

839. Upon receiving the June 17, 2008 DIFRA tons-shipped report (F. 838), Mr. Tatman conducted an analysis to determine McWane's market share. Mr. Tatman spent approximately 40 minutes reviewing the DIFRA tons-shipped data, comparing it to other reference points on McWane's market share, such as McWane sales data, and DIPRA and VMA statistics, and prepared a spreadsheet of relevant data points. Mr. Tatman transmitted the DIFRA report and his spreadsheet analysis internally to Mr. McCullough, Mr. Walton, and Mr. Jansen. Mr. Tatman's email observed:

1. 2006 baseline total DIFRA tonnage tracks very well with what we would have expected based upon walking the 2001 market data from the 421 hearings forward using the change in VMA units.

2. Our share loss for 2007 and Apr YTD 2008 is actually larger than what I expected. Note the DIFRA tonnage is not down as much over those period as the VMA unit data.

3. The "backed into" non DIFRA tonnage appears to be on the lower end of what we would have expected.

4. All points above suggest that data is accurate within reason which was probably the resistance to sending it out before we announced any price.

5. The larger than expected share loss will make the task of getting it back more difficult, but of course will make victory all the more sweater [*sic*] in terms of the incremental financial benefits.

(CX 0139; Tatman, Tr. 536-537, 946-950).

840. In the early evening of June 17, 2008, approximately four hours after receiving the DIFRA aggregated tons-shipped report from DIFRA's accountants, McWane sent a customer letter dated June 17, 2008, notifying McWane's customers of an increase in Fittings multipliers effective July 14, 2008, and stating that the weighted average increase on blended Fittings and accessories was "approximately 8%." ("June 17, 2008 Customer Letter") (CX 1191 at 001 (letter to Glenn Fielding at HD Supply); CX 1576 at 001 (email to Mr. Doane and Mr. Thees at Ferguson); Tatman, Tr. 538-539, 544, 952; RX 644 (Tatman, Dep. at 155); CX 0047 (multiplier increase letter to southeastern states)).

841. McWane's June 17, 2008 Customer Letter included the language: "This increase does not fully absorb the level of cost inflation that has occurred over the past few months, especially within our off-shore operations. As such, we will continue to a[ss]ess market & competitive conditions in addition to our internal operating metrics and advise you if additional actions will be required before year end." (CX 1576 at 003; CX 1191 at 001; CX 0047 at 001).

842. In an email to Mr. Doane and Mr. Thees of Ferguson attaching McWane's June 17, 2008 Customer Letter, Mr. Tatman stated that "[t]he increase is significantly smaller than what I believe others have proposed, but we believe this level is rational given all factors considered." (CX 1576 at 001).

6. Star's and Sigma's reactions to McWane's June 17, 2008 Customer Letter

843. On June 27, 2008, Star sent a letter to its customers notifying them of the new published multipliers to be effective July 14, 2008, thereby effectively rescinding Star's May 2008 price increase announcement that Star had previously put on hold. Star's new multipliers followed McWane's new lower multipliers. (McCutcheon, Tr. 2424, 2448, *in camera*; CX 2430; Minamyer, Tr. 3217-3218).

844. On or about July 8, 2008, Sigma sent a letter to its customers notifying them of an increase in published multipliers, to be effective July 14, 2008, thereby effectively rescinding Sigma's May 2008 price increase that Sigma had previously

delayed implementing. Sigma's new multipliers essentially followed McWane's. (CX 2253 at 001-003; Rybacki, Tr. 3573-3577).

G. Competitive Environment in 2008

1. Facts related to alleged curtailment of Project Pricing

a. Expert opinion

845. If there a were parallel reduction in Project Pricing, there would be an increase in the amount of product sold at multiplier and a decrease in the amount of product sold under special pricing, and a decrease in the "variation" of pricing, ***i.e.***, the dispersion of price points. (RX 712A (Normann Rep. at 15-16), *in camera*; Normann, Tr. 4749).

846. Dr. Normann calculated the "standard deviation" in price for Star, McWane, and Sigma, for the most common products sold, from 2007 to 2010, based on the Suppliers' invoice data for these products. Dr. Normann concluded from this data that McWane's price variation was largely unchanged until late 2008, while Star's price variation increased. In addition, Dr. Normann concluded that price variation during 2008 was "generally higher" than any other time from 2007 to 2010. (RX 712A (Normann Rep. at 15-16 and Figure 4), *in camera*; Normann, Tr. 4749; 4817-4821).

847. The results set forth in F. 846 contradict a parallel curtailment of Project Pricing. The data does not suggest a reduction in job pricing. (RX 712A (Normann Rep. at 15-16 and Figure 4), *in camera*; Normann, Tr. 4749; 4817-4821, 4824).

b. McWane

848. McWane had used Project Pricing to sell Fittings prior to January 2008. (CX 2485 (Walton, Dep. at 114) ("[T]here was job pricing somewhere in the country all the time.").

849. Historically, at McWane, control of Project Pricing by sales persons was a little tighter under David Green, Mr. Tatman's

predecessor, than during Mr. Tatman's tenure in which authority over Project Pricing was more flexible and control varied depending upon the extent to which the sales person could be trusted to exercise good judgment. (Tatman, Tr. 282-283).

850. McWane continued to offer its customers Project Pricing as well as other price concessions to its customers throughout 2008, 2009, 2010 and into the present. (RX 396, *in camera*; RX 399; Tatman, Tr. 387, 904-905, 907, 909-910, 914-915; RX 598; Tatman, Tr. 921, 930-931, 933-934, 995-998, *in camera* ; Tatman, Tr. 1071-1072. ("We continued to job-price every stinking month and we've never stopped.").

851. Mr. Sheley of Illinois Meter, a Distributor, found McWane to be extremely aggressive on pricing in 2008, including pricing below published multipliers. (Sheley, Tr. 3445).

852. Beginning in 2008, McWane kept a "pricing protection log," on which it tracked, in the normal course of business, instances of price protection (*i.e.*, where McWane quotes a price to a customer and agrees to hold that price for a customer for some period of time, thereby "protecting" the price against increases) and Project Pricing. Mr. Napoli was responsible for maintaining the pricing protection log. (Tatman, Tr. 931-933; 1007, 1012-1013, *in camera*; RX 396, *in camera*).

853. McWane did not track Project Pricing in 2007, when Mr. Green was in charge. Mr. Tatman's preference was to have data for use in his decision making. (RX 644 (Tatman, Dep. 109); Tatman, Tr. 1007-1008).

854. The pricing protection log (F. 852) is based upon information received from sales persons in the field. (Tatman, Tr. 1008), *in camera*).

855. The pricing protection log (F. 852) shows, among other things, the Fittings multiplier that was bid; the expiration date of the bid; and the published multiplier when the bid was issued. (RX 396, *in camera*).

856. The pricing protection log (F. 852) tracks other products in addition to Fittings. (Tatman, Tr. 1009, *in camera*; RX 396, *in camera*).

857. The pricing protection log (F. 852) does not separate "protected" prices from one-time "job prices," but if the time period until expiration of the prices is short, for example, one month, that price is likely to be a Project Price, rather than a protected price. (Tatman, Tr. 1014-1015, *in camera*).

858. The pricing protection log (F. 852) does not include information on cash discounts, changes in freight terms, quarterly rebates, annual rebates, branch-level rebates, but only shows what is charged by invoice. (Tatman, Tr. 1018, *in camera*).

859. The pricing protection log (F. 852) includes a "comments" field. In some cases, the "comments" field states "to match Star" or "to match Sigma." Such a comment indicates that McWane quoted the customer a discounted multiplier in order to match a discounted multiplier that the sales person reported had been quoted by Sigma or Star, according to the customer. (Tatman, Tr. 1022-1023, *in camera*; RX 396, *in camera*).

860. The "comments" field on the pricing protection log (F. 852) included notations regarding "matching" Sigma or Star more often between January 2009 and March 2009 than between January 2008 and March of 2008. Mr. Tatman agreed that such notations appeared in the log "far more" often between January 2009 and March 2009 than between January 2008 and March 2008. (RX 396, *in camera*; *compare* Tab '2008,' Column W, Rows 8-807, *with* Tab '2009,' Column W, Rows 9-750; Tatman, Tr. 1028-1029, *in camera*.)

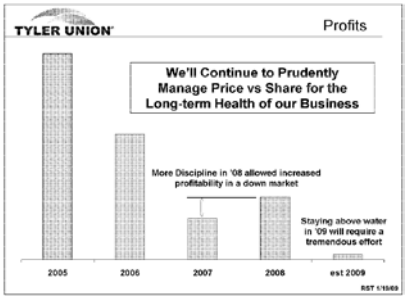
861. During 2008, McWane provided approximately [redacted] different job prices to its customers. (RX 396, *in camera* (McWane 2008 price protection log); RX 644 (Tatman, Dep. at 109)).

862. McWane provided Project Pricing to Illinois Meter in 2008, and offered better pricing to get jobs "aggressively." (Sheley, Tr. 3445).

863. Based on the "comments" field, the pricing protection log (F. 852) reflects fewer instances of McWane Project Pricing to match Star or Sigma in the second and third quarters of 2008 (between [redacted]), compared to the fourth quarter of 2008 (between [redacted]), and the first quarter of 2009 (between [redacted]). (RX 396.xls, *in camera*, Tabs "2008" and "2009," column W) (reflecting the following numbers of entries with comments referencing Sigma or Star: [redacted]).

864. An internal Tyler Union PowerPoint slideshow presentation titled "2009 Sales Meeting," contained a graph showing McWane's share of the Fittings market in the years 2005 through 2008. The graph shows a decline in market share from 2006 through 2007 and again from 2007 through 2008. The graph also contains a notation: "Slight Share Erosion Due to Pricing Discipline." (CX 0622 at 004).

865. An internal Tyler Union PowerPoint slideshow presentation titled "2009 Sales Meeting," contained a graph showing an increase in profitability between 2007 and 2008, and attributed the increased profitability to "more discipline," but does not indicate what products are included or excluded.



(CX 0622 at 005; Tatman, Tr. 853, *in camera*).

866. In an internal September 2008 presentation to Mr. McCullough and Mr. Walton regarding "State of the Business and Potential Options," a slide on the "Current Environment" noted, *inter alia*, that McWane's share was down approximately 8 points since 2006 and that "[l]eading price stability has been detrimental to share." Mr. Tatman explained that its effort to increase share

by compressing pricing "didn't work." (RX 616 at 005; Tatman, Tr. 971-972).

867. In a February 9, 2009 email to Mr. Tatman summarizing past and present pricing actions, Mr. Jansen reported that McWane had "stayed firm on pricing" for the better part of 2008, and had started to give out job pricing in a few territories in late 2008. Mr. Jansen reported as follows:

> **Stayed Firm on Pricing** = for better part of 2008 held pricing to try to stabilize market pricing.
>
> - Consequence = Lost market share due to competitors playing pricing games and having distributors keep it quiet either on the front and/or backside.
>
> - Customer Reaction = Customers had large scale reduction in inventory which is what we were getting and were relying more on regional distribution yards to supply jobs and support inventory.
>
> **Job Pricing** = Gave out pricing on jobs in few territories late 2008.
>
> - Consequences = started to get some support from customers that wondered where we had been. Too little too late since the jobs were few and far between.
>
> - Customer Reaction = Numbers are dropping rapidly and they had been long before we started to move. They know it's ugly but they are in survival mode and have very little loyalty. They would like to work with us but need to know we will support them.

(CX 1223 at 002 (emphasis in original); Tatman, Tr. 1074-1076).

c. McWane statements regarding curtailment of Project Pricing by Sigma and Star

868. Mr. Tatman of McWane stated in his Executive Report for the first quarter of 2008, among other things, on the "Sales/Market/Competitive Environment" that:

> Based upon our competitive feedback log, the level of multiplier discounting by both Star and Sigma appears to have died down significantly. As we understand it, both have removed pricing authority from the front line sales team and pushed it up higher within their organizations. Discounting is still available, but it now requires a more structured decision process. In an effort to drive some volume, they also both selectively honored prior job pricing beyond their published March 1st cut-off date. Our hard stance on that date certainly appears to have cost us some short term tonnage.
>
> . . .
>
> Somewhat off-setting the higher degree of price stabilization is [Star's and Sigma's] greater flexibility with extending terms," to selected accounts.

(CX 1564 at 004).

869. Mr. Tatman based the statement in the McWane 2008 first quarter Executive Report that "the level of multiplier discounting by both Star and Sigma appears to have died down significantly" (F. 868) upon competitive feedback provided by sales persons in the field. (CX 1564 at 004; Tatman, Tr. 1063-1064; *see* RX 598 (competitive feedback log)).

870. Mr. Tatman of McWane stated in his 2008 second quarter Executive Report, among other things, under the heading, "Sales/Market/Competitive Environment" that:

> We continue to track the level of confirmed discounting and job pricing within our competitive action file. The level of activity appears to have slowed over the past several months probably driven by a combination of rising costs putting more pressure on price and more creative use of programs.

(CX 1562 at 004).

d. Star

871. Prior to 2008, Star had always used Project Pricing to sell Fittings. (CX 2539 (McCutcheon, Dep. at 164) ("Being number three, we have to give a value to the customer; and we have chosen for that value to be price. And we have always project priced.").

872. Project Pricing was a significant part of Star's competitive strategy. As the smallest competitor in the market, Star needed to Project Price to remain competitively viable, and Project Pricing helped Star grow its market share. (McCutcheon, Tr. 2387; RX 685 (Minamyer, Dep. at 26)).

873. Throughout 2008 and up until at least November 2008, Star wanted to see documentation of prices in the field before Star offered Project Pricing, and Mr. Minamyer reminded his sales force that this is what he wanted on more than one occasion. Star would hold to the published multiplier unless it learned that a competitor was pricing lower. (CX 2526 (Minamyer, Dep. at 157, 174-176); *see also* CX 0815).

874. In 2007 and in 2008, Star's process for approving Project Pricing was that the territory manager who negotiates a Project Price had to submit a request in writing for approval (the "Pink" sheets) to his division manager, and most of the time the special price also had to be approved by the national sales manager and/or the VP of sales. (CX 2535 (Bhutada, Dep. at 103-106), *in camera*; McCutcheon, Tr. 2272; Minamyer, Tr. 3144-3145).

875. While Mr. Minamyer was the national sales manager, Mr. Minamyer or Mr. McCutcheon approved Project Pricing, although sometimes the discretion was delegated to Star's divisional managers. There were instances where Mr. Minamyer would "push down" approval to the division managers, and sometimes even to the territory managers, if Mr. Minamyer had faith in them to make the correct judgment. (Minamyer, 3147;

CX 2538 (McCutcheon IHT (Vol. 2) at 373); RX 685 (Minamyer, Dep. at 26-27)).

876. If the request for Project Pricing was approved, Star and the Distributor calculated the price Star charged for the product by multiplying the catalog price by the negotiated multiplier (the Project Price) rather than Star's published multiplier. (Minamyer, Tr. 3143-3144).

877. Star's internal process for approving a special price for a customer uses a special pricing request – "SPR" – or "a pink, like the color." (McCutcheon, Tr. 2273).

878. In the course of the FTC's investigation in this matter, Star produced a spreadsheet dated July 23, 2011, titled "2008_Pinks-final.xls." ("RX 557.xls Pinks-final"). (McCutcheon, Tr. 2550-2551).

879. The spreadsheet referred to in F. 878 includes all of the 2008 special pricing requests ("SPRs") or "pinks" that were approved by Star in 2008 for all products, including Fittings. (McCutcheon, Tr. 2550-2552, 2673, 2692-2693; RX 557.xls).

880. The information in the spreadsheet referred to in F. 878 was drawn from the information in Star's "pinks." (F. 874, 877-878; McCutcheon, Tr. 2548).

881. The spreadsheet referred to in F. 878 shows 2,669 total instances of special pricing, including projects, "buy" programs, and "one-time-only" prices. (RX 557.xls).

882. Mr. McCutcheon requested the same information as set forth in F. 879 for 2008 for 2007 through 2009, all of which he reviewed in summary "graph" form. (McCutcheon, Tr. 2553, 2684; CX 2570).

883. The data reflected by the spreadsheet referred to in F. 878 and the summary graph referred to in F. 882 are drawn from data provided in Star's "Special Project Pricing Reports" ("SPPRs"), which are provided periodically by the Star's sales force. (McCutcheon, Tr. 2673; *see e.g.*, RX 444, RX 444.xls (utility spreadsheet, December 2008); RX 548, RX 548.xls (utility

spreadsheet, November 2008); RX 446, RX 446.xls (utility spreadsheet, September 2008); RX 448, RX 448.xls (utility spreadsheet, August 2008); RX 449, RX 449.xls (utility spreadsheet, May 2008); RX 558, RX 558.xls (utility spreadsheet, March 2008); *see* RX 695 (Leider, Dep. at 36); CX 2532 (Berry, Dep. at 38-39)).

884. The SPPRs and the spreadsheet referred to in F. 878 include some entries for Project Prices offered to Distributors that involved other products and not Fittings, such as plumbing products, joint restraints, bolts and accessories, castings, and valve boxes. (McCutcheon, Tr. 2673-2676; RX 557.xls at Row 567 (plumbing products); CX 3033 at 002 (showing project receiving special pricing reflected in RX 557.xls at Row 567 referred to plumbing products); RX 558.xls at Row 69-71 (joint restraints); RX 558.xls at Row 2-3 (bolts and accessories); RX 558.xls at Row 33 (castings); RX 557.xls at Row 1452 (valve boxes); CX 3041 at 001 (showing project receiving special pricing reflected in RX 557.xls at Row 1452 referred to valve boxes)).

885. Star's SPPRs include sales to Canadian customers. (McCutcheon, Tr. 2405; *E.g.*, RX 446.xls, Row 106 (sale to Howie Bird for project in New Brunswick); RX 446.xls, Row 10 (sale to Wolseley for project in Quebec); RX 446.xls, Row 104 (sale to Marcel Baril for project in Quebec); RX 446.xls, Row 150 (sale to Temispal Val D'or for project in Quebec); RX 446.xls, Row 56 (sale to Real Huot for project in Quebec)).

886. Star sells very few Fittings outside the United States. (McCutcheon, Tr. 2405).

887. The overall number of instances in which Star engaged in Project Pricing on all products, including Fittings, dropped from 3,226 instances in 2007 to 2,669 in 2008. (CX 2570 at 001; McCutcheon, Tr. 2685).

888. During the time period from February 2008 through March 2008, the number of instances of Star's Project Pricing on all products, including Fittings, was 20% higher than the same period in 2007. (CX 2570 at 001; *see* McCutcheon, Tr. 2402-2403).

889. The number of instances of Star's Project Pricing on all products, including Fittings, was lower in January 2008 than January 2007; higher in February 2008 than in February 2007; lower in March 2008 than in March 2007; higher in April 2008 than April 2007. (CX 2570 at 001).

890. The instances of Star's Project Pricing on all products, including Fittings, were fewer in each month from May 2008 through November 2008, than May 2007 through November 2007. (CX 2570 at 001).

891. The number of instances of Project Pricing on all products, including Fittings, was higher in December 2008 than in December 2007. (CX 2570 at 001).

892. In an internal email to Mr. McCutcheon and to Star's division managers dated August 25, 2008, Mr. Minamyer stated: "I know we have been very careful on special pricing and it seems to be working pretty good." (CX 0814; McCutcheon, Tr. 2570-2571).

893. On November 25, 2008, Mr. Minamyer wrote an email to his sales team, with the subject line, "Pricing Strategy Changes." The email stated:

> TO: All
>
> We have all been extremely diligent in protecting the stability of our market pricing. So much so that we have earned the reputation of being the best at protecting the market pricing and at times, to the extent that some think us inflexible in that area. You have all done a great job and deserve credit for these effort and results.
>
> However, some of our competition has not performed as admirably nor are we now certain that it was ever part of their strategy. Considering that, we need to change our plan in how we are setting our multipliers. We have many instances where we have documented the competition being irresponsible (Mostly Sigma) and selling under our multipliers in almost

every market with varying strategies. We have lost too much revenue to tolerate it any longer.

Please get with your teams to be sure we are all clear on the following plan.

We will take every order we can after exhausting all avenues to document the competitors pricing. Please be diligent while talking to your customers that we want to continue being good stewards in the market but we will no longer tolerate the competition being irresponsible in the market and being undersold as a result. The reason is that we have documented so much under market pricing that we have to react to protect our partners', and our own market shares. Do it with a combination of buy plans, short term buys, and project pricing. Do this quietly and selectively and as much under the radar as you can but, <u>if it is necessary</u>, be sure to do it. Go get every order!!!!!

You should also go after the competitors' partners to try and gain some of that market share. This doesn't give us the go ahead to be irresponsible on the market but rather the ability to be more flexible in pricing. If we are moving pricing we need to get more revenue as a result.

Your teams will need to be sure they are tracking every project in their territory so that they know what is going on and how to react.

. . .

To manage I will have all the pinks come through me again for awhile so we can measure the results.

. . .

(CX 0831(emphasis in original); Minamyer, Tr. 3226 (describing email as "asking them to get more aggressive on pricing to get more orders."); *see also* CX 2526 (Minamyer, Dep. at 69-71, 72-73), *in camera* ("I'm telling them to take off the gloves and looks like we lost a market share and my patience had run out with that

and we were going to go take it back."; "Q. So what are you directing your sales folks to do? You said take off the gloves; what does that mean? A. It means we were attempting to hold our pricing and it looks like the competition was not, and we're not going to do that anymore. We're going to go out and we're going to take that business back by using pricing.")).

894. On February 3, 2009, Mr. Minamyer wrote an email to his sales team stating that "Divisional Managers will now be able to approve pinks without my approval" for certain specified products within specified multipliers. (CX 0884).

e. Sigma

895. Within Sigma, regional managers had authority to approve a Project Price to some extent, with ultimate authority resting with Mr. Rybacki. Sigma sales people had this authority in every region for all of 2008. (Rybacki, Tr. 1105-1106, 3696).

896. After receiving Mr. Pais' January 24, 2008 email referred to in F. 663-664, Mr. Rybacki told his regional managers "once again that we needed to try to . . . make us more profitable because it was getting to the point where we couldn't make any money at the prices we're selling at." (Rybacki, Tr. 1105-1106, 1137).

897. There was no special effort made in 2008 at Sigma to reduce Project Pricing. As Mr. Rybacki further explained: "I think there's an effort every single . . . quarter every single year to try to reduce it because job pricing has a tendency to get out of hand." (Rybacki, Tr. 1107).

898. Sigma continued to Project Price throughout 2008. Sales persons continued to have some latitude in offering Project Pricing, although they had to prove to their regional manager that the price was necessary. Sigma's pricing was "all over the map." (RX 1002 at 004-006; Rybacki, Tr. 3579, 3653-3659, *in camera*; Rybacki, Tr. 3696-3697Pais, Tr. 1918-1919).

899. In the second half of 2008, Sigma observed a sharp erosion in market pricing. (RX 116; Pais, Tr. 2129-2131).

900. On November 24, 2008, Mr. Pais stated in an email:

> I am sure Tyler is as guilty of 'starting' the price decline as any of the other two of us. But, generally, their record holds that 'they may not make a price . . . but, will meet one'. Here, the culprit again may be the 'PW or Job' pricing which is still priced as in a different manner and this dual pricing practice could be continuing to harm our overall pricing as it has over the past 3-4 years! For sure, with their inventories climbing due to their commitment to a domestic production at 2 plants til 9/08 (mercifully, they closed Tyler, which is sure to relieve some pressure), Tyler had severe pressure to maintain their market share.

(RX 115 at 002).

2. Alleged "monitoring" and "cheating" documents

901. Mr. Minamyer received weekly activity reports from his divisional sales managers. (Minamyer, Tr. 3199). These weekly activity reports included paragraphs under several different category headings, including "Trends"; "Major Events/Happenings"; "Competition Update and/or New Information"; "Customer Service Issues (Good or Bad)"; and "Successes or issues from your sales people." (*See, e.g.*, CX 1692, CX 1693, CX 1696).

902. A two page weekly activity report was provided by Star divisional sales manager Mr. Prado on March 6, 2008, for the week ending February 29, 2008. One of the four points under "Competition Update and /or New Information" included Mr. Prado's statement: "It is still early, but it doesn't appear that Sigma or Tyler is cheating on the new fitting multipliers being quoted after 2/18." (CX 1692 at 002; Minamyer, Tr. 3199-3201; CX 2526 (Minamyer, Dep. at 201-202) ("Q. And what he was telling you here is that they were adhering to the published multipliers? A. I believe that is what he meant. Q. They weren't cheating by undercutting them? A. It's still early, but it doesn't appear that they are. Right.")).

903. "Cheating" is an internal Star term used to refer to any pricing that was below the published multiplier, including among other things, Project Pricing. (Minamyer, Tr. 3201, 3218-3219, 3222, 3255, 3269-3273).

904. In a Star internal email on March 11, 2008, Mr. Minamyer requested his sales force to advise him of "any issues we had with Sigma on how they are handling the Mult increases. . . . Just give me major things that you [hear] of like: - No shipping restriction on NJ; - No letter out on MA; - Letter out late in XX; - Sales guys saying they didn't know; - Honoring all previously priced jobs in OH; - Etc." Mr. Minamyer requested the report because Star was "trying to figure out if Sigma was taking an increase or not." (CX 0856 at 001-002; Minamyer, Tr. 3198). In the same email, Mr. Minamyer shared information he had acquired concerning Sigma quotes in various areas, as well as quotes by McWane and Star. (CX 856 at 001).

905. In response to Mr. Minamyer's March 11, 2008 email asking for any reports on any issues with Sigma "handling the Mult increases" (F. 904), Star's Southwestern Division Manager, Shaun Smith, responded on March 11, 2008 that: "It seems as though they have been pretty discipline[d] in my Division" and "everyone seems to be playing fair." (CX 0856 at 001). By "playing fair," Mr. Minamyer believed Mr. Smith meant "pricing per their published multiplier letters." (Minamyer, Tr. 3199).

906. On April 2, 2008, Mr. Minamyer reported to Mr. McCutcheon that Star had lost a bid for a project with Winwater (referred to as the "Tulsa Bid Sleeves" project) because Star had not given Winwater special pricing, but "It looks like Sigma did, or at least that's what [Winwater] told us. Sigma may be trying to buy some of our business. They should be very careful if they want to hold this price increase as we will not lose our partners or any more orders because they are not responsible in the market." In referring to Sigma "trying to buy" Star's business, Mr. Minamyer meant Sigma may be trying to undercut Star's price to sell to one of Star's better customers. In calling Sigma "not responsible," Mr. Minamyer was referring to the fact that Sigma was pricing below its published multiplier letters. (Minamyer, Tr. 3204-3207; CX 0044 at 001; RX 697 (McCutcheon, IHT (Vol. 2) at 453-454)).

907. In response to Mr. Minamyer's April 2, 2008 email (F. 906), Mr. McCutcheon asked for additional information. (CX 0044 at 001 ("Please give me more info. Bid date, value, selling price, etc…")).

908. In a weekly activity report dated April 21, 2008 for the week ending April 18, 2008, under the category "Major Events/ Happenings" it was reported, among other things, that HD Supply was seeking price help on an order it was preparing to place with Star for a bid it had won. Mr. Smith, a Star divisional sales manager, stated in response: "You know the gig, ask them why? If they give you proof the other guys are cheating, then we will match!" (CX 1696 at 001). This was consistent with Star's Project Pricing policy at that point in time. (Minamyer, Tr. 3203-3204).

909. On May 6, 2008, Mr. Minamyer in an email to his division managers, with a copy to Mr. McCutcheon, wrote: "We have to keep our focus on the pricing and continue to be diligent. I see it getting a little looser and am concerned that we won't hold this increase. Don't let our competitors[']practices force us to fail. One competitor is being pretty strong and one is being pretty weak on pricing. Continue to have the talks with your customers at the highest level to try to hold pricing. All Mfg's are taking increases so it is not an unfamiliar conversation to them." (CX 0525).

910. In a weekly activity report dated June 30, 2008 for the week ending June 27,2008, under "Major Events/Happenings" Mr. Prado reported, among other things, "Received confirmation that Sigma is selling fittings in Florida below the state number of .25. [T]hey have made some verbal agreements to price certain customers 2 points below the state number. Developed plan to strategically lower committed fitting partners to the same level until further notice." (CX 1693 at 001).

911. In a weekly activity report dated June 30, 2008 for the week ending June 27, 2008, under the heading "Competition Update and/or New Information," Mr. Prado included the statement: "Confirmed that Sigma has been cheating in Florida

with fitting multipliers. Also pretty certain that Tyler is doing the same." (CX 1693 at 002).

912. On August 18, 2008, Mr. Smith sent an email to his sales force, with the subject line "weekly report," which stated in pertinent part:

> We need to stay on the high road, but with our relationships, we should be able to react when necessary. I know it sometimes becomes a difficult discussion, but because of how manufactures/ distributors/contractors have acted over the years with (I need a better price!) it created this spiraling price erosion that needed to stop. It doesn't help that the market is soft, but let's be as diligent as we can gathering the proper data needed if the other suspects are cheating. We will react, just need to make sure it is real.

(CX 1695 at 001; Minamyer, Tr. 3219-3221).

913. On August 25, 2008, Mr. Minamyer wrote an email to his sales force and Mr. McCutcheon, regarding "Pricing in the Market." Mr. Minamyer stated:

> I have noticed that recently we have been seeing more pricing pressure in these forms:
>
> - Ford, Smith Blair, and Romac being very low on multipliers.
> - Sigma getting tricky with special local deals.
> - Tyler has been pretty good but a couple of instances where they don't respect the market price in markets where they get no business and have nothing too lose.
>
> My guidance is:
>
> - Don't let anyone take your JR (or fittings) business on price. Confirm the price and match it to get it back. The JR market may be changing due to all the new players. Watch for Tyler and Bulldog very closely and don't let them, or anyone, in.

> - If it is a customer who will shop the price back to the competitor you need to use good judgment on how and if to match price.
> - Do the same thing to Tyler that they do to you. Maybe it will get back to them and they will stop.
> - Continue to report what's going on.
>
> I know we have been very careful on special pricing and it seems to be working pretty good. But, the competitors are starting to get weak and we can't sit back and let them play games and lose our market share. Be aggressive when it happens.

(CX 0814).

914. On September 4, 2008, Mr. Smith of Star wrote an email regarding "BPU Pricing" and stating with regard to a bid, in part: "Both of these guys would be getting the standard .30 number from us. Is this an old contract price or did it just bid, with or without accy's? We have seen Sigma cheat on larger projects in other parts of the country and have responded accordingly when we see something. As you know, we will always cover you in these situations, just [want] to make sure we don't have a bidding mistake or [Distributors] HD and WW just getting stupid in the market." (CX 1694 at 001).

915. On September 9, 2008, Mr. Minamyer received a report from a Star sales representative regarding HD Omaha:

> Tyler has slid back to a .28 in Omaha per Joe … at HD. Municipal took the Omaha annual bid a month after the price increase below a .30 and called out Tyler I think with the market in NE being soooo [*sic*] bad if we don't protect our partner we may loose [*sic*] them. I know we would like to keep the market up but Tyler and Sigma keep cheating and costing our partners in a baddddd [*sic*] market where they are down substantially already. I think we need to go to a .28 with HD. . . .Let me know, but I think after the beating our partners took last year for us trying to lead the market, we are going to loose [*sic*] market share by continuing the tough stance. Tyler got to where they are by being staunch and arrogant. I don't

> want to be looking back a year from now with a 2% [price] increase and 25% less biz.

(CX 1697; Minamyer, Tr. 3222-3226 ("keep the market up" referred to prices, and "tough stance" refers to Star's effort to not offer Project Prices); *see also* CX 1694 at 001).

916. At the end of a 3-page Star internal email exchange among Mr. McCutcheon, Mr. Minamyer and Mr. Smith on October 22, 2008, regarding "Quote 10707007," and whether to offer a customer a lower multiplier than Sigma had offered Mr. Smith stated: "I'm not sure about the market being already there. . . . I really only think this will affect the Houston market, but I am catching Sigma cheating more and more." (CX 1698).

917. A weekly activity report from Mr. Smith for the week ending October 24, 2008, noted a number of jobs where Star was pricing to compete with prices from Sigma and McWane. A final entry under the heading "Competition," noted "My team is in major attack mode – as reported, we are seeing cheating all over from Sigma – they have been instructed not to lose any orders." (CX 1699).

918. On October 29, 2008, Mr. Minamyer wrote an email to his sales force, with the subject, "Sigma Antics." Mr. Minamyer asked "off the top of your heads, please give me no more than the top five things Sigma does or has done in your division that is out of the market pricing or any weird stuff. Make sure they are legit." As examples, Mr. Minamyer stated, "In New Mexico they keep dropping the fitting number to xx. The salesman says that is because they don't get any share and have nothing to lose" and "The[y] put out a letter in TX and OK announcing a truck load special. Any full trucks get xx points off the s[t]ate mult." (CX 0871).

919. On January 31, 2008, Mr. Tatman of McWane, received a copy of the Star January 30, 2008 email to HD Supply in which Mr. Leider of Star, informed HD Supply it would match McWane's multipliers and would be providing "NO UTILITY PROJECT PRICING NATIONWIDE" (F. 702 (emphasis in original)). Mr. Tatman forwarded the email to Mr. McCullough and Mr. Walton, both of McWane, stating:

> Per the e-mail chain below Star is following the [McWane] Multiplier Maps also effective Feb 18th. Also note comment on NO UTILITY PROJECT PRICING NATION WIDE that was sent to HDS regional reps. The proof will be if they actually hold to what they say.
>
> Note that Star has our actual maps, which isn't a bad thing.
>
> We heard a similar announcement is out from Sigma but we've yet to receive a copy.

(CX 0178 at 001 (emphasis in original); Tatman, Tr. 412-418).

920. Three minutes after receiving Mr. Tatman's email referred to in F. 919, Mr. McCullough forwarded the email to McWane's CEO, Mr. Page, writing that "[t]he first tentative baby steps are encouraging but the proof will be in 'saying no' to customer requests for special pricing." (CX 0178 at 001; Tatman, Tr. 417). Mr. McCullough explained:

> [S]omeone makes the comment, "NO UTILITY PROJECT PRICING NATION WIDE." You know, whereas I read that, and I know that this has never happened. So, regardless of what someone is saying, you know, the proof is in the pudding . . . I'm not certain now, but perhaps it would be that at least they're giving the illusion of there will be no special project pricing, whereas in actuality, there's always [been] project pricing . . . at least they were saying visibly that there's no utility project pricing nation wide . . . . Maybe . . . they would carry through on what they're saying here, and that there would be no project pricing. But I don't know that anyone ever had any real belief that that was going to happen.

(CX 2479 (McCullough, Dep. at 197-199)).

921. On March 10, 2008, Mr. Tatman sent an email to Mr. McCullough and Mr. Walton, regarding "VMA data compared to Tyler/Union YTD sales." Mr. Tatman reported that while year-to-date valve sales were up 81% of 2007, "YTD fitting sales are lagging behind @ 69% of 2007." Mr. Tatman's email continued:

> March 1st was the last published date for Tyler/Union, Sigma and Star to honor any job pricing. Market inputs suggest that both Sigma and Star put out some pretty low numbers in Feb trying to grab incremental tonnage prior to the March 1st date. We on the other hand honored existing job quotes but didn't throw out any new low numbers after the increase was announced. In hindsight this might have been a tactical error given our soft tonnage.
>
> Jerry is getting mixed competitive reports ranging from adherence to published pricing by Sigma and Star to cutting deals and extending terms. I have asked Jerry to work with his team on getting qualified competitive information rather than verbal inputs from branches who could be feeding false information to get us to budge.
>
> I'll nervously wait for the March data to come in, but if we're not seeing a recovery trend towards aligning with the general market we'll have to discuss what options are appropriate.
>
> Even with the reduced production schedule, YTD inventory levels are up nearly 4,000 tons.

(CX 0339; Tatman, Tr. 421-422).

922. On March 10, 2008, Mr. Rona, OEM Manager for Sigma, forwarded to Mr. Pais and others at Sigma, an email from Mr. Tatman at McWane regarding "3"-8" DIWF from Tyler/Union." Mr. Rona reported in his email a number of points from a conversation he had with Mr. Tatman, including matters pertaining to McWane's selling certain Fittings to Sigma. According to the Mr. Rona's email, Mr. Tatman "said he hears that some of the new prices in the market are being compromised with deals. He hopes the market will improve and hopes [sic] do our part." (CX 1124 at 002; Rona, Tr. 1609-1613; CX 2530 (Rona, Dep. at 137)).

923. Mr. Tatman testified that he has no recollection of the conversation referenced in F. 922. (CX 2484 (Tatman, Dep. at 106-107); Tatman, Tr. 422).

924. On August 22, 2008, Mr. Rona sent a Sigma internal email to "OEM5" re "Short talk with Rick Tatman." The email stated:

> Guys,
>
> Rick was upset by the numbers in Florida and California based on what he has seen from us and Star.
>
> He said the .26 and .30 respectively were available from us both with any second thought.
>
> Just FYI

(CX 1149).

925. Mr. Rona recalled nothing about the conversation referenced in F. 924, including whether Mr. Tatman asked him to do anything, or why he used the word "upset." Mr. Tatman also had no recollection of the call with Mr. Rona referred to in Mr. Rona's August 22, 2008 email. (Rona, Tr. 1613; Tatman, Tr. 364).

926. Mr. Rona acknowledged that his August 22, 2008 email (F. 924) does not refer to any buying or selling between McWane and Sigma. (Rona, Tr. 1718).

927. Mr. Rona is not involved in setting prices at Sigma. (Rona, Tr. 1437-1440, 1453-1454).

928. Mr. Rybacki had authority over pricing at Sigma during the relevant period. (Rybacki, Tr. 1096).

3. Economic data

a. Background

929. With the economic decline during 2007, the Fittings industry experienced a period of declining demand, increased price competition resulting in price erosion, and increased costs.

(RX 690 (Rybacki, Dep. at 66-67); Tatman Tr. 263-265; CX 2457).

930. Demand for Fittings was falling beginning in 2007 because of the economic downturn and decreased demand for new housing. Business continued to drop off, particularly by the summer of 2008, when the economic crisis really hit "full steam." (Tatman, Tr. 269-272; Rybacki, Tr. 1104-1105; McCutcheon, Tr. 2654, *in camera*).

931. In August 2008, the housing market declined precipitously, creating additional pricing pressure. (Rybacki, Tr. 1105, 3578 (testifying that "[a]fter the third week of August of 2008, I alerted my team that the demand was starting to weaken" and that is when the "demand for all waterworks products started to get soft"); CX 1651 at 026, *in camera* (graph showing drop in housing starts over the summer of 2008); CX 2531 (Rybacki, Dep. at 134-35, 157-58) ("That's when housing had just stopped and the economy had taken -- in August of 2008, the market, somebody just shut the faucet off."; "[W]e had a big July. I remember we had a big July and good first half of August, and that's when it started to go down. It started to go down mid to late August 2008.")).

932. In late 2007 and into 2008, McWane had excess capacity while demand was declining, and idle plant charges were negatively affecting profitability. (Tatman, Tr. 1036-1037, 1040, *in camera*; CX 2416 at 0015, 0035, *in camera*).

933. Market pricing eroded sharply in the second half of 2008. Mr. McCutcheon of Star described Fittings pricing in the second half of 2008 as "chaotic." (McCutcheon, Tr. 2568; RX 116; Pais, Tr. 2129-2131, 2151; Tatman, Tr. 971-972).

b. Expert analysis

934. Dr. Normann was charged, *inter alia*, with determining whether there was economic evidence consistent with the allegations of the Complaint; specifically, whether there was economic evidence consistent with collusive behavior among McWane, Sigma, and Star, to stabilize and increase prices for Fittings. Based on his review of the evidence and his analysis, Dr.

Normann concluded that there was no economic evidence that the price changes in January or June of 2008 were coordinated, or that there was an agreement to reduce job pricing as would be reflected in a decrease in price variance; that there was economic evidence that contradicted a conclusion that prices were raised anticompetitively in the Fittings market; and that the pattern of sales and inventory contradicts the notion of quantity withholding, as would be needed to effect a price increase. (RX 712A (Normann Rep. at 1-3)).

935. Dr. Normann analyzed whether there was reduced price variation and whether prices were increased, as part of an agreement, as alleged in the Complaint. (RX 712A (Normann Rep. at 2)).

936. Dr. Normann examined, *inter alia*, McWane's multiplier maps associated with the January and June 2008 multiplier changes. Dr. Norman found that McWane's multipliers changed in different directions and by different amounts on a state-by-state basis, and concluded that this pattern is more consistent with competitive, independent decision-making by McWane than with concerted action. Moreover, Dr. Normann found that McWane's published multipliers announced in January and June 2008 actually did not increase in most States, which is inconsistent with the Complaint's allegation that the January and June 2008 price changes were coordinated "price increases." (RX 712A (Normann Rep. at 10, Figure 1); Normann, Tr. 4777-4779).

937. Dr. Normann examined the Suppliers' invoice data, kept in the ordinary course of business and produced by the Suppliers in this case. The invoices record the sales price for the transaction in dollars, which includes any discounts off the published multiplier (*i.e.*, Project Pricing), but does not include additional discounts that may arise from rebates, freight terms, or cash discounts. (Normann, Tr. 4740-4741, 4781).

938. Because the alleged conspiracy in this case involves published multipliers and discounts from published multipliers given through Project Pricing, and there are no allegations involving other discounts, the invoice price is exactly the correct price measure. (Normann, Tr. 4741).

939. To control for product mix when analyzing the Suppliers' invoice data, Dr. Normann created an index of Fittings, consisting of a "basket" of the 24 most common types of Fittings that are sold by McWane, Sigma, and Star, as determined by volume. According to Dr. Normann, any conspiracy to raise Fittings prices would be reflected in the invoice prices for this basket of products. (Normann, Tr. 4783-4785).

940. Dr. Normann found, based on McWane's invoice prices for McWane's portion of the common Fittings basket (F. 939), that McWane's average non-domestic (*i.e.*, open specification) Fittings prices declined over the course of a multi-year period from January 2007 through November 2010, including before, during, and after the period of January 2008 to February 2009. The period of January 2008 to February 2009 is the period that Dr. Normann derived from his review of the Complaint and other materials in the case to encompass the "conspiracy period." (RX 712A (Normann Rep. at 12, Figure 2A); Normann, Tr. 4789, 5780).

941. Dr. Normann's use of a multi-year time series (F. 940) captures a rolling average and thereby captures the potential effect of time lags between the date a price was agreed to with a customer, and the date the order was invoiced and shipped. (Normann, Tr. 5144).

942. For the period from January 2008 through February 2009, Dr. Normann found that McWane's average Fittings prices decreased by [redacted]%, Sigma's average Fittings prices increased by [redacted]%, and Star's average Fittings prices increased by [redacted]%. A price decline by McWane during the same period as price increases by Sigma and Star is inconsistent with a conspiracy to raise prices involving McWane. (RX 712A (Normann Rep. at 13, Figure 2B), *in camera*; Normann, Tr. 4789).

943. During a period beginning February 1, 2008 and ending October 1, 2008 McWane's Fittings prices increased by [redacted]%; Sigma's increased by [redacted]%; and Star's increased by [redacted]%. (Normann, Tr. 5776-5782, *in camera*

(as corrected by Nov. 7, 2012 Joint Stipulation Regarding Trial Transcript Errata)).

944. Even when there is evidence of price increases, it is important in a conspiracy case to look at input costs to determine if there are competitive explanations for the price increases, such as needing to keep up with rising costs. (Normann, Tr. 4779-4780).

945. Dr. Normann measured cost changes through an index he created of metal (such as scrap and pig iron) and energy costs. Metal costs, such as scrap and pig iron, and energy costs are variable costs that constitute the primary cost inputs in the manufacture of Fittings. These costs comprise about 30 percent of the total cost of McWane's production of ductile iron pipe fittings. (Normann, Tr. 4779-4780, 4792).

946. The cost data for Dr. Normann's analysis (F. 949-951) came from McWane's "blue books." (Normann, Tr. 4792-2793).

947. "Blue books" are prepared by McWane's controller's office, are provided to Mr. McCullough and other executives within the company, and are important financial documents used in running the waterworks business. (Tatman, Tr. 497-498, 844-845, *in camera*; *see e.g.*, CX 2416, *in camera*).

948. Costs increased earlier and were more pronounced for Sigma and Star, compared to McWane, because of McWane's domestic production. Inflation started earlier in China. (Normann, Tr. 4793).

949. The metal and energy cost input line on Figure 2B of Dr. Normann's report is based upon McWane's actual metal and energy cost data, but because metal and energy costs represent input costs that go into all fittings sold into the open-specification market, McWane's input cost data is a good proxy for input costs incurred by Sigma and Star as well. (Normann, Tr. 4793-4794).

950. The metal and energy cost input line on Figure 2B, of Dr. Normann's Report, included McWane's metal and energy cost figures for its domestic product sold into open specification jobs

and for its imported product (*i.e.*, McWane's "blended" Fittings). (Normann, Tr. 4792-4794).

951. Metal and energy input costs went up 40% to 50% during 2008, and were up 70% to 80% from 2007, which is a dramatic increase. (Normann, Tr. 4794-4795; RX 712A (Normann Rep. at 13, Figure 2B), *in camera*).

952. In a competitive environment, the cost increases referred to in F. 951 would result in significant pressure to increase price. In a competitive environment, it would be expected to see some changes in price because of increases in cost. Thus, when examining whether price increases are indicative of collusion, it is necessary to control for the underlying costs. (Normann, Tr. 4746-4749, 4795-4796).

953. Dr. Normann's analysis showed declining prices for McWane and modest price increases for Sigma and Star during the period from January 2008 through February 2009. Dr. Normann did not find the price increases to be significantly more than the cost increases in the same time period. (RX 712A (Normann Rep. at 13, Figure 2B), *in camera*; Normann, Tr. 4746-4749).

954. Dr. Normann's analysis concluded that during the January 2008 through February 2009 period the Suppliers' price movements were not in parallel and that the Suppliers' prices moved independently of one another. (Normann, Tr. 4747-4748; RX 712A (Normann Rep. at 12-13, and Figure 2B), *in camera*).

955. Dr. Normann's data analysis shows that from the period of mid-2007 through 2008 and into 2009, McWane's non-domestic Fittings prices declined while its costs increased. (Normann, Tr. 4791-4792).

956. The decline in McWane's pricing (F. 940), given the rise in input costs (F. 951), is inconsistent with a conspiracy and consistent with independent pricing behavior. (Norman Tr. 4746-4749; RX 712A (Norman Rep. at 12-13 and Figure 2B), *in camera*).

957. A price increase for imported Fittings would show up as an increase in the price of Fittings sold into open specification jobs relative to domestic-only jobs. Over a multi-year period, including the period from January 2008 through February 2009, the price of open specification Fittings declined relative to the price of domestic-only Fittings, which is also inconsistent with the alleged conspiracy. (Normann, Tr. 4748, 4801-4804; RX 712A (Normann Rep. at 14-15 and Figure 3), *in camera*).

958. Dr. Normann looked at the Suppliers' inventory data to see if there was any evidence of withholding, which would facilitate a cartel's ability to raise prices. He found no evidence of withholding, and instead found an increase in output. (Normann, Tr. 4748-4749; 4805-4808; RX 712A (Normann Rep. at 19-21 and Figures 5, 6), *in camera*).

959. Dr. Normann's findings, conclusions, and opinions regarding price movements in the Fittings market during 2008 constitute substantial, probative, economic evidence that is not consistent with an inference of a conspiracy among McWane, Sigma, and Star, to raise and stabilize prices in the Fittings market. (F. 934-958; *see generally* RX 712A (Normann Rep.) at 1-21).

c. Other financial evidence

i. McWane

960. Mr. Tatman's 2008 second quarter Executive Report showed that the gross invoice price-per-ton for 2007 for "blended" Fittings (*i.e.*, the Fittings sold for open source jobs, including imported or domestically produced Fittings) was [redacted] per ton, and the gross invoice price-per-ton for the first quarter of 2008 was [redacted] per ton; April 2008 was [redacted] per ton; May 2008 was [redacted] per ton; and June 2008 was [redacted] per ton. (Tatman, Tr. 546-548; CX 1562 at 002).

961. McWane's prices for non-domestic Fittings in 2008 did not keep pace with the level of inflation in McWane's costs. (Tatman, Tr. 879-881, 971 ("Q. And you say you're lagging inflation due to competitive actions, and what did you mean by

that? A. Pricing. We couldn't get enough price out there in what we were selling things for to cover our rising cost.")).

962. McWane's average price-per-ton for non-domestic Fittings for the year 2008 declined relative to inflation, because its non-domestic production costs rose by roughly [redacted]% , while price-per-ton for the year increased only by [redacted]% over 2007. (Tatman, Tr. 859-862, *in camera*, CX 2416 at 035, *in camera*).

963. Mr. Tatman's April 29, 2008 General Manager's Meeting presentation included a graph showing a 50% increase in profit for the period from January through April 2008, on a 14% decline in sales volume. The graph does not attribute this to an increase in Fittings prices and states: "inventory write-up & blended-mix shift overriding volume impact." (CX 2047 at 004).

964. McWane's gross profit margin on non-domestically produced Fittings fell from [redacted], which Mr. Tatman attributed in part to job pricing. (CX 2416 at 043, *in camera*; Tatman, Tr. 991-994, *in camera*).

965. McWane's average blended Fittings price (the price of imported or domestic Fittings sold for open source jobs) for its 24 most commonly sold Fittings products declined throughout 2008, 2009, and 2010. (Normann, Tr. 4791-4797).

966. An internal McWane "variance analysis" report comparing 2008 sales and profit figures to 2007 includes a line item for "Sell price – Prior" and "Sell price – Current" for domestic utility fittings and non-domestic utility fittings, on a per-ton basis. Non-domestic refers to imports shipped for an open or import specification. Domestic refers to domestic fittings shipped. Price-per-ton refers to aggregate dollars per ton of product sold. Variance analyses are prepared by McWane's controller. The data in McWane's variance analyses also appear in McWane's "blue book" sales records. (CX 2126 at 004, *in camera*; CX 1569, *in camera*; Tatman, Tr. 818-819, 823-824, 834, 844-846, *in camera*).

967. The McWane variance analysis referred to in F. 966, comparing sales and profit figures for 2008 to 2007, stated with

regard to Utility Fittings: "Utility Fittings have contributed an additional [redacted] of gross profits over the prior year. This is in spite of a [redacted]% reduction in volume. Pricing gains, primarily on domestic product, have contributed an additional [redacted] of gross profits. Increased product costs of both domestic and non-domestic product have eroded profits by [redacted]. Although volume is down substantially, increased sales of the more profitable non-domestic product have reduced the overall volume loss to [redacted]." . . . Idle Plant Expenses of [redacted] were incurred in 2008, which were [redacted] less than 2007. (CX 2126 at 006, *in camera*; Tatman, Tr. 818-819, *in camera*).

968. The gross profits figures for fittings reflected in the variance analysis referred to in F. 967 do not include idle plant costs. "Idle plant" costs are the fixed overhead costs associated with running a Fittings manufacturing facility when the plant is not running on all days of the week. McWane reports this cost as a separate line item on its income statements called "idle plant." (Tatman, Tr. 432-433, 832).

969. McWane's variance analysis report comparing 2008 sales and profit figures to 2007 (F. 967) reflects an increase in non-domestic Fittings prices-per-ton between 2007 and 2008 from [redacted] per ton, and an increase in Domestic Fittings prices-per-ton between 2007 and 2008 from [redacted] per ton. (CX 2126 at 004, *in camera*; Tatman, Tr. 834, *in camera*; *see also* CX 2416 at 043, *in camera* (McWane blue book for year end 2008)).

970. Specifically, McWane's average price-per ton for non-domestic Fittings were as follows: [redacted] in January 2008; [redacted] in February 2008; [redacted] in March 2008; [redacted] in April 2008; [redacted] in May 2008; [redacted] in June 2008; [redacted] in July 2008; [redacted] in August 2008; [redacted] in September 2008; [redacted] in October 2008; [redacted] in November 2008; and [redacted] in December 2008}. (CX 2416 at 043, *in camera*; Tatman, Tr. 846-847, *in camera*).

971. McWane's variance analysis reports stating price-per-ton do not break out fittings by size, or by where the fittings were sold. As Mr. Tatman explained, the price-per-ton figures reflect:

> [T]hat's a big ball of iron that you sold that quarter. It doesn't say what the mix is. We just said before that -- remember before we restructured the list price. There's a huge variance, 250 percent, between the dollar-per-ton list price on a large-diameter fitting versus a small-diameter fitting[.] . . . [A]nd this also doesn't say what area this was closed in. If you look at the multiplier map, . . . the Pacific Northwest is 30 or 40 percent higher in price than what is Florida here. So when you look at that variance, you have to understand what's in there. The year before, did you happen to sell more small diameter versus large diameter? That's going to swing it.
>
> Did you happen to sell -- the year before, did you have heavy sales in Florida and California and Arizona because those were the hot markets, and they were hot markets because they were growing in housing, and housing is small-diameter fittings? What that does on a dollar-per-ton basis, that drives that number down. Now you move forward here. If Arizona and California and Florida housing markets are falling off and you're selling more product in the Pacific Northwest, it's not a price increase with respect to the Pacific Northwest, but in aggregate it's a price increase. Are you now selling more large-diameter product because the housing market has tanked and you're selling into municipalities for lines? That's going to switch it.
>
> So you can't jump to the inference that you have based on this simple number. And this is the exact thing in my executive summary dashboard with that graph that you looked at that we walked through. It's the exact same reference. You have to dig down about three levels deeper and take a look at did a 6" MJ fitting in Indiana over this period, what happened to time, what happened to price, if you really want to understand whether price was going up or whether it was going down. You just don't have enough granularity in what you see here to make that judgment.
>
> . . .

> It -- all it reflects is the big ball of iron that we sold the year prior and the big ball of iron we sold here went up -- I'll agree. It is what it is, but it doesn't give you any insights as to what happened and why.

(Tatman, Tr. 828-831).

972. Dr. Normann opined that price-per-ton is not a proper measure of price increases because selling a higher volume of higher priced items will create the illusion of an overall price increase. (Normann, Tr. 4782-4783).

973. A draft internal presentation prepared by Mr. Tatman dated October 20, 2008 included a chart with McWane's gross profitability stated as a percentage, for each year from 1999 through 2007, and for the first nine months of 2008. According to this document, the gross profitability of McWane's fittings business on a percentage basis for the first nine months of 2008 was higher than for the full year figures for each year from 1999 through 2007. (CX 0120 at 006; Tatman, Tr. 840-841).

974. Mr. Tatman explained the higher gross profitability in the first nine months of 2008 in comparison to prior years, as shown on the draft document described in F. 973, as follows:

> [W]hy is gross profit negative in 2001, 2002, even 2003[?] [B]ecause what did we have there, we had only domestic production. We are trying to fight import prices with only domestic production. What happens when you do that, you have poor profitability.
>
> Starting in about 2004 I believe is when we start sourcing product from overseas, started bringing in product. Sigma helped us out with that, so we had the ability now, rather than using a hundred percent domestic product to serve both the domestic-only spec market and the import market, we started having the ability to source product just like our competitors and sell that lower-cost Chinese product into open specs. [Mr. Tatman's predecessor] David Green starts overproducing the plant, so you get an impact that helps you there. He's running

> up the plants in 2005-2006. He's overproducing compared to what demand is. Inventory levels go up. But when you do that, your gross margins get better because your manufacturing costs go down. I show up in 2007. We got an inventory problem. . . . In 2007 we had heavy substitution of domestic product in blended sales.
>
> Getting the inventory down, being able to run the plants, that's going to drive your gross margin down. In the first nine months of 2008, I suspect if you look at the records and I think if you go through my analysis of the thing, I'll bet you our substitution rate for the first nine thousand -- first nine months of 2008 substituting domestic product against import specs is at a lower rate than it was in 2008, and that's what drives your gross margin up.

(Tatman, Tr. 839-840).

975. Because of the higher cost of producing domestic fittings, providing domestic Fittings for jobs with open specifications was like "wrapping a dollar bill around that fitting" because it is shipped against an import price. Where a specification was open, and therefore did not require domestic product, McWane "would ship a portion of that [order] with import fittings, and . . . partial domestic product," to reduce inventory and keep the domestic plants running. This is the basis for McWane's use of the term "blended" fittings. (Tatman, Tr. 274-275).

976. McWane's variance analysis report comparing the first nine months of 2009 to the prior period stated with regard to fittings: "Non-Domestic Utility Fittings have experienced a [redacted]% drop in volume resulting in a [redacted] of gross profits. Increased costs reduced profits by [redacted]. . . . pricing has deteriorated over the past two months. On a year-to-date basis, pricing reductions have lowered profits by [redacted] with [redacted] of that coming in October. Domestic Utility Fittings have experienced a [redacted]% drop in volume resulting in a [redacted] of gross profits. However, improved pricing and lower manufacturing costs have offset this and enabled domestic fittings to show a [redacted] improvement from the prior year. Additionally, in October, only [redacted] of the domestic fittings

were substituted and sold at non-domestic prices, vs. the year-to-date-substitution average of [redacted]%. . . . Idle Plant Expenses have been reduced by [redacted] due to the closing of the Tyler South plant." (CX 2153 at 006).

ii. Star

977. Star made [redacted] million in gross profit on its sales of 3" to 24" diameter Fittings in January 2008, representing a gross margin of [redacted]%. (McCutcheon, Tr. 2500-2501, *in camera*; CX 0042, *in camera*).

978. Star's Fittings gross margin per pound can be calculated by subtracting its per pound cost of goods sold from its per pound realization. In January 2008, Star's gross margin per pound for all fittings sold was [redacted]. (McCutcheon, Tr. 2657-2658, *in camera*; CX 2470 at 004, *in camera*).

979. In the first four months of 2008, Star's gross profits in the 3" to 24" diameter Fittings segment were at [redacted]%, approximately the same as the same period in 2007. (McCutcheon, Tr. 2501-2502, *in camera*; CX 0528 at 003, *in camera*).

980. In 2008, Star had a gross profit margin of approximately [redacted]%, on all fittings. (McCutcheon, Tr. 2653, *in camera*; CX 2470 at 002, *in camera*).

981. Star's gross profit margins as to all fittings, for each month of 2008, were as follows: [redacted] (January), [redacted] (February), [redacted] (March), [redacted] (April), [redacted] (May), [redacted] (June), [redacted] (July), [redacted] (August), [redacted] (September), [redacted] (October), [redacted] (November), and [redacted] (December)}. (McCutcheon, Tr. 2653, *in camera*; CX 2470 at 002, *in camera*).

982. Star's Fittings net profits decreased in the fourth quarter of 2008 as a result of reduced sales caused by the global financial crisis and the seasonal nature of the Fittings business, with relatively few sales occurring in December. (McCutcheon, Tr. 2656, *in camera*; CX 2470 at 004, *in camera*).

983. Star uses a per pound realization calculation to measure the health of its fittings business. Over the course of 2008, Star's per pound realization, as to all of Star's fittings sales, increased. Star's per pound realization for each month of 2008 were as follows: [redacted] (January), [redacted] (February), [redacted] (March), [redacted] (April), [redacted] (May), [redacted] (June), [redacted] (July), [redacted] (August), [redacted] (September), [redacted] (October), [redacted] (November), and [redacted] (December). (McCutcheon, Tr. 2656-2657, *in camera*; CX 2470 at 004, *in camera*).

984. In August 2008, Star's gross margin per pound for all its fittings was [redacted], approximately [redacted]% higher than in January 2008. (McCutcheon, Tr. 2657-2658, *in camera*; CX 2470 at 004, *in camera*).

iii. Sigma

985. According to data collected and provided by Sigma in connection with a "broad estimate" appraisal of Sigma's orderly liquidation value, Sigma's average selling price (per metric ton) for its "group A" products, which includes all fittings sold by Sigma rose [redacted]% from 2007 into 2008, from [redacted] for 2007 to [redacted] for 2008 through July. By December 2008 the year-to-date price had fallen approximately [redacted]% from its height in July 2008 to [redacted] per metric ton. (CX 0974 at 003, 009; Pais, Tr. 2006-2008; *see also* Pais, Tr. 2122-2123).

986. Sigma's average "effective" multipliers (the average multipliers at which products were actually sold) ("actual transactional multiplier") for small diameter mechanical joint Fittings in its southeast (ALX) region increased from [redacted] in February 2008 to [redacted] in October 2008. (Rybacki, Tr. 3599-3601, *in camera*; CX 1002 at 004, in *camera*).

987. Sigma's average actual transactional multipliers for all Group-A Fittings (*i.e.*, "standard," "fast-moving" items (Rybacki, Tr. 3600) in its southeast (ALX) region increased from [redacted] in February 2008 to [redacted] in October 2008). (Rybacki, Tr. 3652, 3737, *in camera*; CX 1002 at 004, *in camera*).

988. Sigma's average actual transactional multipliers for small diameter mechanical joint Fittings in its midwest (CHI) region increased from [redacted] in February 2008 to [redacted] in October 2008. (CX 1002 at 004, *in camera*; Rybacki, Tr. 3601, *in camera*).

989. Sigma's average actual transactional multipliers for all Group-A Fittings in its midwest (CHI) region increased from [redacted] in February 2008 to [redacted] in October 2008. (CX 1002 at 004, *in camera*; Rybacki, Tr. 3737, *in camera*).

990. Sigma's average actual transactional multipliers for small diameter mechanical joint Fittings in its southwest (HTN) region increased from [redacted] in February 2008 to [redacted] in October 2008, with a peak of [redacted] in August 2008. (CX 1002 at 004, *in camera*; Rybacki, Tr. 3602, *in camera*).

991. Sigma's average actual transactional multipliers for all Group-A Fittings in its southwest (HTN) region increased from [redacted] in February 2008 to [redacted] in October 2008, with a peak of [redacted] in August 2008. (CX 1002 at 004, *in camera*; Rybacki, Tr. 3738, *in camera*).

992. Sigma's average actual transactional multipliers for small diameter mechanical joint Fittings in its western (ONT) region increased from [redacted] in February 2008 to [redacted] in October 2008. (CX 1002 at 004, *in camera*; Rybacki, Tr. 3602-3603, *in camera*).

993. Sigma's average actual transactional multipliers for all Group-A Fittings in its western (ONT) region increased from [redacted] in February 2008 to [redacted] in October 2008}. (CX 1002 at 004, *in camera*; Rybacki, Tr. 3739, *in camera*).

994. The transactional multipliers shown by CX 1002 (F. 986-994) reflect only average transactional multipliers; the actual day-to-day multipliers differed "a lot" from region-to-region, product-to-product, day-to-day. (Rybacki, Tr. 3656-3658, *in camera*).

H. McWane's Spring 2009 List Price Changes

995. In a letter to its customers dated April 13, 2009, McWane announced that it would begin using a new price list, to be effective May 1, 2009 ("April 13, 2009 Customer Letter"). The April 13, 2009 Customer Letter stated that the price list would be made available on McWane's website, or if the customer preferred, a hard copy of the new lists would be made available. (CX 0569 at 002).

996. The cost of printing a new price list is expensive, with a cost of roughly $30,000. (Tatman, Tr. 257; RX 644 (Tatman, Dep. at 45-46); Rybacki, Tr. 3542).

997. McWane's announced list price changes (F. 995) resulted in average Fittings list price changes as follows:

a. (3" - 12") fittings up 7.5%
b. (14" - 24") fittings down 16.6%
c. (30" - 48") fittings down 31.4%

(CX 1563; Tatman, Tr. 279-280; Pais, Tr. 2011).

998. The DIFRA data through December 2008 showed that McWane's market share was strongest in the 3"-12" Fittings segment, and weaker in the 14"-24" and over 24" segments. McWane's restructured prices went up in the 3"-12" segment and went down in the other segments. (Tatman, Tr. 594; CX 0656).

999. Prior to McWane's April 13, 2009 Customer Letter, Mr. Tatman had conducted a product weight analysis to determine McWane's dollars per pound in various product categories. (Tatman, Tr. 976).

1000. Mr. Tatman did not share the results of his product weight analysis (F. 999) with Star or Sigma. (Tatman, Tr. 976-977).

1001. McWane's list price restructuring would increase prices for small diameter Fittings (where McWane's market share was highest) and would lower prices for medium and large diameter Fittings (where McWane had little or no market share

and Sigma and Star were stronger). The "net effect" across all Fittings size ranges was "near zero." (CX 0569 at 001-002; CX 1669; CX 1563; Tatman, Tr. 595-597).

1002. McWane designed its new price list to be revenue neutral across all Fittings size ranges. McWane restructured its price list to (1) realign its prices among different Fittings size ranges in order to better align McWane's prices with its production costs; (2) squeeze its competitors' margins and give less "wiggle room" to its competitors for Project Pricing on larger diameter Fittings, where Star and Sigma had significantly larger market shares; and (3) attempt to compress the range between published pricing and actual market pricing, and thereby get McWane better visibility of pricing. (CX 0171 at 001-002; Tatman, Tr. 595).

1003. The purpose of McWane's 2009 list price restructuring was to try to win back market share that it had been losing to Star and Sigma and to compete in the segments of the market where Sigma and Star were strongest. (Tatman, Tr. 972-975; CX 569; McCutcheon, Tr. 2584-2585; CX 532).

1004. McWane did not consult with Star or Sigma before restructuring its list prices in 2009. (Tatman, Tr. 978).

1005. On or about April 23, 2009, McWane learned that Star had sent a customer letter stating that it would change its price list, effective May 19, 2009, and that the new price list would be available on Star's website "shortly." (CX 2349).

1006. Star had internally decided to follow McWane's new price list shortly after learning of McWane's new price list. (McCutcheon, Tr. 2462).

1007. Sigma received word of McWane's price restructuring on or about April 15, 2009. (CX 0989 at 003, 005; Rybacki, Tr. 3581-3583).

1008. Sigma determined that McWane's price cut in larger Fittings (F. 997) was designed to hit Sigma and Star in products

where they performed strongly. (CX 2531 (Rybacki, Dep. at 197-198); CX 0985).

1009. After learning about McWane's new price list, Sigma undertook an analysis and determined that McWane's new price list would have a fairly drastic impact upon Sigma's bottom line. Mr. Pais considered Sigma's options and perceived only two possible options – either follow McWane's published prices as it normally did, or try to hold on to the previous prices. (Pais, Tr. 2011-2012).

1010. Sigma was upset about McWane's price restructuring. Mr. Rybacki discussed with Mr. McCutcheon of Star the possibility of suing McWane for predatory pricing. (Rybacki, Tr. 3580-3581, 3719).

1011. Sigma wanted to stay with the prior price list and tried to keep to its existing price list in hopes that McWane would rescind its new price list. On April 27, 2009, Sigma sent a letter to its customers announcing that Sigma planned to continue to use its existing price list for Fittings. (CX 1454; Pais, Tr. 2012, 2022-2024; Rybacki, Tr. 3587-3588).

1012. Mr. Pais of Sigma met with Mr. McCullough of McWane on or about April 29, 2009 regarding whether McWane would sell private-label, domestically-manufactured Fittings to Sigma following ARRA's enactment. (Pais, Tr. 1744-1745; 1756-1757; RX 639 (McCullough, Dep. at 61-64); RX 687 (Pais, Dep. at 188-189)).

1013. Mr. Pais denied that he discussed McWane's new price list at the meeting referred to in F. 1012. Mr. McCullough recalled only discussing Mr. Pais' desire to buy private label Fittings from McWane, and nothing else. (Pais, Tr. 2028-2029; RX 639 (McCullough, Dep. at 61-63)).

1014. Mr. Pais of Sigma met with Mr. Page of McWane in Birmingham on or about May 1, 2009 with regard to the possibility of Sigma selling McWane's Domestic Fittings. Mr. Pais denied discussing McWane's list price restructuring or Sigma's reaction to it. (Pais, Tr. 2035; *see* RX 642 (Page, Dep. at

117-124 (Mr. Pais made various proposals for joint ventures with McWane over the years)).

1015. After Sigma sent out its customer letter stating that Sigma was staying with its prior price list (F. 1011), McWane did not know whether Star would follow McWane's new price list or whether Star would retract its customer letter announcing a new price list and stay at the old price list, with Sigma. In an internal email dated April 27, 2009 to Mr. McCullough and Mr. Walton, Mr. Tatman wrote: "Note that Star announced late last week that they would have a new List Price effective May 19th. It will be interesting to see what they do in light of Sigma's announcement." (CX 0651 at 001; Tatman, Tr. 604-607; *see also* CX 1180; CX 2349 (Mr. Tatman advised Mr. Walton in an internal email that he was assuming Star's new price list announced April 23, 2009 would follow McWane's)).

1016. In late April or early May 2009, Mr. Pais of Sigma conveyed an impression to Mr. McCutcheon of Star that McWane might change its mind about changing the price list, as McWane had announced. Mr. McCutcheon advised Mr. Pais that Star had decided to follow McWane's price list, because McWane was the market leader and that is what Star's customers require. (CX 2539 (McCutcheon, Dep. at 229-231), *in camera*).

1017. The impression that Mr. Pais of Sigma gave Mr. McCutcheon of Star McWane might change its mind about changing the price list created some doubt in Mr. McCutcheon's mind as to whether McWane would stick with its previously announced new price list, and Mr. McCutcheon "wanted to make sure before [Star] moved ahead and printed all these price lists." At some point in the late April or early May 2009 time period, Mr. McCutcheon decided to call Mr. Tatman to "make sure" McWane was going to stick with McWane's previously announced new price list. (CX 2539 (McCutcheon, Dep. at 231), *in camera*).

1018. Mr. McCutcheon described his telephone conversation he had with Mr. Tatman, referred to in F. 1017, as follows:

> It cost[s] us about $25,000 to print a new price list. So, I picked up the phone and I called Rick Tatman. And I said, **I'm only going to ask you one question, are you guys going to come out with a new price list, because I'm getting ready to approve it and spend $25,000 to do it.** And he said, we absolutely are, and he says, I'm so sure that I'll pay the $25,000 if we don't. And I said, I appreciate that, nice talking to you, and hung up the phone.

(CX 2538 (McCutcheon, IHT (Vol. 2) at 257-258, *in camera* (emphasis added); RX 698 (McCutcheon, Dep. at 232-234)).

1019. Mr. Tatman testified that he has no recollection of the telephone call with Mr. McCutcheon, referred to in F. 1018. (CX 2484 (Tatman, Dep. at 179-180); Tatman, Tr. 610).

1020. On the morning of April 28, 2009, Mr. Tatman sent an internal email to Mr. Walton and Mr. McCullough regarding Sigma's April 27, 2009 customer letter announcing Sigma was staying with its existing price list (F. 1011). In response to Mr. Walton's request for Mr. Tatman's recommendation as to McWane's strategy going forward, Mr. Tatman recommended staying the course for a variety of reasons, including that it "goes against what the importers want." Mr. Tatman also advised that Star had put out a letter stating they would have a new list price, effective May 19 and that it would be posted to Star's website "shortly" (*see* F. 1005). Referring to Star as a "wild card," Mr. Tatman explained: "We assumed given the language and timing they would be following our List Price, but they very well may post their own List Price as an act of defiance. Star and Sigma don't like each other but they will band together against the common enemy so there is now some probability that Star may change direction and retract their list price change." Later in the day in response to Mr. McCullough's request for a conference call, Mr. Tatman replied: We can discuss in more detail tomorrow, but I am now highly confident that Star will follow our List Price." (CX 1180 at 001-002).

1021. On April 30, 2009, in a McWane internal email exchange between Mr. Jansen and Mr. Tatman, Mr. Jansen advised Mr. Tatman that he had heard conflicting information from the field about whether Star was having new list prices. Mr.

Tatman replied that he had heard from a Mr. Fielding (a customer), that Star was following McWane's new price list. Mr. Tatman concluded: "I think it will be mid next week until the dust settles. If they stick with the old List . . . the[n] we should sell alot in the Northwest." (CX 3027).

1022. On May 1, 2009, Mr. Minamyer of Star sent an internal email to Star's division managers (copying Mr. McCutcheon of Star), setting out an implementation plan for Star to match McWane's new prices. (CX 0890; McCutcheon, Tr. 2464).

1023. In a customer letter dated May 4, 2009, Star announced a new price list for Fittings, as well as new multipliers, to be effective May 12, 2009. The letter stated among other things that the new price list would be made available on Star's website "shortly," and that hard copies would be distributed upon request. Star adopted Fittings list prices and multipliers that were substantially identical to McWane's. (RX 620 at 001-002; CX 2358; CX 2359).

1024. On May 11, 2009, Sigma sent letters to its customers announcing that it would adopt McWane's restructured list prices and multipliers. (CX 1060 at 001, 002; Rybacki, Tr. 3588, 3591).

1025. McWane kept its 2009 list price reductions for medium and large diameter Fittings in place. (Rybacki, Tr. 3664-3665, *in camera*; RX 242 at 004, *in camera*; Pais, Tr. 2046).

I. Monopoly Power

1. Percentage of the Fittings market that is Domestic Fittings

1026. In 2003, Buy American preference provisions applied to 10% to 20% of all ductile iron fittings shipments in the United States. (RDX 012 at 033) (U.S. International Trade Commission report on Certain Ductile Iron Waterworks Fittings From China, Dec. 2003; ITC's finding based on testimony of McWane (the petitioner in the ITC matter, *see* RDX 012 at 009) and Sigma)).

1027. "Domestic-only spec[ification]s have done nothing but erode over time." (Tatman, Tr. 280-281). HD Supply observed

that imports had been taking market share from domestics consistently. (RX 673 (Webb, Dep. at 23)).

1028. Less than approximately 5% of municipalities in Illinois Meter's service area have domestic-only specifications today. (Sheley, Tr. 3447). In the view of Illinois Meter, in the absence of a strong union and municipal push for domestic-only specifications, fewer municipalities require domestic-only Fittings. (RX 674 (Sheley, IHT at 71-72)).

1029. Prior to the passage of ARRA in 2009, domestic-only Fittings projects comprised approximately 15% to 20% of the overall Fittings market. (CX 2260-A (Schumann Rep. at 15); *see also* Tatman, Tr. 236 (15% to 18%); McCutcheon, Tr. 2279-2280 (Star estimated 15% to 20%); CX 2535 (Bhutada, Dep. at 11), *in camera* (approximately 20%); CX 2501 (Prescott, IHT at 41) (20% of customers were "a hundred percent domestic"); Webb, Tr. 2732).

1030. Respondent's expert, Dr. Normann, estimates that Domestic-only Fittings projects grew from 20% of Fittings sales in 2009 to 28% in 2010. (RX 712A (Normann Rep. at 26, 40 fig. 7, 12), *in camera*; Normann, Tr. 5685-5686), *in camera*).

1031. Following the end of ARRA funding for waterworks projects in 2011 (F. 1033-1036), the demand for Domestic Fittings reverted back to where it had been before the ARRA period, approximately 15% to 20% of the overall Fittings market. (Schumann, Tr. 4632; RX 712A (Normann Rep. at 26, 40 fig. 7, 12 (20% in 2011), *in camera*)). *See also* Schumann, Tr. 4632 (total tons of Domestic Fittings dropped in half in 2011 from 2010 because ARRA ended).

2. The impact of ARRA on the Domestics Fittings Market

1032. According to the EPA publication "Implementation of the American Recovery and Reinvestment Act of 2009," all ARRA funded projects were to be under contract by February 2010. As a result, Dr. Normann used March 2009 to February 2010 as "the ARRA period." (RX 712A (Normann Rep. at 40-41)). Industry participants use the term "the ARRA period" to refer to sales made through 2010. F. 1035-1036.

1033. The total number of waterworks projects that were built, repaired, or otherwise commissioned in the United States increased during the period that ARRA funding was available. (Joint Stipulations of Fact, JX0001 ¶ 22).

1034. Distributors' sales of Domestic Fittings increased during the period when ARRA funding was available. (CX 2502 (Prescott, Dep. at 89); RX 663 (Thees, Dep. at 54-55); CX 2492 (Johnson, Dep. at 73-75)).

1035. Market participants felt the majority of the impact of ARRA and its resulting increase in the number of Domestic Fittings sales in 2010. (Tatman, Tr. 1003, *in camera*; Sheley, Tr. 3402 ("Q. Are you still bidding on ARRA jobs today? A. No. Q. When did you see those jobs stop coming through? A. Mid to late 2010."); CX 2502 (Prescott, Dep. at 90)).

1036. While ARRA-funded jobs were primarily serviced during the 2010 calendar year, there were some projects that continued into 2011. (McCutcheon, Tr. 2614; Supp. Response to RFA at ¶ 8 (McWane competed for sales of Domestic Fittings for use in ARRA projects after February 2010); CX 2500 (Swalley, Dep. at 60-61) (While ARRA expired in February 2010, there were still ongoing, unfinished projects that are using ARRA funds)).

1037. ARRA had only a short-term impact on Domestic Fittings, as testified to by each of the suppliers of Fittings:

- "ARRA was a blip in the map. Demand went up for about a six-month period, and then it evaporated as soon as it came." (McWane, Tatman, Tr. 281).

- "For domestic fittings specifically associated with ARRA, we knew that it was not forever." (Sigma, Rona, Tr. 1671).

- "By the definition of that law and the scope, we knew it was going to be a short-term impact." (Sigma, Pais, Tr. 1738).

- ARRA "had a limited life." (U.S. Pipe, Morton, Tr. 2888).

- By fall of 2010, bidding on ARRA jobs had ceased. (Electrosteel, RX 659 (Swalley, Dep. at 158)).

- ARRA funded only "a finite amount of jobs." (Backman Foundry, RX 648 (Backman, Dep. at 109-110)).

1038. ARRA had only a short-term impact on Domestic Fittings, as testified to by each of the Distributors of Fittings:

- ARRA's impact on demand for Domestic Fittings was "mild, at best." (HD Supply, RX 673 (Webb, Dep. at 29); Webb, Tr. 2731-2732) (ARRA's impact was "very minimal and mostly played out in 2009 and 2010").

- ARRA "had a small effect" on sales of Fittings. (Illinois Meter, Sheley, Tr. 3446; RX 674 (Sheley, IHT at 74-75) ("[I]n reality, I don't believe that's [ARRA's] impacted our business at all.").

- ARRA's impact was "minimal." (Dana Kepner, RX 652 (Johnson, Dep. at 30)).

- ARRA did not have much impact on Fittings sales. (WinWholesale, RX 705 (Gibbs, Dep. at 23, 106)).

1039. Given ARRA's limited effect, former Domestic Fittings manufacturers and specialty Domestic Fittings manufacturers did not believe that ARRA made it worthwhile for them to expand or return to a full line of Domestic Fittings production. (Morton, Tr. 2875 (Q: "And despite this history and the fact that it owned patterns in Mexico, it decided in the spring of '09 that it did not make financial sense to try to get back in the domestic market; correct?" … A: "That's correct."); RX 646 (Burns, Dep. at 30-31, 35-36, 176-177); RX 667 (Kuhrts, Dep. at 38, 49-50, 74); RX 648 (Backman, Dep. at 109-110) (Backman

Foundry never considered expanding its production as a result of ARRA "when anybody and their dog can see that this market is going to end at some point.")).

3. Market share in the Domestic Fittings market

1040. From at least 2006 and until Star entered the Domestic Fittings market in late 2009, McWane was the only source of Domestic Fittings. (Answer ¶ 40; Tatman, Tr. 1047; CX 2513 (Webb, IHT at 178); Thees, Tr. 3078; Sheley, Tr. 3401-3402 (when ARRA was enacted in 2009, only McWane sold Domestic Fittings, with the exception of Backman Foundry in Utah, which only sold "some specialty stuff…the real oddball fitting"); Morton, Tr. 2817-2818 (after U.S. Pipe closed its Chattanooga, Tennessee plant in April 2006, McWane was the only producer of Domestic Fittings)).

1041. The only firms that currently manufacture a full line of Domestic Fittings are McWane and Star. (Supp. Response to RFA at ¶ 10; *see* Tatman, Tr. 238-240, 1047; CX 2488 (Backman, Dep. at 16)).

1042. In 2010, after Star entered the Domestic Fittings market, McWane's approximate share of the Domestic Fittings market was [redacted]%. Star's approximate share of the Domestic Fittings market was [redacted]%. (CX 2260-A (Schumann Rep. at 19 tbl. 2), *in camera* (basing market share calculations on supplier sales data); Tatman, Tr. 240-241 (estimating that McWane's share of the Domestic Fittings market in early 2009 was "around 90 percent")).

1043. In 2011, McWane's approximate share of the Domestic Fittings market was [redacted]%; Star's approximate share of the Domestic Fittings market was [redacted]%. (CX 2260-A (Schumann Rep. at 19 tbl. 2), *in camera*).

4. Barriers to entry

a. Barriers for new entrants

1044. A new entrant must make a significant capital investment to enter the Fittings market. (CX 2530 (Rona, Dep. at

256-257); CX 2500 (Swalley, Dep. at 102-107 (describing costs of obtaining certifications and develop molds)). A new entrant into the Fittings market must also either build its own foundry or develop a supply chain of foundries that can produce its Fittings. (Saha, Tr. 1166-1167).

1045. A new entrant into the Fittings market must develop expertise in design engineering. (Rybacki, Tr. 1092, 1094 (even as a "virtual manufacturer," Sigma's engineering staff produces the drawings to make Fittings patterns, and Sigma maintains engineering groups in China and India to oversee the production process)).

1046. A new entrant into the Fittings market must secure the testing and approval of its Fittings by the municipalities or other End Users. (CX 2538 (McCutcheon, IHT (Vol. 2) at 348), *in camera*; *see also* Saha, Tr. 1166-1167, 1163 (to begin selling Fittings, NACIP needed to obtain warehouses, obtain AWWA Underwriters Laboratories ("UL") certification and National Sanitation Foundation ("NSF") approvals, acquire patterns or molds, source foundries that produced Fittings, and establish Distributors through which to sell); CX 2522 (Agarwal, Dep. at 77-78), *in camera,* (to sell Fittings, SIP first needed to obtain UL and NSF certification; SIP also received municipality approvals and placement on engineers' approved lists before supplying Domestic Fittings)).

1047. A new entrant into the Fittings market would need to develop hundreds of patterns and moldings. (CX 2533 (Bhargava, Dep. at 88-89); Saha, Tr. 1166-1167; CX 2500 (Swalley, Dep. at 102-107)).

1048. Because Fittings are commodity products, Distributors base their purchasing decisions in part on relationships, so developing relationships with Distributors is an important part of the business of Fittings suppliers. (Minamyer, Tr. 3135; CX 2538 (McCutcheon, IHT (Vol. 2) at 348)). A new entrant must overcome existing relationships between existing manufacturers and the Distributors and End Users. (CX 2525 (Minamyer, IHT at 99, 102, 103-104)). When SIP began offering Fittings, SIP had existing relationships with waterworks suppliers due to its sale of municipal castings. (RX 681 (Agarwal, Dep. at 77)).

1049. A new entrant into the Fittings market would need about three to five years to enter the market. (CX 2538 (McCutcheon, IHT (Vol. 2) at 348)). SIP took approximately three years to offer a full line of 3500 unique Fittings up to 48" in diameter. (RX 681 (Agarwal, Dep. at 30); CX 2521 (Agarwal, IHT at 64-65)).

1050. The Fittings and Domestic Fittings markets have high barriers to entry. (F. 1044-1049; CX 2260-A (Schumann Rep. at 37).

b. Star did not face the same barriers as new entrants

1051. Through its import business, Star already had the expertise needed to operate its own fittings foundry. (Bhargava, Tr. 2979-2980, *in camera*) (describing his own 35-plus years of experience manufacturing, Star's 20 engineers who have worked in manufacturing in different capacities, and Star's past work setting up foundries).

1052. As an existing supplier of non-Domestic Fittings, Star already had in place the network of Distributor customers required to enter and compete effectively in the Domestic Fittings market. (*See* F. 110, 117-119, 402; Answer ¶ 25 ("[A]ll suppliers of [Fittings] have distribution relationships or other abilities within the United States sufficient to enable them to compete effectively throughout the country.")). Star's entry into the Domestic Fittings market did not require any changes to Star's relationships with its existing Distributor customers, who would also be its customers for Domestic Fittings. (McCutcheon, Tr. 2287).

1053. Star's entry into the Domestic Fittings market did not require any changes to Star's existing regional distribution centers, which Star would also use for Domestic Fittings. (McCutcheon, Tr. 2287).

1054. Star's entry into the Domestic Fittings market did not require any changes to Star's sales team. (McCutcheon, Tr. 2287).

1055. In 2009, Star already had in place the back office support needed to sell a line of Domestic Fittings. (McCutcheon, Tr. 2288).

c. Domestic foundries, pipe suppliers, and other suppliers are not potential entrants

DOMESTIC FOUNDRIES

1056. Frazier & Frazier, Glidewell, EBAA, and East Jordan, which are all domestic foundries that have produced unfinished Domestic Fittings or castings, have no plans to enter the market for selling finished Domestic Fittings. (CX 2505 (Frazier, Dep. at 69-70); CX 2507 (Glidewell, Dep. at 127); CX 2499 (Keffer, Dep. at 13-14); CX 2498 (Teske, Dep. at 33-34)).

1057. Currently, Frazier & Frazier, Glidewell, and Mabry are each producing Domestic Fittings castings, or unfinished Fittings, for suppliers like Star. (CX 2505 (Frazier, Dep. at 68-69); CX 2507 (Glidewell, Dep. at 122-123); RX 676 (Hall, Dep. at 16-20)).

1058. Frazier & Frazier, Glidewell, and Mabry do not sell Domestic Fittings or Domestic Fittings castings to any End User. (CX 2505 (Frazier, Dep. at 68-69); CX 2507 (Glidewell, Dep. at 122-123); CX 2517 (Hall, Dep. at 148-150)).

1059. Backman Foundry "never even considered" producing large quantities of Domestic Fittings in response to the demand created by ARRA because of the "many million dollars" it would cost to "make the expansion to be able to get into the market." (RX 648 (Backman, Dep. at 109-110)).

1060. While EBAA and East Jordan produce waterworks products, neither foundry currently produces Domestic Fittings castings. (RX 658 (Keffer, Dep. at 7-9); CX 2498 (Teske, Dep. at 12)).

1061. To enter into the manufacturing of Domestic Fittings would require major equipment additions and an economic investment at EBAA, including: molding machines; equipment

for producing cored or hollow castings; and new furnaces. (CX 2499 (Keffer, Dep. at 13-14)).

1062. EBAA considered expanding into Domestic Fittings production three or four years ago and estimated that the required expansion would cost at least $10 to $12 million and take two years to realize. (CX 2499 (Keffer, Dep. at 49-51)).

1063. Manufacturing Domestic Fittings at East Jordan would require an extremely expensive capital investment including a major conversion of EJ's East Jordan, Michigan melt facility, the purchase of core-making equipment, and an investment in Domestic Fittings tooling. (CX 2498 (Teske, Dep. at 31-34)).

1064. To manufacture finished Domestic Fittings, a domestic foundry already making Domestic Fittings castings would have to design and develop a Domestic Fittings product line, identify customers, and invest in the equipment and expertise required to finish Domestic Fittings. (CX 2505 (Frazier, Dep. at 69-72); CX 2507 (Glidewell, Dep. at 125-126)).

PIPE MANUFACTURERS

1065. Griffin, ACIPCO, and U.S. Pipe have no plans to begin manufacturing Domestic Fittings under 24" in diameter. (CX 2508 (Kuhrts, Dep. at 19-20, 49, *in camera*); CX 2486 (Burns, Dep. at 70-71, 123-124); CX 2542 (Morton, Dep. at 56)).

1066. ACIPCO presently lacks the equipment necessary for producing Domestic Fittings of less than 30" in diameter. (CX 2486 (Burns, Dep. at 84)).

1067. U.S. Pipe evaluated re-entering domestic production in 2009 and chose not to re-enter because it was cost prohibitive. (RX 701 (Morton, Dep. at 47-49, 56-57)).

1068. To produce Domestic Fittings under 24" in diameter would require a major overhaul of Griffin's existing foundries. (CX 2508 (Kuhrts, Dep. at 19-20, 49, *in camera*)).

OTHER SUPPLIERS OF IMPORTED FITTINGS

1069. Metalfit, a Mexican Fittings producer and supplier to the United States market, has no plans to begin manufacturing Domestic Fittings under 24" in diameter. Even a 10% increase in the price of Domestic Fittings would not induce Metalfit to invest in entering the Domestic Fittings market. (CX 2518 (Meyer, Dep. at 184-185)).

1070. SIP, a supplier of imported Fittings, does not intend to enter the Domestic Fittings market for numerous business reasons, including the fact that ARRA presented a very short time window, that SIP believed it needed to offer a full line of fittings to be considered a viable supplier, that it had taken SIP a full three years to develop a full line of imported fittings, the uncertainties of success, the high cost of developing patterns for a full line of fittings, the fact that there was not one single foundry available to make all the fittings, the vagaries of long term supply given the changing capacity of jobber foundries, the $5 to 10 million cost estimated to develop the line, the need/cost to develop drilling and machining capabilities, the uncertainties of the ARRA demand, and the uncertainties about the post-ARRA domestic demand. (CX 2522 (Agarwal, Dep. at 54-68), *in camera*). *See also infra* II.J.14.

1071. Electrosteel is not poised to make an investment in entry into the Domestic Fittings market. (CX 2500 (Swalley, Dep. at 184-185), *in camera*).

5. Ability to control prices

1072. In 2008, McWane did not typically offer Project Pricing for Domestic Fittings because the less competitive Domestic Fittings market did not require it. (Tatman, Tr. 334-335; CX 2199 at 001 (McWane's Pricing Coordinator's email refusing a sales person's request for Project Pricing for Domestic Fittings because "We are the only one who makes the full line of 24" and down. No need to drop the price unless Star is an issue."); CX 2480 (Napoli, Dep. at 73)).

1073. McWane was not willing to negotiate the price of Domestic Fittings after the passage of ARRA. (CX 2489

(Morrison, IHT at 45) ("[U]ntil the stimulus project came around, everything was negotiable. When the stimulus project came around, the price became firm on the domestic fitting. There has been little if any that I'm aware of negotiation on what you're going to pay for the domestic fitting and the spread widened."); CX 2515 (Sheley, IHT at 28) ("Well, on that import product you can negotiate prices. Domestic product, there's a price and that's what you pay."); CX 2513 (Webb, IHT at 99-100) (explaining that after ARRA was passed McWane "changed and reduced" the rebate on Domestic Fittings which is "effectively" an increase in price for Domestic Fittings)).

1074. In a November 3, 2009 internal McWane email to the McWane sales team, McWane's National Sales Manager, Mr. Jansen, instructed: "when you have someone say that we need to match pricing due to the other guys we need to take a firm stance and ask who is going to use them. **There can be a price out there but if no one uses it then it becomes a [moot] point.**" (CX 0108 at 001 (emphasis in original)).

1075. Domestic Fittings are sold at higher prices than non-Domestic Fittings. (Answer ¶ 20 (admitting that McWane's Domestic Fittings sold into Domestic-only Specifications are generally sold at higher prices than non-Domestic Fittings); CX 2535 (Bhutada, Dep. at 13); Webb, Tr. 2733; Sheley, Tr. 3402-3404 (both before and after passage of ARRA, the price of Domestic Fittings was higher than the price of imported Fittings); Thees, Tr. 3074).

1076. McWane's February 2008 price multipliers for domestically manufactured fittings sold into Domestic-only Specifications were substantially higher than its February 2008 "blended" multipliers (for Fittings sold into Open Specification projects). For example, whereas a given non-Domestic Fitting might sell in Texas for $280, the corresponding Domestic Fitting would sell for $440, an approximately 57% higher price. (RX 410 at 0001, 0002 (Domestic and blended multiplier maps)). Further examples of the price differences between Domestic and non-Domestic Fittings according to McWane's February 2008 price multiplier maps include the following:

State	Non-Domestic Multiplier	Domestic Multiplier	Percentage Difference
California	.33	.44	33.3%
Colorado	.33	.49	48.5%
Florida	.25	.49	96.0%
Michigan	.33	.45	36.4%
Minnesota	6.28	.45	60.7%
New York	.31	.44	41.9%
Ohio	.25	.45	80.0%
Oregon	.42	.51	21.4%

(RX 410 at 0001, 0002).

1077. Non-domestic Fittings manufactured in countries such as China, India, Korea and Mexico are less expensive, by approximately 25%, than Fittings produced in the United States. (RX 658 (Keffer, Dep. at 58-59); RX 675 (Sheley, Dep. at 55); *see also* RX 661 (Prescott, Dep. at 29-30, 33); RX 673 (Webb, Dep. at 24-25); RX 646 (Burns, Dep. at 20-21)).

1078. McWane's costs to produce Domestic Fittings are higher than its costs to produce imported Fittings. (Tatman, Tr. 275, 879, 881; RX 642 (Page, Dep. at 112)).

1079. There are two components of McWane's costs of production of Domestic Fittings: (1) manufacturing costs (F. 1080) and (2) idle plant charges (F. 968, 1081). (Tatman, Tr. 275-276).

1080. Manufacturing costs are the costs of producing an item based on raw material, including labor and direct overhead. McWane's manufacturing costs to produce Domestic Fittings are higher than its costs to produce imported Fittings. (Tatman, Tr. 275-278).

1081. Idle plant costs reflect the overhead costs it takes to have a foundry not running at full capacity. If a plant is normally supposed to run five days a week, but it is only running three days a week, idle plant costs are the costs associated with running a

facility for those other two days of the week. (Tatman, Tr. 432-433).

1082. In 2007, McWane booked $7 million in idle plant charges. McWane produced approximately 25,000 to 30,000 tons domestically in 2007. The $7 million idle plant charges divided by the tons produced amounts to about $650 a ton idle plant cost. That amount is more than half the cost of producing a fitting in China. (Tatman, Tr. 275-277).

1083. On December 21, 2009, Mr. Tatman sent out customer letters announcing multiplier increases for Domestic Fittings, effective January 22, 2010. (Tatman, Tr. 811; CX 1656 at 001-003).

1084. When McWane issued the December 21, 2009 price increase for Domestic Fittings, it also issued a price increase for non-domestic Fittings. (Tatman, Tr. 811; CX 1656 at 001-003).

1085. McWane's manufacturing costs for producing Domestic Fittings began to increase fairly steadily from early 2009 through 2010. (Normann, Tr. 4894).

1086. In June 2009, McWane understood that the impact of the ARRA would be short-lived and did not want to overcharge for Domestic Fittings in the short term at the expense of harming its position in the overall Fittings market. (Tatman, Tr. 979-981) (We didn't really understand the impact of the ARRA, but we all knew that it was a short-term event. And . . . because we think long term[,] . . . we didn't want to overcharge in the short term, make a large business profit off the situation and set ourselves up for the long term where people felt that we took advantage of the situation or we overcharged, and that would be more pressure to work against domestic specs, so Leon is really there -- is really saying always keep your mind on the long term (explaining RX 595 (a June 5, 2009 internal McWane email from Leon McCullough, stating "It has never been our intent to 'over charge' because of the [Buy American] provision [of ARRA].")).

1087. In preparing the budget for 2010 in the fall of 2009, Mr. Tatman expected to have an overall growth of 2 percent due

to Domestic Fittings and made a core assumption that pricing on Domestic Fittings would be flat or fixed to what it was at the time he prepared the budget. (Tatman, Tr. 983-986; CX 0102).

1088. Since Star entered the Domestic Fittings market in 2009, prices eroded. (Tatman, Tr. 988-989).

1089. Looking at sales data on Domestic Fittings in 2010, Respondent's expert concluded that Star failed to price at a discount to McWane. There are numerous states where Star's average price is higher than McWane's. (Normann, Tr. 4979-4980; RX 712A (Normann Rep. at 68-69, Figure 27, *in camera*)).

1090. Looking at sales data on Domestic Fittings from January 2009 to November 2011 by state, Respondent's expert concluded that the presence of Star in the Domestic Fittings market in various states did not result in lower prices. In those states where McWane had effectively one hundred percent of the Domestic Fittings sales, McWane's pricing was not higher than in those states where McWane had a lower share of Domestic Fittings sales. McWane's prices on Domestic Fittings were relatively constant state by state, regardless of the presence of Star in certain states. (Norman, Tr. 4975-4976; RX 712A (Normann Rep. at 70-72, Figure 28, 29, *in camera*)).

1091. Since 2009, the first year for which McWane's blue books report gross profits for Fittings sold into domestic-only projects, McWane has sold Domestic Fittings at prices that earn it significantly higher gross profits than it has earned in the same time period on the sale of non-Domestic Fittings. For year-end 2009, McWane reported gross profits for Domestic Fittings of [redacted]% and reported gross profits for non-Domestic Fittings of [redacted]%. (RX 721 at 0041, 0043, *in camera*). For year-end 2010, McWane reported gross profits for Domestic Fittings of [redacted]% and reported gross profits for non-Domestic Fittings of [redacted]%. At these levels, McWane earned [redacted]% higher gross profits from the sale of Domestic Fittings than for non-Domestic Fittings sales in 2009; and [redacted]% higher gross profits in 2010. (RX 632 at 0027, 0029, *in camera*; Tatman, Tr. 1004, *in camera*).

1092. McWane's blue book financials for year-end 2010 reported its 2010 Domestic Fittings sales increased [redacted]% in volume by tons, and [redacted]% in unit price, compared to 2009. (RX 632 at 027, *in camera*; Tatman, Tr. 1004, *in camera*).

1093. McWane's blue book financials for year-end 2010 reported [redacted] in costs from 2009 to 2010 for its Domestic Fittings. (RX 632 at 027, *in camera*).

6. Entry by Star into the Domestic Fittings market

a. Star's announcement to enter the Domestic Fittings market

1094. In reaction to ARRA's passage in February 2009, Star began to develop plans to expand its product lines to include Fittings that satisfied the "Buy American" provisions of the ARRA. (Bhargava, Tr. 2927 ("Q. And what prompted Star to first consider entering the domestic market? A. In 2008, there was a recession and then there was a stimulus package, the ARRA, which specified there will be a significant amount of funds available for projects that would require only domestically produced product, so that made us look at the possibility of going into the domestic market."); McCutcheon, Tr. 2603-2604; CX 2533 (Bhargava, Dep. at 11) (Star first considered producing fittings domestically in 2009 after the passage of ARRA, because projects funded by ARRA had to be made in the United States.)).

1095. At a June 2009 AWWA industry conference, Star publicly announced that it would offer Domestic Fittings starting in September 2009. (Joint Stipulations of Fact, JX0001 ¶ 23; McCutcheon, Tr. 2603-2604).

1096. On or about June 15, 2009, Star sent a letter to customers stating, "Look for our . . . Fitting inventories to start arriving in September." (CX 1674 at 002).

b. Star's contracts with domestic foundries

1097. Star concluded by March or April of 2009 that ARRA's "Buy American" provisions would require the products

to be manufactured in the United States. Star then focused on three possible courses of action in order to manufacture Fittings in the United States: (1) building a foundry from "ground zero"; (2) buying an existing foundry in the United States; or (3) contracting with existing domestic foundries to produce the desired Fittings. (Bhargava, Tr. 2928-2929).

1098. Star realized that ARRA provided a limited time window of opportunity and, in March or April 2009, elected to pursue contract manufacturing as the option that would allow it to get product to the marketplace in the shortest amount of time. (Bhargava, Tr. 2930-2931, 2989-2990, *in camera*).

1099. Star had a preference for owning its own foundry and did not rule out buying a foundry in March or April 2009, but made the deliberate decision in the spring of 2009 to pursue contract manufacturing instead, so that they could enter the market more quickly. (Bhargava, Tr. 2930, 2990, *in camera*).

1100. Domestic foundries had substantial excess capacity in 2009. (Bhargava, Tr. 2931, *in camera*; CX 2535 (Bhutada, Dep. at 26-27, 118-119), *in camera*; McCutcheon, Tr. 2284).

1101. Star began phoning and emailing potential foundry candidates in the spring of 2009 that could make domestic castings for Star. Star initially contacted 60 to 70 domestic foundries, and from May 2009 through September 2009, Star visited at least 20 domestic foundries to identify those that could produce Domestic Fittings for Star. (Bhargava, Tr. 2931-2932, 2997-2999, *in camera*; CX 2535 (Bhutada, Dep. at 56), *in camera*).

1102. Star sought domestic foundries that could produce Fittings from 2" in diameter to 48" in diameter. No single contract foundry could make the entire size range of Domestic Fittings, so Star utilized multiple foundries in different locations. (Bhargava, Tr. 3000, *in camera*; CX 2535 (Bhutada, Dep. at 57, 118-119), *in camera*).

1103. Once Star decided to use a particular foundry for its Domestic Fittings production, it took approximately two months for that foundry to begin producing Domestic Fittings for Star,

and it took approximately three to six months for that foundry to begin producing all the different types of Fittings that Star required from that foundry. (Bhargava, Tr. 2945-2946, *in camera*).

1104. None of the contract foundries that produced Fittings for Star were capable of the finishing operations necessary to transition a raw casting into a finished Fitting. Finishing is the process, after the foundry makes a casting, of drilling holes, adding lining, and painting the Fitting. Star shipped the castings to its Houston facility to perform the finishing process. (Bhargava, Tr. 2937-2940, 2999-3000, *in camera*; McCutcheon, Tr. 2618-2620; RX 572).

1105. Star invested approximately $[redacted] million in the expansion of its finishing facility in Houston. (McCutcheon, Tr. 2288-2289; Bhargava, Tr. 2937-2939, *in camera*; RX 694 (Bhutada, Dep. at 62-63)).

1106. Star ultimately contracted with multiple domestic foundries to produce Domestic Fittings, including among others, Frazier & Frazier, Glidewell and Mabry. The foundries with which Star contracted made different size Fittings. (Bhargava, Tr. 2933, *in camera*; CX 2535 (Bhutada, Dep. at 60-61), *in camera*).

1107. Star and Frazier & Frazier, a domestic foundry, signed a confidentiality agreement on June 2, 2009, and a supply chain agreement on June 12, 2009. (RX 665 (Gupta, Dep. at 16, 20, 43-44)).

1108. On July 2, 2009, Star submitted a purchase order to Frazier & Frazier for $328,599 worth of Domestic Fittings castings. (RX 665 (Gupta, Dep. at 48, 49)). Frazier & Frazier sold its first Domestic Fitting casting to Star in approximately August 2009. (RX 665 (Gupta, Dep. at 57-58)).

1109. Frazier & Frazier produced 70 to 80 patterns of Domestic Fittings castings for Star by the end of 2009, which increased to approximately 300 unique patterns with a 9” diameter or smaller by 2012. (CX 2506 (Gupta, Dep. at 75-76, 89-90)).

1110. Star first contacted Glidewell about making Domestic Fittings castings at the end of 2009 or the beginning of 2010, and Glidewell began producing Domestic Fittings castings for Star less than one month later. (RX 666 (Glidewell, Dep. at 29-30, 58)).

1111. In 2010, Glidewell sold $635,439 worth of products, and 34 different types of Fittings castings to Star in 2010. (RX 666 (Glidewell, Dep. 54); CX 1417 at 007). In 2011, Glidewell sold $590,773 worth of products, and 46 different types of Fittings castings to Star in 2011. (RX 666 (Glidewell, Dep. at 55-57); CX 1418 at 008). From January 1, 2012 through March 23, 2012, Glidewell sold $83,878 worth of products to Star. (RX 666 (Glidewell, Dep. at 58); CX 1419 at 002).

1112. Star and Mabry entered into an agreement for the production of Domestic Fittings castings on November 2, 2009, and Mabry began producing at least three types of Domestic Fittings castings for Star by the end of 2009. (RX 676 (Hall, Dep. at 32-33, 36-38, 67-68)).

1113. In 2010, Mabry produced at least 135 types of Domestic Fitting castings for Star. To date, Mabry has produced at least 177 types of Domestic Fitting castings for Star, resulting in approximately $2.9 million in invoices from Mabry to Star. (CX 1581; RX 676 (Hall, Dep. at 69-70)).

1114. In March or April 2009, Star recognized that contract manufacturing its Fittings from domestic foundries would result in inefficiencies and higher costs to Star. (Bhargava, Tr. 2990-2992, *in camera*).

1115. Star understood that the contract foundries manufacturing Fittings for Star would build a profit margin into the price that they charged Star. (Bhargava, Tr. 2991, *in camera*).

1116. Having multiple foundry locations and a separate finishing facility would result in additional freight charges and materials handling inefficiencies for Star. (Bhargava, Tr. 2991, *in camera*).

1117. Rather than shipping finished goods directly to a customer or distribution yard, Star's process necessitated raw castings from six locations across the country being shipped to the Houston finishing facility. (Bhargava, Tr. 2991, 2998-3000, *in camera*).

1118. Star recognized that one of the risks of sourcing Domestic Fittings from six different foundries was that it would not control its supply chain, and that the foundries it contracted with might later raise prices or elect not to do business with Star at all. (Bhargava, Tr. 2991-2992, *in camera*).

c. Star's acquisition of patterns to make Domestic Fittings

1119. Star decided that it would be a full line supplier and acquired patterns from China in the summer of 2009. (Bhargava, Tr. 2999-3000, 3011, *in camera*; McCutcheon, Tr. 2605-2606; RX 234).

1120. Star planned to enter the Domestic Fittings market by offering the most popular Fittings items first. Star developed a priority for the patterns it constructed by identifying the best-selling Fittings, which require approximately 150 to 200 patterns, but account for approximately 80% of Fittings sales. (CX 2535 (Bhutada, Dep. at 52-53)).

1121. Star planned to offer a relatively full line of the more commonly used C153 Domestic Fittings, and a more limited line of C110 Fittings, for which Star would stock the common "A" items, (F. 306) and otherwise produce on a per-project basis. (McCutcheon, Tr. 2292-2293).

1122. By May 2012, Star had invested approximately $3.5 million to secure the patterns necessary for producing Domestic Fittings. (RX 694 (Bhutada, Dep. at 62)).

1123. By the end of 2009, Star had more than [redacted] patterns in place at third-party domestic foundries. (Bhargava, Tr. 3010, *in camera*).

1124. Star gradually added patterns after 2009, irrespective of whether Star had an order for the specific Fittings. (CX 2533 (Bhargava, Dep. at 66), *in camera*).

1125. By June 2010, Star had a Domestic Fittings pattern stock comparable to McWane's Domestic Fittings items. (Bhargava, Tr. 3012, *in camera*).

1126. By the end of 2010, Star had close to [redacted] patterns in stock. (Bhargava, Tr. 3011-3012, *in camera*).

d. Star's sales of Domestic Fittings

1127. By September 2009, Star recorded its first sales of domestically manufactured Fittings to customers. (Bhargava, Tr. 3002, *in camera*).

1128. Star began shipping Domestic Fittings to Distributors in late 2009. (CX 2535 (Bhutada, Dep. at 60), *in camera*).

1129. By September or October of 2009, Star was building product for its inventory of Domestic Fittings. (McCutcheon, Tr. 2300; RX 692 (Bhargava, Dep. at 113)).

1130. Star's target, in November 2009, was to develop a full line of Domestic Fittings equal to the stock offered by McWane. By June 2010, Star had come close to that goal, but there were still quite a few odd patterns that Star decided not to make. (Bhargava, Tr. 3010-3013), *in camera*).

1131. Star recognized that it would not have the full range of Domestic Fittings it intended to supply available to its customers on day one, and that a ramp-up period would be required. (McCutcheon, Tr. 2606).

1132. Star recognized that some Distributors were cautious about purchasing Domestic Fittings from Star in 2009 and early 2010 because of delays in filling orders. (Bhargava, Tr. 3003, *in camera*; McCutcheon, Tr. 2634).

1133. As of March 2010, although Star could supply most of the fast-moving items in a timely manner, it still had some

problems in supplying the very slow-moving items for which Star may not yet have developed a pattern. In addition, Star was still building inventory in March 2010. (Bhargava, Tr. 3008-3010, *in camera*).

1134. Since its entry in 2009 into the Domestic Fittings market, Star has sold Domestic Fittings every month and every year. (Bhargava, Tr. 3027, *in camera*).

1135. Star endeavored to and did "pick off" orders of Domestic Fittings from McWane where it could. Mr. McCutcheon asked his division managers to send him lists of Distributors who were purchasing from Star and those who were committed to purchasing from McWane. The report that Mr. McCutcheon received from his Southwest Division Manager on October 9, 2009, listed 44 Distributors or branches of Distributors. Of those 44, the report indicated that 17 were going with Star, about half that amount were going with McWane/Sigma, and the remaining were "on the fence." (McCutcheon, Tr. 2606-2612).

1136. Star sold Domestic Fittings to many distributors during the last quarter of 2009, and throughout 2010 and 2011, including HD Supply, Ferguson, WinWater, and Dana Kepner. (McCutcheon, Tr. 2590-2592; Webb, Tr. 2798-2800; Thees, Tr. 3084, 3111-3112; RX 652 (Johnson, Dep. at 17-18)).

1137. Some of Star's sales of Domestic Fittings were made in circumstances in which McWane could not provide Domestic Fittings in a timely fashion (*e.g.*, large-diameter Fittings), or where the End User needed a special coating, such as "Protecto 401," that Star specialized in. (McCutcheon, Tr. 2666-2667).

1138. Hajoca's Tulsa branch had ordered over [redacted] million dollars' worth of Domestic Fittings from Star as early as January 2010. (RX 671 (Pitts, Dep. at 102-103)).

1139. Dana Kepner determined in February 2010 that it would use Star for all of its Domestic Fittings needs. (CX 0585; McCutcheon, Tr. 2612-2613).

1140. TDG, in 2010, selected Star as a TDG Domestic Fittings vendor partner. (JX 694 (Bhutada, Dep. at 155); RX 675 (Sheley, Dep. at 68); *see infra* F. 1346 (discussing TDG vendor partner program)).

1141. Since entering the market, Star has made sales of Domestic Fittings to more than 100 Distributors. (Normann, Tr. 5042-43, *in camera*).

1142. In calculating the number of Distributors to whom Star sold Domestic Fittings to be 130, Dr. Normann did not differentiate Distributors based on size of the Distributor, the number of projects for which the Distributor sought bids, the number of locations the Distributor operated, the amount of Domestic Fittings the Distributor purchased from Star, the circumstances of the purchase or whether it fell into one of the exceptions to the Full Support Program (F. 1173). (Normann, Tr. 5626-5634).

1143. Star had [redacted] million dollars in Domestic Fittings sales in both 2010 and 2011, and expects to sell more Domestic Fittings in 2012. (Bhargava, Tr. 3027-3028, *in camera*; McCutcheon, Tr. 2597).

1144. Star was on pace, at the time of trial, to have its best year ever for Domestic Fittings sales in 2012. (Bhargava, Tr. 3028, *in camera*).

J. McWane's Full Support Program[5]

1. McWane's Views on Star's Entry into the Domestic Fittings market

1145. In June 2009, McWane was deeply concerned about the viability of its sole remaining domestic Fittings plant, Union Foundry. (RX 643 (Tatman, IHT at 151)).

1146. Because its last remaining domestic foundry had high inventory levels and insufficient demand (F. 18, 477-478), McWane was concerned that if Star entered the Domestic Fittings market, McWane would not be able to generate enough business to operate its foundries. (RX 638 (McCullough, IHT at 34-36)).

1147. McWane was concerned that Star would choose to manufacture only the highest-selling, fastest-moving Fittings. (RX 643 (Tatman, IHT at 152-153) ("The worst case scenario for me is that Sigma or Star comes into the domestic segment of the waterworks fittings market with a cherry-picking strategy. They bring in 50 patterns or 100 patterns, and they get those A items, and they go after those, and I lose volume on those items that I need for my plant . . .").

1148. On June 24, 2009, Mr. McCullough sent an internal McWane email to Mr. Tatman, with a copy to Mr. Walton, requesting information about Star's entry and Sigma's potential entry into the Domestic Fittings market. Mr. McCullough raised questions regarding McWane's "position short term/long term on sharing distribution of our domestic fitting line. Just because we share our blended fittings does not require us to share our domestic, especially if the competition is a short line domestic supplier." (CX 0074 at 002; Tatman, Tr. 646-647).

[5] As defined *infra* F. 1173, McWane sent a letter to its Distributor customers on September 22, 2009, which advised that customers who do not fully support McWane for their Domestic Fittings needs may forego participation in rebates or shipments of their Domestic Fittings orders. (CX 0010 at 001).

1149. In a June 24, 2009 internal email, Mr. Walton responded to Mr. McCullough's email (F. 1148) stating:

> Whether we end up with Star as a complete or incomplete domestic supplier my chief concern is that the domestic market gets creamed from a pricing standpoint just like the non-domestic market has been driven down in the past. That would dramatically [a]ffect our profit potential. Further, I have a sense there is a slim to none possibility that we would ever be able to sell Star domestic product at this point, one I do not think they would ever trust us and, two they seem to be so far down the road that I do not think they will be willing to turn back. I do agree whole heartedly that we need to evaluate our options and plot a comprehensive strategy going forward.

(CX 0074 at 001; CX 2485 (Walton, Dep. at 91-92) (email accurately reflected Mr. Walton's "chief concern" regarding Star's entry at the time); Tatman, Tr. 647).

1150. Mr. Tatman's initial response to Mr. McCullough's and Mr. Walton's emails (F. 1148-1149) was an internal email on June 24, 2009 stating:

> I agree that at this stage the chance for profitable cohabitation with Star owning a pc of the Domestic market is slim. Their actions in soil pipe are a good indication. . . . If their claims are ahead of their actual capabilities we need to make sure that they don't reach any critical market mass that will allow them to continue to invest and receive a profitable return. . . . I don't sense that Sigma is yet fully committed and
>
> they will be watching our response very closely to assess their strategy and probability of financial success.

(CX 0074 at 001; Tatman, Tr. 649-652).

1151. In the narrative for McWane's 2010 budget, Mr. Tatman listed the biggest risk factor for McWane's Fittings business in 2010 as the "Erosion of domestic pricing if Star emerges as a legitimate competitor." (CX 0102 at 002).

1152. In an August 2, 2010 internal email, Mr. Napoli wrote to Mr. Tatman:

> It's the take-a-hit now vs take-a-hit-for-decades argument as in 1984-1990. We chose to not to react then and know the result. We may not be losing business now but I am concerned about the future. Those dist. not aligned with us or Sigma will be aggressive with Star backing them against our people. . . . When that happens our distributors will continually pressure us to 'do something' (lower prices). If they stay in the business we will always see downward pressure in the future.

(CX 2192; CX 2480 (Napoli, Dep. at 90-95) (discussing CX 2192 and that, in order to avoid the loss of business and lower prices that occurred when imported Fittings first entered the U.S. market, McWane should lower their Domestic Fittings prices so that Star will become convinced that the Domestic Fittings business is unprofitable and exit the market)).

1153. McWane's National Sales Manager, Mr. Jansen, wrote an email on November 3, 2009 to his sales representatives regarding Domestic Fittings, "We don't want the market tumbling and if we keep everyone on board we shouldn't have to drop prices." (CX 0107 at 001; CX 2477 (Jansen, Dep. at 228-229) (explaining that "market tumbling" means prices falling; and "keep everyone on board" refers to Distributors being loyal to McWane under the Full Support Program)).

1154. In a September 3, 2010 email to a McWane sales representative, Mr. Jansen wrote: "We need to make sure we are getting into the smaller [Distributors] up there and keep them from Star. That's how a cancer starts is by letting them get in with one, two, then three, and it crumbles from there." (CX 2261 at 002). Mr. Napoli explained this email as follows:

> Like any -- any competitive situation in any industry, I mean, they'll start with the small ones. They won't go after the big fish first. They'll go to the small ones and build their -- build their reputation. You know, a competitor is not going to go to -- a new competitor in something is not going to go to

> Walmart from day one. They'll go to somebody smaller. Maybe that's not a good analogy, but they'll go to somebody smaller and build reputation and build a -- you know, a base and then go from there to bigger ones, makes them a little more legitimate, let's say, if they have a history or a track record.

(CX 2480 (Napoli, Dep. at 104-107)).

2. McWane's strategic responses to Star

1155. In a May 26, 2009 brainstorming document to spark discussion of McWane's possible strategic responses to potential competitive entry into the Domestic Fittings market and whether to sell Domestic Fittings to Sigma, Mr. Tatman observed that "any competitor" seeking to enter the Domestic Fittings market could face "significant blocking issues" if they are not a "full line" domestic supplier. (CX 0067 at 002; Tatman, Tr. 620-621; *see also* CX 2529 (Rona, IHT at 195-196) ("Q. Do you think McWane's policy that we're discussing here, this exclusivity with respect to distributors, is something that could erect a roadblock to a new entrant coming into the market with less than a full line? A. There's -- there's no question for any entrant that requiring exclusivity on those parts would be inherently more difficult than without it.")).

1156. On or about June 29, 2009, after Star had announced its planned entry into the Domestic Fittings market (F. 1095), Mr. Tatman drafted and sent an internal PowerPoint Presentation ("June 29, 2009 PowerPoint Presentation") to Mr. McCullough and Mr. Walton, intended as a brainstorming document based on a series of assumptions to spark discussion. (CX 0076; Tatman, Tr. 653-656).

1157. In a cover email transmitting his June 29, 2009 PowerPoint Presentation, Mr. Tatman stated that if McWane could keep Sigma from establishing an independent source for Domestic Fittings, leaving Star as the only Domestic entrant, then "the appropriate response to distribution is probably fairly hard line approach like a full line or no line approach." (CX 0076 at 001; Tatman, Tr. 653-655).

1158. Among the series of assumptions in the June 29, 2009 PowerPoint Presentation were that Star might "drive profitability out of our business," and that Star "would not be a responsible competitor [in the Domestic market] as long as incremental sales generate incremental margins for their business." (CX 0076 at 006, 009; Tatman, Tr. 653-656).

1159. Mr. Tatman's June 29, 2009 PowerPoint Presentation described as topics for discussion, three potential options for McWane's response to Star's entry: employ a "Wait and See approach," "Handle on a Job by Job basis," or "Force Distribution to Pick their Horse." (CX 0076 at 009; Tatman, Tr. 658).

1160. With respect to the "Wait and See approach," identified as a topic for discussion in the June 29, 2009 PowerPoint Presentation, a disadvantage identified by Mr. Tatman was that it would give Star "time to continue building their business model." (CX 0076 at 009).

1161. With respect to the "Handle on a Job by Job basis" identified as a topic for discussion in the June 29, 2009 PowerPoint Presentation, a disadvantage was that it would allow Star to "drive profitability out of our business." (CX 0076 at 009; Tatman, Tr. 658).

1162. With respect to the "Force Distribution to Pick their Horse" approach identified as a topic for discussion in the June 29, 2009 PowerPoint Presentation, the advantages listed as topics for discussion by Mr. Tatman included:

- It "[a]voids the job by job auction scenario within a particular distributor"

- It "[p]otentially raises the level of supply concern among contractors" and

- It "[f]orces Star/Sigma to absorb the costs associated with having a more full line before they can secure major distribution"

(CX 0076 at 009; Tatman, Tr. 658-666; *see also* CX 2483 (Tatman, IHT at 242-243) (explaining, in the context of this language, that it is quicker to build business through large national Distributors such as HD Supply and Ferguson); Tatman, Tr. 676-679 (Tatman does not recall the intent behind the discussion point "[f]orces Star/Sigma to absorb the costs associated with having a more full line before they can secure major distribution"); Tatman, Tr. 679-680 (Tatman does not recall whether he considered "major distribution" to be major national Distributors)).

1163. The "Pick your Horse" topic identified in the June 29, 2009 PowerPoint Presentation, described a "Soft Approach – Rebates at 100% or 0%" whereby a "domestic rebate would require exclusivity," and a "Hard Approach – Full Line or No Line," under which access to Domestic product line would "require[] exclusivity for Domestic fitting items we manufacture" – *i.e.*, if a customer did not support McWane's full Domestic Fittings line, McWane would not sell to them. (CX 0076 at 010; Tatman, Tr. 672-674).

1164. Listed as a topic for discussion in the June 29, 2009 PowerPoint Presentation under both the "Soft Approach" and the "Hard Approach" under the "Pick your Horse" option (F. 1163) was "Applied on a corporate not branch by branch basis." (CX 0076 at 010; Tatman, Tr. 675).

1165. On July 2, 2009, when asked by Mr. Walton for a recommended course of action with respect to Domestic Fittings, Mr. Tatman responded that the June 29, 2009 PowerPoint Presentation "was more for information sharing rather than trying to obtain agreement on a specific course of action which is probably premature at this point." Mr. Tatman further wrote, "[f]rom the information currently available, a Full Line or No Line approach would be the preferred approach and certainly the best option against Star." (CX 0329 at 001). Mr. Tatman testified that when he wrote that, he was "floundering in the dark" and that the information in the document was based on speculation. (Tatman, Tr. 749-750) (regarding Star's entry into the domestic segment, "[t]here's never been a hard game plan").

1166. On August 5, 2009, regarding McWane's relationships with foundries, Mr. McCullough wrote:

> As we establish or continue existing casting sourcing relationships we need to emphasize with our casting suppliers that we are not interested in sharing their foundry production with Star/Sigma as we feel it will weaken the "McWane" brand recognition in the market place.

(CX 0354 at 001).

1167. On August 24, 2009, Mr. Tatman sent an internal email to Dennis Charko, head of Clow Water (a subsidiary of McWane) that sells a limited number of Fittings, regarding "McWane Domestic Fittings 2010 brand/market protection" stating:

> Star, has announced a Domestic line of waterworks fittings and restraints. . . .
>
> To protect our domestic brands and market position we are going to adopt a distributor exclusivity program for 2010 wherein we won't provide domestic product to distributors who are not fully supporting our domestic product lines.

(CX 0113 at 001; Tatman, Tr. 686-687).

3. McWane's 2009 revisions to its corporate rebate programs

1168. McWane's waterworks fittings division has always had rebate programs with its customers which typically expire on an annual basis ("corporate rebate programs"). McWane's rebate programs with individual Distributors are based on the Distributor's specific needs and sizes. McWane's major customers, including WinWholesale, Ferguson, Hajoca, HD Supply and Mainline, have participated in McWane's corporate rebate program during the relevant period. TDG has a separately negotiated rebate program. (CX 2479 (McCullough, Dep. at 27-28, 33-34); Tatman, Tr. 708-711).

1169. McWane's corporate rebate program has specific requirements that participating Distributors must meet in order to earn a 2% rebate. If a Distributor fails to comply with a requirement, Mr. McCullough speaks to that Distributor and asks it to correct its non-complying conduct. (CX 2479 (McCullough, Dep. at 28, 33-34, 45-47)).

1170. In a document described as the "final" corporate rebate program for HD Supply for 2010 through 2012, one of the provisions lists as one of the requirements for HD Supply to get its 2% corporate rebate, which is based on all of HD Supply's purchases of Fittings, soil pipe, iron pipe, and valve and hydrants, is: McWane "require[s] HD Supply to support its efforts to maintain and promote domestic specifications, when McWane domestically made products are available." (CX 0131 at 001, 002).

1171. In a draft corporate rebate program for Hajoca for 2010, one of the provisions states: McWane "will share Hajoca's valve, hydrant, soil pipe & soil fitting and domestic requirements for ductile iron waterworks fittings with only other historical, domestic, national, and full line manufacturers." In his November 17, 2009 transmittal email to Mr. McCullough, Mr. Tatman wrote that the proposed modification to McWane's corporate rebate program was to "essentially eliminate Star as a supplier of domestic fittings." (CX 0100 at 001, 002).

1172. On December 8, 2009, Mr. McCullough wrote to Mr. Tatman and Mr. Walton that he was "thinking of implementing a 3 year [corporate rebate] program, basically the same as the 2009 programs for [McWane's] national accounts. Most everyone [h]as asked about extended programs." One of Mr. McCullough's stated reasons for this idea was: "My interest [in] getting everyone on board and committed for the next three years is to remove the opportunity for Star to introduce their domestic made fittings into our major national accounts." There were other reasons for extending the duration of the corporate rebate program unrelated to Star, including that customers did not want to have to renegotiate corporate rebate programs on an annual basis. (CX 0126 at 001; CX 2479 (McCullough, Dep. 146-148)).

4. McWane's September 22, 2009 Letter to Distributors regarding Full Support Program

1173. On September 22, 2009, McWane sent a letter to Distributors that stated as follows:

> [E]ffective October 1, 2009, McWane will adopt a program whereby our domestic fittings and accessories will be available to customers who elect to fully support McWane branded products for their domestic fitting and accessory requirements. This applies whether these products are purchased through Tyler Union, Clow Water or through Sigma.
>
> Exceptions are where Tyler Union or Clow Water products are not readily available within normal lead times or where domestic fittings and accessories are purchased from another domestic pipe and fitting manufacturer along with that manufacture's ductile iron pipe.
>
> Customers who elect not to support this program may forgo participation in any unpaid rebates for domestic fittings and accessories or shipment of their domestic fitting and accessory orders of Tyler Union or Clow Water products for up to 12 weeks.

("Full Support Program"). (CX 0010 at 001; Tatman, Tr. 659, 687-688).

1174. In the same September 22, 2009 letter through which McWane announced its Full Support Program, McWane also announced to its Distributors that it had entered into a Master Distribution Agreement ("MDA") with Sigma, through which Sigma would sell McWane Domestic Fittings. (CX 0010 at 001 ("We are pleased to announce that McWane domestic fittings . . . will now be available through Sigma."). *See infra* II.K.

1175. A purpose of McWane's Full Support Program was to persuade McWane's customers to support McWane's full line of domestic Fittings, rather than "cherry picking" and buying only oddball items from McWane, while purchasing the most

commonly used Fittings from Star, in order to generate enough sales volume to sustain McWane's last remaining domestic foundry. (RX 638 (McCullough, IHT at 34-36); RX 643 (Tatman, IHT at 151); *see also* CX 2203 at 002; Morton, Tr. 2844-2846 (According to U.S. Pipe, Mr. Tatman explained to U.S. Pipe that U.S. Pipe could not cherry pick high volume configurations from other domestic suppliers; *i.e.*, if Star was capable of producing A and B items, the high-volume configurations, but couldn't produce the C and D items, U.S. Pipe could not buy the high-volume configurations from Star and then turn to McWane for only the C and D items.).

1176. Mr. Tatman referred to the Full Support Program as an "exclusivity" policy both before and after the policy was announced on September 22, 2009. (CX 0340 (referring to "pending policy on supply exclusivity" on September 8, 2009); Tatman, Tr. 692; CX 1246 (referring to "exclusivity policy" on September 23, 2009); Tatman, Tr. 697).

1177. Mr. Tatman purposefully included the language "may" and "or" in the Full Support Program. (Tatman, Tr. 687-689 ("Q. And the potential consequences for customers were: Customers who elect not to support this program may forgo in any unpaid rebates for domestic fittings and accessories or shipment of their domestic fitting and accessory orders of Tyler/Union or Clow Water products for up to twelve weeks; correct, sir? A. With the words "may" and "or" specifically put in there by me. Q. That's a yes, sir? A. Yes, sir.")).

1178. Mr. Tatman believed that McWane had little or no ability to dictate terms to the Distributors, who held significant market power over it. (Tatman, Tr. 660 ("This is a weak -- a weak stance in this letter because I know when I write this letter that I'm a Chihuahua barking at Rottweiler and I know who has the power here.")).

5. McWane's communications to Distributors regarding the Full Support Program

1179. In preparation for the rollout of the September 22 Full Support Program, McWane's National Sales Manager, Mr. Jansen, led an internal conference call with the McWane sales

force on August 28, 2009, where he explained to his sales force the "new policy on Star Domestic" as follows:

- What are we going to do if a customer buys Star domestic? We are not going to sell them our domestic. . . .
    - This means the customer will no longer have access to our domestic. They can still buy [non-Domestic] from us.
    - Once they use Star, they can't EVER buy domestic from us. . . .
    - For companies with multiple branches (HD, Ferguson, Winwater, Hajoca, etc) - if one branch uses Star, every branch is cut off.

      . . .

- Make sure you are discussing our stance with all customers, every day.

(CX 0710 at 001, 002 (summarizing sales conference call); *see also* CX 2477 (Jansen, Dep. at 164-169) (confirming that CX 0710 accurately reflects Mr. Jansen's statements during conference call)).

1180. McWane communicated to customers that the Full Support Program would be applied on a company-wide basis, such that if one branch purchased Domestic Fittings from Star, all branches would be cut off. (CX 0108 at 001; CX 2477 (Jansen, Dep. at 177-178); CX 2501 (Prescott, IHT at 50-51)).

1181. Mr. Jansen wrote to his sales force on November 3, 2009:

> Team, I think we have made it very clear in the market regarding our stance on supporting the McWane domestic brand of fittings whether purchased through Tyler/Union, Clow or Sigma. If one branch buys f[ro]m someone other

> than this then the whole company will be [a]ffected not just that branch.

(CX 0108 at 001; CX 2477 (Jansen, Dep. at 177-178) (explaining that he wanted to make sure that the sales people expressed this "one clear message" to the market); *see also* CX 1599; CX 2477 (Jansen, Dep. at 173-176) (two regional vice presidents of HD Supply expressed concern to McWane's National Sales Manager, Mr. Jansen, that they did not want to be "punished" under the McWane policy if another HD Supply branch bought Star Domestic Fittings)).

1182. The McWane sales force was tasked with compiling logs to document communicating the Full Support Program to Distributors. (CX 2477 (Jansen, Dep. at 179); CX 1600, CX 1601, CX 1602 (sales force logs of "Star Domestic Conversation with customers")).

1183. In a presentation which was apparently prepared by Mr. Tatman after implementation of the September Full Support Program, Mr. Tatman stated: "Although the words 'may' and 'or' were specifically used, the market has interpreted the communication in the more hard line 'will' sense. . . . Access to McWane or Sigma requires distributors to exclusively support McWane where products are available within normal lead times. Violations will result in: Loss of access, loss of accrued rebates." (CX 0119 at 002, 004; Tatman, Tr. 704-707, 723-725).

1184. Hajoca believed that, despite the terms "may" and "or" in the Full Support Program, it would lose its rebates or be cut off from purchasing from McWane if Hajoca purchased from Star. (CX 2511 (Pitts, IHT at 78) ("Q. So, even though this letter, as written, suggests that you may or may not be penalized and that if you are penalized, it could be for -- it could be one or the other -- A. Yeah, um-hum. Q. -- or essentially both -- A. Selective enforcement, yeah. Q. -- the -- the message that Hajoca received, and specifically that Mr. Tatman and Mr. Jansen relayed to you, was that it would be – both would be implemented against Hajoca -- A. Correct. Q. -- and it would happen indefinitely -- A. Correct. Q. -- if -- if -- A. That's right. Q. -- you started purchasing from Star. A. Correct."); CX 2511 (Pitts, IHT at 76-79, 137-139) (stating: "It wasn't an either/or. It was both."; and:

"we were told right away that our Lansdale location would be cut off. They couldn't buy the fittings anymore." Mr. Pitts further stated that to him, "may" meant "would", and "or" meant "and.").

1185. HD Supply believed that under the Full Support Program, HD Supply would fully support McWane's domestic line of fittings, and that HD Supply would purchase all of its domestic Fittings from McWane except where McWane was unable to fill an order. (Webb, Tr. 2769-2770). *See also* CX 2514 (Webb, Dep. at 90) ("My understanding is that we would lose the rebate on the domestic fittings . . . .").

1186. Ferguson did not view the Full Support Program as preventing Ferguson from purchasing Domestic Fittings from Star and believed that the rebate terms and lead times mentioned in the September 2009 Rebate Policy could be negotiated. (Thees, Tr. 3109-3111).

1187. Groeniger viewed the Full Support Program as a threat that if Groeniger purchased Domestic Fittings from Star, McWane would not sell any Domestic Fittings to them. (CX 2510 (Groeniger, Dep. at 92) ("We were informed that they [McWane] were going to pull everything away from us, a threat.")).

1188. Illinois Meter believed it had been threatened by Mr. Jansen, in January 2010, with loss of access to McWane's Domestic Fittings if Illinois Meter bought Domestic Fittings from Star. (Sheley, Tr. 3411-3412 ("The implied threat that if we bought anybody else's fittings, they [McWane] wouldn't do business with us in any way, shape or form.); CX 2515 (Sheley, IHT at 76-78, *in camera* ("Rick [Tatman] made the statement that he expected a hundred percent support for domestic product . . . if we bought any domestic from Star, they would not sell us anything. And the statement I made to Rick . . . I asked the question, 'So you're telling us all or none?' And he said, 'That's correct.'")). *See also* Sheley, Tr. 3456-3458 (the Full Support Program does not accurately reflect the policy as communicated to Illinois Meter in conversations that Mr. Sheley had with Mr. Jansen and Mr. Tatman).

1189. Illinois Meter interpreted the Full Support Program to mean that Illinois Meter would lose any unpaid rebates on both Domestic and imported Fittings. "[S]o if a rebate had been earned in January through, say, September and you chose not to participate, you would lose all those previous rebates that were unpaid." (Sheley, Tr. 3456-3458; CX 2515 (Sheley, IHT at 85), *in camera*).

1190. E.J. Prescott explained the Full Support Program as follows: "The understanding is in writing. If you bought one [Domestic] fitting [from Star] in one of our 26 places, we're out, simple. . . . They [McWane] said it's all or nothing." (CX 2501 (Prescott, IHT at 50)).

1191. Utility Equipment Company explained the Full Support Program as follows: "Q. And was it your understanding that if you did purchase [Star Domestic Fittings] that you would lose your rebate dollars? A. Yes. Q. The policy on its face states that they may forego participation in any unpaid rebates. Was it your understanding, though, that you would forego them and that it wasn't a 'may forego'? A. Well, I took this as that we were going to lose it." (CX 2544 (Coryn, Dep. at 113-114); CX 2543 (Coryn, IHT at 126) ("There was . . . a veiled threat out there that if . . . [McWane] found out you were buying from [Star], something would happen.")).

1192. CI Thornburg explained its understanding of the Full Support Program as follows: "Q. What did you think the letter meant as a practical matter? A. Well, I knew what it meant was: You better not buy anything from Star. . . . [McWane's] message was clear, both written and verbally, that if you buy a project from Star, you're going to go on our, I'm picking the term 'bad list.'" (CX 2489 (Morrison, IHT at 72); CX 2490 (Morrison, Dep. at 79-80) ("When I read the letter that they [McWane] sent out . . . I interpreted that as a threat.")).

6. Full Support Program as it relates to Hajoca

a. Hajoca elected not to participate in the Full Support Program

1193. Hajoca has nine profit centers or branches that sell waterworks products, three of which sell waterworks exclusively: Tulsa, Oklahoma ("Tulsa"); Salt Lake City, Utah; and Olathe, Kansas. Hajoca's Lansdale, Pennsylvania ("Lansdale") branch also sells waterworks products. (Pitts, Tr. 3296-3297).

1194. At the time of McWane's September 22, 2009 Full Support Program, almost all of Hajoca's purchases of Domestic Fittings were made by Hajoca's Tulsa and Lansdale branches. (CX 0023).

1195. Each of Hajoca's branches makes its own vendor selection decisions, including those regarding Domestic Fittings purchases. (Pitts, Tr. 3306-3307).

1196. In a September 22, 2009 email from Mr. Tatman to Mr. Pitts, Hajoca's director of vendor relations, attaching the Full Support Program, Mr. Tatman stated: "[t]he policy announced is intended to apply at the corporate level, which I understand will give you a few more challenges to manage compared to other nationals." (CX 0021-A at 001).

1197. The week before McWane announced the Full Support Program, Mr. Jansen, McWane's National Sales Manager, met with Mr. Pitts. Mr. Pitts reported that meeting as follows:

> I had heard from Jerry Jansen last week that [McWane] would be taking a hard stance regarding domestic fittings manufactured for Star. . . .
>
> Jerry had told me last week that if any PC [profit center or branch] in the US purchases domestic fittings from Star, all PCs would lose access to McWane's fittings and possibly lose rebates.

(CX 0021-A at 001; Pitts, Tr. 3296, 3304-3305).

1198. Based on McWane's September 22, 2009 Full Support Program and his conversation with Mr. Jansen, Mr. Pitts believed that if any branch of Hajoca purchased Domestic Fittings from Star, the consequences would include loss of rebates from McWane and an interruption of Domestic Fittings shipments from McWane to all of Hajoca's branches. (Pitts, Tr. 3300-3303; CX 0021-A at 001).

1199. Mr. Pitts had conversations with Mr. Tatman, in addition to Mr. Jansen, about the Full Support Program, both before and after the September 22, 2009 announcement, and Mr. Tatman reinforced the nationwide all-or-nothing nature of the policy – that if one Hajoca branch purchased from Star, all branches would be subject to the consequences. (Pitts, Tr. 3305-3306).

1200. On September 30, 2009, Mr. Pitts asked Mr. Tatman to modify McWane's Full Support Program so that McWane would not hold all Hajoca branches responsible if a single branch purchased Domestic Fittings from Star. Mr. Tatman explained that McWane applies the policy at the corporate level because "that's where the [rebate] check is sent," and did not agree to alter McWane's policy. Hajoca also offered to change its rebate model so that checks would be sent to the individual branches, but Mr. Tatman did not agree to change the policy. (CX 0022 at 002; Pitts, Tr. 3306-3308).

1201. In a November 3, 2009 email to Mr. Kelly and Mr. Pitts of Hajoca, Mr. Jansen reiterated the all-or-nothing nature of McWane's Full Support Program:

> [I]f any Hajoca location chooses to buy another domestic fitting supplier[']s product Hajoca will not have direct access to the McWane ductile iron water main fittings for a period of time as well as loss of any accrued rebate to date.

(CX 0024 at 001; Pitts, Tr. 3311-3313 (CX 0024 accurately reflects September 2009 Rebate Policy as described to Mr. Pitts by Mr. Tatman and Mr. Jansen in multiple conversations)).

1202. In an email exchange between Mr. Jansen of McWane and Mr. Kelly of Hajoca between November 3, 2009 and November 7, 2009, Mr. Jansen reiterated the company-wide application of the Full Support Program, and acknowledged that Hajoca would have to make a decision as to whether to purchase exclusively from McWane. (CX 0024 at 001; Pitts, Tr. 3308-3310).

1203. Hajoca's Lansdale, Pennsylvania location purchased a higher volume of Domestic Fittings than other Hajoca branches and anticipated losing business if it lost access to McWane's Domestic Fittings. (Pitts, Tr. 3314).

1204. Hajoca chose to continue to allow each of its branches to make its own Domestic Fittings vendor selections. (Pitts, Tr. 3313 ("Our decision was to stand by our [business model] and let the manager of the [Tulsa] location purchase those fittings if he chose to.")).

1205. On November 16, 2009, Mr. Kelly informed Mr. Jansen that Hajoca "will not be changing our current business practice that allows our managers in the field to determine where or from whom they buy their product," and "cannot in good conscience support a program where the actions of one manager somewhere in the country could undermine an entire rebate program for the balance of the business." (CX 0731 at 001).

1206. The day after Mr. Kelly's communication with Mr. Jansen (F. 1205), November 17, 2009, Greg Dill of Hajoca's Tulsa branch contacted Ms. Susan Schepps of Star and informed her that he would be placing a Domestic Fittings stock order the following day. (CX 0731 at 001; *see also* Pitts, Tr. 3309 (the Tulsa branch was buying Domestic Fittings from Star)).

b. McWane did not accept new orders for Domestic Fittings from Hajoca

1207. As a result of Hajoca's decision to continue allowing its branches to make its own Domestic Fittings vendor selections, all of Hajoca's branches, including Hajoca's Lansdale, Pennsylvania location, were not able to place new orders from

McWane for Domestic Fittings. (Pitts, Tr. 3313-3315; Tatman, Tr. 730 ("Q. And you were enacting this policy [September 2009 Rebate Policy] here by telling Hajoca, you're cut off; right? A. At this moment in time, that's what we did."); *see also* CX 0173 at 001 (Jansen January 19, 2010 email to a customer of Hajoca's Lansdale branch explaining McWane's cutoff of Hajoca: "We don't like the situation either but feel we can't support someone who is helping our competition build a line against us."); CX 2477 (Jansen, Dep. at 223-225)).

1208. On November 23, 2009, Mr. McCullough informed Sean Kelly of Hajoca that McWane would "discontinue selling Hajoca domestic fittings since they are supporting Star's domestic line." (CX 1800; Tatman, Tr. 729).

1209. Based on his November 23, 2009 discussion with Sean Kelly (F. 1208), Mr. McCullough reported that Sean Kelly understood "[that] Lansdale will be also cut off on domestic. They had hoped to be able to buy Tyler/Union domestic at a higher price, but I advised this was not an option." (CX 1800; CX 2479 (McCullough, Dep. at 152) (CX 1800 accurately describes Mr. McCullough's conversation with Sean Kelly of Hajoca)).

1210. Mr. Tatman sent an internal email to Mr. McCullough and Mr. Walton, on November 23, 2009, to confirm that all Hajoca orders had been placed on hold, that Sigma had been advised to do the same per the terms of the Master Distribution Agreement (*infra* II.K.11.), and that Jeff Otterstedt and Scott Frank of Clow Water had also been advised. (CX 1800; Tatman, Tr. 729-730).

1211. On November 24, 2009, Mr. Jansen confirmed to a member of the McWane sales team that the Hajoca decision (F. 1204) was the "[f]inal word unless they change direction corporately." (CX 0702 at 001).

1212. On November 26, 2009, Mr. Tatman sent an email to Mr. Pitts and Mr. Kelly of Hajoca, stating:

> If the PA branch or other Hajoca branches – excluding Tulsa – have in process domestic jobs that require near term

> shipments, please send those into your normal customer service points before December 4th. . . . While you certainly don't agree with our stance, I hope that at least you will consider the broader market view under which we have to make these decisions.

(RX 237; Tatman, Tr. 730-731). *See also* Tatman, Tr. 715 ("So November 26 I'm saying, if you got anything in-house, I'll ship it. If you have any new requirements that you want, just get the orders in-house by -- and I gave a date -- and we'll ship those.").

1213. Hajoca's Tulsa branch was excluded from the allowance for final Domestic Fittings orders (F. 1212) because it was the Hajoca location that had purchased Domestic Fittings from Star. (Pitts, Tr. 3316).

1214. McWane allowed Hajoca's Lansdale branch to place orders to cover existing commitments and provided an extension to the December 4, 2009 date referenced in Mr. Tatman's November 26, 2009 email (F. 1212) to enable Hajoca's Lansdale branch to place orders to satisfy the known requirements of an existing contract with a municipality. (Pitts, Tr. 3314-3320; Tatman, Tr. 714-718 ("the financials records said we shipped Hajoca November, December, January, February, March. We continued shipping Hajoca product all the way through 2009, all the way through 2010. McWane continued to honor the orders Hajoca had previously placed.").

1215. An Hajoca business document listing "all the Union Foundry purchases (receipts) from 1/1/10 through 09/29/10" indicates that Hajoca's Lansdale Branch received Domestic Fittings at the Lansdale branch in January, February and March 2010. (RX 0289 at 001, 004; Pitts, Tr. 3320, 3351-3355).

1216. On December 14, 2009, Mr. Tatman informed Sigma that Sigma could not supply Domestic Fittings to Hajoca per the terms of the Master Distribution Agreement (F.1540) because Hajoca's Tulsa branch "elected to support another brand for some of their Domestic fitting needs," and that McWane therefore had "elected not to supply any of the Hajoca branches with our

domestic product." (CX 1801 at 001; Tatman, Tr. 720, 729-730, 739-740).

1217. On December 15, 2009, Mr. Tatman instructed Clow Water not to accept any Hajoca orders. (CX 0477 at 001; Tatman, Tr. 721; *see also* Tatman, Tr. 730 (when McWane cut off Hajoca, Mr. Tatman, as a matter of policy, told Clow Water not to sell to Hajoca)).

1218. Mr. Scott Frank of Clow Water responded to Mr. Tatman's December 15, 2009 instruction (F. 1217) that "All of Clow is aware to NO QUOTE and REFUSE all Hajoca orders." (CX 1802 (emphasis in original); Tatman, Tr. 738-739).

1219. Between December 4, 2009 and April 13, 2010, Hajoca's Lansdale, Pennsylvania branch was unable to place new Domestic Fittings orders with McWane. (Pitts, Tr. 3314-3315, 3326-3327, 3363; CX 0027 at 001 (internal Hajoca email dated March 9, 2010: "I can no longer purchase from [McWane] and have an immediate need for a large quantity of flanged fittings that must be Tyler Union.").

1220. On March 27, 2010, prior to McWane executives meeting with Hajoca executives to discuss negotiations with Hajoca, Mr. McCullough sent an internal email asking others at McWane "[h]ow our potential FTC action might [a]ffect how we do business with [Hajoca]." (RX 628) (referring to January 22, 2010 letter from FTC to McWane informing McWane that the FTC was conducting an investigation to determine whether McWane had engaged in unfair methods of competition, attached as Attachment B to CCFF).

1221. In April 2010, Hajoca and McWane negotiated regarding McWane's Full Support Program and came to an agreement whereby McWane agreed to allow Hajoca's Lansdale, Pennsylvania branch to resume buying Domestic Fittings from McWane. (Pitts, Tr. 3325, 3347-3348, 3355).

1222. On April 13, 2010, Mr. Kelly reported within Hajoca that he had spoken with Mr. Tatman, and that "we will be moving forward with Tyler Union in Lansdale and perhaps some other waterworks locations depending on how the local relationships

fare." (CX 0030 at 001; Pitts, Tr. 3324-3325). *See also* CX 0028 at 001 (April 1, 2010 internal Hajoca email reporting meeting with McWane and that Hajoca's Lansdale, Pennsylvania branch "will be reinstated as a full stocking distributor of [McWane] fittings.").

1223. McWane did not reinstate Domestic Fittings service to Hajoca's Tulsa, Oklahoma branch. (CX 0030 at 001 (April 13, 2010 internal Hajoca email: "Tulsa is excluded from the deal and will not have access to Tyler Union."); Pitts, Tr. 3325-3326).

c. McWane withheld Hajoca's rebate

1224. McWane withheld Hajoca's rebate in the fourth quarter of 2009 because that was the quarter when Hajoca violated the Full Support Program. (Pitts, Tr. 3322).

1225. In a February 4, 2010 email to Roy Pitts of Hajoca, Mr. Tatman confirmed that McWane had withheld Hajoca's fourth quarter 2009 Domestic Fittings rebate as a result of Hajoca's decision to sell Star products in Tulsa. (CX 1803 at 001; Tatman, Tr. 740; Pitts, Tr. 3322-3323).

1226. Hajoca's fourth quarter of 2009 rebate for non-domestic fittings, which was withheld (F. 1224), was $3,563. (Pitts, Tr. 3323; Tatman, Tr. 726, 740).

1227. With the exception of the fourth quarter of 2009, McWane continued to pay rebates to Hajoca as Hajoca's Lansdale branch purchased McWane Domestic Fittings, even though its Tulsa branch purchased Star Domestic Fittings. (Pitts, Tr. 3366).

d. Hajoca continued to purchase from Star

1228. Since September 2009, Hajoca's Domestic Fittings purchases have been split about 50/50 between McWane and Star. (Pitts, Tr. 3337).

1229. After negotiating McWane's Full Support Program in April 2010, McWane allowed Hajoca's Lansdale branch to purchase McWane's Domestic Fittings, even though Hajoca's

Tulsa branch was continuing to buy Domestic Fittings from Star. (Pitts, Tr. 3325, 3337, 3347-3348, 3355); *see also* Tatman, Tr. 715-718 ("[Hajoca] kept buying from Star, and we kept selling them product. . . . And regardless of what we said with Hajoca, we continued to ship them product. They continued to buy from Star.").

1230. By January 2010, the Tulsa branch of Hajoca had ordered over [redacted] million dollars' worth of Domestic Fittings from Star. (RX 671 (Pitts, Dep. at 102-103); RX 61).

7. Full Support Program as it relates to HD Supply

a. Communications between McWane and HD Supply in advance of the Full Support Program

1231. Before issuing its Full Support Program in September 2009, Mr. Tatman of McWane met with HD Supply. (Tatman, Tr. 689).

1232. By internal McWane email dated September 8, 2009, Mr. Tatman informed Mr. McCullough that Mr. Jansen had been discussing McWane's "pending policy on supply exclusivity" for Domestic Fittings with Distributors, and that he was "starting to pick-up some negative reaction from the HD Supply Region, District, and Branch managers." The "negative reaction" at HD Supply was not universal and depended upon "what level at HD Supply you would talk to." (CX 0340; Tatman, Tr. 689-693).

1233. In his September 8, 2009 email to Mr. McCullough and Mr. Jansen (F. 1232), Mr. Tatman suggested to Mr. McCullough that HD Supply's CEO, Jerry Webb, should send a communication within HD Supply that HD Supply had elected to use McWane Domestic Fittings as its sole supply source through 2010. Mr. Tatman provided Mr. McCullough with draft language for an email or communication to Mr. Webb. (CX 0340; Tatman, Tr. 693-694).

1234. On September 22, 2009, Glenn Fielding, HD Supply's Director of Sourcing and Price Management, sent an email to Jerry Webb, CEO, and Darrin Anderson, Vice President of Sourcing and Operations of HD Supply, forwarding the text of the

Full Support Program and recounting a conversation with Mr. Tatman in which Mr. Tatman informed Mr. Fielding that the policy "must be adhered to by entire company -- if one branch buys domestic from someone else it affects the whole compan[y's] program." (CX 2173 at 001; Webb, Tr. 2750-2753).

1235. Mr. Fielding of HD Supply expressed concern about a reduction in rebate dollars as a result of McWane's Full Support Program and even greater concern about the impact to customer satisfaction in the event that McWane cut off HD Supply's access to McWane's Domestic Fittings. (CX 2173 at 003).

1236. On September 23, 2009, Mr. Tatman sent an internal email to Mr. McCullough and Mr. Walton relaying a report he had received from Mr. Jansen. Mr. Jansen had met with Jack Shaller of HD Supply, who told Mr. Jansen that HD Supply had held a manager's meeting "and the McWane exclusivity policy for domestic fittings was discussed at length," and that "nobody from Jerry [Webb] on down was happy about it." Mr. Tatman noted that "I suspect Jerry [Webb] sold this as a 'We have to do' rather than a 'In the big picture this is best for our business.'" (CX 1246; Tatman, Tr. 696-697).

1237. HD Supply interpreted McWane's Full Support Program to require HD Supply to purchase "all" of its Domestic Fittings from McWane, except where McWane was unable to supply the Domestic Fittings in question. (Webb, Tr. 2768-2770 ("Q. And was this an all-or-nothing support? A. This was all to the extent other than the exceptions where they had a service or inability to fill an order.")).

1238. HD Supply interpreted McWane's Full Support Program to mean that if HD Supply purchased Domestic Fittings from Star that HD Supply "would lose the rebate on the domestic fittings and potentially lose access to the domestic line. . . . [I]t could be a significant event." (CX 2514 (Webb, Dep. at 90-91); Webb, Tr. 2760-2761 ("Q. How did you interpret this policy from Tyler/Union? A. That if their domestic line was not fully supported, there could be implications to your rebate and access to domestic fittings."); CX 2173 at 001).

1239. On September 23, 2009, HD Supply's Jerry Webb sent a memorandum to HD Supply's district managers, branch managers and operations managers stating: McWane has "established their position to not support any company purchasing American made fittings from any other source [besides Sigma and McWane]." (CX 0552; Webb, Tr. 2763-2765).

1240. Mr. Webb's September 23, 2009 memorandum (F. 1239) further stated: "Due to the 'Buy American' requirements in the ARRA funded jobs and with the expectation that the flow of money to these projects will pick up the latter part of 2009 through 2010; we need to adhere to this mandate and purchase all of our American made fittings through Union-Tyler or Sigma. This will ensure . . . continued compliance with the [f]ederal requirements." (CX 0552; Webb, Tr. 2765-2766) (explaining that the "mandate" was McWane's Full Support Program).

1241. Without McWane's September 22, 2009 Full Support Program, Mr. Webb would not have issued his September 23, 2009 company-wide policy requiring HD Supply managers to only purchase Domestic Fittings from McWane (or Sigma). (Webb, Tr. 2804).

b. Impact of Full Support Program on HD Supply

1242. With the exception of items that McWane did not have available or that had been committed to prior to September 22, 2009, HD Supply's then-pending Domestic Fittings orders with Star were canceled. (McCutcheon, Tr. 2310-2311; CX 2539 (McCutcheon, Dep. at 248-250) ("[Webb] asked me for a list of the outstanding quotes that we had with his company. So we put together the list of projects that we had worked with his company and sent it to him. And to my knowledge, all of those were canceled.")).

1243. After September 22, 2009, based on conversations between Mr. McCutcheon of Star and Mr. Webb of HD Supply, Mr. McCutcheon believed that HD Supply could not buy Star's Domestic Fittings because of the Full Support Program. (McCutcheon, Tr. 2302-2303).

1244. Mr. McCutcheon believed that HD Supply could not purchase Domestic Fittings from Star because McWane's Full Support Program required HD Supply to buy 100% of its Domestic Fittings requirements from McWane. (CX 2539 (McCutcheon, Dep. at 248-249)).

1245. On September 28, 2009, in response to a request from Mr. Webb of HD Supply, Mr. McCutcheon of Star sent Mr. Webb a list of orders and inquiries that HD Supply had pending with Star, noting that "I have instructed our people not to pursue these because of the recent events." (CX 0013 at 001). Mr. McCutcheon instructed Star's sales team not to pursue the listed items, based on his conversation with Mr. Webb regarding McWane's Full Support Program. (McCutcheon, Tr. 2307-2312; CX 2539 (McCutcheon, Dep. at 250)).

1246. Two HD Supply Regional Vice Presidents and two HD Supply District or Branch Managers each relayed to Mr. Michael Berry, a general manager of Star that they could not purchase Domestic Fittings from Star because of McWane's Full Support Program and that they did not have the discretion to do so under the HD Supply corporate policy. One of those Regional Vice Presidents also indicated that he could not purchase Domestic Fittings from Star for a project in Arkansas because he could not be the reason that HD Supply lost its rebate for purchases from McWane. (CX 2532 (Berry, Dep. at 138-141)). Mr. Berry believed that the reason that HD Supply refused to purchase Domestic Fittings from Star for these and other projects, such as the Hughson Modesto WWTP, because of the HD Supply corporate policy to not purchase from Star. (CX 2532 (Berry, Dep. at 169-170)).

1247. Star maintained and used a "domestic quote log" to track won and lost Domestic Fittings bids. (McCutcheon, Tr. 2312; CX 2294). Ms. Pam Garey of Star compiled the log on a regular basis at Mr. McCutcheon's request, and used information provided by Star's sales department. (McCutcheon, Tr. 2315).

1248. Star's domestic quote log indicated that between September 22, 2009 and February 22, 2010, Star lost about 25 Domestic Fittings jobs for which Star submitted a quote to HD

Supply, but where HD Supply purchased from McWane or Sigma rather than Star. In the "status/update" field of the domestic quote log on some of these jobs are the following comments: "HD mandate letter," "mandate letter," "letter directing fitting purchases," "Tyler-Sigma announcement," or "HD will not buy from Star." (CX 2294 at 010-011, 013, 015, 017-019; McCutcheon, Tr. 2313 (explaining that "lost due to mandate letter" on the log refers to the fact that Star lost an HD order due to the McWane Full Support Program)).

1249. Star's domestic quote log indicated that between September 22, 2009 and February 22, 2010, Star lost many Domestic Fittings jobs for which Star submitted a quote to HD Supply where in the "status/update" field of the domestic quote log are the following comments: "lost due to delivery times," "lost due to delivery requirement," "lost, lead times were too long." (CX 2294 at 012-014; see also McCutcheon, Tr. 2632-2634) (Star lost lots of Domestic Fittings jobs due to delay in delivery).

1250. Since September 2009, no one at McWane ever threatened to cut HD Supply off from Domestic Fittings, refused to sell or deliver Domestic Fittings to HD Supply, or refused to pay HD Supply rebates that it earned on Domestic Fittings. (Webb, Tr. 2800; RX 673 (Webb, Dep. at 46-47)).

1251. McWane's Full Support Program made HD Supply less willing to do business with Star. (Webb, Tr. 2766-2767; CX 2514 (Webb, Dep. at 95)).

c. HD Supply's views on and purchases from Star

1252. HD Supply believed that Star did not have the capacity to service HD Supply's needs for Domestic Fittings in the fall of 2009 because HD Supply believed that Star did not have a full line of Domestic Fittings to offer and it was important to HD Supply to be able to offer a full line of product to its customers. (Webb, Tr. 2788-2790).

1253. HD Supply had concerns about Star's ability to service Domestic Fittings in the fall of 2009. (Webb, Tr. 2792).

1254. HD Supply had concerns about Star's use of various foundries, as opposed to use of one central foundry, to manufacture its Domestic Fittings in the fall of 2009. (Webb, Tr. 2794-2795).

1255. There were risks to HD Supply's ability to service its own customers if HD Supply were to do business with Star in Domestic Fittings. (Webb, Tr. 2795-2796).

1256. HD Supply views McWane as a known, full line Fittings supplier with a good track record. (RX 673 (Webb, Dep. at 123-125)).

1257. HD Supply, the largest distributor in the industry, has purchased some amount of Domestic Fittings from Star regardless of McWane's Full Support Program. (Webb, Tr. 2798-2800; McCutcheon, Tr. 2591-2592).

1258. HD Supply is Star's largest customer. Star estimates that it has greater than a [redacted]% share of HD Supply's non-Domestic Fittings business. Star estimates that it has less than a [redacted]% share of HD Supply's Domestic Fittings business. (McCutcheon, Tr. 2651-2652, *in camera*).

8. Full Support Program as it relates to Ferguson

a. Impact of Full Support Program on Ferguson

1259. Ferguson received notice of McWane's Full Support Program from McWane on September 22, 2009. (Thees, Tr. 3086; CX 0506).

1260. When Mr. William Thees, Vice President of the Waterworks Division at Ferguson, received notice of the Full Support Program, Ferguson's concerns about the possibility of foregoing unpaid rebates or the potential to lose access to McWane's Domestic Fittings were only secondary concerns. (Thees, Tr. 3086-3089). *See* F. 1271-1275 (Ferguson's primary concerns).

1261. When Mr. Thees received notice of McWane's Full Support Program, he called his district managers to ensure that Ferguson communicated support for McWane's Domestic Fittings by continuing to purchase Domestic Fittings from McWane and not purchasing Domestic Fittings from Star. To his knowledge, his district managers followed his instruction. (Thees, Tr. 3091-3092, 3095).

1262. After McWane's Full Support Program was announced, Star's Mr. Berry had negotiations with Darryl Case and Phil Selby, who are Ferguson district managers, and Dan Warner, who is a Ferguson general manager, for the sale of Star's Domestic Fittings to Ferguson. Mr. Berry of Star believed that there was a corporate edict that no Ferguson employees purchase Star Domestic Fittings unless McWane did not have the Domestic Fittings. (CX 2532 (Berry, Dep. at 131-133)).

1263. In a Star sales person's weekly report to Mr. Berry, the sales person noted that Star had been awarded a job to supply Domestic Fittings for a certain project, but that Ferguson cancelled that job after Ferguson issued its corporate policy notifying its employees that they should not purchase Star Domestic Fittings. (CX 2532 (Berry, Dep. at 164-165); CX 2288).

1264. Star's domestic quote log (F. 1247) indicated that between September 22, 2009 and February 22, 2010, Star lost numerous Domestic Fittings jobs for which Star submitted a quote to Ferguson, but where Ferguson purchased from McWane or Sigma rather than Star. In the "status/update" field of the domestic quote log on some of these jobs are comments including: "letter threatening to cut off if they use Star domestic," "Ferguson will not buy domestic from Star currently," and "All Ferguson are lost-they only get quotes from us for reference." (CX 2294 at 013-018).

1265. Star's domestic quote log indicated that between September 22, 2009 and February 22, 2010, Star lost many Domestic Fittings job for which Star submitted a quote to Ferguson where in the "status/update" field of the domestic quote log are the following comments: "lost due to delivery requirements," "lost ftgs due to delivery," "cust. required

immediate shipment," and "lost due to lead time." (CX 2294 at 007-013).

1266. At the time Ferguson received notice of McWane's Full Support Program, Ferguson was already planning to purchase all of its Domestic Fittings from McWane regardless of the Full Support Program. (Thees, Tr. 3108-3109).

1267. The Full Support Program did not prevent Ferguson from purchasing Domestic Fittings from Star. (Thees, Tr. 3109-3110).

1268. When Ferguson's Mr. Thees received notice of McWane's Full Support Program, he thought it was unlikely that McWane would withhold rebates from Ferguson and believed that the rebate terms and lead times stated in the Full Support Program could be negotiated. (Thees, Tr. 3110).

b. Ferguson's views on and purchases from Star

1269. When Star began selling Domestic Fittings in 2009, Ferguson had already been purchasing Domestic Fittings from McWane for over twenty years. Ferguson viewed McWane as a good, reliable supplier of Domestic Fittings with whom Ferguson was comfortable. (Thees, Tr. 3101-3102).

1270. Ferguson has historically increased its purchases of McWane's Fittings (and other products) in order to maximize its rebate under McWane's rebate programs. (CX 2503 (Thees, IHT at 139-141) ("Q. Is . . . this the rebate structure that you're pointing to as preferable to the programs offered by Sigma or Star? A. Yes. Q. The share tier, the 50-percent share and 55-percent share, do those incentives shape your purchasing activity in any meaningful way? A. Yes. Q. Do you on occasion direct the branches to maximize their purchases and fittings from Tyler in order to qualify for the next tier? A. Yes.")).

1271. Star entering as an unknown in the Domestic Fittings market was Ferguson's primary concern in determining whether to purchase Domestic Fittings from Star. (Thees, Tr. 3096).

1272. Ferguson was reluctant to purchase Domestic Fittings from Star because Ferguson was concerned about Star's ability to produce a complete line of Domestic Fittings without having their own manufacturing facility. Because Star was not using one central foundry, Ferguson was concerned that Star was not controlling the manufacturing process of its Domestic Fittings. (Thees, Tr. 3087, 3103).

1273. Ferguson was reluctant to purchase Domestic Fittings from Star because Ferguson was concerned that Star was using jobber facilities with extra capacity to produce Domestic Fittings for them, Star would not disclose to Ferguson which foundries it was using, and Ferguson was concerned that any of these domestic foundries could abandon Star, leaving Star unable to supply Ferguson with Domestic Fittings. (Thees, Tr. 3102-3103).

1274. At the time Star began producing Domestic Fittings, Star did not have the depth and breadth of inventory to supply Ferguson with all of Ferguson's Domestic Fittings needs. (Thees, Tr. 3103-3104).

1275. Ferguson has had past business dealings with Star that put a strain on the relationship between the two companies. This strain was a leading component in Ferguson's decision to not purchase Domestic Fittings from Star. (Thees, Tr. 3105-3107 (discussing RX 255, a January 21, 2010 email from Mr. McCutcheon of Star to Mr. Thees stating "It is obvious we dropped the ball the last couple years" and explaining that Star's actions were a "breach of trust.")).

1276. After McWane announced its Full Support Program, Star sold Domestic Fittings to Ferguson. (McCutcheon, Tr. 2591-2592; Thees, Tr. 3111-3112).

1277. In 2011, Ferguson purchased hundreds of thousands of dollars' worth, but less than a million dollars' worth, of Domestic Fittings from Star. (Thees, Tr. 3112).

1278. McWane has never refused to pay Ferguson a rebate it earned on Domestic Fittings purchased from McWane. (Thees, Tr. 3112).

1279. McWane has never threatened not to sell Domestic Fittings to Ferguson. (Thees, Tr. 3112-3113).

1280. Ferguson is Star's second largest customer. Star estimates that it has a [redacted]% share of Ferguson's non-Domestic Fittings business. Star estimates that it has less than a [redacted]% share of Ferguson's Domestic Fittings business. (McCutcheon, Tr. 2652, *in camera*).

1281. According to records maintained by Ferguson, in the first four months of 2010, Ferguson purchased [redacted]% of its Domestic Fittings from Star, while purchasing approximately [redacted]% from McWane and [redacted]% from Sigma. (CX 0502, *in camera*; CX 2503 (Thees, IHT at 146-147)).

9. Full Support Program as it relates to U.S. Pipe

a. U.S. Pipe's purchasing history and reaction to ARRA

1282. U.S. Pipe sells complete waterworks systems that include its ductile iron pipe packaged together with related products, including Fittings and accessories. Until April 2006, U.S. Pipe manufactured Domestic Fittings. (Morton, Tr. 2809-2812).

1283. In 2008, U.S. Pipe's primary source for non-Domestic Fittings was Sigma, with Star as its secondary Supplier. Currently, U.S. Pipe purchases non-Domestic Fittings primarily from Star, with Sigma as a secondary supplier. (Morton, Tr. 2819-2820).

1284. After U.S. Pipe stopped manufacturing Fittings in April 2006 until 2010, U.S. Pipe's sole source for Domestic Fittings was McWane. (Morton, Tr. 2810, 2818, 2820, 2857).

1285. Following the passage of ARRA in 2009, U.S. Pipe needed to ensure that it had sources for Domestic Fittings. (Morton, Tr. 2826).

1286. U.S. Pipe believed that it would benefit from having more than one supplier for Domestic Fittings because it wanted to, among other reasons, ensure supply and enjoy the benefits of competition. (Morton, Tr. 2826-2827).

1287. U.S. Pipe began investigating small and medium Domestic Fittings sources other than McWane in early 2009. (Morton, Tr. 2825-2826).

1288. U.S. Pipe initially considered manufacturing its own Domestic Fittings in response to ARRA. U.S. Pipe stopped investigating that option in part because Sigma contacted it in June of 2009 and made a commitment to produce Domestic Fittings. (Morton, Tr. 2876-2877).

1289. The primary reason U.S Pipe decided not to manufacture its own Domestic Fittings in response to ARRA was that it would be cost prohibitive given ARRA's "limited window." (Morton, Tr. 2867-2877, 2876, 2888; RX 701 (Morton, Dep. at 47-49, 56-57)).

1290. Sigma told U.S. Pipe in August 2009 that Sigma had no concrete plans to begin producing Domestic Fittings. (Rona, Tr. 1693-1694).

1291. In September 2009, U.S. Pipe and Star discussed the potential purchase by U.S. Pipe of Domestic Fittings from Star. (Morton, Tr. 2834-2835; CX 2215 at 001).

1292. On September 3, 2009, Mr. McCutcheon of Star sent an email to Mr. Thomas Morton, U.S. Pipe's Vice President of purchasing, and others at U.S. Pipe, thanking them for meeting the day before, and setting forth a schedule for the availability of Star's Domestic Fittings. (CX 2215 at 002-003; *see also* RX 207 (same schedule as sent to Ferguson in more legible form)).

1293. On September 15, 2009, Mr. Morton wrote an email to Ms. Susan Schepps of Star's sales group stating: "We are definitely interested in pursuing the purchasing of our domestic requirements from Star and are looking forward to receiving the list of configurations that will be available." (Morton, Tr. 2834-2835; CX 2215 at 001).

1294. On September 28, 2009, Mr. Morton met with Ms. Schepps in Birmingham, Alabama regarding U.S. Pipe's interest in purchasing Domestic Fittings from Star. Ms. Schepps provided a detailed list of Domestic Fittings products that Star was committed to having available by the end of 2009. (Morton, Tr. 2835-2837; CX 1936).

1295. Star initially proposed to U.S. Pipe pricing for 3" to 12" in diameter Domestic Fittings that matched McWane's Domestic Fittings multipliers. In response to U.S. Pipe's statement to Star that it needed to incentivize U.S. Pipe to leave McWane, Ms. Schepps further committed to U.S. Pipe that Star would offer Domestic Fittings pricing significantly below McWane's in exchange for a major portion of U.S. Pipe's volume. (CX 1936 at 001; Morton, Tr. 2837-2838).

b. Impact of Full Support Program on U.S. Pipe

1296. After U.S. Pipe received notice of McWane's September 22, 2009 Full Support Program, Stephen Gables of U.S. Pipe's sales group forwarded the letter to Mr. Crawford, Mr. Morton, and U.S. Pipe's President Ray Torok, noting as follows:

> There was a lot of buzz last week about [McWane] preparing to "cut off" certain wholesale distributors if they were found to have purchased any STAR domestic product. These letters make that buzz more like the sound of a 757.

(CX 2205 at 001; Morton, Tr. 2849).

1297. U.S. Pipe has never had a Fittings rebate program in place with McWane. (Morton, Tr. 2849, 2862).

1298. On October 13, 2009, Mr. Morton met with Mr. Tatman in Birmingham, Alabama regarding how McWane wanted to conduct business with U.S. Pipe going forward. In that meeting, Mr. Tatman explained to Mr. Morton that McWane's agreement with Sigma (F. 1540, 1571-1573) would not allow Sigma to supply U.S. Pipe with McWane manufactured Domestic

Fittings and that U.S. Pipe would have to buy Domestic Fittings from McWane directly. (Morton, Tr. 2840-2842).

1299. In the October 13, 2009 meeting between Mr. Morton and Mr. Tatman (F. 1298), Mr. Tatman explained that U.S. Pipe would be required to purchase 100% of its domestic requirements from McWane, and not purchase Domestic Fittings from Star, unless McWane did not have the needed items or its lead times were too long. (Morton, Tr. 2842-2845; *see also* CX 2203 at 002 (Morton meeting notes indicating "Tatman - expect customers including USP to be loyal and purchase 100 percent of their requirements from [McWane]")).

1300. In the October 13, 2009 meeting between Mr. Morton and Mr. Tatman, Mr. Tatman also explained that U.S. Pipe could not "cherry pick" "A" or "B" items, or high volume Domestic Fittings from Star, and expect McWane to supply the balance. (CX 2203 at 002; Morton, Tr. 2845-2846). In notes Mr. Morton took of that meeting, Mr. Morton recorded: "if USP strays and purchases any of these fittings from Star, don't come back to [McWane] and expect [McWane] to sell any of the AWWA 4" to 24" fittings to USP." (CX 2203 at 002).

1301. Because U.S. Pipe needed access to a full line of Domestic Fittings, not just the "A" and "B" items initially being offered by Star, Mr. Morton's recommendation to his boss after meeting with Mr. Tatman in October 2009 was to continue to look for alternative sources, but unless U.S. Pipe was convinced that those sources could provide 100% of U.S. Pipe's requirements for Domestic Fittings, U.S. Pipe needed to take the notification from Mr. Tatman very seriously and buy its Domestic Fittings from McWane. (Morton, Tr. 2846, 2848).

1302. Mr. Morton instructed his purchasing manager not to purchase Domestic Fittings from Star unless McWane could not provide the needed Domestic Fittings. (Morton, Tr. 2915-2916).

1303. Around November 12 or 13, 2009, Mr. Morton and Stephen Gables of U.S. Pipe met with Mr. McCutcheon and Ms. Schepps of Star. At that meeting, U.S. Pipe conveyed to Star the message that U.S. Pipe received from McWane that if U.S. Pipe purchased any of its Domestic Fittings requirements from

anyone other than McWane, then McWane would not sell U.S. Pipe any Domestic Fittings. (CX 2217 at 002; Morton, Tr. 2853-2854).

1304. U.S. Pipe further conveyed to Star in the November 2009 meeting that "[w]e must have 100% confidence in Star's ability to deliver all of our domestic requirements" before moving away from McWane. (CX 2217 at 002; Morton, Tr. 2854-2855).

1305. With the exception of minor purchases falling within the limited exceptions to McWane's Full Support Program (*e.g.*, where McWane's lead time to supply the requested Fitting was too long, or if McWane didn't make a particular Fitting configuration), U.S. Pipe did not purchase significant amounts of Domestic Fittings from Star until September of 2010. (Morton, Tr. 2856-2859, 2915-2916).

c. U.S Pipe's views on and purchases from Star

1306. Prior to the end of 2009, Star was not manufacturing many of the Fittings that U.S. Pipe required. (Morton, Tr. 2860, 2899-2901 ("Q. And then below is literally eight pages of single-spaced references to many, many domestic fittings that Star was anticipating producing; correct? A. Correct. . . . Q. And it's true, sir, isn't it, that many of the different item numbers listed on these eight pages were in fact not available by the end of 2009; correct? . . . A. I do not believe they were.)).

1307. Early in Star's domestic development process, U.S. Pipe, had concerns about Star's ability to provide a full line of Domestic Fittings. (Morton, Tr. 2892-2894 (certain Domestic Fittings, for example, the C153s up to 24 inches would not be available until as late as February 15, 2010 and other Domestic Fittings, for example, the DI full-body MJ fittings up to 24 inch would be available only "by project," meaning that if U.S. Pipe had a requirement for that type of Fitting, U.S. Pipe would submit it, and Star would provide U.S. Pipe with a lead time of up to 90 days)).

1308. In 2009, U.S. Pipe was concerned that Star would not commit to putting the tooling in place in advance of getting a requirement for volume. (Morton, Tr. 2893-2894).

1309. From January 2010 to September 2010, U.S. Pipe purchased a minor number of Domestic Fittings from Star in instances where McWane could not provide the required fittings. (Morton, Tr. 2915-2916).

1310. In September 2010, U.S. Pipe was purchasing "a significant portion" of its Domestic Fittings from Star. (Morton, Tr. 2856-2857).

1311. In September 2010, U.S. Pipe "decided as an executive team that the risk of [McWane] not selling us [Domestic Fittings] even if [U.S. Pipe] bought from Star, given the announced FTC investigation, would be significantly less . . . . We believed that [McWane] would not refuse to sell us [Domestic F]ittings." (Morton, Tr. 2857-2858; CX 2210 at 001 ("We also believe that with the current FTC investigation that it is unlikely that McWane will deny selling domestic fittings to USP.")).

1312. McWane never cut off U.S. Pipe from sales of Domestic Fittings. (Morton, Tr. 2861-2862).

10. Full Support Program as it relates to Groeniger

a. Impact of Full Support Program on Groeniger

1313. Prior to the Full Support Program, in September 2009, Groeniger gave Star Domestic Fittings business on "two sizeable projects" to "test[] to find out if Star could produce the domestic fittings." (CX 2509 (Groeniger, IHT at 110); CX 2510 (Groeniger, Dep. at 213-214)).

1314. Groeniger awarded the two projects (F. 1313) to Star for Domestic Fittings "[b]ecause they were more competitive." Groeniger wanted another supplier of Domestic Fittings for "competitive pricing" and "better availability" and "better service." (CX 2509 (Groeniger, IHT at 111-112)).

1315. After McWane's Full Support Program was announced, Groeniger was reluctant to purchase Domestic Fittings from Star "[b]ecause of the inherent threats of retaliation" from McWane. (CX 2510 (Groeniger, Dep. at 207) ("Q. Have you considered purchasing more [ductile] iron pipe fittings from Star on the domestic side? A. Yes. Q. And did you purchase more domestic [ductile] iron pipe fittings from Star? A. Probably not. Q. Why not? A. Because of the inherent threats of retaliation. Q. Who was threatening you? A. Tyler."); CX 2509 (Groeniger, IHT at 116-118) ("Q. Sir, you testified just now I asked you why you haven't purchased any more domestic fittings from Star and you responded, well, because of the potential retribution. Do you recall that? A. Yes. Q. Did you mean because of the potential retribution from Tyler? A. Yes.")).

1316. In 2009, Groeniger needed access to McWane's Domestic Fittings in order to service customers with McWane-only Domestic Fitting requirements. (CX 2510 (Groeniger, Dep. at 214-215) ("There are one or two districts that are big . . . [that have a] Tyler requirement, they didn't approve Star domestic, they wouldn't approve them. . . . So the realization is if we were going to be in that ballgame during that period of time when that was the biggest entity of anything going on in the Hayward region, and to support two of our major contractors in the area that were bidding work down there, we had to have Tyler. And Tyler knew that, it was pretty obvious.")).

1317. Groeniger was concerned about "[b]eing shut out" from McWane if it purchased Domestic Fittings from Star. (CX 2509 (Groeniger, IHT at 119) ("Q. What's your understanding of the possible consequences of purchasing domestic fittings from Star in terms of what Tyler might do? A. Being shut out.")).

1318. Groeniger described the Full Support Program as "the hammer" that "could [a]ffect you price-wise and availability-wise" and could put Groeniger "theoretically out of business." (CX 2509 (Groeniger, IHT at 142-143)).

1319. McWane never withheld rebates from Groeniger, even though Groeniger bought Domestic Fittings from Star. (RX 669

(Groeniger, Dep. at 99) ("Q. In the 2009 time frame after receiving [the Full Support Program] and later, did Tyler ever not pay you a rebate that you were due because you had a relationship with Star? A. I don't think so.")).

1320. McWane never refused to sell Domestic Fittings to Groeniger, even though Groeniger bought Domestic Fittings from Star. (RX 669 (Groeniger, Dep. at 99) ("Q. In the 2009 time frame after receiving [the Full Support Program], Mr. Groeniger, did Tyler ever refuse to sell you something because you had a relationship with Star? A. Not to my knowledge.")). *See also* RX 643 (Tatman, IHT at 197-198 (Groeniger was "using Star product. We talked to Mike the owner -- nice guy -- at a trade show, and Mike basically said, Look, we're going to do what we have to do, and you guys do what you have to do. And we left it that way. We never -- we wanted them to support us. We made a little bit of rumbling to have them support us, but in the end, we kept selling Groeniger material.")

1321. McWane increased prices on Domestic Fittings it sold to Groeniger in 2010. (CX 2509 (Groeniger, IHT at 143); CX 2510 (Groeniger, Dep. at 216)).

b. Groeniger's views on and purchases from Star

1322. The two projects that Groeniger awarded to Star in September 2009 (F. 1313) "were difficult jobs," but Star performed to Groeniger's satisfaction. (CX 2509 (Groeniger, IHT at 110)).

1323. After McWane announced its Full Support Program, Mr. Berry of Star had at least three conversations with representatives of Groeniger, including Mike Groeniger, President of Groeniger. (CX 2532 (Berry, Dep. at 111-113)).

1324. After September 22, 2009, Star perceived that Groeniger had fears that it would not be able to purchase Domestic Fittings from McWane if Groeniger purchased Domestic Fittings from Star. As a result, Star pursued selling Domestic Fittings to Groeniger indirectly, through Griffin Pipe. (CX 2532 (Berry, Dep. at 110-114); RX 224).

1325. In October 2009, Groeniger and Star negotiated a sale whereby Groeniger purchased Star's Domestic Fittings indirectly through Griffin. (CX 2532 (Berry, Dep. at 114-115)).

1326. In an internal email from Mr. Berry to Mr. McCutcheon and others at Star dated October 29, 2009, Mr. Berry reported: "All 24" fittings will be excluded on this [Groeniger] order, because of our delivery dates." (RX 224; McCutcheon, Tr. 2625-2626) (These fittings were excluded by Groeniger because Star couldn't meet the delivery dates.).

1327. In the October 29, 2009 email (F. 1326), Mr. Berry also reported: "They [Groeniger] want this material brought into Sacramento, so they can will call. . . . They will commit all domestic/import business to us if we do so." (RX 224; McCutcheon, Tr. 2625-2526) (Groeniger was willing to buy from Star in October 2009).

1328. In a March 10, 2010 internal email to Mr. McCutcheon, Mr. Berry reported that Groeniger wanted to purchase Domestic Fittings from Star for another project, but had committed to McWane because of the Full Support Program. (CX 2532 (Berry, Dep. at 163-164); CX 2288).

1329. After October 2009, Groeniger did purchase Domestic Fittings from Star, but not frequently. (CX 2532 (Berry, Dep. at 114-115); *see also* McCutcheon, Tr. 2591-2594) (Groeniger purchased Domestic Fittings from Star following the issuance of McWane's Rebate Policy.).

1330. In 2010, Groeniger would have given Star more of its Domestic Fittings business if McWane had not announced the September 2009 Full Support Program. (CX 2510 (Groeniger, Dep. at 219) ("Q. So had Tyler not issued this letter in September 2009, you would have purchased 50 percent of your domestic fittings needs from Star? A. I would think we would have. Knowing personalities involved, knowing the history involved and the sales people that Star had currently in effect in the Central Valley coming out of Sacramento who were very astute to our needs and our capabilities, I think so, yeah.")).

11. Full Support Program as it relates to WinWater

1331. Mr. Eddie Gibbs, vice president of vendor relations for WinWholesale, which does business as WinWater Works ("WinWater") (F. 236), visited Star's Houston, Texas facility on September 10, 2009. WinWater was potentially interested in purchasing Domestic Fittings from Star and wanted to access "how fast they were ramping up production, when product would be able to be shipped." (CX 2545 (Gibbs, IHT at 41-42)).

1332. On September 22, 2009, Mr. Gibbs received notice of McWane's Full Support Program from Mr. Tatman. (CX 2167 at 001).

1333. On September 24, 2009, Mr. Gibbs emailed all the WinWater local companies (branches), Regional Vice Presidents, Area Coordinators and Area Leaders, forwarding McWane's Full Support Program announcement. (CX 2166 at 001-002; CX 2546 (Gibbs, Dep. at 72)).

1334. On November 2, 2009, Mr. Gibbs emailed Mr. Tatman stating: "This email will serve as our official acceptance of the terms of the [Full Support Program]. Any violation of this agreement that Tyler identifies will be brought to WinWholesale corporate's . . . attention before any punitive action takes place against the local company." (CX 2167 at 001).

1335. On April 14, 2010, Mr. Gibbs emailed all the WinWater local companies, Regional Vice Presidents, Area Coordinators and Area Leaders, again forwarding McWane's Full Support Program and stating: "It has come to my attention that I had failed to put out a specific notice concerning **Star Pipe** being given **Not Approved** status on their new line of [Domestic Fittings]." (CX 2166 at 001 (emphasis in original); CX 2546 (Gibbs, Dep. at 72)).

1336. Star was verbally notified of WinWholesale's intention to place Star on its "not approved" list for Domestic Fittings in early December 2009 and received "written notice on February 5, 2010 in the form of our 2010 Preferred Vendor letter listing them as NOT APPROVED . . . ." (CX 2166 at 001 (emphasis in original); CX 2546 (Gibbs, Dep. at 72-73); *see also* RX 601 at

001 (internal McCutcheon email stating "WinWholesale VP, Eddie Gibbs sent letter to their people telling them that Star can not be a provider on Domestic fittings.")).

1337. At WinWholesale, "any vendor that receives not approved status means that the local companies are not to buy from them under any circumstances unless they seek board approval." (CX 2546 (Gibbs, Dep. at 73)).

1338. Although it placed Star on the "Not Approved" vendor list for Domestic Fittings, WinWholesale instructed the WinWater companies that they could purchase Domestic Fittings from Star "if, because of Tyler's inability to perform, they have to buy domestic fittings from Star." (CX 2166 at 002).

1339. WinWholesale was not concerned about the overall WinWater locations being able to get product from Tyler/Union, if an individual WinWater local company purchased Domestic Fittings from Star. (CX 2546 (Gibbs, Dep. at 82-83); RX 705 (Gibbs, Dep. at 35-36) (Gibbs did not interpret the Full Support Policy as McWane telling WinWholesale that they would not sell Domestic Fittings to WinWholesale)).

1340. WinWholesale had some concerns that if the WinWater local companies, "on an ongoing basis," purchased Domestic Fittings from Star, they would lose their rebate and "be placed at the back of the line when [they] place [their] Tyler/Union orders." (CX 2546 (Gibbs, Dep. at 82-83)).

1341. In 2010, WinWholesale had concerns about Star's reliability as a domestic Fittings supplier that were independent of McWane's Full Support Program. WinWholesale was concerned about whether Star had the capacity and quality, whether Star could ship the product, and whether the product would be consistent. (RX 705 (Gibbs, Dep. at 87-88, 93-94) ("[I]f Tyler/Union had never written this letter, I would still have the same issues that I've stated.")).

1342. Mr. Gibbs put Star on the "not approved" list not because of the rebate element of the Full Support Program, but because WinWholesale had no background on where Star was

making its product, because Star had not produced any test data or anything that would lead WinWholesale to believe that Star was as credible a vendor on Domestic Fittings as it was on imported Fittings, or that they could do a good, consistent job making Domestic Fittings using seven foundries. (RX 705 (Gibbs, Dep. at 85-88)).

1343. After McWane announced its Full Support Program, Star sold Domestic Fittings to WinWater. (McCutcheon, Tr. 2591-2592).

1344. McWane has never withheld a rebate to WinWholesale even though WinWholesale bought Domestic Fittings from Star. (RX 705 (Gibbs, Dep. at 35-39); RX 638 (McCullough, IHT at 173)).

1345. McWane has never cut off or threatened to cut off WinWholesale from purchasing Domestic Fittings from McWane even though WinWholesale bought Domestic Fittings from Star. (RX 705 (Gibbs, Dep. at 36)).

12. Full Support Program as it relates to TDG

a. TDG Vendor Committee negotiations on rebates

1346. The Distribution Group ("TDG") collectively negotiates various terms, including rebates, with suppliers, which it refers to as vendors, on behalf of its 32 independent Distributors. Vendors pay earned rebates to TDG and TDG then distributes those rebates back to the member Distributors in proportion to their purchases. TDG members must purchase certain percentages of their purchases from TDG vendors, but members are not required to purchase products from any specific vendor just because the vendor has a rebate program with TDG. F. 244-249.

1347. McWane had a rebate program in place with TDG for Domestic Fittings in 2007, 2008, and 2009. (CX 2494 (R. Fairbanks, Dep. at 107-108), *in camera*; CX 1361 at 004, 018, 034, *in camera*). In negotiating terms with TDG, McWane did not include a rebate for Domestic Fittings in its 2010 proposal.

(CX 2494 (R. Fairbanks, Dep. at 107-108), *in camera*; CX 1366 at 002).

1348. The TDG Vendor Committee wanted to have a rebate proposal on Domestic Fittings from McWane. (CX 2494 (R. Fairbanks, Dep. at 107), *in camera*).

1349. In September of 2009, at the annual TDG Vendor Committee negotiations, McWane explained that its new rebate program for TDG required TDG to police its members' Domestic Fittings purchases to ensure that all locations for all TDG Distributors purchase all of their Domestic Fittings from McWane. Unless all TDG members purchased their Domestic Fittings solely from McWane, McWane would cut off all TDG members' access to McWane's Domestic Fittings. (Sheley, Tr. 3408-3409).

1350. TDG did not accept McWane's September 2009 Domestic Fittings rebate proposal, in part, because TDG refused to police its members' Domestic Fittings purchases. (Sheley, Tr. 3409; CX 2494 (R. Fairbanks, Dep. at 113-114), *in camera*).

1351. In 2010, TDG selected Star, but not McWane, as a TDG Domestic Fittings vendor partner. Selecting Star as a vendor partner did not require TDG members to buy any Domestic Fittings from Star, nor did it preclude TDG members from buying Domestic Fittings from McWane. However, by selecting Star as a vendor partner, TDG did give its members an incentive to buy from Star. (RX 694 (Bhutada, Dep. at 155; CX 2494 (R. Fairbanks, Dep. at 17-18, 33, 37-38), *in camera*; RX 675 (Sheley, Dep. at 68); RX 652 (Johnson, Dep. at 35-36)).

1352. The 2010 proposal that Star offered to give all members of TDG, and that TDG accepted, was a [redacted]% rebate on all purchases of Domestic fittings 3" to 48" mechanical joint, push-on, and flanged. (RX 601 at 025-027, *in camera*; McCutcheon, Tr. 2646-2647, *in camera*).

b. Various TDG members' views and purchases from Star

1353. C.I. Thornburg, in 2010, purchased 95-98% of its Domestic Fittings from Tyler Union or Sigma, which sold Tyler Union Domestic Fittings. Towards the end of 2010, C.I. Thornburg started purchasing small amounts of Star Domestic Fittings that would "not get McWane's attention." (CX 2489 (Morrison, IHT at 64-67)). C.I. Thornburg would have been interested in purchasing "A" item Fittings from Star and then purchasing odd ball Fittings from McWane and would have given a third to a half of all its domestic business to Star, but for McWane's Full Support Program. (CX 2489 (Morrison, IHT at 83-86)).

1354. Western Waterworks' Mr. Jim McDowell, a sales manager and now part owner of Western Waterworks, informed Mr. Berry of Star in the course of its negotiations with Star that Western Waterworks was willing to purchase Domestic Fittings from Star only if the transaction could "fly under the radar," *i.e.*, that McWane would not find out about the sales. (CX 0011; CX 2532 (Berry, Dep. at 124)).

1355. HD Fowler Company informed Mr. Berry of Star in January 2010 that it would not purchase Star's Domestic Fittings because it was afraid that McWane would not sell Domestic Fittings to HD Fowler if HD Fowler purchased Domestic Fittings from Star. (CX 2532 (Berry, Dep. at 134)). Star submitted bids for Domestic Fittings to HD Fowler for a project called "Shelton WWTP." HD Fowler purchased large Domestic Fittings from Star for this project because, at the time, Star could deliver the product more quickly than McWane. (CX 2532 (Berry, Dep. at 168)). However, for the same project, HD Fowler was unable to purchase smaller Domestic Fittings from Star because McWane could supply the product. (CX 2532 (Berry, Dep. at 167-169) (also testifying that HD Fowler did not purchase Domestic Fittings from Star for its Coeur d'Alene, Idaho WWTP project; its Pendleton, Oregon WWTP project, or its HD Valley-Brownsville project); CX 2288).

1356. Hayes Pipe informed Star that it would not purchase Domestic Fittings from Star because of McWane's Full Support Program. (CX 2537 (McCutcheon, IHT (Vol. 1) at 163), *in camera*).

13. Full Support Program as it relates to Illinois Meter

a. Impact of Full Support Program on Illinois Meter

1357. Illinois Meter, a member of TDG, was informed independently of TDG, by Mr. Tatman, Mr. Jansen, and Ms. Jennifer Heys of McWane, that the terms of McWane's Full Support Program applied to Illinois Meter. Mr. Tatman and Mr. Jansen told Mr. Sheley of Illinois Meter that if Illinois Meter purchased Domestic Fittings from anyone but McWane, it "would lose the right to buy [McWane's Domestic Fittings] completely" and would also lose its rebate from its purchases of non-domestic Fittings. Mr. Tatman and Mr. Jansen told Mr. Sheley this in September 2009 at a TDG meeting, and Mr. Jansen reiterated the message in January of 2010 at the TDG meeting in Dallas. (Sheley, Tr. 3407-3411).

1358. Losing access to McWane's Domestic Fittings was a more serious consequence to Illinois Meter than losing McWane's rebates because Illinois Meter needs to have access to a full line of Domestic Fittings in certain locations and McWane carries a complete line. (Sheley, Tr. 3412).

b. Illinois Meter's views on and purchases from Star

1359. Illinois Meter still would have purchased 90-plus percent of its Domestic Fittings from McWane, whether the Full Support Program existed or not. (RX 674 (Sheley, IHT at 90) ("Q: Had McWane not implemented this policy, would you have purchased domestic Fittings from Star? A: Probably not. I'd probably still be buying 90-plus percent of all my stuff from [McWane].")).

1360. In 2009, when Star first announced its Domestic Fittings product line, McWane's Full Support Program did not affect Illinois Meter's decision to not buy Domestic Fittings from Star. (RX 675 (Sheley, Dep. at 162-163) ("Q. But you also said that unequivocally you would not be purchasing Star's domestic? A. In 2009, that's correct. Q. So McWane's -- or Tyler's rebate policy had no effect whatsoever on your decision? A. At that point when they first come out with it, no, it did not.")).

1361. Illinois Meter had a negative experience with Star's reliability as a supplier when Star first entered the joint restraint business, and was not willing to give Star any Domestic Fittings orders in early 2010 until Star had demonstrated it had sufficient inventory to meet Illinois Meter's needs. (Sheley, Tr. 3448-3451).

1362. Illinois Meter did not think that Star could supply Illinois Meter with a complete line in early 2010 and Illinois Meter was not willing to risk coming up short on a project if it could not turn to McWane for Domestic Fittings because of McWane's Full Support Program. In the summer of 2010, Illinois Meter was interested in purchasing Domestic Fittings from Star for an ARRA-funded water treatment plant in Winchester, Illinois, and for a Domestic specification job in Macomb, Illinois. Both projects required smaller-diameter Domestic Fittings that Illinois Meter believed Star could provide. (Sheley, Tr. 3413, 3417-3418).

1363. Illinois Meter did purchase a half dozen Domestic Fittings from Star to evaluate their quality and because it had a couple of engineers who wanted to see what they looked like. Although Illinois Meter found the quality of Star's Domestic Fittings to be very good, Illinois Meter does not buy or supply them. (Sheley, Tr. 3419-3420).

1364. Illinois Meter does not buy Domestic Fittings from Star and has been unwilling to stock or ship Star's Domestic Fittings because it does not want to lose the ability to buy McWane's Domestic Fittings. (Sheley, Tr. 3407-3408).

14. Serampore Industries Private decides not to enter the Domestic Fittings market

1365. Serampore Industries Private ("SIP") supplies Fittings in the United States that it imports from China, India, and Mexico, and currently sells to approximately 50 to 60 Distributors in approximately 35 states. (CX 2522 (Agarwal, Dep. at 6, 22, 29, 38), *in camera*; CX 2521 (Agarwal, IHT at 13), *in camera*).

1366. From May 2009 to September 2009, SIP evaluated entering the Domestic Fittings market. (CX 2522 (Agarwal, Dep. at 56, 107, *in camera*)).

1367. When Star announced in June 2009 that it would begin producing Domestic Fittings, SIP began to look more closely at entering the Domestic Fittings market because SIP did not want to be left behind as a supplier without a Domestic Fittings offering. SIP was concerned that Star could increase its import sales if it had a domestic offering also. (CX 2522 (Agarwal, Dep. at 93-94), *in camera*; CX 2521 (Agarwal, IHT at 158-159), *in camera*).

1368. SIP interviewed foundries and customers as SIP evaluated whether to enter the Domestic Fittings market. (RX 681 (Agarwal, Dep. at 56-57), *in camera*).

1369. Customers, including HD Supply, informed SIP that they wanted another source of Domestic Fittings, because McWane was currently the only source, and it was better to have multiple choices. (CX 2522 (Agarwal, Dep. at 111-112), *in camera*).

1370. SIP had a preexisting relationship with U.S. Foundry. These companies had bought and sold municipal castings and other products from one another for 30 years. In 2009, U.S. Foundry had the equipment and excess capacity to produce for SIP Domestic Fittings up to 12 inches, but did not have the immediate capacity to produce Domestic Fittings up to 24 inches. (CX 2522 (Agarwal, Dep. at 101-103), *in camera*).

1371. U.S. Foundry quoted SIP approximately [redacted] cents per pound for the production of Domestic Fittings castings under 12". Mr. Bharat Agarwal, SIP's Vice President for business development, believed that this production cost would allow SIP to meet its margin requirements. (CX 2522 (Agarwal, Dep. at 103), *in camera*; *see also* CX 0004 at 001, *in camera*).

1372. SIP never entered into any contract or agreement with U.S. Foundry to produce fittings for SIP. (CX 2522 (Agarwal, Dep. at 62-63), *in camera*).

1373. SIP estimated that manufacturing Domestic Fittings would require a 5 to 10 million dollar investment. SIP had sufficient internal financing available to cover its estimated costs to enter the Domestic Fittings market. (CX 2522 (Agarwal, Dep. at 60, 100-101), *in camera*).

1374. To be viable in the Domestic Fittings market, SIP estimated that it needed a minimum gross margin of approximately [redacted]%, and a minimum net margin of about [redacted]%. SIP believed it could meet those margin targets if SIP entered the Domestic Fittings market. (CX 2522 (Agarwal, Dep. at 95-96), *in camera*).

1375. While SIP had a spare set of Fitting patterns up to 24" in diameter in China available for producing Domestic Fittings, it was not known whether those patterns could be used for domestic production and even if they could be used, substantial rework would have been required. (CX 2521 (Agarwal, IHT at 152-154), *in camera*; CX 2522 (Agarwal, Dep. at 97), *in camera*).

1376. SIP viewed the implications of McWane's Full Support Program as significant to the Distributors that were SIP's potential Domestic Fittings customers. SIP believed that McWane's policy would deter Distributors from purchasing Domestic Fittings from SIP because forgoing Domestic Fittings shipments from McWane for up to 12 weeks, and delaying an End User's project, were significant penalties. (CX 2521 (Agarwal, IHT at 199-200), *in camera*).

1377. Given SIP's evaluation of the consequences to Distributors of McWane's Full Support Program, SIP believed it would have difficulty acquiring Domestic Fittings Distributor customers if it entered the market with something less than a full line of Domestic Fittings, and it therefore decided not to enter. (CX 2521 (Agarwal, IHT at 200-202), *in camera* ("[I]f it's a domestic job, then you need to have a domestic fitting, and if [the Distributor is] buying from either SIP or Star and you only had A fittings let's say and even if it was a B fitting, even if it was an A fitting which was 24 inches in diameter, . . . so the distributor would be stuck for twelve weeks. They could not live with that.")).

1378. SIP made its determination to not enter the Domestic Fittings market for numerous business reasons, including the fact that ARRA presented a very short time window, that SIP believed it needed to offer a full line of fittings to be considered a viable supplier, that it had taken SIP three years to develop a full line of imported fittings, the uncertainties of success, the high cost of developing patterns for a full line of fittings, the fact that there was not one single foundry available to make all the fittings, the vagaries of long term supply given the changing capacity of jobber foundries, the 5 to 10 million dollar estimated cost to develop the line, the need/cost to develop drilling and machining capabilities, the uncertainties of the ARRA demand, and the uncertainties about the post-ARRA domestic demand. (CX 2522 (Agarwal, Dep. at 56-68), *in camera*).

1379. McWane's Full Support Program was not the only reason SIP decided not to enter the Domestic Fittings market. (CX 2522 (Agarwal, Dep. at 68), *in camera* ("I would like to clarify something at this point: I think in my previous testimony there has been a place where I mentioned that this letter was the reason why we stopped exploration of domestic production. I'd like to further clarify: This letter wasn't the only cause. All these other reasons which we just went through in this deposition all added up and summed up to that.")).

1380. While McWane's Full Support Program was not the only reason SIP decided not to enter the Domestic Fittings market, it was a significant reason. (CX 2522 (Agarwal, Dep. at 67-68), *in camera* ("That was the straw that broke the camel's back.")).

15. Impact of McWane's Full Support Program on Star

a. Star's perception of McWane's Full Support Program

1381. After McWane announced its Full Support Program on September 22, 2009, Star observed a decline in the number of requests for quotes that resulted in customer orders after McWane's announcement. (Bhargava, Tr. 2958-2960, *in camera*).

1382. After McWane announced its Full Support Program on September 22, 2009, numerous Distributors, including HD Supply, Ferguson, Winwater, and independent customers pulled their requests for quotes from Star. (CX 2535 (Bhutada, Dep. at 80, 87-88), *in camera*; *see also* F. 1242 (HD Supply); F. 1263 (Ferguson)).

1383. Star believed that HD Supply would not buy Domestic Fittings from Star because of McWane's Full Support Program. (McCutcheon, Tr. 2329-2330; *see also* CX 2537 (McCutcheon, IHT (Vol. 1) at 168-169); *see also* Bhargava, Tr. 2976-2977, *in camera*).

1384. Star believed that Ferguson would not purchase Domestic Fittings from Star because of McWane's Full Support Program. (McCutcheon, Tr. 2326-2327; Bhargava, Tr. 2976-2977, *in camera*).

1385. Star believed that Distributor Custom Fab would not purchase Star's Domestic Fittings because of McWane's Full Support Program. (McCutcheon, Tr. 2321-2324).

1386. Star believed that Distributor Dana Kepner would not purchase Star's Domestic Fittings because of McWane's Full Support Program. (McCutcheon, Tr. 2324-2326).

1387. Star believed that Distributor Prescott Supply, PJP would not purchase Star's Domestic Fittings because of McWane's Full Support Program. (McCutcheon, Tr. 2326).

1388. Star believed that Distributors Illinois Meter and C.I. Thornburg would not purchase Domestic Fittings from Star because of McWane's Full Support Program. (McCutcheon, Tr. 2327-2328 (Mr. McCutcheon received reports from his sales force that Distributors Illinois Meter and C.I. Thornburg would not purchase Domestic Fittings from Star because of McWane's Full Support Program)).

1389. Star believed that Distributor WinWater would not buy Domestic Fittings from Star because of McWane's Full Support Program. (McCutcheon, Tr. 2329 (Eddie Gibbs, an employee at Distributor WinWater, informed Mr. McCutcheon that WinWater

could not buy Domestic Fittings from Star because of McWane's Full Support Program, and that he had instructed his employees not to purchase Domestic Fittings from Star)).

1390. Star believed that Distributors Western Water Works and Wells Supply would not purchase Domestic Fittings from Star because of McWane's Full Support Program. (McCutcheon, Tr. 2330-2333 (Star Territory Manager John Ristine informed his superiors that Distributor Western Water Works reported that if it purchased Star's Domestic Fittings, McWane would cut them off, and that Distributor Wells Supply reported that if it purchased Star's Domestic Fittings McWane would either double the sell price for shorts or cut them off altogether); CX 0011).

1391. Even when Star offered a rebate program to TDG Distributors that was more generous than McWane's rebate program (F. 1347), some TDG members were still unwilling to buy from Star. F. 1353-1356; 1364. Star believed that these Distributors were unwilling to purchase from Star because of the "all-or-nothing domestic fitting policy from McWane." (McCutcheon, Tr. 2648-2650, *in camera*).

1392. Star believed that McWane's Full Support Program made Distributors less willing to take the risk of purchasing Domestic Fittings from Star. As Mr. Berry, Star's Regional Sales Manager explained in his deposition:

> Every distributor -- every customer distributor that we talked to or that I talked to after this letter came out, wanted to talk about it. And they all wanted to know what I had seen in other parts of the countr[y] or if any distributors were purchasing our domestic. And if so, had Tyler punished them. And -- and I had not seen anywhere or heard from anybody that -- that there was any repercussions for people buying our fittings anywhere from anybody. But the fear that something could happen in -- in areas that actually buy domestic fittings, customers are afraid. They don't want to take the chance of the what-if.

(CX 2532 (Berry, Dep. at 144)).

1393. Star would not have been able to compensate Distributors for taking the risk of buying Domestic Fittings from Star created by McWane's Full Support Program. (CX 2513 (Webb, IHT at 204-205) ("not enough money . . . that could be offered" to compensate HD Supply for assuming the risk of dealing with Star under the terms of McWane's Full Support Program); CX 2491 (Johnson, IHT at 66-67) ("Q. [I]s there any way that Star could have compensated you for taking that risk on before July of 2010? A. I don't think so. I mean you can have all the guaranties from a money standpoint, but you're still not servicing your customer. And the long-term fallout from that could have been much more than a million dollars."); *see also* CX 2537 (McCutcheon, IHT (Vol. 1) at 196) (Star's cost structure would not allow it to cut prices further); CX 2537 (McCutcheon, IHT (Vol. 1) at 156-157) (Star could not compensate a Distributor for purchasing any Domestic Fittings from Star by charging the Distributor a lower price, because a Distributor would not accept the risk of losing access to any supply from McWane)).

1394. Star estimated that, absent McWane's Full Support Program, Star would have [redacted] million dollars in sales of Domestic Fittings in 2010, potentially rising to an annual rate of [redacted] million dollars in 2011. (CX 2537 (McCutcheon, IHT (Vol. 1) at 110), *in camera*; CX 2535 (Bhutada, Dep. at 79), *in camera;*).

1395. Star's estimated lost sales due to McWane's Full Support Program (F. 1394) were based in part on 10 million dollars in requests for quotes for Domestic Fittings that Star received between June 15, 2009, when it announced its Domestic Fittings entry, and September 22, 2009, when McWane announced its Full Support Program. The requests for quotes included requests by HD Supply, Ferguson, Mainline, WinWater, and a variety of independent customers. (CX 2535 (Bhutada, Dep. at 79-80, 87), *in camera*).

b. Star did not generate enough sales to purchase its own foundry

1396. Star had approximately [redacted] million dollars in sales of Domestic Fittings in 2010. (CX 1801-A at 002, *in*

camera; CX 2535 (Bhutada, Dep. at 68), *in camera*; RX 698 (McCutcheon, Dep. at 136)).

1397. Star had approximately [redacted] million dollars in sales of Domestic Fittings in 2011. (CX 1801-A at 003, *in camera*; CX 2535 (Bhutada, Dep. at 68), *in camera*; RX 698 (McCutcheon, Dep. at 137)).

1398. Star had approximately [redacted] million dollars in sales of Domestic Fittings in the first quarter of 2012. (CX 1801-A at 004, *in camera*; CX 2535 (Bhutada, Dep. at 68-69), *in camera*).

1399. [redacted]. (Bhargava, Tr. 2970-1972, *in camera*; CX 1801-A at 002, *in camera*; CX 1801-A at 003, *in camera*).

1400. In 2009, Star estimated that it needed between [redacted] million dollars in sales of Domestic Fittings to justify purchasing its own domestic foundry. Since then, Star has estimated that it needs between [redacted] million dollars to justify purchasing its own foundry. (Bhargava, Tr. 2961-2963, *in camera*).

1401. Star was not able to generate a sufficient volume of sales of Domestic Fittings to realize cost efficiencies or justify operating a foundry of its own. (CX 2535 (Bhutada, Dep. at 84-85), *in camera*; CX 2537 (McCutcheon, IHT (Vol. 1) at 117-121, 179-181), *in camera*).

c. Star considered purchasing a dedicated foundry for Domestic Fittings production

1402. Star had been considering the purchase of its own domestic foundry in the spring of 2009. (CX 2533 (Bhargava, Dep. at 26), *in camera*).

1403. While there were no foundries for sale in 2009 that were equipped exclusively to produce Fittings, there were foundries available that could be converted for the exclusive production of Fittings. (CX 2535 (Bhutada, Dep. at 83-84), *in camera*).

1404. In September or October 2009, Star began considering the potential acquisition of the [redacted] foundry and entered into acquisition discussions with them. (Bhargava, Tr. 2956, *in camera*; CX 2535 (Bhutada, Dep. at 136-137), *in camera*; CX 2533 (Bhargava, Dep. at 67), *in camera*).

1405. Star estimated it would have to make an investment of approximately [redacted] million dollars to acquire the [redacted] foundry and to convert it to be a dedicated foundry for Fittings. (CX 2535 (Bhutada, Dep. at 138-139), *in camera*).

1406. Star had the financial reserves and borrowing ability to acquire the [redacted] foundry and to convert it to a dedicated foundry for Fittings. (CX 2535 (Bhutada, Dep. at 138-139), *in camera*).

1407. When evaluating whether to acquire the [redacted] foundry, Star considered whether it would have enough volume to support owning its own foundry. (Bhargava, Tr. 2959, *in camera*).

1408. McWane's announcement of its Full Support Program on September 22, 2009 impacted Star's decision to not move forward with the potential acquisition of [redacted] foundry. (CX 2535 (Bhutada, Dep. at 137), *in camera*; Bhargava, Tr. 2957-2958, 3020, *in camera*).

d. Star's costs of contracting with other foundries

1409. Rather than owning its own foundry, Star contracted with six foundries to produce raw castings for Domestic Fittings for Star, which Star then shipped to its Houston facility to perform the finishing process. (Bhargava, Tr. 2937-2940, 2999-3000, *in camera*; McCutcheon, Tr. 2618-2620; RX 572).

1410. Independent foundries are more costly and less efficient than a foundry owned and operated by Star would be because using independent foundries involves: less specialized and less efficient equipment; smaller batch sizes; additional logistical costs associated with inventory, finishing, and freight; less control over inventory levels; less ability to expedite orders;

and inefficiencies resulting from dealing with multiple foundries. (Bhargava, Tr. 2946-2949, 2974, *in camera*; CX 2535 (Bhutada, Dep. at 74, 126-127), *in camera*).

1411. Shipping costs from the six foundries utilized by Star (F. 1409) to Houston alone added approximately [redacted]% to the cost of Star's Domestic Fittings. (CX 2534 (Bhutada, IHT at 91), *in camera*).

1412. Independent foundries have higher labor costs because a dedicated foundry would have a labor force trained in producing Fittings and would therefore be more efficient than a non-specialized labor force at an independent foundry. (CX 2535 (Bhutada, Dep. at 129), *in camera*).

1413. Fittings produced at independent foundries are more costly than a Star operated foundry would be because the independent foundries add an estimated [redacted]% markup or profit margin for the production of Fittings sold to Star. (Bhargava, Tr. 2950, 2954, *in camera*; CX 2535 (Bhutada, Dep. at 74, 91, 128, 131), *in camera*)).

1414. Star's relationship with the independent foundries it uses for the production of Domestic Fittings is on a purchase order basis for the specific Fittings it seeks to have made. (CX 2533 (Bhargava, Dep. at 47), *in camera*).

1415. Star does not have long term, guaranteed price or minimum quantity supply contracts with the independent foundries utilized by Star for Domestic Fittings. (Bhargava, Tr. 2935-2936, *in camera*; CX 2533 (Bhargava, Dep. at 55), *in camera*).

1416. In 2010, Star had to stop using two of the six independent foundries that it had initially used for producing Domestic Fittings. In one case, the foundry lost its excess capacity and told Star that the foundry would stop filling orders within 30 days. In another case, the foundry determined that it had underestimated its costs of production, and asked for a price increase. (Bhargava, Tr. 2933, 2954-2955, *in camera*).

1417. As the overall economy has improved, particularly in 2012, the independent foundries that Star used for producing Domestic Fittings have become increasingly busy with work for other customers, which has impacted Star's Domestic Fittings delivery schedules and increased its costs. (Bhargava, Tr. 2941-2942, *in camera*; *e.g.*, CX 2375 at 001, 002, *in camera*).

1418. Star has little option but to accept surcharge and price increases from its independent foundries because there are fewer foundries with capacity that are willing to undertake the learning curve required to make Star's Domestic Fittings. (Bhargava, Tr. 2942-2945, *in camera* ("[W]hen they come to you with these demands, in the foundry environment you really don't have a choice . . . ."); CX 2375 at 001, *in camera*).

1419. Star estimated that the cost of producing Domestic Fittings at its own foundry would be [redacted]% lower than the cost of contracting with independent foundries. (Bhargava, Tr. 2963, 2995, *in camera*; *see also* CX 2535 (Bhutada, Dep. at 127), *in camera*; McCutcheon, Tr. 2343).

1420. Star estimated that if it owned its own foundry that produced its Domestic Fittings, Star could have lowered its Domestic Fittings prices by [redacted]%. (McCutcheon, Tr. 2343, 2348-2350; Bhargava, Tr. 2963-2964, *in camera*).

K. McWane and Sigma Enter into a Master Distribution Agreement[6]

1. Sigma's initial reaction to ARRA

1421. After ARRA was enacted, Sigma believed that it needed to offer Domestic Fittings. (CX 2524 (Box, Dep. at 22, 61, 82); CX 2530 (Rona, Dep. at 39-40, 239-240); Rona, Tr. 1457 (Sigma believed demand for Domestic Fittings would increase as a result of ARRA and that Sigma therefore "needed to explore the

[6] As defined *infra* F. 1540, on September 17, 2009, McWane entered into an OEM Distribution Agreement (commonly referred to as the "Master Distribution Agreement," or "MDA") for McWane to supply Domestic Fittings to Sigma for resale. (CX 1194 (signed MDA)).

option of being in a position to produce fittings for oursel[ves]"); CX 0219 at 001 (Rona writing in May 2009 that the ARRA Buy American requirement was an "extremely real threat" and that "[i]t is quite clear now that we need a credible plan"); RX 688 (Rona, IHT at 176-178 (After ARRA, there was "an immediate demand for fittings.")).

1422. Sigma knew that ARRA was a short term stimulus program. (RX 687 (Pais, Dep. at 182) ("It was intended as a shovel-ready stimulus. So there was a lot of emphasis on now. In fact, rightly speaking, we should have had that [domestic] capability on day one for us to have any capacity to supply the projects. So we were already behind the eight ball on day one, because it was just a ball from the blue.")).

1423. Sigma considered two potential avenues for entering the Domestic Fittings market: (1) purchasing "private label" Domestic Fittings from McWane (*i.e.*, Fittings manufactured by McWane for Sigma and branded as Sigma); or (2) producing Domestic Fittings using the "virtual manufacturing" model that it used for imported Fittings (*i.e.*, contracting with independent, domestic foundries). (Rona, Tr. 1630; Pais, Tr. 1752; CX 2528 (Pais, Dep. at 184-185)).

1424. Sigma pursued both private label and virtual manufacturing options for entering the Domestic Fittings market simultaneously because "the conditions were just so urgent." (Pais, Tr. 1758; CX 0231; CX 2530 (Rona, Dep. at 211-212)).

2. Sigma's initial discussions with McWane

1425. In the first half of 2009, Mr. Pais of Sigma asked McWane's CEO, Mr. Page, to supply Sigma with "private label" Domestic Fittings. (*See* CX 1225 at 003, 004; Pais, Tr. 1744-1745).

1426. In the spring of 2009, Mr. Pais told Mr. Page and Mr. McCullough of McWane that Sigma would pursue its own Domestic Production if McWane did not supply it with Domestic Fittings. (CX 2527 (Pais, IHT at 100-101, 105-106)).

1427. Mr. McCullough met with Mr. Pais in April 2009. After that meeting, Mr. McCullough believed that Sigma had the ability to enter into domestic production of fittings, had access to the needed capital, and "also had the contacts and the talent [as] they've been importing for a very long time." (CX 2479 (McCullough, Dep. at 76-78).

1428. As of April 25, 2009, McWane had decided not to sell Domestic Fittings to Sigma. (CX 1289; CX 2479 (McCullough, Dep. at 76)).

1429. In a May 4, 2009 memorandum to the Sigma Board, Mr. Pais reported that Sigma had initially received approval from McWane's top management to a "private label" Domestic Fittings supply agreement, but that the McWane operational/sales team persuaded McWane's management not to do this. (CX 0214 at 001, 004; *see also* Pais, Tr. 1744-1745; CX 0908 (April 9, 2009 email from Mr. Page to Mr. Pais stating that "after significant internal discussion," McWane's Fittings team had "decided not to sell Sigma private label product from our domestic foundries")).

1430. After being initially turned down, Sigma's Mr. Pais traveled to two separate meetings with top McWane executives in an effort to convince them to offer private label Fittings to Sigma. Mr. Pais spoke with Mr. McCullough in Iowa on April 28, 2009, and with Mr. Page in Birmingham, Alabama on May 1, 2009. (Pais, Tr. 1756-1757, 2035; CX 0209 at 001, 004; CX 0728; CX 0314).

3. McWane's initial response to Sigma

1431. In May 2009, Mr. Tatman suggested that continued exploration of a limited Domestic Fittings supply arrangement with Sigma may be worthwhile, informing Mr. Page in a May 18, 2009 email that "we could [still] continue to creatively explore whether or not there could be a healthy relationship structure established between McWane, Sigma and ACIPCO." (CX 0456 at 001).

1432. Mr. McCullough, Mr. Walton, and Mr. Tatman scheduled an internal McWane meeting on May 26, 2009 to

discuss "supplying Domestic product to our competitors." (CX 0067 at 001).

1433. In preparation for that meeting, on or about May 26, 2009, Mr. Tatman circulated a memorandum ("May 26, 2009 memorandum") containing the notes he jotted down as discussion points to weigh the advantages and disadvantages of supplying Domestic Fittings to Sigma ("May 26, 2009 memorandum"). (CX 0067 at 003; Tatman, Tr. 621, 623).

1434. In his May 26, 2009 memorandum, Mr. Tatman included as a discussion point that if McWane choose not to sell Domestic Fittings to Sigma, McWane would "[r]etain the full margin for Domestic product within McWane." (CX 0067 at 003; Tatman, Tr. 621, 623).

1435. In his May 26, 2009 memorandum, Mr. Tatman estimated that Sigma would need a 20% discount from McWane's published prices to be "viable," *i.e.*, to be able to resell the Fittings profitably. (CX 0067 at 004; Tatman, Tr. 624-626 (referring to the estimates as "back of the napkin")).

1436. The 20% minimum discount required by Sigma that Mr. Tatman estimated in his May 26, 2009 memorandum included matching McWane's 8% rebate, 2% payment terms, and 4% on freight, to arrive at a total of 14% with zero absorption of any operating expenses. (CX 0067 at 004; Tatman, Tr. 632-633).

1437. In his May 26, 2009 memorandum, Mr. Tatman also estimated that the "break even" point for McWane selling Domestic Fittings to Sigma would be a 12% discount from published prices, *i.e.*, McWane would earn the same profits selling Domestic Fittings to Sigma at a 12% discount as it would from selling at full price to Distributors in light of freight and Distributor rebate savings. (CX 0067 at 004; Tatman, Tr. 624-626, 634-636 (referring to the estimations as "back of the napkin")).

1438. Using Mr. Tatman's estimations (F. 1437), for McWane to sell to Sigma at greater than a 12% discount from

published prices, McWane would be losing money. (Tatman, Tr. 624-626).

1439. In his May 26, 2009 memorandum, Mr. Tatman also noted as a conversation topic that one reason for McWane to sell Domestic Fittings to Sigma was to "eliminate the probability" that Sigma would secure another domestic source option. (CX 0067 at 003; CX 2479 (McCullough, Dep. at 86-87)).

1440. Mr. Tatman's May 26, 2009 memorandum contained the following discussion points in conclusion: McWane's decision to sell Domestic Fittings to Sigma "probably comes down to two factors:

1. How legitimate of a risk is there with a competitor successfully introducing a Domestic product line?

2. Do we believe that in the bigger picture, supporting competitors with
Domestic product would result in a healthier industry on the non-Domestic side of the business?"

(CX 0067 at 002, 004; Tatman, Tr. 627-629).

1441. On May 29, 2009, in a follow up email to the May 26, 2009 memorandum, Mr. Tatman provided to Mr. McCullough a list of "all the potential reasons to not sell domestic product to Sigma." Among the reasons for not selling Domestic Fittings to Sigma, Mr. Tatman's May 29, 2009 email listed:

- Loss of margin because "any incremental margin $ retained by Sigma would be incremental margin $ lost by McWane";

- Loss of business growth opportunities as ARRA and Domestic Fittings sales could be a "foot in the door" to regain former customers;

- Upsetting McWane's most loyal customers, particularly if they lost an ARRA-funded job to a competitor who obtained Domestic Product from Sigma;

- The possible erosion of blended Fittings sales as Distributors placed import Fittings orders to fill the truck for a Domestic Fittings order with Sigma; and

- Losing the ability to leverage its position in Domestic Fittings to benefit its other business lines, including non-Domestic Fittings.

(Tatman, Tr. 634; CX 0070 at 001-002 (emphasis in original) (also noting other reasons, such as losing McWane's identity as "the Domestic supplier," and placement of Domestic Fittings in regional yards could backfire if McWane has less responsive service); Tatman, Tr. 635-637; CX 2479 (McCullough, Dep. at 98-99); CX 1209 (McCullough February 2009 email suggesting need to "leverage our domestic position" to require Distributors to acquire non-Domestic Fittings from McWane)).

1442. In Mr. McCullough's view:

> [U]ltimately [McWane's] decision [of whether to sell Domestic Fittings to SIGMA] was SIGMA has the ability to get into domestic made manufacturing of waterworks fittings, just as Star did. If we had the choice between their not being in it and us selling them, or them being in it and us not selling them, that ultimately, we made the decision it's under our best interest to sell them.

(CX 2479 (McCullough, Dep. at 104-105)).

1443. On June 5, 2009, McWane made its initial offer to sell Domestic Fittings to Sigma at 5% off McWane's published prices ("June 5, 2009 offer"). (CX 1434; CX 0225 at 003; Rona, Tr. 1490; Pais, Tr. 1760-1761).

1444. Sigma was not satisfied with McWane's June 5, 2009 offer, as it would not allow Sigma enough margin to cover operating costs. (CX 0909; CX 2531 (Rybacki, Dep. at 149-150) ("5 percent wouldn't even cover the freight, let alone handling; and not only would we not make money, we would lose money; and we couldn't afford to lose money for two years on a deal. It

was a terrible deal."); Pais, Tr. 1760-1761 (describing offer as "nominal" because it did not provide Sigma the opportunity to make any margin off the resale of Domestic Fittings); Rona, Tr. 1492, 1489-1490).

1445. Sigma did not accept McWane's June 5, 2009 offer. (Pais, Tr. 1761).

4. Sigma's efforts to enter the Domestic Fittings market

1446. In early 2009, Sigma pursued the virtual manufacturing option for producing Domestic Fittings by forming a Sigma Domestic Production ("SDP") plan and assembling a team of executives responsible for investigating and exploring the possibility of Sigma producing Fittings domestically. (Rona, Tr. 1457, 1470).

1447. The SDP team, consisting of Mr. Pais, Mr. Bhattacharji, Mr. Rona, Mr. Box, and Mr. Ramanathan, investigated the possibility of Sigma entering the Domestic Fittings market by producing fittings through independent, domestic foundries and evaluated the costs, foundry capabilities, and time it would take for Sigma to produce Domestic Fittings in response to ARRA. (Rona, Tr. 1462-1463; Pais, Tr. 1751-1752).

1448. In a May 4, 2009 memorandum to the Sigma Board, Mr. Pais described the ARRA "Buy-American" provision and declared that "it behooves SIGMA to review the feasibility of producing a line of 'domestic' Fittings, to meet this growing need, in order to reassure our customer base and retain their loyalty and their business at the current levels." (CX 0214 at 001-002, 005; Pais, Tr. 1751-1752).

1449. Sigma spent between $50,000 and $75,000 investigating domestic production options. (CX 2529 (Rona, IHT at 142-143); CX 0958 at 001 (request to establish accounting mechanism for Sigma's SDP expenses)).

1450. Sigma investigated all aspects of the processing steps necessary to make Fittings, from beginning to end: casting, machining, transportation, and finishing. (CX 2524 (Box, Dep. at 28) (describing how Sigma "looked at all aspects of the

processing steps necessary from the beginning to the end; casting, machining, transportation, finishing.")).

1451. Sigma had personnel who could supervise a virtual manufacturing operation for Domestic Fittings such as Stuart Box, who had extensive experience in United States foundry work and Fittings manufacturing before joining Sigma, and Gopi Ramanathan, who also had extensive foundry experience. (CX 2530 (Rona, Dep. at 213-214); Rona, Tr. 1469-1470).

1452. Sigma's SDP team considered using factories and independent foundries to produce Domestic Fittings based on Sigma's drawings and tooling, similar to Sigma's existing methods of producing Fittings overseas. Sigma contemplated doing the finishing, or lining and painting, of its Domestic Fittings itself. (Rona, Tr. 1469-1470; CX 2524 (Box, Dep. at 41)).

1453. By May 20, 2009, Mr. Pais asked the SDP team to prepare a project plan, including economical, logistical, and financial plans, and including the cost of production. (Pais, Tr. 1759; CX 0307 at 001).

1454. On or about June 5, 2009, Mr. Box summarized the results of SDP planning meetings held on June 3 and 4, 2009, which included detailed action plans for identification of top Fittings, foundries, molding machines, cost modeling, testing of lost foam production technology, and visits to potential foundry partners. (CX 0963 at 001; Rona, Tr. 1482-1486 (Sigma identified top Fittings for production, identified and visited foundries, identified machinery, prepared to produce a sample Fitting for the AWWA show, and purchased equipment)).

1455. In an update by Mr. Pais to Sigma's Board after Sigma had rejected McWane's June 5, 2009 offer, Mr. Pais wrote: "We now need to go all out and implement a SDP plan - replicating SIGMA's 'virtual manufacturing' model working with a collection of domestic foundries who have ample idle capacity, to produce the range of Fittings, just as we do thru a collection of facilities overseas." (CX 1997 at 001, 008, *in camera*).

1456. As of June 5, 2009, Sigma identified over 50 potential foundries in the United States as potential sources of domestic production capacity. (CX 2524 (Box, Dep. at 27-28); CX 0963 at 001; CX 0964 at 001-002).

1457. By June 18, 2009, Sigma's SDP team was working on obtaining patterns for producing Domestic Fittings from Metalfit, and had placed orders for foam patterns and other equipment, such as cope and drag patterns, flasks and vibration tables, to be used in Domestic Fittings production. (Rona, Tr. 1507-1511; CX 0978 at 002).

1458. By June 18, 2009, Sigma was arranging foundry site visits by Mr. Rona. (Rona, Tr. 1507-1508, 1511-1512; CX 0978 at 002).

1459. Mr. Rona visited at least five different domestic foundries as a part of Sigma's investigation of the production of Domestic Fittings: Pryor Foundry, Quality Foundry, Eureka Foundry, and two foundries in eastern Pennsylvania. (Rona, Tr. 1508-1509).

1460. Sigma purchased two large flasks for large Domestic Fittings production trials. (Rona, Tr. 1485-1486; CX 0963 at 001).

1461. By the time of the June 2009 AWWA conference, Sigma had produced two large sample Domestic Fittings at the Eureka Foundry in Tennessee, using patterns supplied by Metalfit. (Rona, Tr. 1480, 1485-1486; Pais, Tr. 2173-2175 (describing the Fittings as trial runs, *i.e.*, not commercially ready)).

1462. U.S. Pipe and ACIPCO, two important OEM customers that owned foundries and had expertise casting fittings domestically, were working cooperatively with Sigma to help Sigma set up domestic production. (CX 2527 (Pais, IHT at 140)).

1463. As of July 11, 2009, Sigma was still pursuing its SDP plan to produce Domestic Fittings, although it was proceeding more "deliberately and thoughtfully" because Sigma was finding the plan more and more difficult to implement. (CX 1505 at 001; Pais, Tr. 1780-1781; Rona, Tr. 1538).

1464. On August 11, 2009, Sigma received a quote from Metalfit for the production of tooling to be used in Sigma's Domestic Fittings production. (CX 0257 at 001; Rona, Tr. 1593-1594).

1465. As of mid-2009, Sigma had no domestic foundries, no contracts with existing domestic foundries, no core boxes, no machining facilities, and no finishing facilities or contracts for coating, painting, and lining, for Domestic Fittings. (Pais, Tr. 2173-2175; Rona, Tr. 1672-1673).

1466. In the summer of 2009, "[t]here were no really good options. The SDP plans were a not very discrete or quantifiable effort. It was -- we were at the early stages." (Pais, Tr. 1761-1762).

1467. In August 2009, Sigma informed its customer, U.S. Pipe: "To date Sigma has not made any concrete plans to either invest in all the required tooling or not invest at all." (CX 0258 at 002; Rona, Tr. 1693-1694).

1468. Sigma believed it needed to be able to offer around 730 different types of Domestic Fittings and that it needed a minimum of 450 core patterns to produce those 730 types of Fittings. (Rona, Tr. 1671-1674).

1469. Sigma contemplated beginning Domestic Fittings production incrementally, increasing the number of Fittings available each month. (Rona, Tr. 1555-1556).

1470. In September 2009, Sigma had very few of the patterns it needed for making Fittings in the United States. (Rona, Tr. 1674-1675; Brakefield, Tr. 1417-1418).

1471. In September 2009, Sigma did not have any contracts with any pattern shops to build the patterns it would need to produce Fittings in the United States. (Rona, Tr. 1674-1675).

1472. In September 2009, Sigma did not have any contracts with any domestic foundries to produce Fittings in the United States. (Rona, Tr. 1672-1673).

1473. In September 2009, Sigma did not have a viable domestic production option. (Pais, Tr. 1799).

1474. In a September 9, 2009 report to the Sigma Board, Mr. Pais stated:

> For Fittings, the range of sizes and complexities of the line items required even at a certain select level is rather huge and along with the additional processing required for machining, coating and packing etc. the entire project was found to be too overwhelming and cumbersome, calling for a sizable Capital Expenditure in the range of $6M to $8M as per the initial estimates. The likely sales volume we could garner from our [Buy American] capability was uncertain at best and far less than what we had originally feared. But most importantly, in the end, the time it would have taken for us to come on line and our inability to service our customers with the [Buy American] requirements over the next 12 months and of course the huge [capital expenditures], made us wish for an alternate viable option and as such, we responded when McWane too revived our dialog to accommodate us as a Master Distributor with better terms.

(CX 1022 at 003).

1475. If Sigma had started producing Domestic Fittings in September of 2009, Sigma could not have sold its first Domestic Fittings until some time between February and May 2010. (Rona, Tr. 1676-1677).

1476. Sigma would have required lead time of at least 18 to 24 months to begin production of a full range of Fittings, and approximately 6 to 8 months to produce even one Domestic Fitting. (Rona, Tr. 1673).

1477. Sigma recognized that the time window for selling Domestic Fittings into ARRA funded projects was a short time window. (Rona, Tr. 1671). *See also* Pais, Tr. 1800-1801 ("This

is a very difficult time when the customers are looking to Sigma to come up with . . . a so-called domestic option from a company which had no domestic capability, and it was only mandated because the U.S. government forced it down to us overnight.").

1478. The SDP team modeled the costs of producing Domestic Fittings using estimates of key variables, including the size of the Domestic-only market, production costs (based on quotes from numerous domestic foundries), and market prices, and arrived at estimated gross margins for the various size categories of Fittings. (CX 2529 (Rona, IHT at 22-23); Rona, Tr. 1522-1523, 1533-1537; CX 0237 at 001, 002).

1479. Sigma estimated that it could develop the tooling required for the full line of approximately 700 Domestic Fittings items for approximately $3 to $5 million. (Rona, Tr. 1517; CX 2530 (Rona, Dep. at 214-215) ("[T]he bulk of all the capital expenditure would be in actual tooling, so the budget of three to five million likely covered just tooling and equipment related to manufacturing the fittings and foundries."); *see also* CX 0258 at 002 (Sigma letter to U.S. Pipe stating, our estimates for conventional tooling would run in excess of 6 million dollars)).

1480. Sigma's estimates for its costs to enter the Domestic Fittings market were between about 5 and 10 million dollars. (RX 0163 at 007; CX 2531 (Rybacki, Dep. at 138-139) (estimating a full line of Fittings would cost between 10 to 12 million dollars); CX 2523 (Bhattacharji, Dep. at 63-64) ("it would take between $5 and $10 million to have a domestic fitting supply chain."); CX 1997 at 008, *in camera* (June 5, 2009 memorandum from Mr. Pais informing the Sigma Board that "[w]e expect the total investment in a SDP capability to be about $5M."); CX 2523 (Bhattacharji, Dep. at 194) ($5 million for SDP was "a placeholder for the board."); CX 1022 at 003 (September 9, 2009 presentation to the Sigma Board stating the capital expenditure was in the range of 6 to 8 million dollars)).

5. Sigma's financial position in 2009

1481. Sigma's financial condition in the second half of 2008 was very poor. (RX 687 (Pais, Dep. at 153-154) ("2008 was a

tale of two halves, if you will. The first half was respectable. And the second half was very poor, because most of the problems we faced from the poor market and the increasing costs and the reduced lower prices, all coalesced into the second half, and especially the last quarter. So the year as a whole was off, compared to plan and compared to '07. Q. When you say the year as a whole was off, what do you mean by the year was off compared to plan and compared to '07? A. In terms of the profitability.")).

1482. Sigma had a loss of [redacted] million dollars in 2008. (Pais, Tr. 2193, *in camera*).

1483. Throughout 2009, Sigma was in a "precarious position overall in financial terms." (Pais, Tr. 1760).

1484. In a May 5, 2009 Market Review update, Mr. Pais warned that Sigma was in a "grave" financial situation, pointing out that the market "update can be deemed to be definitely and mostly bleak." (Pais, Tr. 2163-2164; CX 214 at 002).

1485. In 2009, Sigma was "in survival mode" because its sales were down [redacted] million dollars and its EBITDA was [redacted]. (Rybacki, Tr. 3672, *in camera*).

1486. Sigma's 2009 year-end financial information, which was discussed at a Board meeting, described 2009 as an "extremely challenging" year for Sigma. Sigma's financial condition in 2009 was "horrendous" in part because of the collapse of municipal spending and the lowest residential construction rates since World War II. (RX 242 at 003, *in camera*; Rybacki, Tr. 3663-3664, *in camera*).

1487. As a result of the "very, very difficult" financial environment it faced in 2009, Sigma was forced to lay off employees, cut salaries and benefits for employees who remained, and cut numerous other expenses. (Rybacki, Tr. 3670-3671, *in camera*).

1488. Sigma had a very large amount of debt at the end of 2008, and even breached some of its bank covenants in 2009. (Pais, Tr. 2195-2196, *in camera*; Rybacki, Tr. 3730, *in camera*).

1489. In 2009, a significant portion of Sigma's substantial debt was unsecured and carried high interest rates. (Rybacki, Tr. 3672 *in camera*).

1490. Sigma's long-term debt was approximately [redacted] million dollars at the end of 2008, which it reduced to approximately [redacted] million dollars at the end of 2009. (Pais, Tr. 2195-2196, 2206-2207, *in camera*; CX 1749 at 004, *in camera*).

1491. Sigma's paying down of debt (F. 1490) was mostly a by-product of reduction of inventories. (Pais, Tr. 2207, *in camera*).

1492. In 2009, Sigma's lead bank for loans was PNC Bank. Sigma had a long-term revolving credit loan with PNC Bank of [redacted] million dollars at the end of 2008, which it paid down to [redacted] million dollars at the end of 2009. (Pais, Tr. 2211, *in camera*; CX 1749 at 014, *in camera*).

1493. In 2009, Sigma had extremely high interest rate loans with Ares Capital, an unsecured lender, who attended Sigma's quarterly Board of Director meetings. (Pais, Tr. 2153-2154, Rybacki, Tr. 3672, *in camera*; CX 2523 (Bhattacharji, Dep. at 198-200); CX 1749 at 015, *in camera*).

1494. Ares Capital held [redacted] million dollars of Sigma's debt, which constituted roughly 20% of Sigma's total debt at the end of 2008 and 27% at the end of 2009, when Sigma had reduced its first-lien debt. (CX 1740 at 015, *in camera*). The interest rate on the second lien term loan was [redacted]%. (Pais, Tr. 2208-2209, *in camera*).

1495. In April 2009, Sigma negotiated amendments to the financial covenants applicable to a second long-term debt facility it had entered into in 2007. (Pais, Tr. 2211, *in camera*; CX 1749 at 015, *in camera*; CX 2523 (Bhattacharji, Dep. at 169-171); CX 1998 at 002 (Sigma April 2009 Board minutes)).

1496. In June 2009, Mr. Pais issued an update to Sigma's Board of Directors outlining his "SOS" plan to save Sigma. In that update, Mr. Pais notes the decline of about [redacted] percent in earnings level in 2008 and that Sigma stood to lose another [redacted] percent in 2009; that Sigma will barely be able to meet its second quarter 2009 covenants; that the second quarter 2009 results were "marginal at best," which "may cause a lot of concern to all, especially the banks, as we would be unable to assure them of the future performance trends." (Pais, Tr. 2199-2203, *in camera*; RX 163 at 002-003, *in camera*).

1497. In Mr. Pais' June 2009 update to Sigma's Board, Mr. Pais reviewed Sigma's bank covenants and wrote, "as unthinkable and unpleasant it may be, it's amply evident that without a major infusion of additional equity, 'internal measures alone' will NOT allow us to function in any semblance of normalcy and clear focus." Mr. Pais listed two measures, lease buybacks of real estate holdings and a special effort to reduce inventory through aggressive sales, to pay down Sigma's debt. (Pais, Tr. 2202-2203, *in camera*; RX 163 at 005) (emphasis in original).

1498. In July 2009, Sigma "came to the conclusion that it [Sigma Domestic production] would be a tough investment but something that we had to make if this is the only option that we would go ahead with." (CX 2527 (Pais, IHT at 158); CX 0240 (July 11, 2009 SDP Domestic Fittings budget); Pais, Tr. 1762-1765 (discussing CX 0240); CX 0246 (July 20, 2009 SDP Domestic Fittings budget)).

1499. Capital expenditure limits imposed by Sigma's lenders in 2009 were extremely low. (Rybacki, Tr. 3670, *in camera*).

1500. The Frontenac Group, a private equity firm, which purchased a 60% ownership interest in Sigma in 2007, was the largest shareholder of Sigma in 2009. (F. 54; Pais, Tr. 2149).

1501. Frontenac and the shareholders said at Sigma's July 2009 Board meeting that Sigma did not have the capability to invest in Domestic Fittings production and that Frontenac would not have provided the finances for Sigma's domestic production plan. (Pais, Tr. 2222, *in camera*).

1502. On July 27, 2009, following the July 15, 2009 Sigma Board meeting, Walter Florence, a Frontenac managing director and a member of Sigma's Board of Directors (F. 55), sent an email to Sigma management regarding strategy for upcoming lender meetings. In this email, he noted that Sigma's liquidity was fine, that it had recently received an injection of capital from investors and shareholders, and that these investors and shareholders were prepared to invest $7.5 million more to fund the SDP program and strategic business additions, which will enhance credit quality and help Sigma grow and build equity value. (CX 0099 at 001, 006-007).

1503. Sigma's lenders never authorized it to invest in becoming a domestic Fittings supplier, and Sigma lacked sufficient funds to invest in such an operation on its own. (Pais, Tr. 2184).

1504. At the same time as it was considering entering production of Domestic Fittings in 2009, Sigma attempted to become a supplier of domestic pipe restraints, a product distinct from Fittings which required less initial investment. (Rybacki, Tr. 3672-3673, *in camera;* Pais, Tr. 1781-1782, 2184-2186).

1505. To enter domestic production of pipe restraints, Sigma acquired a portion of The Unique Company in the first quarter of 2010 for approximately [redacted] million dollars. (Pais, Tr. 2211-2212, *in camera*).

1506. Domestic production of pipe restraints is a much simpler, smaller and less expensive venture with a much smaller range of product than Domestic Fittings and thus was an easier market for Sigma to try to enter. (Pais, Tr. 1781-1782, 2184-2186, 2212, *in camera*).

1507. Mr. Rybacki described Sigma's domestic restraints project as "a disaster for us because we were very unsuccessful at it." (Rybacki, Tr. 3672-3673, *in camera*).

1508. Mr. Rybacki believed that it was inadvisable for Sigma to attempt to become a domestic Fittings supplier in 2009,

because "we proved it with the domestic restraint [effort] that we weren't real good at it." (Rybacki, Tr. 3677).

6. Renewed negotiations between McWane and Sigma

1509. After Sigma rejected McWane's June 5, 2009 offer (F. 1445), in mid-July 2009, Mr. Pais reported that he had directly informed McWane's Mr. Page of Sigma's plans to develop its own Domestic Fittings capability. (CX 1018 at 001) (July 13, 2009 email from Mr. Pais to Mr. McGivern explaining that Mr. Pais' negotiations included "My own with the CEO announcing our 'SDP' plans . . . ")).

1510. Mr. Rona of Sigma told Mr. Tatman in mid-July 2009 that "Sigma's preference is to work something out with McWane but we are committed and have the financial backing to move forward either way." (CX 0568 at 003; Tatman, Tr. 760-761; CX 2530 (Rona, Dep. at 218-220)).

1511. McWane viewed Sigma's entry into the Domestic Fittings market to be more likely after Star announced its intended entry at the June 15, 2009 AWWA conference. (CX 0076 at 008 ("Sigma is now in a position where they will feel the need to react. . . . Rybacki said at AWWA their program would announce[] in 4 weeks"); CX 2479 (McCullough, Dep. at 103-104) (explaining that McWane believed Sigma would announce entry plans within four weeks of AWWA)).

1512. In evaluating whether to enter into the MDA with Sigma, Mr. Tatman believed that Sigma was in a "much better position" to develop its own Domestic Fittings capability than Star, in part because of Sigma's existing OEM relationships (with ACIPCO and U.S. Pipe) and Sigma's access to financial backing. (CX 0067 at 003; Tatman, Tr. 618-619).

1513. McWane believed that Sigma wanted to enter the Domestic Fittings market either through developing their own sourcing options or through a purchasing arrangement with McWane. (Respondent's Response to RFA at ¶ 34 (McWane "believed Sigma wished to obtain access to domestically-manufactured fittings after ARRA's enactment, either by manufacturing, through sourcing, or pursuant to a purchasing

arrangement with McWane"); (CX 1179 at 002) (Tatman's October 2009 Q&A document circulated to McWane's sales force stating: "in the absence of the MDA with TylerUnion, Sigma was going to develop their own domestic sourcing options to the extent they could")).

1514. The likelihood of Sigma contracting with independent, domestic foundries to produce Domestic Fittings using the "virtual manufacturing" model that it used for imported Fittings was part of the discussion within McWane as it considered whether to sell Domestic Fittings to Sigma. (CX 2485 (Walton, Dep. at 71-72); CX 0329 at 001 (McWane email stating that Mr. Tatman's main intent in discussion with Mr. Rona of Sigma was "to flush out where SIGMA is in their process of securing Domestic production sources")).

1515. In a June 24, 2009 internal McWane email, Mr. McCullough asked for Mr. Tatman's opinion on Sigma's likely reaction to Star's announced entry into the Domestic Fittings market:

> Sigma's reaction to [Star's entry] and their future positioning, develop their own line as Star does? Align with McWane,? Establish buy/sell relationship with Star that is better than our last offer?

(CX 0074 at 002).

1516. Mr. Tatman believed that there was a "probability" that Sigma would enter the Domestic Fittings market through developing its own sourcing options because Sigma communicated that intention to McWane. (CX 2483 (Tatman, IHT at 175) ("[Y]ou've got SIGMA coming in saying that they're going to do something, and it's a little bit of chest-beating. . . . [Sigma] say[s] that they're coming in. We don't know if they're really doing it. So it's a probability. Is what they're saying true? Are they going to execute on that? Yes or no, I don't know.")).

1517. Mr. Tatman noted on July 27, 2009, "the correct decision really depends upon whether on their own Sigma truly does have the resolve and financial backing to make a long term

strategic commitment to being a supplier of domestic products." (CX 0465 at 010).

1518. In a June 29, 2009 brainstorming slide to spark discussion within McWane, Mr. Tatman noted:

> If [Sigma is] truly committed to make the investment level required to be a viable competitor regardless of our actions, then producing for [Sigma] is probably of greater financial benefit to our business than having them source elsewhere.

(CX 0076 at 008 ("Tatman June 29, 2009 strategy presentation")).

1519. Mr. Tatman's June 29, 2009 strategy presentation included the remarks: "[t]he only reason for [Sigma] not to pursue [Domestic entry] is if they feel McWane's response will make Star's or their programs un-successful which may cause them to hold off making any heavy investments[.]" (CX 0076 at 008).

1520. On July 13, 2009, Mr. Pais informed Sigma's senior management that he believed McWane would be motivated to enter an agreement with Sigma to avoid having Sigma add new capacity to the Domestic Fittings market:

> [T]he high profile publicity by Star as to their domestic plans and our own (low key) plans may have finally convinced [McWane] that addition of new capacity isn't good for them or the industry . . . It's wait and see . . . one step at a time, chess play . . . ."

(CX 1018 at 001; Pais, Tr. 1774 ("[I]t was just my assessment that all these factors would finally sort of persuade them to come up with an agreement to accommodate us.")).

1521. On July 16, 2009, in response to an update of Star's progress in entering the Domestic Fittings market, Mr. Pais wrote to Sigma's management team speculating that Star's very public entry strategy "may induce McWane to think that they may have long term competition even in the BA [Buy American] segment and may create some unique market realignment and hence opportunities for us." (CX 1505 at 001; Pais, Tr. 1779-1780).

1522. In late June and early July 2009, Mr. Rona approached Mr. Walton of McWane with the idea of resuming discussions regarding Sigma's desire to have McWane supply Domestic Fittings to Sigma. (RX 688 (Rona, IHT at 184-188); RX 643 (Tatman, IHT at 149-150)).

1523. Between June 30 and July 2, 2009, Mr. Tatman suggested to Mr. Rona that he make a counterproposal to McWane's June 5, 2009 Domestic Fittings supply offer. Mr. Tatman also communicated that McWane would require two conditions: First, McWane would have to be Sigma's exclusive supplier of Domestic Fittings; and second, the Domestic Fittings would have to be branded Tyler/Union, not Sigma (*i.e.*, it would not be a private-label arrangement). (CX 0329 at 001 (Tatman email to McCullough and Walton reporting on conversation); Tatman, Tr. 747-748).

1524. On July 2, 2009, Mr. Tatman reported to Mr. McCullough and Mr. Walton regarding his conversation with Mr. Rona of Sigma:

> Mitchell Rona called and we had a fairly lengthy discussion. I can fill in the details if needed but the takeaway is that Mitchell/Sigma will come back to us with a counter proposal under the conditions that we would be their exclusive supplier of Domestic fittings and the product would be branded Tyler/Union not Sigma. My main intent was to flush out where Sigma is in their process of securing Domestic production sources and I was somewhat surprised by his non-resistance to those two conditions. If Sigma's counter does comply with those two conditions it would be pretty good indication that at present they don't have a very strong hand to play.

(CX 0329 at 001; Tatman, Tr. 747).

1525. On July 14, 2009, Mr. Rona transmitted Sigma's counterproposal to McWane's June 5, 2009 offer to Mr. Walton and Mr. Tatman, and noted: "As promised please find a simple but straight forward proposal from Sigma for master distribution of your domestic fittings. I hope McWane will find this offer

favorable and respond with further discussions about how we can move this forward." (CX 0243 at 001; Rona, Tr. 1560-1561).

1526. Sigma's July 14, 2009 counterproposal consisted of a one-page term sheet titled "Master Distributor Agreement for AWWA domestic pipe fittings" and described an agreement under which "Sigma would have access to Tyler, Union, and Clow branded domestically produced fittings for a minimum of 3 years beginning August 1st 2009." The counterproposal included the following provision:

> Sigma in turn will not seek any other sources either directly or through 3rd party for the production or distribution of domestic fittings with the following exceptions -- Sigma shall have the right to produce or purchase fittings which are outside the McWane domestic range or which cannot be provided by McWane within a reasonable and customary time frame.

(CX 0243 at 002; Rona, Tr. 1560-1561).

1527. In a July 21, 2009 email to McWane's CFO, Mr. Nowlin, Mr. Tatman described the discussions with Sigma regarding selling McWane's Domestic Fittings to Sigma as follows:

> We are having some discussions with Sigma as to providing them with Domestic fittings as an alternative to them securing their own source option such as Star has done.
>
> This is certainly a choice of evils as having more Domestic suppliers doesn't really increase the size of the pie. Our ultimate decision will be based upon:
>
> - If we say No, would Sigma really spend the $ required to execute a domestic product option
>
> - Would providing Sigma with access to Tyler/Union domestic [product] help us either better protect our brand/share against Star or promote more stable market prices.

(CX 0729 at 001; Tatman, Tr. 754-756; CX 2481 (Nowlin, Dep. at 138-139) (calling the idea of having more domestic suppliers does not really increase the size of the pie "a fairly obvious statement")).

1528. In a July 27, 2009 draft presentation sent to Mr. McCullough and Mr. Walton, Mr. Tatman listed:

> Mitchell [Rona] now understands that we will most likely require "all" distributor customers to be exclusive to the Tyler/Union brand for Domestic fittings. That seemed to catch him by surprise. He said he understood and would discuss internally. . . .
>
> My sense is they don't yet have a cost-competitive option for the [below] 24". The [disamatic] product quote from last year is probably a concern for them as to our cost position.

(CX 0568 at 003; Tatman, Tr. 761-762).

1529. On July 29, 2009, McWane responded to Sigma's July 14, 2009 counterproposal for the sale of McWane's Domestic Fittings to Sigma. Among other provisions, McWane's response:

- Offered to sell Domestic Fittings to Sigma at a 20% discount off published multipliers;
- Required Sigma to agree to only sell to customers that are in an exclusive supply relationship with McWane;
- Required Sigma to agree to sell at McWane's suggested published price levels; and
- Had a term of three years unless earlier terminated by agreement or for cause.

(CX 1805 at 002).

1530. On August 18, 2009, Mr. Tatman sent an internal email to Mr. McCullough and Mr. Walton with an attached

presentation ("August 17, 2009 presentation") that provided an update on the status of negotiations with Sigma. Mr. Tatman was "leaning towards not throwing too much [money]" at what he referred to as an "insurance policy" against Sigma's entry, noting that he is "not picking up any strong sense that they have a strong alternate path at this point that they'd be willing to invest significant $ into." (CX 1184 at 001; Tatman, Tr. 771-772, 783-785).

1531. In his cover email attaching his August 17, 2009 presentation, Mr. Tatman reported that he and Mr. Rona were discussing the final issues in the agreement -- the discount percentage and duration of the agreement. (CX 1184 at 001-002; Tatman, Tr. 771-772).

1532. Mr. Tatman's August 17, 2009 presentation provided an update on two conversations Mr. Tatman had with Mr. Rona after Sigma received McWane's July 29, 2009 offer letter:

- Sigma has now agreed in principle to our requirement for Distributor exclusivity . . .

- Sigma has agreed in principle to selling at Published pricing . . .

- Sigma has agreed to be exclusive to [McWane] for all sales to Distributors . . .

- I sense our distributor exclusivity requirement might have rocked them back a bit on what would be required to enter this market on their own[.]

(CX 1184 at 004; Tatman, Tr. 778-783).

1533. Mr. Tatman's August 18, 2009 presentation included a "Pro Forma" analysis in which Mr. Tatman estimated that by selling Domestic Fittings to Sigma at a 20% discount, McWane would lose approximately 5% of gross profit margin. This estimation was "simplistic" and did not include provision for idle plant costs, inventory reduction or "anything else." (CX 1184 at 003; Tatman, Tr. 778).

1534. On August 24, 2009, Mr. Tatman sent a letter of intent to Mr. Rona with the following "core agreement elements:"

- "McWane shall be Sigma's exclusive source of supply";
- Sigma may only sell McWane's Domestic Fittings to Distributors that are "in an exclusive relationship with McWane branded Product for all of their domestic requirements where McWane branded Products are available";
- McWane will sell its Domestic Fittings to Sigma at an effective 20% discount from McWane's published pricing;
- Disputes will be handled through non-binding dispute resolution process; and
- The agreement will have a 1-year term, with automatic 1-year extension, unless either party provides 90 days' notice prior to the anniversary date or McWane has cause.

(CX 1806 at 002; Rona, Tr. 1571-1572).

1535. McWane's August 24, 2009 letter of intent sent by Mr. Tatman to Mr. Rona stated that Sigma was "expected" to:

- Support any pending or existing Buy American legislation;
- "Independently adhere" to McWane's published pricing, and maintain prices at or above 98% of McWane's published pricing on a weighted average basis;
- Provide significant Sigma customers with an appropriate rebate program, with the "expectation [of] an 8% annual rebate for customers with annual purchases of greater than $100,000"; and

- "Not introduce your own domestic product while the Master Distributorship is active."

(CX 1806 at 003).

1536. In a September 8, 2009 email to Sigma's OEM5 management group, Mr. Pais acknowledged the potential impact of McWane's Full Support Program, as applied to Distributors who purchased Domestic Fittings through Sigma as follows:

> What intrigues me is how customers like Ferguson would even toy with Star when they can risk total exclusion from [Buy America] service from Tyler on the strength of their passionate commitment to the '1C' clause -- Exclusivity! SO, actually, it may generate a steady loyalty to MCW/SIG if it is thoughtfully and effectively introduced and promoted! Sensing the pivotal importance of this clause, I have disguised it as an issue of 'fairness' -- helping SIG/McW thru their loyalty in return of our service of them thru delivery of the ENTIRE job!

(CX 0948 at 001) (emphasis in original)).

7. McWane and Sigma enter into the MDA

1537. On or about September 17, 2009, Mr. Tatman, on behalf of McWane, and Mr. Pais, on behalf of Sigma, signed the MDA. (CX 1194 at 001, 013-014; Tatman, Tr. 791; Pais, Tr. 1807-1808; CX 0278 at 001, 015; CX 0950 at 001).

1538. In its September 22, 2009 letter to Distributors announcing its Full Support Program, McWane also announced to its Distributors that it had entered into an MDA with Sigma, through which Sigma would sell McWane Domestic Fittings, and informed Distributors that the Full Support Program applies to Domestic Fittings whether purchased through McWane or Sigma. (CX 0010 at 001).

1539. Sigma announced the MDA on September 22, 2009, the same day as McWane. (CX 0803; Pais, Tr. 1821).

1540. Under the MDA, McWane and Sigma agreed as follows:

> a. Appointment: McWane hereby appoints Sigma, and Sigma hereby accepts appointment, as an authorized OEM Distributor of McWane Domestic Fittings upon the terms and conditions of this Agreement.
>
> b. Exclusivity: Sigma agrees that McWane shall be Sigma's sole and exclusive source for Domestic Fittings, with the exception that:
>
> (1) Sigma may purchase Domestic Fittings in the 30"- 48" diameter size range from other manufacturers so long as Sigma is the sole owner of the patterns for such Domestic Fittings, but only for resale to other domestic foundry manufacturers of ductile iron pipe and fittings;
>
> (2) If McWane does not own patterns for a particular Domestic Fitting, Sigma may purchase that Domestic Fitting from an alternative source, but only until such time as McWane acquires the pattern for that Domestic Fitting; and
>
> (3) Sigma may purchase Domestic Fittings from alternative sources on an order by order basis only if McWane cannot deliver McWane Domestic Fittings to the designated delivery point by the time specified in the order or within 30 days after the order has been received and processed by McWane, whichever occurs later.

(CX 1194 at 001).

1541. Under the MDA, Sigma became a master distributor of Tyler brand Domestic Fittings. (Pais, Tr. 1830). The MDA explicitly provided, "Sigma shall not relabel any McWane Domestic Fittings prior to sale without written consent from McWane." (CX 1194 at 007).

1542. The initial term of the MDA was for one year, from September 2009, expiring in September 2010. Either party to the MDA could terminate it with or without cause by giving the other

party one hundred eighty days' advance written notice. (CX 1194 at 007).

8. Sigma stopped its efforts to enter the Domestic Fittings market

1543. By agreeing to the MDA, Sigma agreed to stop its efforts to produce its own Domestic Fittings. (CX 2529 (Rona, IHT at 173-175) ("As part of our agreement with McWane for the MDA, we agreed that we wouldn't produce -- it's in the agreement that we wouldn't produce other small-diameter fittings -- again, I think it's 24" and down").

1544. Mr. Rona believed that Sigma's pursuing its own domestic production would be a breach of the MDA agreement:

> [O]nce the MDA was signed, we did not pursue [Sigma's SDP efforts] at that point to go ahead. And we knew that, again, understanding the agreement as it was written, if we decided to continue to go ahead, we technically could go ahead and could, but we would then be in breach of the contract[.]

(Rona, Tr. 1581-1582; CX 0278 at 002 § 1(b) ("Sigma agrees that McWane shall be Sigma's sole and exclusive source for Domestic Fittings")).

1545. Upon agreeing to the MDA, Sigma stopped its efforts to try to develop its own Domestic Fittings production capacity. (Rybacki, Tr. 3729; Rona, Tr. 1548; CX 2523 (Bhattacharji, Dep. at 221-222); CX 2530 (Rona, Dep. at 296-297) ("[O]nce we had the MDA, we were satisfied we had a source of domestic fittings for ARRA, period."); CX 2524 (Box, Dep. at 81) (Mr. Box recommended that Sigma not go forward with domestic production of small Fittings in light of the availability of Fittings from McWane via the MDA)).

1546. On October 3, 2009, Mr. Bhattacharji informed Sigma's China production manager that Sigma's "development plans for domestic fittings are taking a back seat for the moment. This is because we have an MDA (Master Distributor Agrmt) deal with McWane for the fittings." (CX 0934 at 001; Pais, Tr. 1853-1856).

1547. After signing the MDA, Sigma continued its development of larger-sized Domestic Fittings since McWane did not provide larger-sized Domestic Fittings. (Pais, Tr. 1804; CX 1166; CX 1194 at 001 § 1(b) (excepting from exclusive source position Fittings for which McWane does not have the patterns)).

9. Pricing requirements of the MDA

1548. The provision of the MDA relating to pricing of McWane's Domestic Fittings set forth:

> Pricing. McWane will sell McWane Domestic Fittings to Sigma at a discount of twenty percent (20%) off McWane's published distributor pricing in effect at the time the order is received by McWane.
>
> While Sigma may resell McWane Domestic Fittings at any price it deems appropriate, it is the unilateral policy of McWane not to appoint or continue any OEM distributor who resells McWane Domestic Fittings at a price less than 98% of McWane's published pricing on a weighted average basis for all customers and items sold during any given quarterly period, before rebates, freight and prompt payment discounts (the "Suggested Resale Price"), or who fails to establish a rebate program of 8% or greater for customers, excluding manufacturers of ductile iron pipe, who purchase more tha[n] $200,000 annually of McWane Domestic Fittings or who stock McWane Domestic Fittings in the normal course of business.
>
> The determination of whether an OEM distributor has met these requirements shall be made in accordance with the formulas and method set forth in the attached Exhibit A. This agreement shall terminate immediately and without notice in the event that Sigma resells McWane Domestic Fittings at a price below the Suggested Resale Price, or fails to implement and maintain the Suggested Rebate for eligible customers; provided, however, that the Suggested Rebate shall not apply to customers who are domestic manufacturers of ductile iron

> pipe. McWane reserves the right to audit Sigma's compliance with this paragraph at any time through a third party . . . auditor chosen by McWane.

(CX 1194 at 002 § 1(d)).

1549. The MDA provided that McWane would sell McWane Domestic Fittings to Sigma at a discount of 20% off McWane's published pricing. (CX 1194 at 002 § 1(d); CX 2479 (McCullough, Dep. at 121) (McWane agreed to sell Domestic Fittings to Sigma under the MDA at a 20% discount off McWane's published multiplier terms for truckload shipments)).

1550. The MDA required that Sigma resell McWane Domestic Fittings at a weighted average of no less than 98% of McWane's published prices during any given quarterly period, before rebates, freight and prompt payment discounts (the "Suggested Resale Price"). (Tatman, Tr. 798-803; Pais, Tr. 1829-1830; CX 1194 at 002§ 1(d)).

1551. Under the MDA, by using a weighted average, Sigma could sell particular jobs at different percentages off McWane's published prices, so long as all of the prices of the jobs over the quarterly period amounted to within 98% of McWane's published prices. Sigma was also allowed to give rebates, cash discounts, and to set freight terms and payment terms that they wanted. (Tatman, Tr. 801-802).

1552. Under the MDA, if Sigma did not resell McWane's Domestic Fittings at McWane's suggested resale price, McWane could immediately terminate the MDA without notice. (CX 1194 at 002 § 1(d); Tatman, Tr. 802-803).

1553. Mr. Pais described the pricing provision of the MDA as follows: "with the pricing, we are obliged to be as close to the published multiplier as possible. Our hands are not tied – but we cannot sell below, because it will undermine McWane's own sales." (CX 0997 at 004 (September 22, 2009 message dictated by Mr. Pais)).

1554. On December 21, 2009, McWane announced multiplier increases for Domestic Fittings effective January 22, 2010. (CX 1544 at 002).

1555. Mr. Tatman forwarded McWane's December 21, 2009 price increase announcement to Mr. Rona of Sigma: "Per our MDA this will impact Sigma orders as of the effective date." (CX 1662 at 001; *see also* Rona, Tr. 1602-1604 (discussing CX 1662)).

1556. Mr. Greg Fox of Sigma forwarded the McWane December 21, 2009 price increase announcement within Sigma, noting:

> Under the terms and agreements of our Master Distribution Agreement with [McWane], we will mirror the multiplier and implementation dates of this letter. We have no latitude for exceptions.

(CX 1519 at 002; *see also* CX 1544 at 001 (Mr. Rona forwarding McWane price announcement within Sigma); CX 2530 (Rona, Dep. at 300)).

1557. Sigma announced the same price increase as McWane did (F. 1554), effective January 22, 2010. (CX 1519 at 001 (Mr. Pais email December 29: "I am glad to comply" with McWane price increase); CX 1852 at 001 (Mr. Pais December 30 email attaching "our version of the Customer Letter to announce the price increase.")).

10. The MDA limited the Distributors to whom Sigma could resell McWane Domestic Fittings

1558. The MDA limited Sigma's ability to resell McWane Domestic Fittings as follows:

> Markets. Sigma may only resell McWane Domestic Fittings to:
>
> (1) American Cast Iron Pipe Company; and

> (2) Other customers, including distributors, contractors and fabricators, but excluding manufacturers of ductile iron pipe that have agreed to purchase McWane Domestic Fittings as their sole source of Domestic Fittings when McWane Domestic Fittings are available at the time of order.
>
> McWane shall from time to time provide Sigma with a list of customers who have not agreed to source their Domestic Fittings solely from McWane. Sigma agrees not to sell McWane Domestic Fittings to any customer so listed by McWane, or to any other customer who Sigma actually knows has purchased Domestic Fittings from a source other than McWane at any time during the previous 60 days.
>
> McWane reserves the unconditional right in its sole discretion to (i) call upon and sell McWane Domestic Fittings directly to any prospective customers or existing customers, (ii) investigate and resolve customer complaints, (iii) distribute sales and advertising information and (vii) perform other services. McWane reserves the right in its sole discretion to appoint or designate other distributors or representatives other than Sigma to sell McWane Domestic Fittings.

(CX 1194 at 001-002 § 1(c)).

1559. Under the MDA, McWane prohibited Sigma from selling McWane Domestic Fittings to any customer listed by McWane as not having agreed to purchase their Domestic Fittings solely from McWane or Sigma, through the MDA. (CX 1194 at 001-002 § 1(c); Tatman, Tr. 798).

1560. Under the MDA, Sigma agreed not to sell McWane Domestic Fittings to any customer identified by McWane as having "purchased Domestic Fittings from a source other than McWane at any time during the previous 60 days." (CX 1194 at 001-002 § 1(c); Pais, Tr. 1816-1819).

1561. The MDA provided that:

> Sigma shall . . . take reasonable efforts to monitor its customer's sources of supply of Domestic Fittings, and shall notify McWane as soon as possible if Sigma becomes aware

> of any purchases of non-McWane Domestic Fittings by any such customer.

(CX 1194 at 004 § 3(c)(v)).

1562. Sigma believed that under the MDA, if a customer wanted to buy Domestic Fittings through Sigma, they could, but they would have to buy all their Domestic Fittings from Sigma and that if a customer purchased Domestic Fittings from Star, Sigma could no longer sell them McWane's Domestic Fittings. (Pais, Tr. 1817-1819).

1563. McWane informed major Distributor customers that Sigma would not sell McWane's Domestic Fittings to customers who purchased Domestic Fittings from Star. (CX 2479 (McCullough, Dep. at 142); CX 2477 (Jansen, Dep. 179-180); CX 0108). *See also* CX 2479 (McCullough, Dep. 142-144) (testifying that he "probably" told Distributors Ferguson, Groeniger, and WinWater that, pursuant to the MDA, Sigma could not sell to customers who bought from Star).

1564. Mr. Jansen of McWane conveyed to his sales force that Sigma would enforce the MDA, writing on November 3, 2009:

> Team, I think we have made it very clear in the market regarding our stance on supporting the McWane domestic brand of fittings whether purchased through Tyler Union, Clow or Sigma. If one branch buys from someone other than this then the whole company will be [a]ffected not just that branch.

(CX 0108 at 001).

1565. Mr. Tatman described Sigma's role in McWane's Full Support Program as follows:

> Access to McWane domestic product either through McWane or Sigma requires distributors to exclusively support McWane where products are available within normal lead times.

> Violation will result in: Loss of access [and] Loss of accrued rebates.

(CX 0119 at 002, 004; Tatman, Tr. 722-723).

11. Sigma implemented McWane's Full Support Program

1566. In Sigma's September 22, 2009 announcement to its customers, Sigma informed its customers as follows:

> As per this MDA, we are now Master Distributors of [McWane] domestic Fittings. As such, we will follow [McWane's] distribution and pricing policies as they are announced from time to time.
>
> As mentioned in their own letter from [McWane] to their customers, which you too may have received, we wish to supply the [McWane] domestic Fittings to any customers who elect to commit to fully support [McWane] branded Fittings for their requirements of domestic Fittings, purchased thru [McWane] or SIGMA. We appeal to you to accept this requirement of exclusive choice, as a fair and reasonable one, in light of the considerable investment by [McWane] to provide this range of domestic production, which is now being expanded to offer domestic Fittings up to 48".
>
> Please note that customers who elect not to fully support this program may forgo any unpaid volume incentive rebates applicable to only the domestic Fittings and delivery of domestic Fittings up to 12 weeks.

(CX 0803 at 002 (emphasis in original); Pais, Tr. 1821).

1567. In the Q & A document that Mr. Tatman prepared and circulated to the McWane sales force after execution of the MDA, Mr. Tatman described Sigma's participation in McWane's Full Support Program in response to a hypothetical customer question:

> Question: Can I utilize another domestic fitting and accessory brand other than Tyler Union or Clow Water products and then still purchase Tyler Union or Clow Water products through Sigma?

> Answer: No, Sigma will be adhering to the same distribution program and policies as the Tyler Union and Clow Water divisions of McWane.

(CX 1179 at 004; Tatman, Tr. 807).

1568. On December 14, 2009, McWane informed Sigma that it was cutting off Hajoca under its Full Support Program and that Sigma must do the same. Mr. Tatman told Mr. Rona: "Per the terms of our MDA I need you to acknowledge that Sigma will also not supply any Hajoca branch with Domestic fittings or accessories until further notice." (CX 1801 at 001; Tatman, Tr. 720 (Mr. Tatman told Sigma not to sell to Hajoca). *See* II.J.6. (McWane's enforcement of its Full Support Program against Hajoca).

1569. Mr. Rona forwarded the email to Sigma's CEO, who responded that Sigma had "no choice but to agree to abide by the rules of the MDA." (CX 0940; Rona, Tr. 1606, 1608 (Rona forwarded to Sigma's distribution group the instruction not to sell McWane-produced domestic fittings to any Hajoca branch); CX 2530 (Rona, Dep. at 258) (McWane told Sigma that it could not sell to Hajoca)).

1570. As requested by McWane, on December 15, 2009, Mr. Rona confirmed to McWane that Sigma was "clear about Hajoca" and would not sell Domestic Fittings to any Hajoca branch. (CX 1801 at 001; Rona, Tr. 1606).

12. Sigma was not permitted to sell to U.S. Pipe

1571. The MDA precluded Sigma from selling McWane's Domestic Fittings to U.S. Pipe. (CX 2203 at 001; Morton, Tr. 2850-2851).

1572. McWane agreed to permit Sigma to resell McWane Domestic Fittings to ACIPCO, but not to U.S. Pipe. As Mitchell Rona explained in the course of the MDA negotiations:

> McWane will not amend to formally include U.S. Pipe. [Mr. Tatman] is firm that they will not share their profit here too and feel they already did so with Acipco who is formally in the agreement now.

(CX 1046 at 001; Rona, Tr. 1587-1590).

1573. At his October 13, 2009 meeting in Birmingham, Alabama with Mr. Morton of U.S. Pipe, Mr. Tatman conveyed to Mr. Morton that under the MDA between McWane and Sigma, U.S. Pipe would not be able to source its Domestic Fittings through Sigma, but would instead have to purchase McWane's Domestic Fittings directly from McWane. (Morton, Tr. 2842; CX 2203 at 001 ("Tatman informed me that Sigma was forbidden from selling to USP as per the Master Distributio[n] Agreement signed between Union [and] Sigma.")).

1574. Mr. Morton had met with Sigma about procuring Domestic Fittings, and believed that Sigma expected to be able to provide U.S. Pipe with Domestic Fittings pursuant to the MDA. (Morton, Tr. 2852-2853).

13. Sigma's intent to block Star through the MDA

1575. As early as February 20, 2009, when Sigma began assessing its options for offering Domestic Fittings, Mr. Pais wrote to Walter Florence, a Sigma Board Member, the following:

- With our relationship with McWane, it is also fully conceivable to get part of our needs produced with SIGMA label, once we establish ourselves as the '2nd choice' for the [Buy American] segment, as they may privately prefer it to be just a 2-supplier market! Besides, this may marginalize Star. . .

(CX 1003 at 004).

1576. In a September 9, 2009 report to the Sigma Board, Mr. Pais noted that Sigma's "strategy to team up with McWane" through the MDA was "likely to have the intended effect of marginalizing Star whose ability to deliver jobs will be highly

suspect, at least over the next 12 months or so." (CX 1022 at 004, *in camera*).

1577. As Mr. Pais explained in a September 22, 2009 dictated voice message:

> [I]f we do our job right, it might isolate Star and make them suffer with their investment even more, because they may not be able to gain credibility. . . . We need to develop an exclusive agreement arrangement with each customer . . . or we will end up strengthening Star.

(CX 0997 at 003-004; Pais, Tr. 1842-1848).

14. McWane's intent to block Star through the MDA

1578. Mr. McCullough, Mr. Tatman, Mr. Jansen, and Mr. Walton had an internal McWane meeting on August 20, 2009 at which they discussed, among other things, McWane's decision to sell Domestic Fittings to Sigma through the MDA. (CX 2353 (Mr. Walton's handwritten notes from that meeting); CX 2485 (Walton, Dep. at 36-38)).

1579. At the August 20, 2009 meeting (F. 1578), as recorded in the handwritten notes of Mr. Walton, Mr. McCullough made the following points about selling Domestic Fittings to Sigma through the MDA:

> LM [Leon McCullough] want[s] to sell SIGMA to put pressure on Star. LM hopefully to drive Star out of business. Would rather have competition other than Star.
>
> LM thinks that we should sell SIGMA as an insurance policy and to continue to put pressure on Star. . . . LM approved Rick [Tatman]'s recommendation page of his PowerPoint presentation on selling SIGMA.

(CX 2353 at 004 (Mr. Walton handwritten notes of August 20, 2009 meeting); CX 2485 (Walton, Dep. 42-43) ("I wrote down that Leon said that. . . . I remember it more as comments that Leon made towards the end of the meeting.")).

1580. In evaluating the decision to sell Domestic Fittings to Sigma, Mr. Tatman wrote, on June 29, 2009, as a "brainstorming slide" for purposes of discussion, that he did not think that Sigma would be "willing to generate little to no incremental margin $ just to help us block Star." (CX 0076 at 008; Tatman, Tr. 653-654).

1581. In a July 27, 2009 PowerPoint Presentation titled "Sigma - Domestic Review Session," intended for brainstorming and spurring discussion within McWane, Mr. Tatman wrote that having Sigma sell McWane branded product should (1) "reduce Star's ability to grow share," (2) "[k]eep[] additional overcapacity from being added to the industry," and (3) "help drive some additional level of price stability." (CX 0465 at 002, 010; *see also* CX 0170 at 009 (subsequent version of the same presentation sent to Mr. McCullough and Mr. Walton)).

15. Benefits of the MDA

1582. Sigma entered into the MDA with McWane because Sigma saw the MDA as its only viable option for supplying Domestic Fittings to Sigma's customers during ARRA's short time window. (Rona, Tr. 1481; Pais, Tr. 1800-1801 ("[W]e had finally found a recourse by going to our competitor because we thought that was the only option that was viable because the service of the customer was imminent. . . . There was no other option that we could -- this is not a premeditated three or four-year plan that we had to enter a new product."). *See also* Pais, Tr. 1803 ("I would say . . . with the certitude with respect to the requirements of ARRA that we were facing [in September 2009 that] yes, we could not meet the domestic supply option to start complying with the requirements of our customers.").

1583. Sigma perceived that if it was unable to supply Domestic Fittings to its customers, it might also lose some portion of its non-domestic business with those customers. (RX 689 (Rona, Dep. at 118-120) ("I perceived that without domestic fittings, that it could hurt our other fitting or our other products' business. . . . The ARRA period was a very volatile time in a down economy, and if people call you and say do you have any fittings for this, no, I don't have any fittings for that job. The

same customers were buying domestic fittings, other fittings, accessories or restraint products, manholes, and people could potentially forget about you. And as a result, I felt that it was important that we offer a solution to people that they would not forget about us, so I thought it was critical for us. . . . Entering into the master distribution agreement with McWane was a solution to the problem we had.")).

1584. Sigma, with its network of regional distribution yards and larger field sales force, was better able than McWane to provide certain servicing benefits, such as faster delivery to Distributors. (RX 689 (Rona Dep. at 120-124, 133-134); RX 643 (Tatman, IHT at 176-178) ("We have customers that SIGMA has a better relationship [with] than we did. Potentially that could -- volume could be sold from SIGMA versus Star being able to sell that volume. So it's all kind of protecting that volume scenario."); RX 688 (Rona, IHT at 176-78) ("We felt, as a distributor for McWane, that we could take their production as they ramped up and help ourselves and in essence help the market and help them to distribute the fittings through our 14 locations nationwide. That, to us, we perceived as a value.)).

1585. Sigma's distribution centers were more strategically located for more efficient customer delivery than McWane's. (RX 689 (Rona, Dep. at 311-313)).

1586. ACIPCO preferred to buy Domestic Fittings from Sigma rather than McWane, because Sigma provided additional specialty services, including coatings, linings, taps and other add-ons, that ACIPCO felt McWane could not provide as effectively. (RX 688 (Rona, IHT 95-96); Tatman, Tr. 797-798).

1587. ACIPCO benefitted logistically from buying McWane Domestic Fittings from Sigma, rather than McWane, and found the pricing to be competitive. (RX 646 (Burns, Dep. 139-140, 175)).

1588. Groeniger preferred buying Domestic Fittings from Sigma, because Groeniger preferred Sigma's service to both Star and McWane. (RX 669 (Groeniger, Dep. 87-88 ("SIGMA was our prime supplier of foreign product, but understanding that they

were now part of this domestic application, we felt that SIGMA's support, SIGMA's service would now reflect a domestic forehand, that we really did not need Tyler. And . . . we could simply buy the Tyler from SIGMA which was potentially great for us. Because SIGMA had the best service, service, service by far, not even close. Better than Star, much better than Tyler.").

1589. EJ Prescott preferred to buy Domestic Fittings from Sigma when it was concurrently ordering non-domestic Fittings, because Sigma was its preferred non-domestic supplier and it could efficiently round out blended orders. (RX 661 (Prescott, Dep. at 35-36)).

16. The MDA did not increase output or expand the market for Domestic Fittings

1590. McWane's CEO, Ruffner Page, was in favor of entering into the MDA with Sigma because McWane needed "tons in the plant." (RX 642 (Page, Dep. at 61-63)).

1591. McWane had not expected that entry by Sigma into the Domestic Fittings market – through the MDA or independently – would increase the size of the Domestic Fittings market. (CX 0729 at 001 (Tatman July 21, 2009 email: "having more Domestic suppliers doesn't really increase the size of the pie."); CX 2481 (Nowlin, Dep. at 138-139) (calling the idea of having more domestic suppliers does not really increase the size of the pie "a fairly obvious statement")).

1592. In a June 29, 2009 internal McWane PowerPoint Presentation, Mr. Tatman noted as a discussion topic that "[w]hat we 'Assume' to be true at this point" is that having multiple domestic suppliers would not significantly increase the overall Domestic Fittings market size and that a net tonnage gain scenario for McWane was unlikely. (CX 0076 at 006; Tatman, Tr. 656).

1593. The MDA did not increase the size of the Domestic Fittings market. (CX 2531 (Rybacki, Dep. at 160-161) ("Q. The fact that Sigma had access to McWane fittings under the MDA, that didn't cause there to be more domestic jobs; is that right? A. Correct." "Q. . . . By having access to those fittings, you didn't

expand the size of the pie, if you will, you expanded Sigma's ability to service a piece of that pie, is that fair? A. Yes.")).

17. The scope of the MDA

1594. The MDA was a one-year agreement, terminable by either party with 180 days' notice. (Rona, Tr. 1699-1700; CX 1194).

1595. On February 17, 2010, McWane provided Sigma with 180 days' notice that McWane wished to terminate the MDA. (RX 689 (Rona, Dep. at 303-304); CX 1435).

1596. The MDA was in effect for less than a year, from September 2009 to August 2010. (RX 689 (Rona, Dep. at 303-304)).

1597. Through the MDA, Sigma's sales of Domestic Fittings were approximately eight to ten million dollars. (CX 2531 (Rybacki, Dep. at 29).

III. ANALYSIS

A. Jurisdiction

The Complaint charges Respondent McWane, Inc. ("Respondent" or "McWane") with violations of Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45. Section 5(a)(2) of the FTC Act gives the Commission jurisdiction "to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce . . . ." 15 U.S.C. § 45(a)(2); *Kaiser Aluminum & Chem. Corp. v. FTC*, 652 F.2d 1324, 1327 n.2 (7th Cir. 1981). Respondent McWane, Inc. manufactures, markets and sells products for the waterworks industry, including ductile iron pipe fittings that are 3" to 24" in diameter ("Fittings"). F. 2. Respondent is a corporation, as "corporation" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44. F. 3.

Respondent's challenged activities relating to the sale of Fittings are in or affect commerce in the United States, as

"commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44. F. 4. Thus, the Commission has jurisdiction over Respondent and the subject matter of this proceeding, pursuant to Section 5 of the FTC Act.

B. Burden of Proof and Statutory Framework

The parties' burdens of proof are governed by Federal Trade Commission Rule 3.43(a), Section 556(d) of the Administrative Procedure Act ("APA"), and case law. Pursuant to Commission Rule 3.43(a), "[c]ounsel representing the Commission . . . shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto." 16 C.F.R. § 3.43(a). Under the APA, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d). The APA, "which is applicable to administrative adjudicatory proceedings unless otherwise provided by statute, establishes '. . . the traditional preponderance-of-the evidence standard.'" *In re Rambus Inc.*, 2006 FTC LEXIS 101, at *45 (Aug. 20, 2006) (quoting *Steadman v. SEC*, 450 U.S. 91, 95-102 (1981)), *rev'd on other grounds,* 522 F.3d 456 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 1318 (2009). *See In re Automotive Breakthrough Sciences, Inc.*, 1998 FTC LEXIS 112, at *37 n.45 (Sept. 9, 1998) (holding that each finding must be supported by a preponderance of the evidence in the record); *In re Adventist Health System/West*, 1994 FTC LEXIS 54, at *28 (Apr. 1, 1994) ("Each element of the case must be established by a preponderance of the evidence.").

Respondent asserts that Complaint Counsel must prove its case under Section 5 of the FTC Act by "substantial evidence," and that Complaint Counsel must prove substantial injury. RB at 64 (citing *FTC v. Cement Inst.*, 333 U.S. 683, 705 (1948); *California Dental Ass'n v. FTC*, 224 F.3d 942, 957 (9th Cir. 2000); *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 592 n.2 (D.C. Cir. 1970); *Rayex Corp. v. FTC*, 317 F.2d 290, 292 (2d Cir. 1963)). In *Steadman*, the Supreme Court held that the requirement under Section 556(d) of the APA that agency orders be "supported by and in accordance with the reliable, probative and substantial evidence" is satisfied by "the traditional preponderance-of-the-evidence standard." *Steadman*, 450 U.S. at 99, 102. *See also In re Chicago Bridge & Iron Co.*, 138 F.T.C.

1024, 1027 n.4 (2005) ("[W]e take it as settled law that regardless of the standard under which a reviewing court must accept the Commission's findings of fact, the Commission (and the Administrative Law Judge ("ALJ") normally must base findings upon a 'preponderance of the evidence.'") (citing *Carter Prods., Inc. v. FTC*, 268 F.2d 461, 487 (9th Cir. 1959)).

Respondent further asserts that Complaint Counsel must prove substantial injury to consumers. RB at 64 (citing 15 U.S.C. § 45(n)). *See also* RB at 60-63 (asserting Complaint Counsel failed to prove McWane's actions caused "substantial injury" to consumers). The statute upon which Respondent relies provides that "[t]he Commission shall have no authority . . . to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n). The Commission originally articulated the Section 5(n) [15 U.S.C. § 45(n)] standard in a 1980 policy statement, which was drafted in response to a Congressional inquiry regarding the limits of the Commission's consumer protection authority. Federal Trade Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (December 17, 1980) at n.4, *reprinted in In re Int'l Harvester Co.*, 1984 FTC LEXIS 2, at *304 & n.3. The 1980 policy statement explicitly stated that it did not address the Commission's "competition or antitrust mission," which is guided by "a considerable body of antitrust case law." *Id.* The 1980 policy statement was later codified as Section 5(n) of the FTC Act, 15 U.S.C. § 45(n), and consistent with its applicability to the Commission's consumer protection jurisdiction, has the heading: "Definition of unfair acts or practices." *See* Pub. L. No 103-312, 108 Stat. 1695 (codified at 15 U.S.C. § 45(n)); *see also Rambus*, 2006 FTC LEXIS 102, at *35. Because none of the claims in this case is brought under the Commission's "unfair acts or practices" authority, Section 5(n) does not apply.

The provision of the FTC Act under which this case does proceed, Section 5(a) of the FTC Act, prohibits "unfair methods of competition in or affecting commerce." 15 U.S.C. § 45(a). Unfair methods of competition under Section 5 of the FTC Act

include any conduct that would violate Sections 1 or 2 of the Sherman Act. *See*, *e.g.*, *California Dental Ass'n v. FTC*, 526 U.S. 756, 762 & n.3 (1999); *Cement Inst.*, 333 U.S. at 691-92 (stating that "soon after its creation the Commission began to interpret the prohibitions of § 5 as including those restraints of trade which also were outlawed by the Sherman Act, and . . . this Court has consistently approved that interpretation of the Act); *Rambus Inc. v. FTC*, 522 F.3d 456, 462 (D.C. Cir. 2008). Although the Commission does not directly enforce the Sherman Act, conduct that violates the Sherman Act is generally deemed to be a violation of Section 5 of the FTC Act as well, and principles of antitrust law developed under the Sherman Act apply to Commission cases alleging restraint of trade or unfair competition. *E.g.*, *Fashion Originators' Guild, Inc. v. FTC*, 312 U.S. 457, 463-64 (1941); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 451-52 (1986). Accordingly, it is appropriate to rely upon Sherman Act jurisprudence in determining whether the challenged conduct violated Section 5 of the FTC Act. *E.g.*, *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 32 (D.C. Cir. 2005) ("[T]he analysis under § 5 of the FTC Act is the same . . . as it would be under § 1 of the Sherman Act."); *Rambus*, 522 F.3d at 462 (holding that Section 5 of the FTC Act reaches all conduct that violates Section 2 of the Sherman Act).

Section 1 of the Sherman Act prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . ." 15 U.S.C. § 1. Despite its broad language, the ban on contracts in restraint of trade extends only to unreasonable restraints of trade, *i.e.*, restraints that impair competition. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). Section 2 of the Sherman Act prohibits monopolization, attempted monopolization, and combination or conspiracy to monopolize. 15 U.S.C. § 2. The specific standards applicable to the violations alleged in the Complaint are set forth in more detail, *infra*.

C. The Relevant Market

In a Section 1 case, the first step in determining if a respondent unreasonably restrained trade in the relevant market "is determining the relevant market." *Wampler v. Southwestern Bell Tel. Co.*, 597 F.3d 741, 744 (5th Cir. 2010). In a Section 2

case, as well, the first step in assessing whether a respondent possesses monopoly power is establishing the relevant market. *Spectrum Sports v. McQuillian*, 506 U.S. 447, 456 (1993) ("without a definition of th[e relevant] market there is no way to measure [the defendant's ability] to lessen or destroy competition"). A relevant market is comprised of a relevant product market and a relevant geographic market. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325-26 (1962); *H.J., Inc. v. Int'l Tel. & Tel.*, 867 F.2d 1531, 1537 (8th Cir. 1989).

The Complaint alleges that there are two relevant product markets: (1) the supply of ductile iron pipe fittings of 24" and smaller in diameter, that are sold for use on open specification jobs ("Fittings"); and (2) the supply of ductile iron pipe fittings of 24" and smaller in diameter that are made in the United States, that are sold for use on jobs with domestic-only specifications ("Domestic Fittings"). Complaint ¶ 21; CCB at 59. Respondent does not challenge the allegation that Fittings are a relevant product market. *See* RB at 83-87; Answer ¶ 21 ("McWane admits . . . that the 'marketing and sale of DIPF' may be a relevant product market and that all DIPF [ductile iron pipe fittings], whether imported or domestic, compete for all or virtually all jobs."). Respondent does, however, dispute the allegation that there is a separate relevant product market for Domestic Fittings. RB at 83-87. Specifically, Respondent asserts, imported Fittings and Domestic Fittings that meet American Water Works Association standards are entirely interchangeable commodities that are metallurgically and functionally the same. RB at 83. Respondent further asserts that the American Recovery and Reinvestment Act of 2009, discussed below, had little or no impact on Domestic Fittings and had insufficient impact on the interchangeability of non-domestic and Domestic Fittings. RB at 84-86.

To analyze the alleged relevant markets requires first a discussion of background information on fittings, market participants, and the bidding process. Second, to frame the analysis of the relevant market, a discussion of the economic backdrop and the competition between Domestic Fittings and imported Fittings is required.

1. Background

a. Fittings

Ductile (easily molded) iron pipe fittings ("Fittings") are a small but essential part of any waterworks project that involves pressurized water distribution and treatment systems, such as potable water lines that connect water supply facilities to neighborhoods and certain sewer lines. F. 5, 278-279; *see also* F. 328, 371. Fittings attach to the ends of pipes in order to: change the direction of water flow; connect pipes of different sizes; merge two pipelines into one, or branch one pipeline off into two; and attach pipes to valves, fire hydrants, or water meters. F. 5, 278-279. There are thousands of different types and sizes of Fittings that each serve a different purpose, such as connecting to different sized pipes or providing various degrees of "bend." F. 286-287, 293; *see also* F. 288-292.

Fittings that are 24" or less in diameter are commonly used in underground water distribution networks. F. 291. Larger diameter fittings (above 24" in diameter) are more commonly used in water treatment plants or large transmission lines. F. 292. As discussed below, the relevant product markets in this case consist of ductile iron pipe fittings of 24" and smaller in diameter. Thus, the term, "Fittings," as used in this Initial Decision, refers to Fittings that are 24" or less in diameter, except where otherwise indicated.

Although Fittings come in thousands of configurations of shape, size, and coating, there are around 100 commonly used configurations (referred to as "A" and "B" items) that account for approximately 80% of all Fittings sales. F. 306; *see also* F. 307.

Fittings are homogeneous commodity products produced to standards and specifications of the American Water Works Association ("AWWA"). F. 322. Any Fitting that meets an AWWA specification is functionally interchangeable with any other Fitting that meets the same specification. F. 323.

b. Market Participants

i. Suppliers

There are three main Fittings suppliers in the United States: Respondent, McWane, Inc. ("McWane"), Sigma Corporation ("Sigma"), and Star Pipe Products, Ltd. ("Star"). *See* F. 2, 51, 108, 505. Together, McWane, Sigma, and Star accounted for between 90 and 97 percent of United States Fittings sales in 2008 and 2009. F. 355-356.

McWane has manufactured Fittings at two domestic foundries: its Tyler Pipe & Foundry Company South Plant in Tyler, Texas and its Union Foundry Company in Anniston, Alabama. F. 15. Faced with high inventory levels and insufficient demand for Domestic Fittings, McWane closed its Tyler facility in the fall of 2008 and opened a foundry in China, Tyler Xin Xin. F. 16, 18. In 2007, McWane consolidated internal management of all of its Fittings operations, both domestically and in China, into a single division, "Tyler/Union." F. 17.

McWane had more than a 40% share of the United States Fittings market in both 2008 and 2009. F. 356 ([redacted]% in 2008; [redacted]% share in 2009). From April 2006 until Star began manufacturing Fittings in the United States in 2009, McWane was the only significant supplier of Fittings manufactured in the United States. F. 1040.

Sigma imports and sells Fittings and other waterworks products that are made in China, India, and Mexico. F. 56. Sigma engages in "virtual manufacturing" whereby it provides engineering support to foundries that make its Fittings. F. 57. Sigma had more than a 30% share of the United States Fittings market in both 2008 and 2009. F. 356 ([redacted]% in 2008; [redacted]% in 2009).

Star also imports Fittings from China for sale in the United States. F. 108, 113. Star had nearly a 20% share of the United States Fittings market in both 2008 and 2009. F. 356 ([redacted]% in 2008; [redacted]% in 2009). In 2009, Star began

contracting with foundries in the United States to manufacture Fittings domestically. F. 112.

In addition to McWane, Sigma, and Star, there are a few small suppliers of Fittings, including Serampore Industries ("SIP"), NAPAC, Inc., North American Cast Iron Products ("NACIP"), Metalfit, Backman Foundry, and, starting in 2009, Electrosteel. F. 358; *see also* F. 162, 169, 176, 178, 186, 196. Combined, these other sellers represented between three and ten percent of the United States Fittings market in 2008 and 2009. F. 358.

ii. End Users

End users of Fittings are typically municipalities, regional water authorities, and the contractors they hire to construct waterworks projects (collectively, "End Users"). F. 10; *see also* F. 363-366.

iii. Distributors

McWane, Sigma, and Star sell "all or virtually all" of their Fittings to a relatively unconcentrated group of wholesale waterworks distributors ("Distributors"), who then resell the Fittings to End Users. F. 373-374. There are two large national Distributors, HD Supply and Ferguson, which have 235 and 167 locations nationwide, respectively. F. 223, 228, 377. Together, they account for approximately 50% of all Fittings sales in the United States. F. 377-379. The remaining direct purchasers of Fittings consist of a number of regional waterworks distributors with multiple branches that service specific regional areas, and hundreds of small, local companies with just one or a few distribution yards. F. 375.

c. Bidding Process

When a municipality or regional water authority undertakes a waterworks project, it will generally issue specifications for all of the pipes, valves, hydrants, Fittings and related waterworks equipment needed for the project, and seek bids from contractors for its completion. F. 333. These specifications may identify which brands can be used for the project, as well as whether domestically manufactured Fittings are required. F. 339, 346.

Once contractors receive the specifications, contractors will solicit bids and other assistance from Distributors that supply the various components for that project. F. 340.

d. Open Specifications v. Domestic-only Specifications

Waterworks projects specifications that do not specify the country of origin are referred to as "open specifications." F. 349. Either imported or Domestic Fittings can be used in open specification projects. F. 349, 350. When a mix of imported and domestically manufactured Fittings are sold into open specifications projects, the mix is referred to as "blended." F. 351.

Waterworks projects specifications that require the use of domestically manufactured Fittings are referred to as "domestic-only specifications." F. 347. Imported Fittings cannot be used in domestic-only specifications. F. 350. A project may have a domestic-only specification either because of an End User preference or because municipal, state, or federal law imposes a "Buy American" requirement. F. 347. Domestic Fittings sold for use in domestic-only specifications are sold at higher prices than Fittings (whether imported or domestically manufactured) that are sold into open specification jobs. F. 1075.

e. Economic Backdrop

A few decades ago, most Fittings used in waterworks projects in the United States were manufactured in the United States. F. 462. Beginning in the mid-1980s, importers began to successfully convert End Users' specifications for domestically produced Fittings to open specifications, which permitted the use of both domestic and imported Fittings. F. 463. This process accelerated during the 1990s and 2000s, with non-domestic Fittings comprising the vast majority of the Fittings market by 2005. F. 463.

Prior to the entry of importers into the Fittings market, in addition to McWane, full line domestic manufacturers included U.S. Pipe and Foundry Company ("U.S. Pipe"), Griffin Pipe

("Griffin"), and American Cast Iron Pipe Company ("ACIPCO"). F. 462. These other domestic foundries either dramatically reduced or exited domestic Fittings production in the face of the flood of cheap imports from China, Korea, India, Mexico, and Brazil. F. 472-475. Fittings manufactured in foreign countries such as China are far less expensive than Fittings manufactured domestically because labor and wages are cheap and environmental, health, and safety protocols are much less onerous than those of the United States. F. 468.

In response to what it saw as a flood of cheap imports, McWane filed a complaint before the International Trade Commission ("ITC"). F. 469. In December 2003, the ITC determined that Fittings from China had surged "into the United States in such increased quantities or under such conditions as to cause market disruption to the domestic producers[,]" but the President declined to impose the recommended tariffs. F. 470-471. Believing that it could not remain competitively viable with only its United States manufacturing operations, McWane made the decision to build its own foundry in China. F. 16, 477.

With this background in mind, the Initial Decision turns to the issue of the relevant product markets in this case.

2. Relevant product markets

a. General legal standards

A relevant product market consists of "products that have reasonable interchangeability for the purposes for which they are produced - - price, use and qualities considered." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956). "In determining relevant product markets, courts have traditionally considered two factors: '(1) the reasonable interchangeability of use and (2) the cross-elasticity of demand between the product itself and substitutes for it.'" *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 38 (D.D.C. 2009) (quoting *Brown Shoe*, 370 U.S. at 325).

Two products are reasonably interchangeable if they can be used for the same purpose. *FTC v. Staples*, 970 F. Supp. 1066, 1074 (D.D.C. 1997). Cross-elasticity of demand refers to the

"responsiveness of the sales of one product to price changes of the other." *du Pont*, 351 U.S. at 400. Thus, "[i]nterchangeability of use and cross-elasticity of demand look to the availability of products that are similar in character or use to the product in question and the degree to which buyers are willing to substitute those similar products for the product." *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 157 (D.D.C. 2000) (citing *du Pont*, 351 U.S. at 393); *In re Evanston Nw. Healthcare Corp.*, 2007 FTC LEXIS 210, at *144 (Aug. 6, 2007).

b. Fittings for use on open specification jobs

The first relevant product market in this case is the supply of ductile iron pipe fittings of 24" and smaller in diameter, that are sold for use on open specification jobs ("Fittings"). F. 480. As explained below, it is appropriate to group ductile iron pipe fittings of 24" and smaller in diameter into a cluster market and there are no widely available substitutes for ductile iron pipe fittings. As discussed in the following section, ductile iron pipe fittings of 24" and smaller in diameter that are made in the United States and that are sold for use on jobs with domestic-only specifications ("Domestic Fittings") are another relevant product market, a submarket of the Fittings market.

i. Fittings 24" and smaller are an appropriate cluster

While there are thousands of different Fittings, as discussed below, it is appropriate to group all Fittings (24" and smaller in diameter) into a single product market. A cluster of products can constitute a relevant market, even if the individual components of the cluster may not all be – and likely are not – interchangeable or substitutable. *See United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 356 (1963) (holding that cluster of products and services constituting "commercial banking" constituted a relevant market); *Staples*, 970 F. Supp. at 1074. "[C]luster markets [are] based on analytical convenience [and] are [both] useful and appropriate for evaluating competitive effects" under appropriate circumstances. *In re Promedica Health Sys., Inc.*, 2012 FTC LEXIS 58, at *48-49 (Mar. 28, 2012).

Using cluster markets is appropriate when the applicable competitive conditions are identical or nearly so for the entire class of products. For example, in *Brown Shoe*, the defendant appealed the district court's finding that children's shoes represented one relevant product market, arguing that such a market includes products that are not reasonably interchangeable for one another: "Brown argues, for example, that 'a little boy does not wear a little girl's black patent leather pump' and that '[a] male baby cannot wear a growing boy's shoes.'" 370 U.S. at 327. The Court reached the pragmatic conclusion that to subdivide the children's shoe market on the basis of size, age, and sex would not advance the antitrust analysis, and therefore was unnecessary:

> Further division does not aid us in analyzing the effects of this merger. . . . Appellant can point to no advantage it would enjoy were finer divisions than those chosen by the District Court employed. Brown manufactures significant, comparable quantities of virtually every type of nonrubber men's, women's, and children's shoes. Thus, whether considered separately or together, the picture of this merger is the same.

Id.

The thousands of different types and sizes of Fittings in this case generally are not substitutes for each other. F. 498, 500. For example, a four inch diameter Fitting cannot substitute for an eight inch Fitting because it would not fit on an eight inch pipe; and a Fitting with a ninety degree "bend" cannot substitute for a Fitting with a forty-five degree bend (or for a straight Fitting). *See* F. 500. However, all Fittings sized 24" and smaller in diameter are manufactured in substantially the same manner and with the same inputs, are sold to the same network of wholesale waterworks distributors for resale to the same End Users, are sold for the same end uses, and are sold in every state in the country. F. 501-503.

It is not necessary to analyze each size and shape of ductile iron pipe fittings in the range of 24" and below as a separate market. CX 2260-A (Schumann Rep. at 13); Schumann, Tr. 3791-3792. The market analyses of each of these Fittings items

would be essentially identical because the primary suppliers, customers, and Distributors are the same and the materials and other inputs used to produce the products are the same. CX 2260-A (Schumann Rep. at 13); Schumann, Tr. 3791-3792.

The rationale supporting a cluster market of Fittings 24" in diameter and smaller does not support the inclusion of large ductile iron pipe fittings in the same market. Fittings of 24" in diameter and smaller are sold for different uses than fittings over 24" in diameter. *See* F. 289-292, 510-511. Whereas Fittings of 24" or less are typically used underground, for residential work, and by municipalities or plants with long transmission lines, fittings over 24" in diameter are used for large treatment plants or large transmission lines and are a more unusual size for the industry. F. 289-292, 510-511. Fittings 24" in diameter and below make up around 90% of the overall market for ductile iron pipe fittings. F. 290.

Historically, the waterworks industry has differentiated Fittings of 3" to 24" in diameter from fittings of 30" or greater in diameter. F. 515. Moreover, McWane's internal documents group Fittings into categories of 24" or less and 24" or greater. F. 514. The January 2009 DIFRA Report (F. 8, 741-742) also grouped shipments of Fittings by three size ranges: 2"-12", 14"-24", and over 24". F. 516.

In addition, whereas over 90% of Fittings below 24" are sold by three manufacturers, McWane, Sigma, and Star, there is a fourth substantial supplier of ductile iron pipe fittings of 30" and larger, ACIPCO. F. 154-155. ACIPCO has an approximate market share of around 40 percent in ductile iron pipe fittings of 30" and larger in diameter. F. 513. ACIPCO exited the manufacture of fittings under 30" in diameter in 2006 and does not have any interest in extending its product scope to include small and medium diameter Fittings. F. 155, 1065. For these reasons, fittings above 24" in diameter are not properly included in the relevant product market in this case. *See also* CX 2260-A (Schumann Rep. at 14).

Thus, for the above stated reasons, ductile iron pipe fittings with a diameter of 24" or less can be analyzed as if they are part

of a single product market. *See also* CX 2260-A (Schumann Rep. at 13); RX 712A (Normann Rep. at 23 ("domestic and imported product are routinely sold to the same distributors, sold for the same end use, and . . . sold in every state in the country")).

ii. No widely used substitutes for ductile iron pipe Fittings

Products are included in the same relevant market only if they are both functionally and reasonably interchangeable. *United States v. Chas. Pfizer & Co.*, 246 F. Supp. 464, 468 n.3 (E.D.N.Y. 1965); *accord FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 119 (D.D.C. 2004). *See Brown Shoe*, 370 U.S. at 325 (identifying "reasonable interchangeability of use" between products as determinative of product market parameters); *Swedish Match*, 131 F. Supp. 2d at 157 (considering both the "similar in character or use to the product in question" and whether "buyers are willing to substitute those similar products" when analyzing substitution).

There are no widely used substitutes that constrain the price of ductile iron pipe Fittings. F. 492. Indeed, McWane admits that there are no "widely used substitutes" for Fittings. (Answer ¶ 23). The closest substitute for Fittings are fittings made from a type of plastic: polyvinyl chloride ("PVC fittings"). F. 481. However, as explained below, PVC fittings are not reasonably interchangeable with Fittings.

In the view of consumers, PVC fittings are more expensive, have lower pressure ratings, are more difficult to restrain and install, and are viewed as more susceptible to fracture than Fittings. F. 482-484, 487. In addition, PVC fittings are limited in size to 12" and below and some jurisdictions do not allow plastic fittings. F. 485-486.

In the view of the manufacturers of Fittings, PVC fittings are not reasonable substitutes for Fittings. McWane's Price Coordinator and Quality Manager, Mr. Vince Napoli, who has over 20 years of industry experience and was formerly responsible for interpreting product specifications and suitable product applications at McWane, testified at his deposition that: "[n]o one, to my knowledge, has come up with a good plastic substitute for the strength of ductile iron." F. 484. Mr. Napoli further

explained that, in connection with high-pressure applications, "I don't recall ever seeing a PVC fitting even attempt to be used by an engineer [End User]." F. 483.

Further, Fittings suppliers do not track the price of PVC fittings and do not take the price of PVC fittings into account when setting Fittings prices. F. 493. This indicates that Fittings and PVC fittings are not sensitive to each other's price changes, and therefore are in separate markets. (CX 2260-A (Schumann Rep. at 10)). *See Beatrice Foods v. FTC*, 540 F.2d 303, 309 (7th Cir. 1976) (finding separate market when manufacturers of one product did not consider price of other product in setting prices); *Staples*, 970 F. Supp. at 1075-79 (failure to track or react to prices of other products is evidence of separate markets); *see also Brown Shoe*, 370 U.S. at 325 (identifying "sensitivity to price changes" of other products as a factor for market definition); *Staples*, 970 F. Supp. at 1076 (defendant's internal documents comparing its prices to some companies' prices, but not to other companies' prices, indicate the boundaries of the product market).

Fittings are a small sub-segment of the overall waterworks market, comprising 5% or less of the total cost of a typical waterworks project. F. 326. An increase in price in Fittings does not lead to a reduction in demand for Fittings. F. 327-328. McWane's economic expert, Dr. Parker Normann, confirmed that "industry demand for [Fittings] is likely inelastic," *i.e.*, that demand does not decline significantly as price increases. (RX 712A (Normann Rep. at 24)). This acknowledgment that consumers cannot substitute an alternative product when faced with a price increase for Fittings indicates that Fittings constitute a relevant antitrust product market. *See FTC v. Whole Foods Mkt.*, 548 F.3d 1028, 1038 (D.C. Cir. 2008). For the reasons set forth above, ductile iron pipe fittings of 24" and smaller in diameter, that are sold for use on open specification jobs, constitute a relevant product market ("the Fittings market").

c. Fittings for use with domestic-only specification jobs

There is also a separate relevant product market for ductile iron pipe fittings of 24" and smaller in diameter that are made in

the United States, for use in waterworks projects with domestic-only specifications (the "Domestic Fittings market"). F. 518. Domestic Fittings are properly clustered into Fittings sized 24" and smaller in diameter for the same reasons as Fittings sold into open specifications. The Domestic Fittings market is comprised of Domestic Fittings sold into all domestic-only specifications, including domestic-only specifications required by law and those based upon End User preference.

i. No reasonable substitutes for Domestic Fittings in domestic-only specifications

In form and functionality, imported and Domestic Fittings are completely interchangeable: they are manufactured with the same general materials; meet the same AWWA standards; and provide the same functionality and role in waterworks projects. F. 517. Thus, in waterworks projects with open specifications, imported and Domestic Fittings are substitutes for each other. F. 349-350.

However, in waterworks projects where the End User's specification calls for a Domestic Fitting, a Distributor will not purchase an imported Fitting; only Domestic Fittings can be used. F. 350. Thus, for a buyer, *i.e.*, the Distributor having to supply Fittings for a domestic-only waterworks specification, imported Fittings are not interchangeable or a reasonable substitute for Domestic Fittings on domestic-only specifications. Accordingly, because there are no reasonable substitutes, Domestic Fittings sold into waterworks projects with domestic-only specifications are a relevant product market. *See du Pont*, 351 U.S. at 394-95 (defining relevant product market to include all products that are reasonable substitutes for the same purpose for a buyer); *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1435 (9th Cir. 1995) (same).

The evidence in this case demonstrates that some waterworks projects are legally required to use only Domestic Fittings. F. 519-523, 526. Indeed, Respondent's expert witness acknowledges: "There are some locations that have a preference or legal requirements for American-made fittings, but this segment is no more than 20% of the market, is declining, and the preferences only apply at certain price ranges." (RX 712A (Normann Rep. at 24)). Jurisdictions that legally require Buy

American specifications include the State of Pennsylvania, the State of New Jersey, the United States Air Force, and various municipalities located across the United States. F. 520-523. In addition, in February 2009, Congress passed the American Recovery and Reinvestment Act of 2009 ("ARRA"). F. 7. ARRA allocated more than $6 billion to water infrastructure projects. F. 524. Waterworks projects funded by ARRA were required by federal law to use Domestic Fittings. F. 526-527.

Respondent contends that the United States Environmental Protection Agency ("EPA") granted a number of waivers permitting imported Fittings to be used on ARRA-funded jobs (RRB at 57). The evidence demonstrates that the use of such waivers was insignificant. F. 531-533, 537. Neither McWane nor Star sold any imported Fittings for use in any ARRA-funded waterworks projects. F. 538, 540. To the extent that Sigma's imported Fittings were used on any ARRA-funded waterworks project, the quantities were few and the circumstances limited. F. 539. Other suppliers, Metalfit, SIP, and Electrosteel, each were unaware of any instances where imported Fittings were used for ARRA-funded projects. F. 543, 545-546. Distributors HD Supply, Ferguson, and Illinois Meter, did not know of any instance in which a customer used an imported Fitting for an ARRA-funded waterworks project, or any instance in which a customer received a waiver of ARRA's Buy American requirement for a Fittings purchase. F. 541-542, 544.

"To the extent that regulation limits substitution, it may define the extent of the market." Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 572b at 430 (3d ed. 2007); U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines, § 4.2.2 (example 15, describing where "[c]ustomers in the United States must use products approved by U.S. regulators[,] . . . [t]he relevant product market consists of products approved by U.S. regulators") (Aug. 19, 2010) available at http://www.ftc.gov/os/2010/08/100819hmg.pdf (hereafter "Merger Guidelines § __"); *Apani Southwest, Inc. v. Coca-Cola Enters.*, 300 F.3d 620, 626 (5th Cir. 2002) (regulatory constraints impeding the free flow of competing goods may be considered in defining relevant market). Here, not only were there legal requirements that only Domestic Fittings be used in some waterworks projects, the evidence

overwhelming showed these regulations did in fact limit substitution.

Respondent further contends that, while there are municipal engineers or other customers who prefer to buy Domestic Fittings, "preferences alone . . . are insufficient as a matter of law to serve as the basis for a finding that domestic Fittings constitute a separate relevant antitrust market." RB at 86. However, consumer preference is critical in defining the market. "After all, market definition focuses on what products are *reasonably* substitutable; what is reasonable must ultimately be determined by 'settled consumer preference.'" *Whole Foods*, 548 F.3d at 1039 (emphasis in original) (citation omitted). Other cases cited by Respondent (RB at 86-87) illustrate the importance of consumer preference in defining markets. *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1338 (11th Cir. 2010) (consumer preferences are "crucial to understanding whether a separate market exists"); *Buehler AG v. Ocrim S.p.A.*, 836 F. Supp. 1305, 1325-26 (N.D. Tex. 1993) (defining relevant market to consist of both American and European roller mills, rather than a European-only market, because consumers "typically consider both types before purchase"). Furthermore, Distributors consistently testified that Distributors will not purchase an imported Fitting if the End User's specification calls for a Domestic Fitting. F. 527, 537, 542, 544. Additionally, in light of the Buy America legal requirements, it is not "preferences alone" that creates the separate domestic only market.

Respondent also contends that the vast majority of specifications are open to both imports and Domestic Fittings, that cheap imports now constitute the lion's share of all Fittings purchased in the United States today, and that ARRA had little or no impact on Domestic Fittings during its short lifespan. RB at 83-84. Even if the vast majority of specifications are open to imports and Domestic Fittings and even if ARRA had little impact on Domestic Fittings (*infra* III.G.2.), such points go to the size of the Domestic Fittings market, and not to the issue of whether such a market exists.

ii. Fittings sold into domestic-only specifications are priced differently than Fittings sold into open specifications

McWane charges different prices for Fittings sold into open specifications than it does for Fittings sold into domestic-only specifications. F. 1075; *see also infra* Section III.G.2.b.ii.(a). For example, in McWane's February 2008 price multipliers[7], domestically manufactured fittings sold into domestic-only specifications were substantially higher than its February 2008 "blended" multipliers (a mix of imported and domestically manufactured Fittings sold into open specifications projects). F. 1075-1076.

A substantial gap in pricing can be indicative of separate markets. *Geneva Pharms. Tech. Corp. v. Barr Labs.*, 386 F.3d 485, 497 (2d Cir. 2004). In *Geneva Pharmaceuticals*, the court found that generic and branded drugs were not in the same market despite therapeutic equivalence because sustained price differential showed that neither product constrained the other's pricing. *Id.* at 496-97. Similarly, in *U.S. Anchor Mfg. v. Rule Indus.*, 7 F.3d 986, 997-98 (11th Cir. 1993), where there was "no reasonable possibility that a significant number of consumers would have switched to [patented products], many of which were offered at nearly double the price of their generic substitutes, in response to more modest increases in generic prices," "distinctly higher prices, a distinct group of customers, strongly inelastic demand and limited substitution of supply" weighed heavily in determining the relevant product market. *Id.* "Moreover, the higher prices charged for [the patented product] are evidence that a distinct group of customers was unwilling to switch away from the prestigious branded product in response to price increases above competitive levels." *Id.* *See also* Merger Guidelines at § 4.1.4 ("If a hypothetical monopolist could profitably target a subset of customers for price increases, the Agencies may identify relevant markets defined around those targeted customers, to whom a hypothetical monopolist would profitably and separately impose at least a [small but significant and non-transitory increase in price] SSNIP."); *United States v. Aluminum Co. of America*,

[7] Multipliers are published discounts off a Fittings supplier's published list price. F. 419.

377 U.S. 271, 276 (1964) ("[W]here insulated aluminum conductor pricewise stands so distinctly apart, to ignore price in determining the relevant line of commerce is to ignore the single, most important, practical factor in the business.").

The evidence establishes that, regardless of price, a Distributor will not purchase an imported Fitting if the End User's specification calls for a Domestic Fitting. Where the price of Domestic Fittings sold into domestic-only specifications stands so distinctly apart from Fittings sold into open specifications, this important, practical factor is further evidence that Domestic Fittings sold into domestic-only specifications make up a separate product market. For the reasons set forth above, ductile iron pipe fittings of 24" and smaller in diameter that are made in the United States, for use in waterworks projects with domestic-only specifications, constitute a relevant product market ("the Domestic Fittings market").

3. Geographic market

Complaint Counsel contends that the relevant geographic market for both the Fittings market and the Domestic Fittings market is the United States. CCB at 70-81. Respondent does not address this issue in either its Post Trial Brief or Reply Brief. Respondent's expert witness opines that the geographic market is no larger than the United States; however, it may be smaller than the whole United States, as there may be separate regional markets. F. 553.

A relevant geographic market is defined as "the 'area of effective competition . . . in which the seller operates, and to which the purchaser can practicably turn for supplies.'" *Philadelphia Nat'l Bank*, 374 U.S. at 359 (quoting *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961)); *see also Morgenstern v. Wilson*, 29 F.3d 1291, 1296 (8th Cir. 1994) (defining the relevant geographic market as the "area to which consumers can practicably turn for alternative sources of the product and in which the antitrust defendants face competition").

The market area in which the Fittings suppliers operate and to which the purchasers can practicably turn for supply, is the United States. F. 554. For example, McWane, Sigma, and Star each use

warehouses and distribution centers located throughout the United States to supply Fittings to waterworks distributors across the United States. F. 551. Specifically, McWane has distribution centers that enable one to two day delivery to 95 percent of the United States. F. 551. Sigma has five main warehouses, some satellite warehouses, and distribution centers in Florida, California, Washington, and Arizona. F. 551. Star has thirteen distribution centers in the United States, in order to "stock product closer to [customers] for better delivery times." F. 551. From the perspective of a local Distributor, the Fittings of one manufacturer are interchangeable with those of another manufacturer located elsewhere in the United States. F. 552. Both Complaint Counsel's and Respondent's expert witnesses opined that the geographic market is no larger than the United States; however, it may be smaller than the whole United States, as there may be separate regional markets. F. 553.

Defining the relevant geographic market as the United States is common where, as here, firms use competing distribution networks supplying the entire nation. *E.g.*, *FTC v. Cardinal Health*, 12 F. Supp. 2d 34, 50 (D.D.C. 1998) ("the wholesale [drug] industry is largely driven by the competition that takes place on a national level"); *Frito-Lay, Inc. v. Bachman Co.*, 659 F. Supp. 1129, 1138 (S.D.N.Y. 1986) ("Defendant's contention that the entire United States constitutes the relevant geographic market is a logical one since Frito-Lay distributes [salted snack foods] throughout the United States.").

For the above stated reasons, in the Fittings market, the relevant geographic market is the United States. By definition, purchasers of Fittings in the Domestic Fittings market can turn only to manufacturers that produce fittings in the United States. It follows that, in connection with the supply of Domestic Fittings, the relevant geographic market is the United States. Accordingly, the relevant geographic market for both the Fittings market and the Domestic Fittings market is the United States.

D. Count One: Alleged Conspiracy with Sigma and Star to Stabilize and Raise Fittings Prices

1. Overview

a. Conspiracy law

Count One of the Complaint charges that McWane conspired with Sigma and Star to raise and stabilize prices in the Fittings market. Section 1 of the Sherman Act provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. A violation of Section 1 of the Sherman Act also constitutes an unfair method of competition under Section 5 of the FTC Act, 15 U.S.C. § 45. *See California Dental Ass'n*, 526 U.S. at 762 & n.3; *FTC v. Motion Picture Adver. Service Co.*, 344 U.S. 392, 394-95 (1953).

To prevail on this Count, Complaint Counsel must prove: "(1) the existence of an agreement, combination or conspiracy, (2) among actual competitors (*i.e.*, at the same level of distribution), (3) with the purpose or effect of 'raising, depressing, fixing, pegging, or stabilizing the price of a commodity,' (4) in interstate or foreign commerce." *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1361 (10th Cir. 1989) (citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 216-19 (1940); *National Soc'y of Prof'l Engineers v. United States*, 435 U.S. 679 (1978)).

A conspiracy to raise and stabilize prices is illegal *per se* under Section 1. *Socony-Vacuum Oil Co.*, 310 U.S. at 223 ("[A] combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*."); *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969) (stating that "interference with the setting of price by free market forces is unlawful *per se*"). *See also Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958) (stating that price fixing agreements are among those "certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be

unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use"); *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) ("Restraints that are *per se* unlawful include horizontal agreements among competitors to fix prices . . . .").

"The existence of an agreement is 'the very essence of a section 1 claim.'" *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 356 (3d Cir. 2004) (quoting *Alvord-Polk, Inc. v. Shumacher & Co.*, 37 F.3d 996, 999 (3d Cir. 1994)). Section 1 of the Sherman Act "does not prohibit [all] unreasonable restraints of trade[;] . . . only restraints effected by a contract, combination, or conspiracy. . . ." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 775 (1984). As the First Circuit Court of Appeals has summarized:

Section 1 by its plain terms reaches only "agreements" -- whether tacit or express. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). It does not reach independent decisions, even if they lead to the same anticompetitive result as an actual agreement among market actors. 15 U.S.C. § 1; *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2208-09, 176 L. Ed. 2d 947 & n.2 (2010); *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 484 (1st Cir. 1988). The statute "does not require sellers to compete; it just forbids their agreeing or conspiring not to compete." *In re Text Messaging Antitrust Litig.*, No. 10-8037, 630 F.3d 622, 2010 U.S. App. LEXIS 26299, 2010 WL 5367383, at *4 (7th Cir. Dec. 29, 2010) (Posner, J.). *White v. R.M. Packer Co.*, 635 F.3d 571, 575 (1st Cir. 2011).

Thus, the crucial question in determining conspiracy is "whether the challenged anticompetitive conduct 'stem[s] from independent decision or from an agreement . . . .'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007). An "agreement" is "a unity of purpose or a common design and understanding, or a meeting of minds" as to the alleged unlawful arrangement at issue. *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). In other words, there must be a "conscious commitment to a common scheme designed to achieve an unlawful objective."

Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984).

A conspiracy may be demonstrated by direct or circumstantial evidence. *See Monsanto*, 465 U.S. at 768. "Direct evidence in a Section 1 conspiracy must be evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted." *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999). As a practical matter, however, it is rare to be able to prove a conspiracy with direct evidence, such as explicit agreements or admissions of conspiracy; more typically, the proponent of an alleged conspiracy will rely upon inferences drawn from circumstantial evidence, such as the conduct of the parties. *City of Tuscaloosa v. Harcros Chemicals*, 158 F.3d 548, 569 (11th Cir. 1998); *ES Dev., Inc. v. RWM Enterprises*, 939 F.2d 547, 553-54 (8th Cir. 1991); VI Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1410c at 71 (3d ed. 2010) (hereafter, "Areeda"). Such circumstantial evidence will "usually be . . . of two types -- economic evidence suggesting that the defendants were not in fact competing, and noneconomic evidence suggesting that they were not competing because they had agreed not to compete." *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002).

b. Complaint Counsel's conspiracy theory

Complaint Counsel posits a complex, multi-phase conspiracy among McWane, Sigma, and Star (hereafter, the "Suppliers"[8]), engineered by McWane, to raise and stabilize Fittings prices by curtailing certain discounting practices and increasing price transparency. Complaint Counsel argues that this agreement manifested itself in three separate "episodes." CCB at 107. The first "episode" claimed by Complaint Counsel is that in or around January 2008, McWane, Sigma, and Star formed an agreement to "curtail" Project Pricing, a form of discounting off published multipliers that is common in the Fittings market. CCB at 107-108. The second "episode," according to Complaint Counsel, is that in or around May 2008, in an effort to further increase the

[8] The capitalized term "Suppliers" refers only to McWane, Sigma, and Star. In instances where the term is used to encompass other manufacturers of Fittings, the lowercase term "suppliers" is used.

transparency of Fittings prices, McWane, Sigma, and Star "unlawfully exchanged assurances related to" the formation of the Ductile Iron Fittings Research Association ("DIFRA") and the "exchange of" certain Fittings tons-shipped data. CCB at 108. The third "episode," charged by Complaint Counsel, is that in or around April 2009, McWane and Star exchanged mutual assurances to adhere to McWane's newly announced price list. CCB at 108. Complaint Counsel seeks to prove the single, overall price fixing conspiracy by proving one or more of the foregoing "sub-agreements." *Id.*

McWane responds that: there is no direct evidence of conspiracy and the circumstantial evidence fails to demonstrate any agreement involving McWane; the evidence at best demonstrates oligopolistic conscious parallelism, which is legal; the evidence shows McWane acted independently and competitively at all times and it did not engage in any pricing discussions with its competitors; the economic evidence shows the Fittings market was competitive during the relevant time period; and prices were neither "raised" nor "stabilized" in the Fittings market.

In determining whether the behavior at issue in this case "stemmed from independent decision or from an agreement, tacit or express," *Theatre Enterprises v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954), the duty of the fact finder is "to look at the whole picture and not merely at the individual figures in it." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). "[C]ircumstantial evidence alone cannot support a finding of conspiracy when the evidence is equally consistent with independent conduct. In such a case, the evidence of conspiracy would not preponderate." *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1009 (6th Cir. 1999). Thus, "an inference of a conspiracy to restrain trade must be more probable than the inference of independent action in order for the inference of conspiracy to be drawn." *Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479, 1488 n.14 (D.C. Cir. 1984). Indeed, where "taken as a whole, the evidence points with at least as much force toward unilateral actions . . . as toward conspiracy," a fact finder cannot reach the latter conclusion without engaging in "impermissible speculation," and such

evidence is "insufficient as a matter of law to support a finding of conspiracy." *Venture Technology, Inc. v. National Fuel Gas Co.*, 685 F.2d 41, 48 (2d Cir. 1982) (reversing jury verdict). Before analyzing the evidence and applicable law in more detail, a preliminary discussion of the nature of oligopolies is set forth below.

c. Oligopoly

The Fittings market is an oligopoly. F. 362. The term "oligopoly" means few sellers. Areeda, ¶ 1429a at 221. An oligopoly has been further defined as "an economic condition where only a few companies sell substantially similar or standardized products." *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1031 n.3 (8th Cir. 2000) (quoting Black's Law Dictionary 1086 (6th ed. 1990)); *see also* Areeda, ¶ 404a at 9 ("An oligopoly market is one in which a few relatively large sellers account for the bulk of the output.").

An oligopoly is distinctly characterized by "recognized interdependence" among the firms in the oligopoly. Areeda, at ¶ 404a; *see also Rebel Oil*, 51 F.3d at 1443 ("[b]y definition, oligopolists are interdependent . . ." (citation omitted)). The term, "'interdependent' merely describes the phenomenon of sequential pricing decisions that are each made (1) in response to the ones preceding it and (2) in hope or expectation of the ones that follow it." *In re Petroleum Products Antitrust Litig.*, 906 F.2d 432, 442 n.5 (9th Cir. 1990). A participant in an oligopoly market dominated by a small number of firms is aware that "any single firm's 'price and output decisions will have a noticeable impact on the market and on its rivals.'" *Flat Glass*, 385 F.3d at 359 (citation omitted). 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.* As the Areeda treatise further explains:

In a market inhabited by 1,000 small firms, for example, a single firm could double its output without any expectation that total supply would be so affected as to cause any price change; the effects of the firm's increased sales would be so diffused among its numerous competitors that they would not be aware of any

change. By contrast, in a market served by three large companies, each firm must know that if it reduces its price and increases its sales at the expense of its rivals, they will notice the sales loss, identify the cause, and probably respond. In short, each firm is aware of its impact upon the others. Though each may independently decide upon its own course of action, any rational decision must take into account the anticipated reaction of the other two firms. Whenever rational decision making requires an estimate of the impact of any decision on the remaining firms and an estimate of their response, decisions are said to be "interdependent." *Id.* ¶ 1429a at 221-222.

It is possible for sellers in an oligopoly to "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." *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993). "An oligopolist can increase market price, but only if the others go along." *Rebel Oil*, 51 F.3d at 1443 (citation omitted). Through "recognizing their shared economic interests and their interdependence with respect to price and output decisions' . . . , [e]ach producer may independently decide that it can maximize its profits by matching one or more other producers' price, on the hope that the market will be able to maintain high prices if the producers do not undercut one another." *White*, 635 F.3d at 576 (quoting in part *Brooke Group*, 509 U.S. at 227). However, because such conduct, variously referred to as "conscious parallelism," "tacit collusion," or "oligopolistic price coordination," may stem from independent decision making, it is well established that the Sherman Act does not prohibit it. *Brooke Group*, 509 U.S. at 227; *see E.I. du Pont de Nemours & Co., v. FTC*, 729 F.2d 128, 139 (2d Cir. 1984) ("[T]he mere existence of an oligopolistic market structure in which a small group of manufacturers engage in consciously parallel pricing of an identical product does not violate the antitrust laws."); *Twombly*, 550 U.S. at 553-54 (reiterating rule of *Brooke Group* that evidence of parallel behavior or even conscious parallelism alone, without more, is insufficient to establish a Section 1 violation); *Baby Food*, 166 F.3d at 122 ("In an oligopolistic market, . . . interdependent parallelism can be a necessary fact of life but be the result of

independent pricing decisions."); *Flat Glass*, 385 F.3d at 359 ("[A]ccording to the theory of interdependence, . . . 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.").

"Because of their mutual awareness, oligopolists' decisions may be interdependent although arrived at independently." Areeda, ¶ 1429 at 221. Accordingly, as the court stated in *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478 (1st Cir. 1988): "Courts . . . have almost uniformly held, at least in the pricing area, that . . . individual pricing decisions (even when each firm rests its own decision upon its belief that competitors will do the same) do *not* constitute an unlawful agreement under section 1 of the Sherman Act. . . . That is not because such pricing is desirable (it is not), but because it is close to impossible to devise a judicially enforceable remedy for 'interdependent' pricing. How does one order a firm to set its prices *without regard* to the likely reactions of its competitors?" *Id*. at 484 (italics in original).

The particular analytical challenge when evaluating an alleged conspiracy in an oligopolistic market, such as is presented in this case, is to distinguish between mere tacit collusion, on the one hand, which is a function of interdependence, and is not unlawful, *Brooke Group*, 509 U.S. at 227, and an agreement, which requires finding a "conscious commitment" to a common, unlawful plan. *See* Areeda, ¶ 1410a at 68; *Monsanto*, 465 U.S. at 764. Although the language of Section 1 is broad enough to encompass a "tacit agreement," *i.e.*, an agreement that is reached through conduct rather than express words, "tacit coordination" is not unlawful. *See High Fructose Corn Syrup*, 295 F.3d at 654-55. Tacit coordination in an oligopoly market "need not imply even a weak commitment or prior understanding as to how each will behave. The price leader may assume that others have made a similar calculation about which price will maximize profits. Or the leader may simply proceed by trial and error: raise the price and see what happens, especially where reversing an unfollowed price rise is not very costly." Areeda, ¶ 1410b at 71. "Notwithstanding the many difficulties in appraising the sufficiency of circumstantial evidence, we know what we are looking for: some level of commitment to a common course of action." Areeda, ¶ 1410c at 72. Conduct indicating an agreement, particularly in the context

of conscious parallelism, is "'conduct [that] indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement.'" *Twombly*, 550 U.S. at 557 n.4 (quoting with approval Blechman, Conscious Parallelism, Signalling and Facilitating Devices: The Problem of Tacit Collusion Under the Antitrust Laws, 24 N.Y.L.S. L. Rev. 881, 899 (1979)). Where interdependence seems likely, the finder of fact must "weigh all the evidence in the actual business context to decide whether a traditional agreement emphasizing commitment is more probable than not." *Id.* At all times, "the ultimate burden of persuading the factfinder that a conspiracy exists is on the plaintiff." *Kreuzer*, 735 F.2d at 1488.

2. Alleged agreement to curtail Project Pricing (Complaint Counsel's "episode one")

Complaint Counsel's "episode one" of the alleged conspiracy to raise and stabilize prices is an asserted agreement among McWane, Sigma, and Star to "curtail" Project Pricing. Complaint Counsel seeks to prove this agreement to curtail Project Pricing by proving parallel conduct and certain "plus" factors, which, according to Complaint Counsel, demonstrate that the parallel conduct was the result of an agreement to curtail Project Pricing. This agreement, according to Complaint Counsel, began in January 2008 and "largely fell apart in the fall of 2008." CCB at 114. Respondent denies any such agreement and contends that Complaint Counsel has failed to meet its burden of proving any agreement involving McWane.

A summary of the material facts regarding the asserted agreement to curtail Project Pricing follows. Thereafter, the facts are analyzed in relation to the parties' detailed arguments, in which additional facts are addressed as necessary. Finally, the evidence is weighed to determine whether, viewed as a whole, the inference of an agreement to curtail Project Pricing is more likely than not.

a. Summary of Facts

i. Fittings Pricing

(a) Published pricing

The published prices for Fittings have two components: a nationwide list (or catalog) price, and a regional "multiplier" that reduces the list price. F. 413, 418-419. The "published price" or "standard price" for a given Fittings item in a given state is the list price multiplied by the then-applicable multiplier for that state. For example, if a Fitting has a $1,000 list price, and the Texas multiplier is .28, the published price for that individual Fitting in Texas will be $1,000 x .28, or $280. F. 414. Multipliers vary from state to state, based upon the prevailing competitive environment in each state. F. 420.

McWane, Sigma, and Star each publish their list prices in price books or catalogs that are widely disseminated to all of their customers (Distributors). F. 560. List prices are also posted on their public websites. F. 560. Any changes in multipliers are widely disseminated through letters sent from the Suppliers to Distributor customers, via fax or email, either on an individual state or region basis, or, in the case of the large national Distributors, via "multiplier maps" that identify local multipliers for each state across the United States. F. 423, 561.

McWane is an industry leader with respect to pricing, and the other Suppliers try to follow McWane as best they can. F. 555. Historically, when McWane announces new list prices, Sigma and Star generally follow with substantially matching list prices. F. 556. Sigma and Star generally also try to match new multipliers published by McWane. F. 556. Any published price increase by one Supplier that is not adopted by the other Suppliers will not be accepted in the market and will not be sustained. F. 557. As Mr. Daniel McCutcheon, then Vice President of Sales and Operations of Star explained: "[I]f you're the highest-priced fitting in a commodity market, you're not going to sell a lot of fittings." F. 557.

(b) Project Pricing

"Job prices," "special prices," or "project prices" are discounts off the published multiplier that are offered to Distributors bidding on a project ("Project Pricing"). F. 428, 430. Project Pricing, which is typically expressed in the form of a multiplier that is lower than the published multiplier, is generally negotiated in relation to a specific job and is a reaction to the competitive environment.[9] F. 431, 440. Most waterworks projects are individual projects subject to a bidding process. F. 331. For a specific project, Distributors commonly seek bids from multiple Fittings suppliers, including McWane, Sigma, and Star. F. 562. Distributors play the Suppliers off one another in an attempt to procure a lower price, by calling each of them, contending that another Supplier has offered a particular discount, and trying to get Suppliers to match or beat each other's offers. F. 368-369, 565. Distributors consider price, service, relationship, financial stability, warranty, and product quality when selecting a Fittings supplier. F. 391. Price competition among Fittings suppliers takes place principally through Project Pricing, and to a lesser extent, through other price concessions such as rebates, reductions in freight charges, and/or extensions of credit or payment terms.[10] F. 442.

Project Prices are not published, and the Suppliers do not want their competitors to know when a Project Price is being offered, or the amount of any other price concessions, for fear that their competitors will offer a lower price and take the project. F. 435-436, 563-564. Thus, the Suppliers each work to gather competitive information from the field, typically through their sales persons, who attempt to learn from Distributors and then report back, prices being bid in the market. F. 571-573.

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[9] For example, in a state with a published multiplier of .30, the Supplier and Distributor may agree that, for a particular project, the multiplier will be .27.

[10] In addition to its published multipliers and Project Pricing, McWane and the other Suppliers have historically offered customers a variety of other price concessions including freight concessions, cash discounts, extended payment terms, cash-backs, corporate rebates, and branch rebates. F. 430. The alleged conspiracy does not involve these other discounts.

However, the Suppliers may not trust information provided by the Distributor, because the Distributor has a financial incentive to "trick" Suppliers into offering a lower price. F. 565, 573.

When one Supplier learns of a Project Price, the other Suppliers seek to match or beat it. F. 457. In addition, when Distributors in a given region learn of a Project Price being offered, other Distributors demand the same discount, so as to be competitive on their bids to the End User for the same job. F. 457. Furthermore, if a Supplier offers a special price to one Distributor, then the Supplier needs to be prepared to offer that special price to all Distributors bidding on that project. F. 459. Those Distributors then expect that lower price in later projects, and the spiral of declining prices can lead to zero gross margin. F. 459. To the extent that spiraling Project Pricing leads to price erosion and squeezed profits, Project Pricing is not good for a supplier's long-term health. F. 457, 459-460. Therefore, suppliers would prefer not to offer Project Pricing. F. 460. Moreover, Project Pricing in the "auction" environment described above creates greater price instability and a loss of "visibility" as to where the true competitive price level is. F. 566. As described by McWane's Fittings division Vice President and General Manager, Mr. Richard Tatman, bidding in this environment is "shooting in the dark." F. 566. McWane prefers to have greater visibility into where the true competitive market level is, *i.e.*, the actual selling prices, so it can know what price it is "shooting at." As Mr. Tatman stated: "If I can see it, I can shoot it." F. 567. Notwithstanding the problems with Project Pricing, described above, Project Pricing has been a standard practice in the Fittings market. F. 429.

ii. Economic conditions in 2007

During 2007, with the economic decline, the Fittings industry experienced a period of declining demand, which resulted in increased price competition to the point of price erosion, and increased costs. F. 581. The price erosion in the Fittings market occurred not in published list prices or published multipliers, but in the effective or "actual" multiplier, which is the average weighted multiplier at which Fittings products are sold in a given area and includes Project Pricing, but not other discounts, such as rebates. F. 584. In summary, beginning in 2007, demand for

Fittings was falling because of the economic downturn and decreased demand for new housing, which is the principal driver in Fittings demand. F. 579, 582. Rather than scaling back production and reducing inventory in the face of declining demand, the then-manager of McWane's Fittings business, Mr. David Green (F. 42), increased production to spread fixed costs over a higher production volume, thereby creating the appearance of reducing manufacturing costs in the short term. F. 590. Thus, as of late 2007, when Mr. Tatman replaced Mr. Green as general manager of McWane's Fittings business (F. 21-23, 42), McWane had excess inventory and a need to increase volume. F. 591-593.

With the economic decline, the Fittings market became more price competitive, as Distributors demanded discounts off published multipliers in order to compete for the limited number of jobs available with contractors. F. 583. Star, in particular, was known to be especially aggressive with its Project Pricing prior to 2008. F. 568-570. Project Pricing had been a key method through which Star, as the smallest of the Suppliers, grew its business and its market share. F. 568. At the same time as demand was declining and prices were eroding, the costs of doing business overseas, particularly in China, were increasing. F. 586. The acceleration of cost inflation overseas was greater than the cost inflation for domestic production, and thus was poised to affect importers, such as Sigma and Star, more severely than McWane and, to this extent, gave McWane a cost advantage. F. 588-589. McWane also found itself losing share in this market because McWane's sales force was smaller than that of Sigma and Star, which inhibited McWane's ability to detect and respond to Project Prices being offered in the field. F. 594-595. Due to this lack of visibility, and Sigma's and Star's more "aggressive" sales force, McWane was getting "beat at the pricing game." F. 595-596.

iii. McWane's pricing strategy for 2008

On October 23, 2007, Sigma announced in a letter to its customers that, due to a difficult market and increased costs, it planned to implement a published multiplier increase on Fittings of "two or three" points, effective November 5, 2007, and a list price increase for all Sigma's products, to be effective January 2,

2008, which would be "a minimum of 6%." F. 602. On November 30, 2007, Star announced in a letter to its customers that Star would be publishing a new price list, effective January 1, 2008, although Star did not state a percentage increase. F. 603. McWane obtained copies of Sigma's and Star's customer letters. F. 617; *see* CX 0627 at 010, 013 (F. 626).[11] In late 2007, McWane needed to decide what its competitive strategy would be going forward, including how to react to the pricing information contained in Sigma's and Star's earlier customer letters, described above. F. 617, 625.

As part of the decision making process within McWane, Mr. Tatman undertook a detailed analysis, which included the preparation of a spreadsheet in which he assessed and compared, for every state, McWane's then-published multiplier, McWane's "effective" multiplier (*i.e.*, the multipliers at which McWane's Fittings were being actually sold); a proposed new multiplier; and the percentage change and effect on revenue from the proposed multiplier. F. 627. Mr. Tatman included data for both blended Fittings (*i.e.*, imported or U.S. made Fittings sold into open specification jobs (F. 349-351)) and Domestic Fittings (U.S. made Fittings sold into domestic-only specification jobs (F. 347)). F. 627. In addition, Mr. Tatman entered Sigma's proposed new list prices, obtained from Sigma's website, into a spreadsheet and applied them to the mix of products and volume McWane would likely sell, and determined that the weighted average of Sigma's announced list price increase amounted to a 25% increase. F. 628-629.

On December 22, 2007, Mr. Tatman sent an internal email to Mr. Leon McCullough, Executive Vice President of McWane in charge of the Fittings division (F. 28), with a copy to Mr. Thomas Walton, then Senior Vice President overseeing the Fittings division (F. 44), notifying them that Sigma had recently posted its new list prices, to be effective January 2, 2008, and that Sigma was "pulsing sources" to see if McWane would follow. F. 617. Mr. Tatman further noted that Star had not yet published its new

[11] There is no allegation or proof that McWane obtained any of customer letters at issue in this case directly from Sigma or Star, and the evidence demonstrates that these letters were typically provided to a supplier by its Distributor customers, and then circulated internally at the supplier. F. 558.

list prices and had delayed any implementation to February 4, 2008, and that he believed Star was "waiting to see" what McWane was going to do before it posted new prices or printed any new list price books. F. 617. The internal email continued:

> Given both the change in the Tyler/Union leadership structure and the accelerated inflation in China compared to Domestic cost, I believe we're in a unique position to help drive stability and rational pricing with the proper communication and actions.
>
> I have a concept that I believe will work if properly executed. There are some additional data points to review, but I should be in a position to discuss with you in detail during the sales meeting or potentially before if needed.

F. 617. An unstable market to Mr. Tatman means a market in which, based upon a weighted average of all the jobs sold over a period time, there is a high variation between the published multiplier and the average, actual multiplier at which jobs are being sold. F. 618. Mr. Tatman believes that a market begins to become unstable when the average weighted multiplier is 10% or more below the published multiplier. F. 458, 618.

Mr. Tatman prepared and transmitted a PowerPoint Presentation to Mr. Walton and Mr. McCullough on December 25, 2007 ("December 25, 2007 PowerPoint Presentation"). F. 620. Mr. Tatman's transmittal email referred to the PowerPoint Presentation as a "draft presentation," reflecting "a concept we might want to discuss in regards to our pricing strategy for utility fittings." F. 620. The email continued:

> Our past attempts to drive stable pricing haven't been too successful. However, our new leadership structure coupled with China inflation out pacing domestic costs may provide a unique opportunity for success provided our strategy and execution is correct.

> Please let me know if this concept is something you want me to scope further.

F. 620.

Based on his analysis of the competitive environment and the available pricing data, summarized above, Mr. Tatman recommended to his bosses that McWane not follow Sigma's proposed 25% list price increase, but instead publish an average multiplier increase of approximately 8% over McWane's then-effective multiplier levels. F. 631. Mr. Tatman believed that following Sigma's 25% increase would result in even less visibility as to the true competitive level of prices in the market. F. 630. Mr. Tatman's strategy was to publish a lower multiplier increase, which was closer to the true market price. F. 634-635. If Sigma and Star followed McWane's published multipliers, which they historically did, F. 555-557, 679, this would compress the "headroom" between published prices and actual market prices, and result in a narrower range in which Sigma and Star could maneuver to undercut McWane on price. F. 630-634. To the extent this strategy increased "visibility" and "stability" of Fittings prices, McWane would thereby be in a better position to detect and beat Sigma's and Star's pricing in the marketplace, and, hopefully, gain sales volume and market share. F. 566-567, 592-594, 630-636. Mr. Tatman's pricing strategy for McWane was designed to put financial pressure on Sigma and Star, who Mr. Tatman believed were more desperate for a price increase than McWane. F. 633, 638; *see also* F. 586, 588-589 (accelerated cost inflation for China production was outpacing domestic production costs). As Mr. Tatman explained, reduced "wiggle room" affects the amount of discounting the competitor can do because if it "is making 50 percent profit on something, he's got a lot of things he can do. If he's making 20 percent profit on something, he doesn't have near the amount of flexibility." F. 632-633. Accordingly, if Sigma and Star followed McWane's lead, then McWane would benefit competitively.

Mr. Tatman's strategy, summarized above, was reflected in his December 25, 2007 internal PowerPoint Presentation. F. 626. Mr. Tatman, Mr. McCullough, and Mr. Walton discussed the various points of the strategy, including what specifically would be stated in the customer letter that would ultimately announce

McWane's new published multipliers. F. 625; *see* CX 0627 at 006-007 (draft customer letters (F. 626)). McWane knew that its competitors, Sigma and Star, would obtain and review McWane's customer letter and make their decisions about what they each would do, in part, based on the information contained in McWane's customer letter. F. 558-559, 574, 647. The Suppliers read each other's letters with a critical eye, however, and do not necessarily believe that what is said in a customer letter with respect to pricing will necessarily be implemented in the market. F. 573. McWane's January 11, 2008 Customer Letter, described in more detail below, was the result of McWane's internal discussions, including the resolution of what message to send to the market and its competitors. F. 646.

Also in late 2007 or early 2008, McWane created a position at the company, referred to as "pricing coordinator" or "pricing manager," and gave the job to Mr. Vince Napoli, an accountant and McWane employee whose then-position with McWane was being eliminated. F. 656. Mr. Napoli's responsibilities included, among others, keeping track of, and verifying, individual job prices as stated on submitted orders, and, in this way, serving as a middleman between the sales persons and the order entry people. F. 656. Mr. Napoli also had limited authority to approve pricing adjustments, in the range of one to three discount points off the multiplier. F. 656. McWane created forms for sales persons to use when requesting pricing approval that sales persons were supposed to complete and submit to Mr. Napoli; however, not all sales persons complied. F. 657. The degree of control that was exerted over sales persons at McWane with respect to Project Pricing varied depending on the extent to which the individual sales person could be trusted to exercise good judgment. F. 849.

iv. McWane's January 11, 2008 Customer Letter

On January 11, 2008, McWane issued a letter to its customers announcing new pricing. ("January 11, 2008 Customer Letter"). The January 11, 2008 Customer Letter stated in pertinent part:

> Dear Valued Customers
>
> Due to continued rising costs, especially within our off-shore operations, we find it necessary to increase pricing on Utility Fittings and Accessories.
>
> As per our prior letter of October 5, 2007, we will adjust pricing by increasing multipliers while retaining our current List Price, LP-5072. Letters stating the new region specific multipliers will be mailed January 18, 2008. The increase will be 10% to 12% above the current prevailing multiplier levels on Blended Fittings . . . effective February 18, 2008.
>
> To help our distribution customers better manage their Inventory valuations and compete on a more level playing field, it is our intention going forward to sell all products only off the newly published multipliers. We will continue to monitor the competitive environment and adjust regional multipliers as required to provide you with competitive pricing.
>
> All annual municipal bid contracts will be honored per the terms of the contract. Jobs quoted prior to this announcement will be honored through March 1, 2008 . . . .
>
> If the current inflationary trends continue as forecasted, we anticipate the need to announce another multiplier increase within the next six months. However, we will only do so as conditions require.

F. 645.

McWane knew that in order to meet its objectives of increasing volume and gaining market share it would have to engage in Project Pricing. F. 647. Mr. Tatman also believed that Sigma and Star were more desperate for a price increase than McWane was. F. 586, 588-589, 638. Thus, according to Mr. Tatman, the hope was that by declaring a purported intent to stop Project Pricing, McWane might lull (or "head fake," as Mr. Tatman called it) Star and Sigma into temporarily reducing their Project Pricing, leaving McWane to price however it deemed appropriate, and thereby gain a competitive advantage. F. 647.

McWane communicated its new region-specific multipliers, effective February 18, 2008, in letters to its customers dated January 18, 2008. F. 651. For most states, McWane's new published multipliers, for non-domestic Fittings, reflected an increase over McWane's then-effective multipliers. F. 627, 631, 652-654. Compared to McWane's 2007 published multipliers, however, the new 2008 published multipliers constituted reductions in 28 states and no change in 8 states. F. 655. Overall, the new published multipliers reflected an approximate 8 percent increase over McWane's then-effective multipliers. F. 627, 631, 652.

v. Sigma's reaction after McWane's January 11, 2008 Customer Letter

After learning of McWane's January 11, 2008 Customer Letter, the letter was reviewed and discussed among the regional managers and the sales team at Sigma. F. 661. Mr. Larry Rybacki, then Vice President of Sales for Sigma, with responsibilities for Fittings sales to Distributors (F. 76), consulted with others at Sigma to discuss what McWane was doing with multipliers and to address how to respond. F. 661. Mr. Rybacki interpreted McWane's pricing changes to "squeeze . . . the multipliers [making] it very difficult for [Sigma] to make very much margin." F. 670.

A spreadsheet was prepared within Sigma for the purpose of analyzing whether McWane's newly published multipliers would provide any real price improvement for Sigma, compared to Sigma's then-current, actual multipliers. F. 663. Using the data from all Fittings sales in December 2007, the spreadsheet identified the multiplier for each sale, to see the price "spread," and further computed the weighted average multiplier for each territory. F. 663. On January 24, 2008, Mr. Victor Pais, then President and CEO of Sigma (F. 67), sent an internal email to his "M20" management team, comprising Sigma's top managers, and attached the spreadsheet. F. 663-664. Mr. Pais noted that, based on the spreadsheet, most of Sigma's sales were at "very, very, low multipliers!" F. 663. Mr. Pais further concluded that when McWane's new published multipliers were compared to Sigma's

multipliers "apples to apples," McWane's new multipliers did not provide much improvement in many areas, with "reasonable improvement" in just eight states and territories, "marginal to no improvement" in many other territories, and "even a lowering" of multipliers in some areas. F. 663. Mr. Pais referred to McWane's new multipliers as "discouraging." F. 664.

Mr. Pais surmised in his email that while McWane may have wanted to make an improvement to multiplier levels, McWane "may have" based their multiplier choices on the "actual documented competitive pricing that they are known to procure proof for, from the customers." F. 664. Mr. Pais' email continued:

> Unfortunately, the illogical pricing approach used by Star -- and hence SIGMA -- for 'Plant quotes' with lower 'special' multipliers may have biased [McWane's] decisions in pegging the NEW multipliers at where they are. Though Tyler is beginning to pay attention to PW [plant work] jobs too[12], they just don't understand why PW jobs need to be given LOWER pricing -- when in fact, for Soil Pipe, Tyler and CP are known to offer HIGHER prices, since they feel the Distributors don't commit their resources to stock and usually order direct job-site shipments!
>
> I HAVE URGED LARRY [RYBACKI] TO INITIATE A NEW COMMITTED AND SERIOUS EFFORT TO NORMALIZE ALL PRICING FOR FITTINGS -- AT SAME LEVELS -- PW AS WELL AS OTHER ORDERS, TO ELIMINATE THE CONFUSION WE ARE CREATING WITH CUSTOMERS AND COMPETITORS, LEADING TO LOWER OVERALL PRICING LEVELS.

[12] "Plant work" refers to waterworks projects for water treatment plants, pumping stations, or wastewater treatment plants. Plant work projects generally use the largest sized Fittings. F. 283, 665.

> Though Tyler's NEW multipliers are discouraging, this is both a lesson and an opportunity [for] Sigma and Star to develop a patient and disciplined Marketing approach and demonstrate to [McWane] that we are capable of being part of a stable and profitability conscious industry.

F. 664.

Mr. Pais explained that sales persons, anxious to make sales and not to lose business from regular customers, can "lower prices too aggressively," which causes competitors to react in a "vicious cycle" of price erosion, and keeps prices at a depressed level. F. 668. Thus, Mr. Pais was encouraging his sales force to try to minimize the practice. F. 668. Further, Mr. Rybacki interpreted Mr. Pais' email to be asking the sales team to pull back on Project Pricing. F. 669. Mr. Rybacki did not disagree with Mr. Pais that Sigma needed to pull back on Project Pricing. F. 669. However, Sigma had always been trying to curtail Project Pricing, including in 2008. F. 671-672. Since Mr. Rybacki joined Sigma in 1990, Project Pricing was an "ongoing battle within Sigma, within the industry." F. 672. Sigma was trying to be more consistent and disciplined in pricing "every year, every day to today" and was "always trying" to curtail Project Pricing. F. 672. After receiving Mr. Pais' January 24, 2008 email, Mr. Rybacki told his regional managers "once again that we needed to try to . . . make us more profitable because it was getting to the point where we couldn't make any money at the prices we're selling at." F. 896. Despite this directive, there was no special effort made in 2008 at Sigma to reduce Project Pricing. F. 895, 897-898.

On or about January 29, 2008, Sigma sent a letter to its customers, signed by Mr. Rybacki, notifying them that, because one of its competitors chose not to have a list price increase and instead to implement a multiplier increase, Sigma would "follow suit" and implement a multiplier increase for "almost every territory" on February 25, 2008. F. 674. Sigma's January 29, 2008 customer letter explained: "The key word is 'almost' as a few of [the] territory multipliers are below what you currently receive from us and some are in fact well below. . . . We think it's unwise and irresponsible to lower multipliers and devalue your inventory, so your Regional Managers will send you new

multipliers in the next few days as long as they exceed your current ones." F. 674. The letter also included the language: "We apologize for the confusion and lack of discipline our segment of the Industry has shown as we at SIGMA Corporation are committed to make this a more profitable business for all." F. 674.

On or about February 1, 2008, Sigma sent letters to its customers announcing new region-specific multipliers, effective February 18, 2008, pursuant to its January 29, 2008 Customer Letter. F. 678. These letters noted that: "All municipal bids will be honored through the length of the contract," and that "[j]obs quoted prior to this announcement will be honored through March 1, 2008." F. 678. Sigma did not follow all of McWane's multipliers. F. 677. Sigma's announced changes to its multipliers matched some of McWane's January 2008 multiplier changes, but Sigma did not match those that would result in a multiplier lower than Sigma's then-existing published multipliers. F. 677. Sigma "could not afford to follow [McWane] down." F. 677.

vi. Star's reaction after McWane's January 11, 2008 Customer Letter

Star became aware of McWane's January 11, 2008 Customer Letter through a customer. F. 659. Star's then National Sales Manager, Mr. Matthew Minamyer (F. 126), read McWane's statement that "it is our intention going forward to sell all products only off the newly published multipliers" to mean that McWane was telling its customers that McWane wanted to stop Project Pricing, although Mr. Minamyer acknowledged that it was possible this was a communication to Sigma and Star as well. F. 682. Historically, Star followed McWane's price increases, and it was normal procedure for Star to get ready to follow McWane as quickly as possible. F. 679-680.

On January 22, 2008, Mr. Minamyer sent an internal email to Star's division managers advising them that McWane's "multiplier letters [were] hitting the streets. . . . We need to be able to react quickly to be at the right prices." F. 686. Mr. Minamyer's email addressed plans and procedures with respect to putting into place new multipliers and with respect to Project Pricing. F. 686. With respect to multiplier changes, the email

stated in pertinent part: "Once we know what a state or area's multiplier is, if it goes up, we will change to that number. If it goes down, we will discuss it. Later today we will E-mail the procedure for multiplier changes." F. 686.

With respect to Project Pricing, Mr. Minamyer's January 22, 2008 email advised the division managers, with bold letter emphasis, that Star's "goal" was "to take a price increase and to stop project pricing." F. 686. Mr. Minamyer knew that a price increase would not hold, or "stick," despite an increase in published multipliers, if Star or any of its competitors undercut such increase with Project Pricing. F. 688. At the same time, Mr. Minamyer's January 22, 2008 email set out the procedures by which Project Pricing would be approved, notwithstanding the stated "goal" to take a price increase and "stop" Project Pricing. F. 686. The described procedure was that "[a]ll project pricing" was to "go through" Mr. Minamyer; and that the sales persons in the field, known as territory managers, must obtain from their customers, and provide in support of the Project Pricing request, "solid," written documentation of the competing bid, before Star would "move off the buy plan" with the customer. F. 686. In addition, the email advised that Star would follow McWane in honoring existing pricing through March 1, 2008, and that, therefore, the territory managers should "clean up" their Project Pricing and get orders in and shipped before March 1, 2008. F. 686.

Mr. Minamyer's January 22, 2008 internal email to the division managers also included language indicating that Star was taking the foregoing steps regarding Project Pricing not because Star needed a price increase, but because disciplined pricing was "good for the industry"; that Star could weather any price wars; and that although "this will take a major effort," "that is where we need to be focused until the crazy pricing levels out." F. 686.

In letters and emails to its customers, Star advised that it would be matching McWane's multipliers effective February 18, 2008, and that Star would no longer offer Project Pricing after March 1, 2008. F. 702, 704.

As noted above, Star had been perceived to be the most "aggressive" discounter in the marketplace, and Star used Project Pricing in the years prior to 2008 in order to gain market share. F. 568-570. Prior to 2008, Mr. Minamyer or Mr. McCutcheon were responsible for approving Project Pricing, although sometimes the discretion to approve Project Pricing was delegated to Star's divisional managers. F. 875. There were instances where Mr. Minamyer would "push down" approval to the division managers, and sometimes even to the territory managers, if Mr. Minamyer had faith in them to make the correct judgment. F. 875. Prior to Mr. Minamyer's January 22, 2008 email to the division managers, Mr. McCutcheon had asked Mr. Minamyer to be more involved and diligent in the future with regard to the Project Pricing approval process because Star was experiencing dramatic cost increases. F. 684, 697. Indeed, Mr. McCutcheon had been "all over" Mr. Minamyer to stop delegating authority for Project Pricing and, because Star was facing dramatic cost increases, told Mr. Minamyer that he needed to "tighten up" the Project Pricing process. F. 685, 697. Although Mr. McCutcheon had previously encouraged Mr. Minamyer to minimize Project Pricing by tightening up his sales force and being more involved in the Project Pricing process, Mr. McCutcheon thought it was "bizarre" for Mr. Minamyer to tell Star's customers that Star was going to "stop" Project Pricing. F. 703. Further, Mr. McCutcheon thought it was not "logical or reasonable" for Star to even think that Project Pricing would actually stop. In Mr. McCutcheon's view, "stopping" Project Pricing would "shut [Star] down." F. 697. In Mr. McCutcheon's view, Mr. Minamyer's language that Star's goal was to "stop" Project Pricing was too strong and "irrational." F. 698. However, it was "normal" after a price increase to communicate to the division managers the message that Project Pricing needed to be minimized. F. 698. As Mr. McCutcheon stated, this "happens every time there's a [price] increase." F. 698.

Notwithstanding the language in Mr. Minamyer's January 22, 2008 email regarding a goal to "stop" Project Pricing, Star's plan was to try to limit its Project Pricing to those situations where there was firm documentation from a customer that Star's competitors were Project Pricing below Star. F. 694. Thus, Mr. Minamyer's email made clear that Star planned to engage in Project Pricing, so long as there was "firm" documentation of a

competitor's bid, and further made clear that, provided there was such documentation, Star would price as necessary to obtain the job. F. 686. The procedure of requiring documentation before Star gives a Project Price had been Star's policy for at least ten years prior to January 2008. F. 695. In Mr. McCutcheon's view, Mr. Minamyer's email reflected Mr. Minamyer's attempt to minimize Project Pricing by the sales force, and was more of a change in monitoring and managing the Project Pricing process, rather than a direction to "stop" Project Pricing. F. 695. That Star's plan was to engage in Project Pricing, so long as there was "firm" documentation of a competitor's bid, is also evidenced by Mr. Minamyer's email dated February 23, 2008, in which he reminded the division managers that "documentation and justification" were required in order to obtain pricing approval. "I have always been clear that we will always keep our customers at the right price but we need to be diligent at finding out the right price or shipping restrictions . . . . So go get it and you can have your pricing." F. 687; *see also* F. 688 (May 5, 2008 email from Star Western Division Manager Mr. Michael Berry noting with respect to upcoming price increase: "There is some flexibility [with pricing after a price increase] but here is the problem. The more flexible we are the less it holds and it won't work. That said, if you document that the competition is not holding, then match and don't lose the orders."). Furthermore, on August 25, 2008, in an email with the subject line "Pricing in the Market," Mr. Minamyer observed, among other things, that Sigma and McWane were contributing to "pricing pressure" in the market with special pricing. F. 913. Mr. Minamyer advised his divisional sales managers, "[d]on't let anyone take your JR [Joint Restraint] (or fittings) business on price. Confirm the price and match it to get it back. . . . Do the same thing to [McWane] that they do to you. Maybe it will get back to them and they will stop." F. 913.

Additional material facts and evidence pertaining to the asserted agreement to curtail Project Pricing will be addressed in the context of the parties' arguments, in the analysis that follows.

b. Analysis

i. Introduction

Complaint Counsel's asserted "episode one" of the alleged price fixing conspiracy among McWane, Sigma, and Star, is an "agreement to curtail Project Pricing" formed in January 2008. To prove this agreement, Complaint Counsel contends that McWane, Sigma, and Star engaged in parallel conduct by curtailing project pricing (the asserted "parallel conduct") and that this conduct was the result of an agreement. CCB at 107-110. As noted above, proof of parallel conduct, including conscious parallel conduct, can constitute "circumstantial evidence from which an agreement, tacit or express, can be inferred but . . . such evidence, without more, is insufficient . . . ." *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977). This is because tacit collusion, achieved in an oligopoly through consciously parallel conduct, without any preceding agreement, is not unlawful. *White*, 635 F.3d at 576 n.3 (noting that tacit coordination, which is legal, should not be "conflated" with an unlawful "tacit agreement"); *see Twombly*, 550 U.S. at 556-57. To ensure that the law punishes only unlawful agreements by competitors, Complaint Counsel must prove that the asserted parallel behavior was the result of an actual, manifest agreement. *High Fructose Corn Syrup*, 295 F.3d at 661; *Flat Glass*, 385 F.3d at 360; *see also Blomkest Fertilizer*, 203 F.3d at 1032-33; *City of Tuscaloosa*, 158 F.3d at 570. This requires Complaint Counsel to prove certain "plus" factors, which are designed to serve as "proxies for direct evidence of an agreement." *Flat Glass*, 385 F.3d at 360.

Respondent contends that the evidence fails to show parallel pricing conduct among McWane, Sigma, and Star; that Complaint Counsel's inferences of a conspiracy involving McWane are not supported by the greater weight of the evidence; and that the greater weight of the evidence shows that McWane made its pricing decisions independently and for procompetitive reasons. Specifically, Respondent argues that the Supplier witnesses denied any agreement to curtail Project Pricing, and that the evidence shows that all Suppliers continued to provide Project Pricing, as well as other discounts, such as freight, payment terms, and rebates, throughout the alleged conspiracy period. RB at 66-68. Respondent contends that Complaint Counsel's theory

requires assigning nefarious interpretations to selected conduct, and selected language, in selected documents, contrived to fit into Complaint Counsel's conspiracy hypothesis, and that the record is filled with evidence that is consistent with competition and/or inconsistent with an inference of conspiracy, which Respondent refers to as "minus" factors. RB at 70-77. According to Respondent, the inference of independent, or merely interdependent, conduct is just as likely, if not more likely, than the inference of conspiracy. RB at 75.

As more fully discussed below, the greater weight of the evidence fails to show an agreement among McWane, Sigma, and Star to curtail Project Pricing. Accordingly, Complaint Counsel has failed to prove its "episode one" of the alleged price fixing conspiracy.

ii. Parallel pricing related conduct

In support of its claim that McWane, Sigma, and Star engaged in parallel conduct in curtailing Project Pricing, Complaint Counsel cites to the following: (1) McWane's January 11, 2008 Customer Letter stating, *inter alia,* its "intention going forward to sell all products only off the newly published multipliers"; (2) a January 24, 2008 email by Sigma's then President and CEO Mr. Pais to Sigma's management team, stating, among other things, that Mr. Pais had urged Mr. Rybacki to "initiate a new and committed and serious effort to normalize all prices for fittings . . ."; (3) a January 22, 2008 email by Star's then National Sales Manager, Mr. Minamyer, to Star's division managers, stating, among other things, that Star's "goal" going forward was "to take a price increase and to stop project pricing"; and (4) Star's emails in January and February 2008 to its major customers notifying them of Star's coming multiplier increases and that there would be "no more" Project Pricing. CCB at 111-114.

The foregoing documents, read in their entirety, and summarized in Section III.D.2.a.(iv-vi), *supra*, fail to show that the Suppliers engaged in parallel conduct by curtailing Project Pricing, as Complaint Counsel argues. These documents show, at best, that in early 2008, McWane, Sigma, and Star each had some level of intent to stop or minimize Project Pricing. Complaint

Counsel also alludes to parallel "steps" or "efforts" taken by McWane and Star in early 2008 that Complaint Counsel infers were taken in order to "curtail" Project Pricing. Complaint Counsel cites no authority for the proposition that parallel "intentions" or "steps" related to pricing policy is the type of parallel conduct from which an unlawful agreement can be inferred.

In this regard, it must be noted that Complaint Counsel's conspiracy theory has evolved from the time of the Complaint, especially with regard to the particular parallel conduct upon which the government relies as circumstantial evidence of an unlawful agreement. The Complaint alleged a relatively straightforward conspiracy to raise and stabilize prices beginning in January 2008, Complaint ¶ 30, involving two parallel price increases by the Suppliers, in January 2008 and June 2008, Complaint ¶¶ 31, 33, that were alleged to be the "result of" an agreement. Complaint ¶¶ 32, 34. Complaint Counsel's Post Trial Brief appears no longer to rely on any alleged parallel price increases. Instead, Complaint Counsel deemphasizes any parallel pricing, and relies instead upon parallel "pricing related" conduct, *i.e.*, parallel "curtailment" of Project Pricing, as circumstantial evidence of an agreement to curtail Project Pricing. CCB at 111-114.[13] However, Complaint Counsel provides little guidance to define what constitutes a "curtailment," of Project Pricing, either factually or legally. Complaint Counsel did not proffer any expert (or other) testimony as to how a "curtailment" in Project Pricing should be measured, nor did Complaint Counsel offer any expert analysis of pricing data to show that McWane, Sigma, and Star engaged in a parallel curtailment of Project Pricing. Further, Complaint Counsel does not cite a case where a conspiracy

[13] Although Complaint Counsel clearly asserts that the Suppliers engaged in parallel conduct by curtailing Project Pricing, Complaint Counsel simultaneously argues that it need not prove that McWane, Sigma, and Star engaged in parallel curtailment of Project Pricing, because it need not prove that the agreement to curtail Project Pricing was "successful" or "effective." CCB at 144-145. Given that Complaint Counsel is endeavoring to prove an agreement to curtail Project Pricing based upon circumstantial evidence of parallel conduct in curtailing Project Pricing, this position is curious, at best. *See* 16 C.F.R. § 3.43(a) ("[T]he proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto.").

finding has been based on similarly vague and undefined parallel conduct.

(a) Parallel "intentions" or "steps" regarding Project Pricing

To the extent Complaint Counsel is arguing that circumstantial evidence of parallel "intentions" proves actual parallel curtailment of Project Pricing, or otherwise constitutes circumstantial evidence of an agreement to curtail Project Pricing, the argument is rejected. It will not be presumed that intentions resulted in corresponding conduct. Moreover, McWane denied having any actual intent to stop or restrict its Project Pricing, notwithstanding the statement in its January 11, 2008 Customer Letter indicating an intent to price only off published multipliers. F. 645, 647.

With respect to asserted parallel "steps" or "efforts" to curtail Project Pricing, Complaint Counsel relies on the fact that McWane hired Mr. Napoli in late 2007 or early 2008 to oversee, among other things, the Project Pricing approval process. CCB at 26 n.110; CCFF 925; *see* F. 656-657. The evidence shows that McWane's goal in having a central location for the Project Pricing approval process was to have someone with a "national view" involved in McWane's discounting decisions. F. 658. As Mr. Walton explained:

> "[I]f we have a salesperson in California making a pricing decision, it may not be in our best interest for what -- how that affects Texas or Missouri or Florida or New York, . . .[O]ftentimes when somebody makes a local decision here, it has effects in other places that may or may not be in our best interest."

F. 658; *see also* F. 656 (Mr. Napoli testifying that "there's nothing wrong with [giving a discount] except you sure want to know what -- when it's happening, or you like to know before it happens, because they [the sales persons] don't know what the ramifications are as far as profitability"). Some sales persons did not use the approval process put in place, however, and the degree of authority given to sales persons regarding Project Pricing

varied depending upon the extent to which the sales person could be trusted to exercise good judgment. F. 657, 849. Complaint Counsel's inference that hiring Mr. Napoli was a "step" taken by McWane to "curtail" Project Pricing is unsupported and is no more likely than the inference of a legitimate effort to interject a national view on discounting decisions. Thus, the evidence fails to support Complaint Counsel's requested inference.

The evidence shows that Star took steps in early 2008 to tighten up and manage its Project Pricing process, including by requiring Mr. Minamyer to review and approve all Project Pricing and by requiring firm documentation of competitor pricing before a Project Price would be approved. F. 686-687, 694. However, the evidence fails to show any steps taken by Sigma to implement a curtailment of Project Pricing, including any "centralization" of Project Pricing authority. *See* F. 895, 898 (Sigma regional managers retained authority to approve Project Pricing throughout 2008). Rather, the uncontradicted evidence is that Sigma was "always" trying to curtail Project Pricing (F. 671-672, 896); and that notwithstanding Mr. Pais' internal "announcement" that he had asked Mr. Rybacki to make a "new effort" to "normalize" pricing between plant work and other work, Sigma made no special efforts to reduce its Project Pricing in 2008. F. 895, 897-898. Furthermore, the evidence fails to show that Sigma "announced" to its customers any intention to stop or curtail Project Pricing, as argued by Complaint Counsel. CCB at 3, 25. Sigma's January 29, 2008 customer letter said nothing about "normalizing" Fittings prices between plant work and other work, as alluded to in Mr. Pais' January 24, 2008 internal email to Sigma's management team.[14] *See* F. 674. Accordingly, regardless of what the evidence may show as to Star's intentions and efforts to reduce its Project Pricing in 2008, the evidence that McWane or Sigma had similar "parallel" intentions or took "parallel" steps is lacking. Similarly, evidence of "intentions" or "steps" do not justify Complaint Counsel's broad assertion that the Suppliers' conduct amounted to "significant" or "complex and

[14] Mr. Pais made another "push" to implement a single track Fittings price structure for plant work and other work in Mr. Pais' internal email to M20 in April 2008 (F. 799; *see* CX 1138 at 001), indicating that his prior ideas in this regard had not been implemented.

historically unprecedented changes" in the pricing structure of the Fittings market. CCB at 113.

Based on the foregoing, to the extent Complaint Counsel is arguing that parallel "intentions," "steps," or "efforts" to "curtail" Project Pricing constitute circumstantial evidence of parallel curtailment of Project Pricing, or of an agreement to curtail Project Pricing, the evidence fails to demonstrate that the Suppliers had parallel intentions or took parallel steps or made parallel efforts to curtail Project Pricing.

(b) Parallel conduct by McWane, Sigma, and Star in curtailing Project Pricing

It is undisputed that Project Pricing did not "stop" in 2008. *See* CCB at 36, 144. McWane had used Project Pricing to sell Fittings prior to January 2008, and continued to offer its customers Project Pricing as well as other price concessions throughout 2008, 2009, 2010 and to the present time. F. 848, 850. The evidence shows, for example, that McWane provided several hundreddifferent job prices to its customers in 2008. F. 861 (approximately [redacted]). The material issue is whether this is a "curtailment" by McWane, which along with a parallel curtailment by Sigma and Star, constitutes circumstantial evidence of a conspiracy with respect to Project Pricing.

(c) McWane's Pricing Protection Log

In support of a finding that several hundred (approximately [redacted]) different instances of Project Pricing by McWane in 2008 constitute a "curtailment" of McWane's Project Pricing, Complaint Counsel relies on McWane's "pricing protection log." CCB at 145. By way of background, beginning in 2008, McWane kept a pricing protection log, on which it tracked, in the normal course of business, instances of price protection (*i.e.*, where McWane quotes a price to a customer and agrees to hold that price for a customer for some period of time, thereby "protecting" the price against increases) and Project Pricing. F. 852. Mr. Napoli, McWane's pricing "coordinator" or "manager," F. 656, was responsible for maintaining the pricing protection log. F. 852. McWane's pricing protection log shows, among other

things: the Fittings multiplier that McWane bid; the expiration date of the bid; and McWane's published multiplier when the bid was issued. F. 855. There is also a "comments" field in the pricing protection log. F. 859. In some cases, the comments field states "to match Star" or "to match Sigma." F. 859. Such a comment indicates that the sales person reported that the customer advised of a particular discounted multiplier being quoted by Sigma or Star, and that McWane's quoted multiplier was discounted to match the competing quote. F. 859; *see also* F. 854 (pricing protection log is based upon information received from sales persons in the field).

Complaint Counsel argues that it should be inferred that McWane curtailed Project Pricing in 2008 because the comments appearing in the comments field of the pricing protection log reflect more instances of McWane offering a multiplier "to match Star or Sigma" in the fourth quarter of 2008 (between [redacted]), and the first quarter of 2009 (between [redacted]), compared to the second and third quarters of 2008 (between [redacted]). CCB at 145; *see* F. 863. These time frames selected by Complaint Counsel appear designed to support its theory that the alleged agreement to curtail Project Pricing "fell apart" beginning in the fall of 2008, which then lead to increased Project Pricing. However, this does not answer the question whether Project Pricing was "curtailed" by McWane in the 2008 time period prior to the fall of 2008. Complaint Counsel points to nothing identifying the extent of Project Pricing by McWane in 2007, which would be a more significant benchmark against which to determine whether McWane's instances of Project Pricing were "reduced" or "curtailed" in 2008.[15] To be clear, the fact that Complaint Counsel may have shown that Project Pricing increased from 2008 to 2009 does not demonstrate that Project Pricing decreased from 2007 to 2008. Logic dictates that one cannot prove a curtailment or reduction in Project Pricing without proof of a starting point for comparison. *See In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1024 (N.D. Cal. 2007) (dismissing conspiracy complaint and holding that allegations of conduct occurring after alleged conspiracy

[15] Complaint Counsel states, without citation to any supporting evidence, that McWane did not keep a pricing protection log in 2007 because it did not offer a price protection program until 2008. CCB at 145.

were insufficient where plaintiff failed to allege how it differed from conduct prior to alleged conspiracy). In addition, the information in the comments field concerning competitor pricing comes from sales persons in the field and from the customers. F. 854, 859. Customers have a motive to "auction" suppliers against one another, F. 565, and the sales person has an incentive to close the sale. F. 668. Although the information in the comments field is not necessarily unreliable evidence, as shown above, the comments field reflects multiple levels of unverified and potentially inaccurate information, which detracts from its weight in proving a curtailment of Project Pricing by McWane.

Moreover, there is evidence in the record that the Fittings market experienced a significant downturn in the second half of 2008, which would also contribute to increased discounting as Suppliers chased ever-decreasing volume. F. 931, 933; *see also* F. 1026 (Mr. Pais testifying that "2008 was a tale of two halves, if you will. The first half was respectable. And the second half was very poor, because most of the problems we faced from the poor market and the increasing costs and the reduced lower prices, all coalesced into the second half, and especially the last quarter"). It is no more likely that an increase in Project Pricing by McWane during the time period selected by Complaint Counsel, from the fourth quarter of 2008 through the first quarter of 2009, was due to a "collapse" of a "conspiracy" than for other reasons attributable to the competitive environment in the second half of 2008 going into 2009. Indeed, to accept Complaint Counsel's inference that any increase in Project Pricing during this period was the result of a collapsed conspiracy, rather than a common reaction to the competitive environment, would require presuming the existence of the conspiracy in the first instance, which is improper. *See Blomkest Fertilizer*, 203 F.3d at 1033 ("[A] litigant may not proceed by first assuming a conspiracy and then explaining the evidence accordingly.").

(d) "Observations" of McWane curtailing Project Pricing

Complaint Counsel also relies on what it refers to as "observations" by Star and by Sigma of a reduction of Project Pricing by McWane, allegedly contained in various internal

documents of Star and Sigma. CCB at 37-38. However, none of the cited documents address Project Pricing by McWane. For example, Complaint Counsel cites a Star internal email dated March 11, 2008 from Star's Southwestern Division Manager, Mr. Shaun Smith. F. 905. Mr. Smith was responding to an email from Mr. Minamyer asking for any reports on any issues with Sigma "handling the Mult increases." F. 904. Mr. Smith responded that: "It seems as though they have been pretty discipline[d] in my Division" and "everyone seems to be playing fair." F. 904-905. Regardless of what Mr. Smith's "observation" from the field might say about whether Star and Sigma were curtailing Project Pricing in March of 2008, Mr. Smith's vague, ambiguous language on its face does not imply McWane was curtailing Project Pricing. Mr. Smith was not called as a witness at trial, nor was any deposition testimony from Mr. Smith offered into evidence to explain what he meant, and it will not be assumed that he was referring to McWane, especially given that Mr. Minamyer's email requested information about Sigma, not McWane. F. 904. Similarly, Complaint Counsel relies on a Star internal email from Mr. Minamyer to Mr. McCutcheon and to Star's division managers dated August 25, 2008, in which Mr. Minamyer stated: "I know we have been very careful on special pricing and it seems to be working pretty good." F. 892. This document does not on its face reflect anything other than Star's observation of its own unilateral behavior, and does not imply a curtailment of Project Pricing by any other Supplier. Finally, Complaint Counsel cites a Sigma internal email from Mr. Pais dated December 7, 2008 regarding his belief that relatively steady market shares among the Suppliers through October 2008 "should bode well for a more mature and responsible pricing strategy for 09 which focuses on realizing higher prices and hence better GMs to offset the loss of volume, which is inevitable for most of 09." CX 1174 at 001. Mr. Pais' belief about the future of Fittings demand and prices "for 09" implies nothing about McWane (or any other Supplier) curtailing Project Pricing in 2008.

(e) Evidence regarding Star and Sigma curtailing Project Pricing

The evidence shows that both Star and Sigma continued to provide Project Pricing throughout 2008. F. 873, 881, 897-898. To show that the extent of Project Pricing by Sigma and Star was

"curtailed," Complaint Counsel first relies on Mr. Tatman's statement in his April 2008 Executive Report for the first quarter of 2008, that: "Based on our competitive feedback log, the level of multiplier discounting by both Star and Sigma appears to have died down significantly." F. 868. Mr. Tatman's statement is equivocal and based on unexplained statements from sales persons in the field that may not be accurate. F. 565, 668, 868-869.

For Star, in addition to Star's own "observation" of its Project Pricing, referred to above, Complaint Counsel points to a summary document, based upon records of Star's special pricing requests ("Star SPR data"), which shows that that the overall number of instances in which Star engaged in Project Pricing on all products, including Fittings, was 3,226 in 2007, but that in 2008 there were 2,669, which constitutes an overall drop. CCB at 146; F. 881-883, 887. A month-by-month comparison, however, presents a "mixed bag" of both comparative increases and decreases in relation to 2007. F. 888-891. In addition, Complaint Counsel points to a November 25, 2008 internal email written by Mr. Minamyer (F. 893), which Complaint Counsel interprets as an instruction to "resume" Project Pricing, thereby implying that it had been "curtailed" previously. CCB at 147 n.552. In this email, Mr. Minamyer noted that "Star had been diligent in protecting the stability of its pricing," but that Star's competitors, mostly Sigma, had been pricing beneath Star. F. 893. Feeling Star's market share being threatened, Mr. Minamyer instructed the sales force to get more aggressive on pricing to get more orders. F. 893. Even if it is inferred that Star had been making an effort to limit Project Pricing prior to November 25, 2008 to those situations where it could document Project Pricing by the competition, Mr. Minamyer's November 25, 2008 internal email is also evidence that the marketplace was competitive and that Star's efforts had not been in parallel to McWane or Sigma. As Mr. Minamyer stated, Star was attempting to "hold" its prices, but McWane and Sigma were not. F. 893.

Complaint Counsel further argues that the evidence demonstrates Sigma curtailed Project Pricing in 2008 based upon data indicating that Sigma's average, actual transactional multipliers increased for various products in various regions

during the period February 2008 to October 2008. CCB at 147; *see* F. 985-993. An "average" multiplier has limited probative value, however, given the additional evidence that the actual day-to-day multipliers differed "a lot" from region-to-region, product-to-product, and day-to-day. F. 994. To conclude, based on this evidence, that Sigma curtailed Project Pricing in 2008 would require improper speculation.

(f) Evidence inconsistent with curtailment of Project Pricing

There is substantial evidence in the record that is inconsistent with a conclusion of a parallel curtailment of Project Pricing by McWane, Sigma, and Star. Mr. Sheley, of Illinois Meter, a Distributor customer of McWane, testified that McWane was "extremely aggressive" with Project Pricing in 2008. F. 851. Moreover, a McWane internal September 2008 presentation noted, *inter alia*, that McWane's market share was down approximately 8 points since 2006 and that "[l]eading price stability has been detrimental to share." F. 866. This statement indicates that, even if McWane was curtailing Project Pricing in 2008, McWane perceived that it was being underpriced by its competitors, which is both inconsistent with a conclusion of a parallel curtailment of Project Pricing, and consistent with a competitive market. Similarly, on May 6, 2008, Mr. Minamyer stated in an email to his division managers, with a copy to Mr. McCutcheon: "I see [pricing] getting a little looser and am concerned that we won't hold this increase. Don't let our competitors[']practices force us to fail. One competitor is being pretty strong and one is being pretty weak on pricing." F. 909. This document is also inconsistent with a conclusion that the Suppliers, in parallel, curtailed Project Pricing, and is further indicative of non-parallel, independent pricing conduct by the Suppliers.

Also inconsistent with a conclusion that the Suppliers engaged in parallel conduct by curtailing Project Pricing is a data analysis provided by Respondent's economic expert, Dr. Normann, who analyzed actual transaction prices as shown by invoices kept by the Suppliers in the ordinary course of business. F. 937. The price on the invoice reflects the price at which the products were sold, and includes any discounts off the published multiplier, but

does not include any additional concessions, such as rebates, payment terms, freight terms, and cash discounts. F. 937. Dr. Normann opined that if there were a parallel reduction in Project Pricing by McWane, Sigma, and Star, their data would show an increase in the amount of product sold at the published multiplier and a decrease in the amount of product sold under special pricing, as well as a decrease in the "variation" of pricing, *i.e.*, the dispersion of price points. F. 845. To test this hypothesis, Dr. Normann calculated the standard deviation in price for McWane, Sigma, and Star for the most common products sold, from 2007 to 2010, based on the Suppliers' invoice data for these products. F. 846. Dr. Normann concluded from this data that McWane's price variation was largely unchanged until late 2008, while Star's price variation increased. F. 846. In addition, Dr. Normann concluded that price variation during 2008 was "generally higher" than any other time from 2007 to 2010. F. 846. This economic data, according to Dr. Normann, contradicts a conclusion that there was a parallel curtailment of Project Pricing in 2008. F. 847.

Complaint Counsel attacks Dr. Normann's reliance on invoice data in general because, as noted above, the invoice price does not reflect discounts on top of Project Pricing, such as rebates, payment terms, freight terms, and cash discounts. However, the material issue is whether McWane, in parallel with Sigma and Star, curtailed Project Pricing in 2008, not whether it curtailed other discounts. The selling price as shown by the invoice reflects the discount associated with Project Pricing and is therefore precisely the correct measure of changes in the relevant discount. F. 938. Accordingly, the fact that the invoice prices did not include such other discounts does not detract from the probative value of the data for purposes of determining whether there was a parallel curtailment of Project Pricing. Similarly, Complaint Counsel contends that there is a time lag between the time a price is agreed to (price formation) and the date of the invoice, which is generally the date of shipment. This criticism also does not detract from the weight to be given to Dr. Normann's opinion regarding parallel curtailment of Project Pricing, because Dr. Normann examined data from a broad time period, before and after 2008, which effectively captures the alleged time lag between the date of price formation and the invoice date. F. 941.

In conclusion, regardless of what the evidence might show as to a curtailment of Project Pricing by Star and Sigma in 2008, Complaint Counsel's proof that McWane curtailed Project Pricing in 2008, much less in "parallel" with Sigma and Star, is weak at best, and fails to outweigh other competent and reliable evidence summarized herein, including the data analysis provided by Respondent's expert, indicating that McWane, Sigma, and Star did not engage in parallel conduct by curtailing Project Pricing in 2008, in comparison to earlier periods. In any event, the existence of parallel conduct is but one piece of a totality of the evidence, all of which must be weighed to determine whether the preponderance of evidence demonstrates an agreement to curtail Project Pricing. Accordingly, any evidence of parallel conduct will be considered, *infra*, as part of the totality of the evidence to determine whether the preponderance of evidence demonstrates an agreement to curtail Project Pricing.

iii. "Plus" factors

As noted above, "plus" factors are designed to serve as "proxies for direct evidence of an agreement" in a circumstantial case based upon parallel pricing conduct and, therefore, to constitute a "plus" factor, the evidence must be probative of an agreement. *See Flat Glass*, 385 F.3d at 360. There is no exhaustive list of "plus" factors. *Id*. Such evidence is generally grouped into the following three categories: "(1) evidence that the [alleged conspirator] had a motive to enter into a price fixing conspiracy; (2) evidence that the [alleged conspirator] acted contrary to its interests; and (3) 'evidence implying a traditional conspiracy.'" *Id*. (citations omitted); *see also Re/Max Int'l*, 173 F.3d at 1009 (listing plus factors); *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 254 (2d Cir. 1987) (same).

It must first be noted that in the context of parallel pricing behavior in an oligopoly, evidence of "motive" and "actions against interest" typically only demonstrate interdependence among the oligopolists. *Flat Glass*, 385 F.3d at 360-61. "[M]ere interdependence unaided by an advance understanding among the parties" does not suggest an unlawful agreement. *See Twombly*, 550 U.S. at 557 n.4 (discussing what allegations are necessary to state a claim under Section 1 and quoting 6 Areeda & Hovenkamp ¶ 1425). The court in *Flat Glass* explained:

> In the context of parallel pricing, the first two factors largely restate the phenomenon of interdependence. We candidly acknowledged as much in *In re Baby Food*, 166 F.3d at 122. *See also* Areeda, supra, P 1434c1, at 245 ("'Conspiratorial motivation' and 'acts against self-interest' often do no more than restate interdependence."); Posner, supra, at 100. Evidence that the defendant had a motive to enter into a price fixing conspiracy means evidence that the industry is conducive to oligopolistic price fixing, either interdependently or through a more express form of collusion. In other words, it is "evidence that the structure of the market was such as to make secret price fixing feasible." *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651, 655 (7th Cir. 2002). Evidence that the defendant acted contrary to its interests means evidence of conduct that would be irrational assuming that the defendant operated in a competitive market.

385 F.3d at 360-61.

Because the factors of motive and actions contrary to interest may only restate the theory of interdependence among oligopolists, evidence under the third factor above, evidence indicating an "actual, manifest agreement," is the key to a proper determination. *High Fructose Corn Syrup*, 295 F.3d at 661; *Flat Glass*, 385 F.3d at 361. As explained in Section III.D.1., *supra*, an "agreement" for purposes of Section 1, and particularly in the context of an oligopoly market, is revealed by evidence of a prior understanding or commitment, Areeda, ¶ 1410c at 71-74, or "the sort of restricted freedom of action and sense of obligation that one generally associates with agreement." *Twombly*, 550 U.S. at 557 n.4. Moreover, *Twombly* instructs that the purported agreement must precede the parallel conduct at issue. *See id.* at 557 (holding that allegations of parallel conduct, for purposes of stating a Section 1 claim "must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action").

Complaint Counsel relies on the following as "plus" factors to prove that the asserted parallel curtailment of Project Pricing was pursuant to an agreement, rather than independent conduct, or mere conscious parallelism unaided by an agreement: (1) the Suppliers had a motive to conspire; (2) curtailing Project Pricing was against the alleged conspirators' unilateral business interests, absent assurances that their competitors would also curtail Project Pricing; (3) the parallel curtailment of Project Pricing was pursuant to a "written plan" for conspiracy; (4) the Suppliers participated in an "information exchange" through their trade association, DIFRA; (5) the Suppliers complained to one another about pricing and "cheating"; (6) the Suppliers monitored their competitors' pricing, in order to detect "cheating"; and (7) interfirm communications. CCB at 114-144. The dispositive issue for determination is whether the greater weight of the credible and probative evidence, with respect to the demonstrated parallel conduct and the demonstrated "plus" factors, makes the inference of a preceding agreement more likely than not. In this regard, pursuant to the legal authorities set forth above, particular attention, and weight, is accorded to whether or not the evidence shows: (1) a prior understanding among the Suppliers, including McWane, that each Supplier would curtail Project Pricing; (2) a commitment to one another to curtail Project Pricing; (3) a restricted freedom of action and sense of obligation to one another to curtail Project Pricing. Moreover, consistent with the applicable burden of proof, conduct "that is equally consistent with collusion as with lawful competition . . . cannot represent a plus factor." *Williamson Oil Co. v. Phillip Morris USA*, 346 F.3d 1287, 1313 (11th Cir. 2003).

(a) Motive

Complaint Counsel contends that the Suppliers' parallel curtailment of Project Pricing occurred in the context of a Fittings market that is "susceptible" or "conducive" to "collusion" which, according to Complaint Counsel, shows a motive to conspire. CCB at 114. In support of this argument, Complaint Counsel relies on oligopoly theory, as relayed by Complaint Counsel's proffered economic expert, Dr. Laurence Schumann, which provides that firms in a market with few sellers and a commodity product subject to inelastic demand can, by recognizing their mutual interdependence, achieve supracompetitive prices and

profits, and then sustain them through systems that build trust and detect cheating on the consensus price. CCFF 651-662. According to Dr. Schumann, the Fittings market has these characteristics and therefore is conducive to collusion. CCFF 663-665. Complaint Counsel argues that "[t]hese market features make conspiracy allegations more plausible . . . ." CCB at 115. Whether the conspiracy "allegations" in this case are "plausible" is beside the point. "Plausibility" refers to the pleading requirements that must be met to avoid dismissal of a conspiracy complaint. Requiring plausibility in order to infer an agreement from circumstantial evidence "simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Twombly*, 550 U.S. at 556. "Plausibility" is not the standard of proof for purposes of prevailing on the merits. Rather, Complaint Counsel's burden is to prove that the asserted "plus factor" evidence tends to make the inference of an agreement more likely than not. *Flat Glass*, 385 F.3d at 360 (holding that "plus" factors are designed to serve as "proxies for direct evidence of an agreement").

Complaint Counsel's assertions regarding the characteristics of the Fittings market largely restate the theory of interdependence, and the ability of interdependent firms to tacitly coordinate. *See Brooke Group*, 509 U.S. at 238 ("Tacit coordination is facilitated by a stable market environment, fungible products, and a small number of variables upon which the firms seeking to coordinate their pricing may focus."); *see also Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1232 (3d Cir. 1993) (requiring further allegations of "plus" factors, in addition to allegations of oligopolistic characteristics of homogenous service and inelastic demand). The features of the Fittings market relied upon by Complaint Counsel to support an inference of an illegal agreement, are the "same market features [that] make the market susceptible to conscious parallelism. *See, e.g.*, H. Hovenkamp § 4.6a, at 179-80 ('Factors such as high concentration on the seller's side and diffusion on the buyer's side, . . . a standardized product and publicly announced prices and terms, suggest that a market is conducive to express or tacit collusion, as well as non-cooperative oligopoly.')." *In re Florida Cement & Concrete Antitrust Litig.*, 746 F. Supp. 2d 1291, 1317 (S.D. Fla. 2010). An agreement is not necessary to

achieve conscious parallelism in a market with these characteristics. *White*, 635 F.3d at 576-77. Thus, Complaint Counsel's contention that the Fittings market is "conducive to collusion," adds little, if anything, to the inquiry into whether the totality of the evidence proves an unlawful conspiracy. Rather, accepting Complaint Counsel's position that oligopolistic interdependence is a "plus" factor would, in effect, foist a nefarious motive upon the Suppliers merely because they conduct their business within an oligopoly market. This is not the law. *See du Pont*, 729 F.2d at 139 (stating that "[t]he mere existence of an oligopolistic market structure in which a small group of manufacturers engage in consciously parallel pricing of an identical product does not violate the antitrust laws").

Complaint Counsel further argues that each Supplier had a motive to conspire because Fittings prices had eroded in 2007 as a result of Project Pricing; that in 2007, McWane had a problem of excess capacity and inventory, was incurring idle plant charges, and was losing volume and market share to its competitors; and because all Suppliers had declining profits and wanted a price increase. Thus, Complaint Counsel argues, McWane had a motive to reduce Project Pricing. CCB at 115-116.

First, as a factual matter, the evidence cited by Complaint Counsel does not show that "all suppliers had declining profits and wanted a price increase," as argued by Complaint Counsel. CCB at 115 & n.427; CCFF 879-883, 917. In addition, Mr. Tatman credibly testified that McWane's goal going into 2008 was primarily to increase volume, rather than price. F. 592-594. Even if McWane was motivated in part to increase profits, this is still a free country and "[i]n a free capitalistic society, all entrepreneurs have a legitimate understandable motive to increase profits," which does not, on its own, constitute a "plus factor" indicating an unlawful agreement. *Baby Food*, 166 F.3d at 137. *See Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 229 (3d Cir. 2011) (affirming dismissal of complaint and holding that defendants' alleged motive to minimize their risks and costs, maintain and stabilize pricing structures, and stabilize market shares did not constitute a "plus" factor).[16] It is also noteworthy

[16] Complaint Counsel's reliance on *In re Blood Reagents Antitrust Litig.*, 756 F. Supp. 2d 623, 631 (E.D. Pa. 2010), is misplaced. In that case,

in this regard, however, that Fittings are a small segment of McWane's business, representing about 5% of McWane's overall business; Fittings typically represent only 5% of the total cost of a waterworks project in which they are used and only 1.5% to 2% of the cost of the materials in a typical underground waterworks ("line") job; and the price of Fittings is not a major factor in determining whether a Distributor wins a bid. F. 13, 285, 326-327. These facts weigh against a conclusion that McWane would be sufficiently motivated to enter into an unlawful conspiracy in order to increase its Fittings profits.

(b) Actions contrary to interest

Complaint Counsel asserts that curtailing Project Pricing was against the Suppliers' unilateral business interests, absent assurances that their competitors would also curtail Project Pricing. As noted above, actions contrary to interest by an alleged participant in a conspiracy means "conduct that would be irrational assuming that the defendant operated in a competitive market." *Flat Glass*, 385 F.3d at 360-61. To constitute a "plus" factor, asserted "actions contrary to interest" means proof that "each defendant," in this case McWane, "would have acted unreasonably in a business sense if it had engaged in the challenged conduct unless that defendant had received assurances from the other defendants that they would take the same action." *Bolt v. Halifax Hosp. Med. Ctr.*, 891 F.2d 810, 826-27 (11th Cir. 1990). Proof of actions contrary to interest for "plus" factor purposes means "showing that the defendants' behavior would not be reasonable or explicable (*i.e.*, not in their legitimate economic self-interest) if they were not conspiring to fix prices or otherwise restrain trade - that is, that the defendants would not have acted as they did had they not been conspiring in restraint of trade."

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allegations that one defendant "was losing so much money before the conspiracy that it broke bank covenants, and that [another defendant] was losing so much money it considered leaving the market altogether," pled sufficient motive to make the other allegations of conspiracy claim "plausible" and survive a motion to dismiss. At this stage of the instant case, where Complaint Counsel has a burden of proving a conspiracy, proof that Complaint Counsel's claims are "plausible" substantially misses the mark. Moreover, to the extent *Blood Reagents* holds that a desire to increase profits, without more, constitutes a "plus" factor evincing an agreement, the holding conflicts with that of its governing Circuit Court of Appeals in *Baby Food*.

Harcros Chemicals, 158 F.3d at 572. Put another way, in order to constitute "actions against interest," and therefore be probative of an agreement, the parallel conduct at issue "must be so unusual that in the absence of an advance agreement, no reasonable firm would have engaged in it." *Baby Food*, 166 F.3d at 134-35 (quoting *Coleman v. Cannon Oil Co.*, 849 F. Supp. 1458, 1467 (M.D. Ala. 1993)).

Complaint Counsel argues that McWane, Sigma, and Star each knew that if any one of them "unilaterally stopped" Project Pricing, that company would lose business to the others, yet McWane nevertheless announced an intention to sell only off its new multipliers, *i.e.*, to, in effect, stop Project Pricing in its January 11, 2008 Customer Letter. As Complaint Counsel frequently points out in other contexts, the parallel conduct at issue in this case is not a parallel "stopping" of Project Pricing, which, it is undisputed, did not occur, but an asserted parallel "curtailment," or reduction, of Project Pricing.

In fact, contrary to the government's position, there is substantial evidence demonstrating that McWane's pricing strategy was designed to further its own legitimate business interests of increasing volume and market share in the Fittings market. McWane needed greater visibility of actual market pricing in order to beat prices being offered by its competitors, which is a procompetitive purpose. F. 566-567; 595. Mr. Tatman's concept was to narrow the range between the published prices and actual prices being charged in the market, which would give Sigma and Star less "headroom" within which to maneuver to undercut McWane on price. F. 632-635. McWane's pricing strategy was to "compress" the range of pricing by implementing a published multiplier that was within approximately 8% of the true competitive level (*i.e.*, the actual market price, or "effective" multiplier), F. 631, 635, and not follow the large 25% list price increase that had been announced by Sigma the previous October. F. 630-631. It was rational for McWane to hope or expect that Sigma and Star would follow McWane's published multipliers because Sigma and Star historically followed McWane. F. 555-557, 679. If Sigma and Star did choose to follow, then this would serve McWane's legitimate procompetitive, rather than unlawful anticompetitive, goals. In addition, McWane's January 11, 2008 Customer Letter indicating that it intended to, in effect, stop

Project Pricing was part and parcel of its strategy of trying to increase the visibility of Star's and Sigma's pricing, in order to enable McWane to undercut its competitors' pricing. F. 646-647. If Sigma and Star "took the bait" and "stopped" Project Pricing in order to follow McWane's apparent move, then McWane would be in an even better position to compete with pricing by Sigma and Star, and thereby potentially increase its volume and market share. F. 647.

The evidence upon which Complaint Counsel relies, at best, shows that McWane devised its strategy, in part, based on what it believed or hoped its competitors would do in reaction to McWane's pricing move. This merely restates the doctrine of interdependence. *Flat Glass*, 385 F.3d at 360-61. The greater weight of the evidence fails to show that it would be irrational for McWane to proceed with its pricing strategy absent advance assurances from Sigma and Star that they would follow. McWane was the price leader in the Fittings market and Sigma and Star historically followed McWane. F. 555-556, 679. If Sigma and Star declined to adopt McWane's new multipliers, the new multipliers could be easily withdrawn or revised. *See* F. 615, 674 (Sigma withdrew an October 23, 2007 announced list price increase when McWane did not follow); F. 797, 803, 809, 840, 843-844 (Sigma and Star rescinded multiplier increases announced in April and May 2008 after McWane did not follow). Even if the evidence proved that McWane's announced intent to, in effect, stop Project Pricing by selling only off of its new published multipliers was *bona fide*, as opposed to a "head fake," if Sigma and Star failed to follow McWane, McWane could easily and quickly resume Project Pricing. *See White*, 635 F.3d at 579 (noting that a price leader in an oligopoly risks little in announcing a pricing move).

Where, as here, a pricing decision can be easily changed if competitors do not follow, it is not irrational to proceed without advance assurances of competitor compliance. As Areeda explains:

> If each defendant can easily alter its decision as a physical and contractual matter, and can do so with little or no loss of actual or potential profit, then the defendant may feel

> comfortable in acting without advance agreement with its rivals. It can act, or it can wait and revise its behavior after seeing what the others do. Otherwise, unilateral action will be very uncomfortable. At some point, the discomfort will be so great that no rational businessperson will take the challenged step without advance agreement.

Areeda, ¶ 1425a at 183.

Moreover, Complaint Counsel makes no argument as to why or how Sigma acted contrary to its self-interest with respect to Project Pricing. Indeed, the evidence fails to show that Sigma took any special actions with regard to Project Pricing. F. 895, 897-898. Complaint Counsel focuses principally on Star, arguing that Project Pricing enabled Star to grow its market share and stopping Project Pricing would constitute an abrupt departure from Star's prior business practices. CCB at 125. As noted above, an announced intention is not "irrational" absent advanced assurances, where the decision can be easily changed based on the behavior of competitors. Furthermore, it appears that Star did not stop Project Pricing, and continued to Project Price throughout 2008, including when necessary to respond to its competitors' pricing. F. 873, 881, 912; *see also* F. 687 (Mr. Minamyer instruction: "[G]o get [documentation] and you can have your pricing"); F. 694 (Star's plan was not to "stop" Project Pricing, but to first require documentation from a customer that Star's competitors were Project Pricing below Star). In any event, because Complaint Counsel has failed to demonstrate that the announced intention of McWane, the Respondent in this case, to, in effect, stop Project Pricing was contrary to its own interest, absent advance assurances that its competitors would follow, this Initial Decision need not, and does not, decide whether Star's announced intention to stop Project Pricing was contrary to Star's self-interest.

Regardless of what the evidence might show as to the interests of Sigma and Star, McWane is the respondent in this case, and Complaint Counsel has failed to show that McWane's pricing strategy was contrary to its economic self-interest, absent advance assurances that Sigma and Star would follow.

(c) A "written plan for conspiracy"

Complaint Counsel contends that the evidence shows that the actions of McWane, Sigma, and Star, "comported" with a "written plan," namely, Mr. Tatman's internal December 25, 2007 PowerPoint Presentation. CX 0627; *see* F. 626. Indeed, Complaint Counsel argues that this PowerPoint Presentation constitutes McWane's "blueprint" for conspiracy. Complaint Counsel argues that evidence that conspirators are acting pursuant to a written plan is a "significant" "plus" factor because it is "suggestive" of conspiracy. CCB at 116-122. Respondent asserts that Mr. Tatman's December 25, 2007 PowerPoint Presentation testimony establishes that the document was a "brainstorming" document," that was prepared independently by Mr. Tatman, based upon his own data analysis, and that it is undisputed that the document was not shared with Sigma or Star. Moreover, Respondent contends, the "core tenets" of the strategy indicated by the PowerPoint Presentation were not communicated in McWane's January 11, 2008 Customer Letter, as Complaint Counsel contends.

Contrary to Complaint Counsel's argument, to constitute a "plus" factor evincing a conspiracy, evidence must be more than "suggestive" of conspiracy. The inference of conspiracy must be more likely than not. Having evaluated the document in its entirety, in the context of all the surrounding circumstances, the inference that Mr. Tatman's December 25, 2007 PowerPoint Presentation was a "blueprint for conspiracy" is rejected. As more fully explained below, Complaint Counsel has failed to prove that Mr. Tatman's internal December 25, 2007 PowerPoint Presentation was a "written plan" for conspiracy or that the conduct of Sigma and Star with respect to Project Pricing in 2008 was pursuant to, or in "compliance with," McWane's "plan." Rather, the evidence shows that Mr. Tatman's December 25, 2007 PowerPoint Presentation was an internal McWane discussion document that was not shared with Sigma or Star and, at best, represented an internal plan for McWane's own competitive pricing strategy. In addition, the inference that the conduct of Sigma and Star regarding Project Pricing was in furtherance or "compliance" with an agreement is no more likely than the inference of independent – albeit consciously interdependent –

conduct. Accordingly, the December 25, 2007 PowerPoint Presentation does not constitute a "plus" factor evincing a conspiracy in this case.

Although not a "written plan" for conspiracy, the December 25, 2007 PowerPoint Presentation does provide an informative context for evaluating the conduct that followed it. Mr. Tatman testified, credibly and at length, regarding his independent data analysis undertaken to prepare the document, and the meaning of the language in the document. That testimony, as well as other evidence, demonstrates that Mr. Tatman's December 25, 2007 PowerPoint Presentation was an internal document, prepared independently by Mr. Tatman for the purpose of McWane's internal strategy discussions. F. 620, 625-629. Mr. Tatman's pricing strategy for McWane was to narrow the range between the published price and actual prices being charged in the market and thereby give Sigma and Star less "headroom" within which to maneuver to undercut McWane on price. F. 632-634. Accordingly, based on his independent analysis of available data (F. 627-629), Mr. Tatman recommended, and McWane decided, not to follow Sigma's and Star's large list price increase, and instead to take advantage of McWane's relative cost advantage over Sigma and Star by implementing a lower multiplier increase. F. 620, 630-633. If Sigma and Star followed McWane's new multipliers, which McWane recognized was likely given the market dynamics, F. 555, 679, 638 (PowerPoint slide stating that "due to their now more desperate need for price, I believe that Sigma and Star will mimic and verbally follow any program we publish . . . "), this would potentially increase stability in the range of prices in the market. F. 635. Accordingly, McWane would gain a competitive advantage in detecting and beating its competitors' prices, thereby helping to meet McWane's goal of increasing volume and market share, and put financial pressure on McWane's competitors. F. 632-636. This is competitive, not unlawful, conduct by McWane.

Complaint Counsel's argument relies principally on inferences it draws from language from one slide from the December 25, 2007 PowerPoint Presentation, titled "Message to Market and Competitors"; in particular, the statements that: McWane "will be consistent and follow through with what we've formally communicated"; McWane "will encourage/drive both price

stability and transparency"; McWane will adjust multipliers as required to remain competitive within any given market area, and "[c]onsistent Job Pricing will be met with general market actions"; and that, for 2008, "we will support net price increases but will do so in stepped or staged increments. A prerequisite for supporting the next increment of price is reasonable stability and transparency at the prior level." F. 638. Complaint Counsel interprets the points listed on this slide as the four "prongs" of "the Tatman Plan." CCB 118-119. On its face, the foregoing language refers only to unilateral conduct by McWane. F. 638. However, Complaint Counsel further notes the statement that one of the four "keys" to "success" of McWane's strategy is "Sigma & Star's [management] pulling price authority away from front line sales . . . to add discipline to the process." CCB at 119; F. 638. This language is at least as reflective of McWane recognizing its interdependence with Sigma and Star as it is with McWane "planning" to procure an unlawful agreement with Sigma and Star.

In re Sulfuric Acid Antitrust Litig., 743 F. Supp. 2d 827 (N.D. Ill. 2010), upon which Complaint Counsel relies, is readily distinguishable. In that case, the alleged co-conspirators, producers and suppliers of sulfuric acid, were parties to certain sales contracts. Plaintiffs contended that there were additional promises and understandings beyond the face of the sales contracts, pursuant to which sulfuric acid producers were required to shut down or curtail acid production as a condition of entering into the sales agreements, in order to stabilize prices, control industry output, and prevent competition. *Id.* at 835. The court denied the defendants' motion for summary judgment on the plaintiffs' claim, holding that "most damaging piece" of evidence was the defendant's "Sulphuric Acid 1989 Plan," in which the defendant clearly articulated a plan to "approach[] sulphur burning acid producers to purchase acid from [defendant] and thereby shutdown sulphur burning acid plants. It is a strategy of displacement by agreement. *This strategy is being followed so as not to force an oversupply into a balanced market with predictable price disruption* and to minimize the risk of inviting trade action by U.S. authorities." 743 F. Supp. 2d at 858 (emphasis in original). This direct evidence of a clear plan to enter into an unlawful, anticompetitive agreement, under the

cover of an ordinary sales contract, is far from the sequential inferences Complaint Counsel seeks to have drawn from Mr. Tatman's December 25, 2007 PowerPoint Presentation, which, on its face, outlined unilateral conduct by McWane, albeit, and understandably, with consideration of the potential reactions by competitors.

Complaint Counsel further asserts an inference that the actions of McWane, Sigma, and Star beginning in January 2008 were taken to "comport" or "comply" with McWane's "plan." This inference is further based on yet other inferences that Complaint Counsel urges be drawn from McWane's January 11, 2008 Customer Letter, which was an outgrowth of McWane's internal pricing discussions in connection with the December 25, 2007 PowerPoint Presentation. F. 646. Complaint Counsel argues that McWane's January 11, 2008 Customer Letter "communicated" the "substance" of McWane's "plan" allegedly shown by the "Message to Market and Competitors" slide in Mr. Tatman's December 25, 2007 PowerPoint Presentation. Specifically, according to Complaint Counsel, McWane's January 11, 2008 Customer Letter communicated that "McWane was increasing its prices, did not intend to offer Project Pricing, and would support future increases in prices only if pricing had stabilized, *i.e.*, only if Sigma and Star also curtailed Project Pricing." CCB at 119. Complaint Counsel's interpretation of the January 11, 2008 Customer Letter is unsupported by the greater weight of the evidence. Regardless of what McWane might have discussed internally about what "message" to send to the "market and competitors" (F. 638; *see also* CX 0627 at 006-007 (draft customer letters announcing multiplier increase), McWane's January 11, 2008 Customer Letter did *not* include any language indicating that McWane would support future increases in prices only if Sigma and Star curtailed Project Pricing, as argued by Complaint Counsel. F. 645. The vague and ambiguous paragraph in the January 11, 2008 Customer Letter upon which Complaint Counsel relies in this regard states: "If the current inflationary trends continue as forecasted, we anticipate the need to announce another multiplier increase within the next six months. However, we will only do so as conditions require." F. 645. The January 11, 2008 Customer Letter also did not include any language concerning Sigma's and Star's "pulling price authority away from front line sales," which was also referenced on the "Message to

Market and Competitors" slide upon which Complaint Counsel relies.[17]

As proof that Sigma and Star "complied" with McWane's alleged plan, Complaint Counsel asserts that after McWane's January 11, 2008 Customer Letter was sent, Sigma and Star "announced" that they would curtail Project Pricing, and "centralized their pricing authority away from the front lines of their sales force," in order to "please" McWane. CCB at 120-122. As noted above, the evidence fails to show Sigma "announced" that it would curtail Project Pricing. Mr. Pais' email of January 24, 2008, upon which Complaint Counsel relies, in which he "urged" Mr. Rybacki to renew efforts to "normalize all pricing for fittings" between plant work and other work, was an internal Sigma document, and Sigma's January 29, 2008 customer letter said nothing about "normalizing" Fittings prices between plant work and other work, as alluded to in Mr. Pais' January 24, 2008 internal email. F. 664, 674. Even if Mr. Pais believed that curtailing Project Pricing would "please" McWane, this is not proof that Sigma had any prior understanding with McWane, or that there was any commitment by McWane to Sigma, to raise prices in the future. The inference that Sigma, recognizing its oligopolistic interdependence with McWane, hoped it could influence McWane's conduct, is at least as likely as any inference of an agreement involving McWane. Moreover, Complaint Counsel's evidence that Sigma "centralized" its pricing authority consists of statements by Mr. Tatman in his Executive Report for the first quarter of 2008 that: "As we understand it, both [Sigma and Star] have removed pricing authority from the front line sales team and pushed it up higher within their organizations. Discounting is still available, but it now requires a more structured decision process." CCB at 122 & n.457; CCFF 1054; *see* F. 1068. These statements have little probative value in determining whether Sigma, in fact, "centralized" pricing authority in 2008, as they were based on reports from sales

[17] In addition, Complaint Counsel argues that McWane "complied" with its strategy by hiring a pricing coordinator. CCB at 122. As noted in Section III.D.2.b.ii.(a) above, the purpose of the pricing coordinator position was to get a national view of pricing, and was not an element of the strategy referenced in the December 25, 2007 PowerPoint Presentation. Moreover, even if it were, McWane's complying with its own pricing strategy scarcely gives rise to an inference of conspiracy.

persons in the field of information gleaned from discussions with customers, rather than upon any personal knowledge of Mr. Tatman. F. 571, 869. Moreover, any evidentiary value of Mr. Tatman's "understanding" of Sigma's conduct in this regard is outweighed by direct evidence from Mr. Rybacki that Sigma undertook no special efforts to curtail Project Pricing in 2008, and that Sigma's regional managers retained authority to approve Project Pricing throughout 2008. F. 895, 897-898.

With respect to Star, the evidence shows that Star announced to its sales force, and to its customers, an effort to stop or curtail Project Pricing, and that Star worked to tighten up and better manage its process for approving Project Pricing. F. 686-687, 695, 702, 704, 873. However, the inference that it did so because Star believed that, in exchange for these actions, McWane would reward Star with a price increase in the future, in accordance with the "Tatman plan," is rejected. To support this inference, Complaint Counsel cites an internal email dated January 23, 2008 from Mr. Minamyer to his divisional sales managers noting that McWane "said in its multiplier increase letter that they will require all project priced orders to be shipped by March 1" and directed the division managers to start working on doing the same because otherwise "[McWane] won't be able to figure it out and think we didn't take the increase." CCB at 121 n.452 citing CX 0847. However, this language, which is ambiguous, is inconsistent with the inference of any prior understanding or commitment between McWane and Star with respect to future pricing.

Moreover, contrary to Complaint Counsel's argument, the evidence fails to show that McWane communicated its "plan" to Sigma and Star in meetings or telephone calls. *See* CCB at 21-22. The evidence shows that on December 3, 2007, several weeks before the alleged conspiracy was formed in January 2008, Mr. Page, President and CEO of McWane (F. 39), met with Mr. Pais of Sigma in Birmingham, Alabama. F. 604. Mr. Page and Mr. Pais both testified that their December 3, 2007 meeting concerned international opportunities for McWane. F. 608. Mr. Pais testified that they discussed Sigma potentially supplying McWane with metric sized fittings that were needed for international markets that McWane did not have. F. 605. Mr. Pais and Mr. Page denied discussing domestic Fittings; prices being charged in

the marketplace; pricing discipline; McWane's or Sigma's costs; or ways they could work together in the marketplace in this regard. F. 608. Where there is an independent business justification for a defendant's behavior, an inference of conspiracy is not easily drawn. *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438, 1456 (11th Cir. 1991). Even if the testimony of Mr. Pais and Mr. Page is rejected, mere disbelief of testimony does not "rise to the level of positive proof of agreement . . . ." *Venzie Corp. v. United States Mineral Products Co.*, 521 F.2d 1309, 1313 (3d Cir. 1975). It strains credulity to suggest that mere proof of a meeting, together with evidence that pricing was not discussed, equates to proof that McWane's alleged "plan" was discussed. Rather, such a conclusion would be unsupported speculation.

Complaint Counsel also relies upon four telephone calls placed between a cell phone issued to Mr. Tatman and a cell phone issued to Mr. Rybacki, as follows: a three minute call from the Rybacki cell phone to the Tatman cell phone at 10:15 a.m. on December 27, 2007; a six minute call from the Tatman cell phone to the Rybacki cell phone at 12:11 p.m. on December 27, 2007; a three minute call from the Rybacki cell phone to the Tatman cell phone at 11:03 a.m. on January 3, 2008; and a nine minute call from the Tatman cell phone to the Rybacki cell phone at 4:30 p.m. on January 4, 2008. CCB at 120 & n.448; CCFF 923; *see* F. 621-622, 639-640. The short duration of two of the foregoing calls indicates that the inference that a brief voice mail message was left is just as likely as the inference that an actual conversation took place. In any event, Mr. Rybacki and Mr. Tatman both denied having any recollection of the telephone calls and/or denied any recollection of what was discussed. F. 623-624; 639-640. It would be pure speculation on this record to simply assume that Mr. Tatman and Mr. Rybacki discussed McWane's pricing "plan."

Finally, Complaint Counsel points to testimony by Mr. McCutcheon regarding a dinner meeting between Mr. McCutcheon of Star and Mr. Pais of Sigma after an initial meeting of the Ductile Iron Fittings Manufacturers Association ("DIFRA") in Birmingham, Alabama. Specifically, Mr. McCutcheon testified at an investigational hearing in this matter

that Mr. Pais proposed that Sigma and Star agree "to stay within two to three" discount points of McWane; that if Sigma and Star did so, McWane would "not be so overbearing towards" Sigma and Star; and that "if we were good, then they would be good – they would treat us better and we could live happily ever after." CX 2538 (McCutcheon, IHT (Vol. 2) at 227-228); *see also* McCutcheon, Tr. 2373-2374. Complaint Counsel argues this evidence shows that Sigma and Star knew "aspects" of McWane's pricing "plan" and urges that it should be inferred that McWane must have communicated its plan to Sigma and/or Star. Complaint Counsel's argument is based only on unsupported inferences and overreaches. First, Complaint Counsel points to nothing in Mr. Tatman's internal December 25, 2007 PowerPoint Presentation regarding Sigma and Star staying "within two or three points" of McWane. *See* CX 0627; F. 638. In addition, Mr. Pais denied the statements attributed to him by Mr. McCutcheon, and Complaint Counsel cites no reason why Mr. McCutcheon should be believed over Mr. Pais. *See* Pais, Tr. 1957-1959. Even if Mr. McCutcheon's testimony is credited, the initial meeting of DIFRA took place on March 27, 2008 (F. 727), and therefore, the alleged conversation took place more than two months after Sigma and Star had already, ostensibly, "agreed" to McWane's "plan" in January 2008, according to Complaint Counsel. *See* Complaint ¶¶ 2, 29, 32. Moreover, the substance of the conversation is inconsistent with the notion that Sigma and Star had a prior understanding with or commitment from McWane regarding curtailing Project Pricing. Therefore, regardless of what the alleged conversation between Mr. Pais and Mr. McCutcheon says about the conduct of Sigma and Star, this alleged conversation fails to prove that McWane, who is the Respondent in this case, communicated its "plan" to Sigma and Star, or that McWane was party to an agreement to curtail Project Pricing.

For the foregoing reasons, and having fully reviewed and weighed all the evidence on the issue, the evidence fails to demonstrate that Mr. Tatman's December 25, 2007 PowerPoint Presentation constituted a "written plan" for conspiracy, with which McWane, Sigma, and Star all complied, as argued by Complaint Counsel. This internal document is not evidence of the asserted agreement to curtail Project Pricing involving McWane, and therefore does not constitute a "plus" factor in this case.

(d) DIFRA as a "plus" factor

Complaint Counsel next contends that McWane, Sigma, and Star participated in an "information exchange" in order to "detect cheating" on the asserted agreement to curtail Project Pricing, and that, therefore, this constitutes a "plus" factor. CCB at 126-127. Importantly, however, for this evidence to be material under Complaint Counsel's argument, it must first be assumed that there was, in fact, an agreement to curtail Project Pricing, and that McWane was a party to it. An unlawful agreement will not be presumed. *See Blomkest Fertilizer*, 203 F.3d at 1033 ("[A] litigant may not proceed by first assuming a conspiracy and then explaining the evidence accordingly.").

In summary, DIFRA is a trade association with four members, McWane, Sigma, Star, and U.S. Pipe. F. 8. Around the same time as DIFRA's incorporation in January of 2007, DIFRA engaged the accounting firm, Sellers Richardson, of Birmingham, Alabama, as the association's auditor. F. 715, 718. As part of its duties, Sellers Richardson would "compile on a monthly basis, the data submitted by the members reporting their respective sales of ductile iron fittings" in the form of total tons-shipped "and will prepare and issue to the members monthly reports" showing the aggregate tons of ductile iron fittings shipped during the reporting period (hereafter, "DIFRA tons-shipped data reports"). F. 718. On or about April 25, 2008, the members of DIFRA approved a tons-shipped reporting format, which would set forth industry-wide, short-tons of fittings shipped within the United States in the previous month for the following six categories: 2"-12" Flanged; 2"-12" All Other; 14"-24" Flanged; Greater than 24" Flanged; Greater than 24"; and "All Other." F. 732-734. These broad product size ranges contain thousands of different SKUs – all with unique physical attributes and pricing points – and mirror the major size groupings of pipe. F. 742. Members' initial submissions included annual data for 2006, monthly data for 2007, and monthly data for January through April 2008. F. 734. After the members submitted their data to DIFRA's accountants, the accountants aggregated the members' tons-shipped data and disseminated the aggregated totals to DIFRA members. F. 838. The first DIFRA tons-shipped report was issued by the

accountants on June 17, 2008. F. 738. The last DIFRA tons-shipped report was circulated in January 2009. F. 739.

Complaint Counsel's DIFRA "plus" factor argument asserts, but fails persuasively to explain, how historic, aggregated, tons-shipped data reports would disclose the pricing of the Suppliers in such a way as to enable them to "detect cheating" on the presumed agreement to curtail Project Pricing, even if the Suppliers could glean their own individual market share from the data, as Complaint Counsel asserts. CCB at 126. Moreover, the conclusion that the reports would allow the Suppliers to "detect cheating" on the presumed agreement to curtail Project Pricing is not readily apparent. The submitted tons-shipped data was aggregated, and the report did not reveal the tons shipped or market shares of the individual Suppliers. *See* CX 0052 at 005; F. 748-749, 756, 758. No DIFRA member was permitted to review the tons-shipped data of any other member. F. 748. Neither DIFRA nor its accountants, Sellers Richardson, collected sales price data. F. 745. The DIFRA reports provided by Sellers Richardson did not include or reveal any sales prices, or report any dollar figures. F. 746-747. It is far less indicative of a price fixing conspiracy when the information allegedly exchanged pertains to volume rather than prices. *Williamson Oil Co.*, 346 F.3d at 1313. *See also In re Citric Acid Litig.*, 191 F.3d 1090, 1098 (9th Cir. 1999) (holding that gathering information about pricing and competition in the industry is "standard fare" for trade associations and does not warrant an inference of conspiracy).

Also, the fact that the DIFRA members opted to include data for several historic time periods, including all of 2006 and 2007, in addition to a time period during the alleged conspiracy (January through April 2008), is inconsistent with the conclusion that the purpose of the data reporting was to police the alleged conspiracy.

The cases upon which Complaint Counsel relies do not support a holding that the DIFRA tons-shipped data reporting system constitutes a "plus" factor evincing an unlawful agreement. In *In re Petroleum Products*, the issue was whether the defendants conspired to restrict supply, and in this context, the court held that evidence that the defendants, through a trade association, obtained detailed supply projections for individually identifiable suppliers, combined with evidence that the defendants

also individually exchanged their own detailed supply forecasts, among other evidence, made the inference of conspiracy plausible. 906 F.2d at 460-462. In the instant case, in contrast, Complaint Counsel alleges an agreement to curtail Project Pricing, not an agreement to restrict supply, and unlike *Petroleum Products*, the tons-shipped data reported through DIFRA contained only aggregated totals of volume, for broad categories of fittings, and did not set forth the volume of each member. F. 741-744, 748-749. Furthermore, the court in *Petroleum Products* held only that the information exchanges between the defendants contributed to making the inference of conspiracy "plausible." *Id*. at 462. As noted previously, at this stage of the proceedings, Complaint Counsel's burden is to prove that the inference of conspiracy is more likely than not, rather than merely "plausible."

Todd v. Exxon Corp., 275 F.3d 191 (2d Cir. 1991), upon which Complaint Counsel also relies, is distinguishable. In *Todd*, the plaintiff alleged that defendants violated Section 1 of the Sherman Act by regularly exchanging detailed information regarding the compensation they paid to their non-union managerial, professional, and technical employees and using this information to set the salaries of these employees at artificially low levels. 275 F.2d at 195-97. The court specifically noted that the plaintiff was not alleging an agreement among defendants to fix salaries, but an unlawful information exchange, based on the exchange's allegedly "facilitating" the fixing of salaries, which claim the court recognized as a distinct Section 1 action. *Id.* at 198. Whether Complaint Counsel's alleged "information exchange" constitutes an unlawful "facilitating practice" (as opposed to a "plus" factor) is the subject of Count Two of the Complaint in this case, and is addressed *infra* in the analysis of that Count.

Accordingly, the evidence fails to support Complaint Counsel's assertion that participation in the DIFRA tons-shipped data reporting system is probative of an agreement to curtail Project Pricing. Therefore, the DIFRA reporting system does not constitute a "plus" factor in this case.[18]

[18] Complaint Counsel's assertion that mere membership in a trade association is a "plus" factor evincing agreement is without merit. *In re Blood Reagents*, 756 F. Supp. 2d at 632, upon which Complaint Counsel relies, held

(e) "Monitoring" of the market for "cheating"

Complaint Counsel argues that internal documents show that the Suppliers were "tracking" the marketplace for "cheating" on the asserted agreement to curtail Project Pricing. The documents upon which Complaint Counsel relies to support this argument have been thoroughly reviewed and examined, and the documents, as discussed below, do not implicate McWane in an agreement to curtail Project Pricing. The inference that McWane was monitoring the market for "cheating" on an agreement with Sigma and Star to curtail Project Pricing is no more likely than the inference that McWane was gathering competitive information from the field, in the ordinary course of business, to enable it to compete against the prices of its competitors, including with Project Pricing. Therefore, these documents fail to constitute circumstantial evidence of an agreement to curtail Project Pricing involving McWane.

Complaint Counsel argues that McWane monitored the market for "cheating" on the alleged agreement to curtail Project Pricing because it "tasked its sales representatives with logging instances of Project Pricing in its 'price protection log' and reporting instances of cheating in its 'competitive feedback log'," which Mr. Tatman used to conclude in an April 2008 quarterly Executive Report that "the level of multiplier discounting by both Star and Sigma appears to have died down significantly." CCB at 129. The evidence shows that McWane's pricing protection log tracked, in the normal course of business, instances of price protection (*i.e.*, where McWane quotes a price to a customer and agrees to hold that price for a customer for some period of time, thereby "protecting" the price against increases) and instances of Project Pricing, as reported by sales persons in the field. F. 852, 854. The "competitive feedback log" is a summary of competitive information learned in the field and reported by

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that a complaint alleging "common membership in trade associations, . . . while not enough by itself to confer plausibility on an allegation of conspiracy, is yet another feature of the factual background," which together with the many other allegations in that case, raised a reasonable expectation that discovery would reveal evidence of an illegal agreement, and therefore the defendants' motion to dismiss was denied. This is not a holding that proof of membership in a trade association constitutes a "plus" factor evincing an unlawful agreement.

McWane's sales persons in weekly narrative "competitive feedback reports." F. 571. Complaint Counsel cites no evidence to support Complaint Counsel's nefarious inference from these facially legitimate, internal business reporting devices, that the pricing protection log and competitive feedback reports were devices for "tracking" "cheating" on a (presumed) prior agreement, and therefore should constitute a "plus" factor evincing an agreement involving McWane.

In re High Fructose Corn Syrup, upon which Complaint Counsel relies, is not analogous. In that case, there was extensive, explicit evidence of an agreement through the defendants' own statements and documents, including a statement by one of the defendant's managers that: "We have an understanding within the industry not to undercut each other's prices," and a document that referred to "support[ing] efforts to limit" competitors' pricing. 295 F.3d at 662. This evidence is not, as argued by Complaint Counsel, "similar" to the evidence upon which Complaint Counsel relies here to show the alleged agreement involving McWane.

To support its "monitoring" for "cheating" inference against McWane, Complaint Counsel relies principally on statements in internal documents of Sigma and Star. In particular, Complaint Counsel cites to several internal documents of Star that use the term, "cheat," or "cheating" in reference to the prices being offered by its competitors in the marketplace. According to Complaint Counsel, these documents are admissions of Star, and these admissions are further attributable to McWane as Star's "co-conspirator." *See* CCB at 127-128. Having fully reviewed and considered all the documents upon which Complaint Counsel relies, Complaint Counsel's argument is unpersuasive. For example, Complaint Counsel relies heavily on one internal document of Star, an email exchange from September 17, 2008 between Star Divisional Sales Manager, Ramon Prado, and Star's then National Sales Manager, Mr. Minamyer, regarding the status of business in the southeast (CX 1691). The relevant passage, in context, reads:

> [Mr. Minamyer] What the heck can we do? [Ramon Prado] We have climbed our way back into contention and Ferguson

> attrition should be mostly gone now. Are we being aggressive enough? [Ramon Prado] I think we are doing better since figuring out that Sigma was cheating on the fitting deal.
>
> Looks like Ryan is doing OK. Is that from the Lynn deal? [Ramon Prado] Yes primarily.
>
> Are [your] guys on the projects? [Ramon Prado] Yes. Are they project pricing to get every order? [Ramon Prado] Yes.

CX 1691.

Complaint Counsel has failed to show that the statement regarding "cheating" on the "fitting deal," upon which it relies, is an "admission" of Star of an agreement to curtail Project Pricing. *See also* F. 902 (Mr. Prado's statement in internal "competition update" dated March 6, 2008: "It is still early, but it doesn't appear that Sigma or Tyler is cheating on the new fitting multipliers being quoted after 2/18."). Mr. Prado was not called as a witness at trial, nor was any deposition testimony from Mr. Prado offered into evidence, to explain what he meant by the term "cheating" or "the fitting deal" or "the Lynn deal." Under Complaint Counsel's theory, it must be inferred that Mr. Prado was referring to "cheating" on an agreement to curtail Project Pricing, which is an admission of Star, and which should further constitute evidence of an agreement involving McWane. Mr. Minamyer's testimony, which is not contradicted, was that "cheating" is an internal Star term used by Star to refer to any pricing that was below the published multiplier, including among other things, Project Pricing. F. 903. There is no evidence that the term had any particular usage for Fittings. Complaint Counsel's daisy chain of assumptions fails to support or justify an evidentiary inference of any unlawful agreement involving McWane, and the multilayered inference is rejected. In addition, it is unlikely that the existence of any unlawful agreement to curtail Project Pricing would be known below the executive level at Star, down to the level of a divisional sales manager, such as Mr. Prado. For this reason as well, the inference that Mr. Prado was referring to an unlawful agreement in his email is unsupported and unpersuasive.

In addition, the email exchange (CX 1691), set forth above, further states that Star was using "project pricing to get every order," which is inconsistent with the existence of an agreement among McWane, Sigma, and Star to curtail Project Pricing. The document also is evidence that Star was Project Pricing to "get every order" as of September 17, 2008, which is inconsistent with Complaint Counsel's theory that Star sales persons only began using Project Pricing to "get every order," when allegedly instructed to do so by Mr. Minamyer in his email of November 25, 2008 (F. 893) over two months later. CCB at 6, 35-36. Other Star documents upon which Complaint Counsel relies are also consistent with the conclusion that Star continued to use Project Pricing throughout 2008 to compete in the marketplace, which is inconsistent with the inference of a conspiracy to restrain price competition by curtailing Project Pricing. *E.g.*, F. 908 (CX 1696 at 001 (weekly activity report from Mr. Smith for week ending April 18, 2008 stating, "You know the gig, ask them why?" If they give you proof the other guys are cheating, then we will match!")); F. 912 (CX 1695 at 001 (email from Mr. Smith to his sales force regarding a weekly report, stating: "[L]et's be as diligent as we can gathering the proper data needed if the other suspects are cheating. We will react, just need to make sure it is real.")).

Furthermore, the September 17, 2008 email exchange, reflected in CX 1691, above, refers to Sigma and does not mention McWane, thereby requiring the further inference that McWane was part of whatever "deal" Mr. Prado meant. Accordingly, Complaint Counsel has failed to prove that this document constitutes an admission of Star of a conspiracy with McWane to curtail Project Pricing.

The remaining Star documents upon which Complaint Counsel relies suffer from the same or similar defects discussed above. For example, Complaint Counsel relies upon documents containing statements of a Star divisional sales manager, Mr. Shaun Smith. At the end of a 3-page Star internal email exchange among Mr. McCutcheon, Mr. Minamyer, and Mr. Smith on October 22, 2008, regarding "Quote 10707007," and whether to offer a customer a lower multiplier than Sigma had offered, Mr. Smith stated: "I'm not sure about the market being already there. .

. . I really only think this will affect the Houston market, but I am catching Sigma cheating more and more." F. 916; *see also* F. 917 (statement by Mr. Smith in weekly activity report for the week ending October 24, 2008, under the heading "Competition," noted "My team is in major attack mode – as reported, we are seeing cheating all over from Sigma – they have been instructed not to lose any orders."). As in the case of Mr. Prado, as previously noted, Mr. Smith did not testify at trial, nor is there any deposition testimony in the record from Mr. Smith, as to what he meant by the above statements. Furthermore, as noted above with regard to statements by Mr. Prado, it is unlikely that the existence of any unlawful agreement to curtail Project Pricing would be known below the executive level at Star, down to the level of a divisional sales manager, such as Mr. Smith, which weighs against any inference that Mr. Smith was referring to an unlawful agreement. In addition, this Star internal email refers only to Sigma. It will not be assumed that Mr. Smith was referring to a conspiracy with McWane to curtail Project Pricing. Moreover, the document is evidence of active price competition between Sigma and Star, and is inconsistent with an agreement to curtail Project Pricing.[19]

Complaint Counsel next argues that Sigma was "monitoring the market for cheating" by using DIFRA reports. CCB at 128. The statement upon which Complaint Counsel relies, from an internal Sigma email authored by Mr. Pais on May 4, 2009, shows that Mr. Pais believed DIFRA data enabled him to track Sigma's own market share. F. 772 (CX 0319 at 002). The inference that Sigma's purpose in tracking market share was to find "cheating" on an agreement to curtail Project Pricing presumes a preexisting agreement, and is rejected for the same reasons set forth in Section III.2.b.iii.(d), *supra*. At a minimum, the inference that Sigma was tracking its market share for legitimate business purposes is at least as likely as the inference that it was "tracking cheating" on an agreement with McWane and Star to curtail Project Pricing.

[19] Complaint Counsel also uses the Star documents referred to herein as evidence that the conspiracy was "falling apart" beginning in the fall of 2008. However, this assertion presumes the existence of a prior conspiracy, which has not been shown.

In summary, regardless of what the evidence may imply as to the conduct of Sigma and Star, the inference that McWane, who is the Respondent in this case, was "monitoring" the market for "cheating" on an agreement with Sigma and Star to curtail Project Pricing is unproven. The inference urged by Complaint Counsel is no more likely than the inference that McWane was gathering competitive information from the field, in the ordinary course of business, to enable it to compete against the prices of its competitors, including by using Project Pricing. Because the evidence upon which Complaint Counsel relies does not merit an inference of an agreement involving McWane, Complaint Counsel has failed to prove the existence of this asserted "plus" factor.

(f) "Complaints" about "cheating"

Complaint Counsel also argues that the evidence shows the Suppliers "complained" to each other about low prices or "cheating" and that this constitutes a "plus" factor evincing an agreement to curtail Project Pricing involving McWane. CCB at 129-132. Complaints about "cheating," Complaint Counsel argues, suggest the breach of an agreement, rather than independent action. However, the cases upon which Complaint Counsel relies held that complaints about cheating implied a breach of an agreement, where there was independent proof of the underlying agreement allegedly "breached." Thus, in *United States v. Giordano*, 261 F.3d 1134 (11th Cir. 2001), evidence that the appellant "on at least one occasion" complained that a co-conspirator was "cheating" contributed to the totality of the evidence that made the inference of conspiracy reasonable, and therefore supported the jury's verdict finding a price-fixing conspiracy. *Id.* at 1139-40. However, in *Giordano*, unlike the instant case, there was also substantial direct evidence that the appellant had met with the purported co-conspirators and agreed to jointly lower prices. *Id*. at 1136-38. There was also direct evidence that one co-conspirator decided afterward not to comply with the agreement and did not lower prices, which prompted the "complaints." *Id.*

Similarly, in *United States v. Beaver*, 515 F.3d 730 (7th Cir. 2008), cited by Complaint Counsel, there was direct evidence of a

meeting between appellant and other co-conspirators where they discussed ways to raise and stabilize prices on concrete and that attendees left the meeting with the "firm understanding that an agreement to limit . . . discounts had been reached." *Id.* at 734. In *Beaver*, there was also direct evidence that, after it appeared that some of the participants were not complying with the agreement, the alleged co-conspirators had more meetings where they "reaffirmed" their agreement, and expressly agreed that if any member of the conspiracy detected discounting, they would confront that member about "his cheating." *Id.* In those circumstances, subsequent complaints about cheating contributed to the legal sufficiency of the evidence of conspiracy. *See also In re Scrap Metal Antitrust Litig.*, 2006 U.S. Dist. LEXIS 75873, at *6-9, *41 (N.D. Ohio 2006) (holding that direct testimony of "unwritten" agreements by scrap metal resellers, *inter alia*, not to compete with each other by selling to accounts that "belonged" to another reseller, along with evidence of complaints about those that failed to comply, as well as other evidence of agreement, was legally sufficient to support jury verdict). The evidence of an agreement, found in the foregoing cases, distinguishes them from the instant case, in which the probative value of Complaint Counsel's "cheating complaints" first requires an assumption that an agreement existed, which is contrary to the government's burden of proof.

Complaint Counsel relies on an internal Star email dated April 2, 2008, in which Mr. Minamyer reported to Mr. McCutcheon, regarding a bid for the "Tulsa Bid Sleeves Project," that Star had lost because Star had not given the customer a "special price" but Sigma did. F. 906. Mr. Minamyer stated, among other things: "They should be very careful if they want to hold this price increase as we will not lose our partners or any more orders because they are not responsible in the market." F. 906. On its face, this is an internal Star email and not a complaint to a competitor about anything, much less about "cheating" on an agreement. However, Complaint Counsel apparently contends that it should nevertheless be inferred that Mr. McCutcheon complained to Sigma about its Project Pricing, which Complaint Counsel further infers is a complaint about "cheating" on an agreement, based on the timing of certain telephone calls placed on April 3, 2008 between a cell phone issued to Mr. McCutcheon of Star and a cell phone issued to Mr. Rybacki of Sigma. CCB at

131. Although there is no evidence in the record indicating what, if anything, Mr. McCutcheon and Mr. Rybacki discussed, Complaint Counsel urges that Sigma's "cheating" was "surely discussed at some point during these conversations." CCB at 131. Complaint Counsel's invitation to speculate and assume that there was a conversation between Mr. McCutcheon and Mr. Rybacki, in which Mr. McCutcheon "complained" to Mr. Rybacki about "cheating" on an unlawful agreement, is declined. Moreover, whatever this may imply about a possible agreement between Sigma and Star, the evidence does not refer to McWane or implicate any involvement by McWane, who is the Respondent in this case.

Complaint Counsel also refers to an internal Sigma email dated March 5, 2008, in which Mr. Jim Stohr, Sigma's Operations Manager in Houston, Texas, reported a discounted multiplier being offered by a "rogue" McWane sales person that Sigma had refused to match. CX 1726; *see* CCB at 27. Mr. Stohr asked: "Can Larry [Rybacki] make a call and see if this can be stopped?" CX 1726 at 001. This was followed by a Sigma manager responding: "Jim should not write that last sentence!" *Id.* Mr. Stohr was not called to testify at trial, nor was any deposition testimony from Mr. Stohr offered into evidence, to explain what he meant. There is insufficient evidence to support an inference that Mr. Stohr was complaining about McWane's cheating on an agreement to curtail Project Pricing. Complaint Counsel also fails to demonstrate that Mr. Rybacki made the requested call to McWane to "see if this can be stopped." Although Complaint Counsel cites a call three weeks later from a cell phone issued to Mr. Rybacki to a cell phone issued to Mr. Jansen on March 26, 2008, Mr. Rybacki testified that he has no idea what they spoke about, and Complaint Counsel does not point to any testimony from Mr. Jansen regarding the phone call. CCFF 1034; *see* CX 1621-A at 096, *in camera* (Rybacki telephone records); Rybacki, Tr. 3634. Mr. Stohr's unexplained request for a phone call, accompanied by an unexplained phone call occurring three weeks after Mr. Stohr's request, is not evidence that Mr. Rybacki complained to McWane about McWane's "cheating." To conclude that Mr. Rybacki in fact complained to McWane about McWane's "cheating" on an unlawful agreement, based on this evidence, would require improper speculation.

Complaint Counsel also cites a November 24, 2008 internal email from Mr. Pais of Sigma to his management staff, which included the language that "our two main competitors in Fittings seem to see SIGMA as 'leading' [the] recent price decline in the market." CCB at 132; *see* RX 116 at 001. Without citing any support from the record, Complaint Counsel then concludes that Mr. Pais' equivocal statement about "the state of mind of 'our two main competitors' can only be the result of complaints from McWane and Star to Sigma about its discounting practices." CCB at 132. However, the record shows that the Suppliers learned information regarding competitors principally from sales persons in the field and Distributors. F. 571-573, 869, 854. It will not be presumed that Mr. Pais' statement was based on complaints by McWane and Star to Sigma, as Complaint Counsel urges.

Complaint Counsel also relies upon two internal emails authored by Sigma's OEM (original equipment manufacturer) business manager, Mr. Mitchell Rona, who was Mr. Tatman's contact at Sigma for McWane's sales of Fittings to Sigma. CCB at 130, 132. In the first email, dated March 10, 2008, Mr. Rona forwarded to Mr. Pais and others at Sigma an email from Mr. Tatman regarding Sigma's purchase of "3"-8" [Fittings] from Tyler/Union." F. 922. Mr. Rona reported in his email a number of points from a conversation he had with Mr. Tatman, including that Mr. Tatman "said he hears that some of the new prices in the market are being compromised with deals. He hopes the market will improve and hopes [sic] do our part." F. 922. Mr. Tatman did not recall the conversation with Mr. Rona, and Mr. Rona recalled nothing more than that which he wrote in his internal email. F. 923, 925.

Mr. Tatman's statement, as reported by Mr. Rona in his March 10, 2008 internal email, while arguably suspicious, is vague and ambiguous, and far from compelling evidence of McWane "complaining" of a breached "agreement." Mr. Tatman's encouraging Sigma to "do [its] part" in helping the new published multipliers implemented in February 2008 to "stick" could be interpreted as a request that Sigma avoid or minimize Project Pricing. At the same time, however, expressing a "hope," which is the precise word used, that Sigma would "do [its] part" is inconsistent with the notion that Mr. Tatman or McWane had any

prior understanding with or commitment from Sigma that Sigma would curtail Project Pricing and, to this extent, is inconsistent with the inference of an existing agreement. The inference that the statement attributed to Mr. Tatman is a "complaint" about Sigma "breaching" an agreement is no more likely than the inference that there was no agreement between Sigma and McWane to refrain from Project Pricing.

Mr. Rona's second email, dated August 22, 2008, which was sent to the OEM5 management group at Sigma, with the subject line, "Short talk with Rick Tatman," stated that "Rick was upset by the numbers in Florida and California based on what he has seen from us and Star. He said the .26 and .30 respectively were available from us both without any second thought." F. 924. This statement attributed to Mr. Tatman by Mr. Rona is also troublesome because Mr. Tatman's apparent displeasure with the multipliers offered by Sigma and Star "without a second thought" could be interpreted as evidence that Mr. Tatman believed Sigma and Star had some obligation to refrain from offering those prices, which is indicative of a prior agreement. However, Mr. Tatman's reported statement also indicates that Sigma and Star, in offering the stated prices "without a second thought," did not perceive any restricted freedom of action with regard to their Project Pricing or perceive any commitment to McWane, or to each other, to refrain from Project Pricing, which is inconsistent with an agreement among McWane, Sigma, and Star, to curtail Project Pricing. Complaint Counsel's conspiracy inference drawn from this document is no more likely than the inference that there was no such agreement.

Complaint Counsel also notes that Mr. Rybacki of Sigma testified that, even though he did not remember seeing Mr. Rona's email regarding Mr. Tatman's being "upset," Mr. Rybacki "already knew that" and also recalled telling Mr. Rona: "Mr. Tatman needs to look in the mirror because pricing from McWane was a little inconsistent as well." CCB at 132, *see* Rybacki, Tr. 3577-3578. Complaint Counsel did not inquire of Mr. Rybacki as to what he specifically knew, or how he knew it, and it will not be presumed that Mr. Rybacki's knowledge was obtained from Mr. Tatman. It is at least as likely that Mr.

Rybacki obtained his information from sales persons in the field. *See* F. 572-573.

Out of all the evidence upon which Complaint Counsel relies, the statements attributed to Mr. Tatman by Mr. Rona in the two cited emails, above, stand out as perhaps the only evidence arguably implicating McWane in any improper pricing discussions. However, the full context of Mr. Tatman's statements described in Mr. Rona's emails is unknown. *See* F. 923, 925. Ultimately, however, Complaint Counsel has failed to persuade that the inference that Mr. Tatman was "complaining" about Sigma "breaching an agreement" with McWane and Star to curtail Project Pricing is more likely than not. Because Complaint Counsel has not demonstrated that either the Rona emails, or the other Sigma and Star documents upon which Complaint Counsel relies, constitute "complaints" between McWane and its competitors about "cheating" on an agreement to curtail Project Pricing, Complaint Counsel has failed to prove this "plus" factor.[20]

(g) Inter-firm communications

Complaint Counsel argues that "a high volume of communications among top level executives [is] a 'plus' factor . . . because this type of evidence provides 'proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan[.]'" CCB at 132-133 (quoting *Flat Glass*, 385 F.3d at 361). Complaint Counsel argues that the "record is overflowing with evidence that McWane, Sigma, and Star executives were communicating frequently with each other."

[20] In addition, the authority upon which Complaint Counsel relies to support the argument that a complaint about "low pricing" is a "plus" factor is inapplicable. Complaint Counsel cites to Areeda, ¶1419a, for the proposition that complaints to a competitor about low pricing are properly interpreted as an effort to induce a higher price. The cited paragraph deals with "solicitations" of an agreement, and not whether such a complaint is evidence of an existing agreement or a breach of an agreement, which is the relevant "plus" factor inquiry. *Flat Glass*, 385 F.3d at 360 (holding that "plus" factors are designed to serve as "proxies for direct evidence of an agreement" in a circumstantial case based upon parallel pricing conduct).

CCB at 133. The evidence upon which Complaint Counsel relies fails to support this assertion.

Complaint Counsel's "inter-firm communications" evidence largely consists of: (1) unexplained telephone calls placed between Sigma and Star (CCB at 141-143); (2) conversations between Sigma and Star allegedly regarding Fittings pricing (CCB at 133-135), including conversations that were denied by either Sigma or Star; and (3) purported communication between Sigma and McWane in 2009 allegedly for the purpose of Sigma "influencing" McWane to retract McWane's April 2009 announced price list restructuring (CCB at 135-138), which is not related to the asserted agreement to curtail Project Pricing that, according to Complaint Counsel, "fell apart" by the end of 2008. Regardless of what the foregoing communications may imply about the conduct of Sigma and/or Star, these communications do not implicate McWane, the Respondent in this case, in the alleged agreement to curtail Project Pricing.[21] Those communications that do involve McWane and that took place during the relevant time period, further discussed below, do not constitute evidence that McWane, Sigma, and Star "got together and exchanged assurances" on an agreement to curtail Project Pricing, as argued by Complaint Counsel.

Complaint Counsel first points to two meetings between Mr. Page of McWane and Mr. Pais of Sigma in September 2007 and December 2007. CCB at 140. Complaint Counsel relies on Mr. Pais' statements in an October 19, 2007 internal email to show what was discussed at Mr. Pais' September 2007 meeting with Mr. Page. *See* CX 2118. According to the email, the discussion included "changes that [Mr. Page] has initiated to respond to the weak market conditions" which were "publicly known in the

[21] For example, Complaint Counsel reasserts an alleged meeting in March 2008 between Mr. Pais of Sigma and Mr. McCutcheon of Star, at which, according to Mr. McCutcheon's investigational hearing testimony, Mr. Pais told Mr. McCutcheon that "Sigma and Star should agree to stay within two or three points of McWane" so that McWane would "treat" Sigma and Star "better." CCB at 134, *see* CCFF 1036-1037, citing CX 2538 (McCutcheon, IHT (Vol. 2) at 227), *in camera*. As noted in Section III.D.2.b.iii.(c), *supra*, Mr. Pais denies the statements attributed to him, and in any event, the conversation does not indicate any agreement involving McWane.

AWWA industry," including that Mr. Green had been removed as part of a restructuring at McWane "to be more efficient and manage their overall capacity more effectively" and that Mr. Green would be replaced by Mr. Tatman. F. 601. None of the foregoing indicates any discussion about Fittings prices, Project Pricing, or an agreement to curtail Project Pricing. Complaint Counsel also highlights a statement by Mr. Pais in a subsequent internal Sigma email by Mr. Pais regarding his September 2007 meeting with Mr. Page, that Mr. Page was "disappointed at our failure to get a better landscape." F. 601. Even if Mr. Pais' perception of Mr. Page's "disappointment" in the "landscape" constitutes evidence of Mr. Page's state of mind, the statement is vague and ambiguous and does not refer to Fittings, Fittings prices, Project Pricing, or any agreement to curtail Project Pricing. As to a meeting between Mr. Pais and Mr. Page on December 3, 2007, as noted in Section III.D.2.b.iii.(c), *supra*, Mr. Page and Mr. Pais both testified that their meeting concerned international opportunities for McWane. F. 608. Mr. Pais testified that they discussed Sigma potentially supplying McWane with metric sized fittings that were needed for international markets and that McWane did not have. F. 605. Mr. Pais and Mr. Page denied discussing domestic Fittings; prices being charged in the market place; pricing discipline; McWane's or Sigma's costs; or ways they could work together in the marketplace in this regard. F. 608.[22]

Complaint Counsel next points to four telephone calls placed between a cell phone issued to Mr. Tatman of McWane and a cell phone issued to Mr. Rybacki of Sigma in late December 2007 and early January 2008, in the same general time frame that Mr. Tatman was working on McWane's pricing strategy for 2008. CCB at 142. As noted in Section III.D.2.b.iii.(c), *supra*, however, the evidence fails to show what was discussed, if anything, in these cell phone calls and it will not be assumed that Mr. Rybacki and Mr. Tatman discussed Fittings pricing, Project Pricing, or an agreement to curtail Project Pricing. F. 623-624; 639-640.

[22] Complaint Counsel alludes to additional meetings between Mr. Page of McWane and Mr. Pais of Sigma "between August 2007 and May 2009" but cites to a range of proposed findings, including proposed findings unrelated to meetings between Mr. Page and Mr. Pais. Moreover, Complaint Counsel's cited proposed findings state nothing about the substance of these meetings. CCB at 153, citing CCFF 788-804.

Similarly, Counsel Counsel points to five telephone calls placed between a cell phone issued to Mr. Tatman and a cell phone issued to Mr. Rybacki in April 2008. CCB at 142; *see also* CCB at 143 (four minute phone call to a number at McWane occurring May 16, 2008). Again, however, there is no evidence showing what Mr. Tatman and Mr. Rybacki discussed, and it will not be presumed that they discussed Fittings pricing, Project Pricing or an agreement to curtail Project Pricing. F. 790-791, 795, 826. Moreover, it is not immediately apparent that the telephone calls in April or May 2008 even demonstrate an opportunity to agree to curtail Project Pricing, since, under Complaint Counsel's theory, that agreement was already formed through the conduct of McWane, Sigma, and Star in January and February 2008.

Finally, Complaint Counsel relies on evidence that in late 2007 and early 2008, McWane and Sigma negotiated the sale of certain Fittings by McWane to Sigma. According to Complaint Counsel, the evidence shows that the sale was made at a low price, and that this communicated to Sigma that McWane had a "cost advantage." CCB at 138-140. Respondent contends that the evidence shows that the sale of Fittings to Sigma by McWane was in McWane's competitive interest, because McWane had excess capacity of the types of Fittings sold and that, because the price was above its variable costs, the tonnage would absorb a portion of the fixed plant costs, and thereby make a positive impact to McWane's "bottom line." RRCCFF 1074-1087. Complaint Counsel fails to persuasively explain or prove how an arms-length buy-sell agreement evinces an agreement to curtail Project Pricing merely because the negotiated price may have indirectly communicated McWane's position as the low-cost Fittings producer.

In conclusion, the evidence shows some communications between McWane and Sigma during the relevant time period. The evidence fails to show that McWane and Sigma discussed Fittings pricing, Project Pricing, or an agreement to curtail Project Pricing. In these circumstances, a further inference that these communications constitute evidence that McWane, Sigma, and Star, "got together and exchanged assurances" on an agreement to curtail Project Pricing is unwarranted and unjustified, and is rejected. At best, Complaint Counsel has proven an *opportunity*

to conspire; however, "communications between competitors do not permit an inference of an agreement to fix prices unless 'those communications rise to the level of an agreement, tacit or otherwise.'" *Baby Food*, 166 F.3d at 126; *see Blomkest Fertilizer*, 203 F.3d at 1036 (holding that opportunity to conspire is not necessarily probative evidence of conspiracy). "[I]t remains the plaintiff's burden to prove that the defendant succumbed to temptation and conspired. It is not enough to point out the temptation and ask that the defendants bear the onerous, if not impossible, burden of proving the negative – that no conspiracy occurred." Areeda, ¶ 1417b at 115.

c. Summary and conclusion as to asserted agreement to curtail Project Pricing

The totality of the evidence, given due weight and viewed as a whole, fails to demonstrate that McWane, together with Sigma and Star, had an agreement to curtail Project Pricing in the Fittings market, as asserted by Complaint Counsel. As analyzed in detail above, Complaint Counsel's evidence of parallel conduct consists principally of arguably similar expressed "intentions" to stop (McWane and Star) or minimize (Sigma) Project Pricing, followed by Star putting systems in place to authorize Project Pricing only when necessary to beat a competing Project Price. Complaint Counsel cites no case in which this sort of pricing-related conduct has constituted "parallel pricing conduct" probative of a conspiracy. Moreover, the greater weight of the evidence fails to show that McWane, Sigma, and Star, engaged in parallel conduct by curtailing Project Pricing, as claimed by Complaint Counsel. Evidence that, according to McWane's pricing protection log, McWane quoted a Project Price "to match" Sigma or Star less frequently in certain periods of 2008 compared to later periods in 2008 and 2009 fails to persuasively demonstrate that McWane "curtailed" Project Pricing beginning in 2008. Moreover, this evidence does not outweigh other evidence that is inconsistent with the inference of an agreement to curtail Project Pricing, including the reliable, persuasive, expert opinion of Dr. Normann, based upon the actual price data kept by McWane, Sigma, and Star from 2007 through 2010, indicating that there was no parallel curtailment of Project Pricing in 2008 among McWane, Sigma, and Star.

Complaint Counsel has also failed to prove the existence of "plus" factors indicating that the asserted parallel conduct was the result of an agreement, rather than independent, or merely interdependent, conduct, as analyzed above. In summary, Complaint Counsel's inferences of an agreement depend largely on interpreting McWane's January 11, 2008 Customer Letter as a "message" to Sigma and Star that if they curtailed Project Pricing, which McWane's Customer Letter indicated McWane was, in effect, doing, then McWane would support a price increase in the future; however, the evidence fails to show that this message was conveyed by McWane to Sigma and Star by the January 11, 2008 Customer Letter, or by any other claimed communications by McWane to Sigma or Star. Evidence that McWane took into account how Sigma and Star might react to McWane's January 11, 2008 Customer Letter, when making their own pricing decisions, reflects only recognized pricing interdependence in the Fittings market, which is not illegal. "How does one order a firm to set its prices *without regard* to the likely reactions of its competitors?" *Clamp-All Corp.*, 851 F.2d at 484 (holding that individual decisions do not constitute an unlawful agreement even when the decisions rest upon a belief that competitors will do the same).

In addition, the evidence fails to demonstrate that any decisions by Sigma and Star with respect to Project Pricing were made because of any understanding with McWane, or perceived commitment to or from McWane; or that any Supplier felt a restricted freedom of action with respect to offering Project Pricing when necessary to compete. These are the evidentiary hallmarks for proving the required "actual, manifest agreement," especially in an oligopolistic market characterized by pricing interdependence, such as the Fittings market. *See Twombly*, 550 U.S. at 557 n.4 (quoting with approval commentator's example of "conduct [that] indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement" as conduct allegations that would state a claim under Section 1); *Flat Glass*, 385 F.3d at 361; Areeda, ¶¶ 1410b, 1410c. The conduct of Sigma and Star in response to McWane's January 11, 2008 Customer Letter is at least as consistent with oligopolistic, "follow the leader" behavior, which is not illegal, as it is with an unlawful agreement. "A firm in a concentrated

industry typically has reason to decide (individually) to copy an industry leader. After all, a higher-than-leader's price might lead a customer to buy elsewhere, while a lower-than-leader's price might simply lead competitors to match the lower price, reducing profits for all." *Clamp-All Corp.*, 851 F.2d at 484; *accord Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 53 (7th Cir. 1992); *see Florida Cement & Concrete Antitrust Litig.*, 746 F. Supp. 2d at 1310 & n.14 (noting that price following is natural and rational in a concentrated market).

As explained above, the internal documents upon which Complaint Counsel relies as evidence of an agreement among McWane, Sigma, and Star either fail to implicate McWane in the purported agreement; require multiple, unsupported inferences to implicate McWane in an agreement to curtail Project Pricing; are inconsistent with a conclusion of restricted freedom, or a mutual commitment or understanding among the Suppliers with respect to Project Pricing; and/or are at least as consistent with independent, or merely interdependent, conduct as with an agreement. Moreover, much of the circumstantial "plus" factor evidence upon which Complaint Counsel relies requires that the underlying agreement first be presumed in order for the evidence to be probative of an agreement, which does not satisfy Complaint Counsel's burden of proof.

Further weighing against a finding of an agreement to curtail Project Pricing is sworn testimony from the Suppliers that they made pricing decisions independently and did not discuss and agree to stop or curtail Project Pricing. *E.g.*, Tatman, Tr. 1005-1006, *in camera*; Rybacki, Tr. 3661; Pais, Tr. 2130-2131; McCutcheon, Tr. 2524-2525, 2554, 2689-2690. This is direct evidence contrary to the asserted agreement to curtail Project Pricing and is entitled to weight. Complaint Counsel urges that these denials be dismissed as "self-serving"; however, "[a] plaintiff cannot make his case just by asking the [fact finder] to disbelieve the defendant's witnesses . . . ." *High Fructose Corn Syrup*, 293 F.3d at 655. "[M]ere disbelief [does] not rise to the level of positive proof of agreement" sufficient to meet Complaint Counsel's burden of proof. *Venzie*, 521 F.2d at 1313; *Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879, 894 (3d Cir. 1981); *accord Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1014 (3d Cir. 1994) (noting that mere disbelief of contrary

testimony does not prove agreement). In addition, as noted above, Respondent presented reliable and persuasive expert opinion, based on pricing data, that the Suppliers did not engage in a parallel curtailment of Project Pricing.

As the Supreme Court noted in *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), mistaken inferences that arise from circumstantial evidence are costly, because they chill competitive conduct – "the very conduct the antitrust laws are designed to protect." *Id*. at 594 (citing *Monsanto*, 465 U.S. at 763-64). "'[We] must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition.'"). *Id*. (quoting *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983)). Where the evidence points equally to two or more inferences, an objective fact finder would not decide the inference in favor of the party with the burden of proof, in this instance, the government. *See Venture Technology*, 685 F.2d at 48 (holding that where "taken as a whole, the evidence points with at least as much force toward unilateral actions . . . as toward conspiracy," a fact finder cannot reach the latter conclusion without engaging in "impermissible speculation").

Having fully reviewed and weighed the totality of the evidence, Complaint Counsel has failed to meet its burden of proving that it is more likely than not that McWane, together with Sigma and Star, had an agreement to curtail Project Pricing. At best, the evidence shows interdependent or consciously parallel conduct, unaided by any agreement, which is not illegal. *Brooke Group*, 509 U.S. at 227; *Twombly*, 550 U.S. at 557 & n.4.[23]

[23] Complaint Counsel asserts that proof of parallel conduct and at least one "plus" factor entitles it to a "presumption" of an unlawful agreement. CCRB at 31, citing *Baby Food*, 166 F.3d at 122. As shown above, Complaint Counsel has failed to prove parallel conduct in curtailing Project Pricing, and has failed to prove the existence of any "plus" factors. Even if Complaint Counsel did meet this minimal burden, Respondent produced ample credible and probative evidence that McWane, Sigma, and Star, acted independently, even though with consciousness of how their competitors may react, sufficient to rebut a presumption of conspiracy. Unlike *Baby Food*, in which the plaintiffs needed only to produce sufficient evidence to create a dispute of fact sufficient to defeat summary judgment, this case requires a weighing of all the evidence, and a determination of whether or not Complaint Counsel has met its burden of proving that a conspiracy is more likely than not, which burden remains on

The analysis now turns to Complaint Counsel's claimed "episode two" of the alleged price fixing conspiracy, an asserted agreement among McWane, Sigma, and Star to exchange DIFRA tons-shipped data in exchange for a price increase by McWane.

3. Alleged agreement by McWane to increase prices only if Sigma and Star submit DIFRA tons-shipped data (Complaint Counsel's "episode two")

Complaint Counsel argues that McWane's May 7, 2008 Customer Letter (F. 809) communicated an "offer" from McWane to Sigma and Star that McWane would increase prices in exchange for Star and Sigma submitting their tons-shipped data to DIFRA's accountants for aggregation into the DIFRA tons-shipped data report expected on May 20, 2008.[24] Complaint Counsel further argues that Sigma and Star understood and "accepted" the "offer" by their conduct in thereafter submitting their tons-shipped data. CCB at 148-150. Complaint Counsel further characterizes this implied agreement as an exchange of assurances, or a *quid pro quo*, whereby McWane traded its support for a price increase in exchange for Sigma and Star submitting their tons-shipped data, when McWane "rewarded" them with a price increase in June 2008. CCB at 148-150, 156-157. To prove this theory, Complaint Counsel relies principally on inferences drawn from the text of McWane's May 7, 2008

Complaint Counsel at all times. Moreover, even if Complaint Counsel proved parallel curtailment of Project Pricing and one or more plus factors, this would not mandate a finding of an unlawful agreement. "[T]he court may still conclude, based upon the evidence before it, that the defendants acted independently of one another, and not in violation of antitrust laws." *Baby Food*, 166 F.3d at 122 (quoting *Balaklaw v. Lovell*, 822 F. Supp. 892 (N.D.N.Y. 1993)).

[24] As summarized in Section III.D.2.b.iii.(d), the Suppliers were members of DIFRA, a trade association. F. 8. The members agreed to participate in a data reporting system, pursuant to which the members would provide the amount of Fittings tons shipped in the previous month, separated by relevant product categories, to accountants who would then aggregate all the member data and return a report. F. 715, 718, 732-734. The aggregated data that was reported enabled a supplier to see the size of the total market, and was a reference point for determining a supplier's own market share. F. 756, 758, 807.

Customer Letter and a June 5, 2008 email from Mr. McCutcheon of Star to DIFRA's President, Mr. Brakefield of Sigma. [25]

Respondent asserts that there was no agreement among McWane, Sigma, and Star, and that the evidence fails to support Complaint Counsel's theory.

a. Background – Sigma's "big, bold" price increase

The evidence shows that in a customer letter dated April 24, 2008, Sigma notified its customers of an increase in published multipliers of "up to 10 multiplier points," effective May 19, 2008, citing "rising costs in transportation, labor, medical benefits, raw materials, etc." ("April 24, 2008 Customer Letter"). F. 797. This amounted to a price increase of approximately 25 percent to as much as 40 percent over Sigma's then-published multipliers, depending on the region. F. 796, 798, 804. Mr. Pais believed that Sigma's attempt to lead a price increase of this magnitude, which he proposed internally on April 11, 2008, was a "big, bold, move" by Sigma that was necessary to boost its margins, and was one of the biggest one-time increases Sigma had ever had. F. 792, 796. Sigma did not know whether or not Star and McWane would follow Sigma's lead, although Sigma hoped they would. F. 794, 796, 801.

Star learned of Sigma's April 24, 2008 Customer Letter on April 25, 2008. F. 802. On May 7, 2008, Star sent a letter to its customers announcing a multiplier increase of a similar

[25] Complaint Counsel also constructs a complex web of inferences, based largely on the timing of the Suppliers' various pricing moves between mid-April and mid-June 2008 in relation to various DIFRA-related events. For example, Complaint Counsel contends that Sigma sent a price increase letter to its customers on April 25, 2008 because it was the same day as the April 25, 2008 DIFRA conference call (F. 732) and that Sigma and Star must have "misunderstood" that the "*quid pro quo*" required actual submission of data, not just an agreement to submit. *See* CCB at 150-154. Complaint Counsel's inferences and the evidence upon which it relies to draw these supposed connections have all been thoroughly evaluated and considered and they are unpersuasive and/or immaterial to the issue of whether McWane, Sigma, and Star entered into a pricing "*quid pro quo*" involving Sigma's and Star's DIFRA data. Accordingly, the evidence is not probative of the alleged *quid pro quo*, contrary to the argument of Complaint Counsel.

magnitude to that announced by Sigma, effective May 19, 2008. F. 803.

McWane also learned of Sigma's April 24, 2008 Customer Letter on April 25, 2008. F. 804. On May 5, 2008, Mr. Tatman forwarded internally to Mr. McCullough and Mr. Walton, Mr. Tatman's proposal for new McWane multipliers, which reflected an approximate increase of 8 to 12 percent. F. 805. According to Mr. Tatman, Mr. McCullough believed that it was important to first review the DIFRA tons-shipped data report, which was expected by May 20, 2008, before McWane took any price actions. F. 733, 735, 806. Mr. McCullough believed the tons-shipped data would be a more accurate reference point for assessing McWane's market share than other reference points, such as statistics from the Ductile Iron Pipe Research Association ("DIPRA") and the Valve Manufacturers Association ("VMA"). F. 807. Although following Sigma's large price increase could help provide higher prices for McWane, Mr. Tatman recommended against following Sigma, regardless of what the DIFRA data showed. F. 805, 830. Mr. Tatman believed, as he did with respect to Sigma's large list price increase proposed in October 2007, that such a large price increase would not "stick" and would lead to price "instability," which was contrary to McWane's competitive strategy of publishing multipliers that were closer to the true competitive price level in the marketplace. F. 804-805, 830. Accordingly, Mr. Tatman proposed that McWane publish a smaller multiplier increase in the range of 8% to 12%. F. 805.

b. McWane's May 7, 2008 Customer Letter

In accordance with Mr. McCullough's instructions, McWane determined to wait for the DIFRA tons-shipped data report before issuing any price increases. F. 806. Thus, on May 7, 2008, McWane sent the following customer letter, which stated in full:

> Dear Valued Customer,
>
> You have likely heard or read about continued increases in factors of production impacting both domestic and global operations. The foundry industry has been hit particularly

> hard with sharp increases in scrap iron, alloys and transportation costs.
>
> While the financial impact to our business is real, we also recognize there are restrictions as to the level and timing at which pricing can be accommodated in the market.
>
> We are sending this general communication to our waterworks distribution customers to more clearly define our intention in regards to future pricing actions.
>
> Before announcing any price actions, we carefully analyze all factors including: domestic and global inflation, market and competitive conditions within each region, as well as performance against our own internal metrics. We anticipate being able to complete our analysis by the end of May. At that point, we will send out letters to each specific region detailing changes, if any, to our current pricing policy.
>
> For planning purposes only, we expect for regions with a change that multipliers will increase in the range of 6% up to 16% effective June 16th.

F. 809 ("May 7, 2008 Customer Letter"). The plain language of the May 7, 2008 Customer Letter does not show the "offer" regarding a price increase for DIFRA data that Complaint Counsel asserts.

Complaint Counsel argues that McWane's alleged offer to increase prices in exchange for submittal of DIFRA data should be inferred from the language in the third paragraph, quoted above, that: "Before announcing any price actions, we carefully analyze all factors including: domestic and global inflation, market and competitive conditions within each region, as well as performance against our own internal metrics. We anticipate being able to complete our analysis by the end of May." (Hereafter referred to at times as the "factors" language). To support its requested inference, Complaint Counsel argues that DIFRA members were aware that the DIFRA report was expected by May 20; McWane's May 7, 2008 Customer Letter did not announce a price increase (only a range for planning purposes);

and points to testimony that the "factors" language did not communicate something "meaningful" or "helpful" to distributors. CCB at 154-155 & n.551, citing, *e.g.*, Sheley, Tr. 3424-3425, 3441-3442; CX 2516 (Sheley, Dep. at 153); *see also* CX 2544 (Coryn, Dep. at 125); CX 2510 (Groeniger, Dep. at 233-234), *in camera*; CX 2514 (Webb, Dep. at 105) CX 2504 (Thees, Dep. at 96). These assertions, even if true, do not warrant accepting the further inference that the factors language in fact communicated an offer to Sigma and Star: (1) that McWane would follow Sigma's price increase, or even increase prices at all, and/or (2) that McWane wanted to review the DIFRA tons-shipped data for any reason other than as a reference point for assessing McWane's own market share, which is not unlawful. The DIFRA tons-shipped data reporting system did not disclose the market share or prices of any member, but disclosed only aggregated, tons-shipped data. F. 733-734, 745-748, 756, 758.

Complaint Counsel's inference that the "factors" language constituted an offer to trade a price increase in exchange for Sigma and Star submitting their tons-shipped data is against the greater weight of the evidence. The evidence shows that, as stated in the letter, Mr. Tatman did plan to review various "factors" before announcing McWane's price action. F. 812. In addition to the anticipated May 2008 DIFRA report, Mr. Tatman wanted to review and analyze McWane's monthly financial data for April 2008, as set forth in McWane's monthly financial reports known as "blue books," which are prepared by McWane's accountants on a monthly basis for management purposes. F. 812. Mr. Tatman expected to receive this report by mid-May and be able to prepare a spreadsheet analysis by the end of May. F. 812. Also, Mr. Tatman wanted to review all of the competitive inputs collected from the field. F. 812. In an email transmitting the May 7, 2008 Customer Letter to one of its customers, Mr. Tatman explained McWane's position consistently with the language of the customer letter, stating: "Given the market environment, we feel any pricing action warrants careful consideration and analysis. We simply needed more time beyond the competitive May 19th [effective] date [stated by Sigma] to feel comfortable that we properly considered all factors." F. 813. While Mr. Tatman acknowledged that it was unusual to send out a letter that stated intentions as to a future price increase, but not the actual price increase, he explained: "It's not too often that you have to respond

to a competitor putting out a 40 percent price increase, so these are unusual times." F. 810. Mr. Tatman denied that the point of McWane's May 7, 2008 Customer Letter was to communicate to Sigma and Star that they needed to submit their DIFRA data. F. 811.

Complaint Counsel contends that the May 7, 2008 Customer Letter was a "message" to Sigma and Star that McWane was going to wait for the DIFRA data. CCB at 154-155; *see also*, CCFF 1192, 1201. Complaint Counsel quotes from a May 23 and May 24, 2008 internal email exchange among Mr. Tatman, Mr. Walton, and Mr. McCullough, in which Mr. Tatman reported that according to DIFRA's accountants, two of the four DIFRA members had not yet submitted their tons-shipped data, in response to which Mr. McCullough reiterated that he "still believe[d] we stand pat until market share info is available." CCFF 1229; *see* F. 829. Mr. Tatman concurred stating: "Although somewhat painful to the bottom [line] in the short term, that would re[i]nforce the message we've been trying to drill in which when successful will pay long term dividends." F. 829. Complaint Counsel fails to persuasively explain how the message that McWane was waiting for the DIFRA report to finalize its price decision, even if conveyed to Sigma and Star, warrants the further inference of an offer of a "*quid pro quo*" of a price increase. In any event, Mr. Tatman denied that the "message" was a message to DIFRA members that they must get their DIFRA data in before McWane would announce a price increase. F. 830. Mr. Tatman explained further:

> If someone announced a 40 percent price increase and I follow it, I'm going to get a lot of price in the short term. That's going to be a significant benefit in the short term to my bottom line. But do I believe that is in my best interest of my longer-term goal, which is gaining volume and gaining share? No.
>
> So if I have a competitor that announces a 40 percent price increase, if I want to put money in my pocket for the next three months or the next six months, I'm going to jump on that.

> So that is painful to the bottom line, on a relative basis, that I'm not going to jump on and support a 40 percent price increase because you're going to get some traction off of that. It's not like you're -- you might not get 38-39 percent, but you're going to get some traction on that.
>
> And what I'm saying here is consistent with what we said all along, was we were not going to lose visibility of where the competitive marketplace is, and our primary focus at this point in time is volume [and], share.

F. 830.

For all the foregoing reasons, the inference that the language in McWane's May 7, 2008 Customer Letter was a legitimate effort to explain its intentions to its customers is at least as likely as the inference that McWane was communicating a "*quid pro quo*" offer to Sigma and Star of a price increase in exchange for Sigma's and Star's submitting their tons-shipped data for the DIFRA data report. Accordingly, Complaint Counsel has failed to prove that the May 7, 2008 Customer Letter was such an offer.[26]

c. Sigma's and Star's interpretation of McWane's May 7, 2008 Customer Letter

The evidence also fails to show that Sigma understood McWane's May 7, 2008 Customer Letter to communicate anything with regard to DIFRA, much less an offer of a price increase contingent on submission of DIFRA data, as argued by Complaint Counsel.

Upon reviewing McWane's May 7, 2008 Customer Letter, Mr. Rybacki of Sigma thought the language regarding McWane's "carefully analyzing all factors including: domestic and global inflation, market and competitive conditions within each region,

[26] Complaint Counsel also asserts that the "factors" language had not been used in a McWane customer letter before or since. *See* CCFF 1187. However, McWane's June 17, 2008 Customer Letter, discussed *infra*, included very similar "factors" language, noting that "we will continue to [assess] market & competitive conditions in addition to our internal operating metrics and advise you if additional actions will be required before year end." F. 841.

as well as performance against our own internal metrics" was notable because the language looked "a little quirky for [the signer of the Customer Letter, McWane National Sales Manager] Jerry Jansen" and not Mr. Jansen's "style." F. 820. Mr. Rybacki had "no idea" what it meant. F. 820. Moreover, Mr. Rybacki did not interpret McWane's May 7, 2008 Customer Letter to be promising a price increase, finding the Customer Letter ambivalent in this regard. F. 821. When Mr. Pais of Sigma was questioned at his deposition whether he understood that McWane was not going to increase prices on Fittings until all of the DIFRA members submitted their data and DIFRA issued the report, or that McWane was waiting to increase prices until after it had the DIFRA data and the DIFRA report, Mr. Pais responded: "It is so farfetched and ridiculous, what can I say? No, no." F. 822.

Mr. Minamyer of Star received a copy of McWane's May 7, 2008 Customer Letter, via its customer HD Supply, on the afternoon of May 7, 2008. F. 815. Mr. McCutcheon of Star found the wording of McWane's May 7, 2008 Customer Letter to be "odd," "arrogant," and "humorous." F. 817. Moreover, regarding the above quoted third paragraph containing the "factors" language, Mr. McCutcheon testified at the investigational hearing in this matter: "I don't know why [McWane] did it. I mean, it looks like a -- I took it as being a minor poke at us, because we weren't going to do careful analyzing -- we did our own analysis and we quickly determined that we were getting ready to lose money if we didn't take an increase. . . . Other than an attempt to try to look more sophisticated . . . I don't know." F. 817. In addition, when Mr. McCutcheon was questioned about the language in his deposition prior to the hearing in this case, he specifically testified that he had not seen any connection between McWane's Customer Letter and DIFRA, stating: "Absolutely none. As a matter of fact, the first time that . . . I've even ever heard that was today. Of linking that to [the need to submit Star's] DIFRA [data]? . . . No, sir." F. 818.

To show that Star "understood" McWane's "offer" that was allegedly conveyed in McWane's May 7, 2008 Customer Letter, Complaint Counsel relies on the fact that on the same day that McWane sent the Customer Letter, Mr. McCutcheon responded to

an email regarding DIFRA. CCB at 155-156; *see* F. 735. The evidence shows that on April 25, 2008, DIFRA's attorney, Mr. Long, sent an email to the DIFRA members summarizing the results of their conference call of the same day, including the agreed format for tons-shipped data reporting and the agreed date of May 15 for the members' first submissions. F. 734. On May 5, Mr. Long sent an email to the DIFRA members noting that he had not heard back from the DIFRA members in response to his April. 25, 2008 email summary, and asked them to confirm their concurrence with the agreed procedures and parameters he outlined in his April 25, 2008 email. F. 735. McWane, Sigma, and Star each replied to the May 5 email, confirming their prior agreement, but because Star replied on May 7, instead of on May 5, as did Sigma and McWane, F. 735, Complaint Counsel infers that this is evidence of Star's "understanding" that McWane was requiring Star to submit its tons-shipped data as a condition to McWane's issuing a price increase. CCB at 33, 155-156. The far more likely inference is that Mr. McCutcheon, in the ordinary course of business, was responding to a recent email, which had specifically requested a response.

Furthermore, Complaint Counsel's assertion that Star was "reluctant" to participate in the DIFRA tons-shipped reporting system in May 2008 and needed to be "induced" to actually provide the data by McWane's "offer" of a price increase, CCB at 33, 155, is not supported by the greater weight of the evidence. Star had already agreed to join DIFRA by January 2007, having overcome some initial reluctance, and Star had already agreed on April 25, 2008 to submit its tons-shipped data in accordance with the agreed DIFRA tons-shipped data reporting system. F. 712, 714-715, 727, 732-734. A Star employee was tasked with assembling the data. F. 816, 828. On May 16, 2008, Mr. McCutcheon of Star sent an email to Mr. Brakefield of Sigma, DIFRA's President, affirming that Star would be submitting its data and apologizing for the delay. F. 827. Mr. McCutcheon denied that there was a delay in submitting Star's tons-shipped data due to a "reluctance" to participate in the DIFRA tons-shipped data reporting system, stating: "Once we decided that Star was going to join, I had every intention of being a member. I do remember it taking us a while to figure out how to do it, running it back through our purchasing people. I know that took a couple of weeks, easy. F. 837.

Star submitted its ton-shipped data to DIFRA's accounting firm on June 5, 2008, and at the same time advised Mr. Brakefield of Sigma, DIFRA's President, that the submission had been made. F. 834-835. Complaint Counsel argues that Mr. McCutcheon demonstrated Star's understanding and "acceptance" of McWane's "offer" to raise prices in exchange for Star's submission of tons-shipped data, because Mr. McCutcheon's email to Mr. Brakefield quoted McWane's May 7, 2008 Customer Letter, as follows:

> Good morning Mr. President. I just sent our info in. Sorry it took so long, but we were "carefully analyzing all factors including: domestic and global inflation, market and competitive conditions within each region, as well as performance against our own internal metrics." (Does that look familiar?).

F. 835; *see* CCFF 1222-1225; CCB at 156.

According to Complaint Counsel, it should be inferred from Mr. McCutcheon's repetition of the "factors" language in connection with Star's submission of its tons-shipped data that Mr. McCutcheon was aware that "the price increase that was the subject of McWane's May 7, 2008 Customer Letter was contingent upon Star and Sigma participating in the DIFRA information exchange." CCFF 1225. The greater weight of the evidence fails to support this inference. The evidence shows that Mr. McCutcheon thought McWane's "factors" language was arrogant and was "poking" at Star for Star's attempting to lead a price increase with Sigma, and not using a "careful analysis." F. 817. Mr. McCutcheon testified that he quoted the language to "poke fun" at McWane. F. 836. This is a logical and credible explanation for Mr. McCutcheon's statement. Complaint Counsel's inference from Mr. McCutcheon's email is not more likely than Mr. McCutcheon's explanation.

d. McWane's June 17, 2008 Customer Letter

McWane and the other DIFRA members received the first DIFRA aggregated tons-shipped report from DIFRA's accounting

firm at 2:41 p.m. on June 17, 2008. F. 838. As of May 29, 2008, more than two weeks before receiving the DIFRA tons-shipped report, Mr. Tatman had already concluded, based on his review of other reference points, that McWane had lost market share. F. 832. Mr. Tatman had already prepared a customer letter announcing a weighted average increase in published multipliers for blended Fittings of approximately 8 percent. F. 832. Upon receiving the DIFRA report, Mr. Tatman conducted an analysis to determine McWane's market share using the DIFRA data. F. 839. Mr. Tatman spent approximately 40 minutes reviewing the DIFRA tons-shipped data, comparing it to other reference points for assessing McWane's market share that he had already collected, such as McWane sales data, and DIPRA and VMA statistics, and prepared a spreadsheet of relevant data points. F. 839. Mr. Tatman transmitted the DIFRA report and his spreadsheet analysis internally to Mr. McCullough, Mr. Walton, and Mr. Jansen. F. 839. He notified them, among other things, that McWane's share loss for 2007 and through April 2008 was "actually larger than what [he] expected." F. 839. Accordingly, in the early evening of June 17, 2008, approximately four hours after receiving the DIFRA aggregated tons-shipped report from DIFRA's accountants, McWane sent a customer letter dated June 17, 2008, notifying McWane's customers of an increase in Fittings multipliers effective July 14, 2008, and stating that the weighted average increase on blended Fittings and accessories would be "approximately 8%." F. 840 ("June 17, 2008 Customer Letter"). This was the lower range of the 8 to 12 percent increase Mr. Tatman originally considered, in order to account for the lower market share numbers. F. 777, 805. Thereafter, Sigma and Star rescinded their previously announced high multiplier increases and instead followed McWane's lower multiplier increase. F. 843-844.

Complaint Counsel argues that this price increase was McWane's "reward" to Sigma and Star for submitting their DIFRA data and represents McWane upholding its part of the bargain. CCB at 156-157. The strained inferences required to accept this argument are rejected. First, the notion that an 8 percent increase from McWane is a "reward," when Sigma and Star were seeking an increase as high as 40 percent is not logical or persuasive. Complaint Counsel further argues that McWane's rejection of Sigma's and Star's large price increase, in favor of a

smaller increase, was all part of Mr. Tatman's "plan" to support "small" and "staged" increases. CCB at 157; CCRRFF 135; *see also* CCB at 119; CCRRFF 100 (same argument regarding McWane's January 2008 rejection of Sigma's and Star's large list price increase, announced in October and November 2007, in favor of smaller, 8% effective multiplier increase). McWane's acting consistently with its own price strategy does not imply an agreement with Sigma and Star, and the inference that Mr. Tatman's December 25, 2007 PowerPoint Presentation was a "plan" to conspire with Sigma and Star has already been thoroughly reviewed and rejected as unsupported by the greater weight of the evidence. *See* III.D.2.b.iii.(c), *supra*.

In addition, Complaint Counsel attaches undue significance to the facts that McWane sent its June 17, 2008 Customer Letter within just a few hours of receiving the aggregated tons-shipped data report from DIFRA's accountants, and that McWane had already drafted a customer letter announcing the increase. As previously noted, McWane had already internally determined that it would not follow Sigma's "big, bold" price increase, regardless of what the DIFRA data showed, and Mr. Tatman had already recommended a price increase in the range of 8 to 12 percent as better serving McWane's competitive goals. F. 805, 829-830. At the time McWane received the June 17, 2008 DIFRA report, Mr. Tatman had already reviewed many sources of data that indicated that McWane was losing market share; had already concluded that a price increase in the amount of 8 percent was advisable; and had already drafted a customer letter pending review of the DIFRA data. F. 805, 807, 832. In this context, there is nothing suspicious or conspiratorial in the fact that it did not take an extended period to compile a spreadsheet, confer internally, and send the June 17, 2008 Customer Letter. F. 839.

For all the foregoing reasons, Complaint Counsel has failed to prove that McWane's May 7, 2008 Customer Letter was an offer to trade a price increase for Sigma's and Star's submitting their tons-shipped data for inclusion in the DIFRA report; that Sigma and Star understood the Customer Letter to be making such an offer; that Sigma and Star were "accepting" McWane's "offer" by their conduct in submitting their tons-shipped data; or that

McWane's June 17, 2008 Customer Letter was a reward or other "*quid pro quo*" for conduct by Sigma and Star.

4. Spring 2009 telephone conversation between Mr. McCutcheon of Star and Mr. Tatman of McWane (Complaint Counsel's "episode three")

As the third "episode" of the alleged conspiracy among McWane, Sigma, and Star to raise and stabilize Fittings prices, Complaint Counsel argues that in April 2009, McWane and Star reached an illegal agreement through an exchange of mutual assurances that McWane and Star would each adhere to McWane's new list prices, announced April 13, 2009 to be effective May 1, 2009 (hereafter "spring 2009 telephone conversation"). CCB at 157-163 (citing *Sugar Institute v. United States*, 297 U.S. 553, 601-02 (1936)). In support of this claim, Complaint Counsel relies on evidence of a telephone conversation that took place on an unspecified date in April or May 2009 between Mr. Tatman of McWane and Mr. McCutcheon of Star, described more fully *infra*. Respondent argues that the spring 2009 telephone conversation occurred after the alleged conspiracy terminated at the end of 2008; that the evidence shows that McWane acted independently in issuing its April 2009 list price changes; that Star acted independently when it determined to follow McWane's new price list; and that the telephone conversation between Mr. Tatman and Mr. McCutcheon does not constitute an agreement under applicable law. RB at 26-28.

For the following reasons, Complaint Counsel's argument that the spring 2009 telephone conversation constituted an unlawful exchange of mutual assurances to adhere to published prices and constitutes evidence of the "overall" conspiracy to raise and stabilize prices is rejected.

a. Timing of the Spring 2009 telephone conversation in relation to alleged conspiracy

McWane contends that the asserted agreement between McWane and Star to adhere to McWane's list prices, allegedly occurring in April 2009, should not be considered in this case. McWane asserts that the Complaint does not contain any allegations regarding this agreement; that Complaint Counsel

denied at the August 30, 2012 final prehearing conference that it was attempting to prove a separate conspiracy occurring in the spring of 2009; and that Complaint Counsel's expert concluded that the alleged conspiracy began to "collapse" in the fall of 2008 and terminated by the end of 2008. RB at 8-11.[27]

Complaint Counsel's proffered expert, Dr. Schumann, opined that the conspiracy to raise and stabilize prices alleged in this case started to "collapse" in the fourth quarter of 2008 and ended by the end of 2008. Schumann, Tr. 4200-4201, 4298, 4304; *see also* CX 2260-A (Schumann Rep. at 38-39), *in camera* (describing conspiracy to raise and maintain prices, which subsequently collapsed due to "cheating"). Complaint Counsel endeavors to distance itself from the record opinion of its own expert, and takes the position that the conspiracy that ended in the fall of 2008 was a conspiracy to "curtail Project Pricing," CCB at 114, (Complaint Counsel's "episode one") and not the "overall" conspiracy to raise and stabilize prices, which, Complaint Counsel implies, has yet to end. Jan. 24, 2013 (closing argument) Tr. at 16-17; *see also* CCRB at 44. This argument is unpersuasive. Complaint Counsel should be bound by the conclusions of its proffered expert as an admission that the alleged conspiracy to raise and stabilize prices collapsed by the end of 2008. "By the time the trial begins, we may assume that those experts who have not been withdrawn are those whose testimony reflects the position of the party who retains them." *Glendale Fed. Bank, FSB v. United States*, 39 Fed. Cl. 422, 424-25 (Fed. Cl. 1997) (further noting that "[a]t the

[27] This issue was previously addressed in Respondent's August 24, 2012 prehearing Motion to Exclude. Making a substantially similar argument, Respondent urged that evidence pertaining to the spring 2009 conduct, as well as evidence raised by Complaint Counsel in its Pretrial Brief regarding alleged improper pricing communications by McWane, Sigma, and Star in June 2010, be excluded. Complaint Counsel opposed the motion, arguing that the 2009 and 2010 conduct did not constitute separate claims or conspiracies, but constituted "events" tending to prove the "overall" conspiracy; that the Complaint did not allege an end date to the conspiracy; and that Respondent had adequate notice of the evidence and conducted discovery on the evidence. Respondent's Motion to Exclude was denied, *inter alia*, because Respondent had failed to demonstrate that it lacked adequate notice of the 2009 or 2010 conduct, or of its relevance to the case, and therefore the evidence should not be excluded. Order Denying Respondent's Motion to Exclude, September 7, 2012.

beginning of trial we may hold the parties to a final understanding of their case and hence an authorization of their expert witnesses who have not been withdrawn. At this point when an expert is put forward for trial it is reasonable and fair to presume they have been authorized"); *see also Collins v. Wayne Corp.*, 621 F.2d 777, 782 (5th Cir. 1980). Moreover, Complaint Counsel did not discredit its own expert's conclusions as to the end of the alleged conspiracy when Dr. Schumann testified at trial. The telephone conversation upon which Complaint Counsel relies took place in late April or early May 2009. F. 1017-1018. Complaint Counsel offers no authority to support the proposition that conduct occurring at least four to five months after the conclusion of an alleged conspiracy is probative evidence that such earlier conspiracy existed; nor does Complaint Counsel adequately persuade that such a proposition is even logical.[28]

Even if the spring 2009 telephone conversation is considered in connection with the conspiracy to raise and stabilize prices, as further explained below, the evidence fails to show that McWane and Star "exchanged mutual assurances," and therefore agreed, to adhere to McWane's list prices, as argued by Complaint Counsel.

b. Asserted "agreement to adhere" to McWane's list prices

The evidence shows that on April 13, 2009, McWane, unilaterally and for its own competitive reasons, announced that it would begin using a new price list, to be effective May 1, 2009. F. 995, 998-999, 1001-1003. McWane's new price list would increase prices for small diameter fittings (where McWane's market share was highest), and lower prices substantially for medium and large diameter Fittings (where McWane had little or no market share and Sigma and Star were stronger). F. 1001. The purpose of McWane's 2009 list price restructuring was to try to win back market share that it had been losing to Star and Sigma

[28] Complaint Counsel further alludes to conduct from June 2010 as constituting improper "signaling" communications. CCB at 41-42; CCRB at 31; CCFF 1556, 1566-1571. As with conduct allegedly occurring in April 2009, this June 2010 evidence is not probative of a conspiracy ending in 2008. Complaint Counsel fails to persuasively articulate why or how conduct occurring in 2010 makes the alleged 2008 conspiracy more likely than not.

and to compete in the segments of the market where Sigma and Star were strongest. F. 1003. Prior to this time, McWane had conducted a product weight analysis and designed its pricing strategy to (1) realign its prices among different Fittings size ranges in order to better align McWane's prices with its production costs; (2) squeeze its competitors' margins and give less "wiggle room" to its competitors for Project Pricing on larger diameter Fittings, where Star and Sigma had significantly larger market shares; and (3) serve the goal of compressing the range between published pricing and actual market pricing, to give McWane better visibility of pricing. F. 999, 1002. McWane did not consult with Star or Sigma in connection with the restructuring of McWane's list prices in 2009. F. 1000, 1004. Complaint Counsel does not argue, nor does the evidence demonstrate, that McWane's April 13, 2009 price list restructuring announcement was anything other than a unilateral, procompetitive move by McWane.

The evidence further shows that as of April 23, 2009, after learning of McWane's new price list, Star determined that it would also issue a new price list, and that Star would likely follow McWane, which was Star's usual behavior. F. 556, 679, 1005-1006. On or about April 23, 2009, Star sent a customer letter stating that it would be implementing a new price list, effective May 19, 2009, although the letter did not state that Star's new price list would follow McWane's. F. 1005. Actions by Sigma created some uncertainty about how Star would proceed when, on April 27, 2009, Sigma, upset about the adverse impact that McWane's restructured price list would have on Sigma competitively and hoping to dissuade McWane from implementing the change, announced in a customer letter dated April 27, 2009 that Sigma would stick to its existing price list. F. 1010-1011.[29] McWane assumed that Star would follow McWane, although it did not know this for a fact. F. 1020-1021.

[29] Complaint Counsel's proposed findings of fact refer to internal Sigma emails of Mr. Pais tending to show that Mr. Pais may have intended to try to influence McWane into withdrawing its new price list, at meetings that were planned with McWane regarding McWane's selling private-label, domestically-manufactured Fittings to Sigma. *See*, *e.g.*, CCFF 1509-1510. However, whatever this evidence may imply as to the intentions or conduct of Sigma, the evidence does not demonstrate that anyone from McWane discussed the new price list with anyone from Sigma. F. 1012-1014.

In late April or early May 2009, Mr. Pais of Sigma conveyed the impression to Mr. McCutcheon of Star that McWane might change its mind about implementing McWane's previously announced new price list. F. 1016. Mr. McCutcheon advised Mr. Pais that Star had already decided to follow McWane's price list, because McWane was the market leader and that was what Star's customers require. F. 1016. Nevertheless, this communication with Mr. Pais created some doubt in Mr. McCutcheon's mind regarding whether McWane would stick with its previously announced price list, and Mr. McCutcheon wondered whether Star should move ahead with printing its own new price lists, which would cost Star approximately $25,000. F. 1017-1018; *see also* F. 422 (printing price list books can cost tens of thousands of dollars), 996 (printing price list can cost $30,000).

Mr. McCutcheon testified:

> It cost[s] us about $25,000 to print a new price list. So, I picked up the phone and I called Rick Tatman. **And I said, I'm only going to ask you one question, are you guys going to come out with a new price list, because I'm getting ready to approve it and spend $25,000 to do it.** And he said, we absolutely are, and he says, I'm so sure that I'll pay the $25,000 if we don't. And I said, I appreciate that, nice talking to you, and hung up the phone.

F. 1018 (emphasis added).

The evidence of the complete telephone conversation, quoted above, does not prove an agreement to adhere to published prices, within the rule of *Sugar Institute v. United States*, 297 U.S. 553, and its progeny, upon which Complaint Counsel relies. CCB at 157-158. *Sugar Institute* stands for the proposition that an agreement to adhere to published prices is unlawful under Section 1 of the Sherman Act. 297 U.S. at 601-03. However, unlike the instant case, there was no factual issue presented in *Sugar Institute*, or the other cases upon which Complaint Counsel relies, as to whether such an agreement already existed. In *Sugar Institute*, the unlawful "agreement" was an ethical rule jointly issued by members of a trade association, requiring that "sugar should be sold only upon open prices and terms publicly

announced." 297 U.S. at 579. Similarly, in *Energex Lighting Indus. v. North American Philips Lighting Corp.*, 765 F. Supp. 93 (S.D.N.Y. 1991), the court assumed the existence of an agreement to adhere to published prices, but because such an agreement would be illegal under *Sugar Institute*, the court refused to enforce it and dismissed a claim for its breach. *Id.* at 106-09. The alleged unlawful "agreement" in *TFWS, Inc. v. Franchot*, 572 F.3d 186 (4th Cir. 2009), also cited by Complaint Counsel, arose from actual state requirements that liquor wholesalers post with the comptroller, and adhere to, a schedule of prices and offer every retailer the same price for any given product, regardless of volume. *Id.* at 189-90; *see also Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 895-96 (9th Cir. 2007) (addressing "post and hold" rules issued by state liquor control board).

The foregoing cases are clearly factually distinguishable from the instant case and shed no light on whether the telephone call between Mr. Tatman and Mr. McCutcheon, as an evidentiary matter, demonstrates an agreement to adhere to published prices, which would be illegal under the rule of *Sugar Institute*. Moreover, even if Mr. Tatman's communication to Mr. McCutcheon is read as an "assurance" that McWane would proceed to implement the new price list that it had previously announced, this does not equate to a *commitment* to *adhere* to those list prices in McWane's sales, as was the case in *Sugar Institute*.

Complaint Counsel argues that it should be inferred that Mr. McCutcheon provided Mr. Tatman with "assurances" that Star would adhere to McWane's published prices, based upon evidence that Mr. Tatman stated in an email dated April 28, 2009 that "there is now some probability that Star may change their direction and retract their list price change," but that later that same day, in an internal email to Mr. McCullough, Mr. Tatman reported that he was "now highly confident that Star will follow our List Price." CCB at 159-160; *see* F. 1020. According to Complaint Counsel, "only the phone call explains" the asserted "change" in Mr. Tatman's confidence level as to what Star would do, and therefore, Mr. McCutcheon "must have provided assurances to McWane." CCB at 160. However, Complaint Counsel fails to point to any evidence demonstrating that the date

of the telephone conversation between Mr. Tatman and Mr. McCutcheon was, in fact, April 28, 2009, and the date cannot, and will not, be assumed. Rather, the evidence shows only that the telephone conversation took place sometime in late April or early May 2009. F. 1016-1018. Thus, the inference proposed by Complaint Counsel is not sufficiently logical or persuasive to outweigh the direct evidence, summarized above and set forth in detail at Section II.H., *supra*, that Mr. McCutcheon did not "assure" Mr. Tatman that Star would adhere to McWane's price list and that Star had previously made its own independent decision to follow McWane. F. 1006, 1018. In addition, in an internal email dated April 30, 2009, Mr. Tatman noted that there was continuing uncertainty as to whether Star was following McWane's new price list, which is inconsistent with the inference that Mr. Tatman received "assurances" from Star on April 28, 2009, as Complaint Counsel argues. F. 1021.

Moreover, at best, the substance of the telephone conversation upon which Complaint Counsel relies is more akin to an after-the-fact "verification" of a previous price, than to an "agreement to adhere" to prices within the meaning of *Sugar Institute*. *See Blomkest Fertilizer*, 203 F.3d at 1034 (affirming summary judgment in defendants' favor, and holding that calls between competitors that served to verify prices the companies had already charged on particular sales, which did not cause alleged price increases, failed to constitute a plus factor in support of an alleged conspiracy to fix prices). In addition, as in *Blomkest Fertilizer*, the evidence in the instant case fails to demonstrate that the telephone communication between Mr. Tatman and Mr. McCutcheon had any effect on either McWane's or Star's decisions regarding price list changes; rather, the evidence shows that McWane and Star each proceeded in accordance with plans they formed independently, prior to the spring 2009 telephone conversation. F. 995, 999, 1001-1004, 1006, 1016, 1022-1023.

For all the foregoing reasons, Complaint Counsel has failed to prove that the spring 2009 telephone conversation constituted an agreement to adhere to published prices, and the greater weight of the evidence does not support an inference that McWane, Sigma, and Star conspired to raise and stabilize prices, as alleged in the Complaint.

5. Economic evidence

As the court noted in *In re High Fructose Corn Syrup Antitrust Litigation*, circumstantial evidence to prove a conspiracy to restrain trade will "usually be . . . of two types -- economic evidence suggesting that the defendants were not in fact competing, and noneconomic evidence suggesting that they were not competing because they had agreed not to compete." 295 F.3d at 655. Complaint Counsel's conspiracy theory rests overwhelmingly on inferences drawn from noneconomic, circumstantial evidence. There is no direct evidence to support, and no *a priori* reason to believe, that the hypothesis of a conspiracy to raise and stabilize prices in the Fittings market is more likely than the hypothesis of independent conduct or oligopolistic conscious parallelism unaided by an agreement. Therefore, given that Complaint Counsel bears the burden of persuasion, it was incumbent upon Complaint Counsel to present economic evidence to bolster the claim of conspiracy. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 186 F.3d 781, 787 (7th Cir. 1999).

Complaint Counsel did not offer any expert opinion that there was economic evidence indicating a conspiracy to raise and stabilize Fittings prices. Rather than offer its own expert testimony analyzing economic data, Complaint Counsel chose an "attack-the-other-expert" strategy. Complaint Counsel argues that it has no burden to prove that prices in the Fittings market were "raised" and/or "stabilized" during the conspiracy period, which itself has resisted any definition in this case,[30] because it is not legally necessary to show that a conspiracy was "successful." Regardless of whether Complaint Counsel has a legal burden to prove that a conspiracy was "successful," Complaint Counsel still has the burden of proving that the alleged conspiracy existed. In this regard, the absence of persuasive economic evidence that

[30] The complaint alleges that the conspiracy began in January 2008, and was "upset" sometime around the time of the enactment of ARRA in early 2009. Complaint, ¶¶ 2-3. Complaint Counsel's expert opined that the conspiracy began to fall apart in the fall of 2008 and terminated by the end of 2008. Complaint Counsel now argues that only the agreement to curtail Project Pricing (episode "one" of the "overall" conspiracy) terminated by the end of 2008. CCB at 114, and that the "overall" conspiracy has yet to end. Jan. 24, 2013 (closing argument) Tr. at 16-17; *see also* CCRB at 44.

prices in the Fittings market were "raised" and/or "stabilized" and/or otherwise coordinated by the Suppliers, as further explained below, undermines the persuasiveness of Complaint Counsel's circumstantial case.

a. Complaint Counsel's economic evidence

While arguing that it need not prove that the alleged conspiracy to raise and stabilize prices was successful, Complaint Counsel nevertheless argues that the economic data shows the conspiracy was "successful." Specifically, Complaint Counsel argues that Project Pricing was in fact curtailed (*i.e.*, prices were "stabilized") and Fittings prices did in fact increase, resulting in higher profits for all. CCB at 36-39, 145-147; *see also* Complaint ¶ 7 (alleging that Respondent's conduct "led to higher prices for both imported and domestically produced" Fittings).

With regard to proof of curtailment of Project Pricing, as discussed in Section III.D.2.b.ii., *supra*, the evidence upon which Complaint Counsel relies to show that Project Pricing was curtailed in 2008 is hardly persuasive. Complaint Counsel relies principally on inferences drawn from unverified statements of McWane's sales persons in the field, as recorded in McWane's pricing protection log, and from statements in McWane's internal documents regarding McWane's "leading price stability" and using "pricing discipline." This does not constitute persuasive economic data. Complaint Counsel's economic evidence of a "curtailment" of Project Pricing by Sigma and Star is also hardly persuasive. *See* Section III.D.2.b.ii., *supra.* In comparison, Respondent offered credible and persuasive expert opinion, based on actual prices as recorded by the Suppliers' invoice documents, kept in the ordinary course of business, that there was no curtailment of Project Pricing during the period from January 2008 through February 2009 and that pricing was far from stable during this period. F. 845-847, 937-938.

Complaint Counsel relies on McWane's internal "variance analysis" reports of sales volume and profit figures, prepared periodically by McWane's controller, as evidence that McWane raised prices during the alleged conspiracy period. CCB at 38-39. Complaint Counsel relies on a variance analysis comparing McWane's 2008 aggregate price-per-ton for fittings in 2007 to

2008, which noted an increase in the price-per-ton for non-domestic Fittings from [redacted] per ton in 2007 to [redacted] per ton in 2008, and an increase price-per-ton for Domestic Fittings from [redacted] per ton in 2007 to [redacted] per ton in 2008. F. 969. As Mr. Tatman explained, however, the aggregate price-per-ton figure is a revenue measure that does not break down the "product mix," and says nothing about whether prices in fact increased in the Fittings market:

> [The figures show] a big ball of iron that you sold that quarter. It doesn't say what the mix is. We just said before that -- remember before we restructured the list price. There's a huge variance, 250 percent, between the dollar-per-ton list price on a large-diameter fitting versus a small-diameter fitting[.] . . . [A]nd this also doesn't say what area this was closed in. If you look at the multiplier map, . . . the Pacific Northwest is 30 or 40 percent higher in price than what is Florida here. . . The year before, did you happen to sell more small diameter versus large diameter? That's going to swing it.
>
> [T]he year before, did you have heavy sales in Florida and California and Arizona because those were the hot markets, and they were hot markets because they were growing in housing, and housing is small-diameter fittings? What that does on a dollar-per-ton basis, that drives that number down. Now you move forward here. If Arizona and California and Florida housing markets are falling off and you're selling more product in the Pacific Northwest, it's not a price increase with respect to the Pacific Northwest, but in aggregate it's a price increase. Are you now selling more large-diameter product because the housing market has tanked and you're selling into municipalities for lines? That's going to switch it.
>
> So you can't jump to the inference that you have based on this simple number. . . . You just don't have enough granularity in what you see here to make that judgment.
>
> . . .

> It -- all it reflects is the big ball of iron that we sold the year prior and the big ball of iron we sold here went up – I'll agree. It is what it is, but it doesn't give you any insights as to what happened and why.

F. 971. Mr. Tatman's explanation is logical and credible and constitutes persuasive evidence that little, if any, weight should be given to the "price-per-ton" figures as evidence of price increases in the Fittings market. Moreover, Complaint Counsel has not rebutted Mr. Tatman's explanation, including by any expert analysis of the price-per-ton figures. Further, Respondent's expert, Dr. Normann, opined that price-per-ton is not a proper measure of price increases because selling a higher volume of higher priced items will create the illusion of an overall price increase. F. 972. For all the foregoing reasons, the aggregate price-per-ton figures upon which Complaint Counsel relies are entitled to, and given, little weight on the issue of whether prices increased in the Fittings market.

Complaint Counsel also points to evidence that McWane's gross profits were higher in 2008 as compared to 2007, despite a loss in volume, in part due to pricing gains, primarily on domestic product, and that profits were higher in 2008 than in 2009. CCB at 36-38, 147. However, the evidence further shows that McWane's gross profit margin on non-domestically produced Fittings fell from [redacted]% in 2007 to [redacted]% in 2008, which Mr. Tatman attributed in part to Project Pricing, and fell further still in 2009, as volume continued to drop and prices continued to escalate. F. 964. Moreover, Respondent offered reliable and persuasive expert analysis that McWane's average blended Fittings price (the price of imported or Domestic Fittings sold for open source jobs) actually declined throughout 2008, 2009, and 2010. F. 940. Thus, it is not apparent, absent speculation, that McWane's financial performance improved because McWane was involved in an alleged conspiracy to raise and stabilize prices in the Fittings market, as argued by Complaint Counsel.

Nor does an increase in gross profits, even if demonstrated, constitute persuasive evidence that prices increased, or that prices increased because of a conspiracy in the Fittings market, because many variables and factors influence profit levels from year to

year. For this reason as well, the government's evidence of higher profits for McWane, Sigma, and Star carries little if any weight in determining whether Fittings prices were increased. With regard to McWane's profits in particular, Mr. Tatman explained:

> Starting in about 2004 I believe is when we start sourcing product from overseas, started bringing in product. Sigma helped us out with that, so we had the ability now, rather than using a hundred percent domestic product to serve both the domestic-only spec market and the import market, we started having the ability to source product just like our competitors and sell that lower-cost Chinese product into open specs. [Mr. Tatman's predecessor] David Green starts overproducing the plant, so you get an impact that helps you there. He's running up the plants in 2005-2006. He's overproducing compared to what demand is. Inventory levels go up. But when you do that, your gross margins get better because your manufacturing costs go down. I show up in 2007. We got an inventory problem. . . . In 2007 we had heavy substitution of domestic product in blended sales.

F. 974. Because of the higher cost of producing Domestic Fittings, providing Domestic Fittings for jobs with open specifications was, according to Mr. Tatman, like "wrapping a dollar bill around that fitting [because it is shipped] against an import price," thereby depressing profits in 2007. F. 974-975. Accordingly, for the forgoing reasons, Complaint Counsel has failed to demonstrate that the relative change in profits from 2007 to 2008 was more likely due to an increase in prices than to other factors.

b. Respondent's economic evidence

In comparison to Complaint Counsel's indirect and inferential economic evidence of price increases in the Fittings market, Dr. Normann, Respondent's economic expert, analyzed the actual invoice prices charged by McWane, Sigma, and Star, over a multi-year period, including January 2008 through February 2009, as well as cost data and output data, and determined that the evidence is not consistent with the alleged conspiracy. F. 934. Dr. Normann's findings and conclusions in this regard are reliable

and probative, and outweigh Complaint Counsel's proffered economic evidence. F. 959.

Dr. Normann was tasked with determining whether there was economic evidence consistent with the allegations of the Complaint; specifically, whether there was economic evidence consistent with collusive behavior among McWane, Sigma, and Star, to stabilize and increase prices for Fittings. F. 934. Dr. Normann analyzed whether there was reduced price variation and whether prices were increased, as part of an agreement, as alleged in the Complaint. F. 935; *see* Complaint ¶¶ 32-34 (alleging that January and June 2008 "price increase[s] w[ere] the result of a combination and conspiracy among the sellers"). In summary, and as further explained below, Dr. Normann concluded, based on his review and analysis, that there was no economic evidence that the price changes in January or June of 2008 were coordinated, or that there was an agreement to reduce job pricing as would be reflected in a decrease in price variance; that there was economic evidence that contradicted a conclusion of anticompetitive price increases in the Fittings market; and that the pattern of sales and inventory contradicts the notion of quantity withholding, as would be needed to effect a price increase. F. 934.

i. Published prices

Based upon the Complaint's allegations that the announced price changes that occurred in January and June 2008 were coordinated "price increases," Dr. Normann examined, *inter alia*, McWane's multiplier maps associated with the January and June 2008 multiplier changes. F. 936. Dr. Normann found that McWane's multipliers changed in different directions and by different amounts on a state-by-state basis, and concluded that this pattern is more consistent with competitive, independent decision-making by McWane than with concerted action. F. 936. In addition, Dr. Normann found that McWane's published multipliers announced in January and June 2008 actually did not increase in most states, which is inconsistent with the Complaint's allegation that the January and June 2008 price changes were coordinated "price increases." F. 936. Complaint Counsel argues that Dr. Normann's opinion in this regard should be rejected because Dr. Normann failed to consider evidence that McWane's January 2008 multiplier changes constituted an average 8%

increase over McWane's effective multipliers. CCRRFF 279; *see* F. 631, 652. Dr. Normann was charged with evaluating whether there was economic evidence supporting the allegations of the Complaint, and the Complaint in this case clearly alleges that the January and June 2008 published multiplier changes were "price increases" resulting from a conspiracy among McWane, Sigma, and Star. Complaint ¶¶ 32-34. These allegations are not supported by the greater weight of the economic evidence. Dr. Normann could not reasonably be expected to refute and deal with Complaint Counsel's constantly moving targets of when the alleged conspiracy took place and what constituted the alleged conspiracy.

ii. Invoice prices

Dr. Normann also reviewed invoice data, kept in the ordinary course of business and produced by the Suppliers in this action. F. 937. The invoices record the sales price for the transaction in dollars, which includes any discounts off the published multiplier (*i.e.*, Project Pricing), but does not include additional discounts that may arise from rebates, freight terms, or cash discounts. F. 937. To control for product mix when analyzing the Suppliers' invoice data, Dr. Normann created an index of Fittings, consisting of a "basket" of the 24 most common Fittings that are sold by McWane, Sigma, and Star, as determined by volume. According to Dr. Normann, any conspiracy to raise Fittings prices would be reflected in the invoice prices for this basket of products. F. 939.

Dr. Normann found, based on McWane's invoice prices for McWane's portion of the common Fittings basket, that McWane's average prices for non-domestic Fittings (*i.e.*, U.S. made or imported Fittings sold into open specification jobs, *see* F. 349-351) declined over the course of a multi-year period from January 2007 through November 2010, including before, during, and after the period from January 2008 to February 2009, which is the "conspiracy period" that Dr. Normann derived from his review of the Complaint and related materials in this case. F. 940. For the period from January 2008 through February 2009, Dr. Normann found that McWane's average Fittings prices decreased by [redacted] percent, Sigma's average Fittings prices increased by [redacted] percent, and Star's average Fittings prices increased by

[redacted] percent. F. 942. A price decline by McWane during the same period as price increases by Sigma and Star is inconsistent with a conspiracy to raise prices involving McWane. F. 942.

The decline in McWane's prices shown by the invoice data is even more remarkable, given that there was a significant corresponding rise in input costs. F. 951. This is inconsistent with a conspiracy and consistent with independent pricing behavior. F. 955-956. Dr. Normann measured cost changes through an index he created of metal (such as scrap and pig iron) and energy costs. F. 945. As Dr. Normann explained, even when there is evidence of price increases, it is important in a conspiracy case to look at input costs to see if there are competitive explanations for the price increases, such as needing to keep up with rising costs. F. 944. Metal and energy costs are variable costs that constitute the primary cost inputs in the manufacture of Fittings. F. 945. These costs comprise about 30 percent of the total cost of McWane's production of ductile iron pipe fittings. F. 945. Metal and energy input costs went up 40 to 50 percent during 2008, and were up 70 to 80 percent from 2007. This is a dramatic increase. F. 951. In a competitive environment, these cost increases would result in significant pressure to increase price. In a competitive environment, it would be expected to see some changes in price because of increases in cost. F. 952. Yet the invoice data for McWane showed declining prices, and the invoice data for Sigma and Star show only modest price increases, that were not significantly more than their cost increases. F. 953. This is also inconsistent with a conclusion of a conspiracy to raise prices involving McWane, Sigma, and Star. F. 952-953, 955-956.

Dr. Normann also concluded that during the January 2008 through February 2009 time period the Suppliers' price movements were not in parallel and that the Suppliers' prices moved independently of one another. This is also not consistent with the allegations of conspiracy in this case. F. 954.

Furthermore, Dr. Normann reviewed the Suppliers' inventory data to see if there was any evidence of withholding, which would facilitate a cartel's ability to raise prices. Dr. Normann found no evidence of withholding, and instead found an increase in output. F. 958.

Dr. Normann further opined that a price increase for imported Fittings would show up as an increase in the price of Fittings sold into open specification jobs relative to domestic-only jobs. F. 957. His data analysis showed that over a multi-year period, including the period from January 2008 through February 2009, the price of open specification Fittings declined relative to the price of domestic-only specification Fittings, which is also inconsistent with the alleged conspiracy. F. 957.

c. Dr. Schumann's rebuttal

Complaint Counsel criticizes Dr. Normann's data and methodology through the rebuttal report and related testimony of Dr. Schumann. In general, Dr. Schumann contends that Dr. Normann's conclusions should be disregarded because the invoice data is unreliable; Dr. Normann failed to control for material factors other than the alleged conspiracy that might affect prices, such as supply and demand changes; and Dr. Normann failed to "follow accepted practices" for statistical analysis. CCRB at 41-42; CCFF 1425-1435. As further explained below, Dr. Schumann's opinions and the evidence upon which he relies to rebut Dr. Normann's opinions and analyses are unpersuasive, and are therefore rejected.

Complaint Counsel argues that the invoice price data of McWane, Sigma, and Star, constitute an unreliable basis for determining actual selling prices because the invoice price includes any discounts off the published multiplier (*i.e.*, Project Pricing), but does not reflect additional discounts that may arise from rebates, freight terms, or cash discounts. *See* CCFF 1425; CX 2265 (Schumann Rebuttal Rep. at 10-11); Schumann, Tr. 5806. However, the alleged conspiracy in this case involves published multipliers and discounts from published multipliers given through Project Pricing, and there are no allegations involving other discounts. *See* Complaint ¶¶ 32-34. Given these circumstances, the invoice price is precisely the correct measure of selling price. F. 938.

Complaint Counsel also argues that the invoice data is not a reliable basis for determining actual selling prices because there is

a "non-systematic" time lag of a few days to a few months between the date a Supplier and a customer agree to a particular price, and the date the order is invoiced at shipment. CCFF 1426; CX 2265 (Schumann Rebuttal Rep. at 5); Schumann, Tr. 5802-5805. The asserted "time lag" does not render the invoice data unreliable. The evidence shows that, although the time period between order and delivery varies, delivery typically takes place between two or three weeks to two months after the bid and order, and the prices reflected in invoice data typically reflect market pricing that is 30 to 60 days prior to the invoice. F. 344-345. In any event, any potential deficiency in this regard is adequately rectified by Dr. Normann's use of a multi-year time series, which captures a rolling average and effectively captures such time lags. F. 941. For the same reason, Dr. Schumann's contention that month-to-month differences in customer mix meaningfully affect the reliability of Dr. Normann's conclusions is unpersuasive. *See* CCFF 1427; CX 2265 (Schumann Rebuttal Rep. at 12).

In addition, Complaint Counsel contends that the invoice data is unreliable because of alleged data entry errors totaling 4.27 percent in 2008, and 21 percent in January 2008. CCFF 1428-1430; CX 2265 (Schumann Rebuttal Rep. at 9, 13-16); Schumann Tr. 5805.[31] Complaint Counsel's argument and evidence in this regard, based on unexplained and unverified information, has been thoroughly examined, and these errors, to the extent they exist, are not fatal and are not sufficiently pervasive to warrant rejecting Dr. Normann's pricing analysis.

Complaint Counsel further argues that there is no way to unambiguously identify domestically made Fittings sold at

[31] The claim that McWane invoice data contains these errors is based upon Complaint Counsel's extrapolation from correspondence between Respondent's counsel and Complaint Counsel in May and June 2012. (CX 2552). Complaint Counsel sent an inquiry to Respondent's counsel concerning the possible reasons for an entry in McWane's sales data spreadsheet that showed an actual multiplier that was greater than the published multiplier stated on McWane's applicable multiplier map. Counsel for Respondent replied that there was "no commercial reason" that an order would be entered above the published multiplier and that this was "most likely an order entry error. . . ." CX 2252 at 001. Instead of deposing a fact witness to discover the reasons for any data entry anomolies, such as an employee responsible for data entry, Complaint Counsel left the question unexamined and chose to follow the equivocal statement of an attorney for Respondent as "evidence."

domestic-only prices versus domestically made Fittings sold at the open specification prices, resulting in errors in classification that "introduce uncertainty and randomness in that the data" that was not further analyzed. CCFF 1431; CX 2265 (Schumann Rebuttal Rep. at 13); Schumann, Tr. 5825-5826. Dr. Schumann's criticisms in this regard have been fully reviewed, and they are unpersuasive. Apart from his general assertions, Dr. Schumann does not quantify or otherwise analyze the extent to which the alleged errors affected Dr. Norman's analysis. In addition, Complaint Counsel attacks the domestic-only price data as having a 9 percent error rate in 2008. CCFF 1432; CX 2265 (Schumann Rebuttal Rep. at 13-14); Schumann, Tr. 5823, 5824-5825. As in the case of the asserted errors in the open specification Fittings price data, to the extent such errors exist, these errors are not fatal and are not sufficiently pervasive to warrant rejecting Dr. Normann's pricing analysis.

Complaint Counsel also contends that Dr. Normann's Fittings price analysis is flawed because he did not control for factors other than the alleged price fixing agreement that might impact prices, such as the 2008 recession. CCFF 1433; CX 2265 (Schumann Rebuttal Rep. at 18-19). Dr. Schumann's rebuttal report, upon which Complaint Counsel relies, argues that Dr. Normann cannot conclude whether or not the price data is consistent with a conspiracy to raise prices unless he can conclude what prices would have been absent the alleged conspiracy. *Id*. at 23-24. The argument that Dr. Normann's data and conclusions are rendered meaningless because he did not speculate as to what prices might have been, absent a presumed conspiracy, defies logic, is unpersuasive, and is rejected.

In addition, Complaint Counsel argues that Dr. Normann's analysis should be disregarded because, according to Dr. Schumann, Dr. Normann fails to report standard errors or confidence intervals of slopes for his hypothesis tests, (CX 2265 (Schumann Rebuttal Rep. at 25); Schumann, Tr. 5801-5802, 5849, 5863, 5871) or report tests for robustness of his data analysis. CX 2265 (Schumann Rebuttal Rep. at 23, 29, 48); Schumann, Tr. 5831-5832. *See* CCFF 1434. These criticisms raised by Dr. Schumann have been thoroughly reviewed and do not constitute persuasive bases for disregarding Dr. Normann's analyses and

opinions in this case. Dr. Schumann fails to explain or quantify how these alleged shortcomings in Dr. Normann's analysis so adversely affected Dr. Normann's conclusions that they should be completely disregarded.

For all the foregoing reasons, and having fully evaluated Dr. Schumann's rebuttal report and related testimony, Dr. Schumann's opinion that Dr. Normann's figures are unreliable, irrelevant or not useful for economic analysis, is rejected.

Complaint Counsel argues in the alternative that if the invoice pricing data and Dr. Normann's methodology for analyzing it is accepted, the data shows that during a period beginning February 1, 2008, the month in which the January 2008 pricing changes became effective, and ending October 1, 2008, when according to Complaint Counsel, the conspiracy began to "fall apart," McWane's Fittings prices increased by [redacted] percent; Sigma's increased by [redacted] percent; and Star's increased by [redacted] percent. F. 943. Moreover, according to Complaint Counsel, "prices plunged after October 2008," which is consistent with Complaint Counsel's theory that the conspiracy "was losing traction at that time." CCRB at 42. It is not enough for there to be evidence that can be interpreted in a way that is consistent with the government's conspiracy theory – the inference of conspiracy must be more likely than not. Here, Complaint Counsel fails to demonstrate that the price increases in the selected period from February 1 through October 1, 2008 are more consistent with the inference of conspiracy than the inference of a legitimate response to dramatic cost increases. In addition, Complaint Counsel's assertion that prices "plunged after October 2008" is not based upon any economic data. Rather, Complaint Counsel cites to various internal documents of the Suppliers referring to intense price competition in the later months of 2008. CCRB at 42; CCFF 1456-1466. In addition, as previously noted, there is evidence in the record that the Fittings market experienced a significant downturn in the second half of 2008, which would also contribute to increased discounting as Suppliers chased ever-decreasing volume. F. 931, 933; *see also* F. 1026. In any event, these "cherry-picked" time periods, while consistent with Complaint Counsel's theory of when the agreement to curtail Project Pricing became "effective" and then began to "fall apart," fail to outweigh the overall findings and conclusions of Dr.

Normann that the totality of the economic evidence is not consistent with the alleged conspiracy.[32]

d. Summary and conclusion as to economic evidence

Dr. Normann examined the available pricing data, analyzed it, and formed conclusions that the data is not consistent with the alleged conspiracy to raise and stabilize Fittings prices. Dr. Normann reviewed and analyzed actual data, instead of merely offering theories in lieu of using the data. Rather than proffer expert analysis of economic data to support the conspiracy allegations, Complaint Counsel chose simply to attack Respondent's expert analysis.

In summary, Dr. Normann's findings, conclusions, and opinions regarding price movements in the Fittings market during 2008 constitute substantial, probative economic evidence that is not consistent with an inference of a conspiracy among McWane, Sigma, and Star, to raise and stabilize prices in the Fittings market. F. 959. Complaint Counsel's economic evidence fails to outweigh the economic evidence presented by Respondent. Therefore, the greater weight of the economic evidence fails to support the inference of conspiracy. Even if Dr. Normann's opinions and pricing analyses were rejected, Complaint Counsel's economic evidence is insufficiently probative of a conspiracy to raise and stabilize prices in the Fittings market, and is therefore unpersuasive on this issue.

6. Conclusion based on totality of the evidence

Complaint Counsel alleges a conspiracy among McWane, Sigma, and Star to stabilize and increase Fittings prices by

[32] Complaint Counsel relies on evidence that Sigma's average transactional multipliers increased in certain regions during the period from February 2008 through October 2008. However, the actual day-to-day multipliers differed "a lot" from region-to-region, product-to-product, day-to-day. F. 994. Moreover, as set forth above, this "cherry-picked" time period does not outweigh the totality of the evidence that is not consistent with the inference of a conspiracy to raise and stabilize prices in the Fittings market. In any event, regardless of what the evidence may show as to Sigma and Star, the greater weight of the economic evidence fails to justify an inference of a conspiracy involving McWane.

curtailing project pricing and increasing price transparency. CCB at 105. As shown above, Complaint Counsel has failed to prove any of the three "episodes" which it contends prove the "overall" conspiracy.

In addition, viewed as whole, the totality of the evidence fails to prove the alleged conspiracy. In this case, the evidentiary "whole" is no more probative or persuasive than its various parts. Accepting Complaint Counsel's conspiracy theory depends on accepting numerous assertions, assumptions, and inferences that are not sufficiently grounded in evidence. In addition, the preponderance of the economic evidence is not consistent with the alleged conspiracy. Among other things, the evidence:

- fails to prove that Mr. Tatman's December 25, 2007 internal PowerPoint Presentation was a "plan" for a "conspiracy" with Sigma and Star to raise and stabilize prices, through curtailing pricing and increasing price transparency, as opposed to an independently formed pricing strategy designed to make McWane more competitive, *see* Sections III.D.2.a.; III.D.2.b.iii.(c);

- fails to prove that McWane "communicated" its pricing strategy to Sigma and Star, including through "offers" in the January 11, 2008 and May 7, 2008 Customer Letters to raise prices in exchange for (a) Sigma's and Star's curtailing Project Pricing; and/or (b) participating in the DIFRA tons-shipped data reporting system, respectively, *see* Sections III.D.2.a.; III.D.2.b.iii.(c); III.D.3.;

- fails to prove that the decisions or conduct of Sigma and Star with regard to Project Pricing or participating in DIFRA reflected an "understanding" with McWane of future price increases, or "acceptance" of an "offer" from McWane of such increases, or constituted acts of "compliance" with McWane's "plan," as opposed to independent conduct or lawful conscious parallelism, *see* Sections III.D.2.a.; III.D.2.b.iii.(c); III.D.3.;

- fails to prove that the DIFRA tons-shipped data reporting system was part of a conspiratorial "plan" to "enforce"

compliance with the alleged price fixing agreement by increasing price transparency, *see* Section III.D.2.b.iii.(d);

- fails to prove that McWane, Sigma, and Star were "monitoring" the market for "cheating" on the alleged price fixing agreement, or "complained" to one another about "cheating" on the alleged price fixing agreement, *see* Sections III.D.2.b.iii.(e) and (f);

- fails to prove that the few unexplained contacts between McWane and Sigma, or McWane and Star, constituted anything more than mere opportunities to conspire, *see* Section III.D.2.b.iii.(g); and

- fails to prove Project Pricing was curtailed, or that prices were increased or stabilized or coordinated in the Fittings market among McWane, Sigma, and Star, *see* Sections III.D.2.a.; III.D.2.b.ii.; III.D.5.

Complaint Counsel's conspiracy theory is not implausible; it is indeed "possible" that there is some truth in the story Complaint Counsel tells. But neither plausibility nor possibility is sufficient to prove a price fixing conspiracy. Furthermore, in evaluating the totality of the evidence, "it is not the quantity of the plaintiff's evidence which is important, but its qualitative value in demonstrating that the parties actually entered into a conspiracy." *Venture Technology,* 685 F.2d at 48. Despite the numerous pleas by the government for inferences to be made where proof is lacking, the fact that a conspiracy may be difficult to prove does not mean that it is fair or appropriate to fill in the blanks where evidence is missing to assist the government in winning its case. When fairly and objectively scrutinized and weighed, the evidence fails to prove that McWane conspired with Sigma and Star to raise and stabilize prices in the Fittings market, as alleged in the Complaint. At best, the evidence shows interdependent or consciously parallel conduct, unaided by any agreement, which is not illegal. *Brooke Group,* 509 U.S. at 227; *Twombly*, 550 U.S. at 557 & n.4.

"The line between lawful interdependent behavior and unlawful commitment is not sharp." Areeda, ¶ 1410c at 72.

"Although the line between coordination through recognized interdependence and some commitment is shadowy, the distinction is important so long as antitrust law allows the former but condemns the latter." Areeda, ¶ 1410c at 74. Such cases therefore "must be resolved by rules of law allocating burdens of proof or creating presumptions that certain behavior will – or will not – be treated as an agreement." *Id*. Accordingly, because the preponderance of the evidence in this case does not prove the alleged conspiracy, Count One is dismissed. *See Re/Max Int'l*, 173 F.3d at 1009 (holding that evidence of conspiracy does not preponderate where the evidence is equally consistent with independent conduct); *see also Kreuzer*, 735 F.2d at 1488 n.14 (holding that inference of conspiracy must be more likely than not); *Venture Technology*, 685 F.2d at 48 (holding that where evidence, taken as a whole, "points with at least as much force toward unilateral actions . . . as toward conspiracy," inference of conspiracy cannot be drawn).

E. Count Two: Alleged Conspiracy to Exchange Competitively Sensitive Sales Information in Restraint of Trade

Count Two of the Complaint alleges that McWane, Sigma, and Star agreed to "exchange competitively sensitive sales information" and that this agreement constitutes an unreasonable restraint of trade. Complaint ¶ 64. Specifically, Complaint Counsel asserts that McWane, along with the other supplier-members of the Ductile Iron Fittings Research Association ("DIFRA"), a trade association, agreed to participate, and did participate, in the DIFRA tons-shipped data reporting system, discussed above and in more detail *infra*. CCB at 166-167; *see generally* Section II.E., *supra*. Complaint Counsel argues that the DIFRA tons-shipped data reporting system constitutes an unlawful "information exchange" because the data provided has the tendency or effect of "facilitating price collusion," in a market already susceptible to tacit coordination, without countervailing procompetitive justification, in violation of Section 1 of the Sherman Act. CCB at 166-177.

Respondent argues that the DIFRA tons-shipped data reporting system did not "facilitate" price coordination, in theory or in practice, because no pricing data was collected or disseminated,

and because the aggregated, tons-shipped data did not give McWane or any other DIFRA member any meaningful insight into competitor pricing or sales. RB at 23-26. Respondent argues that the tons-shipped data collected, aggregated, and disseminated in the DIFRA reports does not disclose sufficient price information to "facilitate" price coordination or collusion. RB at 23-26. Moreover, according to Respondent, the evidence shows that the DIFRA tons-shipped data reports served legitimate, procompetitive purposes by helping each DIFRA member to assess overall market trends, estimate its own market share, and better manage production schedules and inventory. RRB at 48. In addition, Respondent asserts, the only pricing decisions that McWane made after receiving the DIFRA aggregated, tons-shipped data reports, were procompetitive: On June 17, 2008, McWane implemented published multipliers that were lower than those that had been announced by Sigma and Star; and in April 2009, McWane restructured its price list to lower prices in certain product segments where McWane's volume was weak. RRB at 48-49.

In order to establish a Section 1 violation, the evidence must show (1) that the DIFRA tons-shipped data reporting system constitutes a contract, combination or conspiracy between McWane and the other DIFRA members (concerted action), (2) that unreasonably restrains competition. *See, e.g.*, *Valuepest.com of Charlotte, Inc. v. Bayer Corp.*, 561 F.3d 282, 286 (4th Cir. 2009); *Law v. NCAA*, 134 F.3d 1010, 1016 (10th Cir. 1998).

1. The DIFRA tons-shipped reporting agreement

The evidence shows that all four DIFRA members, McWane, Sigma, Star, and U.S. Pipe, collectively approved and adopted the DIFRA tons-shipped data reporting system. F. 720, 732-734, 787. There was a meeting of the members on March 27, 2008, also attended by Mr. Wood Herren of the Alabama law firm that served as DIFRA's attorneys, which addressed the system for reporting tons-shipped data, and at which it was resolved that the members' initial submissions would report tons-shipped data for 2006, 2007, and January through March of 2008. F. 713, 725-727, 731. Thereafter, in a telephone conference on April 25, 2008 among the available DIFRA members and DIFRA's attorney, Mr.

Thad Long, the DIFRA members approved a tons-shipped reporting format, which would include short-tons of Fittings shipped within the United States in the following six categories: 2"-12" Flanged; 2"-12" All Other; 14"-24" Flanged; 14"-24" All Other; Greater than 24" Flanged; Greater than 24" All Other. F.734, 787. The DIFRA members also agreed to a method of reporting data back to the members. It was agreed that each DIFRA member would submit its fittings tons-shipped data for 2006, 2007, and January through April of 2008 to DIFRA's accounting firm by May 15, 2008, which would then aggregate the data and provide reports to the DIFRA members, reflecting industry-wide tons-shipped, by the 20th of the month. F. 733. In addition, the DIFRA members confirmed by email their agreement to the parameters and procedures agreed to in the April 25, 2008 conference call. F. 735. The evidence further shows that each Supplier jointly participated in the aggregated tons-shipped reporting system. F. 738-739, 788, 825, 834.

Accordingly, the evidence demonstrates that the DIFRA tons-shipped reporting system constitutes concerted action by the DIFRA members for purposes of Section 1 of the Sherman Act. *See National Soc'y of Prof'l Engineers*, 435 U.S. at 679; *Indiana Fed'n of Dentists*, 476 U.S. at 447. Respondent does not argue to the contrary. Thus, the dispositive issue is whether the DIFRA tons-shipped data reporting system unreasonably restrains trade.

2. Applicable standard for determining unreasonable restraint

In analyzing whether an agreement unreasonably restrains trade, the Supreme Court has explained that "a restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held to be '*per se*' unreasonable, or because it violates what has come to be known as the 'Rule of Reason.'" *Indiana Fed'n of Dentists*, 476 U.S. at 457-58; *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 825 (6th Cir. 2011). Complaint Counsel does not contend that the DIFRA tons-shipped data reporting agreement is a *per se* unreasonable restraint, and states that the alleged DIFRA "information exchange" is to be assessed under the rule of reason. CCB at166.

Whether an alleged "information exchange" unreasonably restrains trade is assessed under the rule of reason. *See Todd v. Exxon*, 275 F.3d at 198. A "full-blown" rule of reason analysis requires courts to engage in a detailed analysis of the relevant market and the effects of the restraint in that market. *Realcomp*, 635 F.3d at 825 (citing *Ind. Fed'n*, 476 U.S. at 461). Under this analytical approach, if the challenged restraint is shown to have actual anticompetitive effects, then the burden shifts to the proponent of the challenged restraint to provide procompetitive justifications for it. *Id.* Proof of "[m]arket power and the anticompetitive nature of the restraint" has been held "sufficient to show the potential for anticompetitive effects under a rule-of-reason analysis, and once this showing has been made, [the proponent of the policies] must offer procompetitive justifications." *Id.* at 827.

While there are varying modes of inquiry, the ultimate test of legality "'is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.'" *In re Polygram Holding*, 136 F.T.C. 310, 327 n.14 (2003) (quoting *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918)). "Whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same -- whether or not the challenged restraint enhances competition." *California Dental Ass'n*, 526 U.S. at 779-80 (quoting *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 104 (1984)).

3. Anticompetitive effects

Complaint Counsel does not argue that DIFRA tons-shipped data reporting system had actual anticompetitive effects.[33] Rather, Complaint Counsel argues that the DIFRA tons-shipped data reporting system is likely to have anticompetitive effects because it has the nature or tendency to "facilitate non-competitive or collusive pricing." CCB at 166, 168-169. Proof of

[33] To the extent Complaint Counsel asserts that the DIFRA tons-shipped data reporting system had the actual anticompetitive effect of enabling Suppliers to detect "cheating" on the alleged conspiracy to curtail Project Pricing, as noted in Section III.D., the evidence fails to show this conspiracy and thus fails to show that DIFRA "facilitated" such a conspiracy.

such likely effects is sufficient, Complaint Counsel argues, because the DIFRA members have market power, with a collective market share of almost 97% during the relevant time period, in a market with high barriers to entry. CCB at 168-169. *See Tempur-Pedic, Int'l Inc.*, 626 F.3d at 1339-40 ("[M]arket share is frequently used in litigation as a surrogate for market power." (internal quotation marks and citation omitted)); *United States v. Microsoft Corp.*, 253 F.3d 34, 54-56 (D.C. Cir. 2001). The evidence shows that, collectively, McWane, Sigma, and Star had a combined share of the Fittings market of approximately 90% to 95% in 2008. Sigma and Star are McWane's primary competitors. F. 354-356, 359. The smaller suppliers making up the remaining share of the Fittings market do not affect the Suppliers' ability to implement a price increase. F. 358-360. In addition, the Fittings market has high barriers to entry. *See infra* Section III.G.2.b.i.(b); F. 1050. On these facts, it is readily apparent that McWane, Sigma, and Star, have collective market power, and Respondent does not argue to the contrary. Accordingly, the DIFRA tons-shipped data reporting system is analyzed for its likely anticompetitive effects.

a. Facilitating practice theory

As noted above, Complaint Counsel's theory of likely anticompetitive effects rests on the assertion that the DIFRA tons-shipped data reporting system is a "facilitating practice." 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. The anticompetitive result may in fact ensue, but its actual occurrence is not necessary to the presence of a facilitating practice. The vice of a facilitating practice is its anticompetitive *tendency* in the circumstances rather than a proved anticompetitive *result* in the particular case. . . . [Where] the exchange itself is an agreement that may undesirably facilitate price coordination . . . , prospective injunctive relief may be warranted even though damages cannot be proven." Areeda, ¶ 1407b1 at 38. However, an agreement to behave in a way that facilitates some undesirable result, such as price coordination, "cannot be found unreasonable without considering the offsetting economic or social benefits of the practice. Thus, the label 'facilitating practice' is only an invitation to further analysis, not a

license for automatic condemnation." *Id.* ¶ 1407b2 at 39. *See also Petroleum Products*, 906 F.2d at 448 ("'One may reluctantly tolerate interdependent pricing behavior as such and still condemn [those agreements involving] practices which unjustifiably facilitate interdependent pricing and which can be readily identified and enjoined.'" (quoting P. Areeda, *Antitrust Analysis* ¶ 325, at 381 (3d ed. 1981))). Pursuant to economic theory cited by Complaint Counsel, information exchanges that increase price transparency among oligopolists facilitate coordination by exposing, and thereby discouraging, "cheating" on consensus prices. In this way, according to the economic theory described by Complaint Counsel, the increased transparency can facilitate maintenance of a consensus price. *See* CCB at 171-172.

In *Todd v. Exxon*, 275 F.3d 191, the plaintiff claimed that the defendants routinely gave each other their employees' salary information and used the information to fix and maintain lower salaries for their combined work force. The court laid out the proper approach to analyzing whether an alleged information exchange among competitors is anticompetitive. First, it must be determined whether the structure of the industry is such that it is "'susceptible to the exercise of market power through tacit coordination.'" 275 F.3d at 207-08 (citation omitted); *see United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978) (holding that one of the two "most prominent" factors in the rule of reason analysis of a data exchange among competitors is "the structure of the industry involved"). This involves a determination of whether the market is oligopolistic, with fungible products subject to inelastic demand. *Todd*, 275 F.3d at 208. The evidence in this case demonstrates that the Fittings market has these characteristics. F. 322-328, 362. Second, "[a]longside the 'structure of the industry involved,' the other major factor for courts to consider in a data exchange case is the 'nature of the information exchanged.' *Gypsum*, 438 U.S. at 441 n.16." *Todd*, 275 F.3d at 211. "There are certain well-established criteria used to help ascertain the anticompetitive potential of information exchanges," including the time frame of the data; the specificity of the data; whether the data is made publicly available; and whether the data is discussed in meetings among the participants. *Id.* at 211-13. These factors are analyzed below.

b. Nature of information exchanged

i. Time frame of the data

"The exchange of past price data is greatly preferred because current data ha[s] greater potential to affect future prices and facilitate price conspiracies. By the same reasoning, exchanges of future price information are considered especially anticompetitive." *Todd*, 275 F.3d at 211 (citing *Am. Column & Lumber Co. v. United States*, 257 U.S. 377, 398-99 (1921)). In *Todd*, the complaint was deemed sufficient where the plaintiff alleged that the defendants exchanged past and current salary information, as well as future salary budget information.

In the instant case, in contrast, the reporting format used by DIFRA's accountants referred only to past tons-shipped, and did not include any price data. F. 745-747, 749, 752. The tons-shipped data, upon which the DIFRA reports were based, represented sales taking place at varying past times, from a few weeks, to many months previously in the case of large public works projects, which were particularly prone to delay. Private jobs varied, but most were shipped within a month of the sale. F. 752. Based on *Todd*, the time frame of the DIFRA tons-shipped data does not weigh in favor of concluding that the data reports would facilitate collusive pricing.

ii. Specificity of the DIFRA tons-shipped data

(a) DIFRA data generally

"Price exchanges that identify particular parties, transactions, and prices are seen as potentially anticompetitive because they may be used to police a secret or tacit conspiracy to stabilize prices." *Todd,* 275 F.3d at 212. The court in *Todd* further stated, "[c]ourts prefer that information be aggregated in the form of industry averages, thus avoiding transactional specificity." *Id*. Unlike the information exchange found sufficient to state a claim in *Todd*, the tons-shipped information exchanged through the DIFRA reports was aggregated, and had no transactional specificity. F. 741-744, 748-749. The DIFRA tons-shipped reports consisted of the aggregated totals of tons shipped in the United States during the reporting period, broken down by size

categories (2" to 12", 14" to 24", larger than 24" in diameter, and flanged versus non-flanged). F. 741. These broad categories are commonly used in the industry and mirror the major size groupings of pipe. F. 741-742. They reflect product size ranges containing thousands of different SKUs – all with unique physical attributes and pricing points. F. 742. The reports did not break down the tonnage shipped by state. F. 744. The tons-shipped data gathered by DIFRA's accountants did not distinguish between Domestic Fittings and non-domestic Fittings, and did not indicate whether the tonnage was sold into open preference or domestic preference jobs. F. 743.

Moreover, neither DIFRA nor its accountants ever collected sales price data. F. 745. The DIFRA tons-shipped data reports did not include or reveal any sales prices. F. 746. The DIFRA reports did not show the timing of prior sales or dollar amount of any sales. F. 758. The DIFRA reports did not report any dollar figures. F. 747. However, to the extent the submitted data was accurate, by seeing the aggregated totals of tons shipped during the reporting period, the Suppliers were able to assess the total size of the Fittings market during the reporting period, in the various fittings categories. F. 756. Then, by further analyzing the total tons-shipped data in relation to internal sales information, as other references such as Ductile Iron Pipe Research Association (DIPRA) and Valve Manufacturers' Association (VMA) data, a Supplier could determine its own market share during the reporting period. F. 757, 774-776, 778, 839. A Supplier could then track changes in its market share over time by referencing the monthly DIFRA tons-shipped reports. F. 776-778. Indeed, one of the purposes of the data reporting system was to help each member assess its own individual market share. F. 757. The data was not sufficiently detailed, however, to enable any DIFRA member to determine the respective market shares of any other DIFRA member. F. 758. The tons-shipped data report contained aggregated data, and no DIFRA member was permitted to review the tons-shipped data of any other member. F. 748. Moreover, the evidence shows that there were at least some errors in the data submitted and reported. F. 754-755.

(b) Market share information as "facilitating" price coordination

Complaint Counsel argues that the DIFRA tons-shipped data increases price transparency, notwithstanding the lack of any disclosure of prices, because the DIFRA tons-shipped data enables a Supplier to evaluate changes in market share against the total size of the market, and thereby further enables each Supplier to determine whether one's loss of market share was due to a market decline, or to a loss of business to the competition. CCB at 171. The evidence fails to show that in the Fittings market a loss of business to the competition necessarily means the loss was due to "cheating" or "discounting" by the competition, as Complaint Counsel argues. In fact, the evidence shows, market share loss can be attributed to various factors. As Mr. Page, CEO of McWane, stated in a January 23, 2009 internal email reacting to McWane's apparent loss of market share, as shown in part by the December 2008 DIFRA aggregated, tons-shipped data report: "Trying to not be emotional about it. But these numbers are infuriating. We have serviced our customers I assume and have the product they need, we are just being discounted against?" F. 783. Mr. Page wanted further information: "Are . . . Leon, Rick and our salespeople not keeping our customers competitive and – or do we not have the right product? Why are we losing market share? The question is, are we overpriced? Do we have the wrong mix of products? We don't have what people need? But I'm upset with our people for not managing their business." F. 783; *see also* F. 391 (Distributors consider price, service and relationship, among other things, when selecting a Fittings supplier).

Complaint Counsel further asserts that each of the Suppliers, including McWane, based pricing decisions on its assessment of its market share. The argument that being able to assess one's own market share, and use that information in determining whether to raise or lower one's own price, unlawfully "facilitates" price coordination is without legal support, and is unpersuasive. Furthermore, the evidence supports a conclusion that using one's own market share assessment to determine whether to raise or lower one's own price is rational, competitive behavior, and is indicative of normal competition. As Mr. Pais of Sigma explained: "If the [DIFRA] data point to a significant loss of

market share, then Sigma would generally use price to get share back. If Sigma wanted to grow volume, Sigma would also use price to attract sales." F. 769; *see also* F. 759 (Mr. Bhutada of Star stating: "[I]f market share is going down, then you know that you're on the wrong path. If it is stable or going up, then you know that you're on the right path"). For example, the DIFRA aggregated tons-shipped report in June 2008 helped McWane decide to choose the low end of the 8% to 12% range of multiplier increases that Mr. Tatman had been considering, because the DIFRA report confirmed his suspicion that McWane was continuing to lose market share, and showed that McWane's market share loss was worse than Mr. Tatman had suspected. F. 777. In addition, the evidence shows that Mr. Tatman used the DIFRA tons-shipped data in McWane's internal analysis of its pricing for Fittings, in connection with McWane's restructuring of its price list for medium and large diameter Fittings in early 2009. F. 784. Specifically, McWane was able to determine that McWane's market share was strong or growing in some segments, but weak or falling in others, and changed its list prices accordingly. F. 784.

In further support of the claim that the DIFRA tons-shipped data reports constitute an anticompetitive "facilitating practice," Complaint Counsel relies on a letter dated February 9, 2009 from Mr. Pais of Sigma to Sigma's lender, Ares Capital, in which Mr. Pais stated his opinion that "monthly market size data produced by DIFRA" had the benefit of helping to "maintain the pricing discipline, as the market and market share data point to a relatively consistent and stable market pattern. It has helped [Sigma] not to allow the sharp market decline to be mistaken as a 'loss of market share', which mostly causes price reaction." F. 768. The foregoing statements represented Mr. Pais' "very broad assessment as [Mr. Pais] saw it of one of" the intangible benefits of DIFRA that he communicated to Ares Capital in order to reassure the lender, which was concerned about recent declines in Sigma's pricing and volume, that DIFRA will provide visibility into market demand and help prevent panic selling based on misinformation. F. 768. A "mistaken diagnosis" about the reasons for a loss of market share makes it more difficult for Sigma to make the correct decision going forward, including decisions as to whether to lower price and/or to seek additional

volume from existing customers. F. 769. It makes sense that Mr. Pais would want to communicate to Sigma's lender his opinion that DIFRA data may help prevent Sigma from making a "misdiagnosis" of the competitive environment and pricing mistakes in reliance on such misdiagnosis. Moreover, the evidence fails to show that Mr. Pais was referring to any ability to coordinate with others on price, or to anything other than Sigma's own independent decision-making as to its own pricing conduct. Accordingly, the statements in Mr. Pais' February 9, 2009 letter do not constitute evidence that the DIFRA reports facilitate price coordination.

In summary, the aggregated DIFRA tons-shipped data is far less specific than the individualized salary information allegedly exchanged in *Todd.* In that case, it was alleged that the defendant companies periodically compiled surveys that shared, for each company, the actual salaries paid in thirty different categories of jobs, or "job families," classified according to the nature of the work. The information exchanged for each "family" was further broken down by the job level classification, experience level, and academic background of the employee. 275 F.3d at 196. By periodically updating the foregoing data, it was alleged, each defendant could determine whether the announced budgets of its competitors had been implemented, so that each could consider what adjustments should be made to coordinate salary levels. *Id.* Additional surveys collected further information on starting salaries at the companies for recent college graduates, as well as bonuses and other non-standard payments above base compensation that were not captured in the defendants' other surveys. *Id.* at 197. *Compare also Cason-Merenda v. Detroit Med. Ctr.*, 862 F. Supp. 2d 603, 612-15 (E.D. Mich. 2012) (holding that evidence was sufficient to defeat summary judgment on alleged unlawful information exchange, where evidence showed, among other things, detailed salary surveys and exchanges of information at trade association meetings regarding salary ranges, planned raises, and the timing of annual increases).

For all the foregoing reasons, the DIFRA aggregated data is insufficiently specific to facilitate price coordination, as argued by Complaint Counsel.

iii. Publicly available data

"Public dissemination is a primary way for data exchange to realize its procompetitive potential" and can help mitigate anticompetitive effects. *Todd*, 275 F.3d at 213. It was alleged in *Todd* that the defendants kept their salary surveys confidential, which impeded the ability of employees to bargain competitively with the defendants. *Id.* In the instant case, it is not alleged that the DIFRA tons-shipped data reports were kept confidential by the DIFRA members, nor does the evidence show whether or not the DIFRA tons-shipped data reports were kept confidential by the DIFRA members.

iv. Meetings concerning the data

In *Todd*, the court was troubled by the fact that the defendants "allegedly participated in frequent meetings to discuss the salary information, . . . accompanied by assurances that the participants would primarily use the exchanged data in setting their [employees'] salaries." 275 F.3d at 213. Such frequent meetings, the court explained, tend to "facilitate the policing" of conspiracies. *Id.* In the instant case, in contrast, there is no evidence of any meetings among the DIFRA members after the DIFRA tons-shipped reports were instituted, or of any discussions among the DIFRA members regarding the DIFRA tons-shipped data. The evidence shows that the last DIFRA meeting was a conference call on April 25, 2008, before any data was submitted or reported. F. 736-737. The first DIFRA tons-shipped report was distributed on June 17, 2008. F. 738. The last DIFRA tons-shipped report was circulated in January 2009. F. 739. This dearth of evidence similar to that in *Todd* further distinguishes this case from the alleged information exchange constituting a facilitating practice in *Todd.*

4. Conclusion

As shown above, the evidence fails to prove that the DIFRA tons-shipped data reporting system has the nature and tendency to facilitate price coordination, as argued by Complaint Counsel. Complaint Counsel has therefore failed to prove its theory of likely anticompetitive effects resulting from an information

exchange by competitors. Accordingly, Complaint Counsel has failed to meet its burden of proving that the DIFRA tons-shipped data reporting system is an agreement in restraint of trade, as alleged in Count Two of the Complaint.[34]

F. Count Three: Alleged Invitation to Collude

Count Three of the Complaint charges that McWane engaged in an unfair method of competition in violation of Section 5 of the FTC Act by "inviting Sigma and Star to participate in a *per se* illegal price fixing conspiracy." CCB at 90; Complaint ¶ 66. Specifically, Complaint Counsel argues that McWane's January 11, 2008 and May 7, 2008 Customer Letters, each "unlawfully invited McWane's primary competitors in the Fittings market to participate in a *per se* illegal price fixing agreement." CCB at 92. McWane rejects Complaint Counsel's interpretation of the foregoing customer letters and further argues that no court has held that an invitation to collude violates Section 5.[35]

1. Overview of relevant legal authorities

Although the Commission has previously challenged alleged "invitations to collude" as unlawful under Section 5, Complaint Counsel cites no litigated case that has found the existence of an "invitation to collude" within the purview of Section 5. *See* CCB

[34] Because Complaint Counsel has not demonstrated actual anticompetitive effects, or likely anticompetitive effects, it is not necessary to assess whether Respondent has proved procompetitive justifications for the DIFRA tons-shipped data reporting system. Nevertheless, there is logical and credible evidence of procompetitive effects. As noted above, McWane used the DIFRA data to implement lower published prices in relation to its competitors. F. 777, 784. The evidence also shows that the DIFRA tons-shipped data identifies the extent to which various segments of the market are moving, including over time, which thereby helps each DIFRA member to assess overall market trends, and better manage production schedules and inventory. F. 760, 763, 773.

[35] Contrary to an argument raised by McWane, the fact that customer letters are public documents is not dispositive of whether these letters contained an unlawful invitation to collude. The evidence demonstrates that customer letters served to communicate to customers and competitors. F. 578.

at 90-105. Thus, the type of communications that will prove an unlawful "invitation to collude" is unclear. [36]

Areeda states that a solicitation to enter into an anticompetitive agreement can justify a remedy under Section 5, even if the solicitation does not result in an unlawful agreement under Section 1 of the Sherman Act: "Solicitation to a conspiracy is dangerous to competition even if it cannot be shown that an "offer" has been "accepted." Areeda, ¶ 1419d at 141. "Unaccepted solicitations can facilitate dangerous tacit coordination in oligopolistic markets, even though the solicitor and solicitee do not collectively control the market, and can increase the likelihood of actual price-fixing agreements in all markets." ¶ 1419e at 143. *See also* Calkins, *Counterpoint: The Legal Foundation of the Commission's Use of Section 5 to Challenge Invitations to Collude is Secure*, ANTITRUST Spring 2000 at 69 ("As a matter simply of the English language, 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 Sherman Act's basic policies.").

According to Areeda, highly ambiguous communications should not be actionable. Areeda, ¶ 1419e4 at 147. It has also been noted that the evidence "must be scrutinized closely to ensure that the communication is no more than a naked invitation to fix prices or divide markets." Joseph Kattan, *Facilitating Practices and Section 5: The Evidence of Life After Ethyl*, ABA

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[36] Complaint Counsel cites to the Commission's opinion denying Respondent's motion for summary judgment on Count Three, which held that there were genuine disputes of fact as to whether the evidence demonstrated an "invitation to collude." *See In re McWane, Inc.*, No. 9351, 2012 FTC LEXIS 155, at *54 (Sept. 14, 2012). The Commission's prehearing ruling has no bearing on the merits of the case as determined in this Initial Decision. Complaint Counsel also refers to an FTC statement supporting the consent order in *In re U-Haul, Int'l Inc.*, FTC File No. 081 0157, published at *75 Fed. Reg. 35033 (June 21, 2010).* FTC statements accompanying a consent order do not constitute regulatory law, which is made either by adjudication, 15 U.S.C. § 45(b); 5 U.S.C. § 556, or by promulgated regulation, 15 U.S.C. § 57b-3; 5 U.S.C. § 553. Consent decrees are not an adjudication, and moreover, "[t]he circumstances surrounding . . . negotiated [consent decrees] are so different that they cannot be persuasively cited in a litigation context." *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 331 n.12 (1961).

Section of Antitrust Law, Annual Symposium, at 20-21 (1992) (cited at CCB at 92). The case of *Liu v. Amerco*, 677 F.3d 489 (1st Cir. 2012), is also instructive. In that case, the court upheld a complaint alleging an unsuccessful attempt to fix prices as stating a violation of the Massachusetts unfair competition statute, which is substantially similar to Section 5 of the FTC Act. *Liu* was a follow-on action against U-Haul International, which had entered into a consent order on a complaint issued by the FTC, and the allegations of the Complaint in *Liu* were derived from the FTC's summary of the complaint and consent order, published in the Federal Register. 677 F.3d at 491 (citing *Federal Trade Commission, U-Haul Int'l, Inc. and AMERCO*, 75 Fed. Reg. 35033 (June 21, 2010)).

According to the FTC's summary of the *U-Haul* allegations set forth by the court in *Liu*, U-Haul's chief executive officer issued an instruction to U-Haul regional managers to contact U-Haul's competitor, Budget, to inform Budget of U-Haul's recent conditional truck rate increase, to encourage Budget to follow, and to advise that if Budget did not follow, U-Haul's rates would be reduced to their prior level. In addition, U-Haul's CEO instructed local U-Haul dealers to communicate with their counterparts at competitors Budget and Penske, to reinforce the message that U-Haul had raised its rates and urge that competitors' rates should be raised to match the increased U-Haul rates. *Liu*, 677 F.3d at 491, citing 75 Fed. Reg. at 35034. The complaint further alleged that there were telephone calls from a U-Haul executive to representatives at three major Budget locations, in which the executive identified himself, advised those Budget representatives of U-Haul's recent rate increases, and encouraged them to follow: "[I] told them who I am, I spoke about the [increase to] .40 per mile rates to SE Florida and told them I was killing them on rentals to that area and I am setting new rates to the area to increase revenue per rental. I encouraged them to monitor my rates and to move their rates up." *Id.* In addition, the complaint there alleged that when Budget did not follow U-Haul's rate increases, U-Haul held an earnings conference call, which U-Haul knew would be monitored by Budget representatives, and stated, among other things: that U-Haul was acting as the industry price leader, the company had recently raised its rates, and that its competitors should do the same; that Budget's failure to date to match U-Haul's higher rates

was "unfortunate for the entire industry"; that U-Haul will wait a while longer for Budget to respond, "otherwise it will drop its rates"; that in order to keep U-Haul from dropping its rates, Budget does not have to match U-Haul's rates precisely, and that a 3 to 5 percent price difference is acceptable; that for U-Haul, market share is more important than price; and that U-Haul will not permit Budget to gain market share at U-Haul's expense. *Id.*

With the foregoing legal authorities as reference points, the customer letters that are challenged as invitations to collude in this case are analyzed below. As shown *infra*, the "invitation to collude" alleged in the instant case bears little resemblance to the allegations upheld as stating such a claim in *Liu.*

2. January 11, 2008 Customer Letter

Complaint Counsel asserts that McWane's January 11, 2008 Customer Letter, which notified McWane's customers of upcoming multiplier changes and McWane's intent to, in effect, stop Project Pricing (*see* F. 645), proposed an unlawful price fixing agreement to its competitors Sigma and Star by proposing a "*quid pro quo*." Specifically, Complaint Counsel contends that the January 11, 2008 Customer Letter "offered" to Sigma and Star that McWane would "support a second price increase later in the year (quid) B but only if pricing had stabilized, *i.e.*, Sigma and Star also curtailed Project Pricing (quo)." CCB at 93; *see generally* CCB at 93-96. Complaint Counsel argues that the January 11, 2008 Customer Letter not only announced McWane's intentions with regard to Project Pricing, but also "dangled the prospect" that McWane would support another price increase in order to induce Sigma and Star to curtail Project Pricing along with McWane. CCB at 95. With respect to any future price increase, the January 11, 2008 Customer Letter stated:

> If the current inflationary trends continue as forecasted, we anticipate the need to announce another multiplier increase within the next six months. However, we will only do so as conditions require.

F. 645.

Complaint Counsel urges the inference that "as conditions require" meant "greater pricing stability and transparency in the Fittings market by curtailing project Pricing." CCFF 944. However, the phrase "as conditions require" is vague, highly ambiguous, and on its face does not set forth the alleged "offer" of a second price increase in the future if Sigma and Star curtailed Project Pricing. *See* Areeda, ¶ 1419e4 at 147. To be sure, the letter is hardly a naked invitation to fix prices. *See* Kattan, *supra*, at 20-21. To support its desired inference, Complaint Counsel points to Mr. Tatman's internal December 25, 2007 PowerPoint Presentation, which included a slide titled, "Desired Message to the Market & Competitors," which stated that "[f]or 2008, we will support net price increases but will do so in stepped or staged increments. A prerequisite for supporting the next increment of price is reasonable stability and transparency at the prior level." F. 638. Complaint Counsel also cites language in draft customer letters prepared in connection with the December 25, 2007 PowerPoint Presentation. CCB at 97-98, citing CX 0627 at 006-007; *see* F. 626.

McWane's internal plans or goals as to when, why, or by how much, it might raise prices in the future are not probative or persuasive evidence that the January 11, 2008 Customer Letter, in fact, communicated an "offer" by McWane, to Sigma and Star, to raise prices in the future if Sigma and Star reduced Project Pricing, as contended by Complaint Counsel. Complaint Counsel's argument ignores the fact that the evidence in this case fails to demonstrate that Mr. Tatman's December 25, 2007 PowerPoint Presentation was anything other than an internal discussion document, which was not shared with Sigma or Star. *See* Section III.D.2.b.iii.(c), *supra*. In essence, Complaint Counsel would have Respondent held liable for communicating an "invitation to collude" based upon what McWane may have internally considered or discussed communicating. This is insufficient. If nothing else, the cases and authorities make clear that liability must be based upon the actual communication to a competitor, and not upon a communication that was only considered or discussed internally. Further, the cases and authorities do not support a conclusion that merely "dangling a prospect" of a price increase is the equivalent of an "invitation" to fix prices, as Complaint Counsel argues. *E.g.*, *Liu*, 677 F.3d at 491 (allegations that defendant told competitor, *inter alia*, to

increase prices to match defendant, and threatened a price decrease if the competitor did not do so); *compare also In re Valassis Communs.*, 2006 FTC LEXIS 25, at *5 (2006) (complaint alleging communication to competitor that respondent "will quote all [competitor's] first right of refusal customers at the floor price . . . [and] our net price after ancillary price discounts, rebates, et cetera, will not go below $ 6 [per thousand] for a full page and $ 3.90 [per thousand] for a half page"); *In re Precision Moulding Co.*, *1996 FTC LEXIS 386,* at *3 (1996) (complaint alleging meeting with officer of competitor, in which respondent's Chief Executive Officer stated that competitor's price was "ridiculously low" and that competitor did not need to "give the product away," and threatened a price war if competitor did not match respondent's higher prices).

It should also be noted, as discussed in Section III.D.2.b.iii.(c), *supra*, that Complaint Counsel points to no evidence supporting a finding that Sigma and Star "understood" the January 11, 2008 letter as an offer by McWane to raise prices in exchange for Sigma and Star curtailing Project Pricing. The evidence shows, at most, that Sigma and Star interpreted McWane's letter to be communicating that McWane was raising multipliers from its then-effective multipliers (as opposed to published multipliers) and further announcing to its customers that McWane intended to, in effect, discontinue Project Pricing in the future. F. 663-664, 682; *but see* F. 683 (Mr. McCutcheon of Star did not believe "for one second" that McWane would, in fact, stop Project Pricing, despite what was said in McWane's January 11, 2008 Customer Letter). The greater weight of the evidence does not support an inference that the letter "offered" to raise prices in the future in exchange for Sigma and Star curtailing their Project Pricing.

3. May 7, 2008 Customer Letter

Complaint Counsel argues that McWane's May 7, 2008 Customer Letter (F. 809) also invited Sigma and Star to fix prices. In support of this argument, Complaint Counsel asserts that this customer letter, in which McWane stated that it planned to raise multipliers between 6 and 16 percent, but would not make its final determination until the end of May, was an "offer" by McWane to

its competitors that McWane would raise prices in return for the competitors' submitting their tons-shipped data to DIFRA's accountants. CCB at 100-101. Complaint Counsel relies on the following language from the May 7, 2007 Customer Letter:

> Before announcing any price actions, we carefully analyze all factors including: domestic and global inflation, market and competitive conditions within each region, as well as performance against our own internal metrics. We anticipate being able to complete our analysis by the end of May. At that point, we will send out letters to each specific region detailing changes, if any, to our current pricing policy.

F. 809. As in the case of McWane's January 11, 2008 Customer Letter, the relevant language of the May 7, 2008 Customer Letter, upon which Complaint Counsel relies, is vague, highly ambiguous, and on its face does not set forth the alleged "offer" of a price increase conditioned upon Sigma and Star submitting their tons-shipped data. *See* Areeda, ¶ 1419e4 at 147. The language is also far from "a naked invitation" to fix prices. *See* Kattan, *supra*, at 20-21.

Acknowledging that the alleged offer was not expressly made in the May 7, 2008 Customer Letter, Complaint Counsel asserts that the offer was made "implicitly" in the above-quoted language. CCB at 101. Specifically, Complaint Counsel argues that McWane wanted to wait until after receiving and reviewing the DIFRA tons-shipped data before finalizing its decision on a price increase; the "factors" language, above, was not meaningful to customers, but was meaningful to Sigma and Star, because only they knew that, pursuant to the DIFRA agreement, tons-shipped data reports would not be issued before "the end of May"; Star understood the "offer" because Star quoted the "factors" language in an email regarding Star's submittal of the DIFRA tons-shipped data; and McWane announced a price increase soon after receiving and reviewing the June 17, 2008 DIFRA tons-shipped data report. CCB at 102-105.

Complaint Counsel's arguments that McWane's May 7, 2008 Customer Letter was an illegal "offer" by McWane to its competitors to raise prices if the competitors submitted their tons-shipped data to DIFRA's accountants, are materially identical to

its arguments that McWane, Sigma, and Star reached an agreement to exchange a price increase by McWane for Sigma and Star submitting DIFRA tons-shipped data. *See* CCB at 148-157. Those arguments, and the evidence upon which those arguments were based, were addressed in detail and rejected in Section III.D.3., *supra*. For all the reasons set forth in that Section, the evidence fails to show that McWane's May 7, 2008 Customer Letter was an "offer" by McWane to its competitors to raise prices in return for the competitors' submitting their tons-shipped data to DIFRA's accountants for inclusion in the DIFRA tons-shipped data report. Thus, the evidence fails to prove that McWane's May 7, 2008 Customer Letter constituted an "invitation to collude" in violation of Section 5 of the FTC Act.

4. Conclusion

For all the foregoing reasons, Complaint Counsel has failed to prove any "invitation to collude" by McWane and therefore has failed to meet its burden of proof as to Count Three of the Complaint.

Counts One, Two, and Three, relating to McWane's alleged unlawful conduct in the Fitting market, are dismissed. The Initial Decision next turns to McWane's alleged unlawful conduct in the Domestic Fittings market. Counts Six and Seven, pertaining to McWane's September 22, 2009 Full Support Program, are analyzed first. Counts Four and Five, pertaining to McWane's September 17, 2009 MDA with Sigma, are analyzed second.

G. Counts Six and Seven: Alleged Monopolization and Attempted Monopolization of the Domestic Fittings Market

1. Overview

Counts Six and Seven of the Complaint allege that McWane monopolized or attempted to monopolize the Domestic Fittings market through exclusionary acts and practices. Complaint ¶¶ 69-70. In particular, the Complaint alleges that McWane threatened to withhold rebates, delay deliveries, and refuse to deal with

Distributors who purchased Domestic Fittings from Star. Complaint ¶ 57.

Complaint Counsel asserts that, in response to ARRA's allocation of $6 billion in funds for waterworks projects built with products made in the United States, Star announced at a June 2009 American Water Works Association ("AWWA") show that it would begin selling Domestic Fittings by the fall of 2009. CCB at 206. According to Complaint Counsel, McWane, in response, implemented an exclusive dealing policy (discussed below) with the specific intent of deterring Distributors from dealing with Star and other rivals in the Domestic Fittings market. CCB at 206.

Complaint Counsel charges that McWane has monopoly power in the Domestic Fittings market and that, by denying its competitors a sufficient network of Distributors to whom to sell their Domestic Fittings, McWane effectively prevented its rivals from reaching an efficient scale and, consequently, from constraining McWane's monopoly prices. CCB at 206-07. In addition, Complaint Counsel asserts that no procompetitive efficiencies outweigh the harm caused by McWane's challenged exclusive dealing policy. CCB at 207.

Respondent asserts that even if there is a separate market for Domestic Fittings, McWane did not have monopoly power in that market, as evidenced by McWane's inability to control prices or exclude competition. RB at 89. Respondent further asserts that Star rapidly and effectively entered the Domestic Fittings market and thus McWane did not exclude Star from that market. RB at 90. Finally, McWane asserts that the challenged policy was simply a rebate policy, was not a contract, did not require any customer to buy Domestic Fittings from McWane, is presumptively lawful, and had procompetitive benefits. RB at 92-101, 107-108.

Monopolization requires proof of: "(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 a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Attempted monopolization 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 [or obtaining] monopoly power." *Spectrum Sports*, 506 U.S. at 456. These elements are analyzed below.

2. Monopoly power in the relevant market

a. Relevant market

Establishing the relevant market is the first step in assessing whether a respondent possesses monopoly power. *Spectrum Sports*, 506 U.S. at 456. As analyzed in Section III.C.3., *supra*, the relevant geographic market is the United States and, in addition to the relevant Fittings market, consisting of ductile iron pipe fittings of 24" and smaller in diameter, there is a separate market for Domestic Fittings, consisting of ductile iron pipe fittings of 24" and smaller in diameter that are made in the United States and sold for use on jobs with domestic-only specifications. *Supra* Section III.C.2.

b. Monopoly power or the dangerous probability of achieving monopoly power

Monopoly power is defined as "the power to control prices or exclude competition." *du Pont*, 351 U.S. at 391. Monopoly power may be inferred or proven indirectly through proof of high market share in a market protected by barriers to entry. *Microsoft*, 253 F.3d at 51; *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 307 (3d Cir. 2007). Monopoly power may also be proven by direct evidence of a firm's ability to control prices or exclude competitors. *Microsoft*, 253 F.3d at 51; *Broadcom*, 501 F.3d at 307.

i. Market share in a market with high barriers

Complaint Counsel asserts that monopoly power can be inferred from McWane's high Domestic Fittings market share and the existence of high entry barriers in that market. CCB at 207-208. Respondent asserts that it is inappropriate to infer monopoly power from McWane's share of the Domestic Fittings market where that share was thrust on it by historic accident and further

asserts that barriers to entry into the Domestic Fittings market are not high. RB at 88-89, RRB 60.

(a) Market share

Generally, to support a finding of monopoly power, a market share of at least 70% to 80% is sufficient. *duPont*, 351 U.S. at 379, 391 (finding 75% of a relevant market to constitute monopoly power); *Grinnell Corp.*, 384 U.S. at 567, 571 (inferring monopoly power from "predominant share" (87%) of the market). Market share levels sufficient to support a monopolization claim are also sufficient to support an attempted monopolization claim. *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.").

The market share statistics for the Domestic Fittings market must be viewed in the context of the overall Fittings market. The Fittings industry has changed dramatically over the last 30 years. *See* F. 462-476. The U.S. International Trade Commission, in December 2003, determined that Fittings from China were "being imported into the United States in such increased quantities or under such conditions as to cause market disruption" to domestic Fittings producers. F. 470. *See also* F. 471. As Mr. Tatman testified, "domestic-only specs have done nothing but erode over time." F. 1027. Distributors confirmed this. For example, less than approximately 5% of municipalities in Illinois Meter's service area have domestic-only specifications today. F. 1028. In the view of Illinois Meter, in the absence of a strong union and municipal push for domestic-only specifications, fewer municipalities require domestic-only Fittings. F. 1028.

Prior to 2007, there were several other domestic manufacturers of Fittings in addition to McWane, including U.S. Pipe, Griffin, and ACIPCO. F. 462. These other domestic manufacturers either dramatically reduced or exited Domestic Fittings production in the face of cheap imports. F. 472. By late 2007, McWane was "the last guy standing producing fittings domestically" in the under 30-inch diameter segment of the

Fittings market. F. 476. McWane admits that it was the only manufacturer of Domestic Fittings since at least 2006 until Star entered the Domestic Fittings market in late 2009. F. 1040.

While End User preferences and legal requirements that waterworks projects use Domestic Fittings in domestic-only specifications existed before the passage of ARRA (F. 519-523), the passage of ARRA in 2009, with its Buy American provisions, temporarily increased the size of the Domestic Fittings market. F. 524, 526, 527, 1029-1030. During the period that ARRA funding was available, the total number of waterworks projects that were built, repaired, or otherwise commissioned in the United States increased and Distributors' sales of Domestic Fittings increased. F. 1033-1035. The majority of the impact of ARRA and its resulting increase in the number of Domestic Fittings sales was felt in 2010. F. 1035. While ARRA-funded jobs were primarily serviced during the 2010 calendar year, some projects continued into 2011. F. 1036.

Prior to the passage of ARRA in 2009, domestic-only Fittings projects comprised approximately 15% to 20% of the overall Fittings market. F. 1029. Domestic-only Fittings projects grew to 28% of the overall Fittings market in 2010. F. 1030. Following the end of ARRA funding for waterworks projects in 2011, the demand for Domestic Fittings reverted back to where it had been before "the ARRA period,"[37] approximately 15% to 20% of the overall Fittings market. F. 1031.

Fittings suppliers agreed that ARRA had only a short-term impact on Domestic Fittings sales. *See* F. 1037 (Electrosteel (by the third quarter of 2010, bidding on ARRA jobs had ceased); Backman Foundry (ARRA funded only "a finite amount of jobs.")). Fittings Distributors also agreed that ARRA had only a short-term impact on Domestic Fittings sales. F. 1038. For example, HD Supply's Mr. Webb testified that ARRA's impact

[37] According to the EPA publication titled, "Implementation of the American Recovery and Reinvestment Act of 2009," all ARRA funded projects were to be under contract by February of 2010. As a result, Dr. Normann used March 2009 to February 2010 as "the ARRA period." F. 1032. Industry participants use the term "the ARRA period" to refer to sales made through 2011. F. 1035-1036.

on the demand for Domestic Fittings was "mild, at best" and "very minimal and mostly played out in 2009 and 2010"; and Illinois Meter's Mr. Sheley testified that ARRA "had a small effect" on sales of Fittings. F. 1038; *see also* F. 1038 ("[I]n reality, I don't believe that [ARRA has] impacted our business at all."). Given ARRA's limited effect, former Domestic Fittings manufacturers and specialty domestic Fittings manufacturers did not believe ARRA made it worthwhile for them to expand or return to production of a full line of Domestic Fittings. F. 1039. For example, Mr. Backman of Backman Foundry never considered expanding production as a result of ARRA, "when anybody and their dog can see that this market is going to end at some point." F. 1039.

Star, however, in reaction to ARRA's passage in February 2009, began to develop plans to expand its product lines to include Fittings that satisfied the Buy American provisions of ARRA. F. 1094-1097. Star publicly announced at a June 2009 AWWA industry conference that it would offer Domestic Fittings starting in September 2009. F. 1095. To achieve this objective, Star contracted with multiple domestic foundries to produce castings for Domestic Fittings and expanded its Houston facility to perform the finishing process (drilling holes, adding lining, and painting the fittings). F. 1104-1106. Star decided that it would be a full line supplier and acquired patterns from China in the summer of 2009 that Star needed for a complete line. F. 1119-1121. By September 2009, Star recorded its first sales of domestically-manufactured Fittings and began shipping Domestic Fittings to Distributors in late 2009. F. 1127-1128. Star had [redacted] million dollars in Domestic Fittings sales in both 2010 and 2011, and, at the time of trial, expected to sell more Domestic Fittings in 2012. F. 1143.

After Star entered the Domestic Fittings market, McWane's share of the Domestic Fittings market in 2010 continued to be over 95%. In 2011, McWane's share of the Domestic Fittings market continued to be over 90%, while Star's share of the Domestic Fittings market rose from 0% in 2009 to almost 10% in 2011. F. 1042-1043.

"A court will draw an inference of monopoly power [based on market share] only after full consideration of the relationship

between market share and other relevant market characteristics." *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 98 (2d Cir. 1998). "These characteristics include the 'strength of the competition, the probable development of the industry, the barriers to entry, the nature of the anticompetitive conduct and the elasticity of consumer demand.'" *Id.* (citation omitted). In *Metro Mobile CTS, Inc. v. NewVector Communications, Inc.*, 892 F.2d 62, 63 (9th Cir. 1989), relied upon by Respondent (RB at 88), the court affirmed the district court's refusal to infer monopoly power from defendant's 100% share of the market where defendant, as successor-in-interest to the traditional wireline carrier in the Phoenix area, was permitted to enter the market as the exclusive supplier of wholesale service while the FCC solicited bids for the non-wireline carrier license. The court explained:

> Blind reliance upon market share, divorced from commercial reality, [can] give a misleading picture of a firm's actual ability to control prices or exclude competition. The commercial reality in this case is that the cellular telephone market in Phoenix is heavily regulated by the Federal Communications Commission (FCC) and the Arizona Corporation Commission (ACC). Reliance on statistical market share in cases involving regulated industries is at best a tricky enterprise and is downright folly where, as here, the predominant market share is the result of regulation. In such cases, the court should focus directly on the regulated firm's ability to control prices or exclude competition.

Id. Unlike the defendant in *Metro Mobile*, McWane did not gain its Domestic Fittings market share as a result of operating in a heavily regulated industry; instead, its predominant market share is the result of all other domestic manufacturers having exited the market in the wake of cheap imports. Then, there was suddenly increased demand for Domestic Fittings as a result of the Buy American provisions of ARRA. Nevertheless, under these circumstances, it is inappropriate to infer monopoly power based solely on McWane's market share, as further explained below.

Monopoly power may not be inferred from a high market share in a market with low entry barriers or other evidence of a defendant's inability to control prices or exclude competitors.

United States v. Syufy Enterprises, 903 F.2d 659, 664 & n.6 (9th Cir. 1990); *see also Eastern Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n*, 357 F.3d 1, 6 (1st Cir. 2004) ("A defendant's high share is only a presumptive basis for inferring market power (entry barriers to the market may be very low")). The Initial Decision therefore turns next to the issue of whether there are low entry barriers and then evaluates whether there is other evidence of Respondent's inability to control prices or exclude competitors.

(b) Barriers to entry and expansion

"Barriers to entry are market characteristics which make it difficult or time-consuming for new firms to enter a market." *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co.*, 885 F.2d 683, 696 n.21 (10th Cir. 1989). "Entry barriers are 'additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants,' or 'factors in the market that deter entry while permitting incumbent firms to earn monopoly returns.'" *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 428 & n.8 (5th Cir. 2008) (citing *Los Angeles Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1427-28 (9th Cir. 1993)). Examples of barriers to entry include the construction of large manufacturing plants, regulatory requirements, high capital costs, or technological obstacles. *Colorado Interstate Gas Co.*, 885 F.2d at 696 n.21; *Broadcom*, 501 F.3d at 307.

In addition, a network of exclusive contracts or distribution arrangements designed to lock out potential competitors can be viewed as a barrier to entry. *Syufy Enterprises*, 903 F.2d at 667. *See also United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 194 (3d Cir. 2005) ("Entrants into the marketplace must confront Dentsply's power over the dealers."). However, successful, actual expansion by an existing competitor can preclude a finding that exclusive dealing is an entry barrier of significance. *Omega Envtl. v. Gilbarco, Inc.*, 127 F.3d 1157, 1164 (9th Cir. 1997). These considerations are addressed in the following section, on Respondent's ability to exclude competitors. *Infra* Section III.G.2.b.(ii)(b).

Barriers to entry into the Domestic Fittings market for a *de novo* entrant include a significant capital investment. F. 1044.

The evidence demonstrates that a new entrant must build its own foundry or develop a supply chain of foundries that can produce its Fittings and develop or purchase the hundreds of patterns or moldings necessary for making a full line of Fittings covering thousands of items. F. 1044, 1047. A new entrant would then have to have its products tested and certified to conform to AWWA standards and get on "approved" lists for engineers and municipalities. F. 1046. An entrant must also develop expertise in design engineering, and develop a marketing force and relationships with Distributors that will carry its products. F. 1045, 1048. All of these factors make entry into the market for the manufacturing of Fittings expensive, difficult, and time consuming. *See* F. 1044-1048; *see also* F. 1049 (a new entrant would need three to five years to enter the market). Accordingly, there are high barriers to entry into the Fittings market.

There are, however, fewer barriers to entry for an existing supplier of imported Fittings that wishes to enter the Domestic Fittings market. As exemplified by Star's entry into the Domestic Fittings market, a supplier of imported Fittings would have the necessary expertise from its import business to operate its own fittings foundry and ensure the quality of its products. F. 1051. In addition, a supplier of imported Fittings would have well-established relationships with major Distributors and could leverage its existing sales team, regional distribution centers, and back office support to distribute its products. F. 1052-1055.

As discussed below, Star was able to and did enter the Domestic Fittings market. No other supplier of imported Fittings, with the exception of Sigma and SIP, and no pipe supplier or domestic foundry, however, seriously considered entering the market for manufacturing and selling Domestic Fittings. F. 1056-1071. Indeed, each realized that to enter into the market for manufacturing Domestic Fittings would require an extremely expensive economic investment, including major equipment additions, such as molding machines, equipment for producing cored or hollow castings, and new furnaces. F. 1059, 1061-1064, 1067-1068. The factors that precluded SIP and Sigma, each suppliers of imported Fittings, from entering the Domestic

Fittings market are further discussed *infra* Section III.G.3.a.(v-vi).[38]

"The fact that entry has occurred[,]" in this case, by Star, "does not necessarily preclude the existence of 'significant' entry barriers." *Rebel Oil*, 51 F.3d at 1440. "If the output or capacity of the new entrant is insufficient to take significant business away from the predator, they are unlikely to represent a challenge to the predator's market power." *Id.* (citing *Oahu Gas Serv., Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 367 (9th Cir. 1988); Department of Justice Merger Guidelines Par. 3.0 (1992) (entry must be "timely, likely, and sufficient in magnitude, character and scope to deter or counteract the anticompetitive effects of concern")). As discussed below, Star's entry is inadequate to take significant business away from Respondent and therefore does not represent a challenge to Respondent's market power.

Monopoly power has been proven indirectly through proof of a high market share in a market protected by high barriers to entry. The ultimate focus, however, is not barriers to entry, but whether Respondent could exclude rivals. *Oahu Gas*, 838 F.2d at 367. Thus, "other evidence" (*Syufy Enterprises*, 903 F.2d at 664) of whether Respondent was able to control prices or exclude competitors is next addressed.

ii. Ability to control prices or exclude competitors

Complaint Counsel asserts that direct evidence of McWane's ability to control prices and to exclude Star confirms McWane's power in the Domestic Fittings market. CCB at 209. Respondent asserts that even if ARRA created a temporary, separate domestic market, McWane's inability to control prices or exclude competition over time precludes a finding of monopoly power in that market. RB at 89.

[38] As explained *infra* Section III.H.1., Sigma entered into a Master Distribution Agreement with McWane on September 17, 2009, through which Sigma resold McWane's Domestic Fittings ("MDA").

(a) Ability to control prices

Monopoly power is "the ability '(1) to price substantially above the competitive level *and* (2) to persist in doing so for a significant period without erosion by new entry or expansion.'" *AD/SAT v. Associated Press*, 181 F.3d 216, 227 (2d Cir. 1999) (citation omitted). If a defendant with a large market share is unable to control prices or exclude competitors, then it is not a monopolist. *Tops Mkts.*, 142 F.3d at 99.

In support of its position that McWane has the ability to control prices, Complaint Counsel states that when McWane sells Domestic Fittings into domestic-only specifications, it charges prices that are significantly higher than prices for identical Fittings sold into open specification jobs. CCB at 209-210. The evidence at trial indeed shows that McWane's Domestic Fittings sold into domestic-only specifications are generally sold at much higher prices than non-domestic Fittings. F. 1075. *See also* F. 1073. For example, McWane's February 2008 price multipliers for domestically manufactured fittings sold into domestic-only specifications were substantially higher than its February 2008 "blended" multipliers (for a mix of Fittings sold into open specification projects). F. 1076. In McWane's February 2008 price multipliers maps, whereas a given non-domestic Fitting would sell in Texas for $280, the corresponding Domestic Fitting would sell for $440, an approximately 57% higher price. F. 1076. However, McWane's costs to produce Domestic Fittings were higher than its costs to produce imported Fittings. F. 1077-1078.

Complaint Counsel also points to evidence that, in 2008, McWane did not typically offer Project Pricing for Domestic Fittings because the less competitive Domestic Fittings market did not require it. F. 1072 (McWane's Pricing Coordinator's email refusing a sales person's request for Project Pricing for Domestic Fittings because "We are the only one who makes the full line of 24" and down. No need to drop the price unless Star is an issue."). *See also* F. 1074.

Complaint Counsel next points to evidence that, since 2009, the first year for which McWane's blue books report gross profits for Fittings sold into domestic-only projects, McWane has sold

Domestic Fittings at prices that earn it significantly higher gross profits than it has earned in the same time period on the sale of non-domestic Fittings. CCB at 210. For year-end 2009, McWane reported gross profits for Domestic Fittings of [redacted]% and reported gross profits for non-domestic Fittings of [redacted]%. F. 1091. For year-end 2010, McWane reported gross profits for Domestic Fittings of [redacted]% and reported gross profits for non-domestic Fittings of [redacted]%. F. 1091. These margins are approximately [redacted]% greater on the sale of its Domestic Fittings (sold into domestic-only specifications) than for comparable import Fittings. F. 1091. The significantly higher gross profits that McWane earns from Domestic Fittings, as compared to those it earns from non-domestic Fittings, bolsters Complaint Counsel's argument that McWane has monopoly power in the Domestic Fittings market.

Lastly, Complaint Counsel points to evidence that on December 21, 2009, McWane sent a customer letter announcing multiplier increases for Domestic Fittings, effective January 22, 2010. CCB at 210; F. 1083. Pursuant to the provisions of McWane's Master Distribution Agreement with Sigma, entered into on September 17, 2009 ("MDA"), addressed in more detail *infra* Section III.H.1., when McWane announced these multiplier increases, McWane instructed Sigma that, per the MDA, McWane's price increase announcement would impact Sigma's orders. F. 1555. Sigma, as a distributor of McWane's Domestic Fittings, enacted the same price increase as McWane did for Domestic Fittings. F. 1557. It should be noted, however, that when McWane issued the December 21, 2009 price increase for Domestic Fittings, it also issued a price increase for non-domestic Fittings, and, that McWane's manufacturing costs for producing Domestic Fittings were also increasing at that time. F. 1084-1085. Nevertheless, McWane's ability to increase prices and direct Sigma to do the same provides additional evidence for finding that McWane has monopoly power.

Respondent posits that McWane never attempted to raise prices and that not a single Distributor or End User complained about prices of Domestic Fittings at trial. RRB at 60. The lack of customer complaints on prices for Domestic Fittings may be because the Domestic Fittings market is such a small market (*see* F. 1030) and because Fittings usually comprise less than 5% of

the total cost of a typical waterworks project. F. 326. Moreover, McWane did in fact raise prices on Domestic Fittings when it sent out customer letters on December 21, 2009, announcing multiplier increases for Domestic Fittings. F. 1083. Although Distributors may not have complained about prices of Domestic Fittings at trial, they did complain about McWane's Full Support Program, announced September 22, 2009, which is discussed below.

Respondent's expert, Dr. Normann, testified that McWane's Domestic Fittings prices were essentially flat, even during the ARRA period. Normann, Tr. 4894-4895. In Figure 17 of his expert report, Dr. Normann applied a price series to the bucket of Domestic Fittings for his fixed basket of 24 Fittings (*see* F. 939) to generate an index of weighted average prices for Domestic Fittings. Figure 17 of Dr. Normann's expert report showed that between January 2008 and November 2011, McWane's domestic prices *increased* about 15%, and that nearly half of that (a six or seven percent price increase) occurred during what Dr. Normann called the ARRA period. Normann, Tr. 5525-5529. Dr. Normann explained, however, that prices were largely unchanged for roughly the first half of the ARRA period and then rose slightly along with the upward trend in the cost index as primary input costs were increasing. RX 712A (Normann Rep. at 47); Normann, Tr. 5524-5530.

Complaint Counsel challenges Dr. Normann's opinion as unreliable on the basis that it is methodologically flawed and points out that, even using his data, Dr. Normann's results show that McWane's prices for Domestic Fittings increased. CCRRFF 600. In addition, Complaint Counsel contends that even if Dr. Normann reliably established that Domestic Fittings prices were flat during the ARRA period, Figure 17 does not address whether McWane had pricing power over Domestic Fittings sales independent of ARRA, or whether ARRA increased the size of the preexisting Domestic Fittings market. CCRRFF 600 (citing Normann, Tr. 5524-5525, 5538). Regardless of the economic expert testimony that was offered on this point, the record is replete with instances of Respondent's exercise of monopoly power.

Respondent also contends that McWane did not have the ability to charge monopoly prices for its Domestic Fittings because it knew that the impact of ARRA was limited and McWane did not want to abuse its position in the Domestic Fittings market for fear of losing market share in the Fittings market. Mr. Tatman testified, in reference to an internal McWane email dated June 5, 2009: "It has never been our intent to 'over charge' because of the [Buy American] provision [of ARRA]," and that McWane did not want to overcharge for Domestic Fittings in the short term, at the expense of harming its position in the overall Fittings market in the long term. F. 1086. Irrespective of whether McWane used its dominant position in Domestic Fittings market to overcharge, McWane did use its dominant position to exclude Star from the Domestic Fittings market, as discussed below.

The greater weight of the evidence establishes that even prior to the ARRA period, McWane had increased Domestic Fittings prices to levels substantially higher than non-domestic Fittings prices (F. 1075-1076), that McWane recognized that it did not have to offer Project Pricing on Domestic Fittings to win bids (F. 1072-1074), that McWane was earning substantially higher gross profits from Domestic Fittings than it earned from non-domestic Fittings (F. 1091), and that McWane announced multiplier increases for Domestic Fittings and required Sigma, per the MDA, to do the same (F. 1555, 1557). Monopoly power is "the power to control prices or exclude competition." *du Pont*, 351 U.S. at 391. Thus, Respondent had the ability to control prices, as well as the ability to exclude competitors, as addressed below.

(b) Ability to exclude competitors

Complaint Counsel charges that McWane's ability to exclude Star through its Full Support Program, discussed in detail *infra* Section III.G.3.a., is direct evidence of McWane's monopoly power. CCB at 210. Respondent asserts that Star successfully expanded into the Domestic Fittings market, which disproves the allegation that McWane possessed monopoly power. RB at 90-91.

In reaction to ARRA's passage in February 2009, Star determined it would expand into the Domestic Fittings market. F.

1094. In June 2009, Star publicly announced at an AWWA industry conference and sent a letter announcing to its customers that it would offer Domestic Fittings starting in September 2009. F. 1095-1096.

Star considered three possible courses of action in order to manufacture Fittings in the United States: (1) building a foundry from "ground zero"; (2) buying an existing foundry in the United States; or (3) contracting with existing domestic foundries to produce the desired Fittings. F. 1097. In order to get its product to the marketplace in the shortest amount of time, Star elected to pursue contract manufacturing. F. 1098. Because no single foundry could make the entire size range of Domestic Fittings, Star utilized multiple foundries in different locations to produce castings. F. 1104, 1106. Star then shipped the castings to its Houston facility for the finishing process. F. 1106.

Star decided that it would be a full line supplier and, in the summer of 2009, Star acquired the patterns from China that Star needed for a complete line. F. 1119. By June 2010, Star had a Domestic Fittings pattern stock comparable to McWane's Domestic Fittings items. F. 1125.

By September 2009, Star recorded its first sales of domestically manufactured Fittings to customers. F. 1127. Since its entry in 2009, Star has sold Domestic Fittings every month and every year. F. 1134. Star sold Domestic Fittings to many Distributors during the last quarter of 2009, 2010 and 2011, including HD Supply, Ferguson, Hajoca, WinWater, and Dana Kepner. F. 1136. Star had [redacted] million dollars in Domestic Fittings sales in both 2010 and 2011, and expected to sell more Domestic Fittings in 2012. F. 1143. As stated above, since its determination in 2009 to enter the Domestic Fittings market, Star's market share went from zero to almost 10% in 2011. F. 1042-1043.

Clearly, Star entered the Domestic Fittings market. However, Star's entry was insufficient to constrain McWane's monopoly power. As discussed below, McWane's Full Support Program impeded Star's sales, which made it unprofitable for Star to purchase its own domestic foundry. Because it had to produce

Domestic Fittings through independent foundries rather than its own dedicated foundry, Star's production costs were [redacted] percent higher than they would have been if Star owned its own foundry. F. 1419. Although Star was an aggressive discounter in the overall Fittings market, McWane did not need to respond to price competition from Star in the Domestic Fittings market because Star had a higher cost structure and correspondingly higher prices in that market. *See* F. 1419-1420. Thus, Star's entry was not of sufficient scale to constrain Respondent's monopoly power in the Domestic Fittings market, where McWane has over 90% market share and there are high barriers to entry.

Furthermore, as discussed below, Star's access to Distributors was impeded by McWane's Full Support Program, which further limited Star's ability to constrain McWane's monopoly power. A similar course of conduct was addressed in *United States v. Dentsply International, Inc*. There, in a market where the defendant held 75 to 80 percent of the market selling artificial teeth for use in dentures through a network of dealers, the evidence showed that the defendant operated under a policy that discouraged its dealers from adding its competitors' teeth to their lines of products. 399 F.3d at 185. The Court held that because of Dentsply's blocking of access to the key dealers, its competitors were excluded from the market, which thus demonstrated Dentsply's monopoly power. *Id.* at 189. As analyzed below, McWane's Full Support Program impeded Star's access to Distributors, which demonstrates McWane's ability to exclude competitors and thus demonstrates McWane's monopoly power.

Complaint Counsel has met its burden of proving that Respondent has monopoly power through both indirect evidence – high market share in a market with high barriers to entry – and direct evidence – Respondent's ability to control prices or exclude competitors.

3. Willful maintenance of monopoly power

Having determined that Respondent possesses monopoly power in the Domestic Fittings market, the next step in a monopolization charge requires proof of "the willful acquisition or maintenance of that power as distinguished from growth or

development as a consequence of a superior product, business acumen, or historic accident." *Grinnell Corp.*, 384 U.S. at 570-71. Although Respondent acquired its monopoly power as a consequence of "historic accident" – namely that it was the last remaining domestic manufacturer after other domestic manufacturers exited the market in the wake of cheap imports – Complaint Counsel's challenge here is to the steps that Respondent took to "maintain" that power. CCB at 210-246.

The alleged exclusionary conduct challenged in Counts Six and Seven of the Complaint is based on the letter that McWane sent to Distributors on September 22, 2009 that stated as follows:

> [E]ffective October 1, 2009, McWane will adopt a program whereby our domestic fittings and accessories will be available to customers who elect to fully support McWane branded products for their domestic fitting and accessory requirements. This applies whether these products are purchased through Tyler Union, Clow Water or through Sigma.[39]
>
> Exceptions are where Tyler Union or Clow Water products are not readily available within normal lead times or where domestic fittings and accessories are purchased from another domestic pipe and fitting manufacturer along with that manufacture's [*sic*] ductile iron pipe.
>
> Customers who elect not to support this program may forgo participation in any unpaid rebates for domestic fittings and accessories or shipment of their domestic fitting and accessory orders of Tyler Union or Clow Water products for up to 12 weeks.

F. 1173 ("Full Support Program").

Complaint Counsel charges that the Full Support Program was a deliberate effort by McWane to maintain its monopoly power by

[39] Pursuant to the MDA between McWane and Sigma, Sigma agreed to resell McWane's Domestic Fittings to Distributors on the condition that the Distributor agreed to purchase Domestic Fittings exclusively from McWane or Sigma. *Infra* Section III.H.

impeding Star's entry. CCB at 210. Respondent maintains that the Full Support Program was "simply a letter [sent by McWane] asking customers to support its last domestic foundry . . . fully and offering a rebate in exchange." RB at 93.

Before analyzing whether Respondent engaged in anticompetitive conduct to maintain its monopoly power or acted with specific intent to monopolize, with a dangerous probability of success, evidence on the development of McWane's Full Support Program, the communication of McWane's Full Support Program to Distributors, and the effects the Full Support Program had on Distributors and on Fittings suppliers who considered entering the Domestic Fittings market is summarized below.

a. Summary of the facts

i. Development of McWane's Full Support Program

In reaction to ARRA's passage in February 2009, Star began to develop plans to expand its product lines to include Domestic Fittings. F. 1094. Numerous emails and draft documents generated and discussed internally within McWane demonstrate that McWane was concerned about the effect that entry by Star in the Domestic Fittings market would have on McWane's market share and profits and that McWane developed a strategy in response to Star's announced entry. Findings on these issues are set forth in more detail in Section II.J.1-2 *supra*. The most relevant evidence on these points is summarized below.

Mr. Rick Tatman, Vice President and General Manager in charge of McWane's Tyler/Union division, recognized that "any competitor" seeking to enter the Domestic Fittings market could face "significant blocking issues" if it was not a "full line" domestic supplier. F. 1155. On June 24, 2009, Mr. Leon McCullough, Executive Vice President of McWane, sent an internal email to Mr. Tatman, with a copy to Mr. Thomas Walton, Senior Vice President overseeing the Fittings division, raising questions regarding McWane's "position short term/long term on sharing distribution of our domestic fitting line" and writing, "[j]ust because we share our blended fittings does not require us

to share our domestic. . . ." F. 1148. Mr. Walton responded to Mr. McCullough's email on June 24, 2009, stating:

> Whether we end up with Star as a complete or incomplete domestic supplier my chief concern is that the domestic market gets creamed from a pricing standpoint just like the non-domestic market has been driven down in the past. That would dramatically [a]ffect our profit potential. . . . I do agree whole heartedly that we need to evaluate our options and plot a comprehensive strategy going forward.

F. 1149.

Mr. Tatman responded to the above emails on June 24, 2009 stating:

> I agree that at this stage the chance for profitable cohabitation with Star owning a pc of the Domestic market is slim. Their actions in soil pipe are a good indication. . . . If their claims are ahead of their actual capabilities we need to
>
> make sure that they don't reach any critical market mass that will allow them to continue to invest and receive a profitable return. . . .

F. 1150.

On or about June 29, 2009, Mr. Tatman drafted and sent an internal PowerPoint Presentation ("June 29, 2009 PowerPoint Presentation") to Mr. McCullough and Mr. Walton intended as a brainstorming document. F. 1156. Described by Mr. Tatman as topics for discussion were three potential options for McWane's response to Star's entry: employ a "Wait and See approach," "Handle on a Job by Job basis," or "Force Distribution to Pick their Horse." F. 1159. With respect to the "Force Distribution to Pick their Horse" approach, the advantages listed as topics for discussion by Mr. Tatman included:

- It "[a]voids the job by job auction scenario within a particular distributor"

- It "[p]otentially raises the level of supply concern among contractors" and

- It "[f]orces Star/Sigma to absorb the costs associated with having a more full line before they can secure major distribution."

F. 1162.

Under the "Pick your Horse" option, Mr. Tatman identified two alternatives: a "Soft Approach," whereby a domestic rebate would require exclusivity, and a "Hard Approach – Full Line or No Line," whereby access to McWane's domestic product line would "require[] exclusivity for Domestic fitting items we manufacture" – *i.e.*, if a customer did not support McWane's full Domestic Fittings line, McWane would not sell to them. F. 1163. Also under the "Pick your Horse" option, under both the "Soft Approach" and the "Hard Approach," listed as a topic for discussion, was: "Applied on a corporate not branch by branch basis." F. 1164. In his cover email transmitting the June 29, 2009 PowerPoint Presentation, Mr. Tatman stated that if Star is the only Domestic entrant, then "the appropriate response to distribution is probably a fairly hard line approach like a full line or no line approach." F. 1157. *See also* F. 1165 (July 2, 2009 email from Mr. Tatman to Mr. Walton ("[f]rom the information currently available, a Full Line or No Line approach would be the preferred approach and certainly the best option against Star.")).

In the same September 22, 2009 letter through which McWane announced its Full Support Program, McWane also announced to its Distributors that it had entered into a Master Distribution Agreement with Sigma, through which Sigma would sell McWane Domestic Fittings, and informed Distributors that the Full Support Program applies to McWane's Domestic Fittings, whether purchased from McWane or through Sigma. F. 1174, 1538. Pursuant to the MDA, discussed in detail *infra* Section III.I., McWane and Sigma agreed that Sigma would not sell McWane Domestic Fittings to any customer listed by McWane as having purchased Domestic Fittings from a source other than McWane, or to any other customer who Sigma actually knows has

purchased Domestic Fittings from a source other than McWane at any time during the previous 60 days. F. 1558.

ii. Communication of McWane's Full Support Program to Distributors

Respondent argues that the Full Support Program "made it clear that customers were free to choose another supplier, and simply noted that if they did so, they 'may' forego any unpaid rebates for domestic Fittings or shipments for a short period of time ('up to 12 weeks')." RB at 93. To that end, Respondent points out that Mr. Tatman purposefully included the "soft" language "may" and "or" in the Full Support Program and explained that his use of the terms "may" and "or" in the Full Support Program is "a weak stance . . . because I know when I write this letter [to Distributors] that I'm a Chihuahua barking at Rottweiler and I know who has the power here." F. 1178.

Despite the soft language of "may" and "or" in the Full Support Program letter to Distributors, McWane communicated a "hard approach" to its Distributors. *See, e.g.*, F. 1179-1183. In preparation for the rollout of the Full Support Program, McWane's National Sales Manager, Mr. Jerry Jansen, led an internal conference call with the McWane sales force on August 28, 2009, where he explained to his sales force the "new policy on Star Domestic" as follows:

- What are we going to do if a customer buys Star domestic? We are not going to sell them our domestic. . . .
  - This means the customer will no longer have access to our domestic. They can still buy [non-Domestic] from us.
  - Once they use Star, they can't EVER buy domestic from us. . . .
  - For companies with multiple branches (HD, Ferguson, Winwater, Hajoca, etc) - if one branch uses Star, every branch is cut off.

. . .

- Make sure you are discussing our stance with all customers, every day.

F. 1179.

McWane executives met with various Distributors to explain McWane's Full Support Program. For example, through conversations between Mr. Roy Pitts, Director of Vendor Relations at Hajoca, and Mr. Tatman and Mr. Jansen of McWane, Hajoca believed that, despite the terms "may" and "or" in the Full Support Program, Hajoca would lose its rebates or be cut off from purchasing Domestic Fittings from McWane if Hajoca purchased from Star. F. 1184, 1197-1199. Mr. Dennis Sheley, President and owner of Illinois Meter, believed from his conversations with Mr. Tatman and Mr. Jansen that if Illinois Meter purchased Domestic Fittings from anyone but McWane, Illinois Meter "would lose the right to buy [McWane's Domestic Fittings] completely" and would also lose its rebate from its purchases of non-domestic Fittings. F. 1357. Mr. Thomas Morton, U.S. Pipe's Vice President of Purchasing, was told by Mr. Tatman that U.S. Pipe would be required to purchase 100% of its domestic requirements from McWane, and not purchase Domestic Fittings from Star, unless McWane did not have the needed items or its lead times were too long, and that U.S. Pipe could not "cherry pick" "A" or "B" items, or high volume Domestic Fittings from Star and expect McWane to supply the balance. F. 1298-1300.

In an internal McWane document describing the Full Support Program, Mr. Tatman stated: "Although the words 'may' and 'or' were specifically used, the market has interpreted the communication in the more hard line 'will' sense. . . . Access to McWane or Sigma [through Sigma's reselling of McWane's Domestic Fittings under the MDA] requires distributors to exclusively support McWane where products are available with normal lead times. Violations will result in: Loss of access, loss of accrued rebates." F. 1183.

iii. Enforcement of McWane's Full Support Program

McWane enforced its Full Support Program against only one of the Distributors who was called to testify either at trial or by deposition – Hajoca Corporation. Hajoca is a national waterworks distributor with several locations, two of which purchase Domestic Fittings regularly: Tulsa, Oklahoma ("Tulsa") and Lansdale, Pennsylvania ("Lansdale"). F. 239-240, 1193-1194. Each of Hajoca's branches makes its own vendor selection decisions, including those regarding Domestic Fittings purchases. F. 1195. Prior to announcing the Full Support Program, Mr. Jansen met with Hajoca's Mr. Pitts. F. 1197. Mr. Pitts reported on that meeting as follows:

> I had heard from Jerry Jansen last week that [McWane] would be taking a hard stance regarding domestic fittings manufactured for Star. . . .
>
> Jerry had told me last week that if any PC [profit center or branch of Hajoca] in the US purchases domestic fittings from Star, all PCs would lose access to McWane's fittings and possibly lose rebates.

F. 1197.

Mr. Pitts asked Mr. Tatman to modify McWane's Full Support Program so that McWane would not hold all Hajoca branches responsible if a single branch purchased Domestic Fittings from Star. F. 1200. In a November 3, 2009 email to Mr. Sean Kelly and Mr. Pitts of Hajoca, Mr. Jansen reiterated the all-or-nothing nature of McWane's Full Support Program:

> [I]f any Hajoca location chooses to buy another domestic fitting supplier['s] product Hajoca will not have direct access to the McWane ductile iron water main fittings for a period of time as well as loss of any accrued rebate to date.

F. 1201-1202.

In November 2009, Hajoca's Tulsa branch began placing orders for Domestic Fittings from Star. F. 1206. On November 23, 2009, Mr. McCullough of McWane informed Mr. Kelly of Hajoca that McWane would "discontinue selling Hajoca domestic fittings since they are supporting Star's domestic line." F. 1208. As a consequence of Hajoca's Tulsa branch ordering Domestic Fittings from Star, McWane discontinued selling Domestic Fittings to Hajoca's Lansdale branch also. F. 1209. In an internal McWane email, Mr. Tatman confirmed to Mr. McCullough and Mr. Walton, on November 23, 2009, that all Hajoca orders had been placed on hold. F. 1210. McWane did allow Hajoca's Lansdale branch to place orders to cover existing commitments and to enable Hajoca's Lansdale branch to place orders to satisfy the known requirements of an existing contract with a municipality. F. 1212, 1214. Apart from those exceptions, between December 4, 2009 and April 13, 2010, Hajoca's Lansdale branch was unable to place Domestic Fittings orders with McWane. F. 1219.

In addition to refusing to sell Domestic Fittings to Hajoca from December 4, 2009 to April 13, 2010, McWane withheld the rebate due to Hajoca based on its non-domestic Fittings purchases from McWane in the fourth quarter of 2009. F. 1224. In a February 4, 2010 email to Mr. Pitts, Mr. Tatman confirmed that McWane had withheld Hajoca's fourth quarter 2009 rebate as a result of the Tulsa branch's decision to purchase Domestic Fittings from Star. F. 1225. With the exception of the fourth quarter of 2009, McWane continued to pay rebates to Hajoca, as Hajoca's Lansdale branch resumed purchasing McWane's Domestic Fittings, even though its Tulsa branch purchased Domestic Fittings from Star. F. 1227.

Hajoca is the only Distributor against whom McWane's Full Support Program was enforced. No other Distributor was cut off by McWane after purchasing Domestic Fittings from Star or had its rebate withheld. *E.g.*, F. 1250 (HD Supply); F. 1278-1279 (Ferguson); F. 1312 (U.S. Pipe); F. 1319-1320 (Groeniger); F. 1344-1345 (WinWholesale).

iv. Impact of McWane's Full Support Program on Distributors' purchases from Star

The evidence at trial demonstrates that, besides Hajoca, Distributors, with some exceptions, complied with McWane's Full Support Program, as summarized below.

(a) HD Supply

In September 2009, executives of McWane met with executives of HD Supply. F. 1231. In an internal September 8, 2009 email to Mr. McCullough and Mr. Jansen, Mr. Tatman suggested to Mr. McCullough that HD Supply's CEO, Mr. Jerry Webb, should send an internal communication within HD Supply that HD Supply had elected to use McWane Domestic Fittings as its sole supply source through 2010. F. 1233. On September 22, 2009, Mr. Glenn Fielding, HD Supply's Director of Sourcing and Price Management, sent an internal email to Mr. Webb, and Mr. Darrin Anderson, Vice President of Sourcing and Operations of HD Supply, forwarding the text of the Full Support Program and recounting a conversation with Mr. Tatman in which Mr. Tatman informed Mr. Fielding that the policy "must be adhered to by entire company -- if one branch buys domestic from someone else it affects the whole compan[y's] program." F. 1234. Mr. Fielding expressed concern about a reduction in rebate dollars as a result of McWane's Full Support Program and even greater concern about the impact on customer satisfaction in the event that McWane cut off HD Supply's access to McWane's Domestic Fittings. F. 1235.

HD Supply interpreted McWane's Full Support Program to require HD Supply to purchase all of its Domestic Fittings from McWane, except where McWane was unable to supply the Domestic Fittings desired. F. 1238. HD Supply also interpreted McWane's Full Support Program to mean that if HD Supply purchased Domestic Fittings from Star, HD Supply "would lose the rebate on the domestic fittings and potentially lose access to the domestic line . . . [which] could be a significant event." F. 1240.

On or about September 23, 2009, Mr. Webb, sent a letter to HD's branch managers, district managers, and operations

managers stating that they needed "to adhere to this mandate and purchase all of our American made fittings through [McWane] or Sigma." F. 1239-1240 (explaining that the "mandate" was McWane's Full Support Program). Without McWane's September 22, 2009 Full Support Program, Mr. Webb would not have issued this company-wide policy requiring HD Supply managers to purchase Domestic Fittings only from McWane. F. 1241.

With the exception of items that McWane did not have available or that had been committed to prior to September 22, 2009, HD Supply cancelled its then-pending Domestic Fittings orders with Star. F. 1242. According to Mr. McCutcheon of Star, Mr. Webb informed Mr. McCutcheon that HD Supply could not purchase Domestic Fittings from Star because McWane's Full Support Program required HD Supply to buy 100% of its Domestic Fittings requirements from McWane. F. 1244. Two HD Supply regional vice presidents and two HD Supply district or branch managers each relayed to Mr. Michael Berry, a general manager of Star, that they could not purchase Domestic Fittings from Star because of McWane's Full Support Program and that they did not have the discretion to do so under the HD Supply corporate policy. F. 1246.

While McWane's Full Support Program made HD Supply less willing to do business with Star, there are also numerous other reasons why HD Supply did not purchase Domestic Fittings from Star. HD Supply believed that Star did not have the capacity to service HD Supply's needs for Domestic Fittings in the fall of 2009 because HD Supply believed that Star did not have a full line of Domestic Fittings to offer (F. 1252-1253); HD Supply had concerns about Star's use of various foundries, as opposed to use of one central foundry, to manufacture its Domestic Fittings in the fall of 2009 (F. 1254); and HD Supply views McWane as a known, full line Fittings supplier with a good track record (F. 1256).

Notwithstanding McWane's Full Support Program, HD Supply purchased some Domestic Fittings from Star. F. 1257. However, although HD Supply is Star's largest customer and Star estimates that it has greater than a [redacted]% share of HD Supply's non-domestic Fittings business, Star estimates that it has

less than a [redacted]% share of HD Supply's Domestic Fittings business. F. 1258.

(b) Ferguson

When Ferguson received notice of the Full Support Program from McWane in September 2009, its concerns pertaining to the possibility of foregoing unpaid rebates from McWane were secondary to the concerns Ferguson had about Star's ability to produce Domestic Fittings. F. 1260. When Mr. William Thees, Vice President of the Waterworks Division at Ferguson, received notice of McWane's Full Support Program, he thought it was unlikely that McWane would withhold rebates from Ferguson and believed that the rebate terms and lead times stated in the Full Support Program could be negotiated. F. 1268.

After receiving notice of the Full Support Program, Mr. Thees called his district managers to ensure that Ferguson communicated support for McWane's Domestic Fittings by continuing to purchase Domestic Fittings from McWane and not purchasing Domestic Fittings from Star. F. 1261. To Mr. Thees' knowledge, Ferguson's district managers followed his instruction. F. 1261.

After McWane's Full Support Program was announced, based on conversations that Star's Mr. Berry had with Ferguson managers, Star believed that there was a Ferguson corporate edict that no Ferguson employees were to purchase Star Domestic Fittings unless McWane did not have the Domestic Fittings. F. 1262.

At the time Ferguson received notice of McWane's Full Support Program, Ferguson was already planning to purchase all of its Domestic Fittings from McWane, regardless of the Full Support Program. F. 1266. Ferguson was reluctant to purchase Domestic Fittings from Star because Ferguson was concerned about Star's ability to produce a complete line of Domestic Fittings without having its own manufacturing facility. F. 1272. Ferguson was also reluctant to purchase Domestic Fittings from Star because Ferguson was concerned that Star was using jobber facilities with extra capacity to produce Domestic Fittings for

them, Star would not disclose to Ferguson which foundries it was using, and Ferguson was concerned that any of these domestic foundries could abandon Star, leaving Star unable to supply Ferguson with Domestic Fittings. F. 1273. In addition, at the time Star began producing Domestic Fittings, Star did not have the depth and breadth of inventory to supply Ferguson with all of Ferguson's Domestic Fittings needs. F. 1274.

In 2011, Ferguson purchased hundreds of thousands of dollars' worth, but less than a million dollars' worth, of Domestic Fittings from Star. F. 1277. Ferguson is Star's second largest customer. Star estimates that it has a [redacted]% share of Ferguson's non-domestic Fittings business, but less than a [redacted]% share of Ferguson's Domestic Fittings business. F. 1280. According to records maintained by Ferguson, in the first four months of 2010, Ferguson purchased [redacted]% of its Domestic Fittings from Star, while purchasing approximately [redacted]% from McWane and [redacted]% from Sigma. F. 1281.

(c) U.S. Pipe

In September 2009, U.S. Pipe began discussions with Star relating to potential purchases of Domestic Fittings by U.S. Pipe from Star. F. 1291. Star initially proposed to U.S. Pipe pricing for 3" to 12" diameter Domestic Fittings that matched McWane's Domestic Fittings multipliers. F. 1295. In response to U.S. Pipe's statement to Star that Star needed to incentivize U.S. Pipe to leave McWane, Ms. Susan Schepps of Star committed to U.S. Pipe that Star would offer Domestic Fittings pricing significantly below McWane's in exchange for a major portion of U.S. Pipe's volume. F. 1295.

On October 13, 2009, in a meeting between Mr. Morton of U.S. Pipe and Mr. Tatman of McWane, Mr. Tatman explained that U.S. Pipe would be required to purchase 100% of its domestic requirements from McWane, and not purchase Domestic Fittings from Star, unless McWane did not have the needed items or its lead times were too long. F. 1299. Because U.S. Pipe needed access to a full line of Domestic Fittings, not just the "A" and "B" items initially being offered by Star, Mr. Morton's recommendation to his boss after meeting with Mr. Tatman in October 2009 was to continue to look for alternative sources. F.

1301. Mr. Morton also wrote that, unless U.S. Pipe was convinced that those sources could provide 100% of U.S. Pipe's requirements for Domestic Fittings, U.S. Pipe needed to take the notification from Mr. Tatman very seriously and buy its Domestic Fittings from McWane. F. 1301. Mr. Morton instructed his purchasing manager not to purchase Domestic Fittings from Star unless McWane could not provide the needed Domestic Fittings. F. 1302.

In a meeting between Mr. Morton and Mr. Stephen Gables of U.S. Pipe and Mr. McCutcheon and Ms. Schepps of Star in November 2009, U.S. Pipe informed Star that, according to McWane, if U.S. Pipe purchased any of its Domestic Fittings requirements from anyone other than McWane, then McWane would not sell U.S. Pipe any Domestic Fittings. F. 1303. In 2009, U.S. Pipe also had concerns about Star's ability to provide a full line of Domestic Fittings and had concerns about the lead times it would take for Star to fulfill certain orders. F. 1307. In addition, U.S. Pipe was concerned that Star would not commit to putting the tooling in place in advance of getting a requirement for volume. F. 1308.

With the exception of minor purchases falling within the limited exceptions to McWane's Full Support Program (*e.g.*, where McWane's lead time to supply the requested Fitting was too long, or if McWane did not make a particular Fitting configuration) F. 1309, U.S. Pipe purchased only minor amounts of Domestic Fittings from Star until September of 2010. F. 1310. In September 2010, U.S. Pipe "decided as an executive team that the risk of [McWane] not selling us [Domestic Fittings] even if [U.S. Pipe] bought from Star, given the announced FTC investigation, would be significantly less . . . ." F. 1311. In September 2010, U.S. Pipe was purchasing "a significant portion" of its Domestic Fittings from Star. F. 1310.

(d) Groeniger

Prior to the announcement of McWane's Full Support Program, Groeniger gave Star Domestic Fittings business on two sizeable projects. F. 1313. After McWane's Full Support Program was announced, Groeniger was reluctant to purchase

additional Domestic Fittings from Star "[b]ecause of the inherent threats of retaliation" from McWane. F. 1315. In 2009, Groeniger needed access to McWane's Domestic Fittings in order to service customers with McWane-only Domestic Fitting requirements. F. 1316. Groeniger was concerned about "[b]eing shut out" from McWane if Groeniger purchased Domestic Fittings from Star. F. 1317.

After McWane announced its Full Support Program, Mr. Berry of Star had at least three conversations with representatives of Groeniger, including Mr. Michael Groeniger, President of Groeniger. F. 1323. Based on these conversations, Star perceived that Groeniger had fears that it would not be able to purchase Domestic Fittings from McWane if Groeniger purchased Domestic Fittings from Star. F. 1324. *See also* F. 1328 (reporting that Groeniger wanted to buy from Star, but had committed to McWane because of the Full Support Program). Star documents also note, however, that on one order, Groeniger did not purchase from Star because Star could not meet the delivery dates. F. 1326.

Notwithstanding McWane's Full Support Program, Groeniger did purchase Domestic Fittings from Star, but not frequently. F. 1329. Mr. Groeniger testified that in 2010, Groeniger would have given Star 50% of its Domestic Fittings business if McWane had not initiated the Full Support Program. F. 1330.

(e) WinWholesale

In September 2009, WinWholesale had an interest in potentially purchasing Domestic Fittings from Star. F. 1331. On September 22, 2009, Mr. Eddie Gibbs, Vice President of Vendor Relations, for WinWholesale, which does business as WinWater Works ("WinWater"), received notice of McWane's Full Support Program from Mr. Tatman. F. 1332. WinWholesale had some concerns that if the WinWater local companies purchased Domestic Fittings from Star on a consistent basis, those companies would lose their rebate; however, WinWholesale was not concerned about the overall WinWater locations being able to get product from McWane if an individual WinWater local company purchased Domestic Fittings from Star. F. 1338-1340.

Upon receiving notification from McWane of the Full Support Program, WinWholesale "accepted the terms" of it and listed Star's status as a vendor as "not approved." F. 1334. *See also* F. 1335. At WinWholesale, if a vendor receives "not approved" status, the local companies are not to buy from that vendor under any circumstances unless they seek board approval. F. 1337.

Star was verbally notified of WinWholesale's intention to place Star on its "not approved" list for Domestic Fittings in early December 2009 and received written notice on February 5, 2010 in the form of WinWholesale's 2010 Preferred Vendor letter listing Star as "not approved." F. 1336. WinWholesale had reasons other than the Full Support Program for placing Star on its list of not approved vendors, including concerns about Star's capacity, quality, and timeliness in delivery. F. 1342.

After McWane initiated its Full Support Program, Star did have some sales of Domestic Fittings to WinWater local companies. F. 1343.

(f) Illinois Meter

Mr. Sheley of Illinois Meter was informed by Mr. Tatman and Mr. Jansen that if Illinois Meter purchased Domestic Fittings from anyone but McWane, Illinois Meter "would lose the right to buy [McWane's Domestic Fittings] completely" and would also lose its rebate from its purchases of non-domestic Fittings. F. 1357. Losing access to McWane's Domestic Fittings would be a serious consequence for Illinois Meter. F. 1358. Regardless of McWane's Full Support Program, however, when Star first announced its Domestic Fittings line, Illinois Meter probably would have purchased around 90 percent of its Domestic Fittings from McWane. F. 1359. Illinois Meter had previously had a negative experience with Star's reliability as a supplier when Star first entered the joint restraint business. F. 1361. Illinois Meter was not willing to give Star any Domestic Fittings orders in early 2010 until Star had demonstrated it had sufficient inventory, because Illinois Meter was not willing to risk coming up short on a project if it could not turn to McWane to meet its needs. F. 1361-1362.

In the summer of 2010, Illinois Meter was interested in purchasing Domestic Fittings from Star for an ARRA-funded water treatment plant in Winchester, Illinois, and for a Domestic specification job in Macomb, Illinois. F. 1362. Both projects required smaller-diameter Domestic Fittings that Illinois Meter believed Star could provide. F. 1362. Illinois Meter did purchase a half dozen Domestic Fittings from Star to evaluate their quality. F. 1363. Although Illinois Meter found the quality of Star's Domestic Fittings to be very good, Illinois Meter is not buying them or supplying them. F. 1363. Illinois Meter does not buy Domestic Fittings from Star because it does not want to lose the ability to buy McWane's Domestic Fittings. F. 1364.

v. Impact of McWane's Full Support Program on SIP's evaluation of whether to enter the Domestic Fittings market

Serampore Industries Private ("SIP") supplies Fittings in the United States that it imports from China, India, and Mexico, and currently sells to approximately 50 to 60 Distributors in approximately 35 states. F. 1365. From May 2009 to September 2009, SIP evaluated entering the Domestic Fittings market. F. 1366. SIP estimated that manufacturing Domestic Fittings would require a 5 to 10 million dollar investment. F. 1373. To be viable in the Domestic Fittings market, SIP estimated that it needed a minimum gross margin of approximately [redacted] percent, and a minimum net margin of about [redacted] percent. F. 1374.

In evaluating whether to enter the Domestic Fittings market, SIP viewed the implications of McWane's Full Support Program as significant to the Distributors who were SIP's potential Domestic Fittings customers. F. 1376. SIP believed that McWane's Full Support Program would deter Distributors from purchasing Domestic Fittings from SIP because forgoing Domestic Fittings shipments from McWane for up to 12 weeks, thus delaying an End User's project, was a significant penalty. F. 1376. SIP's determination to not enter the Domestic Fittings market was based on numerous reasons, including the fact that ARRA presented a very short time window, that SIP believed it needed to offer a full line of fittings to be considered a viable supplier, that it had taken SIP three years to develop a full line of imported fittings, the uncertainties of success, the high cost of

developing patterns for a full line of fittings, the fact that there was not one single foundry available to make all the fittings, the vagaries of long term supply given the changing capacity of jobber foundries, the 5 to 10 million dollar estimated cost to develop the line, the need/cost to develop drilling and machining capabilities, the uncertainties of the ARRA demand, and the uncertainties about the post-ARRA domestic demand. F. 1378. While there were numerous reasons behind SIP's decision to not enter the Domestic Fittings market, McWane's Full Support Program was "the straw that broke the camel's back." F. 1379-1380.

vi. Impact of McWane's Full Support Program on Star's entry into the Domestic Fittings market

As summarized above, after McWane announced its Full Support Program on September 22, 2009, numerous Distributors pulled their requests for quotes, cancelled orders, or decided not to purchase Domestic Fittings from Star. F. 1381-1382. Based on those actions and conversations Star had with Distributors, Star believed that Distributors would not purchase from Star because of McWane's Full Support Program. F. 1383.

With respect to HD Supply, based on conversations between Mr. McCutcheon of Star and Mr. Webb of HD Supply, Mr. McCutcheon believed that HD Supply could not buy Star's Domestic Fittings because of the Full Support Program. F. 1383. Star's General Sales Manager, Mr. Berry, was advised by several HD Supply regional vice presidents, district managers and branch managers that they could not purchase Domestic Fittings from Star because of McWane's Full Support Program and that they did not have the discretion to do so under the HD Supply corporate policy. F. 1246. Mr. Berry believed that HD Supply refused to purchase Domestic Fittings from Star for various projects because of the HD Supply corporate policy to not purchase from Star. F. 1246. With respect to Ferguson, after McWane's Full Support Program was announced, Star's Mr. Berry had negotiations with district managers and a general manager of Ferguson. F. 1262. Based on those conversations, Mr. Berry believed that there was a corporate edict that no Ferguson employees were to purchase Star Domestic Fittings

unless McWane did not have the Domestic Fittings. F. 1262. *See also* F. 1384. Star also believed that Distributors Custom Fab, Dana Kepner, Prescott Supply, Illinois Meter, C.I. Thornburg, WinWater, Western Water Works and Wells Supply would not purchase Star's Domestic Fittings because of McWane's Full Support Program. F. 1385-1390. Even when Star offered a rebate program to TDG Distributors that was more generous than McWane's rebate program, some TDG members were still unwilling to buy from Star. F. 1391. Star believed that these Distributors were unwilling to purchase from Star because of the "all-or-nothing domestic fitting policy from McWane." F. 1391. As Star's Regional Sales Manager explained in his deposition:

> Every distributor -- every customer distributor that we talked to or that I talked to after this letter came out, wanted to talk about it. And they all wanted to know what I had seen in other parts of the countr[y] or if any distributors were purchasing our domestic. And if so, had Tyler punished them. And -- and I had not seen anywhere or heard from anybody that -- that there was any repercussions for people buying our fittings anywhere from anybody. But the fear that something could happen in -- in areas that actually buy domestic fittings, customers are afraid. They don't want to take the chance of the what-if.

F. 1392.

Star estimated that, absent McWane's Full Support Program, Star would have [redacted] million dollars in sales of Domestic Fittings in 2010, potentially rising to an annual rate of [redacted] million dollars in 2011. F. 1394. Star's estimated lost sales due to McWane's Full Support Program were based in part on 10 million dollars in requests for quotes for Domestic Fittings that Star received between June 15, 2009, when it announced its Domestic Fittings entry, and September 22, 2009, when McWane announced its Full Support Program. F. 1395. The requests for quotes included requests by HD Supply, Ferguson, Mainline, WinWater, and a variety of other independent customers. F. 1395. *See also* F. 1382.

As summarized above, the evidence shows that there were reasons for Distributors choosing not to purchase Domestic

Fittings from Star other than McWane's Full Support Program, including concerns about Star's inventory, the quality of fittings produced at several different foundries, and the timeliness of delivery. Thus, these estimates by Star are viewed somewhat skeptically. However, it is quite clear that Star believed that because of McWane's Full Support Program, Star would not be able to generate a sufficient volume of sales from Domestic Fittings to purchase its own foundry.

In 2009, Star estimated that it needed between [redacted] million dollars in sales of Domestic Fittings to justify purchasing its own domestic foundry. F. 1400. Since then, Star has estimated that it needs between [redacted] million dollars to justify purchasing its own foundry. F. 1400. [redacted]. F. 1399. Star was not able to generate a sufficient volume of sales of Domestic Fittings to realize cost efficiencies or justify operating a foundry of its own. F. 1401.

Rather than owning its own foundry, Star contracted with six foundries to produce raw castings for Domestic Fittings for Star, which Star then shipped to its Houston facility for the finishing process. F. 1409. Independent foundries are more costly and less efficient than a foundry owned and operated by Star would be because using independent foundries involves: less specialized and less efficient equipment; smaller batch sizes; additional logistical costs associated with inventory, finishing, and freight; less control over inventory levels; less ability to expedite orders; and inefficiencies resulting from dealing with multiple foundries. F. 1410.

b. Exclusionary Conduct Law

A firm violates Section 2 of the Sherman Act when it maintains or attempts to maintain a monopoly by engaging in exclusionary conduct. *Microsoft*, 253 F.3d at 58. Exclusionary conduct is "behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 n.32 (1985) (citation omitted). "Exclusive dealing can have adverse economic consequences by

allowing one supplier of goods or services unreasonably to deprive other suppliers of a market for their goods[.]" *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring), *abrogated on other grounds by Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006); *Barry Wright Corp.*, 724 F.2d at 236 (explaining that "under certain circumstances[,] substantial foreclosure might discourage sellers from entering, or seeking to sell in, a market at all, thereby reducing the amount of competition that would otherwise be available").

"Exclusive dealing arrangements are of special concern when imposed by a monopolist." *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 271 (3d Cir. 2012) (cert. pending) (citing *Dentsply*, 399 F.3d at 187 ("Behavior that otherwise might comply with antitrust law may be impermissibly exclusionary when practiced by a monopolist.")). The court in *ZF Meritor* provided the following example:

> [S]uppose an established manufacturer has long held a dominant position but is starting to lose market share to an aggressive young rival. A set of strategically planned exclusive-dealing contracts may slow the rival's expansion by requiring it to develop alternative outlets for its product, or rely at least temporarily on inferior or more expensive outlets. Consumer injury results from the delay that the dominant firm imposes on the smaller rival's growth.

Id. (citing Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1802c, at 64 (2d ed. 2002)).

Due to the potentially procompetitive benefits of exclusive dealing agreements, their legality is judged under the rule of reason. *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1304 (9th Cir. 1982); *see also Tampa Electric*, 365 U.S. at 327-29. The legality of an exclusive dealing arrangement depends on whether it will foreclose competition in such a substantial share of the relevant market so as to adversely affect competition. *ZF Meritor*, 696 F.3d at 271 (citing *Tampa Electric*, 365 U.S. at 328; *Barr Labs. v. Abbott Labs.*, 978 F.2d 98, 110 (3d Cir. 1992)). "In conducting this analysis, courts consider not only the percentage of the market foreclosed, but also take

into account 'the restrictiveness and the economic usefulness of the challenged practice in relation to the business factors extant in the market.'" *Id.* (citing *Barr Labs.*, 978 F.2d at 110-11). As the Supreme Court has explained:

> [I]t is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein.

Tampa Electric, 365 U.S. at 329. "In other words, an exclusive dealing arrangement is unlawful only if the 'probable effect' of the arrangement is to substantially lessen competition, rather than merely disadvantage rivals." *ZF Meritor*, 696 F.3d at 271 (citations omitted).

The court in *ZF Meritor* further explained:

> There is no set formula for evaluating the legality of an exclusive dealing agreement, but modern antitrust law generally requires a showing of significant market power by the defendant, substantial foreclosure, contracts of sufficient duration to prevent meaningful competition by rivals, and an analysis of likely or actual anticompetitive effects considered in light of any procompetitive effects . . . . Courts will also consider whether there is evidence that the dominant firm engaged in coercive behavior, and the ability of customers to terminate the agreements.

Id. at 271-72 (citations omitted). With these legal principles in mind, the Initial Decision next analyzes whether the challenged conduct engaged in by McWane was an unlawful exclusionary dealing arrangement.

c. The Full Support Program was an all-or-nothing policy imposed upon Distributors

Respondent characterizes the Full Support Program as a mere rebate program. RB at 98-101. Respondent argues that McWane "did not have any contracts that required its customers to buy its domestic Fittings exclusively" and that "[w]hen a customer is free to walk away from even a monopolist's discounts at any time, no violation of the antitrust laws exists." RB at 92-93. These arguments mischaracterize the nature and effects of the Full Support Program.

Although the September 22, 2009 Full Support Program did contain a provision relating to withholding rebates, it also contained an "all or nothing" component. Specifically, the Full Support Program explicitly stated that customers who did not buy 100% of their Domestic Fittings from McWane "may forgo shipment of their domestic fitting and accessory orders of Tyler Union or Clow Water products for up to 12 weeks." F. 1173. Although the word "may" was used in the Full Support Program, McWane communicated to Distributors that if they purchased Domestic Fittings from Star, they would lose the ability to buy Domestic Fittings from McWane, unless those purchases fell into two narrow exceptions: they were part of a bundled sale with pipes, or McWane did not have the Domestic Fitting available for timely delivery. F. 1173, 1179-1183.

Extensive evidence – including contemporaneous documents surrounding the formation of the Full Support Program (F. 1155-1167); McWane's communication and application of the Full Support Program to U.S. Pipe, which did not participate in any McWane rebate program (F. 1297-1300); and McWane's termination of Hajoca as a Distributor when one of its branches purchased Domestic Fittings from Star (F. 1207-1219) – confirms that McWane's Full Support Program was an all-or-nothing exclusive dealing arrangement.

Respondent argues that the Full Support Program "had about as much force as the piece of paper on which it was written" and argues that McWane paid rebates and shipped Domestic Fittings to various Distributors, despite the fact that those Distributors bought Domestic Fittings from Star. RB at 94. Respondent further argues that the Full Support Program "was not only not a contract, but was enforced weakly – if at all – at one customer (Hajoca) for a period of 12 weeks at the most." RB at 101.

The evidence does show that many Distributors bought Domestic Fittings from Star and that McWane never withheld rebates from or refused to sell to these Distributors. F. 1250, 1257 (HD Supply); F. 1277-1279 (Ferguson); F. 1320 (Groeniger); F. 1344 (WinWholesale). However, the evidence also shows that some Distributors' purchases of Domestic Fittings came under the exceptions allowed in the Full Support Program. F. 1242 (HD Supply); F. 1305 (U.S. Pipe); *see also* F. 1137 (Some of Star's sales of Domestic Fittings were made in circumstances in which McWane could not provide Domestic Fittings in a timely fashion (*e.g.*, large-diameter Fittings), or where the End User needed a special coating such as "Protecto 401" that Star specialized in.).

Regarding Illinois Meter, Respondent asserts that McWane paid rebates and shipped Domestic Fittings to Illinois Meter in 2010 and 2011, despite the fact that Illinois Meter bought Domestic Fittings from Star. RB at 94. The evidence shows that Illinois Meter purchased only "a half dozen" Domestic Fittings from Star to evaluate their quality and because it had a couple of engineers who wanted to see what Star's Domestic Fittings looked like. F. 1363. With the exception of these limited purchases, Illinois Meter does not buy Domestic Fittings from Star and has been unwilling to stock or ship Star's Domestic Fittings because it does not want to lose the ability to buy McWane's Domestic Fittings. F. 1364.

With the exception of Hajoca, Respondent did not need to enforce the Full Support Program because Distributors acceded to heavy economic pressure and, with minor exceptions, purchased all their Domestic Fittings from McWane. F. 1239-1240 (HD Supply's CEO sent a letter to HD's branch managers, district managers, and operations managers stating that they needed "to adhere to this mandate and purchase all of our American made fittings through [McWane] or Sigma."); F. 1261 (Ferguson's Vice President of the Waterworks Division called district managers to ensure that Ferguson continued to purchase Domestic Fittings from McWane and not purchase Domestic Fittings from Star); F. 1302 (U.S. Pipe's CEO instructed his purchasing manager not to purchase Domestic Fittings from Star unless McWane could not provide the needed Domestic Fittings.); F. 1324 (Groeniger

purchased Star's Domestic Fittings indirectly through Griffin Pipe Products Co. ("Griffin"), a manufacturer of ductile iron pipes who also resells Fittings as part of packaged sales of pipes and Fittings.); F. 1334-1336 (WinWholesale informed McWane that it "accepted" the terms of McWane's Full Support Program and subsequently placed Star Pipe on the list of vendors who are "not approved" for sales of Domestic Fittings unless McWane was not able to provide the required Domestic Fittings.). Thus, even though McWane did not enforce the Full Support Program against Distributors other than Hajoca, McWane's Full Support Program nevertheless harmed competition. *See ZF Meritor*, 696 F.3d at 282-83 (concluding that defendant's agreements with customers constituted an unlawful exclusionary dealing arrangement where, "despite the fact that [the defendant] did not actually terminate the agreements on the rare occasion when [a customer] failed to meet its [market-penetration] target, the [customers] believed that it might").

With respect to Hajoca, Respondent argues the policy was "enforced weakly . . . for a period of 12 weeks at the most." RB at 101. From December 4, 2009 to April 13, 2010, a period of 18 weeks, McWane refused to sell Domestic Fittings to Hajoca. F. 1219. Respondent's "weak enforcement" of the Full Support Program must be placed in context. In November 2009, McWane informed Hajoca: "[I]f any Hajoca location chooses to buy another domestic fitting supplier['s] product[,] Hajoca will not have direct access to the McWane ductile iron water main fittings for a period of time as well as loss of any accrued rebate to date." F. 1201. Subsequent to receiving notification on January 22, 2010 that the FTC was investigating McWane, Hajoca and McWane negotiated regarding McWane's Full Support Program and came to an agreement in April 2010, whereby McWane agreed to allow Hajoca's Lansdale branch, but not its Tulsa branch, to resume purchasing Domestic Fittings from McWane. F. 1220-1221. Prior to those negotiations, on March 27, 2010, Mr. McCullough sent an internal email within McWane asking, "[h]ow our potential FTC action might [a]ffect how we do business with [Hajoca]." F. 1220.

Actions that may have been taken to improve one's litigating position are entitled to little or no weight. *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1384 (7th Cir. 1986); *see also*

United States v. General Dynamics Corp., 415 U.S. 486, 504-05 (1974) (Because "violators could stave off [government enforcement] actions merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending," probative value of evidence of actions taken post-acquisition was found to be extremely limited.). Thus, in the instant case, Respondent's argument that its "rebate policy" was "enforced weakly . . . for a period of 12 weeks at the most" (RB at 101) is entitled to little or no weight.

Furthermore, the Full Support Program is not a mere rebate from which Distributors can walk away at any time, as argued by Respondent. RB at 93 (citing *Concord Boat Corp. v. Brunswick Corp*., 207 F.3d 1039, 1062-63 (8th Cir. 2000) ("[Defendant's] discount programs were not exclusive dealing contracts . . . [because customers] were free to walk away from [Defendant's] discounts at any time."). Instead, with the exception of Ferguson, Distributors consistently testified that they could not risk McWane refusing to supply them with their Domestic Fittings requirements. F. 1238 (HD Supply interpreting McWane's Full Support Program to mean that if HD Supply purchased Domestic Fittings from Star, HD Supply "would lose the rebate on the domestic fittings and potentially lose access to the domestic line[, which] could be a significant event."); F. 1301 (Because U.S. Pipe needed access to a full line of Domestic Fittings, not just the "A" and "B" items initially being offered by Star, U.S. Pipe needed to take the notification from Mr. Tatman very seriously and buy its Domestic Fittings from McWane.); F. 1317 (Groeniger needed access to McWane's Domestic Fittings in order to service customers with McWane-only Domestic Fitting requirements and was concerned about "[b]eing shut out" from McWane if it purchased Domestic Fittings from Star.); F. 1358 (Losing access to McWane's Domestic Fittings was a serious consequence for Illinois Meter because Illinois Meter needs to have access to a full line of Domestic Fittings in certain locations and only McWane carried a complete line in 2009.). *But see* F. 1260 (Ferguson's concerns about the possibility of the potential to lose access to McWane's Domestic Fittings or foregoing unpaid rebates from McWane were only secondary concerns and Ferguson believed it unlikely that McWane would withhold rebates from Ferguson and that the rebate terms and lead times stated in the Full Support

Program could be negotiated.). Thus, the evidence demonstrates that, overwhelmingly, Distributors viewed McWane's Full Support Program as an all-or-nothing exclusive dealing arrangement and acted accordingly.

Respondent also argues that the Full Support Program was not a contract, did not require any customer to buy Domestic Fittings from McWane, and was short lived. RB at 92, 98-101. A similar argument was rejected in *Dentsply*, where the Court of Appeals for the Third Circuit concluded that "an exclusivity policy imposed by a manufacturer on its dealers violate[d] Section 2 of the Sherman Act . . . based on . . . the nature of the relevant market and the established effectiveness of the restraint despite the lack of long term contracts between the manufacturer and its dealers." *Dentsply*, 399 F.3d at 184. There, the defendant operated "on a purchase order basis with its distributors and, therefore, the relationship [with distributors was] essentially terminable at will." *Id.* at 185. The court found the policy of terminating any dealer that carried its competitor's products (artificial teeth) exclusionary because "the economic elements involved – the large share of the market held by Dentsply and its conduct excluding competing manufacturers – realistically ma[de] the arrangements . . . as effective as those in written contracts." *Id.* at 193-94 ("[I]n spite of the legal ease with which the relationship [could] be terminated, the dealers [had] a strong economic incentive to continue carrying Dentsply's teeth."); *see also ZF Merritor*, 696 F.3d at 278 (upholding jury verdict that rebate policy was *de facto* exclusive dealing and noting, "even if [a customer] decided to forgo the rebates and purchase a significant portion of its requirements from another supplier, there would still have been a significant demand from truck buyers for [the defendant's] products. Therefore, losing [the defendant] as a supplier was not an option.").

In this case, in contrast, McWane's Full Support Program was unilaterally imposed on Distributors; there was no competition to become the exclusive supplier, and McWane did not offer any additional discount, rebate or other consideration to Distributors in exchange for exclusivity. Indeed, McWane threatened to revoke accrued rebates under preexisting rebate agreements with Distributors who chose to violate the Policy.

Distributors viewed McWane's Full Support Program as a threat, and one that they took seriously because of the significant negative impact that losing access to McWane's Domestic Fittings would have on their business. *E.g.*, F. 1192 ("When I read the letter that [McWane] sent out . . . I interpreted that as a threat."); F. 1187 ("We were informed that they [McWane] were going to pull everything away from us, a threat."). Thus, Distributors complied with McWane's Full Support Program because they determined that they could not afford to switch to a competing Domestic Fittings supplier on an all-or-nothing basis – the risk to their business was simply too large. *See Dentsply*, 399 F.3d at 195 (holding similar "all-or-nothing" ultimatum to be exclusionary when it "created a strong economic incentive for dealers to reject competing lines in favor of Dentsply's teeth"). Accordingly, McWane's Full Support Program – even absent long term contracts – significantly foreclosed the Domestic Fittings market to potential competitors.

d. The Full Support Program foreclosed Star from a substantial share of the market

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 69 (quoting *Tampa Electric*, 365 U.S. at 327); *see Dentsply*, 399 F.3d at 191 ("The test is . . . whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit."). Foreclosure occurs when, pursuant to the exclusive dealing, "'the opportunities for other traders to enter into or remain in that market [are] significantly limited.'" *Microsoft*, 253 F.3d at 69 (quoting *Tampa Electric*, 365 U.S. at 328).

As summarized above, McWane communicated to Distributors that its Full Support Program was an all-or-nothing deal and Distributors understood the policy as such. Because Star did not have a complete line of Fittings when it entered the Domestic Fittings market and Distributors could not risk being unable to supply all required Domestic Fittings and not being able to purchase them from McWane, Distributors were reluctant to purchase Domestic Fittings from Star. This scenario is similar to

the agreements found to unlawfully foreclose competition in *ZF Meritor*, where the evidence showed that due to defendant's "position as the dominant supplier, no OEM could satisfy customer demand without at least some [of defendant's] products, and therefore no OEM could afford to lose [defendant] as a supplier." *ZF Meritor*, 696 F.3d at 283.

For a Fittings supplier, Distributors are an important link in the supply chain and access to Distributors is essential for effectively reaching the End Users. Virtually all Fittings are sold through Distributors because they offer numerous advantages. F. 373-374. For example, Distributors maintain inventories of Fittings, which reduces the need for Fittings suppliers to have local warehouses and distribution facilities across the United States. F. 400, 402-404. Distributors lower Fitting suppliers' costs by handling billing and invoicing to End Users, and by assuming the credit risk from dealing with End Users. F. 407, 411. Distributors also provide one-stop shopping for End Users to purchase the entire bundle of waterworks products (pipe, valves, Fittings, hydrants, and accessories), which allows Fittings suppliers to specialize in one or more product lines and not be at a competitive disadvantage relative to a supplier that may have a broader waterworks products line. F. 400, 409. For these and other reasons, McWane agrees that Distributors are "critical to [its] success" as a Fittings supplier. F. 401. Distributors are likewise critical to Star's success. F. 402.

McWane's Full Support Program substantially foreclosed Star from this key distribution channel. Before McWane's September 22, 2009 announcement, Star had received Distributor requests for quotes for Domestic Fittings worth approximately $10 million. F. 1395. Those requests were from the two largest waterworks distributors in the country, HD Supply and Ferguson, important regional distributors, and from a variety of independent waterworks distributors. F. 1395. Almost immediately after McWane announced its Full Support Program, those Distributors withdrew their requests for quotes from Star and informed Star that they were no longer interested in purchasing Domestic Fittings from Star. F. 1382. Other Distributors who had intended to purchase some of their Domestic Fittings from Star decided not to submit requests for quotes to Star after McWane's announcement. F. 1382.

In *United States v. Microsoft Corp.*, the government challenged Microsoft's exclusive dealing agreements with the top Internet Access Providers (IAPs) in North America, accounting for a majority of all IAP subscribers. *Microsoft*, 253 F.3d at 70. Similar to Distributors in this case, IAPs were one of the most efficient channels for distributing browsing software. *Id.* at 70-71. The excluded rival, Netscape, was compelled to use more costly means for reaching consumers. *Id.* The evidence showed that Microsoft's exclusive dealing arrangements diminished Netscape's ability to obtain the critical mass of users needed to constrain Microsoft's operating system monopoly. *Id.* at 60, 70-71 ("Microsoft's deals with the IAPs clearly have a significant effect in preserving its monopoly; they help keep usage of [Netscape's] Navigator below the critical level necessary for Navigator or any other rival to pose a real threat to Microsoft's monopoly."). Here, too, McWane's Full Support Program has a significant effect in preserving its monopoly by keeping Distributors' purchases of Domestic Fittings from Star below the critical level for Star to pose a real threat to McWane's monopoly.

It is undisputed that Star's Domestic Fittings sales represent a small portion of the relevant market, rising to less than 10% in 2011. F. 1042-1043. HD Supply and Ferguson are Star's largest and second largest customers, respectively, for overall Fittings. Star estimates that while it has greater than a [redacted]% share of HD Supply's and a [redacted]% share of Ferguson's non-Domestic Fittings business, it has less than a [redacted]% share of its largest customers' Domestic Fittings business. F. 1258, 1280; *see also* F. 1281.

Respondent argues that Star was not foreclosed, but competed very successfully, quickly grabbing 130 customers after entering the Domestic Fittings market. RB at 90, 93-94. In counting the number of customers to whom Star sold Domestic Fittings, Respondent's expert, Dr. Normann, counted each Distributor that may have purchased only a single Domestic Fitting from Star, or whose purchases fell into one of the limited exceptions to McWane's Full Support Program. F. 1142. The number of customers, without more information on the nature and extent of their purchases, is not entitled to substantial weight. *See Insignia*

Systems v. News Am. Mktg. In-Store, Inc., 661 F. Supp. 2d 1039, 1049, 1064-65 (D. Minn. 2009) (plaintiff produced sufficient evidence to survive summary judgment on claim that plaintiff had been foreclosed even though plaintiff sold its services to nearly 60 customers).

Importantly, "[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." *Dentsply*, 399 F.3d at 191; *Microsoft*, 253 F.3d at 68-71 (condemning exclusive agreements because they prevented rivals from "pos[ing] a real threat to Microsoft's monopoly"); *see also Tampa Electric*, 365 U.S. at 328 (holding that exclusive dealing arrangement need not cover 100% of the buyer's needs, but only that it forecloses "a substantial share of the relevant market"). In other words, foreclosure does not mean that the rival was prevented from making any sales. *E.g.*, *ZF Meritor*, 696 F.3d at 265, 283-84 (exclusive dealing arrangements can be unlawful even where monopolist permitted customers to purchase up to 20 percent of their requirements from the rival); *Insignia Systems*, 661 F. Supp. 2d at 1064-65.

By threatening to cut off Distributors' access to McWane's Domestic Fittings, thereby materially contributing to Distributors' reluctance to purchase from Star, McWane's Full Support Program severely limited Star's ability to enter the Domestic Fittings market. Accordingly, Star was substantially foreclosed from competing in the Domestic Fittings market.

e. The Full Support Program impaired Star's ability to compete effectively

"In some cases, a dominant firm may be able to foreclose rival suppliers from a large enough portion of the market to deprive such rivals of the opportunity to achieve the minimum economies of scale necessary to compete." *ZF Meritor*, 696 F.3d at 271. *See Microsoft*, 253 F.3d at 70-71 (stating that defendant's exclusionary conduct kept Navigator "below the critical level necessary for Navigator or any other rival to pose a real threat to Microsoft's monopoly"); *Dentsply*, 399 F.3d at 190-91 (competitive harm established when defendant's excluded rivals failed to achieve "the critical level necessary for any rival to pose

a real [competitive] threat"). In *LePage's*, following the introduction of defendant's rebate program, the plaintiff lost a significant amount of sales and lost key large volume customers and as a result, LePage's manufacturing process became less efficient. *LePage's Inc. v. 3M*, 324 F.3d 141, 158-59, 161 (3d Cir. 2003).

As summarized above, Star estimated in 2009 that it needed between [redacted] million dollars in sales of Domestic Fittings to justify purchasing its own domestic foundry. F. 1400. Although Star had received Distributors' requests for quotes for Domestic Fittings worth approximately $10 million prior to McWane's announcement of the Full Support Program (F. 1395), Distributors subsequently withdrew their requests for quotes from Star. F. 1382. In each of 2010 and 2011, Star's Domestic Fittings sales were only [redacted] million dollars. F. 1396-1397. Thus, Star did not generate a sufficient volume of sales of Domestic Fittings to purchase and operate its own foundry. F. 1401. Instead, Star contracted with independent foundries, which was more costly and less efficient. F. 1409-1410. Star estimated that the cost of producing Domestic Fittings at its own foundry would be [redacted]% lower than the cost of contracting with independent foundries. F. 1419. Respondent agrees that Star is "a less efficient supplier of domestic Fittings than McWane because of its use of multiple jobber factories, rather than its own, dedicated foundry, like McWane." RB at 62. Star also estimated that if Star owned its own foundry that produced its Domestic Fittings, Star could have lowered its Domestic Fittings prices by [redacted]%. F. 1420.

Without sufficient sales volume, Star was unable to purchase its own foundry. Without its own foundry, Star's costs were higher, and therefore its prices were higher. In this respect also, the Full Support Program hindered Star's ability to compete effectively.[40]

f. Other issues affecting Star's ability to compete

[40] Similarly, Fittings supplier SIP concluded that McWane's Full Support Program would deter Distributors from purchasing Domestic Fittings from SIP and thus SIP would not be able to generate sufficient sales necessary to cover its estimated costs to enter the Domestic Fittings market. F. 1376-1377.

Respondent correctly asserts that Star was unable to capture more business for reasons entirely unrelated to McWane's Full Support Program. RB at 50. For example, Ferguson was reluctant to purchase Domestic Fittings from Star because Ferguson was concerned about Star's ability to produce a complete line of Domestic Fittings without having its own manufacturing facility. F. 1272. Ferguson was reluctant to purchase Domestic Fittings from Star also because it was concerned that Star was using jobber facilities with extra capacity to produce Domestic Fittings for them, Star would not disclose to Ferguson which foundries it was using, and Ferguson was concerned that any of these domestic foundries could abandon Star, leaving Star unable to supply Ferguson with Domestic Fittings. F. 1273. U.S. Pipe, too, had concerns about Star's ability to provide a full line of Domestic Fittings early in Star's domestic development process, and was concerned that Star would not commit to putting the tooling in place in advance of getting a requirement for volume. F. 1307-1308. In addition, WinWholesale had concerns in 2010 about Star's reliability as a Domestic Fittings supplier that were independent of McWane's Full Support Program. F. 1341. WinWholesale was concerned about whether Star had the capacity, about the quality of Star's Domestic Fittings, whether Star could ship the product, and whether the product would be consistent. F. 1341. Similarly, Illinois Meter had previously had a negative experience with Star's reliability as a supplier when Star first entered the joint restraint business, and was not willing to give Star any Domestic Fittings orders in early 2010 until Star had demonstrated it had sufficient inventory to meet Illinois Meter's needs. F. 1361.

Star acknowledged that it lost Domestic Fittings bids due to reasons other than McWane's Full Support Program. For example, an internal Star email acknowledged that its Domestic Fittings were excluded on an order by Groeniger because Star could not meet the delivery dates. F. 1326.

In its "domestic quote log," used to track won and lost Domestic Fittings bids, Star indicated that between September 22, 2009 and February 22, 2010, Star lost various Domestic Fittings jobs for which Star submitted a quote to a Distributor, but where the Distributor purchased from McWane or Sigma (pursuant to

the MDA, *infra)* rather than from Star. F. 1247. To the extent that comments provided by sales persons regarding the reasons for lost jobs are reliable, the domestic quote log fails to resolve the dispositive issue. Complaint Counsel points to entries in the "status/update" field of the domestic quote log on some of these jobs with the following comments: "HD mandate letter," "letter directing fitting purchases," "Tyler-Sigma announcement," "letter threatening to cut off if they use Star domestic," or "Ferguson will not buy domestic from Star currently." F. 1248 (HD Supply); F. 1264 (Ferguson). Respondent points to entries in the "status/update" field on other jobs with the following comments: "lost due to delivery times," "lost due to delivery requirement," or "lost, lead times were too long." F. 1249 (HD Supply); F. 1265 (Ferguson). Thus, the domestic quote log is inconclusive regarding the reasons Star did not gain a greater share of the Domestic Fittings market.

As of March 2010, although Star could supply most of the fast-moving items in a timely manner, it still had some problems supplying the very slow-moving items for which Star might not have developed a pattern yet. F. 1133. In addition, Star was still building inventory in March 2010. F. 1129. Although Star had set a target in November 2009 to develop a full line of Domestic Fittings equal to the stock offered by McWane, by June 2010 Star had come close to that goal, but there were still quite a few odd patterns that Star did not offer. F. 1130.

It cannot be disputed that Star was unable to capture more Domestic Fittings sales for reasons other than McWane's Full Support Program. However, such evidence does not preclude a finding that McWane's Full Support Program substantially foreclosed Star from the Domestic Fittings market. In *ZF Meritor*, the Third Circuit upheld a jury verdict finding exclusionary conduct notwithstanding evidence that the plaintiff's products required frequent repairs and had incurred millions of dollars in warranty claims during the relevant time period. *ZF Meritor*, 696 F.3d at 266. The plaintiff itself acknowledged "poor product quality image" as one reason for its failures; that it had lost deals due to "lack of product availability"; and that it had refused to lower prices despite requests from customers. *Id.* at 308-09, 334-35 (Greenberg, J., dissenting). Yet, the Third Circuit

focused on the defendant's efforts to exclude the plaintiff from the relevant market, and found that there was substantial foreclosure despite evidence that the plaintiff could have competed more effectively. *Id.* at 285-86. *See also LePage's*, 324 F.3d at 158-59 (upholding jury verdict notwithstanding evidence that plaintiff did not "try hard enough" to retain its large customer).

In *Dentsply*, the Third Circuit rejected the district court's evaluation of defendant's two main rivals' business practices as a cause of their failure to secure more of the market, finding it "not persuasive," and focused, instead on defendant's actions. *Dentsply*, 399 F.3d at 189. "The reality is that over a period of years, because of Dentsply's domination of dealers, direct sales have not been a practical alternative for most manufacturers. It has not been so much the competitors' less than enthusiastic efforts at competition that produced paltry results, as it is the blocking of access to the key dealers." *Id. See also Rome Ambulatory Surgical Ctr. v. Rome Mem'l Hosp.*, 349 F. Supp. 2d 389, 405 (N.D.N.Y. 2004) (denying defendant's motion for summary judgment on exclusive dealing claim despite evidence of plaintiff's incompetence because there was evidence that the defendant had "acted to foreclose competition altogether through improper exclusive dealing," rather than "continuing to compete for patients by simply lowering its rates or offering a better facility").

Here, as in *ZF Meritor* and *Dentsply*, evidence that Star lost orders due to delays in delivery and did not have that same depth and breadth of inventory as McWane does not preclude a finding of exclusionary conduct where McWane's efforts were indeed effective in reducing competitive opportunities for Star. *See Dentsply*, 399 F.3d at 189, 196 ("The apparent lack of aggressiveness by competitors is not a matter of apathy, but a reflection of the effectiveness of Dentsply's exclusionary policy.").

g. Proffered procompetitive justifications

The greater weight of the evidence shows that Respondent's Full Support Program foreclosed competition in such a substantial share of the Domestic Fittings market so as to adversely affect competition. As analyzed above, Respondent held significant

market power and was able to substantially foreclose Star from the Domestic Fittings market.

Before concluding that the Full Support Program is an unlawful exclusive dealing arrangement, the likely or actual anticompetitive effects must be considered in light of any procompetitive effects. *See ZF Meritor*, 696 F.3d at 288 (citing *Barr Labs.*, 978 F.2d at 111 (explaining that courts must "evaluate the restrictiveness and the economic usefulness of the challenged practice in relation to the business factors extant in the market")). "[E]ven if a company exerts monopoly power, it may defend its practices by establishing a business justification." *Dentsply*, 399 F.3d at 196. Once the government demonstrates harm to competition, the burden shifts to Respondent "to show that [the challenged conduct] promotes a sufficiently pro-competitive objective." *Id*. (citing *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993)).

Respondent asserts that the purpose of the Full Support Program was to generate sufficient volume to support its foundries. RB at 47, 59, 74, 107; F. 1175 (Mr. McCullough explaining that the purpose of the Full Support Program was to generate enough business to operate its foundries). In November 2008, faced with high inventory levels and insufficient demand for Domestic Fittings, McWane had closed its Tyler South plant. F. 477. *See also* F. 18, 478. Because its last remaining domestic foundry had high inventory levels and insufficient demand, McWane was concerned that if Star entered the Domestic Fittings market, McWane would not be able to generate enough business to operate its last foundry. F. 1145-1146. Another proffered purpose of McWane's Full Support Program was to persuade McWane's customers to support McWane's full line of Domestic Fittings. F. 1147, 1173. McWane was concerned that customers might "cherry pick" by purchasing the highest-selling, fastest-moving items (the "A" and "B" items) from Star, while purchasing from McWane only the slower-moving, infrequently-needed and higher-cost "C" and "D" items. F. 1147, 1175.

"[A] defendant's assertion that it acted in furtherance of its economic interests does not constitute the type of business

justification that is an acceptable defense to § 2 monopolization." *LePage's*, 324 F.3d at 163. As explained by one court of appeals:

> In general, a business justification is valid if it relates directly or indirectly to the enhancement of consumer welfare. Thus, pursuit of efficiency and quality control might be legitimate competitive reasons . . . , while the desire to maintain a monopoly market share or thwart the entry of competitors would not.

Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1183 (1st Cir. 1994) (citing *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 483 (1992); *Aspen Skiing*, 472 U.S. at 608-11)).

McWane's desire to increase sales for its last remaining United States foundry may be a laudable business objective. It is not, however, a valid justification for exclusionary conduct. As explained by the D.C. Circuit in *Microsoft* when it rejected a similar defense, the desire to increase sales "is not an unlawful end, but neither is it a procompetitive justification." 253 F.3d at 71-72 (characterizing the objective as a "competitively neutral goal"). Respondent has proffered no explanation as to how its Full Support Program benefits consumers rather than merely itself. Furthermore, as explained below, there is considerable evidence in the record that McWane implemented the Full Support Program in order to thwart Star from entering the Domestic Fittings market. "Maintaining a monopoly is not the type of valid business reason that will excuse exclusionary conduct." *LePage's*, 324 F.3d at 164.

Because there is no procompetitive justification that outweighs the harm to competition, Respondent's Full Support Program constitutes unlawful exclusionary conduct. Accordingly, Complaint Counsel has established the second step in a monopolization claim: willful maintenance of Respondent's monopoly power.

4. Intent

"The Supreme Court has made clear that intent is relevant to proving monopolization, *Aspen Skiing*, 472 U.S. at 602, and

attempt to monopolize, *Lorain Journal*, 342 U.S. at 154-55." *LePage's*, 324 F.3d at 163. "[K]nowledge of intent may help the court to interpret facts and to predict consequences." *Chicago Bd. of Trade*, 246 U.S. at 238. *Cf Aspen Skiing*, 472 U.S. at 602 ("[E]vidence of intent is merely relevant to the question whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive' . . ."); *Microsoft*, 253 F.3d at 59 ("Evidence of the intent behind the conduct of a monopolist is relevant only to the extent it helps us understand the likely effect of the monopolist's conduct."). Thus, the evidence discussed below, which places McWane's decision to implement its Full Support Program in context, is considered in evaluating whether Respondent's conduct is fairly characterized as exclusionary.

The evidence surrounding McWane's decision to issue the Full Support Program is also evidence of specific intent to monopolize. Whereas for monopolization "the mere intent to do the act" is sufficient, *United States v. Aluminum Co. of America*, 148 F.2d 416, 431-32 (2d Cir. 1945), attempted monopolization requires proof that the defendant had a "specific intent to destroy competition or build monopoly." *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 626 (1953); *accord Spectrum Sports*, 506 U.S. at 456. "[S]pecific intent may be established not only by direct evidence of unlawful design, but by circumstantial evidence, principally of illegal conduct." *William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co.*, 668 F.2d 1014, 1027 (9th Cir. 1981) (citations omitted).

McWane recognized that if Star entered the Domestic Fittings market, prices for Domestic Fittings would decrease. *E.g.*, F. 1149, 1151-1153. The June 24, 2009 email exchanges between Mr. Walton, Mr. McCullough, and Mr. Tatman, set forth in F. 1148-1150 and summarized above, Section III.G.3.a.(i), clearly express McWane's concern that if Star were to enter the Domestic Fittings market, prices of Domestic Fittings would be driven down, which prompted McWane to "plot a comprehensive strategy going forward." F. 1149. *See also* F. 1158 (among the series of assumptions in Mr. Tatman's June 29, 2009 PowerPoint Presentation of topics for discussion were, Star might "drive profitability out of our business"). In the narrative for McWane's 2010 budget, Mr. Tatman listed the biggest risk factor for

McWane's Fittings business in 2010 as the "[e]rosion of domestic pricing if Star emerges as a legitimate competitor." F. 1151.

McWane's Mr. Napoli recognized that if Star entered the market, Distributors would seek lower prices from McWane:

> We may not be losing business now but I am concerned about the future. Those [Distributors] not aligned with us or Sigma will be aggressive with Star backing them against our people… When that happens our distributors will continually pressure us to 'do something' (lower prices). If [Star] stay[s] in business, we will always see downward pressure in the future.

F. 1152.

Internal McWane documents also show that Respondent implemented the Full Support Program with the specific intent of preventing Star from entering and lowering prices in the Domestic Fittings market. As summarized above, McWane drafted and implemented its Full Support Program in direct response to Star's entry and because it wanted to "block" Star from entering the Domestic Fittings market. *E.g.*, F. 1155, 1580 (June 29, 2009 PowerPoint Presentation wherein Mr. Tatman considered how to "block Star" from entering the Domestic Fittings market). *See also* F. 1148 (internal McWane email by Mr. McCullough, writing: "Just because we share our blended fittings does not require us to share our domestic.").

That the intent of the Full Support Program was to discourage Distributors from purchasing Domestic Fittings from Star is quite clear in an internal email that Mr. Tatman sent on August 24, 2009 to Mr. Dennis Charko, head of Clow Water (a subsidiary of McWane), which sells a limited number of Fittings, regarding "McWane Domestic Fittings 2010 brand/market protection." The email stated in part:

> Star has announced a Domestic line of waterworks fittings and restraints. . . .
>
> To protect our domestic brands and market position we are going to adopt a distributor exclusivity program for 2010

> wherein we won't provide domestic product to distributors who are not fully supporting our domestic product lines.

F. 1167. McWane's National Sales Manager, Mr. Jansen, expressed this same intent in a November 3, 2009 email to his sales representatives regarding Domestic Fittings, stating: "We don't want the market tumbling and if we keep everyone on board we shouldn't have to drop prices." F. 1153 (Mr. Jansen explained in his deposition that "market tumbling" means prices falling; and "keep everyone on board" refers to Distributors being loyal to McWane under the Full Support Program). *See also* F. 1154 (Mr. Jansen email to sale representatives, writing, "We need to make sure we are getting into the smaller [Distributor] players up there and keep them from Star. That's how a cancer starts, is by letting them get in with one, two, then three, and it crumbles from there.").

McWane's goal to maintain high prices by preventing Star from becoming a legitimate competitor is not a procompetitive reaction akin to pursuing greater sales by increasing quality and service or lowering price. Instead, McWane's goal is a "clear expression[] of a plan to maintain monopolistic power." *See Dentsply*, 399 F.3d at 190. When viewed in its entirety, the greater weight of the evidence demonstrates that McWane had a specific intent to control prices and eliminate competition.

5. Dangerous probability of achieving monopoly power

The last element of an attempted monopolization claim, "dangerous probability of achieving monopoly power," *Spectrum Sports*, 506 U.S. at 456, although listed as a separate and independent element of attempted monopolization, can be inferred from evidence indicating the existence of the first two elements – anticompetitive conduct and specific intent. *William Inglis*, 668 F.2d at 1029. In determining whether there is a dangerous probability of monopolization, courts consider "the relevant market and the defendant's ability to lessen or destroy competition in that market." *Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co.*, 411 F.3d 1030, 1043 (9th Cir. 2005). As established above, Respondent had the ability to lessen or destroy competition in the Domestic Fittings market. In

addition, Respondent engaged in anticompetitive conduct with specific intent. Thus, the dangerous probability of achieving monopoly power element has been met.

6. Conclusion

Having met its burden of proof on each of the elements, Complaint Counsel has proven Count Six, Monopolization and Count Seven, Attempted Monopolization.

H. Count Four: Alleged Restraint of Trade in the Domestic Fittings Market

1. Overview

Count Four of the Complaint alleges that McWane and Sigma entered into a Master Distribution Agreement, dated September 17, 2009 ("MDA"), that unreasonably restrains trade and constitutes an unfair method of competition in or affecting commerce in violation of Section 5 of the FTC Act. Complaint ¶¶ 49, 67. The Complaint alleges that McWane perceived Sigma as preparing to enter the Domestic Fittings market and sought to eliminate the risk of competition from Sigma by inducing Sigma to become a distributor of McWane's Domestic Fittings, rather than a competitor in that market. Complaint ¶ 48.

Complaint Counsel argues that Count Four of the Complaint charges McWane with violating Section 1 of the Sherman Act by entering the MDA with Sigma. CCB at 180. Specifically, according to Complaint Counsel, the MDA, by its terms and by the parties' understanding, barred Sigma from independently entering the Domestic Fittings market in competition with McWane. CCB at 181. The Complaint does not allege that McWane excluded Sigma, but that McWane and Sigma agreed that Sigma would cede the Domestic Fittings market to McWane. CCRB at 93.

Complaint Counsel asserts that "Sigma was first motivated to enter the Domestic Fittings market after Congress passed ARRA." CCB at 185. Complaint Counsel characterizes Sigma as a potential entrant in the Domestic Fittings market and thus asserts that the MDA is properly characterized as a horizontal agreement

among potential competitors, and not as a simple vertical distribution agreement. CCB at 181. Complaint Counsel argues that because Sigma was a potential competitor and the MDA eliminated Sigma as an independent entrant, the MDA is a naked market allocation agreement among potential competitors not to compete with each other, and is *per se* illegal. CCB at 182. Complaint Counsel argues, alternatively, that because the parties have market power and there are no procompetitive efficiencies, the MDA can also be condemned under a more plenary market analysis pursuant to the rule of reason. CCB at 182.

Respondent asserts that McWane did not exclude Sigma from the Domestic Fittings market; Sigma did. RB at 102. Specifically, Respondent asserts that Complaint Counsel must prove, and cannot prove, that, as of September 2009 when the MDA was executed, Sigma intended to expand into the Domestic Fittings market and had taken the necessary concrete steps to do so. RB at 102. Respondent further asserts that Sigma was in a "grave" financial situation and had not taken any concrete steps to manufacture its own Domestic Fittings by September 2009. RB at 102. Accordingly, Respondent asserts that because the MDA was the best, quickest, and only way for Sigma to serve its customers who desired Domestic Fittings, Respondent is entitled to judgment in its favor on Count Four of the Complaint. RB at 104.

2. Elements of restraint of trade

A Section 1 violation requires (1) the existence of a contract, combination, or conspiracy among two or more separate entities (concerted action), that (2) unreasonably restrains trade. *Realcomp*, 635 F.3d at 824; *Law*, 134 F.3d at 1016.

On September 17, 2009, McWane and Sigma entered into a Master Distribution Agreement through which Sigma would resell McWane's Domestic Fittings. They agreed as follows:

> a. Appointment: McWane hereby appoints Sigma, and Sigma hereby accepts appointment, as an authorized OEM Distributor of McWane Domestic Fittings upon the terms and conditions of this Agreement.

b. Exclusivity: Sigma agrees that McWane shall be Sigma's sole and exclusive source for Domestic Fittings, with the exception that:

(1) Sigma may purchase Domestic Fittings in the 30"- 48" diameter size range from other manufacturers so long as Sigma is the sole owner of the patterns for such Domestic Fittings, but only for resale to other domestic foundry manufacturers of ductile iron pipe and fittings;

(2) If McWane does not own patterns for a particular Domestic Fitting, Sigma may purchase that Domestic Fitting from an alternative source, but only until such time as McWane acquires the pattern for that Domestic Fitting; and

(3) Sigma may purchase Domestic Fittings from alternative sources on an order by order basis only if McWane cannot deliver McWane Domestic Fittings to the designated delivery point by the time specified in the order or within 30 days after the order has been received and processed by McWane, whichever occurs later.

F. 1540. The signed MDA between McWane and Sigma meets the concerted action requirement of Section 1. *See, e.g.*, *United States v. Delta Dental*, 943 F. Supp. 172, 175 (D.R.I. 1996) ("[C]oncerted action may amply be demonstrated by an express agreement."). Therefore, the remaining Section 1 inquiry is whether the MDA unreasonably restrains trade.

Under Section 1 of the Sherman Act, agreements among actual or potential competitors at the same level of the market structure (*i.e.*, horizontal competitors) to allocate markets are *per se* unlawful. *See, e.g.*, *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49 (1990) (per curiam); *United States v. Topco Assocs.*, 405 U.S. 596, 608-09 & n.9, 612 (1972); *Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 58 n.28 (1977). "[A]greements not to compete among potential competitors are also illegal per se." *Transource Int'l, Inc. v. Trinity Indus.*, 725 F.2d 274, 280 (5th Cir. 1984) (citing *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377 (1973)); *Engine Specialties, Inc. v. Bombardier, Ltd.*, 605 F.2d 1, 9 (1st Cir. 1979).

Therefore, the preliminary inquiry focuses on "whether or not each firm alleged to have been a party to [the agreement] was an actual or potential competitor in that market." *United States v. Sargent Electric Co.*, 785 F.2d 1123, 1127 (3d Cir. 1986); *Bombardier*, 605 F.2d at 9 (stating that the first inquiry is whether the parties to the agreement "can be deemed to have been operating at the same horizontal level in the market, thus triggering the per se rule should [market allocation] be found"). If Sigma was not a potential competitor, the MDA does not "constitute a per se violation of section 1 of the Sherman Act as a horizontal restraint." *Transource Int'l Inc.*, 725 F.2d at 280. Thus, if Sigma was not a potential competitor, the MDA must, instead, be analyzed under the rule of reason. *Transource Int'l Inc.*, 725 F.2d at 280; *Bombardier*, 605 F.2d at 9.

To prove that Sigma was a potential competitor, Complaint Counsel must show that Sigma "had the necessary desire, intent, and capability to enter the market at [the manufacturing] level." *Bombardier*, 605 F.2d at 9. Sigma's desire and intent are addressed first. Sigma's capability is addressed second.

3. Whether Sigma was a potential competitor

a. Desire and intent

After the enactment of ARRA in February 2009, with its allocation of $6 billion to shovel-ready water infrastructure projects and requirement that such projects use only Domestic Fittings (F. 524-526), Sigma believed that it needed to offer Domestic Fittings. F. 1421. Sigma considered two potential avenues for entering the Domestic Fittings market: (1) purchasing "private label" Domestic Fittings from McWane (*i.e.*, Fittings manufactured by McWane for Sigma and branded as Sigma); or (2) producing Domestic Fittings using the "virtual manufacturing" model that it used for imported Fittings (*i.e.*, contracting with independent, domestic foundries). F. 1423.

In evaluating both of these options, Sigma recognized that ARRA was a short term stimulus program and that Sigma needed to be able to enter the Domestic Fittings market quickly. F. 1422 ("It was intended as a shovel-ready stimulus. So there was a lot

of emphasis on now."). Notably, as discussed above, with the exception of Star, every current and former Domestic Fittings manufacturer, including Griffin Pipe, U.S. Pipe, and Backman Foundry, concluded that it was not worthwhile to expand or return to Domestic Fittings production. F. 1039. *See also* F. 1037-1038.

Sigma recognized that it had an immediate need to be able to offer its customers Domestic Fittings and thus desired to enter the market. *E.g.*, F. 1421. For example, in a May 4, 2009 memorandum to the Sigma Board, Mr. Pais described the ARRA Buy American provision and declared that "it behooves SIGMA to review the feasibility of producing a line of 'domestic' Fittings, to meet this growing need, in order to reassure our customer base and retain their loyalty and their business at the current levels." F. 1448.

In the first half of 2009, Sigma approached McWane about the possibility of McWane supplying Sigma with "private label" Domestic Fittings that Sigma could resell. F. 1425. On June 5, 2009, McWane made its initial offer to sell Domestic Fittings to Sigma at five percent off McWane's published prices. F. 1443. Sigma was not satisfied with McWane's June 5, 2009 offer, as it would not allow Sigma enough profit margin to cover operating costs, and thus Sigma did not accept McWane's June 5, 2009 offer. F. 1444-1445.

In an update by Mr. Pais to Sigma's Board after Sigma had rejected McWane's June 5, 2009 offer, Mr. Pais wrote: "We now need to go all out and implement a SDP [Sigma Domestic Production] plan - replicating SIGMA's 'virtual manufacturing' model working with a collection of domestic foundries who have ample capacity, to produce the vast range of Fittings, just as we do thru a collection of facilities overseas." F. 1455; *see also* F. 1421 (Sigma believed demand for Domestic Fittings would increase as a result of ARRA and that Sigma therefore "needed to explore the option of being in a position to produce fittings for oursel[ves].").

Thus, the evidence amply shows that Sigma had the desire and had expressed an intent to enter the Domestic Fittings market.

b. Capability

Under the case law advanced by Complaint Counsel, to show that Sigma would "probably have entered the . . . market independently, . . . it must be shown that [Sigma] had 'available feasible means' for entering the relevant market." *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 977 (8th Cir. 1981); *Bombardier*, 605 F.2d at 9 (requiring "intent and ability"). One district court case, in evaluating whether an agreement not to compete was *per se* illegal as between two potential competitors, explained:

Although courts have not defined what a "potential competitor" is for the purpose of determining whether there has been a violation of the Sherman Act, courts have looked to the following factors to determine whether a plaintiff is a potential competitor such that it has standing to sue under the Clayton Act: "1) the background and experience of plaintiff in the prospective business; 2) affirmative acts of plaintiff with the object of entering the proposed business; 3) the ability of plaintiff to finance operation of the business and the purchase of necessary equipment and facilities; and 4) the formation of contracts by plaintiff."

Conergy AG v. MEMC Elec. Materials, Inc., 651 F. Supp. 2d 51, 57-58 (S.D.N.Y. 2009) (citation omitted). These four standards are used herein to evaluate whether Sigma was logistically and financially "capable" of entering the Domestic Fittings market.

i. Sigma's background and experience in the prospective business

First, the evidence of the "background and experience of [Sigma] in the prospective business" (*Conergy*, 651 F. Supp. 2d at 57-58) shows that Sigma has extensive experience in manufacturing and selling imported Fittings, as it has imported and sold Fittings in the United States since 1985, with net sales approaching 200 million dollars in 2009. F. 51, 53. Using a "virtual manufacturing" model, Sigma is responsible for the technical know-how that goes into producing its Fittings and handles administration, engineering, drawings, inspection, testing, quality control, and transportation of the Fittings it imports. F. 57. Sigma has approximately 23 territory sales managers across the

United States and approximately 25 inside customer service personnel supporting the sales force. F. 61. Sigma had personnel who could supervise a virtual manufacturing operation for Domestic Fittings, such as Mr. Stuart Box, who had extensive experience in U.S. foundry work and fittings manufacturing before joining Sigma, and Mr. Gopi Ramanathan, who also had extensive foundry experience. F. 1451.

At the same time that it was considering entering production of Domestic Fittings in 2009, Sigma attempted to become a supplier of domestic pipe restraints, a product distinct from Fittings. F. 1504. Domestic production of pipe restraints is a much simpler, smaller and less expensive venture with a much smaller product range than Domestic Fittings and thus was an easier market for Sigma to try to enter. F. 1506. Mr. Rybacki described Sigma's domestic restraints project as "a disaster for us because we were very unsuccessful at it" and felt that it was inadvisable for Sigma to attempt to become a Domestic Fittings supplier in 2009, because "we proved it with the domestic restraint [effort] that we weren't real good at it." F. 1507-1508.

ii. Sigma's affirmative acts to enter the Domestic Fittings market

Second, the evidence of the "affirmative acts of [Sigma] with the object of entering the proposed business" (*Conergy*, 651 F. Supp. 2d at 57-58) shows that in early 2009, Sigma pursued the virtual manufacturing option for producing Domestic Fittings by forming a Sigma Domestic Production ("SDP") plan and assembling a team of executives responsible for investigating and exploring the possibility of Sigma producing Fittings domestically. F. 1446. The SDP team investigated the possibility of Sigma entering the Domestic Fittings market by producing fittings through independent, domestic foundries and evaluated the costs, foundry capabilities, and time it would take for Sigma to produce Domestic Fittings in response to ARRA. F. 1447. Sigma spent between $50,000 and $75,000 investigating domestic production options. F. 1449. Sigma's SDP team considered using factories and independent foundries to produce Domestic Fittings based on Sigma's drawings and tooling, similar to Sigma's existing methods of producing Fittings overseas. F. 1452. Sigma contemplated doing the finishing, or lining and painting, of its

Domestic Fittings itself. F. 1452. On or about June 5, 2009, Mr. Box summarized the results of SDP planning meetings held in June 2009, which included detailed action plans for identification of top Fittings, foundries, molding machines, cost modeling, testing of lost foam production technology, and visits to potential foundry partners. F. 1454.

Sigma believed that it needed to be able to offer around 730 different types of Domestic Fittings and that it needed a minimum of 450 core patterns to produce those 730 types of Fittings. F. 1468. In June 2009, Sigma's SDP team was working on obtaining patterns for producing Domestic Fittings and had placed orders for foam patterns and other equipment to be used in Domestic Fittings production. F. 1457.

By August 2009, Sigma had visited at least five different domestic foundries as part of its investigation into the production of Domestic Fittings and had purchased two large flasks for large Domestic Fittings production trials. F. 1459-1460. In addition, Sigma had produced two sample Domestic Fittings at the Eureka Foundry in Tennessee, using patterns supplied by Metalfit (F. 1461 (describing the Fittings as trial runs, not commercially ready)); and had received a quote from Metalfit for the production of tooling. F. 1464.

iii. Sigma's ability to finance entry into the Domestic Fittings market

Third, the evidence of the "the ability of [Sigma] to finance operation of the business and the purchase of necessary equipment and facilities" (*Conergy*, 651 F. Supp. 2d at 57-58) shows that throughout 2009, Sigma was in a "precarious position overall in financial terms." F. 1483. Sigma had had a loss of [redacted] million dollars in 2008. F. 1482. In 2009, Sigma's sales were down [redacted] million dollars and its EBITDA was [redacted]. F. 1485. As a result of the "very, very difficult" financial environment it faced in 2009, Sigma was forced to lay off employees, cut salaries and benefits for employees who remained, and cut numerous other expenses. F. 1487.

Sigma had a very large amount of debt at the end of 2008, and even breached some of its bank covenants in 2009. F. 1488. In 2009, a significant portion of Sigma's substantial debt was unsecured and carried high interest rates. F. 1489. Sigma's long-term debt was approximately [redacted] million dollars at the end of 2008, which it reduced to approximately [redacted] million dollars at the end of 2009, mostly as a by-product of reduction of inventories. F. 1490-1491. In June 2009, Mr. Pais issued an update to Sigma's Board of Directors outlining his "SOS" plan to save Sigma. F. 1496. In that update, Mr. Pais noted the decline of about [redacted] percent in its earnings level in 2008; that Sigma stood to lose another [redacted] percent in 2009; that Sigma will barely be able to meet its second quarter 2009 covenants; and that the second quarter 2009 results were "marginal at best," which "may cause a lot of concern to all, especially the banks, as we would be unable to assure them of the future performance trends." F. 1496.

Sigma's estimates for its costs to enter the Domestic Fittings market were between about five and ten million dollars. F. 1480. These estimates are similar to those of both SIP (a supplier of imported Fittings) and EBAA (a domestic foundry). F. 1062, 1070, 1373. Each of these companies, when considering expanding into Domestic Fittings production, estimated that the required expansion would cost up to ten million dollars and take two years to realize. F. 1062, 1378.

Capital expenditure limits imposed by Sigma's lenders in 2009 were extremely low. F. 1499. The Frontenac Group, a private equity firm that purchased a 60% ownership interest in Sigma in 2007, said at Sigma's July 2009 Board meeting, that Sigma did not have the capability to invest in Domestic Fittings production and that Frontenac would not provide the finances for Sigma's Domestic Production Plan. F. 1501. Sigma's lenders never authorized Sigma to invest in becoming a Domestic Fittings supplier, and Sigma lacked sufficient funds to invest in such an operation on its own. F. 1503.

Complaint Counsel presented contrary evidence showing that Sigma did, in fact, have the financial capability to invest in Domestic Fittings production. For example, on July 27, 2009, following the July 15, 2009 Sigma Board meeting, Walter

Florence, a Frontenac managing director and a member of Sigma's Board of Directors, sent an email to Sigma management regarding strategy for upcoming lender meetings. F. 1502. In this email, he noted that Sigma's liquidity was fine, that it had recently received an injection of capital from investors and shareholders, and that these investors and shareholders were prepared to invest 7.5 million dollars more to fund the SDP program and strategic business additions, which will enhance credit quality and help Sigma grow and build equity value. F. 1502. Regardless of whether Sigma had the financial capability to produce Domestic Fittings by contracting with independent, domestic foundries, it did not have the time required to do so, as addressed below.

iv. Sigma's steps to form contracts

Fourth, the evidence on "the formation of contracts by [Sigma]" (*Conergy*, 651 F. Supp. 2d at 57-58) shows that as of mid-2009, Sigma had no domestic foundries, no contracts with existing domestic foundries to produce Fittings in the United States, no core boxes, no machining facilities, and no finishing facilities or contracts for coating, painting, and lining for Domestic Fittings. F. 1465, 1471-1472. Although Sigma believed it needed a minimum of 450 core patterns for Domestic Fittings production, in September 2009, Sigma had very few of the patterns it needed for making Fittings in the United States and, as of September 2009, Sigma did not have any contracts with any pattern shops to build the patterns it would need to produce Fittings in the United States. F. 1468-1471.

c. Summary

It would have taken Sigma approximately 6 to 8 months to produce even one Domestic Fitting and lead time of at least 18 to 24 months to begin production of a full range of Fittings. F. 1476. If Sigma had started producing Domestic Fittings in September of 2009, Sigma could not have sold its first Domestic Fittings until between February and May 2010. F. 1475. Sigma knew that ARRA was a short term stimulus program. F. 1422 ("[R]ightly speaking, we should have had that [domestic] capability on day one for us to have any capacity to supply the projects. So we were already behind the eight ball on day one, because [ARRA]

was just a ball from the blue."). Indeed, according to the EPA publication titled, "Implementation of the American Recovery and Reinvestment Act of 2009," all ARRA funded projects were to be under contract by February of 2010. F. 1032.

In a September 9, 2009 report to the Sigma Board, Mr. Pais explained Sigma's ability to enter the Domestic Fittings market as follows:

> For Fittings, the range of sizes and complexities of the line items required even at a certain select level is rather huge and along with the additional processing required for machining, coating and packing etc. the entire project was found to be too overwhelming and cumbersome, calling for a sizable Capital Expenditure in the range of $6M to $8M as per the initial estimates. The likely sales volume we could garner from our [Buy American] capability was uncertain at best and far less than what we had originally feared. But most importantly, in the end, the time it would have taken for us to come on line and our inability to service our customers with the [Buy American] requirements over the next 12 months and of course the huge [capital expenditure], made us wish for an alternate viable option and as such, we responded when McWane too revived our dialog to accommodate us as a Master Distributor with better terms.

F. 1474.

Weighing the evidence presented at trial, Complaint Counsel has not met its burden of showing that Sigma "had the necessary desire, intent, and capability," *Bombardier*, 605 F.2d at 9, to enter the Domestic Fittings market. Accordingly, Complaint Counsel has not shown that Sigma was a potential competitor.

4. Whether the MDA unreasonably restrained trade

a. Legal standards governing rule of reason inquiries

Because Sigma was not a potential competitor, the MDA must be analyzed under the rule of reason. *Transource Int'l Inc.*, 725 F.2d at 280; *Bombardier*, 605 F.2d at 9. "When restraints are not per se unlawful, and their net impact on competition not obvious,

the conventional rule-of-reason approach requires courts to engage in a thorough analysis of the relevant market and the effects of the restraint in that market." *Realcomp*, 635 F.3d at 825 (citing *Ind. Fed'n*, 476 U.S. at 461). "A full rule-of-reason inquiry 'may extend to a "plenary market examination,"' which may include the analysis of 'the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed'" 'as well as the availability of reasonable, less restrictive alternatives.'" *Id.* at 825 (citations omitted).

Complaint Counsel bears the initial burden of demonstrating that the MDA produced adverse, anticompetitive effects within the Domestic Fittings market or sufficient evidence of market power. *See Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1065 (11th Cir. 2005) (citing *Ind. Fed'n*, 476 U.S. at 460-61). If the MDA is "shown to have an anticompetitive effect," or if McWane "is shown to have market power and to have adopted policies *likely* to have an anticompetitive effect, then the burden shifts to [McWane] to provide procompetitive justifications for the policies." *Realcomp*, 635 F.3d at 825 (citations omitted).

A "quick-look," or abbreviated, rule of reason analysis applies to those arrangements that "an observer with even a rudimentary understanding of economics could conclude . . . would have an anticompetitive effect on customers and markets." *California Dental Ass'n*, 526 U.S. at 770. In such cases, the nature of the restraint is such that the likelihood of anticompetitive effects "can easily be ascertained" or is "comparably obvious" and no elaborate or detailed market analysis is necessary. *See id.* at 769-71. If the nature of the restraint is deemed facially anticompetitive pursuant to this "quick-look," "the proponent of the restraint must provide 'some competitive justification' for it, 'even in the absence of a detailed market analysis' showing market power or market effects." *Realcomp*, 635 F.3d at 825 (quoting *Cal. Dental Ass'n*, 526 U.S. at 769-71). In all cases, "the criterion to be used in judging the validity of a restraint on trade is its impact on competition." *NCAA*, 468 U.S. at 104.

b. Nature of the restraint

In Count Four, Complaint Counsel charges that the MDA is an unreasonable restraint of trade because, through the MDA, McWane and Sigma agreed that Sigma would abandon its efforts to enter the Domestic Fittings market independent of McWane, and instead distribute McWane's Domestic Fittings under restrictive terms. CCB at 180. Complaint Counsel's charge that McWane and Sigma agreed through the MDA to implement and enforce McWane's Full Support Policy with the specific intent of eliminating competition from Star is evaluated separately in the analysis of Count Five, *infra* Section III.I.

As determined in Section III.G.2.b. *supra*, McWane has market power in the Domestic Fittings market. The evidence here shows that, through the MDA, Sigma agreed to abandon its efforts to produce its own Domestic Fittings. F. 1540, 1543-1544. The evidence further shows that Sigma did, in fact, abandon such efforts. F. 1545. As Mr. Rona, Sigma's OEM business manager, explained, "once we had the MDA, we were satisfied we had a source of domestic fittings for ARRA, period." F. 1545.

Complaint Counsel has presented evidence supporting its position that Sigma would have entered the Domestic Fittings market, but for Sigma's decision to enter the MDA. Complaint Counsel points out that Mr. Pais testified that, absent an agreement with McWane, Sigma would have entered the domestic market. CX 2527 (Pais, IHT at 179-180) ("[I]f [McWane] stuck with that initial offer [of a 5% discount] . . . then we certainly would have gone another – to Plan B, which is our [domestic] production."). However, Mr. Pais also testified that, as of September 2009, Sigma did not have a viable plan for entering the Domestic Fittings market and that Sigma had only "some wishful thinking type of scenarios that we could have struggled through." Pais, Tr. 1799, 1801.

Because the testimony of Mr. Pais is contradictory on this point, the contemporary documents of Sigma and the actions taken by Sigma in furtherance of its plan to enter the Domestic Fittings market are relied upon. Contemporaneous documents addressing a firm's subjective intent to enter are "[t]he best evidence that a firm is an actual potential entrant." *In re B.A.T.*

Industries, 1984 FTC LEXIS 4, *154 (Dec. 17, 1984). As analyzed above, the contemporaneous evidence shows that, as of September 2009, Sigma could not have produced its own Domestic Fittings in time to serve its customers' needs. F. 1470-1477. Consistent with this evidence is Mr. Pais' testimony that, "we had finally found a recourse by going to our competitor because we thought that was the only option that was viable because the service of the customer was imminent. . . . There was no other option that we could -- this is not a premeditated three or four-year plan that we had to enter a new product." F. 1582. *See also* F. 1583 (it was critical for Sigma to offer Domestic Fittings to its customers and "entering into the master distribution agreement with McWane was a solution to the problem we had"). Thus, the evidence shows that the MDA was Sigma's only viable option for supplying Domestic Fittings to Sigma's customers during ARRA's short time window.

This finding, however, does not end the inquiry into whether the MDA was an unreasonable restraint of trade. When a rule of reason inquiry extends to a "plenary market examination," the history of the restraint and the reasons why it was imposed and the availability of reasonable, less restrictive alternatives are also evaluated. *Realcomp*, 635 F.3d at 825. Therefore, the history and the reasons are analyzed below.

i. History of the restraint and reasons why it was imposed

An analysis of "the history of the restraint, and the reasons why it was imposed" (*Realcomp*, 635 F.3d at 825) shows that McWane entered into the MDA because it feared entry by Sigma. Although the evidence shows that Sigma could not have entered the Domestic Fittings market in time to take advantage of the increased demand for Domestic Fittings through ARRA, the evidence also shows that after meeting with Mr. Pais in April 2009, Mr. McCullough believed that Sigma had the ability to enter into domestic production of Fittings, had access to the needed capital, and "also had the contacts and the talent[, as] they've been importing for a very long time." F. 1427. In addition, McWane considered the likelihood of Sigma producing its own Domestic Fittings as part of McWane's internal

discussions regarding whether to sell Domestic Fittings to Sigma. *E.g.*, F. 1439-1440, 1442.

Mr. Tatman, in developing topics for discussion as McWane considered whether to sell Domestic Fittings to Sigma, noted that one reason for McWane to sell Domestic Fittings to Sigma was to "eliminate the probability" that Sigma would secure another domestic source option. F. 1439. A May 26, 2009 memorandum by Mr. Tatman contained the following discussion points in conclusion:

> McWane's decision to sell Domestic Fittings to Sigma "probably comes down to two factors:"
>
> 1. How legitimate of a risk is there with a competitor successfully introducing a Domestic product line?
>
> 2. Do we believe that in the bigger picture, supporting competitors with Domestic product would result in a healthier industry on the non-Domestic side of the business?

F. 1440. *See also* F. 1518 (Mr. Tatman noting: "If [Sigma is] truly committed to make the investment level required to be a viable competitor regardless of our actions, then producing for [Sigma] is probably of greater financial benefit to our business than having them source elsewhere.").

Mr. McCullough expressed his view of McWane's determination to sell Domestic Fittings to Sigma as follows:

> [U]ltimately [McWane's] decision [of whether to sell Domestic Fittings to SIGMA] was SIGMA has the ability to get into domestic made manufacturing of waterworks fittings, just as Star did. If we had the choice between [they're] not being in it and us selling them, or them being in it and us not selling them, that ultimately, we made the decision it's under our best interest to sell them.

F. 1442.

McWane viewed Sigma's ability to produce Domestic Fittings and enter the market to be more likely after Star announced its planned entry at the June 15, 2009 AWWA conference. F. 1511. In evaluating whether to enter the MDA with Sigma, Mr. Tatman believed that Sigma was in a "much better position" to develop its own Domestic Fittings capability than Star, in part because of Sigma's existing OEM relationships (with ACIPCO and U.S. Pipe) and Sigma's access to financial backing. F. 1512.

ii. Availability of reasonable, less restrictive alternatives

Conducting a "plenary market examination" also requires an analysis of "the availability of reasonable, less restrictive alternatives." *Realcomp*, 635 F.3d at 825. Although there were no other alternatives to the MDA for Sigma to enter the Domestic Fittings market in a timely manner, the MDA contains restrictive terms that were not necessary for McWane to sell Domestic Fittings to Sigma. The restrictive terms, as they relate to provisions intended to exclude Star from the market, are the subject of Count Five of the Complaint and discussed *infra* Section III.I. The restrictive terms, as they relate to the agreement between McWane and Sigma through which Sigma ceded the Domestic Fittings market to McWane, are evident in two provisions of the MDA relating to: (1) sources from whom Sigma could purchase Domestic Fittings, and (2) prices Sigma could charge under the MDA.

Under the MDA, "Sigma agree[d] that McWane shall be Sigma's sole and exclusive source for Domestic Fittings," with narrow, limited exceptions. F. 1540. Sigma further agreed to, and did, stop its efforts to produce its own Domestic Fittings. F. 1543-1546. Instead, Sigma became an exclusive distributor of McWane branded Domestic Fittings.[41] The effect of this provision was to preclude Sigma from purchasing Domestic Fittings from Star and to prevent Sigma from developing the capability to produce Domestic Fittings on its own in competition

[41] Although Sigma had originally approached McWane seeking to purchase Fittings manufactured by McWane for Sigma and branded as Sigma, under the MDA, Sigma agreed to become an OEM distributor of Domestic Fittings branded as McWane fittings. F. 1425, 1540.

with McWane. Accordingly, this provision of the MDA has likely anticompetitive effects.

In addition, the MDA contains restrictive terms as they relate to price. Specifically, the MDA provides:

> Pricing. McWane will sell McWane Domestic Fittings to Sigma at a discount of twenty percent (20%) off McWane's published distributor pricing in effect at the time the order is received by McWane.
>
> While Sigma may resell McWane Domestic Fittings at any price it deems appropriate, it is the unilateral policy of McWane not to appoint or continue any OEM distributor who resells McWane Domestic Fittings at a price less than 98% of McWane's published pricing on a weighted average basis for all customers and items sold during any given quarterly period, before rebates, freight and prompt payment discounts (the "Suggested Resale Price"), or who fails to establish a rebate program of 8% or greater for customers, excluding manufacturers of ductile iron pipe, who purchase more that [*sic*] $200,000 annually of McWane Domestic Fittings or who stock McWane Domestic Fittings in the normal course of business.
>
> . . . This agreement shall terminate immediately and without notice in the event that Sigma resells McWane Domestic Fittings at a price below the Suggested Resale Price, or fails to implement and maintain the Suggested Rebate for eligible customers; provided, however, that the Suggested Rebate shall not apply to customers who are domestic manufacturers of ductile iron pipe. McWane reserves the right to audit Sigma's compliance with this paragraph at any time through a third party . . . auditor chosen by McWane.

F. 1548. Although the MDA stated, "Sigma may resell McWane Domestic Fittings at any price it deems appropriate," the MDA also stated that McWane could immediately terminate the MDA without notice in the event that Sigma did not resell McWane's Domestic Fittings at McWane's suggested resale price. F. 1548. *See also* F. 1553 (Mr. Pais describing the pricing provision of the MDA as follows: "with the pricing, we are obliged to be as close

to the published multiplier as possible. Our hands are not tied – but we cannot sell below, because it will undermine McWane's own sales.").

On December 21, 2009, McWane sent a customer letter announcing multiplier increases for Domestic Fittings, effective January 22, 2010. F. 1554. Mr. Tatman forwarded McWane's December 21, 2009 multiplier increase letter to Mr. Rona of Sigma: "Per our MDA this will impact Sigma orders as of the effective date." F. 1555. Mr. Greg Fox of Sigma then forwarded the McWane December 21, 2009 customer letter within Sigma, noting: "Under the terms and agreements of our Master Distribution Agreement with [McWane], we will mirror the multiplier and implementation dates of this letter. We have no latitude for exceptions." F. 1556. Sigma enacted the same multiplier increase as McWane did, effective January 22, 2010. F. 1557.

"While vertical agreements setting minimum resale prices can have procompetitive justifications, they may have anticompetitive effects in other cases; and unlawful price fixing, designed solely to obtain monopoly profits, is an ever-present temptation." *Leegin*, 551 U.S. at 892. McWane has offered no procompetitive justifications for the provision of the MDA requiring Sigma to resell McWane Domestic Fittings at a weighted average of no less than 98% of McWane's published prices.

The Supreme Court, in *Leegin*, further explained, "[v]ertical agreements establishing minimum resale prices can have either procompetitive or anticompetitive effects, depending upon the circumstances in which they are formed." *Leegin*, 551 U.S. at 893. Here, the circumstances in which the MDA was formed show that the price provision of the MDA has the potential for anticompetitive effects. As determined in Section III.G.2.b., McWane has monopoly power in the Domestic Fittings market. Further, in considering the circumstances in which the MDA was formed, it is also significant that the MDA contains provisions designed to exclude Star from the Domestic Fittings market, addressed *infra* Section III.I. In these circumstances, the price provision of the MDA has the potential for anticompetitive effects.

iii. Summary of competitive impact

Evidence of the history of the MDA, the reasons McWane entered into it, and the restrictive terms contained therein, demonstrate the anticompetitive nature of the MDA. "Market power and the anticompetitive nature of the restraint are sufficient to show the potential for anticompetitive effects under a rule-of-reason analysis, and once this showing has been made, [the respondent] must offer procompetitive justifications." *Realcomp*, 635 F.3d at 827.

c. Procompetitive justifications

Respondent's concerted action with Sigma through the MDA cannot be sustained under the rule of reason analysis "[a]bsent some countervailing procompetitive virtue." *Indiana Fed'n of Dentists*, 476 U.S. at 459. Respondent bears the burden of "establishing an affirmative defense which competitively justifies [an] apparent deviation from the operations of a free market." *NCAA*, 468 U.S. at 113; *Realcomp*, 635 F.3d at 825.

Respondent asserts that the MDA, as well as the Full Support Program, was an effort to keep its Union foundry operating. RB at 107. As determined in Section III.G.3.g., *supra*, McWane's desire to increase sales for its last remaining United States foundry is not a valid procompetitive justification. *See Microsoft*, 253 F.3d at 71-72 (the desire to increase sales "is not an unlawful end, but neither is it a procompetitive justification"). Moreover, McWane had not expected that entry by Sigma into the Domestic Fittings market – either through the MDA or independently – would increase the size of the Domestic Fittings market. F. 1591. And indeed, the MDA did not increase the size of the Domestic Fittings market. F. 1593 ("The fact that Sigma had access to McWane fittings under the MDA, that didn't cause there to be more domestic jobs; is that right? A. Correct." "Q. . . . By having access to those fittings, you didn't expand the size of the pie, if you will, you expanded Sigma's ability to service a piece of that pie, is that fair? A. Yes.").

Respondent next asserts that Sigma was able to reach and service customers that McWane could not. RB at 107-108. *See* F.

1584-1585 (Sigma, with its network of regional distribution yards and larger sales force, was better able than McWane to provide certain servicing benefits); F. 1586-1589 (some Distributors preferred Sigma to McWane). An efficiency defense is valid only if the challenged conduct is reasonably necessary in order to achieve the legitimate objective identified by the respondent. *In re Realcomp II, Ltd.*, 2009 FTC LEXIS 250 at *39-40 (Oct. 30, 2009). *See also Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 19-21 (1979) (blanket license was "an obvious necessity" for achieving integrative efficiencies, and joint setting of price was "necessary" for the blanket license); *National Soc'y of Prof'l Engineers*, 435 U.S. at 696 (rejecting asserted justification for complete ban on competitive bidding as "simply too broad").

Respondent has not demonstrated that the restrictive provisions of the MDA – requiring Sigma to purchase only from McWane, requiring Sigma to stop its own efforts to produce Domestic Fittings, requiring Sigma to price in accordance with McWane, and requiring Sigma to refuse to sell to Distributors pursuant to McWane's Full Support Program – were reasonably necessary to achieve a legitimate objective. Respondent's proffered justifications are, therefore, rejected.

5. Conclusion

Under a rule of reason analysis, the evidence establishes that the MDA gave rise to potential genuine adverse effects on competition due to McWane's monopoly power and the anticompetitive nature of the MDA. Respondent's proffered procompetitive justifications were insufficient to overcome Complaint Counsel's prima facie case of adverse impact. These findings establish that the MDA was an unreasonable restraint of trade in the Domestic Fittings market. Accordingly, Complaint Counsel has proven Count Four, Unreasonable Restraint of Trade.

I. Count Five: Alleged Conspiracy to Monopolize the Domestic Fittings Market

1. Overview

Count Five of the Complaint alleges that McWane and Sigma entered into the MDA with the specific intent to monopolize the Domestic Fittings market, and took overt acts to exclude their rivals in furtherance of their conspiracy, constituting an unfair method of competition in or affecting commerce in violation of Section 5 of the FTC Act. Complaint ¶¶ 55, 68. The Complaint further alleges that the principal terms of the MDA were that McWane would be Sigma's exclusive source for Domestic Fittings and that Sigma would resell McWane's Domestic Fittings to Distributors only on the condition that the Distributor agreed to purchase Domestic Fittings exclusively from McWane or Sigma. Complaint ¶ 49.

Respondent first asserts that even if there is a separate market for Domestic Fittings, McWane did not have monopoly power in that market. RB at 89. Respondent next asserts that Star rapidly and effectively entered the Domestic Fittings market and thus McWane did not exclude Star from that market. RB at 90. Respondent further asserts that the Full Support Program, as incorporated in the MDA between McWane and Sigma, was merely a rebate policy that did not require any customer to buy Domestic Fittings from McWane or Sigma. RB at 92-101, 107. These arguments have been considered, evaluated, and decided against Respondent, *supra* Sections III.C.2. and III.G.

With respect to the MDA between McWane and Sigma, Respondent asserts that Complaint Counsel must prove that McWane and Sigma possessed the specific intent to confer monopoly power upon McWane by predatory or exclusionary conduct; that McWane and Sigma in fact engaged in such anticompetitive conduct; and that a dangerous probability existed that McWane would succeed in its attempt to achieve monopoly power. RRB at 67-68. Respondent further asserts that Complaint Counsel presented no evidence that McWane or Sigma entered into the MDA with the specific intent to monopolize. RB at 105-106; RRB at 68.

2. Elements of conspiracy to monopolize

"A 'conspiracy to monopolize' means a conspiracy to acquire or maintain the power to exclude competitors from some portion of commerce." *Williams v. 5300 Columbia Pike Corp.*, 891 F.

Supp. 1169, 1175 (E.D. Va. 1995) (citing *American Tobacco Co.*, 328 U.S. at 809). Three elements of a claim for conspiracy to monopolize are: (1) concerted action, with (2) the specific intent to monopolize, and (3) an overt act in furtherance of the conspiracy. *Levine v. Central Fla. Medical Affiliates*, 72 F.3d 1538, 1556 (11th Cir. 1996); *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1582 (11th Cir. 1991).

In addition to these elements, Respondent urges a fourth element, "an effect upon an appreciable amount of interstate commerce," citing the decision of the Court of Appeals for the Tenth Circuit in *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1028 (10th Cir. 2002). RB at 105. Other circuits require no showing or have been quiet on this issue. *E.g., Int'l Distrib. Ctrs., Inc. v. Walsh Trucking Co.*, 812 F.2d 786, 795 (2d Cir. 1987) (holding that elements of a conspiracy to monopolize are concerted action, deliberately entered into with the specific intent to achieve an unlawful monopoly, and the commission of an overt act in furtherance of the conspiracy); *Baxley-DeLamar Monuments, Inc. v. American Cemetery Ass'n*, 843 F.2d 1154, 1157 (8th Cir. 1988) (same); *Thompson*, 934 F.2d at 1582 (same). As analyzed above, Complaint Counsel has proven that Respondent's Full Support Program substantially foreclosed Star from the Domestic Fittings market (Section III.G.3. *supra*), which thus had an effect upon an appreciable amount of interstate commerce. Further, thousands of tons of Domestic Fittings, worth millions of dollars, were sold throughout the United States under the MDA (F. 1597), which reflects an appreciable amount of interstate commerce. *See United States v. Yellow Cab Co.*, 332 U.S. 218, 225-26 (1947) (observing that "interstate purchases of replacements of some 5,000 licensed taxicabs in four cities . . . is an appreciable amount of commerce under any standard"). The remaining elements of conspiracy to monopolize are addressed below.

3. Concerted action

The MDA is a written agreement, entered into and signed by McWane and Sigma on September 17, 2009. F. 1537. This satisfies the concerted action element for a conspiracy to monopolize claim, which has the same standard for proving an agreement as Section 1. *See, e.g., Howard Hess Dental Labs. v.*

Dentsply Int'l Inc., 602 F.3d 237, 254 n.7 (3d Cir. 2010) (standard governing existence of agreement same for Section 1 and Section 2); *U.S. Anchor Mfg.*, 7 F.3d at 1001-02.

The MDA explicitly states that Sigma may only resell McWane Domestic Fittings to:

> (1) American Cast Iron Pipe Company; and
>
> (2) Other customers, including distributors, contractors and fabricators, but excluding manufacturers of ductile iron pipe that have agreed to purchase McWane Domestic Fittings as their sole source of Domestic Fittings when McWane Domestic Fittings are available at the time of order.
>
> McWane shall from time to time provide Sigma with a list of customers who have not agreed to source their Domestic Fittings solely from McWane. Sigma agrees not to sell McWane Domestic Fittings to any customer so listed by McWane, or to any other customer who Sigma actually knows has purchased Domestic Fittings from a source other than McWane at any time during the previous 60 days.

F. 1558. Under the MDA, McWane required Sigma not to sell, and Sigma agreed not to sell, McWane Domestic Fittings to any customer listed by McWane as not having agreed to purchase their Domestic Fittings solely from McWane. F. 1559-1560.

The MDA further provides that Sigma would assist McWane in the enforcement of McWane's Full Support Program:

> Sigma shall . . . take reasonable efforts to monitor its customer's sources of supply of Domestic Fittings, and shall notify McWane as soon as possible if Sigma becomes aware of any purchases of non-McWane Domestic Fittings by any such customer.

F. 1561. Sigma understood that under the MDA, if a customer wanted to buy Domestic Fittings through Sigma, they could, but they would have to buy all their Domestic Fittings from Sigma and that if a customer purchased Domestic Fittings from Star,

Sigma could no longer sell them McWane's Domestic Fittings. F. 1562.

4. Specific intent

The next element of conspiracy to monopolize is "[s]pecific intent to monopolize the relevant market." *Fleer Corp. v. Topps Chewing Gum*, 658 F.2d 139, 153 (3d Cir. 1981) (citing *Times-Picayune Publ'g Co.*, 345 U.S. at 626) (other citations omitted). A "specific intent to monopolize" means an intent to exclude competition or control prices. *Stanislaus Food Products v. USS-POSCO Indus.*, 2011 U.S. Dist. LEXIS 72764, *34-35 (E.D. Cal. 2011) (citing *Carpet Seaming Tape Licensing Corp. v. Best Seam. Inc.*, 616 F.2d 1133, 1141-42 (9th Cir. 1980) (specific adverse impact on the market); *American Tobacco Co.*, 328 U.S. at 789 (object of a combination or conspiracy to monopolize is "to exclude actual and potential competitors")).

In this case, the object of the conspiracy was to exclude Star from the Domestic Fittings market. Although Sigma has been found not to be a potential competitor in the Domestic Fittings market (Section III.H.3. *supra*), for this cause of action, it is not necessary to determine that Sigma was a potential entrant into the Domestic Fittings market. As a distributor of McWane's Fittings, pursuant to the MDA, Sigma had a vertically oriented agreement with McWane. Traders oriented vertically to each other can be held in violation of Section 2 for conspiracy to monopolize. *Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369, 1377 (10th Cir. 1979) ("The fact that [the defendant's] coconspirators competed in markets different from [the defendant's] market does not preclude finding a conspiracy to monopolize [the defendant's] market.").

There is direct evidence of both McWane's and Sigma's specific intent to exclude Star from the Domestic Fittings market. With respect to McWane's specific intent to exclude Star, as previously found, McWane implemented the Full Support Program in order to impede Star's ability to sell to Distributors. Section III.G.4. *supra*. As discussed below, McWane incorporated the Full Support Program into the MDA. That is, through the MDA, McWane required Sigma to enforce McWane's

Full Support Program. *See* F. 1558-1562. From the documents regarding the negotiations between McWane and Sigma leading up to the MDA, it is clear that McWane intended for Sigma to work in concert with McWane to exclude Star from the Domestic Fittings market, as discussed below.

After Sigma rejected McWane's June 5, 2009 offer to supply Sigma with McWane Domestic Fittings at five percent off McWane's published prices, McWane officials continued to debate whether to supply Sigma with McWane's Domestic Fittings. One of the considerations listed in evaluating whether to enter into a master distribution agreement with Sigma was: "Would providing Sigma with access to Tyler/Union domestic [product] help us either better protect our brand/share against Star or promote more stable market prices." F. 1527. *See also* F. 1580 (Mr. Tatman's June 29, 2009, "brainstorming slide," posing that he did not think that Sigma would be "willing to generate little to no incremental margin $ just to help us block Star").

In a July 27, 2009 PowerPoint Presentation titled, "Sigma - Domestic Review Session," intended for spurring discussion within McWane, Mr. Tatman wrote that having Sigma sell McWane branded product should "reduce Star's ability to grow share." F. 1581. On August 20, 2009, McWane held an internal meeting among Mr. McCullough, Mr. Tatman, Mr. Jansen, and Mr. Walton to consider whether to supply Domestic Fittings to Sigma through a master distribution agreement. F. 1578. As recorded in the handwritten notes of Mr. Walton, Mr. McCullough made the following points at that meeting about selling Domestic Fittings to Sigma:

> LM [Leon McCullough (Executive Vice President)] want[s] to sell SIGMA to put pressure on Star. LM hopefully to drive Star out of business. Would rather have competition other than Star.
>
> LM thinks that we should sell SIGMA as an insurance policy and to continue to put pressure on Star. . . . LM approved Rick [Tatman]'s recommendation page of his PowerPoint presentation on selling SIGMA.

F. 1579.

These internal discussions among McWane executives are direct evidence of McWane's specific intent to enter into the MDA with Sigma with the aim of excluding Star from the Domestic Fittings market.

- Sigma also entered into the MDA with the specific intent to exclude Star. When Sigma was first assessing its options for offering Domestic Fittings, Mr. Pais wrote to a Sigma Board member as follows: "With our relationship with McWane, it is also fully conceivable to get part of our needs produced with SIGMA label, once we establish ourselves as the '2nd choice' for the [Buy American] segment, as they may privately prefer it to be just a 2-supplier market! Besides, this may marginalize Star." F. 1575. Mr. Pais also noted in a September 9, 2009 report to the Sigma Board, that Sigma's "strategy to team up with McWane" through the MDA was "likely to have the intended effect of marginalizing Star. . ." F. 1576. In addition, Mr. Pais stated in a September 22, 2009 dictated message: "[I]f we do our job right, it might isolate Star and make them suffer with their investment even more, because they may not be able to gain credibility." F. 1577.

In addition to the foregoing direct evidence, there is circumstantial evidence that McWane and Sigma had specific intent to monopolize the Domestic Fittings market by excluding Star. One court of appeals has stated, specific "intent may be inferred . . . from the proof of actual monopoly power." *Fleer Corp.*, 658 F.2d at 54 (citing *American Tobacco Co.*, 328 U.S. at 789). *See also In re Luria Brothers & Co.*, 1963 FTC LEXIS 97, *112 n.11 (Feb. 13, 1963) (stating that "[w]hile in Section 2 cases involving combinations or conspiracies to monopolize it is necessary to show intent, its proof merges into the proof of unlawful conspiracy. . . . 'Where a conspiracy is proved . . . from the evidence of the action taken in concert by the parties to it, it is all the more convincing proof of an intent to exercise the power of exclusion acquired through that conspiracy'" (quoting *American Tobacco Co.*, 328 U.S. at 809)). Similarly, the court in *Northeastern Tel. Co. v. AT&T*, 651 F.2d 76 (2d Cir. 1981) explained that because "it is frequently impossible for a plaintiff

to obtain direct evidence of the alleged conspirators' specific intent, . . . the finder of fact must be allowed to infer defendants' intent from their anticompetitive practices." *Id.* at 85.

As determined in Section III.G., McWane has monopoly power in the Domestic Fittings market and McWane's Full Support Program is exclusionary conduct. As discussed below, through the MDA, McWane and Sigma implemented McWane's Full Support Program and thus engaged in anticompetitive conduct from which specific intent may be inferred.

5. Overt acts in furtherance of the conspiracy

The final element of a conspiracy to monopolize claim is that the conspirators take overt acts in furtherance of their conspiracy. *Levine*, 72 F.3d at 1556. Transactions that take place pursuant to an exclusive dealing policy are sufficient to establish the overt act requirement of a conspiracy to monopolize. *Fraser*, 284 F.3d at 68; *see also United States v. Hickok*, 77 F.3d 992, 1005-06 (7th Cir. 1996) ("Under the general conspiracy statute, an overt act is defined as 'any act to effect the object of the conspiracy.'"). Here, McWane and Sigma worked in concert and took overt acts in furtherance of their agreement to control prices and exclude rivals, including Star.

McWane and Sigma worked in concert to control prices of Domestic Fittings. As summarized *supra* Section III.H.4.b., pursuant to the MDA, Sigma was required to resell McWane Domestic Fittings at a weighted average of no less than 98% of McWane's published prices. When McWane announced multiplier increases in Domestic Fittings effective January 22, 2010, Sigma enacted the same increases. F. 1557.

In addition, McWane and Sigma collaborated to make Distributors aware of the MDA and that Sigma would be enforcing McWane's Full Support Program. In the same September 22, 2009 letter through which McWane informed its customers of its Full Support Program, McWane also informed its Distributors that McWane had entered into an MDA with Sigma, whereby Sigma would sell McWane Domestic Fittings, and further informed Distributors that the Full Support Program applies to Domestic Fittings whether purchased through McWane

or Sigma. F. 1173. McWane also met with Distributors to inform them that Sigma would be enforcing McWane's Full Support Program. F. 1538; *see also* F. 1558. Mr. Tatman described Sigma's role in McWane's Full Support Program as follows:

> Access to McWane domestic product either through McWane or Sigma requires distributors to exclusively support McWane where products are available within normal lead times. Violation will result in: Loss of access [and] Loss of accrued rebates.

F. 1183.

Sigma implemented McWane's Full Support Program. In Sigma's September 22, 2009 announcement to its customers, Sigma informed its customers as follows:

> As per this MDA, we are now Master Distributors of [McWane] domestic Fittings. As such, we will follow [McWane's] distribution and pricing policies as they are announced from time to time.
>
> As mentioned in their own letter from [McWane] to their customers, which you too may have received, we wish to supply [McWane] domestic Fittings to any customers who elect to commit to <u>fully</u> support [McWane] branded Fittings for their requirements of domestic Fittings, purchased thru [McWane] or SIGMA. We appeal to you to accept this requirement of exclusive choice, as a fair and reasonable one, in light of the considerable investment by [McWane] to provide this range of domestic production, which is now being expanded to offer domestic Fittings up to 48".
>
> Please note that customers who elect not to fully support this program may forgo any unpaid volume incentive rebates applicable to only the domestic Fittings and delivery of domestic Fittings up to 12 weeks.

F. 1566 (emphasis in original).

On December 14, 2009, McWane informed Sigma that it was cutting off Hajoca pursuant to its Full Support Program and that Sigma must do the same. Mr. Tatman told Mr. Rona: "Per the terms of our MDA I need you to acknowledge that Sigma will also not supply any Hajoca branch with Domestic fittings or accessories until further notice." F. 1568; *see also* Section II.J.6. *supra* (McWane's enforcement of its Full Support Program against Hajoca). Mr. Rona forwarded the email to Sigma's CEO, who responded that Sigma had "no choice but to agree to abide by the rules of the MDA." F. 1569. As requested by McWane, on December 15, 2009, Mr. Rona confirmed to McWane that Sigma was "clear about Hajoca" and would not sell Domestic Fittings to any Hajoca branch. F. 1570.

The actions discussed above constitute overt acts in support of the conspiracy between McWane and Sigma to monopolize the Domestic Fittings market. *See Fraser*, 284 F.3d at 68; *Hickok*, 77 F.3d at 1005-06.

6. Conclusion

Having met its burden of proof on each of the elements, Complaint Counsel has proven Count Five, Conspiracy to Monopolize.

J. Remedy

1. Applicable legal standards

Pursuant to Section 5 of the FTC Act, upon determination that the challenged practice is an unfair method of competition, the Commission "shall issue . . . an order requiring such person . . . to cease and desist from using such method of competition or such act or practice." 15 U.S.C. § 45(b); *FTC v. National Lead Co.*, 352 U.S. 419, 428 (1957). Courts have long recognized that the Commission has considerable discretion in fashioning an appropriate remedial order, subject to the constraint that the order must bear a reasonable relationship to the unlawful acts or practices. *See, e.g.*, *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965); *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1946).

Respondent objects to the entry of any remedial order in this case on the ground that "the conduct at issue all ended years ago." RB at 109. Respondent asserts that it changed its "rebate letter" long ago and the MDA with Sigma was terminated in 2010. RB at 109. Respondent further asserts that because courts cannot grant injunctions unless a plaintiff shows ongoing or imminent harm, Complaint Counsel is not entitled to its proposed remedy. RB at 109.

On January 22, 2010, the FTC informed McWane that it was conducting an investigation to determine whether McWane had engaged in unfair methods of competition and sought relevant materials relating to the Full Support Program and the MDA. *See* F. 1220. Less than one month after learning of the Commission's investigation, and only six months into its initial one year term, McWane gave Sigma notice of termination of the MDA. F. 1595. In addition, subsequent to learning of the Commission's investigation, McWane negotiated with Hajoca regarding McWane's Full Support Program and came to an agreement in April 2010 whereby McWane agreed to allow Hajoca's Lansdale branch to resume purchasing Domestic Fittings from McWane. F. 1221; *see also* F. 1220 (internal McWane email from Mr. McCullough asking "[h]ow our potential FTC action might [a]ffect how we do business with [Hajoca]").

Evidence that "is subject to manipulation by the party seeking to use it is entitled to little or no weight" in an antitrust case. *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1384 (7th Cir. 1986). In particular, the probative value of a defendant's evidence is "extremely limited" when the defendant itself can control events; otherwise, violators could "stave off" the government's enforcement efforts "merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending." *General Dynamics*, 415 U.S. at 504-05.

Furthermore, Section 5(b) of the FTC Act expressly authorizes the Commission to issue an administrative complaint whenever it has reason to believe that a person "has been or is using any unfair method of competition . . ." 15 U.S.C. § 45(b). "Voluntary cessation of unlawful activity is not a basis for halting a law enforcement action." *In re The Coca-Cola Company*, 117 F.T.C.

795, 1994 FTC LEXIS 327, at *199 (1994). "To hold otherwise would mean that a Commission law enforcement action could be brought to a halt at any time . . . by an abandonment, even a temporary one, of the challenged conduct." *Id.*

In addition, issuance of a remedy is appropriate even where a respondent no longer engages in the illegal conduct. In *W.M.R. Watch Case Corp. v. FTC*, 343 F.2d 302 (D.C. Cir. 1965), where the respondent voluntarily abandoned the challenged conduct well before the filing of the Commission's complaint, the court rejected the respondent's argument that the matter was moot. The court held that if the danger of recurrence is sufficient, "there is no bar to enforcement merely because the conduct has ceased at least temporarily under the weight of the Commission's hand." *Id.* at 304. *See also Rubbermaid, Inc. v. FTC*, 575 F.2d 1169, 1175 (6th Cir. 1978) (holding that where respondent abandoned the challenged practices and did not intend to resume them, it was, nevertheless, "reasonable to conclude that the effects of [respondent's] illegal agreements with wholesalers may tend to be perpetuated in practice unless affirmative measures are taken to eradicate them"). "A company bears a heavy burden in showing that past conduct will not be repeated." *Id.* at 1173 (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953); *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)). Respondent has not met that burden here. Accordingly, to the extent Respondent did "voluntarily" cease its illegal conduct, such cessation is not a basis for not issuing a cease and desist order.

2. Specific provisions

Complaint Counsel submitted a proposed order along with its Post Trial Brief containing those provisions it believes are necessary and appropriate to remedy the violations alleged in this case. The provisions of the attached order (hereafter, "Order") are substantially the same as Complaint Counsel's proposed order (hereafter, "proposed order"), except that, because the evidence failed to establish the violations alleged in Counts One, Two, and Three, the Order does not include provisions or definitions pertaining to those Counts. Counts One, Two, and Three – that Respondent conspired with Sigma and Star to raise and stabilize Fittings prices, conspired through DIFRA to exchange

competitively sensitive sales information, and invited Sigma and Star to collude – are dismissed.

Counts Four, Five, Six, and Seven – that Respondent engaged in monopolistic practices, attempted to monopolize, engaged in a conspiracy to monopolize, and engaged in an unreasonable restraint of trade with Sigma in the Domestic Fittings market – have been proven by a preponderance of the evidence. The appropriate remedy is to bring an end to this conduct, rectify past violations, and prevent reoccurrence. In this regard, the Order entered herewith, more fully discussed below, adopts the provisions of Complaint Counsel's proposed order relating to Counts Four through Seven. The Order accomplishes the remedial objectives of the FTC Act and is reasonably related to the proven violations. Thus, the Order also is necessary and appropriate to remedy the violations of law found to exist.

The Order entered herewith imposes pragmatic, effective restrictions on Respondent that are necessitated by its illegal conduct. First, to address the violations arising in connection with Respondent's MDA with Sigma, Section II of the Order requires Respondent to cease and desist from:

A. Entering into, adhering to, Participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any Competitors to allocate or divide markets, Customers, contracts, transactions, business opportunities, lines of commerce, or territories.

B. Communicating to any Person who is not an Insider, that Respondent is ready or willing to forbear from competing for any Customer, contract, transaction, or business opportunity conditional upon any other Competitor also forbearing from competing for any Customer, contract, transaction, or business opportunity.

C. Attempting to engage in any of the activities prohibited by Paragraphs II.A or II.B

Order, Paragraphs II. A.-C.

Further, to address the violations arising in connection with Respondent's exclusionary conduct with respect to Star, Section III of the Order precludes Respondent from directly or indirectly monopolizing, or attempting or conspiring to monopolize the market for Domestic Fittings. The Order also prohibits Respondent from financially inducing its customers to deal exclusively with McWane.

In summary, together with the standard provisions of a Commission order, the Order prohibits McWane from engaging in, or attempting thereto, the following conduct:

A. Inviting, entering into, adhering to, maintaining, implementing, enforcing, or attempting thereto any condition, policy, practice, agreement, contract, or understanding that requires Exclusivity with a Customer including as a condition of McWane's sale of any product, including Domestic Fittings, or conditioning the price it charges or the services it offers based on the customer's purchase or sale of Domestic Fittings from McWane.

B. Instituting, for a period of 10 years, a rebate program in which the rebate a customer receives for a Domestic Fitting in a completed sale is increased retroactively if the customer's total purchases in a designated period meet a specified threshold, except under certain conditions outlined in the Order.

C. Discriminating or retaliating against a customer that purchases or sells a competitor's Domestic Fittings, except under certain conditions outlined in the Order. Prohibited types of retaliation include (i) terminating or threatening to terminate the sale to a customer of any product marketed by McWane; (ii) auditing the customer's Domestic Fittings to determine its purchase of competing Domestic Fittings; (iii) changing the price or services McWane furnishes to the customer; or (iv) refusing to deal with the customer on terms generally available to other customers.

D. Enforcing any condition, requirement, policy, agreement, contract or understanding that is inconsistent with the terms of the Order.

Order, Paragraphs III A.-D.

3. Duration

Complaint Counsel has requested that the order issued in this case remain in effect for a period of twenty years. Pursuant to the Policy Statement Regarding Duration of Competition and Consumer Protection Orders, 60 Fed. Reg. 42,569 (August 16, 1995), the Commission's stated policy is for administrative cease and desist orders to terminate after twenty years. The Order entered in this case shall remain in effect for a period of twenty years.

IV. SUMMARY OF CONCLUSIONS OF LAW

1. Complaint Counsel bears the burden of proving jurisdiction and liability by a preponderance of evidence.

2. The Commission has jurisdiction over Respondent McWane, Inc. ("Respondent" or "McWane") and the subject matter of this proceeding, pursuant to Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45.

3. Respondent is a corporation whose business is in or affects commerce in the United States, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

4. Unfair methods of competition under Section 5 of the FTC Act include any conduct that would violate Sections 1 or 2 of the Sherman Act.

5. Section 1 of the Sherman Act prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States. 15 U.S.C. § 1.

6. Section 2 of the Sherman Act prohibits monopolization, attempted monopolization, and combination or conspiracy to monopolize. 15 U.S.C. § 2.

7. Because none of the claims in this case is brought under the Commission's "unfair acts or practices" authority, Section 5(n) of the FTC Act, requiring proof of substantial consumer injury does not apply.

8. In a Section 1 case, the first step in determining if a respondent unreasonably restrained trade in the relevant market "is determining the relevant market." In a Section 2 case, as well, the first step in assessing whether a respondent possesses monopoly power is establishing the relevant market.

9. A relevant product market consists of products that have reasonable interchangeability for the purposes for which they are produced - - price, use and qualities considered.

10. The relevant product market is ductile (easily molded) iron pipe fittings that are 24" and smaller in diameter (the "Fittings market").

11. There is also a relevant product market, a submarket of the Fittings market, consisting of ductile iron pipe fittings of 24" and smaller in diameter that are made in the United States, for use in waterworks projects with domestic-only specifications (the "Domestic Fittings" market).

12. A relevant geographic market is defined as the area of effective competition in which the seller operates, and to which the purchaser can practicably turn for supplies.

13. The relevant geographic market for both the Fittings market and the Domestic Fittings market is the United States.

14. To establish a violation of Section 1 of the Sherman Act, the evidence must show: (1) the existence of an agreement, combination, or conspiracy, (2) that unreasonably restrains competition.

15. A restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held to be *per se* unreasonable, or because it violates what has come to be known as the rule of reason.

16. When restraints are not *per se* unlawful, and their net impact on competition is not obvious, the conventional rule-of-reason approach requires courts to engage in a thorough analysis of the relevant market and the effects of the restraint in that market.

17. A full rule-of-reason inquiry may extend to a plenary market examination, which may include the analysis of the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed as well as the availability of reasonable, less restrictive alternatives.

18. A conspiracy to raise and stabilize prices is illegal *per se* under Section 1.

19. The crucial question in determining conspiracy is whether the challenged anticompetitive conduct stems from an independent decision or from an agreement.

20. An "agreement" is a conscious commitment to a common scheme designed to achieve an unlawful objective.

21. A conspiracy may be demonstrated by direct or circumstantial evidence.

22. Circumstantial evidence to prove a conspiracy to restrain trade will usually be of two types -- economic evidence suggesting that the alleged co-conspirators were not in fact competing, and noneconomic evidence suggesting that they were not competing because they had agreed not to compete.

23. Circumstantial evidence alone cannot support a finding of conspiracy when the evidence is equally consistent with independent conduct. An inference of a conspiracy must

be more probable than the inference of independent action in order for the inference of conspiracy to be drawn.

24. Mistaken inferences that arise from circumstantial evidence are costly, because they chill competitive conduct – the very conduct the antitrust laws are designed to protect.

25. Although the language of Section 1 is broad enough to encompass a "tacit agreement," *i.e.*, an agreement that is reached through conduct rather than express words, it is well established that the Sherman Act does not prohibit mere "conscious parallelism," "tacit collusion," or "oligopolistic price coordination." The evidence must prove an actual, manifest agreement.

26. An unlawful agreement will not be presumed.

27. A plaintiff cannot make its case just by asking the fact finder to disbelieve the defendant's witnesses. Mere disbelief does not rise to the level of positive proof of an agreement.

28. An agreement for purposes of Section 1, and particularly in the context of an oligopoly market, is revealed by evidence of a prior understanding or commitment, or the sort of restricted freedom of action and sense of obligation that one generally associates with agreement. Tacit coordination in an oligopoly market need not imply even a weak commitment or prior understanding among the oligopolists.

29. Proof of parallel conduct, including conscious parallel conduct, can constitute circumstantial evidence from which an agreement, tacit or express, can be inferred but such evidence, without more, is insufficient.

30. "Plus" factors are designed to serve as proxies for direct evidence of an agreement in a circumstantial case based upon parallel pricing conduct and, therefore, to constitute a "plus" factor, the evidence must be probative of an agreement.

31. "Plausibility" is not the standard of proof for purposes of prevailing on the merits. Rather, Complaint Counsel's burden is to prove that the asserted "plus" factor evidence tends to make the inference of an agreement more likely than not.

32. There is no exhaustive list of "plus" factors. Such evidence is generally grouped into the following three categories: (1) evidence that the alleged conspirator had a motive to enter into a price fixing conspiracy; (2) evidence that the alleged conspirator acted contrary to its interests; and (3) evidence implying a traditional conspiracy.

33. In the context of parallel pricing behavior in an oligopoly, evidence of motive and actions against interest typically only demonstrate interdependence among the oligopolists. Mere interdependence among oligopolists, unaided by an advance agreement among them, does not suggest an unlawful agreement.

34. Because the "plus" factors of motive and actions contrary to interest may only restate the theory of interdependence among oligopolists, evidence indicating an actual, manifest agreement is the key to a proper determination in a conspiracy case.

35. Proof of actions contrary to interest, for "plus" factor purposes, means showing that the alleged co-conspirators' behavior would not be reasonable or explicable (*i.e.*, not in their legitimate economic self-interest) if they were not conspiring to fix prices or otherwise restrain trade - that is, that the alleged co-conspirators would not have acted as they did had they not been conspiring in restraint of trade.

36. Communications between competitors do not permit an inference of an agreement unless those communications rise to the level of an agreement, tacit or otherwise. It remains the plaintiff's burden to prove that the defendant succumbed to temptation and conspired. It is not enough to point out the temptation and ask that the defendants

bear the onerous, if not impossible, burden of proving the negative – that no conspiracy occurred.

37. Even where there is proof of parallel conduct and one or more "plus" factors, this does not mandate a finding of an unlawful agreement. The court may still conclude, based upon the evidence, that the alleged co-conspirators acted independently of one another, and not in violation of antitrust laws.

38. An agreement to adhere to published prices is unlawful under Section 1 of the Sherman Act.

39. In evaluating the totality of the evidence of conspiracy, it is not the quantity of the evidence that is important, but its qualitative value in demonstrating that the parties actually entered into a conspiracy.

40. The line between lawful interdependent behavior and unlawful commitment is not sharp. Although the line between coordination through recognized interdependence and some commitment is shadowy, the distinction is important so long as antitrust law allows the former but condemns the latter.

41. Where evidence, taken as a whole, points with at least as much force toward unilateral actions as toward conspiracy, the inference of conspiracy cannot be drawn

42. Viewed as whole, the preponderance of the evidence fails to prove the alleged conspiracy among McWane, Sigma, and Star, to raise and stabilize prices in the Fittings market and, therefore, Complaint Counsel has not met its burden of proof on Count One of the Complaint.

43. Whether an alleged "information exchange" unreasonably restrains trade is assessed under the rule of reason.

44. 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.

45. A facilitating practice cannot be found unreasonable without considering the offsetting economic or social benefits of the practice. Thus, the label "facilitating practice" is only an invitation to further analysis, not a license for automatic condemnation.

46. The proper approach to analyzing whether an alleged information exchange among competitors is anticompetitive is first to determine whether the structure of the industry is such that it is susceptible to the exercise of market power through tacit coordination, and second, to evaluate the nature of the information exchanged.

47. There are certain well-established criteria used to help ascertain the anticompetitive potential of information exchanges, including the time frame of the data; the specificity of the data; whether the data is made publicly available; and whether the data is discussed in meetings among the participants.

48. The preponderance of the evidence fails to show that the DIFRA tons-shipped data reporting system has the nature and tendency to facilitate price coordination and, therefore, Complaint Counsel failed to prove likely anticompetitive effects resulting from an information exchange by competitors. Accordingly, Complaint Counsel has failed to meet its burden of proving that the DIFRA tons-shipped data reporting system is an agreement in restraint of trade, as alleged in Count Two of the Complaint.

49. A solicitation to enter into an anticompetitive agreement (*i.e.,* an "invitation to collude") can justify a remedy under Section 5 of the FTC Act, even if the solicitation does not result in an unlawful agreement under Section 1 of the Sherman Act.

50. The preponderance of the evidence fails to show that Respondent invited its competitors to collude and,

therefore, Complaint Counsel has failed to meet its burden of proof on Count Three of the Complaint.

51. Monopolization requires proof of: (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 a superior product, business acumen, or historic accident.

52. Attempted monopolization 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 [or obtaining] monopoly power.

53. Monopoly power is defined as the power to control prices or exclude competition.

54. Monopoly power may be inferred or proven indirectly through proof of high market shares in a market protected by barriers to entry.

55. Complaint Counsel has proven that Respondent has a high market share in a market protected by barriers to entry, and thus has demonstrated that Respondent has monopoly power in the Domestic Fittings market.

56. Monopoly power may also be proven by direct evidence of a firm's ability to control prices or exclude competitors.

57. Complaint Counsel has proven that Respondent has the ability to control prices and exclude competitors, and thus has demonstrated that Respondent has monopoly power in the Domestic Fittings market.

58. A firm violates Section 2 when it maintains or attempts to maintain a monopoly by engaging in exclusionary conduct.

59. Exclusionary conduct is behavior that not only tends to impair the opportunities of rivals, but also either does not further competition on the merits or does so in an

unnecessarily restrictive way. An exclusive dealing arrangement is unlawful only if the probable effect of the arrangement is to substantially lessen competition, rather than merely disadvantage rivals.

60. Exclusive dealing arrangements are of special concern when imposed by a monopolist.

61. An exclusive dealing arrangement is not unlawful unless it is likely to foreclose competition in a substantial share of the line of commerce affected. The test is not total foreclosure, but whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit.

62. The preponderance of the evidence shows that Complaint Counsel has met its burden of proving that McWane's Full Support Program foreclosed Star from a substantial share of the Domestic Fittings market.

63. The likely or actual anticompetitive effects of exclusionary conduct must be considered in light of any procompetitive effects. Once the government demonstrates harm to competition, the burden shifts to Respondent to show that the challenged conduct promotes a sufficiently procompetitive objective.

64. A respondent's assertion that it acted in furtherance of its economic interests does not constitute the type of business justification that is an acceptable defense to Section 2 monopolization.

65. Because the evidence fails to show any procompetitive justification that outweighs the harm to competition, Complaint Counsel has met its burden of proving that Respondent's Full Support Program constitutes unlawful exclusionary conduct and willful maintenance of Respondent's monopoly power.

66. Intent is relevant to proving monopolization.

67. Specific intent is required for proving attempted monopolization.

68. The preponderance of the evidence demonstrates that Respondent intended to substantially foreclose Star from the Domestic Fittings market.

69. Dangerous probability of achieving monopoly power can be inferred from evidence indicating the existence of anticompetitive conduct and specific intent.

70. The preponderance of the evidence shows that Respondent had a dangerous probability of achieving monopoly power.

71. Having met its burden of proof on each of the elements, Complaint Counsel has proven Count Six, Monopolization and Count Seven, Attempted Monopolization.

72. Under Section 1 of the Sherman Act, agreements among actual or potential competitors at the same level of the market structure (*i.e.*, horizontal competitors) to allocate markets are *per se* unlawful.

73. In evaluating an agreement among competitors, the preliminary inquiry is whether or not each firm alleged to have been a party to the agreement was an actual or potential competitor in that market.

74. To be a potential competitor, one must have the necessary desire, intent, and capability to enter the market.

75. Elements for evaluating capability to enter the market are 1) the background and experience of in the prospective business; 2) affirmative acts with the object of entering the proposed business; 3) the ability to finance operation of the business and the purchase of necessary equipment and facilities; and 4) the formation of contracts.

76. The evidence fails to show that Sigma had the necessary capability to enter the Domestic Fittings market in a timely manner and, thus, the evidence fails to show that Sigma

was a potential competitor in the Domestic Fittings market.

77. Because the evidence fails to show that Sigma was a potential competitor in the Domestic Fittings market, the Master Distribution Agreement ("MDA") is evaluated under a rule of reason analysis.

78. Under a rule of reason analysis, including the evaluation of the market power of Respondent, the nature of the restraint, the history of the restraint and the reasons why it was imposed, and the availability of reasonable, less restrictive alternatives, Complaint Counsel has demonstrated the potential for anticompetitive effects of the MDA.

79. Respondent's concerted action with Sigma through the MDA cannot be sustained under the rule of reason analysis unless Respondent meets its burden of establishing some countervailing procompetitive virtue.

80. A desire to increase one's own sales is not a valid procompetitive justification.

81. Respondent has failed to prove any valid procompetitive justification for the MDA.

82. Under a rule of reason analysis, the MDA was an unreasonable restraint of trade in the Domestic Fittings market. Therefore, Complaint Counsel has proven Count Four, Unreasonable Restraint of Trade.

83. A conspiracy to monopolize means a conspiracy to acquire or maintain the power to exclude competitors from some portion of commerce.

84. Three elements of a claim for conspiracy to monopolize are: (1) concerted action, with (2) the specific intent to monopolize, and (3) an overt act in furtherance of the conspiracy. In addition to these elements, some courts

require an effect upon an appreciable amount of interstate commerce.

85. The MDA is a written agreement that satisfies the concerted action element of a conspiracy to monopolize claim.

86. Specific intent to monopolize means an intent to exclude competition or control prices. Specific intent may be inferred from the proof of actual monopoly power and anticompetitive practices.

87. The evidence demonstrates that McWane and Sigma entered into the MDA with an intent to exclude Star from the Domestic Fittings market, McWane had monopoly power, and the Full Support Program was anticompetitive.

88. Transactions that take place pursuant to an exclusive dealing policy are sufficient to establish the overt act requirement of a conspiracy to monopolize.

89. The MDA had an effect on an appreciable amount of interstate commerce

90. The preponderance of the evidence shows that McWane and Sigma worked in concert and took overt acts in furtherance of their agreement to control prices and exclude rivals, including Star.

91. Having met its burden of proving concerted action, specific intent to monopolize, and an overt act in furtherance of the conspiracy, and having shown an effect upon an appreciable amount of interstate commerce, Complaint Counsel has proven Count Five, Conspiracy to Monopolize.

92. Pursuant to Section 5 of the FTC Act, upon determination that a challenged practice is an unfair method of competition, the Commission "shall issue . . . an order requiring such person . . . to cease and desist from using such method of competition or such act or practice." 15 U.S.C. § 45(b).

93. The appropriate remedy is to bring an end to the unlawful conduct found to exist, rectify past violations, and prevent reoccurrence.

94. Issuance of a remedy is appropriate, upon determination that a challenged practice is an unfair method of competition, even where a respondent no longer engages in the illegal conduct. If the danger of recurrence is sufficient, there is no bar to enforcement merely because the conduct has ceased at least temporarily.

95. The attached Order accomplishes the remedial objectives of the FTC Act and is reasonably related to the proven violations. The Order also is necessary and appropriate to remedy the violations of law found to exist.

ORDER

I.

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

A. "Commission" means the Federal Trade Commission.

B. "Respondent" means McWane, Inc., its officers, directors, employees, agents, representatives, successors, and assigns; and the United States based subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, representatives, successors, and assigns of each.

C. "Communicate" means to transfer or disseminate any information, regardless of the means by which it is accomplished, including without limitation orally, by letter, email, notice, or memorandum. This definition applies to all tenses and forms of the word "communicate," including, but not limited to,

"communicating," "communicated" and "communication."

D. "Competitor" means Respondent and any Person that, for the purpose of sale or resale within the United States: (1) manufactures DIPF or Domestic DIPF; (2) causes DIPF or Domestic DIPF to be manufactured; or (3) imports DIPF.

E. "Customer" means any Person that purchases any DIPF from Respondent

F. "Designated Manager" means the Executive Vice President, General Manager, National Sales Manager, Pricing Coordinator, Regional Manager, or the OEM Manager for sales of DIPF in and into the United States, and any employee performing any job function relating to the setting of Prices (including offering any discounts) for DIPF sold in or into the United States.

G. "Domestic DIPF" means DIPF that is manufactured in the United States of America.

H. "Ductile Iron Pipe Fittings" or "DIPF" means any iron casting produced in conformity with the C153/A21 or C110/A21 standards promulgated by the American Water Works Association, including all revisions and amendments to those standards and any successor standards incorporating the C153/A21 or C110/A21 standards by reference.

I. "Exclusivity" or "Exclusive" means any requirement, whether formal or informal, or direct or indirect, by the Respondent that a Customer purchase all of their Domestic DIPF from Respondent, or any other requirement that a Customer restrain, refrain from, or limit its future purchases of Domestic DIPF from any Competitor.

Provided, however, that the terms "Exclusivity" or "Exclusive" do not:

1. apply to Respondent's sales of non-Domestic DIPF or any product other than Domestic DIPF; and

2. apply to individual bids of Domestic DIPF for specific jobs or refer to the sale by Respondent to a Customer of any specified number of units during any term, without more. For the avoidance of doubt, the fact that a Customer purchases its full requirements of Domestic DIPF from Respondent does not establish that Respondent has engaged in Exclusivity and is not prohibited by this Order unless the Customer does so because Respondent imposes a requirement of Exclusivity.

J. "Federal Securities Laws" means the securities laws as that term is defined in § 3(a)(47) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(47), and any regulation or order of the Securities and Exchange Commission issued under such laws.

K. "Insider" means a consultant, officer, director, employee, agent, or attorney of Respondent. *Provided, however*, that no other Competitor shall be considered to be an "Insider."

L. "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," and "participation."

M. "Person" means any natural person or artificial person, including, but not limited to, any corporation, unincorporated entity, or government. For the purpose of this Order, any corporation includes the subsidiaries, divisions, groups, and affiliates controlled by it.

N. "Price" means the retail or wholesale price, resale price, purchase price, list price, multiplier price, job price, credit term, freight term, delivery term, service term, or any other monetary term defining, setting forth, or relating to the money, compensation, or service paid by a Customer to Respondent, or received by a Customer in connection with the purchase or sale of DIPF or Domestic DIPF.

O. "Retroactive Incentive" means any flat or lump-sum payment of monies or any other item(s) of pecuniary value based upon a Customer's sales or purchases of Respondent's Domestic DIPF reaching a specified threshold (in units, revenues, or any other measure), or otherwise reducing the Price of one unit of Respondent's Domestic DIPF because of the purchase or sale of an additional unit of that product; provided, however, that Respondent may offer a discount or other item of pecuniary value based upon sales or purchases of Domestic DIPF beyond a specified threshold.

By way of example, Respondent may offer or provide a discount of X% on all purchases of Domestic DIPF in excess of Y units, but it may not offer or provide a discount of X% on all units of Domestic DIPF, including those below Y units, if sales exceed Y units.

P. "Service" means any service, assistance or other support provided by Respondent to a Customer, including without limitation, responsiveness to requests for bids, responsiveness in filling purchase orders, product availability, handling of warranty claims, and handling of returns.

II.

IT IS FURTHER ORDERED that in connection with the business of manufacturing, marketing or selling Domestic DIPF in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, Respondent

shall cease and desist from, either directly or indirectly, or through any corporate or other device:

A. Entering into, adhering to, Participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any Competitors to allocate or divide markets, Customers, contracts, transactions, business opportunities, lines of commerce, or territories.

Provided, however, that nothing in Paragraph II.A of this Order prohibits Respondent from entering into an agreement with another Competitor regarding the Price of DIPF if, and only if, that agreement relates exclusively to the terms under which Respondent will buy DIPF from, or sell DIPF to, that other Competitor.

B. Communicating to any Person who is not an Insider, that Respondent is ready or willing to forbear from competing for any Customer, contract, transaction, or business opportunity conditional upon any other Competitor also forbearing from competing for any Customer, contract, transaction, or business opportunity.

Provided, however, that it shall not of itself constitute a violation of Paragraph II.B of this Order for Respondent to Communicate:

1. To any Person reasonably believed to be an actual or prospective purchaser of DIPF, the Price and terms of a sale of DIPF; or

2. To any Person reasonably believed to be an actual or prospective purchaser of DIPF that Respondent is ready and willing to adjust the terms of a sale of DIPF in response to a Competitor's offer.

C. Attempting to engage in any of the activities prohibited by Paragraphs II.A or II.B.

III.

IT IS FURTHER ORDERED that in connection with the business of manufacturing, marketing or selling Domestic DIPF in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, Respondent shall cease and desist from, either directly or indirectly, or through any corporate or other device:

A. Inviting, entering into, adhering to, maintaining, implementing, enforcing, or attempting thereto any condition, policy, practice, agreement, contract, or understanding that requires Exclusivity with a Customer, including but not limited to:

1. Conditioning the sale or purchase of any product, including Respondent's Domestic DIPF, on a Customer's Exclusivity;

2. Conditioning any term of Price or Service offered or provided by Respondent to a Customer relating to any product, including Respondent's Domestic DIPF, on a Customer's Exclusivity;

3. Conditioning any term of Price or Service offered or provided to a Customer based upon a requirement that the Customer purchase 50% or more of its purchases (in units, revenues, or any other measure) of Domestic DIPF from Respondent over any period of time; and

4. Conditioning any term of Price or Service offered or provided to a Customer relating to any product marketed by Respondent upon that Customer's purchases or sales of Respondent's Domestic DIPF.

B. For ten (10) years from the date this Order becomes final, inviting, entering into, adhering to, maintaining, implementing, enforcing, or attempting thereto any condition, policy, practice, agreement, contract, or

understanding that offers or provides any Retroactive Incentive.

C. Discriminating against, penalizing, or otherwise retaliating against any Customer, for the reason, in whole or in part, that the Customer engages in, or intends to engage in, the distribution, purchase or sale of a Competitor's Domestic DIPF, or otherwise refuses to enter into or continue any condition, agreement, contract, or understanding that requires Exclusivity. Examples of prohibited discrimination or retaliation against a Customer shall include, but not be limited to:

1. Terminating, suspending, or threatening or proposing thereto, sales of any product marketed by the Respondent to the Customer;

2. Auditing the Customer's purchases or sales of Domestic DIPF to determine the extent of purchases or sales of competing Domestic DIPF;

3. Withdrawing or modifying, or threatening or proposing thereto, any terms of Price or Service offered or provided by Respondent to a Customer relating to any product marketed by Respondent; and

4. Refusing to deal with the Customer on terms and conditions generally available to other Customers.

D. After ninety (90) days from the date this Order becomes final, from enforcing any condition, requirement, policy, agreement, contract or understanding that is inconsistent with the terms of the Order.

Provided, however, that nothing in paragraphs III A-D of this Order prohibits Respondent from providing discounts, rebates, or other Price or non-Price incentives to purchase Domestic DIPF that are (i) volume-based, above average variable cost, and not Retroactive Incentives as defined herein; or (ii) designed to meet

competition, if Respondent determines in good faith that one or more Competitors are offering terms of sale for their Domestic DIPF for which Respondent needs to match in order to win contested business.

Provided, further, that nothing in Paragraph III.D of this Order prohibits Respondent from honoring or providing discounts, rebates, or other Price or non-Price incentives to purchase its Domestic DIPF that a Customer contracted for prior to the date this Order becomes final even if paid or provided by Respondent subsequent to that date.

IV.

IT IS FURTHER ORDERED that Respondent shall:

A. Within sixty (60) days from the date this Order becomes final distribute by first-class mail, return receipt requested, or by electronic mail with return confirmation, a copy of this Order with the Complaint, to each of its officers, directors, and Designated Managers;

B. Within sixty (60) days from the date this Order becomes final, distribute by first-class mail, return receipt requested, or by electronic mail with return confirmation, a copy of this Order with the Complaint, to each Customer of Respondent that has purchased DIPF or Domestic DIPF at any time since September 1, 2012;

C. For ten (10 years) from the date this Order becomes final distribute by first-class mail, return receipt requested, or by electronic mail with return confirmation, a copy of this Order with the Complaint, within sixty (60) days, to each Person who becomes its officer, director, or Designated Manager and who did not previously receive a copy of this Order and Complaint; and

D. Require each Person to whom a copy of this Order is furnished pursuant to Paragraphs IV.A and IV.C of

this Order to sign and submit to Respondent within sixty (60) days of the receipt thereof a statement that: (1) represents that the undersigned has read and understands the Order; and (2) acknowledges that the undersigned has been advised and understands that non-compliance with the Order may subject Respondent to penalties for violation of the Order.

V.

IT IS FURTHER ORDERED that Respondent shall file verified written reports within ninety (90) days from the date this Order becomes final, annually thereafter for ten (10) 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, among other information that may be necessary:

A. Copies of the signed return receipts or electronic mail with return confirmations required by Paragraphs IV.A-D of this Order;

B. A detailed description of the manner and form in which Respondent has complied and is complying with this Order.

VI.

IT IS FURTHER ORDERED that Respondent shall notify the Commission:

A. Of any change in its principal address within twenty (20) days of such change in address; and

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

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, Respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours of Respondent, and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession, or under the control, of Respondent relating to compliance with this Order, which copying services shall be provided by Respondent at its expense; and

B. Upon fifteen (15) days' notice, and in the presence of counsel, and without restraint or interference from it, to interview officers, directors, or employees of Respondent.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate twenty (20) years from the date it becomes final.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that Respondents McWane, Inc. ("McWane") and Star Pipe Products, Ltd. ("Star) have violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in

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

NATURE OF THE CASE

1. This action concerns the collusive conduct of Respondents, and the exclusionary conduct of McWane, relating to the marketing and sale of ductile iron pipe fittings ("DIPF").

2. Beginning in January 2008, McWane and Star, along with their competitor Sigma Corporation ("Sigma"), conspired to raise and stabilize the prices at which DIPF are sold in the United States. McWane, Sigma and Star (collectively, the "Sellers") exchanged sales data in order to facilitate this price coordination.

3. The passage of the American Recovery and Reinvestment Act of 2009 ("ARRA") in February 2009 significantly altered the competitive dynamics of the DIPF industry, and upset the terms of coordination among the Sellers. In the ARRA, the United States Congress allocated more than 6 billion dollars to water infrastructure projects, conditioned on the use of domestically produced materials, including DIPF, in those projects (the "Buy American" requirement).

4. At the time the ARRA was passed, McWane was the sole supplier of a full line of domestically produced DIPF in the most commonly used size ranges. Federal stimulus of the domestic DIPF market potentially left McWane in a position to reap a monopoly profit.

5. In response to the passage of the ARRA and its Buy American provision, Sigma, Star and others attempted to enter the domestic DIPF market in competition with McWane.

6. McWane maintained its monopoly in the domestic DIPF market through exclusionary conduct, including (i) entering into a distribution agreement with Sigma that eliminated Sigma as an actual potential entrant into the domestic DIPF market, and (ii) excluding actual and potential competitors, including Star, through the adoption and enforcement of exclusive dealing policies.

7. Respondents' conduct has restrained competition and led to higher prices for both imported and domestically produced DIPF.

THE RESPONDENTS

8. Respondent McWane is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 2900 Highway 280, Suite 300, Birmingham, Alabama 35223. McWane manufactures, imports, markets and sells products for the waterworks industry, including DIPF.

9. At all times relevant herein, McWane has been, and is now, a corporation as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

10. McWane's acts and practices, including the acts and practices alleged herein, are in or affect commerce in the United States, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

11. Respondent Star is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal place of business located at 4018 Westhollow Parkway, Houston, Texas 77082. Star imports, markets and sells products for the waterworks industry, including DIPF.

12. At all times relevant herein, Star has been, and is now, a corporation as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

13. Star's acts and practices, including the acts and practices alleged herein, are in or affect commerce in the United States, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

THE DIPF INDUSTRY

14. DIPF are a component of pipeline systems transporting drinking and waste water under pressurized conditions in municipal distribution systems and treatment plants. DIPF are used to join pipes, valves and hydrants in straight lines, and to change, divide or direct the flow of water. The end users of DIPF are typically municipal and regional water authorities.

15. DIPF are produced in a broad product line of more than 2000 unique configurations of size, shape and coating. The industry differentiates between "A Items," or commonly used fittings used routinely and on almost every job, and "oddball" fittings that are either of unusual configuration or size, or both. Although approximately 80 percent of market demand may be serviced with a product line of 100 fittings, DIPF suppliers must be able to supply more than 1900 additional fittings to serve the remaining 20 percent of demand.

16. Independent wholesale distributors, known as "waterworks distributors," are the primary channel of distribution of DIPF to end users. Waterworks distributors specialize in distributing products for water infrastructure projects, and generally handle the full spectrum of waterworks products, including pipes, DIPF, valves and hydrants. Waterworks distributors employ sales personnel dedicated to servicing the needs of end users, and are generally able to satisfy the needs of end users for rapid service by stocking inventory in relatively close proximity to project sites.

17. Direct sales of DIPF to end users, or to the utility contractors that often serve as the agent of the end user in purchasing and installing DIPF, are uncommon. End users and DIPF suppliers alike prefer to work through waterworks distributors with locations near project sites. As a result, DIPF suppliers need to distribute DIPF through local waterworks distributors in each region of the country in order to compete effectively in that region.

18. Both imported and domestically produced DIPF are commercially available. All of the Sellers sell imported DIPF. Before Star's entry into domestic production in 2009, McWane

was the sole domestic producer of a full line of small and medium-sized DIPF.

19. The end user of DIPF specifies whether, on a particular project, it will accept both imported and domestically produced DIPF, or only domestically produced DIPF. This specification is often mandated by municipal code, or by state or federal law.

20. Domestically produced DIPF sold for use in projects specified as domestic only are sold at higher prices than imported or domestically produced DIPF sold for use in projects not specified as domestic only.

THE RELEVANT MARKETS

21. The relevant product market in which to evaluate Respondents' conduct is the marketing and sale of DIPF, and narrower relevant markets as contained therein (collectively, the "relevant DIPF markets"), including:

a. DIPF for projects not specified as domestic only;

b. DIPF for projects specified as domestic only; and

c. DIPF of certain size ranges (e.g., 24" in diameter and smaller).

22. In particular, the marketing and sale of domestically produced small and medium-sized (3-24" in diameter) DIPF for use in projects specified as domestic only constitutes a separate relevant product market (the "relevant domestic DIPF market").

23. There are no widely used substitutes for DIPF, and no other product significantly constrains the prices of DIPF.

24. Before and after the passage of the ARRA, some end users purchasing DIPF for use in projects specified as domestic only were unable to substitute imported DIPF, or any other product, for domestically produced DIPF. The passage of the ARRA and its Buy American requirement temporarily expanded the relevant domestic DIPF market.

25. The relevant geographic market is no broader than the United States. To compete effectively within the United States, DIPF suppliers need distribution assets and relationships within the United States. DIPF suppliers located outside the United States that lack such assets and relationships are unable to constrain the prices of DIPF suppliers that have such assets and relationships.

26. Each and every state within the United States is also a relevant geographic market, and smaller markets within the boundaries of many states exist as well. DIPF suppliers can and do engage in price discrimination based on customers' location. DIPF end users require local and expeditious service and support, and typically do not purchase DIPF from waterworks distributors located more than 200 miles away. Waterworks distributors typically do not resell DIPF to other waterworks distributors or end users outside their service areas in any substantial quantity. As a result, DIPF suppliers charge different prices in different states, and within certain regions within many states.

THE RELEVANT DIPF MARKETS ARE CONDUCIVE TO COLLUSION

27. The relevant DIPF markets have several features that facilitate collusion among the Sellers, including product homogeneity, market concentration of DIPF suppliers, barriers to timely entry of new DIPF suppliers, inelastic demand at competitive prices, and uniform published prices.

a. DIPF are commodity products produced to industry-wide standards. Product homogeneity enhances the Sellers' ability to collude on prices and to detect deviations from those collusive prices.

b. The relevant DIPF markets are highly concentrated. In 2008, the Sellers collectively made more than 90 percent of sales in the relevant DIPF markets. A highly concentrated market enhances the Sellers' ability and incentive to collude on prices.

c. Effective de novo entry into the relevant DIPF markets takes several years. Barriers to entry include the need for a new entrant to develop a distribution network and a reputation for quality and service with waterworks distributors and end users. Convincing end users to allow the use of a new entrant's DIPF is often a time consuming process.

d. Demand for DIPF is inelastic to changes in price at competitive levels. DIPF are a relatively small portion of the cost of materials of a typical waterworks project, and there are no widely used substitutes for the product.

e. The Sellers publish nearly identical price books listing per-unit prices for each unique DIPF item carried by a given supplier, and periodically publish uniform multiplier discounts at which they offer to sell DIPF on a state-by-state basis. By simplifying and standardizing published prices, the DIPF price list/multiplier format enhances the Sellers' ability to collude on prices and to detect deviations from those collusive prices.

THE SELLERS RESTRAINED PRICE COMPETITION IN THE RELEVANT DIPF MARKETS

28. Senior executives of the Sellers frequently and privately communicate with one another. These communications often relate to DIPF price and output.

29. Beginning in January 2008, the Sellers conspired to raise and stabilize the prices at which DIPF were sold in the United States.

30. Due to rising input costs, all of the Sellers desired price increases in 2008. However, McWane was concerned that Sigma and Star would not adhere to announced price increases, which would result in lost sales for McWane. The Sellers worked together though 2008 to alleviate McWane's concerns, with the common purpose of clearing the way for McWane to support common price increases.

31. On January 11, 2008, McWane publicly announced its first DIPF price increase of 2008. Sigma and Star followed this price increase.

32. This January 2008 price increase was the result of a combination and conspiracy among the Sellers.

a. Before announcing the January 2008 price increase, McWane planned to trade its support for higher prices in exchange for specific changes to the business methods of Sigma and Star that would reduce the risk that local sales personnel for these competitors would sell DIPF at prices lower than published levels.

b. McWane communicated the terms of its plan to Sigma and Star. McWane acted with the intent of conspiring with Sigma and Star to restrain price competition.

c. Sigma and Star manifested their understanding and acceptance of McWane's offer by publicly taking steps to limit their discounting from published price levels in order to induce McWane to support higher price levels.

d. On or about March 10, 2008, McWane and Sigma executives discussed by telephone their efforts to implement the January 2008 price increase.

33. On June 17, 2008, McWane publicly announced its second DIPF price increase of 2008. Sigma and Star followed this price increase.

34. The June 2008 price increase was the result of a combination and conspiracy among the Sellers.

a. Before announcing the June 2008 price increase, McWane planned to trade its support for higher prices in exchange for information from Sigma and Star documenting the volume of their monthly sales of DIPF. This exchange of information was to be

achieved under the auspices of an entity styled as the Ductile Iron Fittings Research Association ("DIFRA").

b. McWane communicated the terms of its plan to Sigma and Star, at least in part through a public letter sent by McWane to waterworks distributors, the common customers of the Sellers. A section of that letter was meaningless to distributors, but was intended to inform Sigma and Star of the terms of McWane's offer. McWane acted with the intent of conspiring with Sigma and Star to restrain price competition.

c. Sigma and Star manifested their understanding and acceptance of McWane's offer by initiating their participation in the DIFRA information exchange in order to induce McWane to support higher price levels.

d. McWane then led a price increase, and Sigma and Star followed.

e. On or about August 22, 2008, executives of McWane and Sigma discussed by telephone their efforts to implement the June 2008 price increase.

DIFRA FACILITATED PRICE COORDINATION AMONG THE SELLERS

35. The DIFRA information exchange operated as follows. The Sellers submitted a report of their previous month's sales to an accounting firm. Shipments were reported in tons shipped, subdivided by diameter size range (e.g., 2-12") and by joint type. Data submissions were aggregated and distributed to the Sellers. Data submitted to the accounting firm was typically no older than 45 days, and the summary reports returned to the Sellers contained data typically no more than 2 months old.

36. During its operation between June 2008 and January 2009, the DIFRA information exchange enabled each of the Sellers to determine and to monitor its own market share and, indirectly, the output levels of its rivals. In this way, the DIFRA information exchange facilitated price coordination among the Sellers on the pricing of DIPF.

37. The acts and practices of Respondents, as alleged herein, have the purpose, capacity, tendency, and effect of (i) fixing, maintaining and raising prices of DIPF in the relevant DIPF markets, and (ii) facilitating collusion in the relevant DIPF markets.

38. There are no legitimate procompetitive efficiencies that justify the conduct of Respondents as alleged herein, or that outweigh its anticompetitive effects.

MCWANE MONOPOLIZED THE RELEVANT DOMESTIC DIPF MARKET

39. At the time of the enactment of the ARRA in February 2009 and thereafter, McWane possessed monopoly power in the relevant domestic DIPF market.

40. At the time of the enactment of the ARRA, McWane was the only manufacturer of a full line of DIPF in the relevant domestic DIPF market and controlled nearly 100 percent of the relevant domestic DIPF market. Despite Star's entry into the relevant domestic DIPF market in late 2009, McWane continues to make more than 90 percent of sales in the relevant domestic DIPF market.

41. McWane's monopoly power in the relevant domestic DIPF market is protected by substantial barriers to effective entry and expansion, including the unfair methods of competition of McWane and Sigma, as alleged in Paragraphs 42 through 63, below.

42. For suppliers of the relevant DIPF that have existing relationships and goodwill with waterworks distributors and established reputations for quality and service in the provision of the relevant DIPF, McWane's unfair and exclusionary methods of competition are the primary barriers to effective entry and expansion in the relevant domestic DIPF market.

43. McWane's monopoly power in the relevant domestic DIPF market is further demonstrated directly by its ability to

exclude competitors, to control prices, and to coercively impose unwanted distribution policies on its customers.

44. Federal stimulus gave Sigma, Star and Serampore Industries Private, Ltd. ("SIP"), another imported DIPF supplier, an incentive to enter the domestic DIPF market.

45. Sigma, Star and SIP all attempted to enter the relevant domestic DIPF market in response to the ARRA.

46. McWane maintained its monopoly in the relevant domestic DIPF market by illegally inducing Sigma to abandon its effort to enter the domestic DIPF market, and by implementing an exclusive dealing policy to prevent other competitors from entering or expanding. Through this conduct, McWane eliminated or delayed competition from the only firms with the ability and incentive to enter the relevant domestic DIPF market in a timely fashion. McWane acted with the specific intent to monopolize the relevant domestic DIPF market.

McWane Eliminated Sigma as an Actual Potential Entrant

47. After the enactment of the ARRA, Sigma took steps to evaluate entry into domestic production of DIPF, including but not limited to (i) formulating a complete or nearly complete operational plan, (ii) arranging for an infusion of equity capital to fund domestic production, (iii) obtaining the approval of its Board of Directors for its entry plans, and (iv) casting prototype product.

48. McWane perceived that Sigma was preparing to enter the relevant domestic DIPF market. McWane sought to eliminate the risk of competition from Sigma by inducing Sigma to become a distributor of McWane's domestic DIPF rather than a competitor in the relevant domestic DIPF market.

49. McWane and Sigma executed a Master Distribution Agreement dated September 17, 2009 ("MDA"). The principal terms of the MDA were as follows:

a. McWane would sell domestic DIPF to Sigma at a 20 percent discount off of McWane's published prices;

b. McWane would be Sigma's exclusive source for the relevant domestic DIPF;

c. Sigma would resell McWane's domestic DIPF at or very near McWane's published prices for domestic DIPF; and

d. Sigma would resell McWane's domestic DIPF to waterworks distributors only on the condition that the distributor agreed to purchase domestic DIPF exclusively from McWane or Sigma.

50. An unwritten term of the MDA was that McWane would also sell its domestic DIPF at or very near its published prices.

51. In the absence of a sufficiently profitable arrangement with McWane, Sigma would likely have entered the relevant domestic DIPF market in competition with McWane.

52. Under the MDA, McWane controlled the price at which Sigma could sell domestic DIPF and the customers to whom Sigma could sell domestic DIPF. Sigma's participation in the relevant domestic DIPF market under the MDA was not equivalent to, and for consumers not a substitute for, Sigma's competitive entry into the relevant domestic DIPF market.

53. Sigma's independent, competitive entry into the relevant domestic DIPF market would likely have benefitted consumers by constraining McWane's prices for the relevant domestic DIPF and otherwise.

54. Through the MDA, McWane transferred a share of its sales and monopoly profits in the domestic DIPF market to Sigma in exchange for Sigma's commitment to abandon its plans to enter the relevant domestic DIPF market as an independent competitor.

55. Both McWane and Sigma entered into the MDA with the specific intent to maintain and share in McWane's monopoly profits in the relevant domestic DIPF market by eliminating competition among themselves and excluding their rivals.

McWane Excluded Star Through Exclusive Dealing

56. Star announced its entry into the relevant domestic DIPF market in June 2009. McWane knew that, initially, Star would have a shorter product line and a smaller inventory than McWane. Star would therefore have difficulty convincing a waterworks distributor to purchase all of its domestic DIPF from Star. McWane nevertheless projected that Star's entry into the domestic DIPF market, if unobstructed by McWane, would place downward pressure on McWane's prices for its domestic DIPF.

57. McWane responded to Star's entry into the relevant domestic DIPF market by adopting restrictive and exclusive distribution policies (collectively, "McWane's exclusive dealing policies"). McWane intended and expected that these policies would impede and delay the ability of Star to enter the domestic DIPF market.

a. McWane threatened waterworks distributors with delayed or diminished access to McWane's domestic DIPF, and the loss of accrued rebates on the purchase of McWane's domestic DIPF, if those distributors purchased domestic DIPF from Star.

b. As part of its MDA with McWane, Sigma agreed to implement a similar distribution policy, as alleged in Paragraph 49, above.

c. McWane threatened some waterworks distributors with the loss of rebates in other product categories, such as ductile iron pipe, waterworks valves, and hydrants, if those distributors purchased domestic DIPF from Star.

d. Beginning in 2011, McWane changed its rebate structure for domestic DIPF to require waterworks distributors to make certain minimum, and high, shares of their total domestic DIPF purchases from McWane in order to qualify for these rebates.

58. The purpose and effect of McWane's exclusive dealing policies has been and is to compel the majority of waterworks

distributors to deal with McWane and Sigma on an exclusive or nearly exclusive basis for their domestic DIPF business.

a. Due to Star's perceived or actual status as an untested supplier of domestic DIPF with a shorter product line and smaller inventory than McWane, many distributors interested in purchasing domestic DIPF from Star were unwilling to switch all of their domestic DIPF business to Star.

b. Instead, many distributors wished to purchase domestic DIPF from both McWane/Sigma and Star, and thereby to garner the benefits of price and service competition.

c. McWane's exclusive dealing policies increased the risk of purchasing domestic DIPF from Star.

d. Distributors otherwise interested in purchasing domestic DIPF from Star were and are unwilling to do so under the terms of McWane's exclusive dealing policies, and have remained exclusive or nearly exclusive with McWane and Sigma, contrary to their preference.

59. McWane's exclusive dealing policies have foreclosed Star from a substantial volume of sales opportunities with waterworks distributors.

60. By foreclosing Star from a substantial volume of sales opportunities with waterworks distributors, McWane's exclusive dealing policies tend to minimize and delay Star's ability to compete in the domestic DIPF market and thereby to benefit consumers by constraining the prices of domestically produced DIPF charged by McWane and Sigma, and otherwise.

61. McWane's exclusive dealing policies have also raised barriers to entry into the relevant domestic DIPF market by other potential entrants, including SIP. This conduct has contributed to McWane's monopolization of the relevant domestic DIPF market.

62. The acts and practices of McWane, as alleged herein, have the purpose, capacity, tendency, and effect of (i) maintaining and stabilizing prices of DIPF in the relevant DIPF markets, (ii) eliminating potential competition from Sigma in the relevant domestic DIPF market, (iii) impairing the competitive effectiveness of Star in the relevant domestic DIPF market, and (iv) raising barriers to entry for potential rivals in the relevant domestic DIPF market. The conduct of McWane is reasonably capable of making a significant contribution to the enhancement or maintenance of McWane's monopoly power in the relevant domestic DIPF market.

63. There are no legitimate procompetitive efficiencies that justify the conduct of McWane as alleged herein, or that outweigh its anticompetitive effects.

FIRST VIOLATION ALLEGED
RESTRAINT OF TRADE

64. As alleged herein, McWane and Star conspired, along with their competitor Sigma, to restrain price competition. These concerted actions unreasonably restrain trade and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

SECOND VIOLATION ALLEGED
RESTRAINT OF TRADE

65. As alleged herein, McWane and Star conspired, along with their competitor Sigma, to exchange competitively sensitive sales information. These concerted actions unreasonably restrain trade in and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

THIRD VIOLATION ALLEGED
UNFAIR METHODS OF COMPETITION

66. As alleged herein, McWane invited its competitors to collude with McWane to restrain price competition. These actions constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

FOURTH VIOLATION ALLEGED
RESTRAINT OF TRADE

67. As alleged herein, McWane and Sigma entered into the MDA. The agreement unreasonably restrains trade and constitutes an unfair method of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

FIFTH VIOLATION ALLEGED
CONSPIRACY TO MONOPOLIZE

68. As alleged herein, McWane and Sigma entered into the MDA with the specific intent to monopolize the relevant domestic DIPF market, and took overt acts to exclude their rivals in furtherance of their conspiracy, constituting an unfair method of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

SIXTH VIOLATION ALLEGED
MONOPOLIZATION

69. As alleged herein, McWane has willfully engaged in anticompetitive and exclusionary acts and practices to acquire, enhance or maintain its monopoly power in the relevant domestic DIPF market, constituting unfair methods of competition in or

affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

SEVENTH VIOLATION ALLEGED
ATTEMPTED MONOPOLIZATION

70. As alleged herein, McWane has willfully engaged in anticompetitive and exclusionary acts and practices, with the specific intent to monopolize the relevant domestic DIPF market, resulting, at a minimum, in a dangerous probability of monopolizing the relevant domestic DIPF market, constituting unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

NOTICE

Notice is hereby given to Respondents that the fourth day of September, 2012, at 10:00 a.m., is hereby fixed as the time and Federal Trade Commission offices, 600 Pennsylvania Avenue, NW, Washington D.C. 20580, as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

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 allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings of fact and conclusions of law under ☐ 3.46 of said Rules.

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 an answer is filed by the last answering Respondent. 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., Washington DC 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within five days of receiving the answer of the last answering Respondent, to make certain initial disclosures without awaiting a formal discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that Respondents have violated or are violating Section 5 of the FTC Act, as amended, as alleged in the Complaint, 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. Ordering Respondents to cease and desist from the conduct alleged in the Complaint to violate Section 5 of the FTC Act, and to take all such measures as are appropriate to correct or remedy, or to prevent the recurrence of, the anticompetitive practices engaged in by Respondents.

2. Prohibiting Respondents from agreeing with any competitor to fix prices or to allocate markets, or from soliciting any competitor to enter into such an agreement.

3. Prohibiting Respondents from agreeing with any competitor to exchange competitively sensitive information unless that information exchange meets sufficient criteria to assure that the information exchange will not facilitate collusion among Respondents and their competitors, such conditions to be determined by the Commission, or soliciting any competitor to enter into such an agreement.

4. Prohibiting Respondents from communicating competitively sensitive information to any competitor, except where such communications are the unavoidable result of announcing the terms on which Respondents propose to sell their products to their customers, or where the information communicated by Respondents relates solely to the terms on which Respondents propose to sell any product to, or purchase any product from, the person to whom the information is communicated by Respondents.

5. Requiring, for a period of time, that Respondents document all communications with any competitor, including by identifying the persons involved, the nature of the communication, and its duration, and that Respondents submit such documentation to the Commission.

6. Requiring that Respondents, upon request, provide the Commission with notification of any public price change relating to DIPF, including copies of pricing letters.

7. Prohibiting McWane from conditioning the sale, or any term of sale (including invoice price, delivery terms, credit allowances, rebates, or discounts), of any product on a customer's

dealing, refusal to deal, or terms of dealing with any other supplier of domestically produced DIPF.

8. Prohibiting McWane, for a period of time, from providing any discounts or other incentives that retroactively reduce the price of previously purchased units of McWane's domestically produced DIPF because of the purchase or sale of an additional unit of that product. Provided, however, that McWane shall be permitted to offer discounts or lower prices based solely on volume, provided that these discounts or lower prices are otherwise in accordance with the law.

9. Prohibiting McWane, for a period of time, from offering bundled rebates involving domestically produced DIPF.

10. Requiring that Respondents' compliance with the order shall be monitored at its expense by an independent monitor, for a term to be determined by the Commission.

11. Requiring that Respondents file periodic compliance reports with the Commission.

12. Any other relief appropriate to correct or remedy the anticompetitive effects in their incipiency of any or all of the conduct alleged in the complaint.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fourth day of January, 2012, issues its complaint against Respondents.

By the Commission.

STATEMENT OF COMMISSIONER J. THOMAS ROSCH, CONCURRING IN PART AND DISSENTING IN PART

The Commission has voted separately (1) to issue a Part 3 Administrative Complaint against Respondents McWane, Inc. ("McWane") and Star Pipe Products, Ltd. ("Star"), and (2) to accept for public comment a Consent Agreement settling similar allegations in a draft Part 2 Complaint against Respondent Sigma Corporation ("Sigma"). While I have voted in favor of both actions, I respectfully object to the inclusion—in both the Part 3 Administrative Complaint and in the draft Part 2 Complaint—of claims against McWane and Sigma, to the extent that such claims are based on allegations of exclusive dealing, as explained in Part I below. I also respectfully object to naming Star, a competitor of McWane and Sigma, as a Respondent in the Part 3 Administrative Complaint, which alleges, *inter alia*, that Star engaged in a horizontal conspiracy to fix the prices of ductile iron pipe fittings (DIPFs) sold in the United States, and in a related, information exchange, as described in Part II below.

I.

For reasons similar to those that I articulated in a recent dissent in another matter, *Pool Corp.*, FTC File No. 101-0115, http://www.ftc.gov/os/caselist/1010115/111121poolcorpstatementrosch.pdf, I do not think that the Part 3 Administrative Complaint against McWane and the draft Part 2 Complaint against Sigma adequately allege exclusive dealing as a matter of law. In particular, there is case law in both the Eighth and Ninth Circuits blessing the conduct that the complaints charge as exclusive dealing.

II.

I also object to the allegations in the Part 3 Administrative Complaint and in the draft Part 2 Complaint that name Star as a co-conspirator in the alleged horizontal price-fixing of DIPF sold in the United States and the related, alleged DIFRA information exchange.[1] I do not consider naming Star, along with McWane

[1] *See* McWane/Star Part 3 Administrative Compl. ¶¶ 29–38, 64–65; Sigma draft Part 2 Compl. ¶¶ 23–33.

and Sigma, as a co-conspirator to be in the public interest. There are at least three reasons why this is so. First, although there may be reason to believe Star conspired with McWane and Sigma in this oligopolistic industry, Star seems much less culpable than the others. More specifically, I believe that we must be mindful of the consequences of public law enforcement in assessing whether the public interest favors joining Star as a co-conspirator.[2] Second, I am concerned that a trier of fact may find it hard to believe that Star could be both a victim of McWane's alleged "threats" to deal exclusively with distributors, and at more or less the same time (the "exclusive dealing" program began in September 2009), a co-conspirator with McWane in a price-fixing conspiracy (June 2008 to February 2009). (This concern further explains why I do not have reason to believe that the exclusive dealing theory is a viable one.) Third, I am concerned that Star's alleged participation in the price-fixing conspiracy and information exchange relies, in part, on treating communications to distributors as actionable signaling on prices or price levels.[3] *See, e.g., Williamson Oil Co., Inc. v. Philip Morris USA*, 346 F.3d 1287, 1305–07 (11th Cir. 2003).

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[2] *See* Credit Suisse Secs. (USA) LLC v. Billing, 551 U.S. 264, 281–84 (2007) (questioning the social benefits of private antitrust lawsuits filed in numerous courts when the enforcement-related need is relatively small); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557–60 (2007) (expressing concern with the burdens and costs of antitrust discovery, and the attendant *in terrorem* effect, associated with private antitrust lawsuits).

[3] McWane/Star Part 3 Administrative Compl. ¶ 34b; Sigma draft Part 2 Compl. ¶ 29.

Complaint

IN THE MATTER OF

WESTERN DIGITAL CORPORATION

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

Docket No. C-4350; File No. 111 0122
Complaint, March 5, 2012 – Decision, May 7, 2013

This consent order addresses concerns that the acquisition by Western Digital of Hitachi Global Storage Technologies ("Hitachi") violates Section 5 of the FTC Act and Section 7 of the Clayton Act. According to the complaint, the acquisition would substantially reduce competition in the worldwide market for desktop hard disk drives and would enable Western Digital to exercise market power, resulting in higher prices for consumers. The consent order requires Western Digital to divest select Hitachi assets to Toshiba within 15 days of the acquisition. The consent order further requires Western Digital to license all intellectual property needed to make and supply desktop hard disk drives to Toshiba and to be available to supply Toshiba with components needed to operate the acquired assets successfully. The consent order further appoints a monitor to oversee the sale of the assets to Toshiba and to keep the Commission informed about the status of the required divestiture.

Participants

For the *Commission*: *Roberta Baruch, Leonor Velazquez Davila, Eric Elmore, Michael Franchak, Benjamin Gris, Sean Hughto, Janet Kim, Jennifer Lee,* and *Danielle Sims*.

For the *Respondent*: *George Cary* and *Jeremy Calsyn, Cleary Gottlieb Steen & Hamilton LLP*; *W. Stephen Smith, Morrison & Foerster LLP*; *David Beddow* and *Rich Parker, O'Melveny & Myers LLP*; and *Alex Chang, Skadden Arps Slate Meagher & Flom 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 Western Digital Corporation ("Western Digital"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Viviti Technologies Ltd., formerly known as

Hitachi Global Storage Technologies Ltd. ("HGST"), a wholly-owned subsidiary of Hitachi, Ltd. ("Hitachi"), in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent Western Digital is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its head office and principal place of business located at 3355 Michelson Drive, Irvine, California 92612. Respondent is engaged in, among other activities, the manufacture, marketing, and sale of hard disk drives ("HDDs").

II. JURISDICTION

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 corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. THE PROPOSED ACQUISITION

3. Pursuant to a Stock Purchase Agreement (the "Merger Agreement") dated March 7, 2011, Western Digital proposes to acquire HGST from Hitachi in a transaction valued at approximately $4.5 billion ("Acquisition"). Both Respondent and HGST manufacture, market, and sell HDDs, including, but not limited to, 3.5 inch desktop HDDs ("desktop HDDs").

IV. THE RELEVANT PRODUCT MARKET

4. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is desktop HDDs. Desktop HDDs are installed in non-portable personal computers, and offer the highest storage capacities and

lowest price per gigabyte of storage capacity of any of the different types of HDDs on the market. Other types of available HDDs, such as 2.5 inch HHDs for mobile computing, and HDDs for use in enterprise computing, are more expensive than desktop HDDs and offer additional features, at additional cost, that are generally considered unnecessary and superfluous in desktop computing. For these reasons, no other types of HDDs are reasonable substitutes for desktop HDDs.

V. THE RELEVANT GEOGRAPHIC MARKET

5. For the purposes of this Complaint, the relevant geographic area in which to analyze the likely effects of the Acquisition on the desktop HDD market is worldwide.

VI. THE STRUCTURE OF THE MARKET

6. The desktop HDD market is highly concentrated, as measured by the Herfindahl-Hirschman Index ("HHI"). The combination of Respondent's HDD business with HGST's HDD business would consolidate two of three remaining desktop HDD suppliers in the market. Post-Acquisition, a combined Western Digital and HGST would have a market share for desktop HDDs of approximately 50 percent, with only one remaining competitor. The post-merger HHI would be 5,000 and the Acquisition will increase the HHI level by 800. This market concentration level far exceeds the thresholds set out in the Horizontal Merger Guidelines, and thus, creates a presumption that the Acquisition will create or enhance market power.

VII. ENTRY CONDITIONS

7. Entry into the desktop HDD market would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. Deterrents to entry into the desktop HDD market include high capital expenditures, and intellectual property barriers. Further, the market for desktop HDDs provides limited potential for growth, making it unlikely that a potential competitor would have the incentive to make the substantial investments necessary to enter the market de novo. Existing component manufacturers in

the HDD industry are unwilling to enter the desktop HDD market and compete with their customers, the HDD manufacturers.

VIII. EFFECTS OF THE ACQUISITION

8. The effects of the Acquisition, if consummated, may be to substantially lessen competition, and to tend to create a monopoly in the relevant market, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Specifically, the Acquisition would, among other anticompetitive effects:

a. eliminate actual, direct, and substantial competition between Western Digital and HGST in the relevant market;

b. increase the likelihood that Western Digital will exercise market power unilaterally in the relevant market;

c. increase the likelihood of coordinated interaction among competitors in the relevant market; and

d. increase the likelihood that U.S. consumers would be forced to pay higher prices for desktop HDDs.

IX. VIOLATIONS CHARGED

9. The allegations contained in Paragraphs 1 through 9 above are hereby incorporated by reference as though fully set forth here.

10. The Acquisition, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

11. The Acquisition, if consummated, would constitute a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

12. The Merger Agreement described in Paragraph 3 constitutes a violation of 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 March, 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 Western Digital Corporation ("WD" or "Respondent") of Viviti Technologies Ltd. ("HGST"), a wholly owned subsidiary of Hitachi, Ltd. ("Hitachi"), 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 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

Respondent, its 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 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 Western Digital Corporation 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 3355 Michelson Drive, Irvine, California 92612.

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

ORDER

I.

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

A. "Western Digital" means Western Digital Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Western Digital (including, after the Acquisition Date, HGST), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Hitachi" means Hitachi, Ltd., a corporation organized, existing, and doing business under and by

virtue of the laws of Japan, with its headquarters address at 6-6 Marunouchi 1- chome, Chiyoda-ku, Tokyo, 100-8280, Japan. HGST is a wholly owned subsidiary of Hitachi, Ltd.

C. "HGST" means Viviti Technologies Ltd. ("HGST"), a corporation organized, existing, and doing business under and by virtue of the laws of the Republic of Singapore, with its headquarters address at 3403 Yerba Buena Road, San Jose, California 95135.

D. "Commission" means the Federal Trade Commission.

E. "3.5 Inch HDD" means a three and a half (3.5) inch wide fixed, re-writeable, magnetic data storage device with one or more flat, circular platters coated with a magnetically sensitive material, enclosed in a vacuum sealed case with recording heads, used for the purpose of storing and retrieving electronic data.

F. "3.5 Inch HDD Product(s)" means the HGST Mars product lines for 3.5 Inch HDDs with one, two, or three platters, used in non-portable desktops and tower personal computers.

G. "3.5 Inch HDD Products Business" means the research, development, manufacture, distribution, finishing, packaging, marketing, sale, storage and transport of 3.5 Inch HDD Products by HGST before the Acquisition Date, including any contracts, agreements or other arrangements by HGST with any Person to provide any such research, development, manufacture, distribution, finishing, packaging, marketing, sale, storage or transport.

H. "3.5 Inch HDD Products Business Assets" means the following assets primarily related to the 3.5 Inch HDD Products Business:

1. the 3.5 Inch HDD Manufacturing Assets;

2. the 3.5 Inch HDD Products Business Records;

3. the 3.5 Inch HDD Products Intellectual Property License; and

4. the 3.5 Inch HDD Products Patents License.

I. "3.5 Inch HDD Products Business Employee(s)" means any employee whose duties primarily related to the 3.5 Inch HDD Products Business at any time during the twelve (12) month period prior to the Closing Date.

J. "3.5 Inch HDD Products Business Key Employee(s)" means an employee designated by the Acquirer as a Product Manager, a Design Manager, a Manufacturing Manager, and a Quality Assurance Manager.

K. "Acquirer" means the following:

1. Toshiba; 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.

L. "Closing Date" means the date on which the Respondent (or a Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey assets or rights related to the 3.5 Inch HDD Products Business to an Acquirer pursuant to this Order.

M. "Confidential Business Information" means all information owned by, or in the possession or control of, Respondent that is not in the public domain and that is directly related to the operation and management of the 3.5 Inch HDD Products Business including, but not limited to, information related to the cost, supply, sales, sales support, customers, contracts, research, development, distribution and marketing of

3.5 Inch HDD Products; provided, however, this provision shall not include:

1. information that subsequently falls within the public domain through no violation of this Order;

2. information that Respondent develops or obtains independently, without violating any applicable law or this Order; and

3. information that becomes known to Respondent from a Third Party not in breach of applicable law or other confidentiality obligation.

N. "Employee Access Period" means the later of:

1. one hundred fifty (150) days from the Closing Date; or

2. the date that is sixty (60) days after the date the Acquirer transfers six (6) Primary Production Lines and such lines have been qualified as provided in the Transition Services Agreement Schedule 2.01 Part D.

O. "Geographic Territory" means worldwide.

P. "Intellectual Property" means any type of intellectual property, including without limitation, patents, copyrights, trademarks, trade dress, trade secrets, techniques, data, inventions, practices, methods and other confidential or proprietary technical, business, research, or development information.

Q. "Interim Monitor" means any monitor appointed pursuant to Paragraph III of this Order. R. "Know-How" means all knowledge, information and know-how in the possession of Respondent or within the knowledge of any employee or consultant of Respondent on or before the Closing Date that relates to the 3.5 Inch HDDs Products.

S. "Monitor Agreement" means the Monitor Agreement dated February 26, 2012, between ING Financial Markets LLC, and Western Digital Corporation. The Monitor Agreement is attached as Appendix E to this Order.

T. "Order to Maintain Assets" means the Order to Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.

U. "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.

V. "Remedial Agreement(s)" means:

1. any agreement between Respondent and an Acquirer that is specifically referenced and attached to the proposed Decision and 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 proposed Decision and Order in connection with the Commission's determination to make the proposed Decision and Order final; and/or

2. 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 the Order.

W. "Third Party(ies)" means any non-governmental Person other than Respondent or the Acquirer.

X. "Toshiba" means Toshiba Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of Japan, with its headquarters address at 1-1, Shibaura 1-chrome, Minato-Ku, Tokyo 105-8001, Japan. Toshiba America Electronic Components Inc., is a wholly owned subsidiary of Toshiba Corporation, with its principal office at 19900 MacArthur Boulevard, Suite 400, Irvine, California 92612.

Y. "Transition Services Period" means the period beginning on the Closing Date and ending on the later of:

1. the end of the Transfer Period; or

2. if the Acquirer purchases the Shenzhen Facility Option Assets, the date the Acquirer transfers the Shenzhen Facility Option Assets and such lines have been qualified as provided in the Transition Services Agreement Schedule 2.01 Part D.

II.

IT IS FURTHER ORDERED that from the Acquisition Date:

A. Respondent shall maintain the full economic viability, marketability and competitiveness of the 3.5 Inch HDD Products Business Assets, and shall prevent the destruction, removal, wasting, deterioration, or impairment of the 3.5 Inch HDD Products Business Assets except for ordinary wear and tear. Respondent shall not sell, transfer, encumber or otherwise impair the 3.5 Inch HDD Products Business 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 businesses related to the 3.5 Inch HDD Products Business Assets.

B. Respondent shall maintain the operations of the 3.5 Inch HDD Products Business 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 businesses) and shall use its best efforts to preserve the existing relationships with the following: suppliers; vendors and distributors; customers; employees; and others having business relations with the 3.5 Inch HDD Products Business Assets. Respondent's responsibilities shall include, but are not limited to, the following:

1. providing the 3.5 Inch HDD Products Business Assets 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 3.5 Inch HDD Products Business Assets;

2. continuing, at least at their scheduled pace, any additional expenditures for the 3.5 Inch HDD Products Business Assets, authorized prior to the date the Consent Agreement was signed by Respondent including, but not limited to, all marketing and sales expenditures;

3. providing such resources as may be necessary to respond to competition against the 3.5 Inch HDD Products Business Assets and/or to prevent any diminution in sales of 3.5 Inch HDD Products prior to divestiture;

4. making available for use by the 3.5 Inch HDD Products Business Assets funds sufficient to perform all routine maintenance and all other

maintenance as may be necessary to, and all replacements of the 3.5 Inch HDD Products Business Assets;

5. providing the 3.5 Inch HDD Products Business Assets with such funds as are necessary to maintain the full economic viability, marketability and competitiveness of the 3.5 Inch HDD Products Business;

6. providing such support services to the 3.5 Inch HDD Products Business Assets as were being provided to such business by Respondent as of the date the Consent Agreement was signed by Respondent; and

7. maintaining a work force at least equivalent in size, training, and expertise to what has been associated with the 3.5 Inch HDD Products Business Assets for the last fiscal year.

C. Until the Closing Date, Respondent shall provide all 3.5 Inch HDD Products Business Employees with reasonable financial incentives to continue in their positions and to research, develop, and manufacture the 3.5 Inch HDD Products consistent with past practices and/or as may be necessary to preserve the marketability, viability, and competitiveness of the 3.5 Inch HDD Products pending divestiture. Such incentives shall include a continuation of all employee benefits offered by HGST until the Acquisition Date, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by applicable law), and additional incentives as may be necessary to prevent any diminution of the competitiveness of the 3.5 Inch HDD Products Business.

D. For the duration of the Employee Access period and within ten (10) days of request by the Acquirer, Respondent shall, to the extent permitted by law, provide to the Acquirer or proposed Acquirer, the following information regarding each 3.5 Inch HDD

Products Business Employee whose duties relate to the 3.5 Inch HDD Products Business:

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 the last fiscal year, value of vested and unvested deferred compensation including when any unvested portions are due to vest, 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 option of the Acquirer, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant employees.

E. For the duration of the Employee Access Period, Respondent shall not interfere with the hiring or employing by the Acquirer of the 3.5 Inch HDD Products Business Employees, and shall remove any contractual impediments within the control of Respondents that may deter these employees from accepting employment with the Acquirer, including, but not limited to, any non-compete provisions of employment or other contracts with Respondents that would affect the ability of those individuals to be employed by the Acquirer. In addition, Respondent

shall not make any counteroffer to a 3.5 Inch HDD Products Business Employee who receives a written offer of employment from the Acquirer; provided, however, this Paragraph shall not prohibit Respondent from continuing to employ any 3.5 Inch HDD Products Business Employee under the terms of such employee's employment with Respondent prior to the date of the written offer of employment from the Acquirer to such employee.

F. Respondent shall provide reasonable financial incentives to the 3.5 Inch HDD Products Business Key Employees as needed to facilitate the employment of such employees by the Acquirer.

G. For a period of one (1) year following the Employee Access Period, Respondent shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any 3.5 Inch HDD Products Business Employee(s) who have accepted offers of employment with the Acquirer to terminate his or her employment relationship with the Acquirer; *provided, however,* a violation of this provision will not occur if: (1) the 3.5 Inch HDD Products Business general advertisements for employees including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at Acquirer's employees; or (3) a 3.5 Inch HDD Products Business Employee independently applies for employment with Respondent, as long as such employee was not solicited by Respondent.

H. Pending divestiture of the 3.5 Inch HDD Products Business Assets, Respondent shall:

1. not use, directly or indirectly, any Confidential Business Information related to3.5 Inch HDD Products Business other than as necessary to comply with the following: (1) the requirements of the Orders; (2) Respondent's obligations to the Acquirer under the terms of any Remedial

Agreement related to the 3.5 Inch HDD Products Business; or (3) applicable law;

2. not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person except the Acquirer or Persons specifically authorized by the Acquirer or the Commission to receive such information; and

3. not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information related to 3.5 Inch HDD Products to employees associated with Respondent's own 3.5 Inch HDD business;

provided, however, that Respondent may use any Intellectual Property or Know-How that is conveyed or licensed to Respondent or that Respondent retains the right to use pursuant to any Remedial Agreement; provided further, however, to the extent that the use of such Intellectual Property or Know-How involves disclosure of Confidential Business Information to another Person, such Person must agree to maintain the confidentiality of such Confidential Business Information under terms and in a manner consistent with the requirements of this Order.

I. Respondent shall adhere to and abide by the Remedial Agreements (which agreements shall not vary or contradict, or be construed to vary from or contradict, the terms of the Orders, it being understood that nothing in the Orders shall be construed to reduce any obligations of Respondent under such agreement(s)), which are incorporated by reference into this Order to Maintain Assets and made a part hereof.

J. The English-language versions of all Remedial Agreements, as submitted to and approved by the Commission and attached to the proposed Decision and Order, shall be the versions of such agreements used in interpreting and enforcing this Order.

K. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the 3.5 Inch HDD Products Business Assets within the Geographic Territory through their full transfer and delivery to the Acquirer, to minimize any risk of loss of competitive potential for the 3.5 Inch HDD Products Business Assets within the Geographic Territory, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the 3.5 Inch HDD Products Business Assets except for ordinary wear and tear.

III.

IT IS FURTHER ORDERED that:

A. At any time after Respondent signs the Consent Agreement in this matter, the Commission may appoint a monitor ("Interim Monitor") to assure that Respondent expeditiously complies with all of its obligations and perform all of their responsibilities as required by this Order to Maintain Assets, the proposed Decision and Order (collectively, "Orders"), and the Remedial Agreements.

B. The Commission appoints ING Financial Markets LLC ("ING") as Interim Monitor and approves the Monitor Agreement executed between ING and Respondent which agreement, inter alia, names Philip Comerford, Jr., as ING designated Project Manager.

C. Respondent shall facilitate the ability of the Interim Monitor to comply with the duties and obligations set forth in this Order to Maintain Assets, and shall take no action that interferes with or hinders the Interim Monitor's authority, rights or responsibilities as set forth herein or any agreement between the Interim Monitor and Respondent.

D. The Interim Monitor's duties and responsibilities shall include the following:

1. the Interim Monitor shall have the power and authority to monitor Respondent's compliance with: the divestiture and asset maintenance obligations of the Orders; the restrictions on the use, conveyance, provision, or disclosure of the identified Confidential Business Information under the Orders; and, the related requirements of the Orders. The Interim Monitor shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission;

2. the Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission;

3. the Interim Monitor shall serve until the later of (1) the Transition Services Period or (2) the termination of all Respondent's obligations under all Remedial Agreements; provided, however, the Commission may extend or modify this period as may be necessary to accomplish the purposes of the Orders;

4. subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondent's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondent's compliance with its obligations under the Orders, including, but not limited to, its obligations related to the 3.5 Inch HDD Products Business Assets. Respondent shall cooperate with all reasonable requests of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondent's compliance with the Orders;

5. the Interim Monitor shall serve, without bond or other security, at the expense of 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 Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities;

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

7. Respondent shall report to the Interim Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondents, and any reports submitted by an Acquirer with respect to the performance of Respondents' obligations under the Orders or any 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; and

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 shall serve until termination of this Order to Maintain Assets pursuant to Paragraph VII.

I. The Interim Monitor appointed pursuant to this Order may be the same person appointed as: (1) an Interim Monitor pursuant to Paragraph III of the proposed Decision and Order; or (2) a Divestiture Trustee pursuant to Paragraph IV of the proposed Decision and Order.

IV.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order to Maintain Assets becomes final, and every thirty (30) days thereafter until Respondent has fully

complied with its obligations to divest, license, transfer and/or grant assets as required by the proposed Decision and Order in this matter, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order to Maintain Assets and the related proposed Decision and Order; provided, however, that, after the proposed Decision and Order in this matter becomes final, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission at the same time as the reports required to be submitted by Respondent pursuant to the Decision and Order.

V.

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

A. any proposed dissolution of Respondent;

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

C. any other change in Respondent that may affect compliance obligations arising out of this Order, including but not limited to assignment, the creation or dissolution of subsidiaries, or any other change in Respondent.

VI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent, Respondent shall permit any duly authorized representative of the Commission:

A. access, during office hours of Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of

Respondent related to compliance with this Order, which copying services shall be provided by Respondent at the request of the authorized representative(s) of the Commission and at the expense of Respondent; and

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

VII.

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

A. the day after the divestiture of all 3.5 Inch HDD Products Business Assets, as required by and described in the proposed Decision and Order, has been completed and the Interim Monitor, in consultation with Commission staff and the Acquirer, notified the Commission that all assignments, conveyances, deliveries, grants, license, transactions, transfers and other transitions related to such divestiture are complete;

B. the day the proposed Decision and Order becomes final; or

C. the Commission otherwise directs that this Order to Maintain Assets be terminated;

provided, however, if the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of the Commission Rule 2.34, 16 C.F.R. § 2.34, this Order to Maintain Assets shall terminate no later than three (3) days after such action by the Commission.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Western Digital Corporation ("Western Digital" or "Respondent") of Viviti Technologies Ltd. ("HGST"), a wholly owned subsidiary of Hitachi, Ltd. ("Hitachi"), 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 ("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, and having carefully considered the comment filed by an interested person, and having modified this Decision and Order in certain respects, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Western Digital Corporation 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 3355 Michelson Drive, Irvine, California 92612.

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

ORDER

I.

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

A. "Western Digital" means Western Digital Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Western Digital (including, after the Acquisition Date, HGST), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Hitachi" means Hitachi, Ltd., a corporation organized, existing, and doing business under and by virtue of the laws of Japan, with its headquarters address at 6-6 Marunouchi 1- chome, Chiyoda-ku, Tokyo, 100-8280, Japan. HGST is a wholly owned subsidiary of Hitachi, Ltd.

C. "HGST" means Viviti Technologies Ltd. ("HGST"), a corporation organized, existing, and doing business under and by virtue of the laws of the Republic of Singapore, with its headquarters address at 3403 Yerba Buena Road, San Jose, California 95135.

D. "Commission" means the Federal Trade Commission.

E. "3.5 Inch HDD" means a three and a half (3.5) inch wide fixed, re-writeable, magnetic data storage device with one or more flat, circular platters coated with a magnetically sensitive material, enclosed in a vacuum sealed case with recording heads, used for the purpose of storing and retrieving electronic data.

F. "3.5 Inch HDD Manufacturing Assets" means the manufacturing equipment, machinery, tools, and other parts primarily related to the fully configured production lines for the production of 3.5 Inch HDD Products including, but not limited to:

1. sixteen (16) Primary Production Lines used to manufacture 3.5 Inch HDDs at the Shenzhen Facility;

2. four (4) Re-Work lines used to disassemble 3.5 Inch HDDs at the Shenzhen Facility; and

3. at the Acquirer's option, the Shenzhen Facility Option Assets.

G. "3.5 Inch HDD Product(s)" means the HGST Mars product lines for 3.5 Inch HDDs with one, two, or three platters, used in non-portable desktops and tower personal computers.

H. "3.5 Inch HDD Products Business" means the research, development, manufacture, distribution, finishing, packaging, marketing, sale, storage and transport of 3.5 Inch HDD Products by HGST before the Acquisition Date, including any contracts, agreements or other arrangements by HGST with any Person to provide any such research, development, manufacture, distribution, finishing, packaging, marketing, sale, storage or transport.

I. "3.5 Inch HDD Products Business Assets" means the following assets primarily related to the 3.5 Inch HDD Products Business:

1. the 3.5 Inch HDD Manufacturing Assets;

2. the 3.5 Inch HDD Products Business Records;

3. the 3.5 Inch HDD Products Intellectual Property License; and

4. the 3.5 Inch HDD Products Patents License.

J. "3.5 Inch HDD Products Business Employee(s)" means any employee whose duties primarily related to the 3.5 Inch HDD Products Business at any time during the twelve (12) month period prior to the Closing Date.

K. "3.5 Inch HDD Products Business Firewalled Employees" means:

1. all employees at the Shenzhen Facility whose duties involve the contract manufacture of the 3.5 Inch HDD Products for the Acquirer;

2. all 3.5 Inch HDD Products Business Key Employees;

3. all employees of Respondent seconded to the Acquirer until May 15, 2015;

4. all employees of Respondent whose duties involve the supply of Heads and/or Media to the Acquirer; and

5. all employees of Respondent with access to Confidential Business Information related to the 3.5 Inch HDD Products whose duties relate to Respondent's own 3.5 Inch HDD business.

L. "3.5 Inch HDD Products Business Key Employee(s)" means an employee designated by the Acquirer as a Product Manager, a Design Manager, a Manufacturing Manager, and a Quality Assurance Manager.

M. "3.5 Inch HDD Products Business Records" means (i) all documents and records (including all electronic records and files wherever stored) that are exclusively used in the 3.5 Inch HDD Products Business and (ii) copies of all documents and records (including all electronic records and files wherever stored) that are primarily related to 3.5 Inch HDD Products Business including, without limitation:

1. all documents and information related to employees, contractors, and others employed or contracted by Respondent whose duties primarily relate to the 3.5 Inch HDD Products Business;

2. all Software primarily related to 3.5 Inch HDD Products; and

3. all 3.5 Inch HDD Products Manufacturing Documents.

N. "3.5 Inch HDD Products Business Divestiture Agreement" means:

1. the WD-Toshiba Asset Purchase Agreement; or

2. any agreement that receives the prior approval of the Commission between Respondent (or a Divestiture Trustee) and an Acquirer for the divestiture of the 3.5 Inch HDD Products Business entered into pursuant to Paragraph II (or Paragraph IV) of this Order, and any attachments, amendments, exhibits, and schedules related thereto.

O. "3.5 Inch HDD Products Contract Manufacturing Agreement" means:

1. the Manufacturing Agreement by and between Toshiba Corporation, Hitachi Global Storage Products (Shenzhen) Co. Ltd., and Western Digital Corporation, dated on the Closing Date, and any

attachments, amendments, exhibits, and schedules related thereto as of the Closing Date. This Manufacturing Agreement is attached to this Order and contained in non-public Appendix A; or

2. any agreement that receives the prior approval of the Commission between Respondent (or a Divestiture Trustee) and an Acquirer for the supply of 3.5 Inch HDD Products entered into pursuant to Paragraph II (or Paragraph IV) of this Order, and any attachments, amendments, exhibits, and schedules related thereto.

P. "3.5 Inch HDD Products Intellectual Property License" means a worldwide, fully paid-up, perpetual, non-revocable and royalty-free license(s) to all documents, Intellectual Property and Know-How primarily related to 3.5 Inch HDD Products in a manner and form substantially similar to the WD-Toshiba License Agreement; provided, however, the 3.5 Inch HDD Products Intellectual Property License(s) does not include (i) corporate names or corporate trade dress of "WD," "HGST," or "Hitachi," or any other trademark, trade dress, or corporate name, or (ii) patents owned by Respondent.

Q. "3.5 Inch HDD Products Manufacturing Documents" means the books, records, files and other documentation, including electronic copies, primarily related to the research, development, production, manufacturing or testing of 3.5 Inch HDD Products including, but not limited to, tooling documentation, specifications, schematics, product designs, failure analysis data, quality data, and qualification data.

R. "3.5 Inch HDD Products Input Supply Agreement(s)" means:

1. the Head Supply Agreement;

2. the Media Supply Agreement; or

3. any agreement that receives the prior approval of the Commission between Respondent (or a Divestiture Trustee) and the Acquirer for the supply of Heads or Media necessary for the manufacture of 3.5 Inch HDD Products.

S. "3.5 Inch HDD Products Patents License" means a worldwide, fully paid-up, perpetual, non-revocable, non-exclusive license to all WD or HGST patents used or useful in making, using, or selling HDDs that are issued or have a first effective filing date on or before September 29, 2017 in a manner and form substantially similar to the Toshiba Cross- License Agreement; provided, however, the 3.5 Inch HDD Products Patents License shall not include design patents.

T. "Acquirer" means the following:

1. Toshiba; 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.

U. "Acquisition" means the acquisition of Viviti Technologies Ltd. by Western Digital as contemplated by the Stock Purchase Agreement by and among Hitachi, Ltd., Viviti Technologies Ltd., Western Digital Corporation, and Western Digital Ireland, Ltd., dated March 7, 2011, and all attachments, amendments, exhibits, and schedules related thereto.

V. "Acquisition Date" means the date on which the Acquisition occurs.

W. "Closing Date" means the date on which the Respondent (or a Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey assets or rights related to

the 3.5 Inch HDD Products Business to an Acquirer pursuant to this Order.

X. "Confidential Business Information" means all information owned by, or in the possession or control of, Respondent that is not in the public domain and that is directly related to the operation and management of the 3.5 Inch HDD Products Business including, but not limited to, information related to the cost, supply, sales, sales support, customers, contracts, research, development, distribution and marketing of 3.5 Inch HDD Products; *provided, however,* this provision shall not include:

1. information that subsequently falls within the public domain through no violation of this Order;

2. information that Respondent develops or obtains independently, without violating any applicable law or this Order; and

3. information that becomes known to Respondent from a Third Party not in breach of applicable law or other confidentiality obligation.

Y. "Design Manager" means an employee of Respondent, designated by the Acquirer, who has managerial or supervisory duties, in whole or in part, in the research or design of 3.5 Inch HDD Products within the twelve (12) month period immediately prior to the Closing Date, and may be an individual identified in Confidential Appendix B.

Z. "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 provided the relevant assistance or service.

AA. "Divestiture Trustee" means the person appointed to act as trustee by the Commission pursuant to Paragraph IV of this Order.

BB. "Employee Access Period" means the later of:

1. one hundred fifty (150) days from the Closing Date; or

2. August 15, 2013.

CC. "Geographic Territory" means worldwide.

DD. "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.

EE. "Heads" means the components of 3.5 Inch HDDs that move above the Media and are used to write data onto Media by transforming an electrical current into a magnetic field and to read data from Media by transforming a magnetic field into an electrical current.

FF. "Heads Supply Agreement" means the Heads Supply Agreement by and between Toshiba Corporation, Western Digital (Malaysia) SDN BHD, Western Digital Corporation, dated on the Closing Date, and any attachments, amendments, exhibits, and schedules related thereto. This Heads Supply Agreement is attached to this order and contained in non-public Appendix C.

GG. "Intellectual Property" means any type of intellectual property, including without limitation, patents, copyrights, trademarks, trade dress, trade secrets, techniques, data, inventions, practices, methods and other confidential or proprietary technical, business, research, or development information.

HH. "Interim Monitor" means any monitor appointed pursuant to Paragraph III of this Order. II. "Know-How" means all knowledge, information and know-how in the possession of Respondent or within the knowledge of any employee or consultant of

Respondent on or before the Closing Date that relates to the 3.5 Inch HDDs Products.

JJ. "Law" means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.

KK. "Manufacturing Period" means the period beginning on the Closing Date and ending on the later of:

1. one (1) year after the Closing Date; or

2. the date the Acquirer transfers twelve (12) Primary Production Lines and such lines have been qualified as provided in the Transition Services Agreement Schedule 2.01 Part D.

LL. "Manufacturing Manager" means an employee of Respondent, designated by the Acquirer, who has managerial or supervisory duties, in whole or in part, in the manufacture or production of 3.5 Inch HDD Products within the twelve (12) month period immediately prior to the Closing Date, and may be an individual identified in Confidential Appendix B.

MM. "Media" means the components of 3.5 Inch HDDs that consist of a flat, circular platter coated with a magnetically sensitive material used for storing electronic data.

NN. "Media Supply Agreement" means the Media Supply Agreement by and between Toshiba Corporation, WD Media (Malaysia) SDN, and Western Digital Corporation, dated on the Closing Date, and any attachments, amendments, exhibits, and schedules related thereto. This Media Supply Agreement is attached to this order and contained in non-public Appendix D.

OO. "Monitor Agreement" means the Monitor Agreement dated February 26, 2012, between ING Financial

Markets LLC, and Western Digital Corporation. The Monitor Agreement is attached as Appendix E to this Order.

PP. "Order to Maintain Assets" means the Order to Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.

QQ. "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.

RR. "Primary Production Lines" means prime production lines used to manufacture and test HDDs as referenced in Section 1.01(b)(i) of the disclosure schedule to the WD-Toshiba Asset Purchase Agreement.

SS. "Product Manager" means an employee of Respondent, designated by the Acquirer, who has managerial or supervisory duties, in whole or in part, in the management of a HDD product line within the twelve (12) month period immediately prior to the Closing Date, and may be an individual identified in Confidential Appendix B.

TT. "Quality Assurance Manager" means employee of Respondent, designated by the Acquirer, who has managerial or supervisory duties, in whole or in part, in the testing or quality assurance of 3.5 Inch HDD Products within the twelve (12) month period immediately prior to the Closing Date, and may be an individual identified in Confidential Appendix B.

UU. "Remedial Agreement(s)" means:

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/or

2. 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 the Order.

VV. "Reserved Capacity" means productive capacity that Respondent is obligated to reserve on behalf of the Acquirer including, at a minimum:

1. for 3.5 Inch HDD Products, the capacity of seven (7) fully configured Primary Production Lines initially, increasing to ten (10) fully configured Primary Production Lines; provided, however, that after the Rolling Manufacturing Asset Transfer Date, Respondent may reduce the number of lines on a rolling basis to enable the transfer of lines; and

2. for Heads and/or Media, the capacity to supply fifty (50) percent of Heads and/or Media that is required to support the number of 3.5 Inch HDD Products produced from sixteen (16) fully configured Primary Production Lines; provided, however, Respondent shall also reserve the capacity to supply fifty (50) percent of Heads and/or Media that is required to support the number of 3.5 Inch HDD Products produced from

any of the six (6) additional fully configured primary production lines from the Shenzhen Option Assets that are purchased by the Acquirer.

WW. "Re-Work Lines" means re-work production lines used to disassemble HDDs as referenced in Section 1.01(b)(i) of the disclosure schedule to the WD-Toshiba Asset Purchase Agreement.

XX. "Rolling Manufacturing Asset Transfer Date" means the date ten (10) fully configured Primary Production Lines are reserved, after which Respondent may reduce the number of lines on a one-for-one basis as additional lines are qualified as provided in the Transition Services Agreement Schedule 2.01 Part D.

YY. "Shenzhen Facility" means Hitachi's production plant located at 119-121, Block 1, International Commerce Centre, 1001 Honghua Road, Futian Free Trade Zone, Shenzhen, China, used primarily for the manufacture of 3.5 Inch HDDs for use in desktop and consumer electronics including, without limitation, real estate, buildings, warehouses, storage facilities, structures, manufacturing equipment, other equipment, machinery, tools, spare parts, personal property, furniture, fixtures, supplies and other tangible property.

ZZ. "Shenzhen Facility Option Assets" means the following assets as referenced in Schedule 2.10 of the disclosure schedule to the WD-Toshiba Asset Purchase Agreement:

1. the six (6) additional production lines used to manufacture HDDs at the Shenzhen Facility; and

2. the two (2) additional re-work lines used to disassemble HDDs at the Shenzhen Facility. AAA. "Software" means any and all computer programs in both source and object code form, including all modules, routines and sub-routines thereof and all related source and other preparatory materials

including functional specifications and programming specifications, programming languages, algorithms, flow charts, logic diagrams, orthographic representations, file structures, coding sheets, coding and manuals or other documentation related thereto.

BBB. "Supply Cost" means:

1. for 3.5 Inch HDD Products, the transfer price as determined under the 3.5 Inch HDD Products Contract Manufacturing Agreement; or

2. for Heads and/or Media, the price as determined under the 3.5 Inch HDD Products Input Supply Agreement(s).

CCC. "Third Party(ies)" means any non-governmental Person other than Respondent or the Acquirer.

DDD. "Toshiba" means Toshiba Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of Japan, with its headquarters address at 1-1, Shibaura 1-chrome, Minato-Ku, Tokyo 105-8001, Japan. Toshiba America Electronic Components Inc., is a wholly owned subsidiary of Toshiba Corporation, with its principal office at 19900 MacArthur Boulevard, Suite 400, Irvine, California 92612.

EEE. "Toshiba Cross-License Agreement" means the Form of Amended and Restated Patent Cross-License Agreement by and between Toshiba Corporation and Western Digital Technologies, Inc., dated on the Closing Date, and any attachments, amendments, exhibits, and schedules related thereto. This Toshiba Cross-License Agreement is attached to this order and contained in non-public Appendix F.

FFF. "Transfer Period" means the period beginning on the Closing Date and ending on the later of:

1. one (1) year after Closing Date; or

2. the date the Acquirer transfers sixteen (16) Primary Production Lines and such lines have been qualified as provided in the Transition Services Agreement Schedule 2.01 Part D.

GGG. "Transition Services Agreement" means:

1. the Transition Services Agreement by and between Western Digital Corporation and Toshiba Corporation, dated on the Closing Date, and any attachments, amendments, exhibits, and schedules related thereto. This Transition Services Agreement is attached to this order and contained in non-public Appendix G; or

2. any agreement that receives the prior approval of the Commission between Respondent (or a Divestiture Trustee) and an Acquirer for the provision of transition services related to the divestiture of the 3.5 Inch HDD Products Business entered into pursuant to Paragraph II (or Paragraph IV) of this Order, and any attachments, amendments, exhibits, and schedules related thereto.

HHH. "Transition Services Period" means the period beginning on the Closing Date and ending on the later of:

1. the end of the Transfer Period; or

2. if the Acquirer purchases the Shenzhen Facility Option Assets, the date the Acquirer transfers the Shenzhen Facility Option Assets and such lines have been qualified as provided in the Transition Services Agreement Schedule 2.01 Part D.

III. "WD-Toshiba Asset Purchase Agreement" means the Asset Purchase Agreement by and between Western

Digital Corporation and Toshiba Corporation, dated January 20, 2012, and any attachments, amendments, exhibits, and schedules related thereto. This Asset Purchase Agreement is attached to this order and contained in non-public Appendix H.

JJJ. "WD-Toshiba License Agreement" means the Form of Intellectual Property License and Sublicense Agreement by and between Western Digital Technologies, Inc., Hitachi Global Storage Technology Netherlands BV, and Toshiba Corporation, dated on the Closing Date, and any attachments, amendments, exhibits, and schedules related thereto. This WD- Toshiba License Agreement is attached to this order and contained in non-public Appendix I.

II.

IT IS FURTHER ORDERED that:

A. Respondent shall divest, license, transfer and/or grant absolutely, and in good faith, the 3.5 Inch HDD Products Business Assets to Toshiba pursuant to and in accordance with the 3.5 Inch HDD Products Business Divestiture Agreement, the 3.5 Inch HDD Products Patents License, and the 3.5 Inch HDD Products Business Intellectual Property License (which agreements shall not limit or contradict, or be construed to vary from or contradict, the terms of this Order), and each such agreement, if it becomes a Remedial Agreement related to the 3.5 Inch HDD Products Business Assets is incorporated by reference into this Order and made a part hereof, by the earlier of:

1. within five (5) days after Respondent has obtained the prior approval from all Government Entities of the divestiture of the 3.5 Inch HDD Products Business Assets to Toshiba and all related Remedial Agreements; or

2. June 20, 2012;

provided, however, if, at the time the Commission determines to make this Order final, the Commission notifies Respondent that Toshiba is not an acceptable Acquirer of the 3.5 Inch HDD Products Business Assets then Respondent shall immediately rescind the transaction with Toshiba, in whole or in part, as directed by the Commission, and shall divest, license, transfer and/or grant the 3.5 Inch HDD Products Business Assets within six (6) months from date of determination, 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;

provided further, however, that if Respondent has complied with the terms of this Paragraph 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 that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondent or appoint the Divestiture Trustee, to effect such modifications to the manner of divestiture to Toshiba (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. At the Acquirer's option and upon reasonable notice, for the duration of the Manufacturing Period, Respondent shall supply 3.5 Inch HDD Products pursuant to a 3.5 Inch HDD Products Contract Manufacturing Agreement to allow the Acquirer, or a Third Party affiliated with the Acquirer, time sufficient to obtain all necessary Government Entity approvals and transfer the 3.5 Inch HDD Manufacturing Assets to a new location to manufacture in commercial quantities, and in a manner consistent with past

practices, the 3.5 Inch HDD Products independently of Respondent.

C. At the Acquirer's option and upon reasonable notice, for a period of three (3) years from the Closing Date, Respondent shall supply Heads and/or Media, pursuant to a 3.5 Inch HDD Products Input Supply Agreement(s) to allow the Acquirer, or a Third Party affiliated with the Acquirer, time to secure a supply of Heads and/or Media from sources other than Respondent.

D. In accordance with the 3.5 Inch HDD Products Contract Manufacturing Agreement and/or any 3.5 Inch HDD Products Input Supply Agreement, Respondent shall:

1. deliver, in a timely manner and under reasonable terms and conditions, a supply of 3.5 Inch HDD Products, Heads, and/or Media at a price not to exceed Supply Cost;

2. represent and warrant to the Acquirer that Respondent shall hold harmless and indemnify the Acquirer for liabilities resulting from the failure by Respondent to deliver the 3.5 Inch HDD Products, Heads, and/or Media in the following manner:

   a. for 3.5 Inch HDD Products, as specified in the 3.5 Inch HDD Products Contract Manufacturing Agreement Articles VIII through X and Article XIII; and

   b. for Heads and/or Media, as specified in the 3.5 Inch HDD Input Supply Agreements Articles VII through IX and Article XII;

3. give priority to supplying a Reserved Capacity of 3.5 Inch HDD Product, Head, and/or Media to the Acquirer over manufacturing and supplying of products for Respondent's own use or sale;

4. during the term of any 3.5 Inch HDD Products Contract Manufacturing Agreement and/or 3.5 Inch HDD Input Supply Agreement, upon written request of the Acquirer or the Interim Monitor, make available to the Acquirer or the Interim Monitor all records that relate to the manufacture or supply of the 3.5 Inch HDD Products, Heads used in 3.5 Inch HDD Products, and/or Media used in 3.5 Inch HDD Products that are generated or created after the Closing Date; and

5. not seek, pursuant to any dispute resolution mechanism incorporated in any 3.5 Inch HDD Products Contract Manufacturing Agreement and/or 3.5 Inch HDD Input Supply Agreement, a result that would be inconsistent with the terms or the remedial purposes of this Order.

E. Within twenty (20) days of the Closing Date, Respondent shall:

1. submit to the Acquirer, at Respondent's expense, all 3.5 Inch HDD Products Business Records related to the 3.5 Inch HDD Products;

2. deliver, in good faith, such 3.5 Inch HDD Products Business Records to the Acquirer;

   a. in a timely manner, i.e., as soon as practicable, avoiding any delays in transmission of the respective information; and

   b. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;

3. pending complete delivery of all such 3.5 Inch HDD Products Business Records to the Acquirer, provide the Acquirer and the Interim Monitor with access to all such 3.5 Inch HDD Products Business Records 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 3.5 Inch HDD Products that contain such 3.5 Inch HDD Products Business Records and facilitating the delivery in a manner consistent with this Order;

4. not use, directly or indirectly, any Confidential Business Information related to the research, development, manufacturing, marketing, or sale of the 3.5 Inch HDD Products other than as necessary to comply with the following:

   a. the requirements of this Order;

   b. Respondent's obligations to the Acquirer under the terms of any Remedial Agreement related to the 3.5 Inch HDD Products; or c. applicable Law;

5. not disclose or convey any Confidential Business Information, directly or indirectly, to any Person except the Acquirer or other Persons specifically authorized by such Acquirer to receive such information; and

6. not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information related to 3.5 Inch HDD Products to employees associated with Respondent's own 3.5 Inch HDD business;

   provided, however, that Respondent may use any Intellectual Property or Know-How that is conveyed or licensed to Respondent or that Respondent retains the right to use pursuant to any Remedial Agreement; provided further, however, to the extent that the use of such Intellectual Property or Know-How involves disclosure of Confidential Business Information to another Person, such Person must agree to maintain the confidentiality of such Confidential Business

Information under terms and in a manner consistent with the requirements of this Order.

F. Not later than thirty (30) days after the Closing Date, Respondent shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information by Respondent's personnel to all 3.5 Inch HDD Products Business Employee and all 3.5 Inch HDD Products Business Firewalled Employees. Respondent shall:

1. 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;

2. maintain complete records of all such agreements at Respondent's corporate headquarters and provide an officer's certification to the Commission stating that such acknowledgment program has been implemented and is being complied with; and

3. shall provide an Acquirer with copies of all certifications, notifications, and reminders sent to Respondent's personnel.

G. Respondent shall require, as a condition of continued employment post-divestiture of the assets required to be divested pursuant to this Order, that each 3.5 Inch HDD Products Business Firewalled Employee retained by Respondent, the direct supervisor of any such employee, and any other employee retained by Respondent and designated by the Interim Monitor sign a confidentiality agreement pursuant to which such employee shall be required to maintain all Confidential Business Information strictly confidential, including the non- disclosure of such information to any other employee, executive or other personnel of Respondent (other than as necessary to comply with the requirements of this Order).

H. Any 3.5 Inch HDD Products Business Firewalled Employee identified in Paragraph I.K.3, as a condition of continued employment by Respondent, shall be prohibited from working on Respondent's own 3.5 Inch HDD business for a period of six (6) months after such employee ceases to work with the Acquirer.

I. For the duration of the Employee Access Period and within ten (10) days of request by the Acquirer, Respondent shall, to the extent permitted by law, provide to the Acquirer or proposed Acquirer, the following information regarding each 3.5 Inch HDD Products Business Employee whose duties relate to the 3.5 Inch HDD Products Business:

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 the last fiscal year, value of vested and unvested deferred compensation including when any unvested portions are due to vest, 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 option of the Acquirer, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant employees.

J. For the duration of the Employee Access Period, Respondent shall not interfere with the hiring or employing by the Acquirer of the 3.5 Inch HDD Products Business Employees, and shall remove any contractual impediments within the control of Respondents that may deter these employees from accepting employment with the Acquirer, including, but not limited to, any non-compete provisions of employment or other contracts with Respondents that would affect the ability of those individuals to be employed by the Acquirer. In addition, Respondent shall not make any counteroffer to a 3.5 Inch HDD Products Business Employee who receives a written offer of employment from the Acquirer; *provided, however*, this Paragraph shall not prohibit Respondent from continuing to employ any 3.5 Inch HDD Products Business Employee under the terms of such employee's employment with Respondent prior to the date of the written offer of employment from the Acquirer to such employee.

K. Respondent shall provide reasonable financial incentives to the 3.5 Inch HDD Products Business Key Employees as needed to facilitate the employment of such employees by the Acquirer.

L. For a period of one (1) year following the Employee Access Period, Respondent shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any 3.5 Inch HDD Products Business Employee(s) who have accepted offers of employment with the Acquirer to terminate his or her employment relationship with the Acquirer; *provided, however*, a violation of this provision will not occur if: (1) the 3.5 Inch HDD Products Business Employee's employment has been terminated by the Acquirer; (2) Respondent may make general advertisements for employees including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at Acquirer's employees; or (3) a 3.5 Inch HDD Products Business Employee independently

applies for employment with Respondent, as long as such employee was not solicited by Respondent.

M. During the Transition Services Period, Respondent shall provide, at no greater than Direct Cost, assistance from knowledgeable employees of Respondent in the transfer of the 3.5 Inch HDD Products Business Assets from Respondent to the Acquirer in a timely and orderly manner pursuant to a Transition Services Agreement.

N. Until Respondent completes the divestiture required by Paragraph II.A, Respondent:

1. shall take such actions as necessary to:

   a. maintain the full economic viability and marketability of the 3.5 Inch HDD Products Business;

   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 the 3.5 Inch HDD Products Business;

   d. ensure the assets required to be divested are transferred and delivered to the Acquirer in a manner without disruption, delay, or impairment of the 3.5 Inch HDD Products Business; and

2. 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 3.5 Inch HDD Products Business.

O. The purpose of the divestiture of the 3.5 Inch HDD Products Business and the related obligations imposed on Respondent by this Order is:

1. to ensure the continued use of such assets in the research, development, manufacture, and sale of the 3.5 Inch HDD Products within the Geographic Territory; and

2. 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. The Commission may appoint an Interim Monitor to assure that Respondent expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order, the Order to Maintain Assets, and any Remedial Agreement.

B. The Commission appoints ING Financial Markets LLC ("ING") as Interim Monitor and approves the Monitor Agreement between ING and Respondent which agreement, inter alia, names Philip Comerford, Jr., as ING designated Project Manager.

C. No later than one (1) day after the Closing Date, Respondent shall, pursuant to the Monitor Agreement and to this Order, transfer to the Interim Monitor all the rights, powers, and authorities necessary to permit the Interim Monitor to perform their duties and responsibilities in a manner consistent with the purposes of this Order.

D. The Interim Monitor shall serve until the later of (1) the Transition Services Period or (2) the termination of all Respondent's obligations under all Remedial Agreements; *provided, however*, the Commission may

extend or modify this period as may be necessary to accomplish the purposes of this Order and the Order to Maintain Assets.

E. In the event a substitute Interim Monitor is required, 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. Not later than ten (10) days after appointment of a substitute 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 terms of this Order, the Order to Maintain Assets, and the Remedial Agreements in a manner consistent with the purposes of this Order.

F. 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 terms of this Order, the Order to Maintain Assets, and the Remedial Agreements, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of this Order and in consultation with the Commission, including, but not limited to:

   a. assuring that Respondent expeditiously complies with all of its obligations and performs all of its responsibilities as required

by the this Order, the Order to Maintain Assets, and the Remedial Agreements;

b. monitoring any Transition Services Agreement;

c. assuring that Confidential Business Information is not received or used by Respondent or the Acquirer, except as allowed in this Order and in the Order to Maintain Assets, in this matter.

2. the Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.

3. the Interim Monitor shall serve for such time as is necessary to monitor Respondent's compliance with the provisions of this Order, the Order to Maintain Assets, and the Remedial Agreements.

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 this Order, the Order to Maintain Assets, and the Remedial Agreements. Respondent shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondent's compliance with this Order, the Order to Maintain Assets, and the Remedial Agreements.

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. The Interim Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.

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

7. Respondent shall report to the Interim Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondent, and any reports submitted by the Acquirer with respect to the performance of Respondent's obligations under this Order, the Order to Maintain Assets, and the Remedial Agreements.

8. Within one (1) month from the date the Interim Monitor is appointed pursuant to this paragraph, every sixty (60) days thereafter, and otherwise as requested by the Commission, the Interim Monitor shall report in writing to the Commission concerning performance by Respondent of its obligations under this Order, the Order to Maintain Assets, and the Remedial Agreements.

9. Respondent may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; Provided, however, such agreement shall not restrict the Interim Monitor from providing any information to the Commission.

G. 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 Relating To Commission materials and information received in connection with the performance of the Interim Monitor's duties.

H. 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 III.

I. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order, the Order to Maintain Assets, and the Remedial Agreements.

J. An Interim Monitor appointed pursuant to this Order may be the same Person appointed as a trustee pursuant to Paragraph IV of this Order and may be the same Person appointed as Interim Monitor under the Order to Maintain Assets.

IV.

IT IS FURTHER ORDERED that:

A. If Respondent has not divested, absolutely and in good faith and with the Commission's prior approval, all of the 3.5 Inch HDD Products Business Assets pursuant

to Paragraph II of this Order, the Commission may appoint a trustee to divest, license, transfer and/or grant any of the 3.5 Inch HDD Products Business Assets that have not been divested pursuant to Paragraph II of this Order in a manner that satisfies the requirements of Paragraph II of this Order. In the event that the Commission or the Attorney General brings an action pursuant to Section 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 trustee in such action to divest the relevant assets in accordance with the terms of this Order. Neither the appointment of a trustee nor a decision not to appoint a 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 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 trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The 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 trustee within ten (10) days after receipt of notice by the staff of the Commission to Respondent of the identity of any proposed trustee, Respondent shall be deemed to have consented to the selection of the proposed trustee.

C. Within ten (10) days after appointment of a trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestitures required by this Order.

D. If a trustee is appointed by the Commission or a court pursuant to this Order, Respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest any of the 3.5 Inch HDD Products Business Assets that have not been divested pursuant to Paragraph II of this Order.

2. the trustee shall have twelve (12) months from the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the trustee has submitted a divestiture plan 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 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 trustee may request. Respondent shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent shall extend the time for divestiture under this Paragraph IV in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

4. the trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer or Acquirers that receives the prior approval of the Commission, as required by this Order; *provided, however*, if the trustee receives bona fide offers for particular assets from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity for such assets, the trustee shall divest the assets to the acquiring entity selected by Respondent from among those approved by the Commission; *provided further, however*, that Respondent shall select such entity within five (5) days of receiving notification of the Commission's approval.

5. the 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 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 trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for the trustee's services, all remaining monies shall be paid at the direction of Respondent, and the trustee's power shall be terminated. The compensation of the 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 trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

7. the trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.

8. the trustee shall report in writing to Respondent and to the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestiture.

9. Respondent may require the trustee and each of the trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the trustee from providing any information to the Commission.

E. If the Commission determines that a trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in this Paragraph IV.

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 trustee issue such additional orders or

directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

G. The trustee appointed pursuant to this Paragraph may be the same Person appointed as the Interim Monitor pursuant to the relevant provisions of this Order or the Order to Maintain Assets.

V.

IT IS FURTHER ORDERED that:

A. Within five (5) days after the Acquisition Date, Respondent shall submit to the Commission a letter certifying the date on which the Acquisition occurred.

B. Respondent shall submit to the Commission and, if appointed, the Interim Monitor, a verified written report setting forth in detail the manner and form in which it intends to comply, are complying, and have complied with this Order:

1. within thirty (30) days after the date this Order becomes final;

2. every thirty (30) days thereafter until Respondent has fully divested, licensed, transferred and/or granted the 3.5 Inch HDD Products Business Assets to an Acquirer; and

3. every six (6) months thereafter so long as Respondent has a continuing obligation under this Order and/or the Remedial Agreements to render services to the Acquirer.

C. One (1) year from the date this Order becomes final, and annually for the next nine (9) years thereafter on the anniversary of the date this Order becomes final, Respondent shall submit to the Commission verified written reports setting forth in detail the manner and form in which it is complying and has complied with

this Order, the Order to Maintain Assets, and the Remedial Agreements. Respondent shall submit at the same time a copy of these reports to the Interim Monitor.

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 that may affect compliance obligations arising out of this Order, including but not limited to assignment, the creation or dissolution of subsidiaries, or any other change in Respondent.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent, Respondent shall permit any duly authorized representative of the Commission:

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

B. upon five (5) days' notice to Respondent and without restraint or interference from Respondent, to interview

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

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on May 7, 2023.

By the Commission, Commissioner Ohlhausen not participating and Commissioner Wright recused.

CONFIDENTIAL APPENDIX A

3.5 INCH HDD PRODUCTS CONTRACT MANUFACTURING AGREEMENT

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

CONFIDENTIAL APPENDIX B

3.5 Inch HDD Products Business Key Employees

[Redacted from the Public Record Version, But Incorporated by Reference]

CONFIDENTIAL APPENDIX C

Heads Supply Agreement

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

CONFIDENTIAL APPENDIX D

Media Supply Agreement

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

CONFIDENTIAL APPENDIX E

Monitor Agreement

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

CONFIDENTIAL APPENDIX F

Toshiba Cross-License Agreement

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

CONFIDENTIAL APPENDIX G

Transition Services Agreement

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

CONFIDENTIAL APPENDIX H

WD-Toshiba Asset Purchase Agreement

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

CONFIDENTIAL APPENDIX I

WD-Toshiba License 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 from Western Digital Corporation ("Western Digital"), subject to final approval, an Agreement Containing Consent Order ("Consent Agreement"), designed to remedy the likely anticompetitive effects resulting from Western Digital's proposed acquisition of Viviti Technologies Ltd., formerly known as Hitachi Global Storage Technologies Ltd. ("HGST"), a wholly-owned subsidiary of Hitachi, Ltd. ("Hitachi")

Pursuant to an agreement dated March 7, 2011, Western Digital intends to acquire HGST from Hitachi for approximately $4.5 billion in cash and Western Digital stock. The proposed merger would result in a merger to duopoly in the market for 3.5 inch hard disk drives used in desktop computers ("desktop HDDs"). The Commission's Complaint alleges that the proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening competition in the market for desktop HDDs.

The Consent Agreement remedies the alleged violation by replacing the lost competition in the desktop HDD market that would result from the proposed acquisition. Under the terms of the Consent Agreement, Western Digital will divest to Toshiba Corporation ("Toshiba") all of the assets relating to the manufacture and sale of desktop HDDs necessary to replicate HGST's position in the desktop HDD business. The Consent Agreement requires Western Digital to provide Toshiba with access to employees involved in the research, development, and production of desktop HDDs, cross license all intellectual property necessary to manufacture and sell desktop HDDs, and to supply Toshiba with up to 50 percent of certain critical components needed for the divested business. In addition, the Consent Agreement requires Western Digital to contract manufacture desktop HDDs for Toshiba at cost until Toshiba is able to manufacture these products on its own.

The 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 Consent Agreement and the comments received, and will decide whether it should withdraw from the Consent Agreement, modify it, or make final the accompanying Decision and Order.

II. The Products and Structure of the Market

HDDs are key inputs into computers and other electronic devices used to store and allow fast access to data. HDDs are used in various end-use applications including desktop and mobile computers, and in enterprise computing applications.

The relevant line of commerce in which to analyze the effects of the Acquisition is desktop HDDs. Desktop HDDs are utilized in non-portable desktop or tower personal computers. Consumers of these products demand HDDs with the highest available capacity at the lowest price per gigabyte. Desktop HDDs are the only HDDs that meet these specifications. As a result, customers would likely not switch to a different kind of HDD in response to a five to ten percent increase in the price of desktop HDDs in sufficient numbers to make that price increase unprofitable for a hypothetical monopolist.

The relevant geographic market for desktop HDDs is worldwide. Most HDDs, including desktop HDDs, are manufactured in Asia and are shipped to customers worldwide. Also, most large customers negotiate the purchase price of desktop HDDs at a global level.

The desktop HDD market is highly concentrated, with three manufacturers currently in the market. After Western Digital's acquisition of HGST, Western Digital's market share would increase to approximately 50 percent, and the number of suppliers of desktop HDDs would decrease from three to two.

III. Entry

Neither new entry nor repositioning and expansion sufficient to deter or counteract the likely anticompetitive effects of the proposed acquisition in the desktop HDD market is likely to occur. Deterrents to entry into the desktop HDD market include high capital expenditures and intellectual property barriers. Because the market for desktop HDDs is mature with limited growth potential, it is unlikely that a potential competitor would have the incentive to make the substantial investments necessary to enter this market.

IV. Effects of the Acquisition

The proposed acquisition likely would result in anticompetitive effects in the market for desktop HDDs. The structure and characteristics of this highly concentrated and mature market, where competitors sell largely homogenous products and have substantial insight into their competitors' price and output levels, suggests that the two remaining firms in the market would likely find it possible and profitable to coordinate on pricing or output. In addition, HDD customers generally wish to have at least three suppliers available to them. The fact that customers have a strong desire to source their desktop HDD purchases from several suppliers simultaneously in order to obtain competitive pricing and adequate supply suggests that the transaction could result in unilateral effects as well.

V. The Consent Agreement

The Consent Agreement resolves the competitive concerns raised by Western Digital's proposed acquisition of HGST by requiring the divestiture of HGST's assets relating to the manufacture and sale of desktop HDDs to Toshiba. This divestiture must occur within fifteen days after the acquisition but may be extended an additional fifteen days, if necessary, to allow for regulatory approval in other jurisdictions.

Toshiba has the industry experience, reputation, and resources to replace HGST as an effective competitor in the desktop HDD market. Headquartered in Tokyo, Japan, Toshiba is a diversified

manufacturer and marketer of advanced electronic and electrical products spanning digital consumer products, electronic devices and components, power systems, industrial and social infrastructure systems, and home appliances. Toshiba does not currently compete against Western Digital or HGST in the sale of desktop HDDs, but it does manufacture HDDs for use in mobile and enterprise applications. Because Toshiba has extensive experience manufacturing these other types of HDDs, and has a worldwide infrastructure for the research, development, and sale of desktop HDDs, Toshiba is well-positioned to replace the competition that will be eliminated as a result of the proposed transaction.

Pursuant to the Consent Agreement, Toshiba would receive all of the assets necessary to replicate HGST's market position in the desktop HDD business, including sixteen desktop HDD production lines, representing the capacity to produce more than twenty million desktop HDD units per year, along with the product designs for HGST's most recent and advanced desktop HDD products. The Consent Agreement further requires Western Digital to provide Toshiba with access to HGST and/or Western Digital employees involved in the research, development, and production of desktop HDDs. In addition, the Consent Agreement also requires Western Digital to cross license all intellectual property necessary to manufacture and sell desktop HDDs and to supply Toshiba with up to 50 percent of certain critical components needed for the divested business. The Consent Agreement also requires Western Digital to contract manufacture desktop HDDs for Toshiba at cost until Toshiba is able to manufacture these products on its own. A divestiture of HGST's desktop HDD assets to Toshiba will enable Toshiba to compete immediately with the merged entity.

The Commission has appointed Phillip Comerford, Jr., Managing Director and Head of the Mergers & Acquisitions Group of ING Capital LLC, as Interim Monitor to oversee the divestiture of the desktop HDD assets. In order to ensure that the Commission remains informed about the status of the proposed divestiture, the Consent Agreement requires the parties to file periodic reports with the Commission until the divestiture is accomplished.

If, after the public comment period, the Commission determines that Toshiba is not an acceptable acquirer of the assets to be divested, or that the manner of the divestiture is not acceptable, Western Digital must unwind the divestiture and divest the assets within 180 days of the date the Order becomes final to another Commission-approved acquirer. If Western Digital 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 Consent Agreement, and it is not intended to constitute an official interpretation of the Consent Agreement or to modify its terms in any way.

STATEMENT OF THE COMMISSION

After a thorough investigation the Federal Trade Commission has challenged Western Digital Corporation's ("Western Digital") proposed acquisition of Viviti Technologies Ltd., formerly known as Hitachi Global Storage Technologies ("HGST"). This challenge comes several months after the Federal Trade Commission closed its investigation of Seagate Technology LLC's ("Seagate") acquisition of Samsung Electronics Co. Ltd.'s hard disk drive assets ("Samsung"). The two proposed transactions were announced within weeks of each other, and both had potential implications for competition in the same product markets. Commission staff reviewed both matters at the same time in order to understand the effects on competition resulting from each transaction on its own, as well as the cumulative effect on the relevant markets if both transactions were allowed to be consummated.

The evidence gathered in the Commission's investigation revealed that the relevant product markets in which to assess the competitive impact of the proposed transactions are based on specific end-uses for hard disk drives ("HDDs") -- such as desktop, notebook, and enterprise – because product features, pricing, and competition differ by end-use applications. For many of these end-uses, we did not have reason to believe that the proposed transactions would result in effects that would have justified a challenge. In the 3.5 inch desktop HDD ("desktop HDD") market, however, we had reason to believe the consummation of both of these acquisitions would result in likely anticompetitive effects. The Commission came to this conclusion based on the evidence from interviews with market participants, testimony of the parties' executives, and documents produced by the parties and other industry participants.

The Commission determined after its investigation that there were significant differences between the competitive implications of the two proposed mergers. Since in each case the acquiring firm was a strong competitor, attention turned to the characteristics of the two firms that were to be acquired in these proposed transactions – HGST and Samsung. Based on this analysis, it was clear that an independent HGST was much more

likely to be an effective competitive constraint in the desktop HDD market than would an independent Samsung.

In particular, HGST has been a strong, high quality and innovative competitor in the desktop HDD market. Moreover, HGST has been identified by a number of industry participants as a key driver of aggressive price competition in the desktop HDD market in 2010, and was well-positioned to grow its desktop HDD business in the near future. In contrast, Samsung had struggled to be competitive in the desktop HDD market. In a market for desktop HDDs containing only Western Digital, HGST, and the combined Seagate/Samsung entity, HGST would retain the ability and incentive to act as an effective constraint on desktop HDD pricing. By contrast, Samsung would be less likely to serve as a meaningful constraint on pricing in a desktop HDD market consisting of Western Digital/Hitachi, Seagate, and Samsung. Based on these considerations, the Commission made the decision to challenge the Western Digital/HGST transaction while clearing the Seagate/Samsung transaction, and to preserve the competitiveness of the desktop HDD market by requiring Western Digital to divest HGST's desktop HDD assets to Toshiba Corporation under the terms of a proposed Consent Agreement.

As we have explained in other cases, each merger that comes before the Commission is investigated and considered based on the particular facts presented. These investigations bear out the assertion in our Horizontal Merger Guidelines that our review of mergers "is a fact-specific process through which the Agencies, guided by their extensive experience, apply a range of analytical tools to the reasonably available and reliable evidence to evaluate competitive concerns in a limited period of time."[1]

In addition to the scrutiny they have received from the Commission, many other antitrust enforcement agencies investigated these mergers. Commission staff cooperated with agencies in Australia, Canada, China, the European Union, Japan, Korea, Mexico, New Zealand, Singapore, and Turkey, and worked closely with the agencies' investigative teams on the

[1] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 1 (2010), *available at* http://www.ftc.gov/os/2010/08/100819hmg.pdf.

timing of review, substantive analyses, and potential remedies, during the pendency of these investigations. This close cooperation with foreign antitrust enforcers helped ensure an outcome that benefited consumers in the United States.

Complaint

IN THE MATTER OF

CHARLOTTE PIPE AND FOUNDRY COMPANY
AND
RANDOLPH HOLDING COMPANY LLC

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

Docket No. C-4403; File No. 111 0034
Complaint, May 9, 2013 – Decision, May 9, 2013

This consent order addresses allegations that the 2010 purchase by Charlotte Pipe and Foundry Company of Star Pipe Products, Inc.'s cast iron soil pipe ("CISP") business was anticompetitive. CISP products are used throughout domestic pipeline systems to transport wastewater from buildings to municipal sewage systems, to vent plumbing systems, and to transport rainwater to storm drains. According to the complaint, Charlotte Pipe is one of the largest producers and sellers of CISP products in the United States. The complaint alleges that the acquisition eliminated Star Pipe as the "maverick" firm and enabled Charlotte Pipe to raise prices for CISP products to its consumers. The consent order requires Charlotte Pipe to provide the Commission with prior notification of any acquisitions of any entity engaged in the manufacture or sale of CISP products in the United States. The consent order further prohibits Charlotte Pipe from enforcing a confidentiality and non-compete agreement with Star Pipe and requires Charlotte Pipe to disclose publicly its prior acquisitions of other CISP importers.

Participants

For the *Commission*: *William L. Lanning* and *Tejasvi Srimushnam*.

For the *Respondents*: *Mark W. Merritt*, *Robinson Bradshaw & Hinson, P.A.*

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 respondents Charlotte Pipe and Foundry Company (hereinafter "CP&F"), and its wholly-owned subsidiary, Randolph Holding Company, L.L.C. (hereinafter

"Randolph") (hereinafter jointly referred to as "Charlotte Pipe" or "Respondents"), entered into a transaction with Star Pipe Products, Ltd. (hereinafter "Star Pipe"), in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. NATURE OF THE CASE

1. This action concerns Charlotte Pipe's acquisition of the cast iron soil pipe products business of Star Pipe in a transaction that was not required to be reported to the Commission under the Hart-Scott-Rodino Act, as amended, 15 U.S.C. § 18a. At the time of the transaction, Star Pipe was one of Charlotte Pipe's chief rivals in the cast iron soil pipe products industry in the United States.

II. RESPONDENTS CHARLOTTE PIPE AND FOUNDRY COMPANY AND RANDOLPH HOLDING COMPANY

2. Charlotte Pipe and Foundry Company is a privately-held corporation organized, existing, and doing business under and by virtue of the laws of the State of North Carolina with its principal place of business located at 2109 Randolph Road, Charlotte, NC 28207. Charlotte Pipe is one of the largest producers and sellers of cast iron soil pipe products in the United States.

3. Randolph Holding Company is a wholly-owned subsidiary of CP&F, and is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its principal place of business located at 2109 Randolph Road, Charlotte, NC 28207. Randolph Holding Company, acting on behalf of its corporate parent, executed the Asset Purchase Agreement described herein as the "Buyer" of certain assets of Star Pipe's cast iron soil pipe products business. Randolph Holding Company also executed the "Confidentiality and Non-Competition Agreement" described herein.

4. Prior to acquiring the assets of Star Pipe's cast iron soil pipe products business, Charlotte Pipe acquired the cast iron soil pipe product assets of several other competitors in non- reportable transactions, including Matco- Norca in 2009, DWV Casting Company in 2004, and Richmond Foundry, Inc., in 2002.

III. THE ACQUIRED COMPANY

5. Star Pipe Products, Ltd. is a privately-held corporation organized, existing and doing business under and by virtue of the laws of the State of Texas with its principal place of business located at 4018 Westhollow Parkway, Houston, Texas 77082. Star Pipe imports, markets, and sells in the United States, among other things, ductile iron pipe fittings. Prior to the acquisition, Star Pipe imported, manufactured, and sold cast iron soil pipe products in direct competition with Charlotte Pipe. Star Pipe entered the domestic cast iron soil pipe products market in 2007. Between 2007 and 2010, Star Pipe expanded its sales throughout the United States.

IV. THE CAST IRON SOIL PIPE PRODUCTS INDUSTRY

6. Cast iron soil pipe products are a component of pipeline systems used in buildings to transport wastewater to the sewer system, to vent the plumbing system, and to transport rainwater to storm drains.

7. Cast iron soil pipe products are primarily used in the construction of commercial, industrial, and multi-story residential buildings where local or state building codes require its use.

8. Manufacturers and importers of cast iron soil pipe products sell to independent wholesale distributors for re-sale to end users. The end users of cast iron soil pipe products are typically construction firms, mechanical engineering firms, plumbers, and developers.

V. JURISDICTION

9. Respondent CP&F, Respondent Randolph, and Star Pipe are, and at all times relevant herein have been, engaged in

commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and are corporations whose businesses are in or affect commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

VI. THE TRANSACTION

10. In July 2010, Charlotte Pipe executed an Asset Purchase Agreement with Star Pipe to acquire the assets of Star Pipe's cast iron soil pipe products business for approximately $19 million. Pursuant to the agreement, Charlotte Pipe purchased, among other things, Star Pipe's inventory, its production equipment located in China, its business records, and its customer list. After the acquisition, Charlotte Pipe destroyed the cast iron soil pipe production equipment that it acquired from Star Pipe.

11. The parties to the transaction also executed a "Confidentiality and Non-Competition Agreement" that prohibited Star Pipe and certain Star Pipe employees from competing with Charlotte Pipe in the manufacture and sale of cast iron soil pipe products in the United States, Mexico, and Canada for a period of six years. Star Pipe also agreed to keep the transaction confidential and to send to its customers a letter indicating that it had decided to exit the cast iron soil pipe products business.

VII. THE RELEVANT PRODUCT MARKET

12. For purposes of this Complaint, the relevant line of commerce within which to analyze the effects of the transaction is the market for the sale of cast iron soil pipe products for use in commercial, industrial, and multi-story residential buildings in the United States. Plastic pipe is not a viable substitute for cast iron soil pipe products because many state and local building codes in the United States require the use of cast iron soil pipe products in commercial, industrial, and multi-story residential buildings.

VIII. THE RELEVANT GEOGRAPHIC MARKET

13. For purposes of this Complaint, the relevant geographic market within which to analyze the effects of the transaction is no broader than the United States, and may contain smaller geographic markets consisting of states, multi-state regions, or metropolitan areas.

IX. MARKET STRUCTURE

14. The relevant markets are highly concentrated. At the time of the transaction, two firms, Charlotte Pipe and McWane Inc., sold in excess of ninety percent of the cast iron soil pipe products in the United States. Companies that sell imported cast iron soil pipe products accounted for the remaining sales. Star Pipe was the largest of the importers, acting as a disruptive force in contested markets, competing on price and service to the benefit of customers.

X. CONDITIONS OF ENTRY

15. Entry into the relevant markets 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.

XI. EFFECTS OF THE AGREEMENT

16. The effect of the agreement has been a substantial lessening of competition in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45. Specifically, the agreement has:

a. eliminated actual, direct, and substantial competition between Charlotte Pipe and Star Pipe in the relevant markets;

b. substantially increased the level of concentration in the relevant markets;

c. eliminated a maverick firm;

d. increased the ability of Charlotte Pipe unilaterally to exercise market power; and

e. prevented Star Pipe and certain Star Pipe employees from re-entering the cast iron soil pipe products market for a period of six years.

XII. VIOLATIONS CHARGED

17. The allegations contained in Paragraphs 1 through 16 above are hereby incorporated by reference as though fully set forth here.

18. The transaction described in Paragraphs 10 and 11 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 ninth day of May, 2013, issues its Complaint against said Respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of certain acts and practices of Charlotte Pipe and Foundry Company ("Charlotte Pipe"), and its wholly-owned subsidiary, Randolph Holding Company, LLC, ("Randolph"), hereinafter referred to jointly as "Respondents," including the acquisition of certain assets of Star Pipe Products, Ltd., 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, would charge Respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and Section 7 of the Clayton Act, 15 U.S.C. § 18, and

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

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

1. Respondent Charlotte Pipe and Foundry Company, is a corporation organized, existing, and doing business

under and by virtue of the laws of the State of North Carolina with its principal place of business located at 2109 Randolph Road, Charlotte, NC 28207.

2. Respondent Randolph Holding Company, LLC is a wholly-owned subsidiary of Charlotte Pipe and is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its principal place of business located at 2109 Randolph Road, Charlotte, NC 28207.

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

ORDER

I.

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

A. "Charlotte Pipe" means Charlotte Pipe and Foundry Company, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries (including Randolph), divisions, groups and affiliates controlled by Charlotte Pipe and Foundry Company, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Randolph" means Randolph Holding Company, LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Randolph Holding Company, LLC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Star Pipe" means Star Pipe Products, Ltd., a limited partnership organized and existing under the laws of the State of Texas, with its office and principal place

of business located at 4018 Westhollow Parkway, Houston, Texas 77082, and includes its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Star Pipe Products, Ltd., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Commission" means the Federal Trade Commission.

E. "Asset Purchase Agreement" means the acquisition agreement between Randolph and Star Pipe executed on or about July 14, 2010.

F. "Cast Iron Soil Pipe Products" means cast iron soil pipe and cast iron soil pipe fittings, made primarily from recycled scrap iron or pig iron, which are used to transport wastewater to sewer systems, to vent building plumbing systems, and/or to transport rainwater to storm drains.

G. "Confidentiality and Non-Competition Agreement" means each agreement entered into by Star Pipe and Randolph, by the general partners of Star Pipe and Randolph, and by each employee of Star Pipe and Randolph, as a condition to closing the transaction contemplated by the "Asset Purchase Agreement."

H. "Charlotte Pipe Distributor" means any Person to whom Charlotte Pipe has sold Cast Iron Soil Pipe Products having a wholesale value exceeding $35,000 during calendar year 2012.

I. "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.

J. "Person" means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, or other business or legal entity.

II.

IT IS FURTHER ORDERED that Respondents shall not, without providing advance written notification to the Commission in the manner described in this Paragraph II, directly or indirectly, acquire:

A. Any stock, share capital, equity, or other interest in any Person, corporate or otherwise, other than Charlotte Pipe, that produces or manufactures Cast Iron Soil Pipe Products that are sold in or into the United States; or

B. Any assets that are used in, or that were used during the six (6) month period prior to the acquisition in the production or manufacture of Cast Iron Soil Pipe Products that are sold 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 and a contemporaneous copy with the Bureau of Competition's Compliance Division, 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 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 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.

III.

IT IS FURTHER ORDERED that:

A. Respondents shall not enforce any provisions of the "Confidentiality and Non- Competition Agreement" against any signatory to that agreement.

B. Charlotte Pipe shall:

1. Within two (2) days after the date this Order became final, Distribute to each signatory of the "Confidentiality and Non-Competition Agreement," the letter attached as Appendix A to this Order; and

2. Within seven (7) days from the date this Order becomes final, certify that Charlotte Pipe has Distributed to each signatory of the "Confidentiality and Non- Competition Agreement," the letter attached as Appendix A to this Order, as required by this Paragraph III.B1.

The purpose of this Paragraph III is to ensure that Star Pipe, and any former or current employee of Star Pipe, can manufacture, import, distribute, or sell Cast Iron Soil Pipe Products in competition with Respondents, and to remedy the lessening of competition alleged in the Commission's Complaint.

IV.

IT IS FURTHER ORDERED that Respondents shall:

A. Within thirty (30) days after the date this Order becomes final, distribute to each member of the Board of Directors of Charlotte Pipe a copy of this Order and the Complaint issued by the Commission, and the letter attached as Exhibit A to this Order;

B. For a period of five years from the date this Order becomes final:

1. Publish on the official web site of Charlotte Pipe a copy of this Order, the Complaint issued by the Commission, the Commission's press release regarding this Order, and the letter attached as Exhibit B to this Order as a link from Charlotte Pipe's home or menu page, entitled "Federal Trade Commission Order Regarding Star Pipe Acquisition," in the same size and font as other menu items;

2. Assure that the Order can be accessed through common search terms and archives on the web site; and

3. Distribute this Order and the Complaint to each person who becomes an officer or member of the Board of Directors of Charlotte Pipe within (30) days of the date that he or she becomes an officer, director, or member of the Board of Directors.

V.

IT IS FURTHER ORDERED that:

A. No later than sixty (60) days after the date the Order becomes final, Respondents shall:

1. Distribute a copy of this Order, the Complaint, and the letter attached as Exhibit B to this Order, to each Charlotte Pipe Distributor.

2. Submit to the Commission a verified written report setting forth in detail the manner and form in which Respondents have complied, are complying, and will comply with this Order. Such report shall include, but not be limited to:

   a. The name and business address of each member of the Board of Directors of Charlotte Pipe to whom Respondents sent a copy of this Order and the Complaint, and a copy of the return receipt or return confirmation received from each; and

   b. The name and business address of each Charlotte Pipe Distributor to whom Respondents sent a copy of this Order, the Complaint, and the letter attached as Exhibit B to this Order, and a copy of the return receipt or return confirmation received from each; and

   c. A description of any other action taken by Respondents to comply with this Order.

B. Beginning twelve (12) months after the date this Order becomes final, and annually thereafter on the anniversary of the date this Order becomes final, for the next five (5) years, and at such other times as the Commission requests, Respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they are complying and have complied with this Order. For the periods covered by these reports, these reports shall include, but not be limited to:

1. The name and business address of each member of the Board of Directors of Charlotte Pipe to whom Respondents sent a copy of this Order and the

Complaint, who did not previously receive them, and a copy of the return receipt or return confirmation received from each; and

2. A description and explanation, in reasonable detail, of the actions taken by Respondents with regard to Paragraph IV.B of this Order; and

3. A copy of the return receipt or return confirmation from any Charlotte Pipe Distributor not previously submitted; and

4. A description of any other action taken by Respondents to comply with this Order.

VI.

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

A. Any proposed dissolution of such Respondent;

B. Any proposed acquisition, merger, or consolidation of such Respondent; or

C. Any other change in such 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 the purpose of determining or securing compliance with this order, upon written request, each Respondent shall permit any duly authorized representative of the Commission:

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

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on May 9, 2023.

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission" or "FTC") has accepted, subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") from Charlotte Pipe and Foundry Company (hereinafter "CP&F") and its wholly-owned subsidiary, Randolph Holding Company, L.L.C. (hereinafter "Randolph") (hereinafter jointly referred to as "Charlotte Pipe" or "Respondents"). The purpose of the Consent Agreement is to address the anticompetitive effects resulting from Charlotte Pipe's 2010 acquisition (the "Acquisition") of the cast iron soil pipe ("CISP") business of Star Pipe Products, Ltd. ("Star Pipe"). The parties to that transaction also entered a "Confidentiality and Non-Competition Agreement." The Acquisition was not reportable under the Hart-Scott-Rodino Antitrust Improvement Act of 1976, 15 U.S.C. 18a ("HSR Act"). The administrative complaint ("Complaint") alleges that the Acquisition violated Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

Under the terms of the proposed Consent Agreement, Charlotte Pipe is: required to provide prior notification to the FTC, for a period of ten years, of an acquisition of any entity engaged in the manufacture and sale of CISP products in or into the United States; prohibited from enforcing the "Confidentiality and Non-Competition Agreement" against Star Pipe; and required to inform its customers and the public of the Acquisition and other transactions involving other CISP competitors.

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

The purpose of this Analysis to Aid Public Comment is to invite and facilitate public comment. It is not intended to constitute an official interpretation of the proposed Consent

Agreement and the accompanying Decision and Order or in any way to modify their terms.

The Consent Agreement is for settlement purposes only and does not constitute an admission by Charlotte Pipe that the law has been violated as alleged in the Complaint or that the facts alleged in the Complaint, other than jurisdictional facts, are true.

I. The Complaint

The Complaint makes the following allegations.

A. The Respondents

CP&F is a privately-held corporation with its principal place of business located at 2109 Randolph Road, Charlotte, NC 28207. CP&F is one of the largest producers and sellers of CISP products in the United States.

Randolph is a wholly-owned subsidiary of CP&F. Randolph, acting on behalf of CP&F, executed both the Acquisition agreement as the "Buyer" of Star Pipe's CISP business and the "Confidentiality and Non-Competition Agreement" referenced herein.

B. The Product and Structure of the Market

CISP products are components of pipelines systems used in buildings to transport wastewater to the sewer system, to vent the plumbing system, and to transport rainwater to storm drains. The end-users of CISP products are construction firms, plumbers, or developers.

The relevant line of commerce within which to analyze the effects of the Acquisition is the market for the sale of CISP products for use in commercial, industrial, and multi-story residential buildings in the United States. Plastic products are not a viable substitute for CISP products because state and local building codes in the United States generally require the use of CISP products in commercial, industrial, and multi-story residential buildings.

The relevant geographic market within which to analyze the effects of the Acquisition is no broader than the United States, and may contain smaller geographic markets consisting of states, multi-state regions, or metropolitan areas.

The United States CISP products market is highly concentrated. At the time of the Acquisition, two firms, Charlotte Pipe and McWane Inc., sold in excess of ninety percent of the CISP products in the United States. Companies that sell imported CISP products, including Star Pipe, accounted for the remaining sales.

C. Star Pipe and the Acquisition

In 2007, Star Pipe entered the United States CISP products market. Between 2007 and 2010, Star Pipe expanded its sales base throughout the United States. In contested markets, Star Pipe acted as a disruptive force, competing on price and service to the benefit of consumers.

In July 2010, Charlotte Pipe executed an Asset Purchase Agreement with Star Pipe to acquire the assets of Star Pipe's CISP business for approximately $19 million. Pursuant to the agreement, Charlotte Pipe purchased, among other things, Star Pipe's inventory, its production equipment located in China, and its business records and customer list. The parties to the agreement also executed a "Confidentiality and Non-Competition Agreement" that prohibited Star Pipe and certain Star Pipe employees from competing with Charlotte Pipe in the United States, Mexico, and Canada for a period of six years. In addition, Star Pipe agreed to keep the Acquisition confidential and to send to its customers a letter indicating that it had decided to the exit the CISP business. After the Acquisition, Charlotte Pipe destroyed the CISP production equipment that it acquired from Star Pipe.

D. Conditions of Entry

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.

E. Effects

The effects of Charlotte Pipe's acquisition of Star Pipe's CISP business have been a substantial lessening of competition in the relevant markets. Specifically, the Acquisition has: eliminated actual, direct, and substantial competition between Charlotte Pipe and Star Pipe in the relevant markets; substantially increased the level of concentration in the relevant markets; eliminated a maverick firm; increased the ability of Charlotte Pipe unilaterally to exercise market power; and prevented Star Pipe and certain Star Pipe employees from re-entering the CISP products market for a period of six years.

II. The Proposed Order

Paragraph II of the Proposed Order requires Charlotte Pipe to provide prior notification to the Commission of an acquisition of any entity engaged in the manufacture and sale of CISP products in or into the United States. This paragraph also requires Charlotte Pipe to comply with premerger notification procedures and waiting periods similar to those found in the HSR Act.

This provision is necessary because Charlotte Pipe has previously acquired several firms in the CISP products market in non-reportable transactions. The Proposed Order affords the Commission an appropriate mechanism to review all proposed acquisitions by Charlotte Pipe in the CISP products market to guard against future anticompetitive transactions.

Paragraph III of Proposed Order prevents Charlotte Pipe from enforcing the Confidentiality and Non-Competition Agreement. This frees Star Pipe, and its current and former employees, to enter and compete against Charlotte Pipe in the United States, Canada, or Mexico.

Paragraphs IV-VII impose reporting and other compliance requirements. In particular, Charlotte Pipe is required to send a letter to its customers and to maintain a link on its website relating to the Acquisition and Charlotte Pipe's other non-reportable transactions, including Matco-Norca in 2009, DWV Casting

Company ("DWV") in 2004, and Richmond Foundry, Inc. ("Richmond Foundry") in 2002. This provision is appropriate because Charlotte Pipe's confidential acquisitions are not widely known in the CISP industry and have given rise to a perception among distributors and end-users that importers of CISP products are transient and unreliable operations. The proposed order serves to inform market participants about Charlotte Pipe's role in the exit of Star Pipe, Matco-Norca, DWV, and Richmond Foundry from the CISP industry.

The Proposed Order will expire in 10 years.

Complaint

IN THE MATTER OF

BOSLEY, INC,
ADERANS AMERICA HOLDINGS, INC.
AND
ADERANS CO., LTD.

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

Docket No. C-4404; File No. 121 0184
Complaint, May 30, 2013 – Decision, May 30, 2013

This consent order addresses allegations that Bosley, Inc. illegally exchanged competitively sensitive, nonpublic information about its business practices with one of its competitors, HC (USA), Inc. ("Hair Club"), in violation of Section 5 of the Federal Trade Commission Act. According to the complaint, the CEOs of Bosley and Hair Club exchanged information regarding future product offerings, surgical hair transplantation price floors and discounts, plans for business expansion and contraction, and current business operations and performance for at least four years. These communications predated discussions between the respondents regarding the acquisition of Hair Club by Bosley's parent entity, Aderans Co., Ltd. The consent order bars Bosley from communicating competitively sensitive, nonpublic information directly to any hair transplantation competitor. It also bars Bosley from requesting, encouraging, or facilitating the communication of any such information from any of its competitors. Additionally, the consent order requires Bosley to institute a program to ensure that it complies with federal antitrust laws in the future and to submit periodic compliance reports to the Commission.

Participants

For the *Commission*: *Rebecca P. Dick, Mara M. Grobins, Marc S. Lanoue, Ashley Masters, Justin Stewart-Teitelbaum,* and *Michelle A. Wyant*.

For the *Respondents*: *Rebecca A.D. Nelson and Daniel Schwartz, Bryan Cave LLP*.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41, et seq., and by virtue of the authority vested in it by said Act, the Federal Trade Commission

("Commission"), having reason to believe that Bosley, Inc. and HC (USA), Inc. have violated the provisions of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges as follows:

NATURE OF THE CASE

1. Bosley, Inc. ("Bosley") and HC (USA), Inc. ("Hair Club") specialize in the management of medical/surgical hair restoration practices, including providing input on pricing. Bosley and Hair Club have national brand recognition and nationwide geographic footprints. Over a period of several years, Bosley and Hair Club executive officers repeatedly exchanged competitively sensitive, nonpublic information about their respective organizations. These discussions facilitated coordination and endangered competition between the companies in violation of Section 5 of the Federal Trade Commission Act.

PRELIMINARY ALLEGATIONS

2. Respondent Bosley is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware. Its corporate headquarters are located at 9100 Wilshire Blvd., East Penthouse, Beverly Hills, California 90212. Bosley is a wholly-owned subsidiary of Aderans America Holdings, Inc.

3. Respondent Aderans America Holdings, Inc. ("Aderans America") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of New York. Its corporate headquarters are located at 9100 Wilshire Blvd., East Penthouse, Beverly Hills, California 90212. Aderans America is a wholly-owned subsidiary of Aderans Co., Ltd.

4. Respondent Aderans Co., Ltd. ("Aderans") is a corporation organized, existing, and doing business under and by virtue of the laws of Japan. Its corporate headquarters are located at 13-4 Araki-cho, Shinjyuku-ku, Tokyo 160-0007, Japan.

5. Hair Club is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware.

Its corporate headquarters are located at 1515 South Federal Highway, Suite 401, Boca Raton, Florida 33432. Currently, Hair Club is a subsidiary of Regis Corporation ("Regis"), a corporation organized, existing, and doing business under and by virtue of the laws of the state of Minnesota. Regis's corporate headquarters are located at 7201 Metro Blvd., Minneapolis, Minnesota 55439.

6. Pursuant to a Stock Purchase Agreement dated July 13, 2012, Aderans proposes to acquire all of Hair Club's common stock from Regis for $163.5 million.

7. The primary business of Bosley is the management of medical/surgical hair restoration practices, including providing input on pricing, and the provision of certain non-prescription hair therapy products.

8. The primary business of Hair Club is treatment for hair loss. Hair Club provides non-surgical hair restoration and hair therapy products. Hair Club manages medical/surgical hair restoration practices, including providing input on pricing.

JURISDICTION

9. At all times relevant herein, Respondents Bosley, Aderans America, and Aderans, have been, and they now are, corporations as defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

10. The acts and practices of Respondents, including the acts and practices alleged herein, are in commerce and affect commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

LINE OF COMMERCE

11. Bosley is the largest manager of medical/surgical hair transplantation practices in the United States. Bosley and Hair Club are managers of medical/surgical hair transplantation with nationwide geographic footprints and national brand recognition.

EXCHANGES OF COMPETITIVELY SENSITIVE NON-PUBLIC INFORMATION

12. For at least four years, Bosley's and Hair Club's chief executive officers ("CEOs") repeatedly exchanged competitively sensitive, nonpublic information regarding aspects of their firms' surgical hair transplantation business.

13. Bosley's and Hair Club's CEOs directly exchanged detailed information about future product offerings, surgical hair transplantation price floors, discounting, forward-looking expansion and contraction plans, and operations and performance.

14. Bosley and Hair Club's tacit understanding to exchange information of the nature alleged herein had the purpose, tendency, and capacity to facilitate coordination and served no legitimate business purpose for Bosley, Aderans America, or Hair Club.

15. The exchanges of information, alleged herein, had the effect of reducing Bosley's and Hair Club's uncertainty about a competitor's product offerings, current discounting, geographic expansion and contraction, marketing plans, and operating strategies. The reduction of uncertainty facilitated coordination and endangered competition.

16. Information exchanges were not strictly limited to Bosley and Hair Club. Bosley viewed these information exchanges as business as usual, and indicated that it had similar communications with other competitors.

VIOLATIONS ALLEGED

17. As set forth in Paragraphs 12 through 16 above, Respondent Bosley solicited, exchanged, and obtained competitively sensitive information with and about its competitors. By facilitating coordination and endangering competition, these information exchanges violated Section 5 of the Federal Trade Commission Act, as amended.

18. The acts and practices of Respondents, as alleged herein, constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended. Such acts and practices of Respondents will continue or recur in the absence of appropriate relief.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission, on this thirtieth day of May, 2013, issues its complaint against Respondents.

By the Commission, Commissioner Wright recused.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of Bosley, Inc., ("Bosley") a subsidiary of Aderans America Holdings, Inc. ("Aderans America") and Aderans Co., Ltd. ("Aderans") (collectively, "Respondents"), and Respondents having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 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 Act and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Bosley is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware. Its corporate headquarters are located at 9100 Wilshire Blvd., East Penthouse, Beverly Hills, California 90212. Bosley is a wholly owned subsidiary of Aderans America Holdings, Inc.

2. Respondent Aderans America Holdings, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the state of New York. Its corporate headquarters are located at 9100 Wilshire Boulevard, East Penthouse, Beverly Hills, California 90212. Aderans America is a wholly owned subsidiary of Aderans Co., Ltd.

3. Respondent Aderans Co., Ltd. is a corporation organized, existing, and doing business under and by virtue of the laws of Japan. Its corporate headquarters are located at 13-4 Araki-cho, Shinjyuku-ku, Tokyo 160-0007, Japan.

4. 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 Order, the following definitions shall apply:

A. "Bosley" means Bosley, Inc., its directors, officers, employees, agents, attorneys, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Bosley; and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each; provided, however, that Bosley shall not include the physicians, individually or through his/her professional corporations, under independent contractor agreements with the various Bosley Medical Groups, or the various Bosley Medical Groups operating under management contracts with Bosley.

B. "Aderans America" means Aderans America Holdings, Inc., its directors, officers, employees, agents, attorneys, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Aderans America; and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.

C. "Aderans" means Aderans Co., Ltd., its directors, officers, employees, agents, attorneys, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Aderans America; and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each. After the acquisition of HC (USA), Inc. ("Hair Club"), Aderans includes Hair Club.

D. "Respondents" means Respondent Bosley, Respondent Aderans America and Respondent Aderans, individually and collectively.

E. "Commission" means the Federal Trade Commission.

F. "Antitrust Compliance Program" means the program to ensure compliance with this Order and with the Antitrust Laws, as required by Paragraph III of this Order.

G. "Antitrust Laws" means the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 et. seq., the Sherman Act, 15 U.S.C. § 1 et. seq., and the Clayton Act, 15 U.S.C. § 12 et. seq.

H. "Communicate," "Communicating," and "Communication" means any transfer or dissemination of information, whether directly or indirectly, and regardless of the means by which it is accomplished, including without limitation orally or by printed or electronic materials.

I. "Competitor" means any Person engaged in the business of managing or offering for sale medical/surgical hair transplantation services in the United States; provided, however, that Competitor does not include the physicians, individually or through his/her professional corporations, under independent contractor agreements with the various Bosley Medical Groups, or the various Bosley Medical Groups operating under management contracts with Bosley.

J. "Competitively Sensitive, Non-Public Information" means any competitively sensitive, non-public business information of Respondents or any of their Competitors relating to medical/surgical hair transplantation services in the United States, including without limitation non-public information relating to pricing or pricing strategies, costs, revenues, profits,

margins, output, business or strategic plans, marketing, advertising, promotion, or research and development;

Provided, however, that "Competitively Sensitive, Non-Public Information" does not include:

1. Information that has been Communicated publicly to current or prospective customers or investors through widely accessible methods, including websites, analyst conference calls, press releases, and other methods of advertising, such as print, television, signage, direct mail or online media;

2. Information that has been Communicated publicly as required by the Federal Securities Laws.

K. "Federal Securities Laws" means the securities laws as that term is defined in §3(a)(47) of the Securities Exchange Act of 1934, 15 U.S.C. §78c(a)(47), and any regulation or order of the Securities and Exchange Commission issued under such laws.

L. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, partnerships, and unincorporated entities.

II.

IT IS FURTHER ORDERED that in connection with the business of managing medical/surgical hair transplantation services in or affecting commerce, as "commerce" is defined by the Federal Trade Commission Act, Respondents shall cease and desist from, either directly or indirectly, or through any corporate or other device:

A. Communicating any Competitively Sensitive, Non-Public Information to any Competitor; or

B. Requesting, encouraging, or facilitating the Communication of Competitively Sensitive, Non-Public Information from any Competitor.

Provided, however, that it shall not, of itself, constitute a violation of Paragraph II of this Order for Respondents: (1) to Communicate or request Competitively Sensitive, Non-Public Information to or with a Competitor where such conduct is reasonably related to a lawful joint venture or as part of legally supervised due diligence for a potential transaction, and reasonably necessary to achieve the procompetitive benefits of such a relationship; (2) to Communicate to any Person who Respondents reasonably believe is an actual or prospective customer Respondents' rates or other terms of service and/or that Respondents are willing to lower their rates in response to a Competitor's rate; (3) to Communicate to any Person who Respondents reasonably believe is affiliated with a market research firm Respondents' rates; (4) to Communicate, provide, or request information as part of the ordinary and customary participation in trade associations or medical societies; (5) to Communicate with Respondents' vendors and independent contractors in an ordinary and customary manner; or (6) without knowingly disclosing his/her affiliation with Respondents, and while taking steps reasonably calculated to conceal his/her affiliation with Respondents, and for the purpose of legitimate market research (such as secret shopping), to request or receive from a Competitor information, including but not limited to, its pricing terms.

III.

IT IS FURTHER ORDERED that:

A. Within sixty (60) days after the date on which this Order becomes final, Respondents shall design, maintain and operate for the duration of this Order an Antitrust Compliance Program to assure ongoing compliance with this Order and with the Antitrust Laws. This Antitrust Compliance Program shall include, but not be limited to:

1. Respondents' designation of an officer or director to supervise the design, maintenance, and operation of the Antitrust Compliance Program;

2. Antitrust compliance training for (a) all officers of Respondents, and (b) all other executives, managers, employees and agents of Respondents whose positions entail contacts with Competitors or who have sales, marketing, or pricing responsibilities with respect to the business of managing medical/surgical hair transplantation services in the United States;

3. Distributing Respondents' Antitrust Compliance Program (including any updates thereof, as applicable) to all those Persons identified in Paragraph III.A.2 above;

4. Making available ongoing legal support to respond to any questions on the Antitrust Compliance Program or the Antitrust Laws in a timely manner; and

5. Annual training on the requirements of this Order and the Antitrust Laws for all the Persons identified in Paragraph III.A.2 above.

B. Within thirty (30) days after the date on which this Order becomes final, Respondents shall provide to each of Respondents' officers and directors a copy of this Order and the Complaint. For a period of four (4) years from the date this Order becomes final, Respondents shall provide a copy of this Order and the Complaint to any Person who becomes an officer or director of any Respondent, and shall provide such copies within thirty (30) days of the commencement of such Person's term as an officer or director;

C. Respondents shall require each person to whom a copy of this Order is furnished pursuant to Paragraph III.B above to sign and submit to Respondents within thirty (30) days of the receipt thereof a statement that (1) represents that the undersigned has read and understands the Order, and (2) acknowledges that the undersigned has been advised and understands that

non-compliance with the Order may subject Respondents to penalties for violation of the Order; and

D. Respondents shall retain documents and records sufficient to record Respondents' compliance with their obligations under Paragraph III of this Order.

IV.

IT IS FURTHER ORDERED that Respondents shall file verified written reports within sixty (60) days from the date this Order becomes final, annually thereafter for four (4) 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, among other information that may be necessary:

A. A detailed description of the manner and form in which Respondents have complied and are complying with this Order;

B. The name, title, business address, email address, and business phone number of the officer or director designated by Respondents to supervise Respondents' Antitrust Compliance Program;

C. The name, title, business address, email address and business phone number of each Person who received training on the requirements of this Order and the Antitrust Laws pursuant to Paragraph III of this Order, and information sufficient to show the date, location, and manner in which each Person was trained;

D. A description of the Antitrust Compliance Program; and

E. A copy of the acknowledgements required by Paragraph III.C of this Order.

V.

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.

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 applicable Respondent made to its principal United States offices, registered office of its 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 United States 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.

VII.

IT IS FURTHER ORDERED that this Order shall terminate on May 30, 2033.

By the Commission, Commissioner Wright recused.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted for public comment, subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") from Bosley, Inc. ("Bosley"), and its corporate parents, Aderans America Holdings, Inc. ("Aderans America") and Aderans Co., Ltd. ("Aderans") (collectively, "Respondents"). Bosley is the largest manager of medical/surgical hair transplantation practices in the United States. The Commission's Complaint alleges that Bosley facilitated coordination and endangered competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by exchanging competitively sensitive, nonpublic information with HC (USA), Inc. ("Hair Club"). Bosley indicated that it exchanged similar information with other medical/surgical hair transplantation practitioners.

The proposed Consent Agreement would resolve competitive concerns by requiring Bosley: (1) not to communicate competitively sensitive, nonpublic information with any competitor; (2) not to request, encourage, or facilitate communication of competitively sensitive, nonpublic information from any competitor; and (3) to institute an antitrust compliance program to assure ongoing compliance with the proposed Decision and Order ("Order") and with U.S. antitrust laws.

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 Consent Agreement, modify it, or make final the proposed 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. Further, the Consent Agreement has been entered into for settlement purposes only, and does not constitute an admission by Respondents that they violated the law or that the facts alleged in the Complaint (other than jurisdictional facts) are true.

I. The Complaint

The allegations of the Complaint are summarized below.

Bosley and Hair Club are managers of medical/surgical hair transplantation with nationwide geographic presence and national brand recognition. Bosley is the largest such manager in the United States. For at least four years, the chief executive officers ("CEOs") of Bosley and Hair Club repeatedly exchanged competitively sensitive, nonpublic information about their companies' medical/surgical hair transplantation practices. The information exchanged included details about future product offerings, surgical hair transplantation price floors and discounts, plans for expansion and contraction, and business operations and performance. At the time the CEOs exchanged the information, it was not publicly available.

Bosley considered the information exchanges to be business as usual, and as alleged in the Complaint, Bosley indicated that it had similar communications with other competitors.

II. Analysis

Competition may be unreasonably restrained whenever a competitor directly communicates, solicits, or facilitates exchange of competitively sensitive information with its rivals, particularly where such information is highly detailed, disaggregated, and forward-looking. The risks posed by such communications are three-fold. First, a discussion of competitively sensitive prices, output, or strategy may mutate into a conspiracy to restrict competition. Second, an information exchange may facilitate coordination among rivals that harms competition, even in the absence of any explicit agreement regarding future conduct. Third, knowledge of a competitor's plans reduces uncertainty and enables rivals to restrict their own competitive efforts, even in the absence of actual coordination.

According to the Commission's Complaint, by directly and repeatedly exchanging competitively sensitive, nonpublic information with Hair Club and other rivals, Bosley engaged in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. The Commission's Complaint alleges that Bosley and Hair Club exchanged information on competitively sensitive subjects, including future plans to close existing facilities and current strategies regarding price discounting. Bosley and Hair Club's alleged tacit understanding to exchange the information could facilitate coordination or endanger competition by reducing uncertainty about a rival's product offerings, prices, and strategic plans. For example, the information exchanges could lead a competitor to determine not to open facilities or market services in a particular location. Alternatively, a competitor might avoid granting additional discounts to maintain existing price levels for surgical hair transplantation services. Any or all of these decisions could result in consumer harm in the form of reduced choice or artificially inflated transaction prices. The potential for harm increases to the extent that Bosley engaged in similar communications with additional rivals.

The Commission must weigh the potential for competitive harm from direct and repeated exchanges of competitively sensitive, nonpublic information against the prospect of legitimate efficiency benefits. The Commission's Complaint alleges that the

information exchanges between Bosley and Hair Club served no legitimate business purpose. Specifically, the Commission alleges that in this instance – considering the types of information involved, the level of detail, the direct nature of the communication, and the absence of any related pro-competitive impact – the exchanges were potentially anticompetitive and lacked a legitimate business justification.

III. The Proposed Consent Order

The Consent Agreement signed by Respondents contains a proposed Order resolving the allegations in the Commission's Complaint. First among its provisions, Paragraph II. of the proposed Order enjoins Respondents from communicating competitively sensitive, nonpublic information directly to any hair transplantation competitor. Paragraph II. further prohibits Respondents from requesting, encouraging, or facilitating communication of competitively sensitive, nonpublic information from any competitor.

Paragraph II. of the proposed Order would not interfere with Respondents' ability to compete or prevent participation in legitimate industry practices, such as ordinary trade association or medical society activity. Specifically, the proposed Order excludes from its prohibitions certain communications including: (1) where the information is reasonably necessary to achieve pro-competitive benefits related to a lawful joint venture or as part of legally supervised due diligence; (2) provision of rates to market research firms or Respondents' own vendors or independent contractors; (3) provision of rates or competitive offers to actual or prospective customers; and (4) receipt of information from competitors for the purpose of legitimate market research where the information is not knowingly conveyed to Respondents or their representatives (e.g., competitive intelligence).

In addition, Paragraph III. of the proposed Order requires Respondents to institute programs to ensure compliance with the proposed Order and U.S. antitrust laws. Paragraph III. requires: (1) annual antitrust compliance training for all Bosley officers, executives, employees, and agents whose positions entail contact with competitors or who have sales, marketing, or pricing

responsibility for Respondents' management of medical/surgical hair transplantation practice; (2) the provision of legal support to respond to any questions regarding antitrust compliance or U.S. antitrust laws; and (3) document retention sufficient to record compliance with Respondents' obligations under the proposed Order.

Paragraph IV. requires Respondents to submit periodic compliance reports to the Commission. Respondents must provide an initial compliance report within sixty (60) days from the date the Order becomes final and annually thereafter for the next four (4) years or upon written notice by the Commission.

Pursuant to Paragraph V. of the proposed Order, Respondents must also provide notice to the Commission thirty (30) days prior to any planned dissolution, acquisition, or other change that may affect compliance obligations arising from the proposed Order.

Paragraph VI. gives the Commission access, upon five (5) days written notice, to Respondents' U.S. facilities, records, and employees to ensure on-going compliance.

Paragraph VII. of the proposed Order provides that the proposed Order will expire in twenty (20) years.

Complaint

IN THE MATTER OF

HTC AMERICA INC.

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

Docket No. C-4406; File No. 122 3049
Complaint, June 25, 2013 – Decision, June 25, 2013

The consent order addresses allegations that HTC America failed to take reasonable steps to secure the software it developed for its smartphones and tablet computers, in violation of Section 5(a) of the FTC Act. According to the complaint, HTC America failed to provide its engineering staff with adequate security training, failed to review or test the software on its mobile devices for potential security vulnerabilities, failed to follow well-known and commonly accepted secure coding practices, and failed to establish a process for receiving and addressing vulnerability reports from third parties. As a result of HTC America's failure to implement reasonable security measures, malware was permitted to be placed on millions of consumers' devices without their permission. This malware could be used to record and transmit information entered into or stored on the device, including, for example, financial account numbers and related access codes, geolocation information, or medical information such as text messages received from healthcare providers and calendar entries concerning doctor's appointments. The complaint further alleges that the user manuals for HTC America's Android-based devices contained deceptive representations. The consent order requires HTC America to develop and release software patches to repair the vulnerabilities in its devices. The consent order further requires HTC America to establish a comprehensive security program designed to address security risks during the development of its devices and to undergo independent security assessments every other year for the next 20 years.

Participants

For the *Commission*: *Nithan Sannappa* and *Jonathan Zimmerman*.

For the *Respondent*: *Susan Lu Lyon, Cooley LLP*.

COMPLAINT

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

1. Respondent HTC America Inc. ("HTC") is a Washington corporation with its principal office or place of business at 13920 SE Eastgate Way, Suite #400, Bellevue, WA 98005.

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

3. Respondent is a mobile device manufacturer that develops and manufactures smartphones and tablet computers using Google Inc.'s ("Google") Android operating system and Microsoft Corporation's ("Microsoft") Windows Mobile and Windows Phone mobile operating systems.

ANDROID'S PERMISSION-BASED SECURITY MODEL

4. Google's Android operating system protects certain sensitive information (e.g., location information or the contents of text messages) and sensitive device functionality (e.g., the ability to record audio through the device's microphone or the ability to take photos with the device's camera) through a permission-based security model. In order to access sensitive information or sensitive device functionality, a third-party application must declare the fact that it will access such information or functionality.

5. Before a user installs a third-party application, the Android operating system provides notice to the user regarding what sensitive information or sensitive device functionality the application has declared it requires. The user must accept these "permissions" in order to complete installation of the third-party application.

HTC'S FAILURE TO EMPLOY REASONABLE SECURITY IN THE CUSTOMIZATION OF ITS MOBILE DEVICES

6. HTC has customized its Android-based mobile devices by adding and/or modifying various pre-installed applications and components in order to differentiate its products from those of competitors also manufacturing Android-based mobile devices.

HTC has also customized both its Android and Windows Mobile devices in order to comply with the requirements of certain network operators, such as Sprint Nextel Corporation ("Sprint") and AT&T Mobility LLC ("AT&T"). Since the customized applications and components are pre-installed on the device, consumers do not choose to install the customized applications and components, and the device user interface does not provide consumers with an option to uninstall or remove the customized applications and components from the device.

7. Until at least November 2011, respondent engaged in a number of practices that, taken together, failed to employ reasonable and appropriate security in the design and customization of the software on its mobile devices. Among other things, respondent: (a) failed to implement an adequate program to assess the security of products it shipped to consumers; (b) failed to implement adequate privacy and security guidance or training for its engineering staff; (c) failed to conduct assessments, audits, reviews, or tests to identify potential security vulnerabilities in its mobile devices; (d) failed to follow well-known and commonly-accepted secure programming practices, including secure practices that were expressly described in the operating system's guides for manufacturers and developers, which would have ensured that applications only had access to users' information with their consent; and (e) failed to implement a process for receiving and addressing security vulnerability reports from third-party researchers, academics or other members of the public, thereby delaying its opportunity to correct discovered vulnerabilities or respond to reported incidents.

8. As a result of its failures described in Paragraph 7, HTC introduced numerous security vulnerabilities in the process of customizing its mobile devices. Once in place, HTC failed to detect and mitigate these vulnerabilities, which, if exploited, provide third-party applications with unauthorized access to sensitive information and sensitive device functionality. The following examples in paragraphs 9 to 15 serve to illustrate the consequences of HTC's failure to employ reasonable and appropriate security in the design and customization of the software on its mobile devices.

PERMISSION RE-DELEGATION

9. HTC undermined the Android operating system's permission-based security model in its devices by introducing numerous "permission re-delegation" vulnerabilities through its custom, pre-installed applications. Permission re-delegation occurs when one application that has permission to access sensitive information or sensitive device functionality provides another application that has not been given the same level of permission with access to that information or functionality. For example, under the Android operating system's security framework, a third-party application must receive the user's permission to access the device's microphone, since the ability to record audio is considered sensitive functionality. But in its devices, HTC pre-installed a custom voice recorder application that, if exploited, would provide any third-party application access to the device's microphone, even if the third-party application had not requested permission for that functionality.

10. HTC could have prevented this by including simple, well-documented software code - "permission check" code - in its voice recorder application to check that the third-party application had requested the necessary permission. Because HTC failed in numerous instances to include permission check code in its custom, pre-installed applications, any third-party application exploiting these vulnerabilities could command those HTC applications to access various sensitive information and sensitive device functionality on its behalf -- including enabling the device's microphone; accessing the user's GPS-based, cell-based, and WiFi-based location information; and sending text messages -- all without requesting the user's permission.

11. Malware could exploit these vulnerabilities to, for example, surreptitiously record phone conversations or other sensitive audio, to surreptitiously track a user's physical location, and to perpetrate "toll fraud," the practice of sending text messages to premium numbers in order to charge fees to the user's phone bill. These vulnerabilities have been present on approximately 18.3 million HTC devices running Android v. 2.1.x, 2.2.x, 2.3.x, and 3.0.x.

APPLICATION INSTALLATION VULNERABILITY

12. Relatedly, HTC pre-installed a custom application on its Android-based devices that could download and install applications outside of the normal Android installation process. Again, HTC failed to include appropriate permission check code to protect this pre-installed application from exploitation. As a result, any third-party application exploiting the vulnerability could command this pre-installed application to download and install any additional applications from any server onto the device without the user's knowledge or consent. Because this would occur outside the normal installation process, the user would not be presented with a permission screen that explained what sensitive information or sensitive device functionality the additional application being installed would be able to access. In effect, this vulnerability undermines all protections provided by Android's permission-based security model. This vulnerability has been present on approximately 18.3 million HTC devices running Android v. 2.1.x, 2.2.x, 2.3.x, 3.0.x and certain devices that were upgraded to Android v. 4.0.x.

INSECURE COMMUNICATIONS MECHANISMS

13. HTC failed to use readily-available and documented secure communications mechanisms in implementing logging applications on its devices, placing sensitive information at risk. Logging applications collect information that can be used, for example, to diagnose device or network problems. Because of the sensitivity of the information, as described below, communications with logging applications should be secure to ensure that only designated applications can access the information. Secure communications mechanisms -- such as the Android inter-process communication mechanisms expressly described in the Android developer guides, or secure UNIX sockets – could have been used to ensure that only HTC-designated applications could access the sensitive information collected by the logging application. Instead of using one of these well-known, secure alternatives, HTC implemented communication mechanisms (e.g., INET sockets) that could not be restricted in a similar manner. Moreover, HTC failed to implement other, additional security measures (e.g., data

encryption) that could have secured these communications mechanisms. Because the communications mechanisms were insecure, any third-party application that could connect to the internet could communicate with the logging applications on HTC devices and access a variety of sensitive information and sensitive device functionality, as described below.

a. HTC Loggers. Beginning in May 2010, HTC installed its customer support and trouble-shooting tool HTC Loggers on approximately 12.5 million Android-based mobile devices. Because HTC Loggers could collect sensitive information from various device logs, it was supposed to have been accessible only to HTC and certain network operators, and only after the user had consented to its use by manually entering a special code into the mobile device. Moreover, the Android permission-based security model normally requires a third-party application to obtain the user's consent before accessing the device logs. Because HTC used an insecure communications mechanism, however, both of these intended protections were undermined, and any third-party application on the user's device that could connect to the internet could exploit the vulnerability to communicate with HTC Loggers without authorization and command it to collect and transmit information from the device logs. This information could include, but was not limited to, contents of text messages; last known location and a limited history of GPS and network locations; a user's personal phone number, phone numbers of contacts, and phone numbers of those who send text messages to the user; dialed digits; web browsing and media viewing history; International Mobile Equipment Identity ("IMEI") or Mobile Equipment Identifier ("MEID"); and registered accounts such as Gmail and Microsoft Exchange account user names.

b. Carrier IQ. Beginning in 2009, HTC embedded Carrier IQ diagnostics software on approximately 10.3 million Android-based mobile devices and 330,000 Windows Mobile-based mobile devices at the direction of network operators Sprint and AT&T, who used

Carrier IQ to collect a variety of information, described in subparagraph (i) below, from user devices to analyze network and device problems. In order to embed the Carrier IQ software on its mobile devices, HTC developed a "CIQ Interface" that would pass the necessary information to the Carrier IQ software. The information collected by the Carrier IQ software was supposed to have been accessible only to the network operators, but because HTC used an insecure communications mechanism, any third-party application on the user's device that could connect to the internet could exploit the vulnerability to communicate with the CIQ Interface, allowing it to:

i. Intercept the sensitive information being collected by the Carrier IQ software. This information could include, but was not limited to, GPS-based location information; web browsing and media viewing history; the size and number of all text messages; the content of each incoming text message; the names of applications on the user's device; the numeric keys pressed by the user; and any other usage and device information specified for collection by certain network operators; and

ii. In the case of HTC's Android-based devices, perform potentially malicious actions, including, but not limited to, sending text messages without permission. As described in Paragraph 11, malware could exploit this vulnerability to perpetrate toll fraud. Moreover, in this case, the sent text messages would not appear in the user's outbox, making it impossible for the user to verify that unauthorized text messages had been sent from the device.

DEBUG CODE

14. During the development of an application, developers may activate "debug code" in order to help test whether the application is functioning as intended. When developing its CIQ Interface for

its Android-based devices, HTC activated debug code in order to test whether the CIQ Interface properly sent all of the information specified by the network operator. The debug code accomplished this by writing the information to a particular device log known as the Android system log, which could then be reviewed. However, HTC failed to deactivate the debug code before its devices shipped for sale to consumers. As a result of the active debug code, all information that the CIQ Interface sent to the Carrier IQ software from a consumer's device, including the information specified in Paragraph 13(b)(i), was also written to the Android system log on the device. This information was supposed to have been accessible only to the network operators, never written to the system log. Because it ended up in the system log, this sensitive information was:

a. Accessible to any third-party application with permission to read the system log. Although users may provide third-party applications with permission to read the system log for certain purposes -- for example, to trouble-shoot application crashes -- those applications never should have had access to all the sensitive information, such as the contents of incoming text messages, that the Carrier IQ software was collecting.

b. Sent to HTC. The information in the system log is sent to HTC when a user chooses to send HTC an error report through its "Tell HTC" error reporting tool, described in Paragraph 20. Accordingly, in some cases, HTC also received this sensitive information, including users' GPS-based location information.

15. HTC could have detected its failure to deactivate the debug code in its CIQ Interface had it had adequate processes and tools in place for reviewing and testing the security of its software code.

CONSUMERS RISK HARM DUE TO HTC'S SECURITY FAILURES

16. Because of the potential exposure of sensitive information and sensitive device functionality through the security

vulnerabilities in HTC mobile devices, consumers are at risk of financial and physical injury and other harm. Among other things, malware placed on consumers' devices without their permission could be used to record and transmit information entered into or stored on the device, including financial account numbers and related access codes or personal identification numbers, medical information, and personal information such as text messages and photos. Sensitive information exposed on the devices could be used, for example, to target spear-phishing campaigns, physically track or stalk individuals, and perpetrate fraud, resulting in costly bills to the consumer. Misuse of sensitive device functionality such as the device's audio recording feature would allow hackers to capture private details of an individual's life.

17. In fact, malware developers have targeted the types of sensitive information and sensitive device functionalities that potentially are exposed through the security vulnerabilities in HTC mobile devices. Text message toll fraud, for example, is one of the most common types of Android malware. Security researchers have also found Android malware that records and stores users' phone conversations and that tracks users' physical location.

18. Had HTC implemented an adequate security program, it likely would have prevented, or at least timely resolved, many of the serious security vulnerabilities it introduced through the process of customizing its mobile devices. HTC could have implemented readily-available, low-cost measures to address these vulnerabilities – for example, adding a few lines of permission check code when programming its pre-installed applications, or implementing its logging applications with secure communications mechanisms. Consumers had little, if any, reason to know their information was at risk because of the vulnerabilities introduced by HTC.

HTC'S PRIVACY AND SECURITY REPRESENTATIONS

19. Since at least October 2009, user manuals for HTC's Android-based mobile devices contained the following

statements, or similar statements, regarding Android's permission-based security model:

Finding and Installing an Application

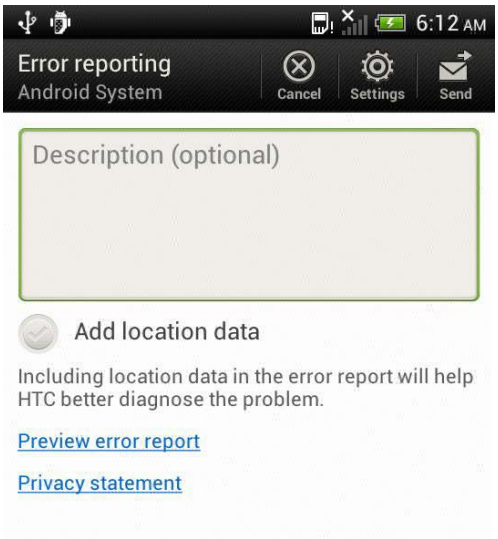
When you install apps from Android Market and use them on your device, they may require access to your personal information (such as your location, contact data, and more) or access to certain functions or settings of your device. Download and install only apps that you trust.

. . .

5. The subsequent screen notifies you whether the app will require access to your personal information or access to certain functions or settings of your device. If you agree to the conditions, tap **OK** to begin downloading and installing the app.
If you selected a paid application, after tapping **OK**, you're redirected to the Google Checkout screen to pay for the application before it's downloaded to your device.

WARNING: **Read it carefully!** Be especially cautious with applications that have access to many functions or a significant amount of your data. Once you tap **OK** on this screen, you are responsible for the results of using this item on your device.

20. Since at least June 2011, HTC has, in many of its Android-based mobile devices, included the Tell HTC error reporting tool. The error reporting tool provides the user with an opportunity to send a report to HTC when there is an application or system crash. The report includes the information in the Android system log. The Tell HTC user interface provides the user with the additional option of submitting location information with the report by checking the button marked "Add location data," as depicted below:



Through this user interface, HTC represents that the user's location data will not be sent to HTC if the user does not check the button marked "Add location data."

HTC'S UNFAIR SECURITY PRACTICES (Count 1)

21. As set forth in Paragraph 7-18, HTC failed to employ reasonable and appropriate security practices in the design and customization of the software on its mobile devices. HTC's practices caused, or are likely to cause, substantial injury to consumers that is not offset by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. This practice was, and is, an unfair act or practice.

HTC'S DECEPTIVE ANDROID USER MANUALS (Count 2)

22. As described in Paragraph 19, HTC has represented, expressly or by implication, that, through the Android permission-based security model, a user of an HTC Android-based mobile device would be notified when a third-party application required access to the user's personal information or to certain functions or settings of the user's device before the user completes installation of the third-party application.

23. In truth and in fact, in many instances, a user of an HTC Android-based mobile device would not be notified when a third-party application required access to the user's personal information or to certain functions or settings of the user's device before the user completes installation of the third-party application. Due to the security vulnerabilities described in Paragraphs 8-15, third-party applications could access a variety of sensitive information and sensitive device functionality on HTC Android-based mobile devices without notifying or obtaining consent from the user before installation. Therefore, the representation set forth in Paragraph 22 constitutes a false or misleading representation.

HTC'S DECEPTIVE TELL HTC USER INTERFACE (Count 3)

24. As described in Paragraph 20, HTC has represented, expressly or by implication, that, if a user does not check the button marked "Add location data" when submitting an error report through the Tell HTC application, location data would not be sent to HTC with the user's error report.

25. In truth and in fact, in some instances, if a user did not check the button marked "Add location data" when submitting an error report through the Tell HTC application, location data was nevertheless sent to HTC with the user's error report. Due to the security vulnerability described in Paragraph 14, in some instances, HTC collected the user's GPS-based location information through the Tell HTC error reporting tool even when the user had not checked the button marked "Add location data" in the Tell HTC user interface. Therefore, the representation set forth in Paragraph 24 constitutes a false or misleading representation.

26. 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, 15 U.S.C. § 45(a).

THEREFORE, the Federal Trade Commission this twenty-fifth day of June, 2013, has issued this complaint against respondent.

By the Commission, Commissioner Ohlhausen recused.

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 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 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 Consent Order ("Consent Agreement"), which includes: a statement by respondent that it neither admits nor denies any of the allegations in the draft complaint, except as specifically stated in the Consent Agreement, and, only for purposes of this action, admits the facts necessary to establish jurisdiction; 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 comments received from interested persons pursuant to section 2.34 of its Rules, 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 HTC America, Inc. ("HTC") is a Washington corporation with its principal office or place of business at 13920 SE Eastgate Way, Suite #400, Bellevue, WA 98005.

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, "respondent" shall mean HTC America, Inc., and its successors and assigns.

2. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

3. "Covered device" shall mean any desktop computer, laptop computer, tablet, handheld or mobile device, telephone, or other electronic product or device developed by respondent or any corporation, subsidiary, division, or affiliate owned or controlled by respondent that has a platform on which to download, install, or run any software program, code, script, or other content and to play any digital audio, visual, or audiovisual content.

4. "Covered information" shall mean individually-identifiable information from or about an individual consumer collected by respondent through a covered device or input into, stored on, captured with, or transmitted through a covered device, including but not limited to (a) a first and last name; (b) a home or other physical address, including street name and name of city or town; (c) an email address or other online contact information, such as an instant messaging user identifier or a screen name; (d) a telephone number; (e) a Social Security number; (f) a driver's license or other state-issued identification number; (g) a financial institution account number; (h) credit or debit card information; (i) a persistent identifier, such as a customer number held in a "cookie," a static Internet

Protocol ("IP") address, a mobile device ID, or processor serial number; (j) precise geo-location data of an individual or mobile device, including GPS-based, WiFi-based, or cell-based location information; (k) an authentication credential, such as a username and password; or (l) any other communications or content that is input into, stored on, captured with, accessed or transmitted through a covered device, including but not limited to contacts, emails, text messages, photos, videos, and audio recordings.

5. "Covered device functionality" shall mean any capability of a covered device to capture, access, or transmit covered information.

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, website, or other device or affiliate owned or controlled by respondent, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, the extent to which respondent or its products or services, including any covered devices, use, maintain and protect the security of covered device functionality or the security, privacy, confidentiality, or integrity of any covered information from or about consumers.

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 security program that is reasonably designed to (1) address security risks related to the development and management of new and existing covered devices, and (2) protect the security, confidentiality, and integrity of covered information, whether collected by respondent or input into, stored on, captured with, accessed or transmitted through a covered device. Such program, the content and implementation of which must be fully documented in writing, shall contain administrative, technical, and physical safeguards appropriate to

respondent's size and complexity, the nature and scope of respondent's activities, and the sensitivity of the covered device functionality or covered information, including:

A. the designation of an employee or employees to coordinate and be accountable for the security program;

B. the identification of material internal and external risks to the security of covered devices that could result in unauthorized access to or use of covered device functionality, and assessment of the sufficiency of any safeguards in place to control these risks;

C. the identification of material internal and external risks to the security, confidentiality, and integrity of covered information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, whether such information is in respondent's possession or is input into, stored on, captured with, accessed or transmitted through a covered device, and assessment of the sufficiency of any safeguards in place to control these risks;

D. at a minimum, the risk assessments required by subparts B and C should include consideration of risks in each area of relevant operation, including, but not limited to: (1) employee training and management; (2) product design, development and research; (3) secure software design and testing, including secure engineering and defensive programming; and (4) review, assessment, and response to third-party security vulnerability reports;

E. the design and implementation of reasonable safeguards to control the risks identified through the risk assessments, including through reasonable and appropriate software security testing techniques, and regular testing or monitoring of the effectiveness of the safeguards' key controls, systems, and procedures;

F. the development and use of reasonable steps to select and retain service providers capable of maintaining security practices consistent with this order, and requiring service providers by contract to implement and maintain appropriate safeguards; and

G. the evaluation and adjustment of the security program in light of the results of the testing and monitoring required by subpart E, 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 security program.

Provided, however, that this Part does not obligate respondent to identify and correct security vulnerabilities in third parties' software on covered devices to the extent the vulnerabilities are not the result of respondent's integration, modification, or customization of the third party software.

III.

IT IS FURTHER ORDERED that respondent shall develop security patches to fix the security vulnerabilities described in Attachment A for each affected covered device having an operating system version released on or after December 2010. Within thirty (30) days of service of this order, respondent shall release the applicable security patch(es) either directly to affected covered devices or to the applicable network operator for deployment of the security patch(es) to the affected covered devices. Respondent shall provide users of the affected covered devices with clear and prominent notice regarding the availability of the applicable security patch(es) and instructions for installing the applicable security patch(es).

IV.

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 Secure Software Lifecycle Professional (CSSLP) with experience in secure mobile programming; or as a Certified Information System Security Professional (CISSP) with professional experience in the Software Development Security domain and secure mobile programming; 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 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 covered device functionality or covered information;

C. explain how the safeguards that have been implemented meet or exceed the protections required by Part II of this order; and

D. certify that respondent's security program is operating with sufficient effectiveness to provide reasonable assurance that the security of covered device functionality and the security, confidentiality, and integrity of covered 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 of Enforcement within ten (10) days of request. Unless otherwise directed by a representative of the Commission, the initial Assessment, and any subsequent Assessments requested, shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, D.C. 20580, with the subject line *In the Matter of HTC America, Inc.*, FTC File No. 1223049. 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.

V.

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

B. unless covered by V.A, for a period of three (3) years from the date of preparation or dissemination, whichever is later, all other documents relating to compliance with this order, including but not limited to:

1. all advertisements and promotional materials containing any representations covered by this

order, as well as all materials used or relied upon in making or disseminating the representation; and

2. any documents, whether prepared by or on behalf of respondent, that contradict, qualify, or call into question respondent's compliance with this order.

VI.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future subsidiaries, current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. Respondent shall deliver this order to such current subsidiaries and personnel within thirty (30) days after service of this order, and to such future subsidiaries and personnel within thirty (30) days after the person assumes such position or responsibilities.

VII.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including, but not limited to: a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation(s) about which respondent learns fewer than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. 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, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, D.C. 20580, with the subject line In the matter of HTC America, Inc., FTC File No. 1223049. 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.

VIII.

IT IS FURTHER ORDERED that respondent 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, it shall submit an additional true and accurate written report.

IX.

This order will terminate on June 25, 2033, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

A. any Part in this order that terminates in fewer than twenty (20) years;

B. this order's application to any respondent that is not named as a defendant in such complaint; and

C. this order if such complaint is filed after the order has terminated pursuant to this Part.

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

By the Commission, Commissioner Ohlhausen recused.

ATTACHMENT A

PERMISSION RE-DELEGATION

1. Permission re-delegation occurs when one application that has permission to access covered information or covered device functionality provides another application that has not been given the same level of permission with access to that information or functionality. Because HTC failed in numerous instances to include "permission check" code in its custom, pre-installed applications on its Android-based devices, any third- party application exploiting these vulnerabilities could command those HTC applications to access various covered information and covered device functionality on its behalf -- including enabling the device's microphone; accessing the user's GPS-based, cell-based, and WiFi-based location information; and sending text messages -- all without requesting the user's permission.

APPLICATION INSTALLATION VULNERABILITY

2. HTC pre-installed a custom application on its Android-based devices that could download and install applications outside of the normal Android installation process. HTC failed to include appropriate permission check code to protect this pre-installed application from exploitation. As a result, any third-party application exploiting the vulnerability could command this pre-installed application to download and install any additional applications from any server onto the device without the user's knowledge or consent.

INSECURE COMMUNICATIONS MECHANISMS

3. HTC failed to use readily-available and documented secure communications mechanisms in implementing logging applications on its devices, placing covered information at risk. Communications with logging applications should be secure to ensure that only designated applications can access the information. HTC implemented insecure communication mechanisms, as described below.

ATTACHMENT A

a. HTC Loggers. HTC installed its customer support and trouble-shooting tool HTC Loggers on Android-based mobile devices. Because HTC Loggers could collect sensitive information from various device logs, it was supposed to have been accessible only to HTC and network operators. Because HTC used an insecure communications mechanism, however, any third-party application on the user's device that could connect to the internet could exploit this vulnerability to communicate with HTC Loggers without authorization and command it to collect and transmit covered information from the device logs.

b. Carrier IQ. HTC embedded Carrier IQ diagnostics software on Android-based mobile devices and Windows Mobile-based mobile devices at the direction of network operators who used Carrier IQ to collect a variety of covered information from user devices to analyze network and device problems. In order to embed the Carrier IQ software on its mobile devices, HTC developed a "CIQ Interface" that would pass the necessary information to the Carrier IQ software. Because HTC used an insecure communications mechanism, any third-party application on the user's device that could connect to the internet could exploit this vulnerability to communicate with the CIQ Interface, allowing it to:

   i. Intercept the covered information being collected by the Carrier IQ software; and

   ii. In the case of HTC's Android-based devices, perform potentially malicious actions, including, but not limited to, sending text messages without permission.

DEBUG CODE

4. During the development of its CIQ Interface for its Android-based devices, HTC activated "debug code" in order to help test whether the CIQ Interface was functioning as intended,

ATTACHMENT A

but then failed to deactivate the code before its devices shipped for sale to consumers. As a result of the active debug code, covered information was written to the Android system log, and was accessible to any third-party application with permission to read the system log, and in many instances, was also sent to HTC.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, a consent order applicable to HTC America, Inc. ("HTC").

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.

HTC is a mobile device manufacturer that develops and manufactures smartphones and tablet computers using Google Inc.'s Android operating system and Microsoft Corporation's Windows Mobile and Windows Phone operating systems. HTC has customized its Android-based mobile devices by adding or modifying various pre-installed applications and components in order to differentiate its products from those of competitors also manufacturing Android-based mobile devices. HTC has also customized both its Android and Windows Mobile devices in order to comply with the requirements of certain network operators. As the customized applications and components are pre-installed on the device, consumers do not choose to install the customized applications and components, and the device user interface does not provide consumers with an option to uninstall or remove the customized applications and components from the device.

The Commission's complaint alleges that HTC engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security in the design and customization of software on its mobile devices. Among other things, HTC:

(1) failed to implement an adequate program to assess the security of products it shipped to consumers;

(2) failed to implement adequate privacy and security guidance or training for its engineering staff;

(3) failed to conduct assessments, audits, reviews, or tests to identify potential security vulnerabilities in its mobile devices;

(4) failed to follow well-known and commonly-accepted secure programming practices, including secure practices that were expressly described in the operating system's guides for manufacturers and developers, which would have ensured that applications only had access to users' information with their consent;

(5) failed to implement a process for receiving and addressing security vulnerability reports from third-party researchers, academics or other members of the public, thereby delaying its opportunity to correct discovered vulnerabilities or respond to reported incidents.

The complaint further alleges that, due to these failures, HTC introduced numerous security vulnerabilities in the process of customizing its mobile devices. Once in place, HTC failed to detect and mitigate these vulnerabilities, which, if exploited, provide third-party applications with unauthorized access to sensitive information and sensitive device functionality. The sensitive device functionality potentially exposed by the vulnerabilities includes the ability to send text messages without permission, the ability to record audio with the device's microphone without permission, and the ability to install other applications, including malware, onto the device without the user's knowledge or consent. The complaint alleges that malware placed on consumers' devices without their permission could be used to record and transmit information entered into or stored on the device, including financial account numbers and related access codes or personal identification numbers, and medical information. In addition, other sensitive information exposed by the vulnerabilities includes, but is not limited to, location information, the contents of text messages, the user's personal phone number, phone numbers of contacts, phone numbers of

those who send text messages to the user, and the user's web and media viewing history.

The proposed order contains provisions designed to prevent HTC from engaging in the future in practices similar to those alleged in the complaint.

Part I of the proposed order prohibits HTC from misrepresenting the extent to which HTC or its products or services -- including any covered device -- use, maintain and protect the security of covered device functionality or the security, privacy, confidentiality, or integrity of covered information from or about consumers. Part II of the proposed order requires HTC to (1) address security risks related to the development and management of new and existing covered devices, and (2) protect the security, confidentiality, and integrity of covered information, whether collected by respondent or input into, stored on, captured with, accessed or transmitted through a covered device. The security program must contain administrative, technical, and physical safeguards appropriate to HTC's size and complexity, nature and scope of its activities, and the sensitivity of the information collected from or about consumers. Specifically, the proposed order requires HTC to:

- designate an employee or employees to coordinate and be accountable for the information security program;

- identify material internal and external risks to the security of covered devices that could result in unauthorized access to or use of covered device functionality, and assess the sufficiency of any safeguards in place to control these risks;

- identify material internal and external risks to the security, confidentiality, and integrity of covered information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, whether such information is in HTC's possession or is input into, stored on, captured with, accessed or transmitted through a covered device, and assess the sufficiency of any safeguards in place to control these risks;

- consider risks in each area of relevant operation, including but not limited to (1) employee training and management; (2) product design, development and research; (3) secure software design and testing, including secure engineering and defensive programming; and (4) review, assessment, and response to third-party security vulnerability reports;

- design and implement reasonable safeguards to control the risks identified through risk assessment, including through reasonable and appropriate software security testing techniques, and regularly test or monitor the effectiveness of the safeguards' key controls, systems, and procedures;

- develop and use reasonable steps to select and retain service providers capable of maintaining security practices consistent with the order, and require service providers by contract to implement and maintain appropriate safeguards; and

- evaluate and adjust its information security program in light of the results of testing and monitoring, any material changes to HTC's operations or business arrangement, or any other circumstances that it knows or has reason to know may have a material impact on its security program.

However, Part II does not require HTC to identify and correct security vulnerabilities in third parties' software on covered devices to the extent the vulnerabilities are not the result of respondent's integration, modification, or customization of the third party software.

Part III of the proposed order requires HTC to develop security patches to fix the security vulnerabilities in each affected covered device having an operating system version released on or after December 2010. Within thirty (30) days of service of the order, HTC must release the security patches either directly to affected covered devices or to the applicable network operator for deployment to the affected covered devices. HTC must provide users of the affected covered devices with clear and prominent

notice regarding the availability of the security patches and instructions for installing the security patches.

Part IV of the proposed order requires HTC to obtain, within the first one hundred eighty (180) days after service of the order and on a biennial basis thereafter for a period of twenty (20) years, an assessment and report from a qualified, objective, independent third-party professional, certifying, among other things, that: (1) it has in place a security program that provides protections that meet or exceed the protections required by Part II of the proposed order; and (2) its security program is operating with sufficient effectiveness to provide reasonable assurance that the security of covered device functionality and the security, confidentiality, and integrity of covered information is protected.

Parts V through IX of the proposed order are reporting and compliance provisions. Part V requires HTC to retain documents relating to its compliance with the order. The order requires that the documents be retained for a three-year period. Part VI requires dissemination of the order now and in the future to all current and future principals, officers, directors, and managers, and 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 HTC submit a compliance report to the FTC within 60 days, and periodically thereafter as requested. Part IX is a provision "sunsetting" the order 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 proposed complaint or order or to modify the order's terms in any way.

INTERLOCUTORY, MODIFYING, VACATING, AND MISCELLANEOUS ORDERS

PHOEBE PUTNEY HEALTH SYSTEM, INC., PHOEBE PUTNEY MEMORIAL HOSPITAL, INC., PHOEBE NORTH, INC., HCA INC., PALMYRA PARK HOSPITAL, INC., AND HOSPITAL AUTHORITY OF ALBANY-DOUGHERTY COUNTY

Docket No. D-9348. Order, March 14, 2013

Order granting Complaint Counsel's motion to lift the stay of the administrative proceedings and reset the hearing schedule, in light of the Supreme Court's decision in a collateral federal court action.

ORDER GRANTING COMPLAINT COUNSEL'S MOTION TO LIFT STAY

On July 15, 2011, on Respondents' unopposed motion and pursuant to Rule 3.41(f) of the Commission's Rules of Practice, 16 C.F.R. § 3.41(f), the Commission stayed the administrative proceeding in this matter pending the appellate resolution of a collateral federal court action. On February 19, 2013, the Supreme Court of the United States issued its decision in that collateral action, in view of which Complaint Counsel now moves the Commission to lift the administrative stay and to order the resetting of the administrative hearing schedule. For the reasons noted below, the Commission has determined to grant the motion, and to direct the Chief Administrative Law Judge to hold a scheduling conference in this matter promptly to reset the necessary scheduling deadlines, including a new hearing, which should begin as soon as is practicable but no later than July 15, 2013.

The Commission issued the administrative complaint in this matter on April 19, 2011, alleging that the then-proposed acquisition of Palmyra Park Hospital, Inc. (Palmyra) by Phoebe Putney Health System, Inc. ("PPHS"), Phoebe Putney Memorial Hospital, Inc. ("PPMH"), Phoebe North, Inc. ("PNI") and the Hospital Authority of Albany-Dougherty County from HCA Inc.

would reduce competition substantially and allow the combined entity to raise prices for general acute-care hospital services charged to commercial health plans in Albany, Georgia, and the surrounding region, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and – if consummated – Section 7 of the Clayton Act, 15 U.S.C. § 18. Administrative proceedings began under Chief Administrative Law Judge Chappell, and a hearing was scheduled to begin on September 19, 2011.

On April 20, 2011, the Commission filed in the United States District Court for the Middle District of Georgia a complaint for a preliminary injunction pending resolution of the Commission's administrative proceeding. The defendants there (Respondents here) did not contest the antitrust merits of the Commission's complaint, but moved the district court to dismiss the collateral action on the ground that the state action doctrine exempts the challenged acquisition of Palmyra from federal antitrust law. The District Court agreed with the defendants and dismissed the complaint for failure to state a claim. The Commission appealed that ruling to the United States Court of Appeals for the Eleventh Circuit and, as noted above, stayed its administrative proceeding pending appellate resolution of the collateral court action.

Following the Eleventh Circuit's affirmance of the district court's ruling,[1] the Supreme Court granted certiorari to hear the case and, on February 19, 2013, unanimously reversed the judgment of the court of appeals, adopting instead the standard for state action antitrust exemption advocated by the Commission. *FTC v. Phoebe Putney Health Sys., Inc.*, No. 11-1160, Slip Op. (U.S. Feb. 19, 2013). The Court held that the challenged transaction was not exempt from federal antitrust law: "respondents' claim for state-action immunity fails because there is no evidence the State affirmatively contemplated that hospital authorities would displace competition by consolidating hospital ownership." Slip Op. 9. Accordingly, the Court remanded the case to the Eleventh Circuit for further proceedings in light of its decision.

[1] The court of appeals had issued a stay pending appeal to block the consummation of the challenged transaction, but following its appellate decision, it lifted that stay, and Phoebe Putney concluded its acquisition of Palmyra on December 15, 2011.

With the only ground for the administrative stay now resolved, Complaint Counsel moves for lifting the stay on the administrative proceeding, noting that time is of the essence because "this is now a consummated acquisition in which significant integration of hospital assets and operations—and likely, interim harm to competition—may have taken place." (Motion at 4.) We agree. "To the extent practicable and consistent with requirements of law, the Commission's policy is to conduct [adjudicative] proceedings expeditiously." 16 C.F.R. § 3.1; *see also id*. § 3.41(b) ("Hearings shall proceed with all reasonable expedition . . .").

The sole ground for Respondents' opposition to lifting the stay—that it would be premature because the Supreme Court's decision is not yet final—does not withstand scrutiny. The Supreme Court's decision concerns a separate (albeit related) action. The Commission's stay order was discretionary, and it remains entirely proper, therefore, for the Commission to restart its own administrative proceeding. *See* Rule 3.41(f), 16 C.F.R. § 3.41(f) ("The pendency of a collateral federal court action that relates to the administrative adjudication shall not stay the proceeding unless a court of competent jurisdiction, or the Commission for good cause, so directs."). Moreover, although Respondents argue that the Supreme Court's decision would not be final until the 25-day period for a motion for reconsideration has elapsed, they have not indicated that they intend to file such a motion—nor indeed provided any grounds for the Court's reconsideration of its unanimous decision. In light of these circumstances, we are unwilling to delay resolution of this matter any further.

Accordingly,

IT IS ORDERED THAT Complaint Counsel's Motion to Lift Stay be, and it hereby is, **GRANTED**; and

IT IS FURTHER ORDERED THAT the Chief Administrative Law Judge is hereby directed to hold a scheduling conference in this matter promptly to reset the hearing schedule and set a new hearing date, with the new hearing date to be as

soon as is practicable, but in no circumstance later than July 15, 2013.

By the Commission.

AEA INVESTORS 2006 FUND L.P., HHI HOLDING CORPORATION, AND HOUGHTON INTERNATIONAL, INC.

Docket No. C-4297. Order, April 30, 2013

Order reopening and setting aside the consent order with respect to AEA Investors 2006 Fund L.P. ("AEA"), in light of the fact that AEA sold its interest in the assets that raised the competitive concerns addressed by the consent order.

ORDER REOPENING AND MODIFYING FINAL ORDER

AEA Investors 2006 Fund L.P. ("AEA") filed its Petition of Respondent AEA Investors 2006 Fund L.P. to Reopen and Modify Decision and Order ("Petition") in this matter on January 3, 2013. AEA was named as a respondent in the consent order issued by the Commission in *AEA Investors 2006 Fund L.P., et al.*, Docket No. C-4297 ("Order") because at the time it was the ultimate parent entity of HHI Holding Corporation and Houghton International, Inc. AEA has now sold its interest in HHI Holding Corporation and Houghton International, Inc. to Gulf Oil Corporation, and is requesting that the Commission reopen and modify the Order to set it aside as it applies to AEA. HHI and Houghton remain respondents to the Order, and Gulf has become a successor to AEA's obligations under the Order. AEA bases its request to reopen and modify the Order on both changed facts and public interest grounds. For the reasons stated below, the Commission has determined to grant the Petition to reopen and modify the Order as requested.

I. BACKGROUND

Houghton International, Inc. acquired D.A. Stuart Corporation on July 3, 2008, from Wilh. Werhahn KG. Houghton, at the time, was a wholly-owned subsidiary of HHI Holding Corporation, which itself was a subsidiary of AEA Investors 2006 Fund L.P., an investment fund managed by AEA Investors L.P., a private equity investment firm.

At the time of the acquisition, both Houghton and D.A. Stuart produced aluminum hot rolling oil for sale in North America. To resolve the competitive concerns resulting from the acquisition, the Commission ordered Houghton to divest the United States aluminum hot rolling assets that Houghton had acquired from D.A. Stuart to Quaker Chemical Corporation.[1] Because AEA and HHI owned and controlled Houghton at the time, they were also named as respondents in the Commission's complaint and Order. The Commission issued the Order on August 26, 2010, and it terminates on August 26, 2020.

In addition to requiring the divestiture and related provisions, the Order requires the respondents to comply with certain obligations until the Order terminates. These include maintaining the confidentiality of certain sensitive business information and refraining from reverse engineering certain components of the divested products,[2] as well as submitting annual reports and notification of corporate changes.[3] Houghton completed the required divestiture to Quaker on July 16, 2010, and all respondents have complied with the requirements of the Order.

II. AEA'S PETITION

AEA states that, on November 6, 2012, HHI, Houghton's direct parent, entered into a purchase agreement whereby GHG

[1] Order, ¶ II.

[2] Order, ¶IV.

[3] Order, ¶¶ VIII., IX., and X.

Lubricants Holdings Limited, a subsidiary of Gulf Oil Corporation Limited, acquired HHI and Houghton. The parties also complied with the premerger notification requirements of the Hart-Scott-Rodino Act with respect to the proposed acquisition, and were granted early termination of the waiting period on November 29, 2012.[4] The sale to Gulf closed on December 20, 2012, at which time AEA divested its entire interest in Houghton and HHI and "no longer has any interest in any business relating to [aluminum hot rolling oil].[5]

AEA contends that reopening and modification is warranted in light of the sale of its interest in Houghton and HHI to Gulf, which, according to AEA, "is a material and significant changed condition of fact."[6] The Order was issued to remedy the anticompetitive effects in the aluminum hot rolling oil market that resulted from the combination of Houghton and D.A. Stuart. AEA was included as a respondent because it was, at the time, the ultimate parent entity of Houghton and HHI. After the sale to Gulf, Houghton and HHI continue to be bound by the terms of the Order, and Gulf is bound as a successor to AEA. AEA has no remaining interest in Houghton, HHI, or any aluminum hot rolling oil assets. It will thus have no "ability to ensure compliance with the Order by HHI or Houghton, which are directly responsible for the operations of the [aluminum hot rolling oil] business."[7]

III. STANDARD FOR REOPENING AND MODIFYING A FINAL ORDER

A final order may be reopened and modified on the grounds set forth in Section 5(b) of the Federal Trade Commission Act.[8] Section 5(b) provides that the Commission shall reopen an order

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[4] Petition at 3.

[5] *Id.*

[6] Petition at 4.

[7] Petition at 5. AEA also contends that modification is warranted on public interest grounds. *Id.* at 5-6.

[8] 15 U.S.C. § 45(b).

to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require.[9] A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition.[10] Section 5(b) also provides that the Commission may reopen and modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification.[11]

In all instances, whether the request is based on changed conditions or on public interest grounds, respondents' showing must be supported by evidence that is credible and reliable.[12]

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[9] *See also Supplementary Information*, Amendment to the Commission's Rules of Practice § 2.51(b), 16 C.F.R. 2.51(b) (August 15, 2001).

[10] S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter"). *See also United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) ("A decision to reopen does not necessarily entail a decision to modify the Order. Reopening may occur even where the petition itself does not plead facts requiring modification.").

[11] Hart Letter at 5; 16 C.F.R. § 2.51.

[12] In the case of a public interest request, Rule 2.51(b) requires an initial satisfactory showing of how modification would serve the public interest before the Commission determines whether to reopen an order and consider all of the reasons for and against its modification. 16 C.F.R. § 2.51(b). A "satisfactory showing" requires that the requester make a *prima facie* showing of a legitimate public interest reason or reasons justifying relief, and this requirement will not be satisfied if the request is merely conclusory or otherwise fails to set forth by affidavit(s) specific facts demonstrating in detail the reasons why the public interest would be served by the modification. *Id.* A sufficient showing requires the requester to demonstrate, *e.g.,* that there is a more effective or efficient way of achieving the purposes of the order, that the order in whole or part is no longer needed, or that there is some other clear public interest that would be served if the Commission were to grant the requested relief.

Commission Rule 2.51(b) requires a "satisfactory showing" to include affidavits setting forth admissible facts, and that all information and material that the requester wishes the Commission to consider must be contained in the request at the time of filing.[13]

If, after determining that the requester has made the required showing, the Commission decides to reopen the order, the Commission will then consider and balance all of the reasons for and against modification. In no instance does a decision to reopen an order oblige the Commission to modify it,[14] and the burden remains on the requester in all cases to demonstrate why the order should be reopened and modified. The petitioner's burden is not a light one in view of the public interest in repose and the finality of the Commission's orders.[15]

IV. THE ORDER WILL BE REOPENED AND MODIFIED

We agree that changed circumstances warrant reopening and setting aside the Order as to AEA. At the time the Commission issued the Order, AEA was made a party to the complaint and Order because it was the ultimate parent entity of Houghton and HHI and, thus, necessary to assure the compliance of its subsidiaries. AEA no longer has any relationship with Houghton or HHI and can thus exert no influence over them. Houghton and HHI remain respondents to the Order, and Gulf succeeds to AEA's obligations under the Order and will be in a position to assure compliance of its newly-acquired subsidiaries. There is thus no longer any need to require AEA's compliance with the Order.

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[13] 16 C.F.R. § 2.51(b).

[14] *See United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) (reopening and modification are independent determinations).

[15] *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

Accordingly,

IT IS ORDERED that the Order in Docket No. C-4297 be, and it hereby is, reopened; and

IT IS FURTHER ORDERED that the Order be, and it hereby is, modified by setting aside the Order as to AEA Investors 2006 Fund L.P. as of the date of issuance of this order.

By the Commission.

UNIVERSAL HEALTH SERVICES, INC., ET AL.

Docket No. C-4372. Order, May 14, 2013

Letter approving divestiture by Universal Health Services, Inc. of the Peak Behavioral Health Assets to Strategic Behavioral Health, LLC.

LETTER APPROVING APPLICATION FOR DIVESTITURE

Dear Ms. Varney and Ms. Viswanatha:

This letter responds to the Application for Approval of Divestiture of the Peak Behavioral Health Assets ("Application") filed by Universal Health Services, Inc. ("Universal"), on March 14, 2013. The Application requests that the Federal Trade Commission approve, pursuant to the order in this matter, Universal's proposed divestiture of the Peak Behavioral Health Assets to Strategic Behavioral Health, LLC. The Application was placed on the public record for comments until April 29, 2013, and one comment was received.

After consideration of the proposed divestiture as set forth in Universal's Application and supplemental documents, as well as other available information, the Commission has determined to approve the proposed divestiture. In according its approval, the

Commission has relied upon the information submitted and representations made in connection with Universal's Application and has assumed them to be accurate and complete.

By direction of the Commission, Commissioner Wright not participating.

RESPONSES TO PETITIONS TO QUASH OR LIMIT COMPULSORY PROCESS

UNNAMED TELEMARKETERS

FTC File No. 012 3145. Order, March 4, 2013.

ORDER DENYING PETITION TO QUASH DECEMBER 12, 2012, CIVIL INVESTIGATIVE DEMAND ISSUED TO THE WESTERN UNION COMPANY AND NOVEMBER 5, 2012 CIVIL INVESTIGATIVE DEMAND ISSUED TO LONNIE KEENE, MONITOR, STATE OF ARIZONA V. WESTERN UNION FINANCIAL SERVICES, INC.

By OHLHAUSEN, Commissioner.

Western Union Company ("Western Union") has filed a petition to quash civil investigative demands ("CIDs") issued by the Federal Trade Commission ("FTC" or "Commission") to Western Union and to Mr. Lonnie Keene, an independent monitor appointed pursuant to Western Union's settlement of money laundering charges by the State of Arizona. *See Arizona v. Western Union Financial Services, Inc.*, No. CV 2010-5807 (Ariz. Super. Ct. Maricopa Cnty. Feb. 24, 2010). For the reasons stated below, the petition is denied.

I. BACKGROUND

Over the past several years, money transfers have become the payment method of choice for those seeking to defraud consumers in the U.S. and abroad. There are several reasons for this development. First and foremost, a money transfer through companies like Western Union or MoneyGram is essentially the same as sending cash. Thus, consumers have no chargeback rights, as they would have if they had paid by credit card. A money transfer also enables the perpetrators of a scheme to get consumers' funds quickly. Indeed, a money transfer can be picked up by the recipient within a matter of minutes at multiple locations virtually anywhere in the world, rather than a single designated location. In many instances, the recipient is not even required to provide identification. All of these factors make it extremely difficult for the FTC and other enforcement agencies to

identify and take action against perpetrators of frauds that employ money transfers.

The FTC continues to receive a high volume of complaints about fraudulent and deceptive practices that rely on money transfers as the method of payment. In 2012 alone, the FTC's database of consumer complaints ("Consumer Sentinel") received more than 102,000 complaints from consumers who lost money through a fraud-induced money transfer, with reported losses exceeding $450 million. In the same year, money transfers were by far the most common payment method for consumers complaining of fraudulent or deceptive practices, accounting for 47% of all Consumer Sentinel complaints that reported a method of payment.[1] In many of these schemes perpetrators outside the U.S. target U.S. consumers.

Money transfer companies can play an important role in addressing the use of money transmission services to facilitate fraud. They can often identify suspicious outlets, locations, or agents, and can detect patterns of transactions consistent with ongoing fraudulent and deceptive practices. Through diligent and effective antifraud policies and procedures, these companies can address and deter those activities. For example, as required by the consent order in *FTC v. MoneyGram Int'l, Inc.*, No. 09-cv-6576 (N.D. Ill. Oct. 19, 2009), MoneyGram must establish, implement, and maintain a comprehensive antifraud program that "is reasonably designed to protect Consumers by detecting and preventing Fraud-Induced Money Transfers *worldwide* and to avoid installing and doing business with MoneyGram agents *worldwide* who appear to be involved in or complicit in processing Fraud-Induced Money Transfers."[2]

Following the consent order with MoneyGram, FTC staff asked Western Union to provide, on a voluntary basis, information about steps the company was taking to reduce fraud-

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[1] *See* FTC, Consumer Sentinel Network Data Book for January B December 2012, at 8 (Feb. 2013), *available at* http://ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2012.pdf.

[2] Stipulated Order for Permanent Injunction and Final Judgment at 7-8, *FTC v. MoneyGram Int'l, Inc.*, No. 09-cv-6576 (N.D. Ill. Oct. 19, 2009) (emphasis added).

induced money transfers. In June 2012, FTC staff requested that Western Union voluntarily provide the FTC with reports produced by a monitor appointed pursuant to an agreement with the State of Arizona that settled charges that Western Union's money transfer business was being used to facilitate human smuggling or narcotics trafficking.

After Western Union refused to provide the reports voluntarily,[3] the Arizona Attorney General sought an order clarifying that the terms of the settlement were broad enough to allow Arizona to share the Monitor's reports with the FTC.[4] The reports had been filed under seal (and therefore kept off the public record) pursuant to a provision in the Settlement Agreement allowing – but not requiring – either Western Union or the Arizona Attorney General to request that the reports be filed under seal.[5]

The state court denied the Arizona Attorney General's request, without prejudice, on September 25, 2012. The ruling was premised on the court's view that "for the Court to order disclosure to [the FTC and Department of Homeland Security] pursuant to the agreement, I would want them in the courtroom to know what the scope of the agreement is, that it is going to be a two-way street. It would benefit the monitor in doing the monitor's job."[6] The court made clear that it was making no comment on "the extent that the FTC or Homeland Security has a

[3] Western Union did provide other information about its antifraud program and contributed complaints from U.S.-based consumers to the Commission's online complaints database. Starting in August 2012, FTC staff also requested foreign complaints, but Western Union declined based on privacy concerns.

[4] Pet. Ex. E. The Arizona Attorney General pointed out that such a release is consistent with the Monitor Engagement Letter ("MEL") (*see* Pet. Ex. E, at 5-6; *see also* Pet. Ex. B ¶ 9) and is specifically authorized by Paragraph 17.1.4 of the Settlement Agreement (providing that the state has leave to disclose any materials or information provided by Western Union where such disclosure "is required by law, otherwise authorized by this Agreement, or is in the proper discharge of or otherwise furthers the State's official duties or responsibilities.").

[5] Pet. Ex. D, at 4.

[6] Pet. Ex. F, at 21-22.

right to secure information that the monitor has or the Attorney General's Office has."[7]

The Commission then issued CIDs to obtain the reports and related materials, first to the Monitor and then to Western Union directly. Specifically, on November 5, 2012, the Commission issued a CID to the Monitor, seeking

> All documents referring or relating to the Periodic Reviews of the Monitor appointed by the court in *State of Arizona ex rel. Horne v. Western Union Financial Services, Inc.*, No. CV 2010-005807, including, but not limited to, all drafts of any reports, reviews, or correspondence with Western Union.

The Commission directed a separate CID to Western Union on December 12, 2012. In addition to the Monitor's reports, the CID requires Western Union to produce (1) internal documents that refer or relate to communications with the Monitor B *i.e.*, documents showing Western Union's internal reaction to the findings and recommendations in the Monitor's reports; and (2) complaints from consumers worldwide referring or relating to fraud-induced transactions. As defined, such complaints include complaints made by foreign consumers about transactions that were picked up either in the U.S. or in a foreign jurisdiction.

After receiving the CID, the Monitor sought to confirm his authority to provide the requested materials to the FTC by filing a motion in the settled Arizona action. On January 28, 2013, [redacted].[8] [redacted].[9] [redacted].[10]

On January 31, 2013, Western Union filed the instant petition to quash.[11]

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[7] Pet. Ex. F, at 21.

[8] Pet. Ex. G, at 4.

[9] Pet. Ex. G, at 2-3.

[10] Pet. Ex. G, at 3-4.

[11] It is by no means certain that Western Union has standing to seek to quash the CID issued to the Monitor. Generally, the target of a government investigation lacks standing to dispute the validity of administrative subpoenas

II. ANALYSIS

A. The Applicable Legal Standards.

Compulsory process such as a CID is proper if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant to the inquiry, as defined by the Commission's investigatory resolution.[12] Agencies have wide latitude to determine what information is relevant to their law enforcement investigations and are not required to have "a justifiable belief that wrongdoing has actually occurred."[13]

Western Union argues that the CIDs should be quashed because they do not satisfy these standards. First, Western Union claims that the CIDs were not issued pursuant to a valid resolution. Second, Western Union claims that the requested materials are not relevant to the purpose of the investigation. Third, it claims that the FTC lacks authority to compel the production of materials prepared pursuant to, or as a consequence

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directed to a third party. *See, e.g.*, *Greene v. Phila. Hous. Auth.*, 789 F. Supp. 2d 582, 586 (E.D. Pa. 2011); *see also FTC v. Trudeau*, 2012 U.S. Dist. LEXIS 160545, at *8 (N.D. Ohio Nov. 8, 2012). Western Union contends that its privacy interests are sufficient to confer standing. Pet. 7 n.3. We note, however, that Western Union's claimed privacy interests are inconsistent with the terms of the MEL. *See* Pet. Ex. B ¶ 5 ("The Monitor shall be independent of Western Union and the State, and no attorney-client relationship shall be formed between them."). Thus, the decision of the Sixth Circuit in *American Motors Corp. v. FTC,* 601 F.2d 1329, 1338-39 (6th Cir. 1979), cited by petitioner, is questionable authority for Western Union's assertion that it has retained "privacy rights." Pet. 7 n.3. In any event, even if Western Union has an interest that is sufficient to confer standing, its petition to quash the Monitor's CID is without merit for the reasons discussed herein.

[12] *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992); *FTC v. Texaco, Inc.*, 555 F.2d 862, 874 (D.C. Cir. 1977).

[13] *See*, *e.g.*, *Morton Salt*, 338 U.S. at 642-43 (A[Administrative agencies have] a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants an assurance that it is not.").

of, a state court settlement. Fourth, Western Union contends that the Commission exceeded its authority in seeking complaints and information related to money transfers between foreign countries. As explained below, we are not persuaded that these contentions have merit.

B. The CIDs Are Supported by a Specific and Valid Resolution.

Western Union's contention that the resolution would permit the FTC to investigate any party "engaged in sales with respect to any form of practice or conduct" is not borne out by the text of the resolution. In issuing the CIDs, the Commission relied on omnibus resolution No. 0123145, *Resolution Directing Use of Compulsory Process in a Nonpublic Investigation of Telemarketers, Sellers, Suppliers, or Others* (Apr. 11, 2011). The resolution authorizes the use of compulsory process to determine whether telemarketers, sellers, or others assisting them have or are violating Section 5 of the FTC Act, 15 U.S.C. § 45, or the Telemarketing Sales Rule, 16 C.F.R. Part 310.[14] The resolution also provides specific notice that it pertains to investigations relating to telemarketing activities, and includes investigations of telemarketers or sellers as well as entities such as Western Union

[14] The resolution describes the nature and scope of the investigation as follows:

> To determine whether unnamed telemarketers, sellers, or others assisting them have engaged in or are engaging in: (1) unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (as amended); and/or (2) deceptive or abusive telemarketing acts or practices in violation of the Commission's Telemarketing Sales Rule, 16 C.F.R. pt 310 (as amended), including but not limited to the provision of substantial assistance or support B such as mailing lists, scripts, merchant accounts, and other information, products, or services B to telemarketers engaged in unlawful practices. The investigation is also to determine whether Commission action to obtain redress for injury to consumers or others would be in the public interest.

Resolution Directing Use of Compulsory Process in a Nonpublic Investigation of Telemarketers, Sellers, Suppliers, or Others, File No. 0123145 (Apr. 11, 2011).

who may be providing substantial assistance or support to telemarketers or sellers.

This statement of the purpose and scope of the investigation is more than sufficient under applicable standards, and courts have enforced compulsory process issued under similar resolutions.[15] Indeed, this resolution has been in effect for many years and has supported multiple other investigations, including CIDs issued to Western Union's competitor, MoneyGram, in 2007 and 2008.

Western Union's reliance on the decision of the D.C. Circuit in *FTC v. Carter*, 636 F.2d 781, 788 (D.C. Cir. 1980), is misplaced. Although *Carter* held that a bare reference to Section 5 of the FTC Act, without more, "would not serve very specific notice of purpose," the Court approved the resolution at issue, noting that it also referred to specific statutory provisions of the Cigarette Labeling and Advertising Act, and further related it to the subject matter of the investigation.[16] With this additional information, the Court felt "comfortably apprised of the purposes of the investigation and the subpoenas issued in its pursuit."[17] Similarly, the resolution here provides substantially more information than the bare text of Section 5, and thus adequately notifies Western Union of the nature and scope of the investigation.

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[15] *See* Opinion and Order at 11-12, *FTC v. LabMD, Inc.*, No. 1:12-cv-3005-WSD (N.D. Ga. Nov. 26, 2012); *FTC v. Nat'l Claims Serv., Inc.*, 1999 WL 819640, at *2 (E.D. Cal. Feb. 9, 1999) (approving use of omnibus resolution citing provisions of the FTC Act and the Commission's Franchise Rule); *FTC v. O'Connell Assocs., Inc.*, 828 F. Supp. 165, 171 (E.D.N.Y. 1993) (enforcing CIDs issued pursuant to omnibus resolution citing provisions of the FTC Act and the Fair Credit Reporting Act). The Commission has repeatedly rejected similar arguments about such omnibus resolutions. *See, e.g., LabMD, Inc.*, No. 123099, at 9 (Apr. 20, 2012); *Firefighters Charitable Found.*, No. 102-3023, at 4 (Sept. 23, 2010); *D.R. Horton, Inc.*, Nos. 102-3050, 102-3051, at 4 (July 12, 2010); *CVS Caremark Corp.*, No. 072-3119, at 4 (Dec. 3, 2008).

[16] *Carter*, 636 F.2d at 788.

[17] *Id.* Western Union also contends that the resolution fails to conform to the FTC's Operating Manual. Pet. 9. But for the reasons stated above, the resolution at issue is sufficiently specific to comply with the Operating Manual. FTC Operating Manual, Ch. 3.3.6.7.4.1. In any event, the manual itself confers no rights on Western Union. *Id.*, Ch. 1.1.1; *see also FTC v. Nat'l Bus. Consultants, Inc.*, 1990 U.S. Dist. LEXIS 3105, 1990-1 Trade Cas. (CCH) & 68,984, at *29 (E.D. La. Mar. 19, 1990).

Western Union's argument also fails in light of the history of communications between the company and the FTC. The purpose of an authorizing resolution is to notify a CID recipient of the nature and scope of the investigation.[18] Given the lengthy dialogue between staff and Western Union, there is no doubt that the company is aware of the nature of staff's investigation. The Commission has previously found that such interactions may be considered along with the resolution in evaluating the notice provided to Petitioners: "[T]he notice provided in the compulsory process resolutions, CIDs, and other communications with Petitioner more than meets the Commission's obligation of providing notice of the conduct and the potential statutory violations under investigation."[19]

C. The Documents Sought Are Relevant to the Commission's Investigation.

Western Union claims that the CID specification calling for the Monitor's reports and related documents is irrelevant to the FTC's investigation into consumer fraud and telemarketing. Specifically, Western Union claims that the Monitor's reports relate to human and drug trafficking in the Southwest border area and that these issues are far outside the stated purposes of the FTC's investigation.[20]

In the context of an administrative CID, "relevance" is defined broadly and with deference to an administrative agency's determination.[21] An administrative agency is to be accorded "extreme breadth" in conducting an investigation.[22] As the D.C. Circuit has stated, the standard for judging relevance in an administrative investigation is "more relaxed" than in an

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[18] *O'Connell Assocs., Inc.*, 828 F. Supp. at 170-71.

[19] *Assoc. First Capital Corp.*, 127 F.T.C. 910, 915 (1999).

[20] Pet. 13-14.

[21] *FTC v. Church & Dwight Co., Inc.*, 665 F.3d 1312, 1315-16 (D.C. Cir. 2011); *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001).

[22] *Linde Thomsen Langworthy Kohn & Van Dyke, P.C. v. RTC*, 5 F.3d 1508, 1517 (D.C. Cir. 1993).

adjudicatory proceeding.[23] As a result, the agency is entitled to the documents unless the CID recipient can show that the agency's determination is "obviously wrong" or the documents are "plainly irrelevant" to the investigation's purpose.[24] We find that Western Union has not met this burden.

Although Western Union tries to couch the settlement and the Monitor's tasks as relating to human or drug trafficking, a review of the Monitor Engagement Letter shows that it is more general and relates to oversight by the Monitor of Western Union's anti-money laundering ("AML") program as required by the Bank Secrecy Act ("BSA") and related guidance.[25] The statutory and regulatory provisions relating to Western Union's money services business ("MSB") authorities do not segregate AML and antifraud programs. Western Union is required by the BSA and its implementing regulations to implement an AML program,[26] which includes filing Suspicious Activity Reports ("SARs") for "possible violation[s] of law or regulation."[27] Those reports are not limited to money laundering. Instead, the BSA is clear that the SARs required from Western Union's AML program must report *any* type of suspicious transaction, including consumer fraud.[28] Indeed, in guidance published to examiners of money

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[23] *Invention Submission Corp.*, 965 F.2d at 1090.

[24] *Id.* at 1089; *Carter*, 636 F.2d at 788. We note that Western Union has not contested the relevance of the worldwide complaints that are the subject of Specification 1. Its arguments on relevance are limited to the Monitor's reports and related documents sought under Specification 2.

[25] "To ensure that its Program adheres to the principles enunciated in the Financial Action Task Force Risk-Based Approach to Combating Money Laundering and Terrorist Financing ('FATF RBA Guidance'), to its legal obligations, to the Agreement, and to this Monitor Engagement Letter, Western Union has agreed to be overseen by an independent Monitor . . . ." Pet. Ex. B ¶ 2.

[26] 31 U.S.C. §§ 5312(a)(2)(R), 5318(h); 31 C.F.R. § 1022.210(d).

[27] 31 U.S.C. § 5318(g); 31 C.F.R. § 1022.320(a).

[28] 31 U.S.C. § 5318(g) ("The Secretary may require any financial institution, and any director, officer, employee, or agent of any financial institution, to report any suspicious transaction relevant to a possible violation of law or regulation."); 31 C.F.R. § 1022.320(a) ("Every money services business . . . shall file with the Treasury Department, to the extent and in the manner required by this section, a report of any suspicious transaction relevant to a possible violation of law or regulation.").

services businesses for compliance with the BSA, the Department of the Treasury made it plain that an AML program must detect and report on transactions that involve more than just money laundering, and that the business itself should not try to distinguish one type of illegal conduct from another for purposes of its reporting requirement:

> MSBs are required to report suspicious activities above prescribed dollar thresholds that may involve money laundering, BSA violations, terrorist financing, *and certain other crimes*. However, MSBs cannot be expected and are not required to investigate or confirm the underlying crime (e.g., terrorist financing, money laundering, tax evasion, identity theft, *or fraud*).[29]

Thus, from a regulatory perspective, there is substantial overlap between an AML program and a program to detect consumer fraud and other illegal activities. Indeed, until the summer of 2012, Western Union's AML and antifraud personnel were housed within the same corporate group, meaning that a common set of personnel were involved in responding to complaints of consumer fraud as well as suspected money laundering activity.

The overlap is further demonstrated by a comparison of the Monitor's obligations for overseeing the AML program, as outlined in the MEL, and Western Union's antifraud program, as described in the overview document that Western Union provided to FTC staff in September 2012.[30] For example, the Monitor is required to evaluate whether Western Union's AML program, among other things:

- Provides for adequate oversight and controls of Agents, consumers, transactions, products, services, and

[29] Fin. Crimes Enforcement Network & Internal Revenue Serv., Bank Secrecy Act/Anti-Money Laundering Examination Manual for Money Services Businesses 86 (2008) (emphasis added) (footnote omitted), *available at* http://*www.fincen.gov/news_room/rp/files/MSB_Exam_Manual.pdf*.

[30] Letter from John R. Dye, EVP, Gen. Counsel & Sec'y, Western Union, to David Vladeck, Dir., Bureau of Consumer Prot., FTC (Sept. 14, 2012) [hereinafter Anti-Fraud Program].

geographic areas that are more vulnerable to abuse by money launderers and other criminals;
- Provides for regular review of the risk assessment and risk management processes;
- Contains channels for informing senior management of compliance initiatives, compliance deficiencies, corrective actions, and filing of suspicious activity reports;
- Provides for appropriate initial and refresher training for Agents to be given at appropriate intervals.[31]

None of these tasks is unique to anti-money laundering activities. Indeed, the same tasks are specifically mentioned in Western Union's Anti-Fraud Program overview.[32]

Similarly, the Monitor is charged with developing an "Implementation Plan" that includes the Monitor's own recommendations for Western Union and that presumptively includes certain "existing measures" already employed by Western Union as part of its AML program.[33] Many of these existing AML measures are also part of Western Union's antifraud program, as described in the company's own materials:

- One of the "existing measures" for the AML program is "developing the ability to aggregate consumer transactions to identify unusual activity on a real-time basis (through its Real Time Risk Assessment initiative)."[34] [redacted].[35]

- Another "existing measure" is "developing, to the extent reasonably feasible, Real Time Risk Assessment that will provide the ability to block noncompliant transactions

[31] Pet. Ex. B, at 6-7.

[32] *See, e.g.*, Anti-Fraud Program 7 [redacted]; *id.* at 4 [redacted]; *id.* at 5-6 [redacted]; *id.* at 23-24 [redacted].

[33] Pet. Ex. B ¶¶ 18-23. Specifically, paragraph 23 of the MEL, entitled "Presumed Program Measures," provides that Western Union's existing AML measures will become part of the Monitor's recommendations "unless the Monitor, with input from Western Union and the State, determines that it is not technically feasible or would not improve the Program." Pet. Ex. B ¶ 23.

[34] Pet. Ex. B ¶ 23.1.2.

[35] Anti-Fraud Program 14-16 [redacted].

before they are processed, so that when a transaction violates established business rules, a 'pop-up screen' will immediately notify the Agent that the transaction cannot be completed."[36] [redacted][37]

- A third "existing measure" is "implementing Transaction Risk Index ('TRI') model variables and formulas . . . to more strategically mitigate the risks associated with certain geographies (e.g., Arizona) and 'red flags' such as structuring, sharing of consumer identifying information, high volume, high frequency, and SARs filed by Western Union on transactions facilitated by/through the Agent."[38] [redacted].[39]

We conclude, therefore, that the steps Western Union must take to eliminate various forms of any suspected illegal transactions from its system are essentially the same. Both the AML and antifraud programs are intended to prevent illegal transactions occurring through the company's money transfer system, and both programs employ similar tools to do so: analysis of transaction data to identify patterns, computer-based rules that prevent illegal transactions from entering the system, training to help agents identify illegal transactions, and disciplinary action against agents that are complicit in the illegal activity or continue to generate high levels of complaints.[40] To the extent the Monitor's reports include an assessment of, and recommendations for, each of these facets of Western Union's AML program, they

[36] Pet. Ex. B ¶ 23.1.8.

[37] Anti-Fraud Program 4.

[38] Pet. Ex. B ¶ 23.1.5.

[39] Anti-Fraud Program 3.

[40] To provide another example of the overlap between Western Union's AML and antifraud programs: one of the key issues identified in the Arizona action was Western Union's awareness of, and failure to terminate, complicit U.S. and foreign agents who "were knowingly engaged in a pattern of money laundering violations." *See* Settlement Agreement Ex. A ("Statement of Admitted Facts"), *Arizona v. W. Union Fin. Servs., Inc.*, No. CV 2010-5807 (Ariz. Super. Ct. Maricopa Cnty. Feb. 24, 2010), *available at* https://www.azag.gov/sites/default/files/sites/all/docs/swbamla/State%20of%20Arizona%20v.%20Western%20Union%20Settlement%20Agreement%20compact.pdf. [redacted]. Anti-Fraud Program 4.

are highly relevant to the current inquiry into the adequacy of the company's antifraud program.[41]

It is also important to note that the CID directed to Western Union is not limited to the Monitor's reports. Rather, the CID requests "[a]ll documents referring or relating to communications with the Monitor."[42] The CID thus encompasses Western Union's internal communications and reactions to the findings and recommendations of the Monitor, which are relevant to determining the strength of the company's culture of compliance and whether there is a widespread commitment to eliminating illegal transactions from Western Union's system. These documents, which have not been shared with the Monitor or with the Arizona Attorney General, are not covered by any confidentiality provisions in the settlement documents and thus must be produced in response to the CID directed at Western Union.

In short, the Monitor's reports and related materials are relevant to assessing Western Union's commitment to eliminating illegal transactions from its system, and thus are "reasonably relevant" to the purposes of the Commission's investigation. Western Union has not satisfied its burden to demonstrate that the information requested by the CID is "plainly irrelevant" or "obviously wrong."[43]

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[41] The Monitor's reports are also uniquely valuable because they provide the perspective of an independent third party who owes no duties to Western Union. Indeed, to ensure the Monitor's independence, the MEL specifies that neither Western Union nor the State of Arizona shall provide any personal benefit to the Monitor during the term of the Monitor's engagement or for five years afterward. Pet. Ex. B ¶ 4.

[42] Pet. Ex. A, at 7-8.

[43] *Invention Submission Corp.*, 965 F.2d at 1089; *Carter*, 636 F.2d at 788.

D. The CIDs Are Valid Exercises of the Commission's Authority.

1. The FTC Has Authority to Obtain the Monitor's Reports and Related Documents.

Western Union next argues that the Commission may not use its process to obtain access to documents that are subject to confidentiality restrictions imposed by an Arizona state court. [redacted].[44] We are not persuaded.

First, the confidentiality provisions of the Arizona settlement documents do not by their terms limit the Commission's ability to use investigatory process to obtain the Monitor's reports and related information. The settlement documents do not address the question of whether the reports and related documents must be released in response to compulsory process of a federal agency. On the contrary, the Settlement Agreement specifically states that it "does not bind any federal agencies or any other state's authorities."[45] Indeed, the settlement documents state that the Monitor's reports and the underlying information may be shared in certain circumstances — including with investigative agencies or in furtherance of the Attorney General's duties.[46]

Second, Western Union errs in contending that CIDs represent an improper attempt to circumvent an order of a state court. The

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[44] Pet. 15-16.

[45] Pet. Ex. C ¶ 28.

[46] For example, the Monitor is required to "take appropriate steps to maintain the confidentiality of any information entrusted to him or her" and to "share such information only with the State, *appropriate investigative agencies*, and individuals or entities hired by him or her." Pet. Ex. B ¶ 36 (emphasis added). For its part, the office of the Arizona Attorney General must "maintain the confidentiality of any materials or information provided by Western Union under this paragraph and shall not provide such material or information to any third party, except to the extent that disclosure is required by law, otherwise authorized by this Agreement, or *is in the proper discharge of or otherwise furthers the State's official duties and responsibilities*." *Id.*, Ex. C ¶ 17.1.4 (emphasis added). With respect to the reports themselves, the Arizona Attorney General is required to maintain their confidentiality "*except to the extent that disclosure may be necessary by the State in connection with the discharge of its official duties*." *Id.*, Ex. B ¶ 37 (emphasis added).

September 2012 ruling dealt solely with the Arizona Attorney General's request to share copies of the reports that had been provided to him.[47] [redacted].[48] Neither the ruling [redacted] purports to address the copies of the Monitor's reports that reside in Western Union's own files, or the other materials sought in Specification 2 of the CID addressed to Western Union – which includes materials besides the Monitor's reports, such as "information Western Union provided to the Monitor" and Western Union's internal reactions to the Monitor's reports.[49] The state court's ruling [redacted], by their own terms, are simply inapplicable to the documents that Western Union seeks to shield from disclosure.

Third, the Arizona state court did not purport to prohibit the Commission from using its process to obtain the reports or related information either from the Monitor or the State of Arizona. On the contrary, [redacted] the court specifically noted that it was not addressing the scope of the Commission's process authority. When ruling on the Arizona Attorney General's request, the state court explained that it was "mak[ing] no comment" on "the extent that the FTC or Homeland Security has a right to secure information that the monitor has or the Attorney General's Office has."[50] [redacted].[51]

Fourth, even if the Arizona state court had intended to prohibit the FTC from obtaining the Monitor's reports and related materials, confidentiality restrictions under state law must give way if they conflict with federal agencies' statutory power to gather evidence. Agencies of the United States may use their

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[47] Pet. Exs. E, F.

[48] Pet. Ex. G.

[49] Although the MEL requires the State of Arizona and Western Union to "maintain the confidentiality of all such information provided to them by the Monitor," Pet. Ex. B ¶ 37, there is nothing in the settlement documents or the state court's subsequent ruling [redacted] that restricts Western Union from disclosing its own business records – such as its communications to the Monitor and its internal documents discussing the Monitor's reports and recommendations.

[50] Pet. Ex. F, at 21.

[51] Pet. Ex. G, at 3-4.

compulsory process to obtain documents whose disclosure would otherwise be barred by state statute.[52] Put differently, even when a state legislature has specifically acted to prohibit disclosure of certain information, those state statutes are preempted to the extent they frustrate the federal statutory schemes that entitle federal agencies to "have access to relevant evidence."[53] The same considerations apply when a state court purports to restrict the Commission's ability to use its investigative process. "'To . . . federal statute and policy, conflicting state law and policy must yield. Constitution, Art. VI, cl. 2.'"[54]

Fifth, the fact that the requested documents were generated as a result of Western Union's settlement with the Arizona Attorney General does not change the analysis. Documents created pursuant to settlement or in reliance on confidentiality protections are not automatically shielded from all disclosure. For example, even in the context of purely private rights, the Third Circuit has recognized that parties' reliance on a confidentiality order is only one of several factors that must be considered when nonparties

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[52] *See, e.g.*, *EEOC v. Ill. Dep't of Emp't Sec.*, 995 F.2d 106, 107 (7th Cir. 1993) (enforcing EEOC subpoena for transcript of unemployment compensation hearing, despite state statute making such proceedings confidential); *United States ex rel. Office of Inspector Gen., U.S. Dep't of Hous. & Urban Dev. v. Phila. Hous. Auth.*, 2011 WL 382765, at *5 (E.D. Pa. Feb. 4, 2011) (enforcing HUD OIG subpoena seeking employees' partial Social Security Numbers, despite state statutes restricting disclosure of sensitive personal information); *United States v. United Network for Organ Sharing*, 2002 WL 1726536, at *1-*2 (N.D. Ill. May 17, 2002) (enforcing HHS OIG subpoena, despite state statute restricting disclosure of peer review documents); *United States ex rel. Agency for Int'l Dev. v. First Nat'l Bank of Md.*, 866 F. Supp. 884, 887 (D. Md. 1994) (enforcing USAID OIG subpoena, despite state statute restricting disclosure of financial documents); *United States v. N.Y. State Dep't of Taxation & Fin.*, 807 F. Supp. 237, 240-43 (N.D.N.Y. 1992) (enforcing DOL OIG subpoena, despite state statute restricting disclosure of tax and wage records); *EEOC v. County of Hennepin*, 623 F. Supp. 29, 32 (D. Minn. 1985) (enforcing EEOC subpoena, despite state statute permitting production of government personnel information only in response to a court order).

[53] *County of Hennepin*, 623 F. Supp. at 32.

[54] *Liner v. Jafco, Inc.*, 375 U.S. 301, 309 (1964) (quoting *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942)).

seek access to confidential settlement materials.[55] The threshold to forestall disclosure of documents submitted to facilitate settlement is even higher when a case involves – as it does here – "a government agency and an alleged series of deceptive trade practices culminating (it is said) in widespread consumer losses," because "[t]hese are patently matters of significant public concern."[56]

Moreover, Western Union's cited cases – *United States v. Bleznak,* 153 F.3d 16 (2d Cir. 1998), and *McCoo v. Denny's Inc.*, 2000 WL 156824 (D. Kan. Feb. 11, 2000) – do not support the proposition that the Commission may not use process to obtain documents that would not exist but for the Arizona settlement agreement. Notably, the persons seeking disclosure in *Bleznak* and *McCoo* were seeking evidence to use in vindicating their purely private rights. By contrast, the Commission is an agency of the United States and seeks materials in connection with its statutory mandate to prevent unfair and deceptive practices in furtherance of the public interest. Furthermore, in both cases, the consent decree at issue specifically barred the requested disclosure.[57] As noted above, the Arizona settlement documents

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[55] *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 787-90 (3d Cir. 1994) (noting that parties' reliance "should not be outcome determinative," and instructing courts to also consider factors such as privacy interests, the purpose for which the information is being sought, whether the information is important to public health and safety, whether sharing would promote fairness and efficiency, and whether the case involves issues important to the public); *see also Daines v. Harrison*, 838 F. Supp. 1406, 1408-09 (D. Colo. 1993) (finding that parties' reliance on confidentiality order was "not enough to tip the balance in their favor" in light of competing interests favoring disclosure, such as the public right of access to court records and the involvement of public agencies and public funds); *cf. Palmieri v. New York*, 779 F.2d 861, 864-66 (2d Cir. 1985) (recognizing that orders sealing court records and a settlement agreement could be modified if warranted by "extraordinary circumstances" or "compelling need").

[56] *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 412 (1st Cir. 1987).

[57] The intervenors in *Bleznak*, who were parties in a separate private action against the defendants, sought to circumvent specific language in the consent decree that the tapes created pursuant to the settlement would not be "subject to civil process" or "admissible in evidence in civil proceedings." 153 F.3d at 19. Similarly, the *McCoo* plaintiffs were using discovery to seek the materials at issue, an act specifically prohibited by the consent decree provisions barring the Monitor and the parties from disclosing "Confidential Information to any

specifically contemplate that the Monitor's reports and the underlying information may be shared in certain circumstances, including with investigative agencies or in furtherance of the Attorney General's duties. Thus, the provisions considered in *Bleznak* and *McCoo* are not comparable to the confidentiality provisions at issue here.

Finally, Western Union suggests that the "appropriate procedure" would be for the Commission to appear before the Arizona state court or seek to intervene.[58] However, the Commission is an agency of the United States not subject to the jurisdiction of state courts. A state may not interfere with a valid exercise of federal authority.[59] Thus, there is no basis for the contention that the Commission must appear before a state tribunal or seek to intervene in a state proceeding to use its statutory process authority to obtain the requested documents – [redacted].[60]

2. The FTC May Obtain Western Union's Worldwide Complaints.

Specification 1 of the CID requires Western Union to produce "[a]ll documents referring or relating to complaints made to Western Union by consumers anywhere in the world, referring or relating to fraud-induced money transfers."[61] Under the governing law, this specification must be enforced if the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant to the purpose of the inquiry, as set forth in the Commission's investigatory resolution.

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person who is not a party to this Decree, including without limitation any person who seeks such Confidential Information in other litigation through discovery process in other courts." 2000 WL 156824, at *2.

[58] Pet. 16.

[59] *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 n.1 (1988) (Supremacy Clause "immunizes the activities of the Federal Government from state interference"); *Mayo v. United States*, 319 U.S. 441, 445 (1943) ("[T]he activities of the Federal Government are free from regulation by any state.").

[60] Pet. Ex. G, at 3.

[61] Pet. Ex. A, at 7 (Specification III.1).

Responses to Petitions to Quash

Western Union does not claim that the specification is too indefinite or not reasonably relevant. It contends, however, that the Commission has exceeded its authority in requesting information about transactions that occurred outside the U.S. and further, that the request cannot be reconciled with foreign data privacy laws. We are not persuaded by either of these claims.

The FTC is authorized to obtain through compulsory process Western Union's worldwide complaints about fraud-induced money transfers. In 2006, Congress passed the U.S. SAFE WEB Act, which enhanced the FTC's ability to protect U.S. consumers from perpetrators of fraud operating abroad and to prevent the U.S. from becoming a haven for fraudulent activity targeting foreign victims by amending Section 5's core provisions to confirm the agency's cross-border jurisdictional authority. The SAFE WEB amendments provide that the term "unfair or deceptive acts or practices" in Section 5(a) of the FTC Act "includes such acts or practices involving foreign commerce" that either: "(i) cause or are likely to cause reasonably foreseeable injury within the United States; or (ii) involve material conduct occurring within the United States." 15 U.S.C. § 45(a)(4)(A).

Indeed, the Senate Report on the U.S. SAFE WEB Act cited by Western Union makes it clear that Congress intended to empower the FTC to combat cross-border fraud by obtaining and sharing information from foreign jurisdictions. The report states that the Act will

> authorize the FTC to: (1) share information involving cross-border fraud with foreign consumer protection agencies; (2) secure confidential information from those foreign consumer protection agencies; (3) take fraud-based legal action in foreign jurisdictions; (4) seek redress on behalf of foreign consumers victimized by United States-based wrongdoers; (5) make criminal referrals for cross-border criminal activity; [and] (5) strengthen its relationship with foreign consumer protection agencies.[62]

[62] S. Rep. No. 109-219, at 3 (2006).

For this reason, Western Union's reliance on the Supreme Court's decision in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), is misplaced. In *Morrison*, the Supreme Court held, in the context of a private class action involving foreign buyers and sellers operating on foreign security exchanges, that there was no "affirmative indication" that Section 10(b) of the SEC Act applies extraterritorially. The "presumption against extraterritoriality" affirmed in *Morrison* does not apply to the FTC's CID here, given Congress' express intent in extending the FTC Act to specified acts and practices involving foreign commerce. *See* 15 U.S.C. § 45(a)(4).

Further, the request in the CID for Western Union's worldwide complaints is proper under both the "material conduct" and "cause or likely to cause reasonably foreseeable injury" tests in Section 45(a)(4).

For one, the FTC's investigation has focused primarily on whether Western Union has adopted and implemented policies and procedures that are sufficient to prevent or limit wrongdoers from using its money transfer system to perpetrate fraud. The "material conduct" at issue is therefore Western Union's actions in developing and administering its antifraud program – activities that Western Union does not dispute occur within the United States.[63] Any complaints from foreign consumers related to fraud-induced money transfers in non-U.S. jurisdictions certainly "involve" this "material conduct" and call into question the effectiveness of these policies and procedures to protect U.S. and

[63] Western Union asserts that its oversight of its antifraud program cannot be "material conduct" because it is an "act of omission" involving an alleged failure to act. Pet. 11. This argument ignores the affirmative duty imposed by the BSA on Western Union to implement an AML program. *See* II.C., *supra*. It also ignores the detailed information Western Union already provided the Commission that describes its antifraud program, including program documentation. This information confirms that, far from performing an "act of omission," Western Union affirmatively sets policy and dictates procedures within the U.S. that are designed to detect and curtail fraudulent activities both within and outside the U.S. Western Union also employs procedures developed here to receive complaints, analyze complaint data, and to take remedial action in response to that data. *See generally* Anti-Fraud Program 5-24, 29-33. In further support, we note that the complaints sought by the CID are maintained in the United States.

non-U.S. consumers alike.[64] The FTC is entitled to such worldwide complaints to help it assess the levels of fraud perpetrated through Western Union's network, the extent of Western Union's knowledge of the number of any fraud-induced money transfers being picked up at particular agent locations, and the adequacy of Western Union's actions in response to such complaints.[65]

For similar reasons, any failure by Western Union to take effective remedial action against a problematic foreign agent would necessarily cause or be likely to cause reasonably foreseeable injury to consumers within the U.S. As explained above, if Western Union, through complaints it receives from U.S. and foreign victims, or even from foreign victims alone, is able to identify a problem agent abroad, then it may need to take immediate action to suspend or terminate that agent from its system to prevent additional consumers from being victimized. Any future victims may include both U.S. and foreign consumers, because a problem agent in a foreign jurisdiction that is receiving fraud-induced transactions from foreign victims may also likely be receiving fraud-induced transactions from U.S. victims.

Western Union's assertions on this issue fail to account for the worldwide nature of the networks that may be perpetrating fraud through its system. As we have learned, funds transferred by a

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[64] We note that Western Union does not address the fact that documents responsive to Specification 1 include any complaints by non-U.S. consumers about fraudulent transactions picked up in the U.S. Such complaints, which the company has also refused to provide, directly touch the U.S., and none of the arguments advanced by Western Union calls into question the Commission's authority to use its investigative process to require the company to produce them.

[65] Western Union's claim that fraud is somehow being conducted "unbeknownst" to the company by foreign con artists is troubling and serves to underscore the need for staff to investigate. Pet. 12. The FTC and other law enforcers have put the company on notice that the perpetrators of fraudulent or deceptive practices may be using its money transfer services, and the company has acknowledged and committed to improving its processes for detecting such activities. Indeed, Western Union has a legal obligation to detect and report such unlawful conduct. If Western Union now claims that it is unaware of this fraud, this highlights a need to examine the antifraud program more closely and its ability to detect such conduct.

single consumer victim may subsequently be transferred multiple times through a money transfer network before the funds reach the ultimate perpetrator of the scheme. For example, a U.S. consumer who is the victim of a lottery scheme could transfer funds to a money transfer outlet in Canada, which, in turn, may transfer the funds to another outlet in Romania. The transfer from Canada to Romania injures the U.S. consumer, because it was her funds that were transferred. Similarly, the funds transferred by consumer victims in the U.K. that are picked up in Romania may subsequently be transferred to a con artist operating in the U.S. The fact that the complained-of transfer might have been routed through an agent in Romania, rather than directly to the U.S., would not negate the effects of such a transfer on the U.S.[66]

Western Union's references to the need to promote international comity and avoid conflicts among data protection laws do not provide any basis for quashing the CID. Western Union has not cited any actual foreign data protection law, or described how such law would preclude Western Union from providing the FTC with any worldwide complaints.

Furthermore, Western Union's reliance on *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct.*, 482 U.S. 522, 546 (1987), is misplaced. First, *Aerospatiale* involved private interests, not a federal agency's use of compulsory process in a law enforcement investigation. Second, contrary to Western Union's assertion, nothing in *Aerospatiale* stands for the proposition that discovery rules "ought never to be construed to violate the law of nations if any other possible construction remains . . . ."[67] Instead, the Supreme Court concluded that the

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[66] Though Western Union does not address it, Section 5(a)(4)(B) of the FTC Act, which addresses remedies for U.S. and foreign victims of consumer frauds, also supports the CID's request for worldwide complaints. If Western Union's failure to take reasonable steps to detect and prevent con artists from using its money transfer system causes harm to U.S. and foreign victims, the FTC is empowered by the SAFE WEB Act to remedy this harm. Any complaints from worldwide victims could bear on the scope of the harm and the proper amount of restitution.

[67] Pet. 12-13 (quoting *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct.*, 482 U.S. 522, 546 (1987)). The text quoted by Western Union actually appears in a much older case, *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), and was intended to promote international

litigants were not required to use the procedures of the Hague Convention to obtain documents maintained outside the United States -- even from foreign corporations.[68] Indeed, federal courts analyzing the *Aerospatiale* decision have often applied the factors described there to order compliance with U.S. discovery requests even in the face of a foreign blocking or other statute.[69]

Finally, Western Union fails to cogently explain how the CID undermines the FTC's role in enforcing the U.S.-EU Safe Harbor Framework.[70] Generally, the European Union's Directive on Data Protection requires that transfers of personal data take place only to non-EU countries that provide an "adequate" level of protection. The Framework is deemed adequate and provides a "safe harbor" to receive personal data from the European Union for those U.S. organizations that pledge to comply with a defined

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comity as was the Court's decision in *Aerospatiale.* But the *Aerospatiale* Court also explicitly recognized the interests of the United States as an important factor in developing a comity analysis, following the *Charming Betsy* canon, that balances respect for other countries' judicial sovereignty against U.S. discovery requirements.

[68] 482 U.S. at 538-43. The Court explained that foreign blocking statutes

> do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute. Nor can the enactment of such a statute by a foreign nation require American courts to engraft a rule of first resort onto the Hague Convention, or otherwise to provide the nationals of such a country with a preferred status in our courts.

Id. at 544 n. 29 (citations omitted, citing *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 204-206 (1958)).

[69] *See*, *e.g.*, *Devon Robotics v. Deviedma*, No. 09-cv-3522, 2010 U.S. Dist. LEXIS 108573, *10-*17 (E.D. Pa. Oct. 8, 2010) (ordering disclosure notwithstanding an Italian blocking statute); *Accessdata Corp. v. Alste Techn*, No. 2:08-cv-569, 2010 U.S. Dist. LEXIS 4566, *4-*8 (D. Utah. Jan. 21, 2010) (ordering disclosure notwithstanding a German blocking statute). This is particularly true in cases involving the enforcement of U.S. law. *See, e.g.*, *In re Air Cargo Shipping Services Antitrust Litigation*, 278 F.R.D. 51, 52-54 (E.D.N.Y. 2010) (finding that "strong national interest[]" in U.S. enforcing antitrust laws outweighed France's interest in controlling access to information within its borders).

[70] Pet. at 13.

set of privacy principles and certify to that commitment.[71] The FTC then enforces that commitment and certification under Section 5 of the FTC Act. Contrary to what Western Union's brief appears to suggest,[72] the FTC has not brought cases for violations of EU data protection laws.[73] Instead, the FTC may treat false certifications of compliance with the Framework as deceptive acts or practices.[74] As the European Commission itself has recognized, "U.S. law will apply to questions of interpretation and compliance with the Safe Harbor principles."[75] The Safe Harbor framework is clear that in the event of a conflict between U.S. law and the law of another jurisdiction, U.S. companies must still follow U.S. law. The Safe Harbor Framework itself provides that "where U.S. law imposes a conflicting obligation, U.S. organizations whether in the safe harbor or not must comply with the law."[76]

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[71] *See* Export.gov, U.S.-E.U. Safe Harbor Overview, http://export.gov/safeharbor/eu/eg_main_018476.asp (last updated Apr. 26, 2012). As stated in that overview, "the Principles were solely designed to [deem the Framework to be adequate and] … cannot be used as a substitute for national provisions implementing the Directive that apply to the processing of personal data in the Member States."

[72] Pet. 13.

[73] The cases referenced by Western Union all involved allegations that companies falsely self-certified that they met the Safe Harbor requirements.

[74] *See, e.g.*, *In re Facebook, Inc.*, FTC File No. 092 3184 (July 27, 2012).

[75] *See* Commission Decision of 26 July 2000 Pursuant to Directive 95/46/EC of the European Parliament and of the Council on the Adequacy of the Protection Provided by the Safe Harbour Privacy Principles and Related Frequently Asked Questions Issued by the US Department of Commerce, at Annex 1 (attaching U.S. Department of Commerce Safe Harbor Privacy Principles (July 21, 2000)), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000D0520:en:NOT.

[76] *See* Export.gov, Damages for Breaches of Privacy, Legal Authorizations and Mergers and Takeovers in U.S. Law, at § B, http://export.gov/safeharbor/eu/eg_main_018482.asp (last updated Jan. 30, 2009). We note that Western Union is not presently among the organizations that have certified their compliance with the Safe Harbor privacy requirements. *See* http://safeharbor.export.gov/list.aspx (last visited March 4, 2013).

IV. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** the Petition of Western Union to Quash Civil Investigative Demands be, and it hereby is, **DENIED**.

IT IS FURTHER ORDERED THAT all responses to the specifications in the Civil Investigative Demand to Western Union must now be produced on or before March 18, 2013.

By the Commission, Commissioner Leibowitz not participating.

POLITICAL OPINIONS OF AMERICA

FTC File No. 122 3196. Order, May 9, 2013.

ORDER DENYING PETITION TO LIMIT OR QUASH MARCH 22, 2013, CIVIL INVESTIGATIVE DEMAND ISSUED TO CARIBBEAN CRUISE LINE, INC.

By OHLHAUSEN, Commissioner.

Caribbean Cruise Line, Inc. ("CCL") has filed a petition to quash or limit the civil investigative demand ("CID") issued by the Federal Trade Commission ("FTC" or "Commission") on March 22, 2013. For the reasons stated below, the petition is denied.

I. INTRODUCTION

In 2012, the Commission received thousands of complaints about the following version, or a nearly identical version, of an unsolicited robocall that began,

> Hello, this is John from Political Opinions of America. You've been carefully selected to participate in a short 30 second research survey and for participating, you'll receive a free two-day cruise for two people to the Bahamas, courtesy of one of our supporters, gratuitous of the small port tax that will apply.

The consumer complaints alleged that, if consumers participated in the survey, they were given three automated political survey questions. Following each question, consumers were asked to select from a series of multiple-choice answers. They were then asked whether they were "interested in reserving a free cruise to the Bahamas" and were instructed to press 1 for "yes."

Consumers who pressed 1 were transferred to a live CCL telemarketer.[1] The telemarketer told consumers that the "free" cruise would cost $59 per person in port taxes and attempted to "up-sell" the consumer with lodging in pre-boarding hotels, cruise excursions, enhanced accommodations, and other things.

In response to the complaints, the Commission opened an investigation of several entities, including CCL, which was identified in some complaints, to determine whether their practices constituted unfair or deceptive acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45 (as amended), or deceptive or abusive practices in violation of the Telemarketing Sales Rule, 16 C.F.R. pt 310 (as amended). On August 28, 2012, pursuant to a Commission resolution authorizing the use of compulsory process,[2] the FTC issued a CID

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[1] CCL's business includes marketing and selling cruises [redacted].

[2] *See* Resolution Directing Use of Compulsory Process in a Nonpublic Investigation of Telemarketers, Sellers, Suppliers, or Others, File No. 0123145 ("Resolution"); Caribbean Cruise Line, Inc.'s Petition to Limit or Quash Civil Investigation Demand, at 6 n.17 (quoting Resolution) ("Petition"). The Resolution authorizes the use of compulsory process:

> To determine whether unnamed telemarketers, sellers, or others assisting them have engaged or are engaging in: (1) unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (as amended); and/or deceptive or abusive telemarketing acts or practices in violation of the Commission's Telemarketing Sales Rule, 16 C.F.R. pt 310 (as

to CCL seeking, among other things, information concerning the company's role in robocall campaigns and its telemarketing practices.[3] Although CCL filed a petition to quash or modify the CID,[4] it later withdrew that petition and provided a number of responses. After staff alerted CCL to certain deficiencies, CCL made a supplemental production.[5] Further review of the original and supplemental productions made it apparent to FTC staff that CCL had withheld information about its telemarketing lead generators.[6] Accordingly, on March 22, 2013, the Commission issued a follow-up CID specifically seeking such materials.[7] In particular, the CID seeks:

> D-2 All documents that relate to any entity that used or uses phone calls to generate potential leads or customers for Caribbean Cruise Line, Inc.

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amended), including but not limited to the provision of substantial assistance or support – such as mailing lists, scripts, merchant accounts and other information, products or services – to telemarketers engaged in unlawful practices. The investigation is also to determine whether Commission action to obtain redress for injury to consumers or others would be in the public interest.

[3] Petition at 5.

[4] *Id.* at 2 n.1, 5.

[5] *Id.* at 5.

[6] When staff inquired about the absence of any information or materials about CCL's telemarketing lead generators, CCL responded that it believed that such information and materials were not responsive.

[7] CCL suggests that by issuing the follow-up CID to obtain the materials that CCL claimed were not responsive to the first CID, the FTC was "seek[ing] an end-run around" its duty to enforce the first CID. Petition at 5. The Commission does not have such a duty. It is well established that agencies have discretion with regard to the manner in which they approach such decisions. *See, e.g.*, *Weight Watchers Int'l, Inc. v. FTC*, 47 F.3d 990, 992 (9th Cir. 1995). Here, the Commission issued a follow-up CID to request those materials that were not produced in response to the original CID as well as additional materials related to new areas of concern.

D-4 All documents that relate to any entity that provided or used automated dialers to generate potential leads or customers for Caribbean Cruise Line, Inc.[8]

The CID also sought information about additional named entities and individuals that, based on staff's review of documents provided by CCL in its delayed supplemental response to the first CID and other investigative leads, appear to have been involved in the robocall campaign.[9] That specification in the CID seeks:

D-1 All correspondence, electronic mails, notes on conversations, work orders, and other documents that relate to Firebrand Group SL, LLC, Employment for America, Inc., Political Boost LLC also dba CFPP Research Group, Linked Service Solutions, LLC, Jacob deJongh, Scott Broomfield or Jason Birkett.

Counsel for CCL and FTC staff conferred regarding possible limitations to the CID, but were unable to reach agreement.[10] Accordingly, on April 9, 2013, CCL filed a petition to quash or limit the CID.

II. ANALYSIS

A. CCL Has Not Shown that the CID is Overbroad or Seeks Irrelevant Information

CCL's principal claim is that the CID seeks irrelevant information that falls outside the scope of the FTC's investigation. In particular, CCL claims that Specification D-1, which requires the production of correspondence, notes, work orders and other documents that relate to particular named entities or individuals, is overbroad and seeks information that "has nothing to do with the nature of the FTC's investigation." Similarly, CCL argues that "it is an absurdity to state that the names of CCL's customers

[8] Petition at 6, 7.

[9] *Id.* at 2.

[10] *Id.* at 10.

and/or lead generators [demanded by Specifications D-2 and D-4] are reasonably related to the FTC's inquiry, as names logically cannot contain information related to an entity's conduct."[11]

We find CCL's objection to be without merit. Agency compulsory process is proper if the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant to the inquiry, as that inquiry is defined in the investigatory resolution.[12] It is well established that agencies have wide latitude to determine what information is relevant to their law enforcement investigations.[13] In the context of an administrative CID, "relevance" is defined broadly and with deference to the administrative agency's determination.[14] The specifications of the CID must be upheld so long as the information sought is "reasonably relevant" to the purpose and "not plainly incompetent or irrelevant to any lawful purpose" of the agency.[15] Here, the Commission's investigation examines whether telemarketers, sellers, or others assisting them may have violated Section 5 of the FTC Act or the Commission's Telemarketing Sales Rule.[16] The requested materials are plainly relevant to such an inquiry.

CCL also argues that Specification D-1 should be quashed because the request is over-inclusive to the extent that it demands *all* documents regarding the particular named entities or

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[11] *Id.* at 6-7.

[12] *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1088 (D.C. Cir. 1992); *FTC v. Texaco, Inc.*, 555 F.2d 862, 874 (D.C. Cir. 1977).

[13] *See, e.g.*, *Linde Thomsen Langworthy Kohn & Van Dyke, P.C. v. RTC*, 5 F.3d 1508, 1517 (D.C. Cir. 1993) (citing *Texaco, Inc.*, 555 F.2d at 882) (acknowledging that relevance is defined within the scope of investigation that may itself have broad scope).

[14] *FTC v. Church & Dwight Co., Inc.*, 665 F.3d 1312, 1315-16 (D.C. Cir. 2011); *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001).

[15] *Invention Submission*, 965 F.2d at 1091-92.

[16] *See* Resolution, File No. 0123145, *supra* note 2.

individuals.[17] CCL admits that the specification calls for relevant material.[18] Specification D-1 calls for the production of documents related to entities and individuals that CCL's response to the first CID and other investigative leads show either [redacted]. Documents that relate to such companies and individuals are of obvious relevance to the investigation.

Looking at the details of CCL's argument reveals that CCL's claim of over-inclusiveness is, at best, only a theoretical objection to the specification. CCL has not provided any factual basis to support its claim that the CID requires it to produce documents that are not relevant to the investigation.[19] We find that the specification is reasonable. Given staff's prior dealings with CCL with the first CID, staff drafted the specification in a manner that directly identified the relevant information by naming the entities and individuals. [Redacted], the exploration of documents and areas that do not directly discuss one particular robocall campaign may nonetheless lead to information and materials that are directly relevant to the investigation, and courts have found such inquiries to be relevant.[20] Because relevance is defined broadly during the investigation stage,[21] there is no basis to quash or limit

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[17] Petition at 7.

[18] Petition at 6-7 ("request D-1 not only calls for information that is relevant to the investigation, but also *any* information between the parties regardless of subject matter").

[19] *See FTC v. Church & Dwight Co., Inc.*, 756 F. Supp. 2d 81, 85 (D.D.C. 2010) (it is the burden of the party receiving the CID "to show that the information it wishes to withhold is irrelevant to the investigation"), *aff'd*, 665 F.3d 1312 (D.C. Cir. 2011); *FDIC v. Garner*, 126 F.3d 1138, 1144 (9th Cir. 1997) ("Once the [agency] has established relevancy, the party opposing the subpoena bears the burden of demonstrating the subpoena is unreasonable."); *Invention Submission*, 965 F.2d at 1090 (citing *Texaco,* 555 F.2d at 882) (it is petitioner's burden to demonstrate that the FTC has exceeded the broad standard for relevance).

[20] *See FTC v. Church & Dwight Co, Inc*., 747 F. Supp. 2d 3, 9 (D.D.C. 2010) (rejecting claim that "FTC [must show] like any litigant, that the document demanded will lead to reasonably relevant and ultimately admissible evidence" as mischaracterizing the nature of the FTC's investigative authority) (citing *Morton Salt*, 338 U.S. at 642, and *Texaco*, 555 F.2 at 874.).

[21] *See, e.g.*, *Church & Dwight*, 747 F. Supp. 2d at 6 ("Speculations made by the FTC as to the possible relevance of the disputed information were

the CID based on CCL's unsupported allegation that the specification calls for material outside the scope of the FTC's investigation.

CCL also objects to the scope of Specifications D-2 and D-4, which seek documents concerning entities that use phone calls or automated dialers to generate potential leads or customers for CCL. CCL claims that – because the "investigation merely concerns CCL's conduct" – "it is an absurdity to state that the names of CCL's customers and/or lead generators are reasonably related to the FTC's inquiry, as names cannot contain information related to an entity's conduct."[22] We disagree. As stated previously, "The standard for judging relevancy in an investigatory proceeding is more relaxed than in an adjudicatory one. . . . The requested material, therefore need only be relevant to the investigation – the boundary of which may be defined quite generally[.]"[23] Documents related to third-party telemarketing lead generators used by CCL go to the heart of an investigation looking into, among other things, possible violations of the Telemarketing Sales Rule. The names of CCL's customers and lead generators are similarly reasonably related to the investigation. Even if we accept CCL's characterization of the investigation's scope, such documents may provide material directly relevant to CCL's conduct or may lead to other material that is relevant to CCL's conduct.

B. The CID Properly Asks for Documents Within CCL's Possession and Control

CCL further objects to Specifications D-1, D-2, and D-4 "to the extent that they purport to require CCL to produce documents that are not in its possession." According to CCL, the specifications "have no limitations with regard to CCL's liability

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sufficient as long as they were not 'obviously wrong.'"); *Genuine Parts Co. v. FTC*, 445 F.2d 1382, 1391 (5th Cir. 1971) (explaining that the court recognizes the extreme breadth that must be accorded the FTC in conducting an investigation).

[22] Petition at 7.

[23] *Invention Submission*, 965 F.2d at 1090.

to produce information not within CCL's possession." CCL contends that it is a separate legal entity than the companies named or identified in the specifications, and consequently, it asks that the requests be limited to make it clear that CCL is responsible for producing only those documents and information within its possession and control.

CCL's request for relief is unnecessary because the CID already provides appropriate limiting instructions. Specifically, Instruction I provides:

> **Scope of Search:** This CID covers documents and information in your possession or under your actual or constructive custody or control including, but not limited to, documents and information in the possession, custody, or control of your attorneys, accountants, directors, officers, employees, and other agents and consultants, whether or not such documents and information were received from or disseminated to any person or entity.

These instructions are consistent with the applicable precedent. In the present context, "control" means the legal or practical ability to obtain the responsive documents.[24] Thus, a party can be said to control documents if they are available through a contractual right of access,[25] in the possession of a party's agents,[26] in the

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[24] *See, e.g.*, *In re NTL, Inc. Secs. Litig.*, 244 F.R.D. 179, 195 (S.D.N.Y. 2007) (applying Fed. R. Civ. P. 34) (citing *Bank of New York v. Meridien BIAO Bank Tanzania Ltd.*, 171 F.R.D. 135, 146-47 (S.D.N.Y. 1997)). *See also, e.g.*, *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 236 F.R.D. 177, 180 (S.D.N.Y. 2006); *Dietrich v. Bauer*, 2000 WL 1171132 at *3 (S.D.N.Y. 2000) ("'Control' has been construed broadly by the courts as the legal right, authority or practical ability to obtain the materials sought upon demand.").

[25] *Flagg v. City of Detroit*, 252 F.R.D. 346, 353 (E.D. Mich. 2008) (citing *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 928-29 (1st Cir. 1988); *Golden Trade, S.r.L. v. Lee Apparel Co.*, 143 F.R.D. 514, 525 (S.D.N.Y. 1992)).

[26] *Flagg*, 252 F.R.D. at 353 (citing *Commercial Credit Corp. v. Repper*, 309 F.2d 97, 98 (6th Cir. 1962); *Am. Soc. for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 233 F.R.D. 209, 212 (D.D.C. 2006); *Gray v. Faulkner*, 148 F.R.D. 220, 223 (N.D. Ind. 1992); *Cooper Indus. v. British Aerospace, Inc.*, 102 F.R.D. 918, 920 (S.D.N.Y. 1984)).

possession of a party's officers or employees,[27] or maintained by a third party on the party's behalf.[28] CCL's obligation to produce documents includes the entities or individuals named or described by the CID that fall within these categories. Thus, we find that there is no basis to limit or quash the CID merely because CCL is organized separately from the named companies or individuals. If CCL has a legal right to control the documents, [29] including a right to obtain them on demand from the companies and individuals, then CCL must produce those documents and materials to respond to the CID.

C. A Demand for Trade Secret or Proprietary Information is Not a Reason to Quash or Limit the CID

CCL further contends that the CID should be limited or quashed because Specifications D-2 and D-4 demand documents and information that are trade secrets or constitute proprietary information.[30] Even assuming that CCL is correct in describing the materials, that would not be a basis for quashing the CID. The Commission's authority to use investigatory process and obtain relevant materials does not turn on the sensitivity of the information sought.[31] As courts have recognized, "The fact that information sought by the Commission in an investigation

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[27] *Flagg*, 252 F.R.D. at 353 (citing *Riddell Sports Inc. v. Brooks*, 158 F.R.D. 555, 558 (S.D.N.Y. 1994)).

[28] *Flagg*, 252 F.R.D. at 354 (citing *Tomlinson v. El Paso Corp.*, 245 F.R.D. 474, 477 (D. Colo. 2007)).

[29] CCL argues that the FTC cannot request CCL to produce documents that are possessed by the companies and individuals identified by Specifications D-1, D-2, and D-4, and cites *Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 233 F.R.D. 143 (D. Del. 2005) and *Linde v. Arab Bank, PLC*, 262 F.R.D. 136 (E.D.N.Y. 2009). The cited cases are inapposite. The courts in both cases considered only whether American subsidiaries of a foreign parent corporation or foreign bank exerted control over the foreign parent. Here, in contrast, the companies and individuals are not corporate parents of CCL and CCL constructively or actually controls the entities.

[30] Petition at 8.

[31] *FTC v. Invention Submission Corp.*, 1991-1 Trade Cas. (CCH) ¶ 69,338, at 65,353 (D.D.C. 1991), *aff'd*, 965 F.2d 1086, 1089 (D.C. Cir. 1992).

constitutes a trade secret does not limit the Commission's power to obtain it. The only issue is whether the data which the Commission seeks is reasonably relevant to its investigation[.]"[32]

The courts have acknowledged that an agency's confidentiality rules and practices provide ample protection for confidential information, and, therefore, the status of the responsive materials as trade secrets or confidential commercial information is not a proper basis for a motion to quash.[33] The Commission's Rules of Practice and Procedure provide CCL with adequate protections. Indeed, in its petition, CCL acknowledged that it was advised during its conference with Commission counsel that it could mark all trade secret information produced as "confidential."[34] Commission rules specify that "no material that is marked or otherwise identified as confidential . . . will be made available without the consent of the person who produced the material, to any individual other than a duly authorized officer or employee of the Commission or a consultant or contractor retained by the Commission who has agreed in writing not to disclose the information."[35] Moreover, material obtained by the Commission:

> [t]hrough compulsory process and protected by section 21(b) of the Federal Trade Commission Act, 15 U.S.C. 57b-2(b) . . . and designated by the submitter as confidential and protected by . . . 15 U.S.C. 57b-2(f) [] and

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[32] *FTC v. Green*, 252 F. Supp. 153, 157 (S.D.N.Y. 1966).

[33] *See, e.g.*, *FTC v. Rockefeller*, 441 F. Supp. 234, 242 (S.D.N.Y. 1977) (citations omitted) ("Respondents contend that the subpoenas should not be enforced because they seek confidential information. Such an objection poses no obstacles to enforcement. Even if it did, the impediment would be overcome by the protective provisions [implemented by the FTC], which are more than adequate for the purpose of guaranteeing confidentiality."); *Texaco*, 555 F.2d 862, 884 n.2 (D.C. Cir. 1977) ("It is the agencies, not the courts, which should, in the first instance, establish the procedures for safeguarding confidentiality," citing *FCC v. Schreiber*, 381 U.S. 279, 290-91, 295-96 (1965)).

[34] Petition at 8 n.24.

[35] 16 C.F.R. §4.10 (d).

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> § 4.10(d) of [Commission rules] . . . may be disclosed in Commission administrative or court proceedings subject to Commission or court protective or in camera orders as appropriate. . . . Prior to disclosure of such material in a proceeding, the submitter will be afforded an opportunity to seek an appropriate protective or in camera order.[36]

These procedures provide ample protection for CCL for any responsive trade secrets or proprietary information that might be produced.[37] Consequently, there is no basis to limit or quash the CID merely because the documents may include confidential information.

III. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED THAT the Petition of Caribbean Cruise Line, Inc. to Limit or Quash the Civil Investigation Demand be, and it hereby is, **DENIED**.

IT IS FURTHER ORDERED THAT all responses to the specifications in the Civil Investigative Demand to Caribbean Cruise Line, Inc. must be produced on or before May 24, 2013.

By the Commission.

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[36] 16 C.F.R. § 4.10 (g).

[37] *See U.S. Int'l Trade Comm'n v. Tenneco West*, 822 F.2d 73, 79 (D.C. Cir. 1987) ("deference is due an agency in choosing its own procedures for guarding confidentiality").

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